

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MAINE**

STATE OF MAINE, and
PATRICIA AHO, in her capacity as
Commissioner of the Maine Department of
Environmental Protection,

Plaintiffs,

v.

GINA MCCARTHY, in her capacity as
Administrator, United States Environmental
Protection Agency, and H. CURTIS
SPALDING, in his capacity as Regional
Administrator of the United States
Environmental Protection Agency (Region I),

Defendants.

CIVIL ACTION NO. 1:14-cv-00264-JDL

AMENDED COMPLAINT

Introduction

1. Plaintiffs State of Maine and Patricia Aho, Commissioner of the Maine Department of Environmental Protection (“DEP”) (collectively “Plaintiffs” or “Maine”), bring this action to challenge Defendants’ ongoing failure to act on certain revisions (reflected in attached Exhibits A-F, H-K) to Maine’s surface water quality standards (“WQS”) pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA”) for unspecified waters that the United States Environmental Protection Agency (“EPA”) claims may be within Indian territories and/or lands.

2. Maine’s environmental regulatory jurisdiction over *all* waters within the state is established by the Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* (“MIA”) and the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* (“Federal Settlement Act” or

“MICSA”) (collectively the “Settlement Acts”), and has recently been confirmed by the First Circuit Court of Appeals in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

3. Pursuant to the CWA and corresponding federal regulations, Maine has the primary authority to establish and revise WQS for *all* waters within the state, and Defendants and EPA have the non-discretionary duty to timely approve or disapprove those WQS and revisions.

4. Rather than fulfill this duty, Defendants and EPA have in recent years attempted to limit Maine’s environmental regulatory jurisdiction by failing to take any action on Maine’s revisions to its WQS for unspecified waters in Indian territories and/or lands in direct contravention of the CWA, the Settlement Acts, and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

5. At roughly the same time, and without informing Maine, EPA has also communicated with Maine Indian tribes, including the Penobscot Indian Nation (“PIN”), regarding tribal environmental matters such as PIN’s efforts to promulgate separate WQS for, and obtain separate EPA-delegated National Pollution Discharge Elimination System (“NPDES”) permitting authority over, Maine waters within Indian territories and/or lands.

6. By way of this lawsuit, Maine seeks, among other things, an order and declaration that: 1) Maine’s environmental regulatory jurisdiction for all purposes under the CWA, including Maine’s jurisdiction and authority to promulgate WQS and WQS revisions, applies uniformly throughout the State of Maine, including to all waters arguably within Indian territories and/or lands; and 2) the revisions to Maine’s WQS submitted by DEP to EPA that have not yet been fully acted on by EPA for waters arguably within Indian territories and/or lands, including those revisions reflected in EPA’s letters dated February 9, 2004, April 14, 2004, January 25, 2005, April 17, 2006, July 7, 2006, September 18, 2006, August 19, 2009, May 19, 2010, July 20, 2011, and May 16, 2013 (attached as Exhibits A-F, H, H-1, and J, and hereafter referred to as the “EPA Partial Approval

Letters”), are required to be approved by EPA uniformly throughout the State of Maine, including within those unspecified Maine waters that EPA claims are within Indian territories and/or lands.

The Parties

7. Plaintiff State of Maine is a sovereign state with environmental regulatory jurisdiction over all waters within its boundaries.

8. Plaintiff Patricia Aho is the Commissioner of the Maine DEP and has primary responsibility for the environmental protection, regulation and control over all waters within the State of Maine.

9. Defendant Gina McCarthy is the Administrator of EPA and is being sued in her official capacity.

10. EPA is an agency of the United States and has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control over waters within the United States.

11. Defendant H. Curtis Spalding, who is also being sued in his official capacity, is the EPA Regional Administrator for Region I (New England), which includes the State of Maine.

12. Within EPA’s Region I, Mr. Spalding has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control over waters within the United States.

13. As Regional Administrator for EPA’s Region I, Mr. Spalding also oversaw or was responsible for: 1) EPA’s failure in recent years to take any action on Maine’s revisions to its WQS (including those WQS revisions submitted by DEP as reflected in the EPA Partial Approval Letters, and in DEP’s letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K)) for waters arguably within Indian territories and/or lands; and 2)

undisclosed communications between EPA and PIN and other Maine tribes regarding, among other things, PIN's attempts to establish tribal WQS for and obtain EPA-delegated NPDES permitting authority over Maine waters.

14. The failure by Defendants and EPA to take any action regarding Maine's WQS revisions (including those reflected in the EPA Partial Approval Letters and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K)) has harmed Plaintiffs by: 1) preventing Maine from establishing its WQS revisions on a statewide basis and from effectively regulating the unspecified waters that EPA claims may be within Indian territories and/or lands; 2) creating regulatory uncertainty for such unspecified waters; 3) stripping Maine of a portion of its environmental regulatory jurisdiction; and 4) undermining the jurisdictional framework set forth in the CWA and in the Settlement Acts.

Jurisdiction

15. This Court has jurisdiction over the subject matter of this action pursuant to 33 U.S.C. § 1365(a)(2), 28 U.S.C. §§ 1331, 1361, and 2201-2202, and 5 U.S.C. §§ 701-706.

Venue

16. Venue is proper in this Court pursuant to 33 U.S.C. § 1365, 28 U.S.C. § 1391, and 5 U.S.C. § 703.

Under the CWA, Defendants and EPA have the non-discretionary duty to approve or disapprove Maine's new and revised WQS for all Maine waters

17. The CWA aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

18. In establishing the CWA's regulatory framework, Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution..." 33 U.S.C. § 1251(b).

19. The CWA requires each state to create WQS for *all* intrastate waters and submit those WQS to EPA for review. 33 U.S.C. §§ 1313(c)(1) & (2); *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).
20. The CWA has deep roots within the State of Maine, as Maine's Senator Edmund Muskie was the CWA's chief architect.
21. Consistent with this legacy, Maine takes seriously its responsibility and commitment to protect water quality on behalf of all citizens throughout Maine, including members of Maine Indian tribes.
22. Defendants and EPA have the non-discretionary duty to either approve or disapprove new or revised WQS submitted by states such as Maine. 33 U.S.C. § 1313(c)(2) & (3); 40 C.F.R. §§ 131.5 & 131.21.
23. In particular, Defendants and EPA have the non-discretionary duty to either approve new or revised WQS within 60 days of their submission, or disapprove those WQS within 90 days of their submission. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21.
24. If new or revised WQS are disapproved or determined by EPA not to meet the requirements of the CWA in any way, then Defendants and EPA have the non-discretionary duty to notify the state of the deficiencies in the WQS and specify the changes required for EPA approval within 90 days of the state's submission of those WQS. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21.

