UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, and AVERY DAY, in his capacity as Acting 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 1), Defendants.	Civil Action No: 1:14-cv-264-JDL

SECOND AMENDED COMPLAINT

Introduction

1. Plaintiffs State of Maine and Avery Day, Acting Commissioner of the Maine Department of Environmental Protection ("DEP") (collectively "Plaintiffs" or "Maine"), bring this action to challenge the lawfulness of certain disapprovals by Defendants (collectively "EPA") of Maine's surface water quality standards ("WQS") promulgated pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. ("CWA") for unspecified waters that EPA claims may be within Indian territories and lands ("Indian Waters"). The challenged EPA disapprovals and rationale, which effectively establish different WQS for Maine's Indian tribes than for Maine's other citizens, are set forth in a letter sent by EPA's Region 1 to Maine dated February 2, 2015, and a 51-page "Attachment A" to that letter (collectively EPA's "February 2, 2015 letter," a copy of which is attached hereto as Exhibit 1).

2. Maine's environmental regulatory jurisdiction over all intrastate waters, including Indian Waters, has long been 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*. ("MICSA") (collectively the "1980 Acts"), and was reaffirmed by the First Circuit Court of Appeals in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

3. Under the 1980 Acts, Maine's WQS, including Maine's designated uses of its intrastate waterbodies (set forth in Maine's established Water Classification Program, 38 M.R.S. §§ 464 *et seq*.) and Maine's water quality criteria designed to protect its designated uses, apply throughout Indian Waters to the same extent and in the same manner as those WQS apply to other Maine waters. (30 M.R.S. § 6204; 25 U.S.C. §§ 1725(a) & (b)(1), 1725(h), 1735(b)).

4. Similarly, under the 1980 Acts, members of Maine's Indian tribes have no special or greater status or rights with respect to water quality and are subject to Maine's WQS to the same extent and in the same manner as the rest of Maine's general population. (30 M.R.S. § 6204; 25 U.S.C. §§ 1725(a) & (b)(1), 1725(h), 1735(b)).

5. In 2004, however, EPA began limiting its approvals of Maine's WQS to non-Indian Waters only, while taking no action on Maine's WQS for Indian Waters, in contravention of the CWA, the 1980 Acts, and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). As a consequence, and with no other remaining extra-judicial options, Maine resorted to filing this action in 2014, which originally sought to force EPA to honor Maine's statewide environmental regulatory jurisdiction to set WQS for all intrastate waters, including Indian Waters, and to act on Maine's outstanding WQS for its Indian Waters.

6. In response, and while this action was pending, EPA issued its February 2, 2015 letter, which generally does two things: first, it belatedly but correctly determines that Maine has

statewide environmental regulatory authority under the 1980 Acts to set WQS for all Maine waters, including Indian Waters, consistent with *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). (Exhibit 1, Attachment A, pp. 2, 7-10). However, EPA's February 2, 2015 letter then unlawfully disapproves certain Maine WQS (human health water quality criteria) for Indian Waters based on an intricate rationale, announced for the first time in the February 2, 2015 letter, that is built on a series of unlawful determinations that EPA employs to try to get around the 1980 Acts and *Maine v. Johnson* and reach an apparently pre-determined result – EPA's disapproval of Maine's human health criteria for Maine's Indian Waters only. (Exhibit 1, Attachment A, pp. 2-3, 10-44).

7. EPA's disapprovals of Maine's WQS for Indian Waters affords members of Maine's Indian tribes special rights and a status that is greater than the rest of Maine's general population in violation of the 1980 Acts, the CWA, and *Maine v. Johnson*.

8. EPA's February 2, 2015 letter also suggests that any separate WQS ultimately implemented for Maine's Indian Waters will have a regulatory reach beyond those Indian Waters into Maine' non-Indian Waters within the same watersheds, which irresponsibly disrupts settled regulatory expectations and creates uncertainty with respect to Maine's long-standing Water Classification Program. (Exhibit 1, Attachment A, p. 11).

9. The many unlawful aspects of EPA's February 2, 2015 letter that EPA relies on to ultimately disapprove Maine's human health criteria for Maine's Indian Waters include, without limitation, the following:

- EPA unlawfully asserts that, prior to February 2, 2015, no WQS were ever in effect for Maine's Indian Waters, even though EPA historically (*i.e.*, pre-2004) approved Maine's WQS without qualification as to their effect in Indian Waters, and has acted as if those WQS were in effect for Indian Waters (Exhibit 1, Attachment A, p. 14);
- EPA unlawfully asserts that its pre-2004 approvals of Maine's WQS did not extend to Indian Waters because EPA was required to make a formal threshold determination that Maine has environmental regulatory jurisdiction over its Indian Waters before

EPA could ever approve any Maine WQS for such Indian Waters (Exhibit 1, Attachment A, pp. 14-15);

- EPA unlawfully asserts that its historical recognition of and acquiescence to the application of Maine's WQS in Indian Waters was the result of individual mid-level EPA mistakes (Exhibit 1, Attachment A, p. 15);

- EPA unlawfully asserts that the purpose of MIA, MICSA, and each of Maine's other Indian Settlement Acts was to establish a land base from which Maine's Indian tribes could practice their unique cultures, including tribal sustenance living practices and fishing rights, free from Maine regulation (Exhibit 1, Attachment A, pp. 2, 17-28);

- EPA unlawfully asserts that Maine's WQS and the protection of Maine's existing designated uses of its waterbodies must be "harmonized" with EPA's flawed interpretation of the purpose of MIA, MICSA, and Maine's other Indian Settlement Acts (Exhibit 1, Attachment A, pp. 2, 28-30);

- EPA unlawfully interprets the narrow portions of MIA that permit members of Maine's Southern Tribes to take fish within their reservations (provided that such fish takings are for individual sustenance only) as more broadly constituting a designated use of tribal "sustenance fishing" for the Southern Tribes in their respective Indian Waters (Exhibit 1, Attachment A, pp. 2, 30-31);

- EPA unlawfully issues a new interpretation of Maine's longstanding designated use of "fishing," as used throughout Maine's Water Classification Program for all Maine waters, as instead meaning tribal "sustenance fishing" with respect to each of Maine's Indian tribes in their respective Indian Waters (Exhibit 1, Attachment A, pp. 2, 31-32);

- EPA unlawfully usurps Maine's role as a State under the CWA by establishing its own new WQS in Maine (*i.e.*, EPA's newly-created designated use of tribal "sustenance fishing") without any public input or other required process (Exhibit 1, Attachment A, pp. 2, 30-32);

- EPA unlawfully interprets its new designated use of tribal "sustenance fishing" as in turn requiring an implicit, bootstrapped right to heightened water quality in Indian Waters (and potentially beyond) in order to protect the use by ensuring a higher quality of fish for tribal-only sustenance purposes (Exhibit 1, Attachment A, pp. 2-3, 12, 20-21, 27-28);

- EPA unlawfully analyzes its new designated use of tribal "sustenance fishing" in the context of a tribal-only "target" population, as opposed to Maine's general population, for purposes of establishing water quality criteria to protect that new use (Exhibit 1, Attachment A, pp. 2-3, 35-36);

- EPA unlawfully interprets its new designated use of tribal "sustenance fishing" as requiring unsuppressed tribal fish consumption rates based on a new historical tribal fish consumption "scenario" that assumes fish free from any pollution and that was

itself never the subject of any public input process (Exhibit 1, Attachment A, pp. 3, 37-41); and

- EPA unlawfully disapproves Maine's human health water quality criteria for Indian Waters as being un-protective of EPA's new tribal "sustenance fishing" designated use (Exhibit 1, Attachment A, pp. 3, 41-43).

Jurisdiction and Venue

10. The Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 1331 & 2201-2202, and 33 U.S.C. § 1365(a)(2).

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

The Parties

12. Plaintiff State of Maine is a sovereign state with environmental regulatory jurisdiction over all waters within its boundaries, including Indian Waters.

13. Plaintiff Avery Day is the Acting Commissioner of the Maine DEP and has primary responsibility for the environmental protection, regulation and control of all waters within the State of Maine.

14. Defendant Gina McCarthy is the Administrator of EPA and is being sued in her official capacity. 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 of waters within the United States. As Administrator, Ms. McCarthy oversaw or was responsible for EPA's February 2, 2015 letter and the positions and disapprovals of Maine's WQS contained therein.

15. Defendant H. Curtis Spalding, who is also being sued in his official capacity, is the EPA Regional Administrator for Region 1 (New England), which includes the State of Maine. Within EPA's Region 1, Mr. Spalding has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control over waters within the United

States. As Regional Administrator for EPA's Region 1, Mr. Spalding oversaw or was responsible for EPA's February 2, 2015 letter and the positions and disapprovals of Maine's WQS contained therein.

Maine's Indian Settlement Acts

16. There are now four federally recognized Indian tribes in Maine represented by five governing bodies: the Penobscot Indian Nation ("PIN") and the Passamaquoddy Tribe (with two separate Passamaquoddy governing bodies) (collectively the "Southern Tribes"); and the Houlton Band of Maliseet Indians ("Maliseets") and the Aroostook Band of Micmacs ("Micmacs") (collectively the "Northern Tribes").

17. In 1980, Congress passed MICSA, which, among other things, resolved litigation in which the Southern Tribes asserted land claims to an area consisting of approximately two-thirds of the State of Maine's land mass. (25 U.S.C. §§ 1721 *et seq.*; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007)).

18. MICSA also ratified MIA, a Maine law that reflects a comprehensive negotiated settlement between the State of Maine and the Southern Tribes, and that also addresses jurisdictional issues and defines the relationship between Maine and its Indian tribes. (30 M.R.S. §§ 6201 *et seq.*; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007)).

19. As a result of MIA and MICSA, Maine has a nationally unique and novel relationship with its Indian tribes. (*See Akins v. Penobscot Nation*, 130 F.3d 482, 483 (1st Cir. 1997) ("The relations between Maine and the Maine Tribes are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement.")).

20. In 1989, Maine passed the Micmac Settlement Act (the "Micmac Act"), which was ratified by Congress in 1991 through passage of the Aroostook Band of Micmacs Settlement Act ("ABMSA"), and which was designed to give the Micmacs the same limited settlement that had been provided to the Maliseets under the 1980 Acts (the Micmac Act, ABMSA, and the 1980 Acts are collectively referred to as Maine's "Indian Settlement Acts"). (*Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 56-58 & n. 20 (1st Cir. 2007); Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 1143, §2(a)(5) ("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 benefitted from inclusion in the Maine Indian Claims Settlement Act of 1980.")).

