

Nos. 16-1424; 16-1435; 16-1474; 16-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf,
and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO,
Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL
T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE;
TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE
SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET;
KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF
MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY
DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO
PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND
TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

**RESPONSE OF STATE DEFENDANTS TO REHEARING EN BANC
PETITIONS OF THE UNITED STATES AND THE PENOBSCOT NATION**

[continued on next page]

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MICSA was formerly codified at 25 U.S.C. §§ 1721-35. MICSA and other settlement acts remain in effect but were removed from the United States Code in 2016 in an effort by codifiers to improve the code's organization. For ease of reference we continue to refer to MICSA's sections as previously codified.

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INTRODUCTION

In 1980, the State of Maine, the United States, and the Maine Tribes negotiated a comprehensive settlement to resolve litigation that claimed title to more than half of the State of Maine. That settlement culminated in two pieces of legislation: the Maine Implementing Act (“MIA”), 30 M.R.S.A. §§ 6201-14 (2011 & Supp. 2018), which “defined the relationship” between the State of Maine and the Maine Tribes, and the Maine Indian Claims Settlement Act (“MICSA”), 25 U.S.C. §§ 1721-35, which ratified MIA (collectively, “Settlement Acts”).

The panel decision carefully reviewed these two statutes and correctly determined that the Penobscot Indian Reservation (“Reservation”) is solely the islands in the Penobscot River, not the river or the riverbed. In reaching this conclusion, the panel followed precedent of the United States Supreme Court and this Circuit to 1) interpret unambiguous statutory text according to its plain meaning and 2) construe MIA and MICSA as a whole. The panel’s decision neither conflicts with Supreme Court precedent, nor undermines the uniformity of this Circuit’s decisions, and *en banc* review is not warranted.

Further, the recent enactment of “An Act to Protect Sustenance Fishing,” P.L. 2019, ch. 463 (effective Sept. 19, 2019), (the “Act”), does not affect the panel’s decision or analysis with respect to the Penobscot Nation’s sustenance

fishing rights. The Act explicitly does not alter the jurisdictional relationship between Maine and the Tribes, and therefore does not affect the issues in this case.

Instead, the Act was the result of negotiations involving all four Maine Tribes, the Maine Department of Environmental Protection (“DEP”), and the Environmental Protection Agency (“EPA”); the Act creates a new designated use of sustenance fishing in Maine’s Water Classification Program, 38 M.R.S.A. §§ 464-70 (2001 & Pamph. 2018), outside of the Settlement Acts. The sustenance fishing designated use applies in waterbodies with particular significance to tribal communities (including the Main Stem of the Penobscot River) and will provide greater protection for all Maine citizens through more rigorous water quality standards (“WQS”). Although not affecting this case, the Act demonstrates a trajectory of collaboration between the State and the Maine Tribes on issues of tribal significance within the existing framework of MIA and MICSA.

ARGUMENT

In support of their petitions, the Penobscot Nation and the United States reiterate many of the arguments considered and properly rejected by the panel. Their assertions of error are incorrect.

En banc review is not warranted unless “necessary to secure or maintain the uniformity of the court’s decisions” or the issue involves a question of exceptional

importance.¹ F.R. App. P. 35(a). Neither ground applies, and the Court should deny both petitions.²

I. The Panel Decision Followed Supreme Court and First Circuit Precedent by Applying Ordinary Rules of Statutory Construction.

A. The Panel Construed MIA and MICSA to Give Unambiguous Language its Plain Meaning.

That the plain language controls is fundamental to statutory construction: “[w]hen ... Congress has unambiguously expressed its intent through its choice of statutory language, courts must read the relevant laws according to their unvarnished meaning.” *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 793 (1st Cir. 1996); accord *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Accordingly, plain and unambiguous statutory text is given its ordinary meaning. *Carcieri v. Salazar*, 555 U.S. 379, 387-88 (2009).

The panel carefully examined the statutory text that defines the scope of the Reservation in accordance with these principles. Section 6203(8) of MIA states:

“Penobscot Indian Reservation” means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation

¹ Both *en banc* petitions refer glancingly to the exceptional importance criteria, but the rest of their petitions focus on alleged conflicts with precedent. This response does the same.

² State Intervenors join in this response.

subsequent to June 29, 1818, and prior to the effective date of this Act.

30 M.R.S.A. § 6203(8) (emphasis added).

The panel construed this definition, paying particular attention to the emphasized language, and found no ambiguity. (Op. 8-12.) As the panel stated, a “definition which declares what a term ‘means’ ... excludes any meaning that is not stated.” (Op. 8 (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008)).)