Under the Settlement Acts, Maine has the exclusive authority to establish and revise WQS for all Maine waters, including waters within Indian territories and lands

25. The 1980 Settlement Acts “provided that ‘with very limited exceptions,’ [the Maine Indian tribes] would be ‘subject to’ Maine law....” *Maine v. Johnson*, 498 F.3d 37, 42 (1st Cir. 2007).

26. The Settlement Acts establish:

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S. § 6204 (MIA), confirmed by 25 U.S.C. § 1725 (MICSA).

27. “[T]he then Interior Secretary's state[d] to Congress that the Settlement Acts were ‘intended to effectuate the broad assumption of jurisdiction over Indian land by the State of Maine.’ H.R. Rep. 96-1353 at 28, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3803-3804 (report of the Department of the Interior).” *Maine v. Johnson*, 498 F.3d 37, 45 n.10 (1st Cir. 2007).

28. “At the time the Settlement Acts were adopted, the Interior Department, largely responsible for relations with Indian tribes, told Congress that the southern tribes’ lands would generally be subject to Maine law. H.R. Rep. 96-1353 at 28 (report of the Department of the Interior).” *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007)

29. Congress understood that, under the Settlement Acts, Maine would retain its environmental regulatory authority over Maine Indian territories and lands:

The Senate Report, adopted by the House Report, declared that “State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in [the proposed bill] and Section 6204 of the Maine Implementing Act.” S. Rep. 96-957 at 27; H.R. Rep. 96-1353 at 20.

Maine v. Johnson, 498 F.3d 37, 43-44 (1st Cir. 2007).

30. Congress also understood that any special environmental rights afforded to Indian tribes generally would be inapplicable in Maine:

The Senate Report stated that “for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulation or land use.” S. Rep. 96-957 at 31.

Maine v. Johnson, 498 F.3d 37, 44 n.7 (1st Cir. 2007).

31. Thus, under the terms of the 1980 Federal Settlement Act (MICSA), no existing federal laws that afforded Indian tribes any special rights or status, and that affected or preempted Maine’s civil regulatory jurisdiction (including Maine’s environmental laws), would apply in Maine. 25 U.S.C. § 1725(h).

32. Similarly, under the terms of the 1980 Federal Settlement Act (MICSA), no future federal laws that benefit Indian tribes and that affect or preempt Maine’s laws would apply in Maine unless those laws were made specifically applicable to Maine. 25 U.S.C. § 1735(b).

33. In 1987, Congress amended the CWA by, among other things, adding Section 518, which sets forth Indian tribal rights and responsibilities, and which allows Indian tribes to apply for “treatment as state” status. 33 U.S.C. § 1377(e).

34. Generally, outside of the State of Maine, an Indian tribe may be granted jurisdiction to regulate water resources within its borders in the same manner as states, including the authority to establish tribal WQS subject to EPA approval, and the authority to issue NPDES permits for discharges into such waters. 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8; *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (9th Cir. 1996).

35. Because it would affect Maine’s regulatory jurisdiction and it was not made explicitly

applicable to Maine, Section 518 of the CWA does not apply in Maine. 25 U.S.C. § 1735(b).

36. Congress considered this very issue when enacting Section 518 of the CWA:

This section does not override the provisions of the Maine Indian Claims Settlement Act (25 U.S.C. 1725). Consistent with subsection (h) of the Settlement Act, the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes. . .

Water Quality Act of 1987, Section-by-Section Analysis, *reprinted in* 1987 U.S.C.C.A.N. 5, at 43;

see also Maine v. Johnson, 498 F.3d 37, 43 n.5 (1st Cir. 2007).

37. EPA itself also addressed this issue at length in a 1993 guidance document from the Chief of its General Law Office:

The critical jurisdictional section of the Federal [Settlement] Act is § 1725, which ratifies the State Act, limits the application of federal Indian law in Maine if it would affect State law, and bars the application of future federal Indian law in Maine unless the federal legislation specifically notes its applicability in Maine. . . .

Subsection 1725(h) is a critical provision of the Federal [Settlement] Act that explicitly and completely prohibits the application to the [Maine Indian tribes] of any federal law that (1) gives special status to the [Maine Indian tribes] and (2) “affects or preempts” Maine’s civil, criminal, or regulatory jurisdiction. 25 U.S.C. § 1725(h). This provision specifically includes state environmental law and land use law. . . . This subsection would seem to invalidate federal laws that might give the [Maine Indian tribes] special status, including treatment as a state, for certain environmental programs or purposes if it would “affect or preempt” the State’s authority, including the State’s jurisdiction over environmental and land use matters.

The final critical provision of the 1980 Federal Act for jurisdictional analysis relates to future legislation. Future federal legislation for the benefit of Indians that “would affect or preempt” state laws (including the State Act) would not apply in Maine unless the federal legislation specifically addressed its application in Maine . . . Thus, any post-1980 special federal legislative provisions that might give Indians special jurisdictional authority (if, for example, any federal laws in the 1980’s provided authority for EPA approval of a Tribal environmental program equivalent to a state environmental program delegated by EPA to the state) could not provide the [Maine Indian tribes] with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

EPA Memorandum: Penobscot's Treatment as a State under CWA, § 518(e), at 7-8 (July 20, 1993) (emphasis in original).

38. To date, no Maine Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

EPA has historically evaluated and approved Maine's WQS and WQS revisions for all Maine waters, including all waters arguably within Indian territories and lands

39. Historically, both before and after the 1980 passage of the Settlement Acts, EPA reviewed and acted on Maine's WQS submissions without mention of any issue regarding Maine's jurisdiction or authority over Indian territories and/or lands.