21. MIA, as ratified by MICSA, generally establishes that:

> 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 (emphasis added), confirmed by MICSA, 25 U.S.C. § 1725).

22. Similarly, MICSA establishes that the Southern Tribes and their "lands and natural resources" are subject to Maine's jurisdiction as provided in MIA, while the Northern Tribes:

> and any lands or natural resources held in trust by the United States, or by any other person or entity, for [the Northern Tribes] shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

(25 U.S.C. § 1725(a) and (b)(1); 25 U.S.C. § 1725(f); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 50-51 (1st Cir. 2007)).

23. Both MIA and MICSA use the same broad definition of "lands and natural resources," which expressly includes tribal water and water rights, and tribal hunting and fishing rights. (30 M.R.S. § 6203(3); 25 U.S.C. § 1722(d)).

24. As recognized by the First Circuit Court of Appeals, Congress expressly understood that, under MICSA, Maine would retain its environmental regulatory jurisdiction and authority over Maine's Indian lands and waters:

> 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)).

25. As recognized by the First Circuit Court of Appeals, Congress also understood that, under MICSA, any special or greater environmental status or rights afforded to Indian tribes generally, such as those under the Clean Air Act (no similar tribal provisions had yet been enacted under the CWA in 1980), would expressly ***not*** apply 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)).

26. The principle that the State of Maine's jurisdiction and environmental laws extend throughout Maine and encompass Indian tribal "lands and natural resources" was central to the 1980 Acts, and in crafting MICSA, Congress carefully ensured that no then-existing federal Indian law of any kind would be interpreted in a manner that would call into question the applicability of Maine's State laws to Maine's tribes, which would upset the jurisdictional bargain that had been negotiated:

> [No] law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory, or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

(25 U.S.C. § 1725(h)).

27. Elsewhere in MICSA, Congress further secured Maine's unique tribal-State jurisdictional arrangement against ***future*** changes in federal law by using language that essentially tracks the language used in Section 1725(h):

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

(25 U.S.C. § 1735(b)).

28. The combined effect of MICSA Sections 1725(h) and 1735(b) is to bar the application of any kind of federal law that accords special or greater status or rights to Indians and affects or preempts Maine's jurisdiction, unless Congress expressly makes such law applicable in Maine. (25 U.S.C. §§ 1725(h) & 1735(b); *see also Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983); 68 Fed. Reg. 65052, 65057 (November 18, 2003) (EPA concluded that the combination of MICSA Sections 1725(h) and 1735(b) "prevents the general body of federal Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state."); 25 U.S.C. § 1722(d) (defining "laws" of the State to include common law)).

29. The Congressional Senate Report makes clear that the application of federal Indian canons of construction was one of the specific concerns that gave rise to MICSA's Sections

1725(h) and 1735(b), and that these provisions were intended to prevent courts from applying the common law canons to questions of interpretation involving the 1980 Acts:

> The phrase "civil, criminal, or regulatory jurisdiction" as used in [section 1725(h)] is intended to be broadly construed to encompass the statutes and regulations of the State of Maine as well as of the jurisdiction of the courts of the State. The word "jurisdiction" is not to be narrowly interpreted as it has in cases construing Public Law 83-280 such as *Bryan v. Itasca County*, 426 U.S. 373 (1976).

(S. Rep. 96-957, at 30-31).

30. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), issued just four years before passage of the 1980 Acts, illustrated how federal courts generally rely (except where Congress provides otherwise) on Indian canons of construction to resolve ambiguities in statutes against states and in favor of Indians, and the Congressional Senate Report invoked *Bryan* to clarify that the *Bryan* decision's mode of analysis – including its use of Indian canons favoring Indian tribes – was not to apply to questions arising under the 1980 Acts. (S. Rep. 96-957, at 30).

31. Indeed, during the Senate hearings, counsel for the Southern Tribes testified that the "general body of Federal Indian law" had been excluded in Maine "in part because that was the position that the State held to in the negotiations. . . [and] it is also true to say that the tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the federal government in internal tribal matters." (Hearings before the Senate Committee on Indian Affairs on S. 2829, 96th Cong. 2d Sess. 181-82 (1980)).

32. Similarly, before Maine's Joint Select Committee, the same counsel for the Southern Tribes had stated:

> Increasingly [during negotiations], both sides found areas of mutual interest as, for example, in the case of the General Body of Federal Indian Regulatory Law, which the tribes came to see as a source of unnecessary federal interference in the management of tribal property and the State came to see as a source of uncertainty in future Tribal-State relations.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 25).

33. Overall, as the Maine Supreme Court summarized:

> It was generally agreed that [the 1980 Acts] set up a relationship between the tribes, the state, and the federal government different from the relationship of Indians in other states to the state and federal governments. . . . We therefore look not to federal common law . . . but to the statute itself and its legislative history.

(*Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983)).

34. The First Circuit Court of Appeals has concluded that, when interpreting the 1980 Acts or other Maine Indian Settlement Acts, EPA is not to be afforded any deference. (*Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007); *see also id*. at 45 & n.9-10 (also discounting a Department of Interior ("DOI") opinion letter to EPA as non-authoritative and in apparent tension with DOI's 1980 testimony to Congress regarding Maine's jurisdiction under the 1980 Acts)).

The jurisdictional effect of the 1980 Acts on the Southern Tribes

35. With respect to the Southern Tribes, and as the First Circuit Court of Appeals has observed, "[a]t 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); *see also id*. at 45 n.10).

36. This understanding was shared by the Southern Tribes, who, through their counsel during the State hearings, explained:

> In light of all this, one might ask why the Indians were willing to even discuss the question of jurisdiction with the State but simply the answer is that they were obliged to do so if they wanted to effectuate the Settlement of the monetary and land aspects of the claim.... [T]he Tribes opened negotiation with the State concerning the question of

> jurisdiction not because they wanted to do so but because they were obliged to do so to obtain a Settlement that they had already negotiated with the Federal Government.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 23-24; *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 n.7 (Me. 1983)).

37. Counsel for the Southern Tribes further explained that, "[f]or the Indians [negotiating the settlement] meant, among other things, understanding the legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine." (Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 25).

38. Similarly, the State of Maine, through the Maine Attorney General, explained that MIA would avoid a situation where Maine's water and air pollution control laws would be unenforceable within tribal areas. (Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of Maine Attorney General Richard S. Cohen, *reprinted in* Me. Leg. Record (1980) at 6-7).

39. Thus, as the First Circuit Court of Appeals determined, MIA (as ratified by MICSA) "provided that 'with very limited exceptions,' the southern tribes would be 'subject to' Maine law…." (*Maine v. Johnson*, 498 F.3d 37, 42 (1st Cir. 2007) (*quoting Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997); *see also Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996) (the 1980 Acts were designed to "create a unique relationship between state and tribal authority" by submitting the Maine Indians and their tribal lands and resources to the State's jurisdiction and by giving the State "a measure of security against future federal incursions upon these hard-won gains.")).

40. Under MIA, the Southern Tribes were to be treated like municipalities and subject to the laws and regulatory oversight of the State with the exception of things such as "internal tribal matters," which have been determined not to encompass environmental regulation. (30 M.R.S. § 6206(1); *Akins v. Penobscot Nation,* 130 F.3d 482, 484 (1st Cir. 1997) (the Southern Tribes benefitted from the settlement by gaining municipal powers); *Maine v. Johnson,* 498 F.3d 37, 46, 47 (1st Cir. 2007) ("In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected . . . *unless* the internal affairs exemption applies;" discharge of pollutants into Maine waters was not of the same character as "the structure of Indian government or distribution of tribal property;" concluding that the internal tribal matter exception did not apply to bar Maine's environmental regulatory jurisdiction over Indian wastewater facilities); (Exhibit 1, Attachment A, pp. 8-11)).

41. Among the other very limited exceptions to the general application of Maine laws and regulations to the Southern Tribes is a provision involving certain regulatory restrictions on the taking of fish:

> 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 [30 M.R.S. § 6207(6)].

(30 M.R.S. § 6207(4)).

42. In general, a combination of the Southern Tribes, the joint Maine Indian Tribal-State Commission ("MITSC"or the "commission"), and/or the Commissioner of Maine's Department of Inland Fisheries and Wildlife ("IFW") regulate fish catch and size limits and fishing seasons with respect to waters within or bounding on Maine's Indian territory. (30 M.R.S. § 6207).

43. Section 6207(4) of MIA merely permits members of the Southern Tribes the limited

right to take fish within their respective reservations regardless of and free from the normally applicable IFW and/or MITSC restrictions on things such as the "method, manner, bag and size limits and season for fishing" provided that (*i.e.*, only if) the fish being taken is for the tribal member's individual sustenance. (30 M.R.S. §§ 6207(3), (4)).

44. The use of the word "sustenance" in Section 6207(4) of MIA was intended as (and is) a limitation on the exemption from otherwise applicable IFW and/or MITSC fishing laws and regulations with respect to fishing catch and size limits and seasons only; the use of the word "sustenance" in Section 6207(4) does not provide for any kind of special or expanded tribal right to any particular quantity or quality of fish or heightened level of underlying water quality, or otherwise create a Southern Tribal-specific designated use of "sustenance fishing" for any Maine water bodies. (30 M.R.S. § 6207(4); *see also* 38 M.R.S. § 464(2-A)(F) (under Maine's Water Classification System, "designated use" means the use specified in WQS for each waterbody or segment under Title 38, Sections 465 – 465-C, 467 – 470, and not under any part of MIA); *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 215-16 (W.D. Wis. 1996)).

45. During Maine's legislative hearings on MIA, there was testimony regarding whether the Southern Tribes' limited right to "take fish" under Section 6207(4) was intended to apply to commercial as well as personal fishing, which testimony clarified that the phrase "for their individual sustenance" was used merely as a way to limit the exception from Maine and/or MITSC fishing laws and regulations to personal consumption only:

> We didn't just use the word sustenance, we used sustenance for the individual which we construe as not covering commercial fishing operations. We believe that means consumption by the individual.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of John Paterson, *reprinted in* Me. Leg. Record (1980) at 165-66).