The stated definition means the Reservation is “solely” the islands in the Penobscot River. The panel gave “island” its ordinary meaning as land that is completely surrounded by water. *See Carcieri*, 555 U.S. at 389 (construing statutory term affecting Indians based on dictionary definitions and according to ordinary meaning). The panel also acknowledged the definition’s use of the word “solely,” a powerful word of limitation that “leaves no leeway.” (Op. 12 (quoting *Helvering v. Sw. Consol. Corp.*, 315 U.S. 194, 198 (1942)).) Taken together, the plain meaning of “islands in the Penobscot River” is the islands themselves, and not “the surrounding water itself” or the “land submerged by the surrounding water.” (Op. 12.)

B. The Panel Construed MIA and MICSA as a Whole.

In concluding that the Reservation did not include the waters or bed of the Penobscot River, the panel did not “myopically” limit its analysis to the word “islands” and section 6203(8). (US Pet. 9.) Instead, the panel analyzed numerous

other MIA and MICSA provisions to test and support its conclusion, in line with Supreme Court and First Circuit precedent. *See Carcieri*, 555 U.S. at 389-90; *Maine v. Johnson*, 498 F.3d 37, 42-47 (1st Cir. 2007) (finding explicit language of MIA section 6204 confirmed necessary State authority under Clean Water Act, but also analyzing other MIA and MICSA provisions); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 49-54 (1st Cir. 2007) (finding MICSA section 1725(a) clear, but analyzing MICSA as a whole).³

For example, the panel evaluated the use of the words “water,” “water rights,” “natural resources,” and “submerged lands” throughout both MIA and MICSA. (Op. 12-13 (citing 25 U.S.C. §§ 1721(b)(2), 1722(b), (n); 30 M.R.S.A. §§ 6203(3), (13), 6207).) None of these phrases are used in defining the location of the Reservation in the Penobscot River, which supports the panel’s conclusion that the Reservation does not include any water or submerged lands. *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”).

³ Because the panel concluded that the plain language controls and the Reservation is only the islands in the Main Stem, the panel did not address State Defendants’ other arguments and defenses in support of their position, i.e., extinguishment by transfer, laches, acquiescence, impossibility, and failure to join indispensable parties. (Op. 6 n.1, 10 n.5.)

Similarly, section 6205(3) of MIA strongly supports the panel’s conclusion that the Reservation does not include the Main Stem’s waters and submerged lands. The provision, which deals with regulatory takings within Indian reservations, states: “For purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation.” 30 M.R.S.A. § 6205(3)(A). As the panel determined, this language deeming contiguity would be superfluous if the Reservation already included the waters or bed of the Penobscot River.⁴ (Op. 13-14.) *Mass. Ass’n. of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) (“no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous” (citations omitted)).

Finally, and contrary to the *en banc* petitions (US Pet. 10-11; PN Pet. 10-11), the panel considered MIA’s sustenance fishing provision (section 6207(4)) when determining the scope of the Reservation. The panel concluded that this provision is not in tension with section 6203(8)’s definition of the Reservation as including only the islands. (Op. 15-16.) As the panel explained, individual rights provided to members of the Penobscot Nation and Passamaquoddy Tribe in section 6207(4) “cannot dramatically alter the plain meaning of section 6203(8)’s definition of ‘Penobscot Indian Reservation.’” (Op. 16.) “Legislatures do not

⁴ The United States offers a different interpretation of section 6205(3), but the panel did not find it persuasive.

‘hide elephants in mouseholes.’” (*Id.* (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).) Further, there was no occasion to determine where Penobscot members may engage in sustenance fishing because no one has ever prevented them from doing so in the Main Stem. (Op. 24-27.) And, as discussed *infra*, the State, through negotiations involving the EPA and Maine Tribes, recently passed sustenance fishing legislation outside of the Settlement Acts that applies to the Main Stem and will improve water quality for the benefit of all citizens.

C. Indian Canons of Construction and Common Law Rules of Construction Cannot Vary Clear Statutory Text.

The panel’s plain meaning analysis of the Settlement Acts, without resort to the federal common law doctrine that requires doubts and ambiguities to be resolved to the Tribe’s benefit (“Indian canons”), was in accord with Supreme Court precedent and this Circuit’s precedent. (Op. 9 n.3.) As the Supreme Court has stated, the Indian canons, “[do] not permit reliance on ambiguities that do not exist; nor [do they] permit disregard of the clearly expressed intent of Congress.” *Catawba Indian Tribe*, 476 U.S. at 506; *see also Carcieri*, 555 U.S. at 387-88; *Or. Dep’t. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Rice v. Rehner*, 463 U.S. 713, 733 (1983); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977); *DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

Further, this Court has twice declined to apply the Indian canons to unambiguous language in MIA and MICSA. *See Aroostook Band*, 484 F.3d at 50-54; *Passamaquoddy Tribe*, 75 F.3d at 793. Faced with similarly clear language, the panel applied ordinary rules of statutory construction, as required by precedent.