40. During the 1980s and the 1990s, EPA repeatedly approved Maine's proposed and revised WQS even though they applied to areas that Maine Indian tribes claim to be within their territories and/or lands.

41. For example, in the mid-1980s, Maine substantially revised and strengthened its WQS to protect its water resources and designated uses. Me. Pub. L. 1985, c. 698, § 15, now as amended 38 M.R.S. §§ 464, *et seq.*

42. Those revised and strengthened WQS applied to all surface waters in Maine, including waters in or near Indian territories such as the Penobscot River, and none of those WQS mentioned or provided any special protection to Indian tribal interests or sustenance fishing. 38 M.R.S. §§ 464, 467(7).

43. Although EPA raised unrelated concerns regarding Maine's revised and strengthened WQS, EPA did not at that time raise any issue regarding Maine's jurisdiction over any Maine waters arguably within Indian territories and/or lands.

44. When EPA issues a NPDES discharge permit, the CWA requires a certification from the state pursuant to Section 401, 33 U.S.C. § 1341, that the discharge complies with the state WQS and state law requirements. *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 707-708 (1994).

45. Historically, Maine has issued Section 401 water quality certifications under the CWA for such EPA-issued NPDES permits throughout the State of Maine, including for areas in or near Maine waters arguably within Indian territories and/or lands.

46. EPA has never suggested that such Section 401 water quality certifications by Maine were unnecessary or that Maine's WQS and revisions were inapplicable to EPA-issued NPDES permits for those areas in or near waters arguably within Indian territories and/or lands.

47. In addition, EPA, in its oversight role over its CWA-delegated authority to Maine under the Maine Pollutant Discharge Elimination System ("MEPDES"), has historically reviewed draft MEPDES permits issued by Maine for areas within Indian territories and lands, including the main stem of the Penobscot River from Indian Island northward to the confluence of the East and West Branches of the Penobscot River ("Main Stem").

48. EPA has never taken the position that any WQS other than Maine's generally-applicable WQS and revisions govern its NPDES permits, or MEPDES permits issued by Maine, for waters arguably within Indian territories and/or lands, such as the Main Stem of the Penobscot River.

49. For instance, EPA issued a NPDES permit to PIN dated January 26, 2006, for discharges into the Penobscot River from PIN's Penobscot Nation Pollution Control Facility in Indian Island, Maine, which are governed by Maine's WQS.

50. EPA's January 26, 2006 NPDES permit issued to PIN states in part:

B. NARRATIVE EFFLUENT LIMITATIONS

...

5. The discharge shall not cause a violation of state water quality standards (Maine Law, 38 M.R.S.A. 467(15)(1)(4) which classifies the Penobscot River as a Class B waterway in the proximity of the discharge.

...

1. APPLICATION SUMMARY

...

October 31, 2003 – EPA approved Maine to implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit program in the territories of two Maine Indian tribes, the Penobscot Indian Nation and Passamaquoddy Tribe. However, EPA did not [at that time] authorize the state to regulate two tribally owned and operated sewage treatment facilities: the Penobscot Indian Nations' Water Pollution Control Facility on Indian Island and the Passamaquoddy Tribe's Pleasant Point Facility. . . .

2. RECEIVING WATER QUALITY CONDITIONS

The Penobscot River is classified as a class B waterway in the proximity of the discharge. Refer to state water quality standards (Maine Law, 38 M.R.S.A. § 467(15)(1)(4)). Class B waters require that a minimum. . .

6. DISCHARGE IMPACT ON RECEIVING WATER QUALITY

As permitted, the EPA has determined the existing water uses will be maintained and protected and the discharge will not cause or contribute to the failure of the water body to meet standards for Class B classification. . . .

51. Maine's EPA-delegated authority to issue MEPDES permits throughout the State of Maine, including for PIN's facility on Indian Island and the Passamaquoddy Tribe's Pleasant Point Facility, were subsequently confirmed by the First Circuit Court of Appeals in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

52. Accordingly, EPA has historically acted as if Maine's generally-applicable WQS have state-wide application, including to all waters arguably within Indian territories and/or lands.

EPA's recent failure to take any action on revisions to Maine's WQS for unspecified waters that EPA claims are within Indian territories and/or lands

53. Beginning in approximately 2004, and despite its historical acceptance of Maine's generally-applicable WQS on a state-wide basis, EPA began to limit approvals of certain revisions to Maine's WQS to waters outside of Indian territories and lands within Maine, as reflected in the EPA Partial Approval Letters.

54. For instance, EPA sent a letter to Maine dated February 9, 2004, which approves certain revisions to Maine's WQS, and which states in part:

I hereby approve the revised water quality standards in Chapter 257. This approval is made pursuant to Section 303(c)(2) of the Clean Water Act and 40 CFR Part 131, and is based on my determination that the approved revisions are consistent with the requirements of Section 303 of the Act. . . .

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under Section 303(d) for those waters. . . .

Exhibit A, attached hereto, is a true and accurate copy of this February 9, 2004 letter.

55. EPA sent another letter to Maine dated April 14, 2004, which approves other revisions to Maine's WQS, and which states in part:

First, I thank you and your staff for an impressive effort with regard to the upgrading of use classifications for numerous water body segments. In many cases waters were reclassified to Class AA or SA, Maine's most protective classifications for freshwater and saltwater respectively. These reclassifications will significantly strengthen Maine's ability to protect its waters and further progress towards achieving the objectives of the Clean Water Act (CWA).

I hereby approve the revised water quality standards in Chapters 227 and 317. Chapter 227 adds a designated use to Maine's classifications, and Chapter 317 upgrades the classifications of numerous water segments. This approval is made pursuant to Section 303(c)(2) of the Clean Water Act (CWA) and 40 C.F.R. Part 131, and is based on my determination that the approved revisions are consistent with the requirements of Section 303 of the Act. . . .

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under §303(d) for those waters. . . .

Exhibit A-1, attached hereto, is a true and accurate copy of this April 14, 2004 letter.

56. EPA sent another letter to Maine dated January 25, 2005, which approves other revisions to Maine's WQS, and which states in part:

Pursuant to §303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131, and based on my determination that the approved revisions are consistent with the requirements of §303 of the Act, I hereby approve the following revised standards: . . .