46. Nothing in the text or history of the 1980 Acts suggests that Section 6207(4) of MIA was intended to create any kind of special designated use of tribal "sustenance fishing" for the Southern Tribes (or any other Maine Indians), let alone entitle any Indian tribes to any kind of bootstrapped special status or rights with respect to water or fish quality, as this would have been contrary to one of the State's primary goals with respect to the settlement and the 1980 Acts – the avoidance of a two-tiered system, or a "nation within a nation" in Maine. (*See* Hearings before the Senate Committee on Indian Affairs on S. 2829, 96th Cong. 2d Sess. 139 (1980) (Testimony of Maine Governor Joseph Brennan: "We could never have a nation within a nation in Maine. . . . So we have created a new model. . . . [O]ur Indian citizens [will] be on a substantially equal footing with their fellow citizens . . .")).

The jurisdictional effect of the 1980 Acts on the Northern Tribes

47. Under MIA and MICSA, and as recognized by the First Circuit Court of Appeals, there are no exceptions to Maine's environmental regulatory jurisdiction for the Northern Tribes, and their tribal "lands and natural resources" are fully subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources." (30 M.R.S. § 6202 (the Maliseets and their lands "will be wholly subject to the laws of the State"); 30 M.R.S. § 7205 (the Micmacs have no municipality status or civil or criminal jurisdiction within their lands); 30 M.R.S. §§ 6204, 6206-A, 7203; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 45-46 (1st Cir. 2007) (State Micmac Act gave the Micmacs a status similar to the Maliseets, which was different from that of the Southern Tribes)).

48. Thus, Maine's Indian Settlement Acts afford the Northern Tribes significantly less than the Southern Tribes, as their lands and resources, including their tribal water and water rights and tribal hunting and fishing rights, are wholly subject to the laws of the State to the

same extent as any other person or lands or other natural resources therein. (30 M.R.S. 7203; 30 M.R.S. §§ 6202, 6204; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 49-50 (1st Cir. 2007); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74-75 (1st Cir. 2007); (Exhibit 1, Attachment A, p. 8)).

EPA's contemporaneous view of tribal authority under the 1980 Acts

49. Shortly after the passage of the 1980 Acts, EPA prepared a report summarizing its understanding of the terms of the 1980 Acts for EPA's internal use ("EPA Report"), which EPA forwarded to Maine in March 1982. (EPA Report, which is attached hereto as Exhibit 2 (cover letter)).

50. The EPA Report does not acknowledge any separate or special tribal right to or authority over water quality for any purpose, but instead assumes Maine's full environmental regulatory authority over all Indian Waters, while limiting tribal and/or MITSC authority over the regulation of "fish and game laws" only – implicitly for things such as fish catch and size limits and fishing seasons, and not enhanced water quality. The EPA Report states in part:

> The Maine Settlement Act establishes [Southern] tribal governments as municipalities, rather than federal reservations. They are "subject to the laws of the state and to the civil and criminal jurisdiction of the courts of the state" except for "internal tribal matters", minor crime, juvenile crime, small claims and domestic relations. . . .
>
> Tribes will have jurisdiction over hunting and over fishing on ponds of less than 10 acres. Fishing in larger bodies of water and river reaches will be controlled by the Maine Indian Tribal Commission described below. At the same time, the Indians will register game like other hunters and take part in the game census conducted by the State. The State, in turn, may overrule Indian fish and game laws after notice and adjudicatory hearing if species are threatened. . . .
>
> INDIAN AUTONOMY
>
> . . .the state and federal acts declare [Southern tribal governments] to be

> municipalities. . . the Maine Settlement Acts impose State law on the Indian territories, although minor crime, juvenile crime, small claims and domestic relations will be handled in tribal courts. . . .
>
> STATE ENVIRONMENTAL LAWS
>
> . . .state law on land use, land management, conservation and environmental protection will apply on Indian territory. "That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and not barred from application under this Act." according to the Section-by-Section Analysis of the Federal Act. . . .
>
> OPERATION AND MAINTENANCE OF WATER AND SEWER FACILITIES
> . . .
>
> Maine DEP has two staffers assigned to make regular visits and to provide training, and hope to start receiving regular lab reports in the near future. . .
>
> Although DEP has the same enforcement power against the reservations as against any other municipality, DEP is reluctant to incur tribal hostility by using it. . .

(Exhibit 2).

Maine's role as a State under the CWA

51. The CWA has deep roots within the State of Maine, as Maine's Senator Edmund Muskie was one of the CWA's chief architects. Consistent with this legacy, Maine takes seriously its responsibility and commitment to uniformly protect Maine's water quality on behalf of all citizens throughout the State of Maine, including members of Maine's Indian tribes.

52. In 1972, Congress substantially amended the Federal Water Pollution Control Act, commonly known as the CWA, which aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." (33 U.S.C. § 1251(a)).

53. 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, [and] to plan the development and use . . . of land and water resources . . ." (33 U.S.C. § 1251(b)).

54. Congress provided, additionally, that nothing in the CWA "shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." (33 U.S.C. § 1370).

55. Under the CWA, States rather than EPA have the primary authority and responsibility to create, review and revise WQS for all intrastate waters. (33 U.S.C. §§ 1313(c)(1), (2); 40 C.F.R. §§ 131.3(i), 131.4; *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994); *Pronsolino v. Nastri,* 291 F.3d 1123, 1127 (9th Cir. 2002); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1400 (4th Cir. 1993); *Friends of Merrymeeting Bay v. Olsen*, 839 F.Supp.2d 366, 370 (D. Me. 2012)).

56. A State's WQS both define the water quality goals of intrastate water bodies (or portions thereof) by designating the uses to be made of the waters, and set numeric water quality criteria to protect the State's designated uses. (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 131.2, 131.3(i), 131.10, 131.11).

57. Prior to changing a WQS by either adding a new designated use or establishing any sub-category(ies) of use, a State (or EPA, as the case may be) must provide notice and opportunity for a public hearing. (33 U.S.C. §§ 1251(e), 1313(c)(4); 40 C.F.R. § 131.10(e); (EPA Water Quality Standards Handbook, § 6.1.2 (a copy of this and other relevant portions of EPA's WQS Handbook (chapters 3 and 6) are attached hereto as Exhibit 3)).

58. Upon adopting or revising WQS, a State must submit its WQS to EPA for review, and EPA then has the non-discretionary duty either to approve the new or revised WQS within 60 days of their submission if they meet the requirements of the CWA, or disapprove the WQS

within 90 days of their submission. (33 U.S.C. § 1313(c)(2) & (3); 40 C.F.R. §§ 131.5 & 131.21).

59. If a State's new or revised WQS are disapproved or determined by EPA not to meet the requirements of the CWA in any way, then EPA has 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).

60. In addition to promulgating WQS such as designated uses of intrastate waterbodies and water quality criteria to protect those uses, States may also apply to EPA for authorization to regulate point sources of pollution by prohibiting unpermitted discharges of pollutants into waters of the United States under the National Pollution Discharge Elimination System ("NPDES"). (33 U.S.C. §§ 1311(a) & 1342; *Maine v. Johnson*, 498 F.3d 37, 39-40 (1st Cir. 2007)).

61. In November 1999, Maine applied for such NPDES permitting authority and submitted its Maine Pollution Discharge Elimination System ("MEPDES") program to EPA for approval for all Maine waters, including Indian Waters. (33 U.S.C. § 1342(b); *Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007)).

Under the 1980 Acts, the 1987 tribal amendments to the CWA do not apply in Maine

62. In 1987, Congress amended the CWA by, among other things, adding Section 518, which for the first time set forth Indian tribal rights and responsibilities under the CWA and allowed Indian tribes outside of Maine to prospectively apply for "treatment as state" status under the CWA. (33 U.S.C. § 1377(e)).

63. Generally, as a result of the 1987 amendments to the CWA, a qualifying Indian tribe outside of Maine may now 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 review and approval and 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)).

64. Under MICSA, however, the 1987 addition of Section 518 to the CWA does not apply in Maine and affords Maine's Indian tribes no separate status or rights because it would affect Maine's regulatory jurisdiction and because it was not made explicitly applicable to Maine. (25 U.S.C. §§ 1725(h), 1735(b); *Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007)).

65. 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)).

66. 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) for Purposes of Receiving CWA § 106 Grant, at 7-8 (July 20, 1993) (emphasis in original) (a copy of this 1993 EPA Memorandum is attached hereto as Exhibit 4)).

67. To date, and as far as Maine is aware, no Maine Indian tribe has been authorized by EPA to issue NPDES permits, 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, as such an EPA authorization would violate the 1980 Acts and be inconsistent with *Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007).

Maine's longstanding and EPA-approved Water Classification Program

68. Maine's designated uses of its intrastate waterbodies are set forth in Maine's Water Classification Program, which was enacted in its current form in 1986 to strengthen Maine's WQS. (P.L. 1985, c. 698, §15 (eff. July 16, 1986), now as amended 38 M.R.S. §§ 464 *et seq*.; 38 M.R.S. § 464(1) ("The Legislature intends by passage of this article [Title 38, c. 3, sub. 1, art. 4-A] to establish a water quality classification system. . . based on water quality standards which designate the uses and related characteristics of those uses for each class of water. . . The Legislature further intends by passage of this article to assign to each of the State's surface water

bodies the water quality classification which shall designate the minimum level of quality. . . intended to direct the State's management of that water body. . ."); 38 M.R.S. § 464(2-A)(F) (under Maine's Water Classification Program, "designated use" means the use specified in WQS for each waterbody or segment under Title 38, Sections 465-465-C and 467-470, and not under any part of MIA)).

69. Since 1986, the designated uses and other WQS set forth in Maine's Water Classification Program have applied statewide to all of Maine's surface waterbodies, including all portions of Maine's major river basins and minor drainages and Maine's Indian Waters, and have not provided any special status, rights or protections with respect to (or have even mentioned) Maine's Indian tribes or tribal sustenance fishing. (P.L. 1985, c. 698, §15 (eff. July 16, 1986); 38 M.R.S. §§ 464-470).

70. Since 1986, the designated uses set forth in Maine's Water Classification Program have included uses such as "fishing" and "recreation in or on the water," which are goals that are generally required by the CWA. (38 M.R.S. §§ 465, 465-A, 465-B; P.L. 1985, c. 698, §15 (eff. July 16, 1986); 33 U.S.C. § 1251(a)(2); EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004 (October 2000) (EPA's "2000 Guidance, " portions of which are attached hereto as Exhibit 5), § 4.1.1.2 (State standards for human health are set to protect CWA Section 101(a) "fishable" and "swimmable" uses)).

71. Historically, EPA communicated extensively with Maine regarding Maine's development and enactment of its Water Classification Program, including EPA's communications set forth in EPA letters to Maine dated February 20, 1985; November 12, 1985; July 16, 1986; August 20, 1986; April 24, 1987; May 21, 1987; August 31, 1987; November 3, 1988; May 11, 1989;

December 20, 1990; and June 28, 1999. (Copies of these letters are collectively attached hereto as Exhibit 6).

72. As of December 20, 1990, EPA had determined that Maine's Water Classification Program (including all of Maine's designated uses) as well as Maine's numeric water quality criteria were in compliance with the CWA and corresponding federal regulations, and EPA had not: 1) limited EPA's approval of Maine's Water Classification Program, designated uses, or water quality criteria to non-Indian Waters only; 2) recognized (or even mentioned) any kind of designated use for sustenance fishing for any Maine waterbody; or 3) raised any other question regarding the application of Maine's Water Classification Program in Indian Waters. (Exhibit 6).

73. In June 1999, Maine submitted what was then a "complete and current" set of WQS to EPA for inclusion in EPA's CWA WQS docket for Maine, and Maine's submission did not include or identify 30 M.R.S. § 6207(4) or any other portion of MIA as a WQS. In its response dated June 28, 1999, EPA raised no objection or concern regarding the absence of any portion of MIA or of Section 6207(4) in particular, which EPA now contends (as of its February 2, 2015 letter) constitutes a WQS – an alleged designated use of tribal "sustenance fishing" for the Southern Tribes' Indian Waters. (Exhibit 6).

74. The Maine Legislature has sole authority to make changes in the designated uses of the waters of the State of Maine, and has never enacted a designated use (for WQS purposes) of sustenance or subsistence fishing for any Maine surface waterbody. (38 M.R.S. § 464(2-A)(E)).

75. In 2002, the Maine Legislature considered but rejected a controversial proposal to create a designated use of "subsistence" fishing within Maine's Water Classification Program (at 38 M.R.S. §§ 466(10-A) & 467(7)(A)), which was proposed following a DEP review of Maine's Water Classification Program that resulted in suggested changes to Maine's WQS. (A copy of

DEP's recommendations, the proposed bill (L.D. 1529) and amendment, and related materials is attached hereto as Exhibit 7).

76. The rejected portion of the 2002 bill (L.D. 1529) would have created a new designated use of "subsistence" fishing for select portions of the Penobscot River only, and was not intended to affect or change the 1980 Acts in any way, but was instead designed to recognize for the first time, as a matter of State environmental policy and within Maine's Water Classification Program, a new and more specific kind of "fishing" designated use for a subset of Maine's general population that purportedly engaged in higher-than-average rates of fish consumption. (Exhibit 7).

77. L.D. 1529, however, was ultimately amended to remove any reference to the controversial proposal for a new designated use of subsistence fishing. The amendment also authorized further consideration of a new designated use of subsistence fishing in the next legislative session. (Exhibit 7, Summary of Committee Amendment A to L.D. 1529). As far as Maine is aware, no further action was taken regarding the proposal for a new designated use of subsistence fishing.

States such as Maine have flexibility when establishing numeric water quality criteria to protect those designated uses and populations that the State chooses to protect

78. States have the primary authority to determine the appropriate numeric water quality criteria levels to protect their designated uses and the human health of the populations that they have chosen to protect, and may make their own judgments, within reasonable scientific bounds, on factors such as cancer potency or systemic toxicity, exposure, and risk characterization. (Exhibit 3, § 3.1.1 ("EPA's water quality criteria documents are available to assist States in . . . adopting [WQS] that include appropriate numeric water quality criteria . . . in these situations,

States have primary authority to determine the appropriate level to protect human health . . .”); *see also* 40 C.F.R. § 131.11(b); 33 U.S.C. § 1251(b)).

79. In establishing numeric water quality criteria to protect their designated uses, States may adopt numeric water quality values based on published EPA guidance. (40 C.F.R. § 131.11(b)(1)(i) (“In establishing criteria, States should . . . [e]stablish numerical values based on . . . 304(a) Guidance. . .”); 40 C.F.R. § 131.3(c) (Section 304(a) criteria are developed by EPA based on the latest scientific information and are issued to the States for use in developing criteria); 33 U.S.C. § 1314 (EPA information and guidelines on criteria); Exhibit 3, Chapter 3 introduction (States may use EPA’s published water quality criteria “as the basis for developing enforceable water quality standards”) & §§ 3.1.1, 3.4.1 (“Under EPA’s regulation, in addition to basing numeric criteria on EPA’s section 304(a) criteria documents, States may also base numeric criteria on site-specific determinations or other scientifically defensible methods,” & State Option 1)).

80. In 2000, EPA released its Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (“2000 Guidance”), which updated EPA’s methodology for deriving human health criteria and its prior criteria recommendations (published in 1980), and which was intended to provide States with flexibility when establishing WQS by providing scientifically valid WQS options that States could use as default human health criteria for various populations such as the general population. (Exhibit 5, §§ 1.2, 1.3; Exhibit 1, Attachment A, p. 34 & n. 25).

81. Multiple factors are considered together when developing human health criteria, including factors such as an individual fish consumption rate (“FCR,” measured in the amount of fish and shell fish consumed per day) and lifetime excess cancer risk level (“Risk Level,” which

represents a carcinogenic dose associated with a chosen target risk measured in number of people, such as EPA's accepted risk range of 10^{-4} (10,000 people) and 10^{-6} (1,000,000 people)). (Exhibit 5, §§ 1.6, 2.4 ("EPA believes that both 10^{-6} and 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level."); Exhibit 3, § 3.4.1 ("EPA generally regulates pollutants treated as carcinogens in the range of 10^{-6} and 10^{-4} to protect average exposed individuals and more highly exposed populations."); 06-096 C.M.R. ch. 584, §§ 4 (Risk levels), 5 (Human health assumptions) (eff. July 29, 2012)).

82. A State's chosen FCR works with and is relative to the State's selected cancer Risk Level, which is a parameter that represents what the State considers to be an appropriate level of cancer risk. Differences in Risk Levels will in turn affect the levels of FCRs that will protect human health to the State's chosen level of individual cancer risk, which EPA explains as follows:

> the incremental cancer risk levels are ***relative***, meaning that any given criterion associated with a particular cancer risk level is also associated with specific exposure parameter assumptions (i.e., intake rates, body weights). When these exposure values change, so does the relative risk. For a criterion derived on the basis of a cancer risk level of 10^{-6}, individuals consuming up to 10 times the assumed fish intake rate would not exceed a 10^{-5} risk level. Similarly, individuals consuming up to 100 times the assumed rate would not exceed a 10^{-4} risk level. Thus, for a criterion based on EPA's default intake rate (17.5 gm/day) and a risk level of 10^{-6}, those consuming a pound per day (i.e., 454 grams/day) would potentially experience between a 10^{-5} and a 10^{-4} risk level). (Note: Fish consumers of up to 1,750 gm/day would not exceed the 10^{-4} risk level).

(Exhibit 5, § 2.4 (emphasis in original)).

83. EPA's 2000 Guidance permits the use of cancer Risk Levels that are lower than Maine's conservative Risk Level of 10^{-6}, and recognizes that such lower Risk Levels (10^{-5} and 10^{-4}) are and have been properly used by States and Indian tribes:

> EPA believes that both 10^{-6} or 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level. States or Tribes that have adopted standards based on criteria at the 10^{-5} risk level can continue to do so, if the highly exposed groups would at least be protected to the 10^{-4} level. . . .

> Adoption of a 10^{-6} or 10^{-5} risk level, both of which States and authorized Tribes have chosen in adopting water quality standards to date, represents a general acceptable risk management decision, and EPA intends to continue to provide this flexibility to States and Tribes. . .

(Exhibit 5, § 2.4; Exhibit 1, Attachment A, p. 36 (discussing EPA's approved range of Risk Levels)).

84. EPA issued additional guidance in November 2000 entitled Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Volume 2: Risk Assessment and Fish Consumption Limits, Third Edition, EPA 823-B-00-008 (November 2000) ("2000 Fish Consumption Guidance," portions of which are attached hereto as Exhibit 8), which "presents consumption limits that were calculated using a risk level of 1 in 100,000 (10^{-5})" but notes that "states may choose to calculate consumption limits based on other risk levels." (Exhibit 8, § 1.2 (Objectives)).

85. EPA's 2000 Fish Consumption Guidance also recommends default FCRs of 17.5 grams/day for recreational fishers and 142.4 grams/day for subsistence fishers using a cancer Risk Level of 10^{-5}, which EPA believes is "especially protective of recreational fishers and subsistence fishers within the general U.S. population," and which equates to a FCR of 14.24 grams/day when coupled with a Risk Level (like Maine's) of 10^{-6}. (Exhibit 8, § 1.3; *see also id*. at § 1.5 (noting that the guidance assumed an acceptable risk of 1 in 100,000 (10^{-5}) in meal consumption limits, as opposed to the July 1997 second edition, which "used an acceptable risk of 1 in 10,000, 1 in 100,000, and 1 in 100,000" (*i.e.*, 1 in 10^{-4}, 10^{-5}, and 10^{-6})).

86. EPA's 2000 Guidance affords States the flexibility to select the particular population that the State wishes to protect, and to either use EPA's default national recommendations for factors such as the FCR, or to make alternative exposure estimates for subpopulations based on more localized data – something which EPA encourages but does not (and may not) require. (Exhibit

5, § 2.1 ("An important decision . . . is the choice of the particular population to protect. For instance, criteria could be set to protect those individuals who have average or "typical" exposures . . . EPA has selected default parameter values that are representative of several defined populations . . . EPA believes that its assumptions afford an overall level of protection targeted at the high end of the general population . . . EPA also believes that this is reasonably conservative and appropriate to meet the goals of the CWA . . ."); § 4.2.2.3 (States have "the flexibility to choose alternative intake rate . . . assumptions to protect specific population groups that they have chosen."); § 4.2.4 (States are "encouraged to consider protecting population groups that they determine are at greater risk . . . The ultimate choice of. . . exposure intake rates requires the use of professional judgment"); § 4.3 ("In providing additional exposure intake values for highly exposed subpopulations (e.g., sport angler, subsistence fishers), EPA is providing flexibility for States and authorized Tribes to establish criteria specifically targeted to provide additional protection using adjusted values for exposure parameters for. . . fish consumption."); 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. . . . Once again, EPA emphasizes the flexibility for States and authorized Tribes to use alternative assumptions based on local or regional data to better represent their population groups of concern."); *see also* 65 Fed. Reg. 66444-01, 66449, §C (November 3, 2000) ("For the purpose of deriving criteria based on the 2000 Human Health Methodology, EPA is publishing default values for risk level, fish intake. . . We believe these default values result in water quality criteria protective of the general population, and we will use these values when deriving 304(a) criteria. States and authorized Tribes may use other values more representative of local conditions . . ."); *but see* Exhibit 1, Attachment A, p. 35).