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit B, attached hereto, is a true and accurate copy of this January 25, 2005 letter.

57. EPA sent another letter to Maine dated April 17, 2006, which approves other revisions to Maine's WQS, and which states in part:

Pursuant to §303(c)(3) of the Clean Water Act and 40 CFR Part 131, I hereby approve the following water quality standards revisions: . . .

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit C, attached hereto, is a true and accurate copy of this April 17, 2006 letter.

58. EPA sent another letter to Maine dated July 7, 2006, which approves other revisions to Maine's WQS, and which states in part:

Pursuant to §303(c)(2) of the Clean Water Act (CWA) and 40 CFR Part 131, I hereby approve the following water quality standards revisions, except as noted: . . .

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's revisions with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit D, attached hereto, is a true and accurate copy of this July 7, 2006 letter.

59. EPA sent another letter to Maine dated September 18, 2006, which approves other revisions to Maine's WQS, and which states in part:

Pursuant to §303(c)(2) of the Clean Water Act and 40 CFR Part 131, I hereby approve footnote J associated with Maine's human health criteria for dioxin in DEP Rule Chapter 584, Appendix A, Table 1. . . .

EPA has determined that approval of footnote J is consistent with the CWA and 40 CFR Part 131 because the dioxin criteria are applicable to all waters of the State, and because the discharge prohibition is more stringent than regulation based on the ambient criteria.

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's revisions with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit E, attached hereto, is a true and accurate copy of this September 18, 2006 letter.

60. EPA sent another letter to Maine dated August 19, 2009 (well after the decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) was issued), which approves other revisions to Maine's WQS, and which states in part:

Pursuant to §303(c)(2) of the Clean Water Act and 40 CFR Part 131, I hereby approve the water quality standards revisions in Legislative Chapter 291 (L.D. 1274). . .

EPA's approval of the revisions. . . is consistent with the requirements of the Clean Water Act. . . . Therefore, EPA finds that the WQS revisions are protective of applicable designated and existing uses and are consistent with the requirements of the Clean Water Act.

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's revision with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit F, attached hereto, is a true and accurate copy of this August 19, 2009 letter.

61. Thereafter, Maine's DEP submitted additional revised WQS to EPA for approval by letter dated December 7, 2009, which contained as an attachment an October 27, 2009 letter from the Maine Office of the Attorney General to EPA stating:

As you know, it has now been established that Maine's environmental regulatory jurisdiction, in particular regarding water resources, applies uniformly throughout the State, and that jurisdiction applies to all of Maine's waters including those in the Penobscot River basin. *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). Thus, it is clear that these standards apply to those areas previously disputed by the Maine tribes. In acting on the water quality standards set forth above, therefore, EPA should expressly confirm their applicability throughout Maine without exception.

Exhibit G, attached hereto, is a true and accurate copy of the October 27, 2009 letter from the Maine Office of the Attorney General to EPA.

62. In response to DEP's December 7, 2009 submission, EPA sent another letter to Maine dated May 19, 2010, which approves the requested revisions to Maine's WQS, acknowledges receipt of the Maine Office of the Attorney General's letter dated October 27, 2009, and states in part:

I commend DEP for upgrading many of its waters, including 167 miles of rivers and streams and 214 acres of estuarine waters. Pursuant to §303(c)(2) of the Clean Water Act and 40 CFR Part 131, I hereby approve the water quality standards revisions in Legislative Chapter 163 (L.D. 330), "An Act to Change the Classification of Certain Waters of the State": . . .

EPA's approval of Maine's surface water standards revision does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's revision with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit H, attached hereto, is a true and accurate copy of this May 19, 2010 letter.

63. EPA sent another letter to Maine dated July 20, 2011, which approves other revisions to Maine's WQS, and which states in part:

Pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131, I hereby approve the following water quality standards revisions to 38 M.R.S.A. § 469(5) as set

forth in Section 11 of P.L. 2011, c. 206 (LD 1398) “An Act To Amend the Laws Administered by the Department of Environmental Protection”: . . .

EPA’s approval of Maine’s surface water quality standards revisions does not extend to waters that are within Indian territories and lands. The Region is taking no action to approve or disapprove the State’s revisions with respect to those waters at this time. EPA will retain responsibility under Sections 303(c) and 303(d) of the Clean Water Act for those waters.

Exhibit H-1, attached hereto, is a true and accurate copy of this July 20, 2011 letter

64. EPA sent another letter to Maine dated November 30, 2011, which comments on yet other revisions to Maine’s WQS, and which contains a footnote stating:

At present, note that Maine’s state water quality standards are not applicable to the waters of the federally recognized Tribes in Maine, because the State has not specifically applied to implement its water quality standards program in these territories and EPA has not made a specific finding that the State has jurisdiction to implement the water quality standards program in Tribal waters. EPA is taking no position now on whether the State has adequate authority to implement its standards in Indian territories. However, even though the standards do not currently apply in the Indian territories, it appears that they could have substantial effect on water quality in the Tribes’ territories and on the Tribes’ use of waters adjacent to their territories. EPA recognizes that there are significant disputes over the exact boundaries of the certain Indian reservations in Maine. But under any scenario of which EPA is aware, these water quality standards apply in waters directly adjacent to the tribes’ reservations, and in some scenarios they would apply in waters that completely surround a reservation. Therefore, it is important to clarify Maine’s ability to consider and protect the Tribal members’ right to fish for their individual sustenance.

65. EPA sent a letter dated October 16, 2012, to former Maine Attorney General William J. Schneider, which, addressing Maine’s WQS and Indian territories, states that “EPA’s policy is that states are not authorized to implement federally approved environmental programs, like the WQS program under the federal Clean Water Act (CWA), in the territories of federally recognized tribes unless and until EPA has made clear findings on the record approving the state standards to apply in Indian country.”

66. EPA’s own current Water Quality Standards Handbook, however, states in part:

Until tribes qualify for the standards program and adopt standards under the Clean Water Act, EPA will, when possible, assume that existing water quality standards remain applicable. EPA's position on this issue was expressed in a September 9, 1988, letter from EPA's then General Counsel, Lawrence Jensen, to Dave Frohnmayer, Attorney General for the State of Oregon. This letter states: "if States have established standards that purport to apply to Indian reservations, EPA will assume without deciding that those standards remain applicable until a Tribe is authorized to establish its own standards or until EPA otherwise determines in consultation with a State and Tribe that the State lacks jurisdiction..."