87. EPA's recommended criteria for potentially exposed subpopulations are non-binding options that are available should a State opt not to use EPA's recommended criteria for the general population or some other scientifically defensible criteria:

> States and authorized Tribes have the option to develop their own criteria and the flexibility to base those criteria on population groups that they determine to be at potentially greater risk because of higher exposures, yet, EPA cannot oblige the States to specific consulting agreements because, again, criteria are guidance, not enforceable regulations, and do not impose legally binding requirements. Therefore, we recommend that States and Tribes give priority to identifying and adequately protecting their most highly exposed population by adopting more stringent criteria, ***if the State or Tribe determines that the highly exposed populations would not be adequately protected by criteria based on the general population.*** In all cases, States and authorized Tribes have the flexibility to use local or regional data that they believe to be more indicative of the population's fish consumption—instead of EPA's default rates—and we strongly encourage the use of these data.

65 Fed. Reg. 66444, 66468 (November 3, 2000) (emphasis added); *see also id*. at 66454 (EPA recommended criteria serve as guidance to States, and "EPA cannot force States or Tribes to conduct their own evaluations.").

88. For purposes of Maine's human health numeric water quality criteria, Maine utilizes a general FCR of 32.4 grams/day coupled with a Risk Level of 10^{-6} for all pollutants other than inorganic arsenic, and a FCR of 138 grams/day coupled with a Risk Level of 10^{-4} for inorganic arsenic. (Exhibit 1, Attachment A, p. 37 & n. 31; EPA's January 25, 2013 comparison of State and tribal FCRs, a copy of which is attached hereto as Exhibit 9; 06-096 C.M.R. ch. 584, §§ 4 (Risk levels), 5 (Human health assumptions) (eff. July 29, 2012)).

89. Thus, Maine's use of a general 32.4 grams/day FCR coupled with a cancer Risk Level of 10^{-6} is the equivalent of a FCR of 324 grams/day coupled with a Risk Level of 10^{-5}, or a FCR of 3240 grams/day coupled with a Risk Level of 10^{-4} – both FCRs that greatly exceed any EPA default FCR recommendations for any subpopulations, including subsistence fishers, within EPA-accepted Risk Levels. (Exhibit 5, § 2.4).

90. As reflected by EPA's January 2013 comparison of FCRs, Maine's FCR of 32.4 grams/day coupled with a cancer risk level of 10^{-6} represents one of the highest and most protective FCRs of all of the 50 States, and exceeds any EPA guidance on recommended FCRs for the general population. (Exhibit 9).

91. In contrast to Maine's general FCR of 32.4 grams/day, EPA's 2000 Guidance, which is currently in effect, utilizes a FCR of 17.5 grams/day for the general population, which, according to EPA represents the 90th percentile of EPA's data, is protective of the majority of the general population, and is recommended by EPA for State use as a FCR for the general population. (Exhibit 5, §§ 4.2.2.3, 4.3.3.1; Exhibit 1, Attachment A, p. 34 & n.25).

92. EPA's prior 1980 human health guidance for the general population assumed a default FCR of 6.5 grams/day, which was EPA's estimated national per capita FCR for freshwater and estuarine fish. As EPA acknowledges, many States utilize this 1980 EPA-recommended FCR of 6.5 grams/day in the development of their human health criteria, while other States such as Maine utilize a higher and more protective FCR. (Exhibit 3, § 3.1.3 ("Many States use EPA's 6.5 g/day consumption value. . ."); Exhibit 9).

Prior to 2004, EPA had already approved Maine's WQS for Indian Waters and had acted as if those WQS were fully in effect for Maine's Indian Waters

93. Historically, both before and after passage of the 1980 Acts, and throughout the 1980s and 1990s, EPA reviewed, acted on, and fully approved Maine's WQS for Indian Waters without any qualification as to the effect of those WQS within Maine's Indian Waters. (Exhibit 6).

94. Historically, EPA, including the highest members of EPA's Region 1, also acted as if Maine's WQS were in effect for Maine's Indian Waters for various CWA purposes. (Exhibit 1, Attachment A, p. 15; *but see id*. (asserting that mid-level EPA officials mistakenly assumed, without expressly considering the issue, that Maine's WQS applied within Indian Waters)).

95. For instance, in a letter dated May 31, 1996, EPA's then Regional Administrator for Region 1, John DeVillars, declined a request to EPA by PIN to begin a process of establishing federally promulgated WQS for the Penobscot River, including "waters affecting the Penobscot Indian Nation's reservation," and instead stated that he believed "the most promising approach to achieving our mutual objective is through thoughtfully applying the current [Maine] standards." The EPA Regional Administrator's letter goes on to discuss implementation of Maine's dioxin criterion ("based on EPA's national criterion") within waters "adjacent to" PIN's reservation, and states that EPA Region 1 believes that the "most efficient and effective way to address the tribe's concern at this time is through the permit process [based on Maine's WQS], rather than through a separate federal promulgation of a dioxin criterion." (A copy of this letter is attached hereto as Exhibit 10).

96. In 1997, EPA also responded to comments in connection with a proposed EPA NPDES permit for discharges by Lincoln Pulp and Paper within Indian Waters on the Penobscot River. (A copy of EPA's response to comments on Lincoln Pulp and Paper's proposed NPDES permit, along with portions of a draft fact sheet for the same NPDES permit, is attached hereto as Exhibit 11). In its responses, EPA applied Maine's WQS (including Maine's dioxin criterion) within Indian Waters, and determined that the EPA NPDES permit protected a FCR of 110 grams/day to a Risk Level of 10^{-5} [the equivalent of a FCR of 11.0 grams/day to a Risk Level of 10^{-6}], which EPA described as a "reasonable level of risk." (Exhibit 11, Response to Comments, p. 18; *see also id.*, draft fact sheet, p. 11 ("EPA seeks to apply the criterion for dioxin that Maine has adopted so as to ensure protection of human health, including the health of members of the Penobscot Nation who consume relatively large quantities of fish from this river."), p. 12 (EPA's NPDES permit protects both members of PIN and the general population; EPA has "left it to the

states to select a risk level from within an acceptable range" for human health, and has approved state human health criteria "based on risk levels ranging from 10^{-4} to 10^{-6}"), pp. 12-13 (for NPDES permit purposes, treating Maine tribes such as PIN as a "highly exposed subpopulation" of Maine's general population, and not as a separate "target population" protected by any kind of tribal-specific designated use of "sustenance fishing").

97. In addition, when EPA issues such a NPDES discharge permit, a State water quality certification that the discharge complies with the State's WQS and State law requirements is required pursuant to Section 401 of the CWA, 33 U.S.C. § 1341. (*PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 707-708 (1994); (Exhibit 1, Attachment A, p. 15)). Historically, Maine has issued Section 401 water quality certifications for EPA-issued NPDES permits throughout Maine, including permits for discharges in Indian Waters, and EPA has never suggested that Maine's Section 401 certifications were unnecessary or that Maine's WQS were not applicable within those Indian Waters. (Exhibit 1, Attachment A, p. 15 (acknowledging EPA Region 1's historical requests for State Section 401 certifications that discharges within Indian Waters complied with Maine's WQS, but dismissing those requests as mid-level EPA mistakes).

98. 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 discharges within Indian Waters.

99. EPA has never taken the position that any WQS other than Maine's generally-applicable WQS govern its NPDES permits, or Maine's MEPDES permits, for Indian Waters.

100. In fact, by letter dated June 10, 1998, EPA wrote DEP stating that, despite the "great strides in protection of water quality and human health Maine has taken," EPA believed that portions of the Penobscot River within Indian Waters immediately below Lincoln Pulp and Paper

still failed to meet Maine's stringent WQS applicable to those Indian Waters, which needed "to remain on [Maine's] 1998 §303(d) list." (33 U.S.C. § 1313(d) (requiring States to identify a list of those intrastate waters not attaining applicable State WQS); a copy of EPA's June 10, 1998 letter is attached hereto as Exhibit 25).

101. In addition, on January 26, 2006, EPA, through the Director of EPA Region 1's Office of Ecosystems Protection, renewed NPDES permit No. ME 0101311 issued to PIN for discharges into the Penobscot River from PIN's wastewater facility in Indian Island, Maine, which permit was governed by Maine's WQS and superseded prior EPA-issued NPDES permits stretching back to 1985 and 1990, which were also governed by Maine's WQS. (A copy of this EPA-issued renewal of PIN's NPDES permit in Indian Waters is attached hereto as Exhibit 12).

102. EPA's January 2006 renewal of PIN's NPDES permit clearly applies Maine's WQS to Indian Waters and documents EPA's historical acceptance and application of Maine's WQS within Indian Waters for things such as prior NPDES permits, Penobscot River modeling, and non-attainment findings with respect to Maine's WQS:

> B. NARRATIVE EFFLUENT LIMITATIONS
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> . . .
>
> 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.
>
> . . .
>
> <u>FACT SHEET</u>
>
> . . .
>
> RECEIVING WATER: Penobscot River
>
> CLASSIFICATION: Class B
>
> . . .
>
> 1. APPLICATION SUMMARY

a. Application: The applicant applied for renewal of its Clean Water Act permit on May 8, 1990. The application reflects the discharge of 0.10 MGD of secondary treated municipal wastewater from the Penobscot Indian Nation's publicly owned treatment works facility to the Penobscot River, Class B, in Indian Island.

b. History: The most recent relevant licensing/permitting actions include the following:

November 21, 1985 – The U.S. Environmental Protection Agency (EPA) reissued NPDES permit No.ME0101311 authorizing 0.07 MGD of treated municipal wastewater discharge from its wastewater treatment facility to the Penobscot River.

1990 – Maine DEP upgraded section of Penobscot River (previously classified as Class C)

May 8, 1990 – The U.S. Environmental Protection Agency (EPA) received a complete application from the Penobscot Indian Nation.

March 30, 2000 – The Maine Department of Environmental Protection (DEP) issued Waste Discharge License WDL#W002672-59-B-R authorizing 0.07 MGD (based on a monthly average) of treated municipal wastewater discharge from its wastewater treatment facility to the Penobscot River.

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 dissolved oxygen level of 7 ppm and 75% of saturation be maintained at all times. A Penobscot River Modeling Report (April 2003) recommended that all municipal wastewater discharges should be capped at current phosphorus input levels. . . . This study of the Penobscot River from Millinocket to Bucksport (103 miles) began in the summer of 1997 involving the DEP and a number of stakeholders such as the Penobscot Nation, Great Northern Paper, International Paper, USEPA, and the Lincoln Sanitary District. A second round of monitoring was conducted in the summer of 2001. . . .

Non-attainment of class B dissolved oxygen criteria was observed at one location in 1997, but at ten of fourteen (10/14) locations sampled in 2001. . .

> . . .
>
> 3. EFFLUENT LIMITATIONS & MONITORING REQUIREMENTS
> . . .
>
> Limits for pH are consistent with Maine Water Quality Standards for the adjacent receiving waters. (Class B).
>
> Limits on e. coli bacteria are consistent with Maine Water Quality Standards for the adjacent receiving waters (Class B). . .
>
> 4. ENDANGERED SPECIES ACT ASSESSMENT
> . . .
>
> **Receiving Water**
> The secondary treated wastewaters are discharged to the Penobscot River – Maine Class B upstream of the Veazie Dam and downstream of the confluence of the Stillwater River.
> . . .
>
> 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.
> - Discuss any recent plant improvements to improve water quality impacts
> - Discuss WQ assessment results
> . . .

(Exhibit 12). As EPA's own permit reflects, EPA has historically not recognized or applied any designated use of tribal "sustenance fishing" for Indian Waters in the Penobscot River, but has instead recognized and applied Maine's designated uses set forth in its established Water Classification Program. (*Id.*).

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

EPA's disapproval of Maine's 1999 application for NPDES permitting authority for tribal facilities, and the Maine v. Johnson decision

104. In January 2001, EPA approved Maine's 1999 application for its MEPDES permitting program for non-Indian Waters only and EPA took no "final action on the issues related to the State's jurisdiction and the applicability of State law in Indian country for the purposes of implementing the NPDES program in those areas." (*Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007); 66 Fed. Reg. 12791, 12,795 (February 28, 2001)).

105. Thereafter, in October 2003, EPA approved Maine's MEPDES permitting program for all non-Indian facilities discharging into Maine's Indian Waters, but not for two Indian wastewater facilities operated by the Southern Tribes that discharged into Indian Waters under the EPA theory that the operation of those two facilities constituted "internal tribal matters" not subject to Maine's regulation under the 1980 Acts. (*Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007); 68 Fed. Reg. 65052, 65053 (November 18, 2003)).

106. In the course of reaching this October 2003 decision, EPA acknowledged that the 1980 Acts prevent "the general body of Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state," 68 Fed. Reg. 65052, 65057 (November 18, 2003), and rejected arguments that the Southern Tribes had concurrent environmental regulatory jurisdiction with Maine over Maine's Indian Waters. (*Id.* at 65058-65059).

107. In any event, Maine appealed and ultimately prevailed on its challenge to EPA's refusal to fully approve Maine's MEPDES permitting program for Indian Waters in *Maine v. Johnson*, which confirmed Maine's statewide environmental regulatory authority as well as Maine's authority to issue MEPDES permits for all facilities discharging into Indian Waters, including Indian facilities. (*Maine v. Johnson*, 498 F.3d 37, 42, 45-46 (1st Cir. 2007)).

108. Based on the history and text of the 1980 Acts, the First Circuit Court of Appeals interpreted the "internal tribal matters" exception in the 1980 Acts (*see* 30 M.R.S. § 6206(1)) narrowly so that it "does not displace general Maine law on most substantive subjects, including environmental regulation," and held that regulation of the discharge of pollutants into Maine's Indian Waters was not an internal tribal matter because it is "not of the same character as tribal elections, tribal membership or other examplars that relate to the structure of Indian government or the distribution of tribal property." (*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)).

109. Following the decision in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007), Maine's DEP wrote EPA in mid-2008 stating:

> I hereby request that U.S.E.P.A. amend its January 2001 delegation decision to make it consistent with the Maine v. Johnson decision. We expect that this amendment will include 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. . . .
>
> As you are aware, we are in the midst of relicensing all dischargers on the Penobscot River. . .
>
> As we have discussed with both you and George Frantz, the State is in very close communications with the Penobscot Indian Nation in regards to pending licenses. . .

(A copy of this letter is attached hereto as Exhibit 13).

110. EPA delayed responding to the order on remand in *Maine v. Johnson,* 498 F.3d 37, 49 (1st Cir. 2007) for over four years, and did not take action to fully approve Maine's delegated NPDES permitting authority over the two remaining Indian wastewater facilities until March 28, 2012. That EPA Region 1 March 28, 2012 action states in part:

> On December 17, 1999, EPA determined that the State of Maine had submitted a complete application to administer the NPDES permitting program in the state under the Clean Water Act. . .
>
> On January 12, 2001, EPA approved the State of Maine's application to administer the NPDES program for all areas of the state other than Indian country. . .
>
> 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. . . . As a result, the state will assume responsibility from EPA for issuing and administering the permits for the Penobscot Nation Indian Island treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672) and the Passamaquoddy Tribal Council treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672). 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)). As noted above, these NPDES permits for tribal wastewater discharges into Indian Waters were (and are) governed by Maine's WQS, and before its February 2, 2015 letter, EPA never raised any objections or concerns about the application of Maine's WQS in those Indian Waters.

111. 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." (A copy of this letter and certain other communications between EPA and Maine's tribes are attached hereto as Exhibit 14).

112. 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. (Exhibit 14).

113. 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 1 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." (Exhibit 14).

EPA's secret communications with Maine Indian tribes regarding tribal WQS for and NPDES permitting authority over Maine waters

114. Beginning as early as 1999, and without informing Maine, EPA has been communicating with Maine Indian tribes regarding environmental matters such as a separate set of WQS (different from Maine's WQS) for Maine's Penobscot River. (Exhibit 14).

115. For instance, in July 1999, and without informing Maine, EPA and PIN, "in order to better achieve mutual environmental-governmental goals in the[ir] government-to-government relationship," entered into a Tribal Environment Agreement that contemplates EPA's implementation of its alleged federal trust responsibility towards PIN, contains a confidentiality agreement regarding communications between EPA and PIN, and commits EPA to using "best efforts to protect all such communications, including those that predate this agreement that are requested under the Freedom of Information Act." (A copy of this agreement is attached hereto as Exhibit 15).

116. 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 PIN's reservation in Maine. (Exhibit 14).

117. Without informing Maine, EPA sent letters dated March 6, 2013, to all four of Maine's recognized Indian tribes, which, citing EPA's alleged "federal trust responsibility and government-to-government relationship" with Maine's tribes, initiated "consultation and coordination" with the tribes regarding certain Maine WQS revisions (including arsenic) addressed by EPA's February 2, 2015 letter. The letters each acknowledge that "EPA's guidance for the development and approval of human health criteria for carcinogenic compounds allows states and tribes to use cancer risk levels between 10^{-6} and 10^{-4} as long as sensitive subpopulations are protected to at least the 10^{-4} cancer risk." (Exhibit 14).

118. Three months later, EPA, by letter dated June 24, 2013, informed Maine of its approval of Maine's WQS revisions for arsenic for non-Indian Waters only and of its "consultation and coordination" with Maine's tribes regarding Maine's WQS, stating 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" Maine's human health criteria revisions for Indian Waters. (Exhibit 14).

119. To the extent that EPA claims any authority to invoke a federal "trust responsibility" with respect to Maine's Indian tribes in a manner that would affect Maine's state environmental regulatory jurisdiction, it would not apply in Maine. (25 U.S.C. §§ 1725(h) & 1735(b)).

120. 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), and no such express relationship exists in Maine. (*See also Bangor Hydroelectric Co.*, 83 FERC P 61,037, 61,085 – 61,086, 1998 WL 292768 (with limited exceptions, Indian "reservation" lands in Maine are not held in trust by the federal government)).

121. 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." PIN's January 23, 2014 letter to EPA also notified EPA of PIN's intention to promulgate its own WQS 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." (Exhibit 14).

122. 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 1 staff to a meeting to discuss PIN's forthcoming WQS application "in relation to the overall environmental regulatory regime within the Penobscot Indian Reservation." (Exhibit 14).

123. EPA sent a letter dated April 18, 2014, apparently 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. . . .

(Exhibit 14).

124. On or about June 10, 2014, PIN published for hearing and comment draft tribal WQS applicable to PIN Indian Waters, and on or about October 8, 2014, PIN, without informing Maine, applied to EPA Region 1 seeking TAS status for purposes of a separate PIN WQS program in Maine and EPA approval of PIN's proposed tribal WQS for PIN Indian Waters. EPA Region 1 acknowledged receipt of PIN's application by letter dated November 5, 2014, which did not copy Maine. (Exhibit 14). Maine received a copy of EPA's letter on or about December 2, 2014.

125. Maine learned after-the-fact of the 1999 Tribal Environment Agreement between EPA and PIN and many of the other communications between EPA and Maine's Indian tribes only as a result of Maine's own efforts, including Maine's requests for public records and information, discovery requests in other litigation, and independent research.

From 2004-2015, EPA refused to act on Maine's WQS for unspecified Indian Waters

126. Beginning in approximately 2004, and despite its historical approvals of and adherence to Maine's WQS within Maine's Indian Waters, EPA began to limit its approvals of revisions to Maine's WQS to non-Indian Waters only. (Exhibit 1, Attachment A, pp. 1, 4, 14).

127. For example, EPA sent a letter to Maine dated February 9, 2004, which approved certain revisions to Maine's WQS, but which stated 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. . . .

Thereafter, and even after the issuance of *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), EPA continued to include similar limiting language in additional EPA letters to Maine dated 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. (Copies of these letters are collectively attached as Exhibit 16).