See <http://water.epa.gov/scitech/swguidance/standards/handbook/chapter01.cfm#section8> (EPA Water Quality Standards Handbook, Section 1.8.6, last visited September 24, 2014).

67. Maine's DEP sent a letter to the EPA Regional Administrator dated January 14, 2013, which sought EPA's approval of yet further revisions to Maine's WQS expressly for all waters throughout the State of Maine, and which states in part:

In recent years, EPA's approval of new or revised water quality standards in Maine has included language to the effect that the approval "does not extend to waters that are within Indian territories and lands." Although it should not be necessary, by this letter I am expressly requesting that EPA approve the enclosed water quality standards as effective throughout the State of Maine without distinction as to waters within Indian territories or lands. There is no basis in the law for such a distinction, as Maine's environmental regulatory jurisdiction is uniform throughout the State, including as to lands and waters that EPA might consider to be Indian. *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007) (Maine Indian Land Claims Settlement Act, and particularly the Maine Implementing Act at 30 M.R.S. § 6204, is "about as explicit as possible" in conferring environmental regulatory authority over Indian lands and waters on the State).

To the extent EPA does anything other than approve the enclosed standards in the unconditional manner requested, I hereby request that EPA:

- Identify with specificity each water body or segment thereof to which EPA contends the enclosed standards do not apply because they are waters "within Indian territories and lands"; and
- Explain with specificity what water quality standards, if any, EPA contends are applicable to such water bodies or segments thereof, and the legal basis for that conclusion.

As I am sure you can appreciate, if it is indeed EPA's position that Maine's duly adopted water quality standards do not apply to some subset of waters within the State, then both MDEP and Maine's regulated community are entitled to clear answers to these questions from your agency. . . .

Exhibit I, attached hereto, is a true and accurate copy of this January 14, 2013 letter and attachments.

68. DEP welcomes comments from Maine's Indian tribes on Maine's proposed new and revised WQS, and received and considered comments from both PIN and the Houlton Band of Maliseet Indians on the revised WQS submitted to EPA for approval in DEP's January 14, 2013 letter to EPA.

69. EPA responded to DEP's January 14, 2013 request for approval of its revisions to Maine's WQS by letter dated May 16, 2013, which states in part:

Pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131, I hereby approve the following water quality standards revisions to 38 M.R.S.A §420, sub-§2 as set forth in P.L. 2011, Ch. 194 (LD 515) "An Act To Review State Water Quality Standards" and CMR 584, Surface Water Quality Criteria for Toxic Pollutants. . . .

EPA acknowledges your request to approve the revisions for all waters, including waters that are within Indian territories. Today's approval does not extend to waters that are within Indian territories. EPA intends to publish a notice explicitly seeking public input on the applicability of the revised arsenic criterion in question to waters within Indian territories before completing its review. Therefore, EPA is taking no action to approve or disapprove the State's revisions with respect to those waters at this time. In the meantime, EPA will retain responsibility under Sections 303(c) and 303(d) of the Clean Water Act for those waters. . . .

Exhibit J, attached hereto, is a true and accurate copy of EPA's May 16, 2013 letter.

70. By letter dated February 27, 2014, Maine's DEP again sought EPA's approval of yet further revisions to Maine's WQS for all waters throughout the State of Maine.

71. The Maine DEP's February 27, 2014 request for approval of further revisions to Maine's WQS echoes the statements contained in the DEP's January 14, 2013 letter, again stating in part:

In recent years, EPA's approval of new or revised water quality standards in Maine has included language to the effect that the approval "does not extend to waters that are within Indian territories and lands." Although it should not be necessary, by this letter I am expressly requesting that EPA approve the enclosed water quality standards as effective throughout the State of Maine without distinction as to waters within Indian

territories or lands. There is no basis in the law for such a distinction, as Maine's environmental regulatory jurisdiction is uniform throughout the State, including as to lands and waters that EPA might consider to be Indian. *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007) (Maine Indian Land Claims Settlement Act, and particularly the Maine Implementing Act at 30 M.R.S. § 6204, is "about as explicit as possible" in conferring environmental regulatory authority over Indian lands and waters on the State).

To the extent EPA does anything other than approve the enclosed standards in the unconditional manner requested, I hereby request that EPA:

- Identify with specificity each water body or segment thereof to which EPA contends the enclosed standards do not apply because they are waters "within Indian territories and lands"; and
- Explain with specificity what water quality standards, if any, EPA contends are applicable to such water bodies or segments thereof, and the legal basis for that conclusion.

As I am sure you can appreciate, if it is indeed EPA's position that Maine's duly adopted water quality standards do not apply to some subset of waters within the State, then both MDEP and Maine's regulated community are entitled to clear answers to these questions from your agency. . . .

Exhibit K, attached hereto, is a true and accurate copy of this February 27, 2014 letter and attachments.

72. To date, EPA has not specified any necessary changes to any of the revisions to Maine's WQS that were the subject of the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J) and/or the letters from DEP to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K), that EPA contends would meet the requirements of the CWA for purposes of those unspecified Maine waters that EPA claims are within Indian territories and/or lands.

73. To date, EPA has neither approved nor disapproved any of the proposed revisions to Maine's WQS that were the subject of the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J) and/or the letter from DEP to EPA dated January 14, 2013 (Exhibit I), for purposes of the unspecified Maine waters that EPA claims are within Indian territories and/or lands.

74. To date, EPA has neither approved nor disapproved, nor taken any other action that Maine is aware of, in connection with the Maine DEP's February 27, 2014 request for approval of further revisions to Maine's WQS for any waters within the State of Maine.

75. To date, EPA has not provided any responses to any of the requests for information contained in the letters from DEP to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K).

76. To date, EPA has never advised Maine: 1) what unspecified Maine waters EPA contends are within Indian territories and/or lands and are allegedly not subject to Maine's WQS; or 2) what WQS EPA believes apply within such waters.