128. In one such letter dated May 16, 2013, EPA formally approved (for non-Indian Waters only) Maine's revised WQS related to arsenic, including Maine's revised cancer Risk Level "used to calculate the human health criteria for arsenic from one in 1,000,000 [10^{-6}] to one in 10,000 [10^{-4}]" and Maine's revised numeric criteria for inorganic arsenic using a FCR of 138 grams/day, but EPA continued to take no action on those WQS with respect to Indian Waters. (Exhibit 16 (May 16, 2013 letter)).

129. In approving Maine's WQS for arsenic in non-Indian Waters, EPA's May 16, 2013 letter acknowledges:

> Maine's revised numeric criteria for arsenic were derived using the same general methodology and equations used to calculate EPA's current 304(a) recommended criteria for carcinogens. . .
>
> Cancer Risk Factor (RF): The State of Maine enacted LD 515 in 2011 directing DEP to revise Maine's human health water quality criteria for arsenic based on a cancer risk factor of 1 in 10,000 [10^{-4}] rather than the previous RF of 1 in 1,000,000 [10^{-6}]. EPA's recommended methodology for the derivation of water quality criteria states that 1 in 1,000,000 [10^{-6}] or 1 in 100,000 [10^{-5}] may be acceptable cancer risk factors for the general population and that highly exposed populations should not exceed a 1 in 10,000 [10^{-4}] risk level. [citing EPA's 2000 Guidance, Exhibit 5]
>
> Fish Consumption Rate (FCR): Maine's previous 32.4 g/day FCR represents the 94th percentile for Native American anglers in Maine and the 95th percentile for the total angler population in Maine, based on data from a 1990 survey of licensed Maine anglers. In deriving the new arsenic criteria, DEP used 138 g/day, which is the 99th percentile of this survey, to ensure that the criteria are protective of subsistence fishers, a highly exposed population. This approach is consistent with EPA recommendations for estimating fish consumption rates for subsistence fishers and is appropriate to ensure that highly exposed subpopulations are not exposed to a risk level greater than 1 in 10,000 [10^{-4}]. [Table 1 omitted]

> . . .
>
> EPA approves of the WQS revision to the arsenic criteria on the basis of the demonstrated use of available sound science, including state specific data, to derive the new criteria. . . .

(Exhibit 16 (May 16, 2013 letter)).

130. EPA's refusal to act on Maine's WQS for Indian Waters continued even after the Maine Office of the Attorney General sent a letter to EPA dated October 27, 2009, 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.

(A copy of this letter is attached hereto as Exhibit 17).

131. EPA sent a letter dated October 16, 2012, to former Maine Attorney General William J. Schneider setting forth an apparent explanation for its recent (since 2004) failures to act on Maine's WQS for Indian Waters: "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." (A copy of this letter is attached hereto as Exhibit 18).

132. This was contrary to not only the CWA and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), but also to EPA's WQS Handbook, which at least as of September 24, 2014, still stated 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…"

(EPA WQS Handbook, § 1.8.6; because this portion of EPA's WQS Handbook no longer exists online, a copy of the former Chapter 1 of EPA's WQS Handbook (printed on August 22, 2014) is attached hereto as Exhibit 19).

133. In response to EPA's refusals to act on Maine's WQS for Indian Waters, Maine repeatedly asked EPA to identify what specific Maine waters comprised EPA's undefined concept of Indian Waters, and what WQS, if any, EPA believed were in effect for Maine's Indian Waters. (*See, e.g.*, letters to EPA dated January 14, 2013, and February 27, 2014, attached hereto as Exhibit 20).

134. Prior to EPA's February 2, 2015 letter, EPA never advised Maine: 1) what specific Maine waters comprised EPA's concept of Indian Waters; or 2) what WQS, if any, EPA believed were in effect for such Indian Waters.

135. While this action was pending, EPA issued its February 2, 2015 letter, which remains unclear as to what specific waterbodies comprise EPA's concept of Indian Waters. (Exhibit 1, Attachment A, p. 7). The many other unlawful aspects of EPA's February 2, 2015 letter include, without limitation, the twelve bulleted items set forth in paragraph 9 of this Second Amended Complaint.

EPA's disapproval of Maine's WQS reflects a larger EPA attempt to force States to accept the higher end of EPA's criteria recommendations based on tribal considerations

136. In addition to EPA's disapprovals of Maine's WQS, EPA has also recently expressed its disapproval of other states' human health criteria for their respective Indian Waters, even where

those other states' human health criteria (like Maine's) were within the range of EPA's recommended criteria options.

137. For instance, by letter dated March 23, 2015 (EPA's "Washington Letter"), EPA Region 10 stated its disapproval of a recent rule proposal by the State of Washington, which proposed to increase Washington's FCR from 6.5 grams/day to 175 grams/day and reduce its cancer Risk Level from 10^{-6} to 10^{-5}. (A copy of EPA's Washington Letter and attached EPA comments, as well as a response by the National Association of Clean Water Agencies ("NACWA") are attached hereto as Exhibit 21).

138. Contrary to EPA's 2000 Guidance, EPA's Washington Letter alleges that "a cancer risk level of 10^{-5}does not provide appropriate risk protection for all Washington citizens, including tribal members with treaty-protected fishing rights, when coupled with a fish consumption rate of 175 grams per day or higher." (Exhibit 21, at p. 1).

139. Echoing the new kind of approach outlined in EPA's February 2, 2015 letter to Maine (Exhibit 1), EPA's Washington Letter also asserts that EPA and Washington must "interpret the state's designated uses to include subsistence fishing," treat Washington's tribal population as "the target general population, not as a high-consuming subpopulation of the state," utilize FCR data reflecting tribal subsistence practices "unsuppressed by fish availability or concerns about the safety of the fish available for them to consume," and select a Risk Level that ensures "a minimum level of protection for that tribal target population when consuming fish at unsuppressed levels." (Exhibit 21 (Comments at pp. 2-3, 4-5)).

140. EPA's apparent rationale for its Washington Letter is based on the relationship between Risk Levels and FCRs (in a way that is inconsistent with States' roles under the CWA and that

violates EPA's own 2000 Guidance), and on treaty rights that are different from the terms of Maine's 1980 Acts:

> By using a 10^{-5}cancer risk level, the state has substantially offset the environmental benefits of raising the fish consumption rate for carcinogenic human health criteria. For tribes with treaty-protected fishing rights, this approach to the cancer risk level will not advance health protections consistent with their treaty-reserved right to harvest and eat fish and shellfish.

(Exhibit 21, pp. 1-2); *see also id.* at Comments at p. 2 ("In Washington, many tribes hold a treaty-reserved right to take fish for subsistence, ceremonial, religious, and commercial purposes at all usual and accustomed fishing grounds. . .") and p. 5 ("It should also be noted that the 2000 Human Health Methodology did not consider how CWA decisions should account for applicable treaty-reserved fishing rights, and the treaties themselves may require higher levels of protection.")).

141. By letter dated May 13, 2015, the National Association of Clean Water Agencies ("NACWA") responded to EPA's Washington Letter in a way that carries equal force here in Maine:

> [T]he language in the CWA and the implementing regulations was not intended to give EPA authority to disapprove standards because the state's science and policy decisions are not identical to [EPA's] preference, policies and guidance. . . . In the case of Washington's proposed rule, which in fact was consistent with the range of values and approaches included in existing federal guidance, EPA appears to ignore the flexibility afforded to states in its own guidance by insisting that the state's program conform to EPA's preferred approach. These tactics are inconsistent with the CWA's cooperative federalism foundation and history that provides the states the responsibility for developing and approving water quality standards. . . . The structure established by the CWA – where EPA provides criteria recommendations and guidance and the states develop water quality standards based on that information as well as state policy and risk decisions (where a range of acceptable CWA options exist) – must be preserved to ensure that federal preference and the criteria recommendations do not become de facto regulations.

(Exhibit 21 (NACWA letter at pp. 2-3)).

142. EPA sent a similar letter and comments to Idaho dated May 29, 2015 (EPA's "Idaho Letter"), which responds to Idaho's proposed revisions to its human health criteria in a way that is similar to EPA's new and aggressive approach in Maine and Washington. (A copy of EPA's Idaho

Letter with EPA's comments is attached hereto as Exhibit 22; *see also id*. at Comments, p. 4 (outlining EPA's new position that states must select FCRs reflecting unsuppressed fish consumption, which EPA believes may be "necessary" to protect "tribal treaty or other reserved fishing rights")).

143. EPA's recent attempts to force States such as Maine, Washington, and Idaho to adopt the higher end of EPA's criteria recommendations (set forth in EPA's long established guidance) appear to stem from a late 2014 policy directive made at EPA's national level "regarding the role of tribal treaty rights in the context of EPA's activities," which directive was developed outside of the context of Maine's unique Indian Settlement Acts and which encourages EPA to implement and "enhance protection of tribal treaty rights and treaty-covered resources [including "hunting, fishing, and gathering"] when [EPA has] discretion to do so." (Copies of memoranda on this directive from EPA's national leadership dated November 28, 2014, and December 1, 2014, are attached hereto as Exhibit 23).

Count I – 5 U.S.C. §§ 701-706
Appeal of EPA's disapprovals of Maine's WQS set forth in
EPA's February 2, 2015 Letter under the Administrative Procedure Act

144. Plaintiffs reallege the allegations contained in paragraphs 1 through 143 and incorporate them herein.

145. EPA's February 2, 2015 letter sets forth EPA final agency action(s) with respect to Maine's WQS for Indian Waters only, which have harmed Plaintiffs and which are reviewable by this Court under the Administrative Procedure Act, *5 U.S.C. §§ 701-706* ("APA"), and for which Plaintiffs have no other adequate remedy in court other than review under the APA.