***EPA's undisclosed and secret communications with
Maine Indian tribes regarding environmental matters such as
tribal WQS for and NPDES permitting authority over Maine waters***

77. As early as 1999, and without informing Maine, EPA has communicated with PIN regarding plans to promulgate separate WQS (in addition to Maine's statewide WQS) for the Penobscot River in Maine.

78. For instance, in July 1999, and without informing Maine, EPA and PIN, "in order to better achieve mutual environmental-governmental goals in the government-to-government relationship" between them, entered into a Tribal Environment Agreement, which contemplates EPA's implementation of its alleged federal trust responsibility towards PIN, contains a confidentiality agreement regarding communications between EPA and PIN, and contemplates that EPA would use "best efforts to protect all such communications, including those that predate this agreement that are requested under the Freedom of Information Act."

79. In addition, by letter dated February 4, 2000, and without informing Maine, EPA wrote PIN stating that EPA would “fully consider” PIN’s request that EPA promulgate separate WQS and administer CWA programs for the Penobscot Indian Reservation in Maine.

80. Following the First Circuit Court of Appeals’ decision in *Maine v. Johnson*, 498 F.3d 37, (1st Cir. 2007), Maine’s DEP wrote EPA in mid-2008 urging it to amend its prior NPDES delegation decisions with an “acknowledgement both of D.E.P.’s jurisdiction over all dischargers within the State, and that Maine’s water quality standards apply uniformly throughout the State.”

81. EPA delayed responding to the order on remand in *Maine v. Johnson*, 498 F.3d 37, 49 (1st Cir. 2007) and did not take action to approve Maine’s delegated NPDES permitting authority for purposes of PIN’s facility on Indian Island and the Passamaquoddy Tribe’s Pleasant Point Facility until March 2012.

82. EPA’s March 28, 2012 published action taken in response to *Maine v. Johnson*, 498 F.3d 37, 49 (1st Cir. 2007), states in part:

On October 31, 2003, EPA approved the State of Maine’s application to administer the NPDES program in the Indian territories of the Penobscot Indian Nation and the Passamaquoddy Tribe, with the exception of any discharges that qualified as “internal tribal matters” under MICSA and MIA. . . .

On August 8, 2007, the U.S. Court of Appeals for the First Circuit issued its opinion in *Maine v. Johnson*, 498 F.3d 37. . . . The court’s mandate was issued on October 2, 2007. . . .

EPA proposed to implement the court’s order by modifying its approval of Maine’s NPDES program to authorize the State to issue NPDES permits for all discharges within the Indian territories of the Penobscot Nation and Passamaquoddy Tribe. 76 FR 29747 (May 23, 2011). . . . As a result, the state will assume responsibility from EPA for issuing and administering the permits for the Penobscot Nation Indian Island treatment works. . . and the Passamaquoddy Tribal Council treatment works. . . Neither tribe has applied to EPA to implement the NPDES permit program, so this action does not address the question of either tribe’s authority to implement the program.

77 Fed. Reg. 23481, 23482 (April 19, 2012).

83. Shortly thereafter, by letter dated May 29, 2012, and without informing Maine, PIN wrote EPA requesting a determination that PIN “qualifies pursuant to section 518 of the Clean Water Act for the purposes of seeking NPDES permit program approval for pollution discharges in the Penobscot River” originating from “point sources and storm water located within Penobscot Indian Territory,” including “waters of the Penobscot River from Indian Island and northward thereof.”

84. By letter dated July 17, 2012, and without informing Maine, EPA initiated “consultation and coordination” with PIN regarding PIN’s “request for a determination that the PIN qualifies for treatment in the same manner as a state (TAS), pursuant to Section 518” of the CWA for purposes of PIN’s attempt to obtain NPDES permit program approval from the EPA for discharges into the Penobscot River.

85. By letter dated August 23, 2012, and without informing Maine, EPA wrote to PIN as a follow-up to a meeting between PIN and EPA Region I staff held on July 25, 2012, which EPA described as “a very positive and productive meeting, as one step in EPA Region 1’s ongoing efforts to consult with the PIN and deliberate upon your request for a TAS determination for purposes of NPDES program authorization.”

86. By letters dated March 6, 2013, sent to each of Maine’s five federally recognized Indian tribes, EPA, citing its alleged “federal trust responsibility and government-to-government relationship” with those tribes, and without informing Maine, initiated “consultation and coordination” with the tribes regarding the WQS revisions submitted by Maine in its January 14, 2013 letter to EPA.

87. Over three months later, EPA wrote a letter to Maine’s DEP dated June 24, 2013, which states that “[a]s part of EPA’s trust responsibility to the tribes, EPA must consult with the tribes in

Maine before determining whether to approve the arsenic criteria revisions [set forth in DEP's January 14, 2013 letter to EPA] for waters in Indian Territories in Maine.”

88. To the extent that EPA claims any authority to invoke a federal “trust responsibility” towards Indian territories in a manner that affects state environmental jurisdiction under the CWA, such a trust responsibility would not apply in Maine. 25 U.S.C. §§ 1725(h) & 1735(b).

89. Substantive statutes and regulations must expressly create a fiduciary relationship giving rise to defined obligations in order for any federal “trust responsibility” to exist with respect to Maine's Indian tribes. *Nulankeyutmonen Nkihttaqmikon v. Impson*, 503 F.3d 18, 31 (1st Cir. 2007).

90. With limited exceptions, Indian “reservation” lands in Maine are not held in trust by the federal government. *Bangor Hydroelectric Co.*, 83 FERC P 61,037, 61,085 – 61,086, 1998 WL 292768.

91. EPA's June 24, 2013 letter to DEP also invited DEP to participate in EPA's discussions with Maine's Indian tribes regarding tribal sustenance fishing rights, and announced EPA's intention to seek “public input on the applicability of [Maine's] revised criterion [as set forth in DEP's January 14, 2013 letter to EPA] to waters within Indian territories.”

92. The Maine Attorney General submitted comments to EPA dated September 13, 2013, on EPA's review of Maine's WQS revisions as they apply within Indian territories, which, among other things, object to EPA's public input process as being unlawful under the CWA and unnecessary, and which assert Maine's full authority and jurisdiction to promulgate WQS throughout the State of Maine, including within Indian territories and/or lands. Exhibit L, attached hereto, is a true and accurate copy of the Comments Of Maine Attorney General Janet T. Mills On EPA's Review Of Maine's Water Quality Standards Revisions As They Apply In Indian Territories, dated September 13, 2013 (without attachments).

93. The Maine DEP Commissioner also submitted comments to EPA dated September 11, 2013, which, among other things, dispute EPA's suggestion that the statewide application of Maine's WQS revisions submitted to EPA by letter dated January 14, 2013 (Exhibit I) was unclear during Maine's promulgation of those WQS revisions. Exhibit M, attached hereto, is a true and accurate copy of the letter comments by Maine DEP Commissioner Patricia W. Aho dated September 11, 2013 (sent via email).

94. By letter dated January 23, 2014, and without informing Maine, PIN wrote to EPA referencing the "ongoing government-to-government consultations" between EPA and PIN regarding the "administration and operation of the Clean Water Act within Penobscot Indian Reservation."

95. PIN's January 23, 2014 letter to EPA also notified EPA of PIN's intention to promulgate its own WQS for application within the Penobscot Indian Reservation pursuant to Sections 303 and 518(e) of the CWA, and sought EPA input on "issues surrounding any competing authorities between the EPA, the State, and the Penobscot Nation with respect to the promulgation of water quality standards within the Reservation."

96. As a follow-up to its January 23, 2014 letter, PIN, without informing Maine, sent EPA a letter dated February 27, 2014, referencing its prior request to EPA for input on "issues surrounding any competing authorities between the EPA, the State, and the Penobscot Nation with respect to the promulgation of water quality standards within the Reservation," and inviting the EPA Regional Administrator and Region I staff to a meeting to discuss PIN's forthcoming WQS application "in relation to the overall environmental regulatory regime within the Penobscot Indian Reservation."

97. EPA wrote a letter dated April 18, 2014, apparently sent to all federally-recognized Indian tribes (including those in Maine), which states:

[EPA] is initiating consultation and coordination with federally-recognized Indian tribes concerning a potential reinterpretation of Clean Water Act provisions regarding treatment of tribes in the same manner as a state (TAS). The reinterpretation could reduce some of the time and effort for tribes submitting applications for TAS for regulatory programs under the Clean Water Act. Specifically, EPA is considering reinterpreting section 518(e) as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations. This reinterpretation would replace EPA's current interpretation that applicant tribes need to demonstrate their inherent regulatory authority. . . .

98. On or about June 10, 2014, PIN published proposed draft tribal WQS as well as a Public Notice of Hearing and Request for Comments on those WQS, which are presumably for eventual submission to EPA pursuant to the secret Tribal Environment Agreement between PIN and EPA.

99. On or about August 6, 2014, PIN held a public hearing on its proposed draft tribal WQS.

100. Maine learned well after-the-fact of the 1999 Tribal Environment Agreement between EPA and PIN, and many of the other communications between EPA and PIN and other Maine Indian tribes discussing tribal roles in the administration of the CWA in Maine, only by filing public records requests, by conducting its own independent research, and through discovery requests in other litigation.

Count I – 28 U.S.C. §§ 2201, 2202 – Declaratory Judgment Act

101. Plaintiffs reallege the allegations contained in paragraphs 1 through 100 and incorporate them herein.

102. An actual controversy within the Court's jurisdiction exists between Maine and Defendants under the CWA and the Settlement Acts regarding the scope and extent of Maine's environmental regulatory jurisdiction and authority within the State of Maine.

103. An actual controversy within the Court's jurisdiction exists between Maine and Defendants under the CWA and the Settlement Acts regarding Maine's jurisdiction and authority to promulgate WQS and WQS revisions for those unspecified Maine waters that EPA and Defendants claim are within Indian territories and/or lands.

104. An actual controversy within the Court's jurisdiction exists between Maine and Defendants under the CWA and the Settlement Acts regarding the application of Maine's WQS and all outstanding WQS revisions that have not yet been fully acted on by EPA and Defendants, including those reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J) and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K), to those unspecified Maine waters allegedly within Indian territories and/or lands, and whether such WQS revisions are required by law to be approved by Defendants and EPA for such waters.

105. An actual controversy within the Court's jurisdiction exists between Maine and Defendants under the CWA and the Settlement Acts over whether Defendants and EPA have waived all rights to disapprove, or are otherwise legally barred from disapproving, all outstanding revisions to Maine's WQS that have not yet been fully acted on by EPA and Defendants, including those reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J) and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K).

106. A declaration by the Court of the rights and legal relations of the parties will redress the existing actual controversies between the parties, and a declaration in favor of Plaintiffs will redress the harms to Plaintiffs.

***Count II – 33 U.S.C. §§ 1313, 1365(a)(2); 28 U.S.C. §§ 2201, 2202
EPA’s Failure to perform non-discretionary duties under the CWA***

107. Plaintiffs reallege the allegations contained in paragraphs 1 through 106 and incorporate them herein.

108. Plaintiffs are citizens entitled to commence a civil action on their own behalf against Defendants pursuant to 33 U.S.C. §§ 1365(a)(2), 1365(g).

109. Plaintiffs have provided the requisite notice pursuant to 33 U.S.C. § 1365(b) by virtue of certified letters sent to the EPA Administrator and the United States Attorney General dated 1) July 23, 2013 (which, per that letter’s return receipts, was received by EPA on July 29, 2013, and by the U.S. Attorney General on August 14, 2013), and 2) June 27, 2014 (which, per that letter’s return receipts, was received by EPA on July 1, 2014, and by the U.S. Attorney General on July 3, 2014). Exhibit N, attached hereto, is a true and accurate copy of the July 23, 2013 notice letter and return receipts. Exhibit O, attached hereto, is a true and accurate copy of the June 27, 2014 notice letter and return receipts.

110. Defendants and EPA each have a non-discretionary, official and public duty under the CWA, 33 U.S.C. § 1313, to timely approve, disapprove, or specify any changes required for approval of, revisions to Maine’s WQS submitted by Maine to EPA for approval, including those reflected in the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J), and those set forth in DEP’s letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K).