146. EPA's disapprovals of Maine's WQS (*i.e*., Maine's human health water quality criteria) for Indian Waters only set forth in EPA's February 2, 2015 letter, as well as EPA's supporting

rationale set forth in Attachment A to that letter, are, among other things within the meaning of 5 U.S.C. § 706(2), arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law (including, without limitation, the CWA and corresponding regulations, EPA's Section 304(a) and other guidance documents, the 1980 Acts and other Maine Indian Settlement Acts, and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)), in excess of EPA's jurisdiction and authority and without observance of required procedure under the same authorities, and unsupported by substantial evidence and unwarranted by the facts, inasmuch as Defendants, among other things: 1) do not define with specificity their concept of Maine's Indian Waters; 2) assert that no Maine WQS are currently or were ever in effect for Maine's Indian Waters; 3) assert that EPA's pre-2004 approvals of Maine's WQS did not extend to Indian Waters because EPA was first required to make a formal threshold determination that Maine has environmental regulatory jurisdiction over its Indian Waters; 4) assert that EPA's historical recognition of and acquiescence to the application of Maine's WQS in Indian Waters was mistaken; 5) assert that the purpose of MIA, MICSA, and each of Maine's other Indian Settlement Acts was to establish a land base from which Maine's Indian tribes could practice their unique cultures, including tribal sustenance living practices and fishing rights, free from Maine environmental regulation; 6) assert that Maine's WQS and the protection of Maine's own existing designated uses of its waterbodies must be "harmonized" by EPA with EPA's flawed interpretation of the underlying and unwritten purpose of MIA, MICSA, and Maine's other Indian Settlement Acts; 7) interpret the narrow portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction within their reservations (provided that such fish takings are for individual sustenance only) as more broadly constituting a designated use of tribal "sustenance fishing" for the Southern Tribes in their respective Indian Waters; 8) assert a new interpretation of Maine's longstanding

designated use of "fishing," as used throughout Maine's established Water Classification Program, as now meaning tribal "sustenance fishing" with respect to each of Maine's Indian tribes in their respective Indian Waters; 9) usurp Maine's role as a State under the CWA by purporting to establish EPA's own new WQS in Maine (*i.e.*, EPA's newly-created designated use of tribal "sustenance fishing") without any public input or other required process; 10) interpret EPA's own new designated use of tribal "sustenance fishing" as in turn requiring an implicit, bootstrapped right to heightened water quality in Indian Waters (and potentially beyond) in order to protect EPA's new use by ensuring a higher quality of fish for tribal-only sustenance purposes; 11) focus on a tribal-only fish consuming population, as opposed to Maine's general population, as the "target" population to be protected by EPA's new designated use of tribal "sustenance fishing"; 12) interpret EPA's new designated use of tribal "sustenance fishing" as requiring an unsuppressed tribal FCR based on a newly announced historical tribal fish consumption study that was never the subject of any public input process; and 13) disapprove Maine's human health water quality criteria for Indian Waters only as being un-protective of EPA's new tribal "sustenance fishing" designated use for those unspecified waters.

Count II – 28 U.S.C. §§ 2201, 2202
Requests for declaratory relief under the Declaratory Judgment Act

147. Plaintiffs reallege the allegations contained in paragraphs 1 through 146 and incorporate them herein.

148. An actual controversy within the Court's jurisdiction exists between the parties regarding EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) for Indian Waters only set forth in EPA's February 2, 2015 letter, as well as EPA's supporting rationale set forth in Attachment A to that letter, including, without limitation, EPA's interpretations of the CWA and corresponding regulations, the 1980 Acts and Maine's other Indian Settlement Acts,

EPA's Section 304(a) and other guidance documents, and applicable case law, and EPA's assertions identified in paragraphs 9 and 146 of this Second Amended Complaint.

149. Additional actual controversies within the Court's jurisdiction also exist between the parties, including the following: 1) whether under the CWA and the 1980 Acts Maine's pre-2004 WQS were already approved and remain approved for Maine's non-Indian and Indian Waters; 2) whether Maine can lawfully be, or have been without, any WQS for Indian Waters, as EPA's rationale in its Attachment A to its February 2, 2015 letter states; 3) whether EPA waived all rights to disapprove, or is otherwise barred from disapproving, some or all of Maine's WQS that were previously approved without qualification as to their effect in Indian Waters by EPA, or that have been approved for adjacent non-Indian Waters; 4) whether there are any Indian Waters that warrant different environmental regulatory treatment from other Maine waters, and/or special treatment for members of Maine's Indian tribes from the standpoint of water quality regulation; 5) the meaning of the narrow portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction within their reservations provided that the taking of such fish is for the members' individual sustenance only, and whether such portions of MIA amount to a designated use tribal "sustenance fishing" for any Maine waterbodies; 6) the meaning of Maine's longstanding designated use of "fishing" within Maine's established Water Classification Program, and whether that designated use also encompasses a separate tribal "sustenance fishing" designated use with respect to each of Maine's Indian tribes within their respective Indian Waters; 7) whether EPA may create its own designated use of tribal "sustenance fishing" for Maine, and if so, whether EPA can do so without the benefit of any public input or process; 8) whether EPA may select a tribal-only fish consuming population as the target population to be protected under provisions of Maine law, the CWA, and EPA's regulations; and 9) the range of

acceptable Risk Levels and FCRs available to States such as Maine under the CWA and existing EPA Section 304(a) guidance, whether EPA can restrict those options without new guidance subject to a public input process, and whether Maine's Risk Levels and FCRs fall within permissible EPA criteria options for WQS purposes.

150. Declarations by the Court of the rights and legal relations of the parties will redress the existing actual controversies between the parties, and the requested declarations in favor of Plaintiffs will redress the harms to Plaintiffs.

Count III – 33 U.S.C. §§ 1313, 1365(a)(2)
EPA's failure to perform non-discretionary duties under the CWA

151. Plaintiffs reallege the allegations contained in paragraphs 1 through 150 and incorporate them herein.

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

153. Plaintiffs have provided the requisite notice pursuant to 33 U.S.C. § 1365(b) by virtue of a certified letter sent to the EPA Administrator and the United States Attorney General dated 1) March 17, 2015, which, per that letter's return receipts, was received by both EPA and the U.S. Attorney General on March 23, 2015. (A copy of the March 17, 2015 notice letter and corresponding return receipts is attached hereto as Exhibit 24).

154. Defendants have a non-discretionary, official and public duty under the CWA, 33 U.S.C. § 1313, and the 1980 Acts to approve, and have no discretion to disapprove, WQS for Maine's Indian Waters where those same standards have been determined to be consistent with the CWA, 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5 & 131.6, and approved by EPA for Maine's non-Indian Waters, and where no 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.

155. Defendants failed to fulfill this non-discretionary duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Indian Waters only, as set forth in its February 2, 2015 letter, which WQS had already been determined to be consistent with the CWA and approved by EPA for Maine's non-Indian Waters.

156. Defendants have a non-discretionary, official and public duty under the CWA and the 1980 Acts to approve, and have no discretion to disapprove, Maine's WQS that EPA already approved without qualification as to their effect in Maine's Indian Waters (*i.e.*, before 2004), where no 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.

157. Defendants failed to fulfill this non-discretionary duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Maine's Indian Waters only, as set forth in its February 2, 2015 letter, to the extent those disapprovals extend to Maine's WQS previously approved by EPA before 2004 without qualification as to their effect in Maine's Indian Waters.

158. Defendants have a non-discretionary, official and public duty under the CWA and the 1980 Acts to disapprove Maine's WQS within 90 days of their submission to EPA, and Defendants have no discretion to disapprove Maine's WQS for Indian Waters only after expiration of the 90 day deadline where no 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.

159. Defendants failed to fulfill this duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Maine's Indian Waters only, as set forth in EPA's February 2, 2015 letter, which occurred well beyond any applicable 90-day deadline for such disapprovals.

160. Prior to the issuance of EPA's February 2, 2015 letter, Defendants waived all right to disapprove and/or specify any changes required for approval of, or are otherwise legally barred

from disapproving, Maine's WQS that had historically been approved by EPA without qualification as to their effect in Indian Waters (*i.e.*, before 2004), and that had previously been fully approved by EPA for non-Indian Waters.

161. Defendants have a non-discretionary, official and public duty under the CWA to approve Maine's WQS that are consistent with EPA Section 304(a) guidance, and Defendants have no discretion to disapprove Maine's WQS provided they are within the acceptable range of EPA's guidance.

162. Defendants failed to fulfill this duty by failing to approve Maine's WQS (*i.e.*, its human health water quality criteria) that were well within the range of acceptable EPA criteria recommendations considering the relative relationship of Maine's FCRs and Risk Levels.

163. The failure by Defendants and EPA to perform their non-discretionary duties under the CWA and the 1980 Acts and approve Maine's WQS at issue in EPA's February 2, 2015 letter has harmed Plaintiffs, and the relief requested by Plaintiffs will redress those harms.

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

Requests For Relief

Plaintiffs request from the Court the following relief:

a. A declaration and order setting aside as unlawful and void each of EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) set forth in EPA's February 2, 2015 letter, as well as EPA's rationale for those disapprovals;

b. A declaration and order that all Maine WQS that are or were approved by EPA for non-Indian Waters are also required under the CWA and the 1980 Acts to be approved by EPA for Indian Waters;

c. A declaration and order that all of Maine's WQS submitted to EPA prior to 2004 that purported to apply to Indian Waters and that were previously approved by EPA for non-Indian Waters only were fully approved by EPA for both Indian Waters and non-Indian Waters, and were in effect for Indian Waters as of the date of their approval by EPA for non-Indian Waters;

d. A declaration and order that, in Maine and under the 1980 Acts, EPA's concept of Indian Waters has no relevance or meaning for WQS purposes under the CWA, and EPA may not lawfully base any disapproval of Maine's WQS on any distinctions between Indian Waters and non-Indian Waters, or between Maine's tribal population and its general population;

e. A declaration and order that the portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction (within their reservations provided that the taking of such fish is for the members' individual sustenance only) relate only to IFW and/or MITSC restrictions on things such as the "method, manner, bag and size limits and season for fishing," and do not, for CWA and WQS purposes, constitute a separate "sustenance fishing" designated use for any waterbodies in Maine for CWA and WQS purposes, entitle any Maine Indian tribes or members to any special rights or status greater than the rest of Maine's general population, or require any heightened quality of water or fish in any waterbodies;

f. A declaration and order that Maine's longstanding designated use of "fishing" as used in Maine's established Water Classification Program for all Maine waterbodies does not, for CWA and WQS purposes, encompass or also constitute a separate "sustenance fishing" designated use for any waterbodies in Maine, entitle any Maine Indian tribes or members to any special rights or status greater than the rest of Maine's general population, or require any heightened quality of water or fish in any waterbodies;

g. A declaration and order that, when developing WQS under the CWA for any of its intrastate water bodies, Maine retains the flexibility to choose from among its many CWA options any of EPA's acceptable criteria recommendations set forth in EPA's Section 304(a) guidance documents, including EPA's 2000 Guidance, and may rely on its chosen EPA criteria recommendations as a lawful basis for establishing enforceable Maine WQS under the CWA;

h. 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

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

Dated: October 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2015, I electronically filed Plaintiffs' Second 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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