111. Defendants and EPA have failed to perform their non-discretionary duties under the CWA by failing to take any action regarding Maine’s WQS submitted by Maine to EPA for waters that EPA claims may be within Indian territories and/or lands, as reflected in the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J) and in DEP’s letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K).

112. Defendants and EPA have waived all rights to disapprove and/or specify any changes required for approval of, or are otherwise legally barred from disapproving, the revisions to Maine's WQS that have not yet been fully acted on by EPA, including those reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J) and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K).

113. Defendants and EPA also each have a non-discretionary, official and public duty under the CWA to approve a state's WQS revisions on a state-wide basis, and have no discretion to disapprove or refrain from acting on such WQS revisions for, or otherwise retain responsibility over, any waters allegedly within Indian territories and/or lands within the borders of such state, where the state's WQS revisions have been determined by EPA to be consistent with the requirements of the CWA, 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5 & 131.6 for other portions of the state, and where no Indian tribe in such state has been authorized by EPA to promulgate WQS or administer a WQS program pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

114. Defendants and EPA have failed to perform their non-discretionary duties under the CWA by failing to timely approve the revisions to Maine's WQS submitted by Maine to EPA for those waters that EPA claims may be within Indian territories and/or lands, as reflected in the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J), which revisions have been determined by EPA to be consistent with the requirements of the CWA and approved by EPA for other portions of the State of Maine.

115. The failure by Defendants and EPA to perform their non-discretionary duties under the CWA and act on Maine's WQS revisions has harmed Plaintiffs, and the relief requested by Plaintiffs will redress those harms.

116. Plaintiffs are seeking litigation costs, including attorneys fees, pursuant to 33 U.S.C. § 1365(d).

***Count III – 5 U.S.C. §§ 702, 706(1), 706(2); 28 U.S.C. §§ 2201, 2202
Administrative Procedure Act (APA): EPA’s Unlawful Withholding and
Unreasonable Delay of its Approval of Maine’s WQS Revisions***

117. Plaintiffs reallege the allegations contained in paragraphs 1 through 116 and incorporate them herein.

118. In each of the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J), and in response to DEP’s letter to EPA dated February 27, 2014 (Exhibit K), Defendants have unlawfully withheld and unreasonably delayed their recognition of Maine’s primary jurisdiction and authority to promulgate WQS revisions for those Maine waters allegedly within Indian territories and/or lands, which are each discrete agency actions that are required by the CWA and the Settlement Acts and are reviewable by this Court under and compelled by the APA, 5 U.S.C. §§ 702, 706(1).

119. In each of the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J), and in response to DEP’s letter to EPA dated February 27, 2014 (Exhibit K), Defendants unlawfully withheld and unreasonably delayed their approval of Maine’s WQS revisions for those Maine waters allegedly within Indian territories and/or lands, which are each discrete agency actions that are required by the CWA and the Settlement Acts and are reviewable by this Court under and compelled by the APA, 5 U.S.C. §§ 702, 706(1).

120. Each of Defendants’ decisions to take no action on Maine’s WQS revisions for, and instead retain responsibility over, those Maine waters allegedly within Indian territories and/or lands, as reflected in the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J), are also agency actions that are arbitrary and capricious, an abuse of discretion, and unlawful under the

CWA, the Settlement Acts, and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), and are reviewable by this Court under and are in violation of the APA, 5 U.S.C. §§ 702, 706(2).

Count IV – 28 U.S.C. §§ 2201, 2202, 1361 – Writ of Mandamus

121. Plaintiffs reallege the allegations contained in paragraphs 1 through 120 and incorporate them herein.

122. In the alternative, should the Court decline to order the relief requested by Plaintiffs under Counts I-III, then there is no other adequate means for Plaintiffs to attain the relief sought, and the issuance of a writ of mandamus ordering that same relief will result in justice under the circumstances.

Requests For Relief

Plaintiffs request from the Court the following relief:

- a. An order and declaration that the State of Maine's jurisdiction for all environmental regulatory purposes under the CWA, including Maine's authority to promulgate WQS and WQS revisions under the CWA, applies uniformly throughout the State of Maine, including to all waters within Indian territories and/or lands;
- b. An order and declaration that Defendants' and EPA's failures to act on all outstanding revisions to Maine's WQS that have not yet been fully acted on by EPA, including those reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J) and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K), are unlawful under the CWA, the Settlement Acts, and the APA;
- c. An order and declaration that each of Defendants' and EPA's decisions to retain responsibility over, for WQS purposes, those waters that EPA claims are within Indian territories

and/or lands, as reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J), is unlawful under the CWA, the Settlement Acts, and the APA;

d. An order and declaration that Defendants and EPA have waived all rights to disapprove and/or specify any changes required for approval of, or are otherwise legally barred from disapproving, all outstanding revisions to Maine's WQS that have not yet been fully acted on by EPA, including those reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J) and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K);

e. An order and declaration that all outstanding revisions to Maine's WQS submitted by Maine to EPA that have not yet been fully acted on by EPA, including those WQS revisions reflected in the EPA Partial Approval Letters (Exhibits A-F, H, H-1, and J), are by law required to be approved by Defendants uniformly throughout the State of Maine, including for those unspecified waters that EPA claims are within Indian territories and/or lands, and shall be approved by Defendants no later than thirty (30) days from any final order issued by the Court;

f. In the alternative, an order requiring EPA to act on all of Maine's outstanding WQS revisions, including those reflected in the EPA Partial Letters (Exhibits A-F, H, H-1, and J) and in DEP's letters to EPA dated January 14, 2013 (Exhibit I) and February 27, 2014 (Exhibit K), in a manner consistent with the Settlement Acts, *Maine v. Johnson*, and the CWA, no later than thirty (30) days from the date of any final order issued by the Court;

g. An order awarding Plaintiffs their attorneys' fees and costs incurred in bringing and maintaining this action pursuant to 33 U.S.C. § 1365(d), 28 U.S.C. § 2412, and 5 U.S.C. § 504; and

h. Such further and additional relief as the Court may deem just and proper.

Dated: September 25, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2014, I electronically filed Plaintiffs' Amended Complaint and exhibits with the Clerk of Court using the CM/ECF system, which will send notification and a copy of such filing(s) to all counsel of record who have consented to electronic service, including the following:

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