Based on the plain language of the statute, the panel also declined to apply the common law rules of deed construction urged by the United States. (Op. 19 n.10.) Common law principles and rules can sometimes be of assistance in construing statutory terms, but there was no need to resort to their use in this case. Consistent with this Court's decision in *Passamaquoddy Tribe*, the panel gave unambiguous language its plain and ordinary meaning and did not vary that meaning through extrinsic concepts. 75 F.3d at 793.

D. Indian Canons of Construction do not Apply Against the State of Maine.

As State Defendants have previously argued, MICSA contains unique provisions that protect the State against the effects of federal law that might otherwise undermine Maine's jurisdiction over tribes and tribal lands. Sections 1725(h) and 1735(b) bar the application of any federal law that accords special status to Indians and affects or preempts Maine's jurisdiction, unless Congress has acted expressly to make that law applicable in Maine.⁵ 25 U.S.C. §§ 1725(h),

⁵ The United States also argues that only Congress can diminish a reservation and it must do so in the clearest of language to be effective. (US Pet. 16-17.) It is

1735(b). The Indian canons are part of federal common law, and applying them here against the State and in favor of the Tribe would affect and potentially preempt the State's jurisdiction. (*See also* SD Br. 24-28 (explaining MICSA's legislative history confirms inapplicability of Indian canons).)

Because of these provisions, decisions of this circuit have made clear that the Court would treat a jurisdictional dispute between the State and a Maine Tribe differently than a private dispute involving a Maine Tribe. *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 710-11 (1st Cir. 1999). Further, although this Court referred in dicta to the Indian canons in *Fellencer*, the Court has never applied them when construing MIA or MICSA. *Akins*, 130 F.3d at 488 (applying factor balancing test to determine scope of "internal tribal matters," not Indian canons); *Fellencer*, 164 F.3d at 709-12 (acknowledging canons, but applying *Akins* factors); *see also Aroostook Band*, 484 F.3d at 49 (noting MICSA "displaced any federal common law that might otherwise bear on this dispute").

unclear how the line of cases regarding reservation diminishment applies to the Maine Tribes, who were not recognized by the federal government until 1979 as part of the settlement reached through MIA and MICSA.

II. The Panel Decision Does Not Conflict with the Supreme Court Decision in *Alaska Pacific Fisheries v. United States* or the First Circuit Decision in *Maine v. Johnson*.

A. The Supreme Court’s Decision in *Alaska Pacific Fisheries* is Inapposite and Inapplicable.

The Supreme Court’s decision *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78 (1918), does not conflict with the panel’s decision or analysis. *Alaska Pacific Fisheries* involved the Metlakahtla Reservation on the Annette Islands in southeastern Alaska and stands for the standard, but inapplicable, principle that “doubtful expressions” in statute are resolved in favor of Indians. *Id.* at 89-90. As the panel held, *Alaska Pacific Fisheries* does not affect the issues in this case because there is no comparable ambiguity in section 6203(8) and the definition of the Reservation. (Op. 18-19.)

First, the language defining the scope of the Metlakahtla reservation differs substantially from the language defining the scope of the Penobscot Indian Reservation. Congress established the Metlakahtla reservation in 1891, describing it as a “body of lands known as the Annette Islands, situated in Alexander Archipelago in southeastern Alaska.” The Supreme Court concluded that this was a colloquial description of a region generally, and not just certain islands in the region. 248 U.S. at 86, 89. Because the reservation was defined in statute as a region, the Court applied the Indian canons and concluded it encompassed the waters surrounding the islands and not just the islands. *Id.* at 89. MIA, on the

other hand, specifically defines the Reservation as meaning “the islands in the Penobscot River ... consisting solely of Indian Island ... and all islands in that river northward” 30 M.R.S.A. § 6203(8). MIA’s technical definition leaves no room for surrounding waters.

Second, the context and circumstances of *Alaska Pacific Fisheries* and the Settlement Acts are distinct. After establishing the Metlakahtlan reservation in 1891, the Department of Interior (“DOI”) issued regulations in 1915 permitting the use of salmon traps by the tribe in the waters adjacent to the Annette Islands. *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 48 (1962). A year later, DOI decided to establish a cannery on the Annette Islands for the benefit of the Metlakahtlans. *Id.* at 48. On April 28, 1916, President Wilson accordingly issued a Proclamation declaring that “the waters within 3,000 feet from the shore lines” of the Annette Islands were “reserved for the benefit of the Metlakahtans ... to be used by them under the general fisheries laws and regulations of the United States.” Proclamation, 39 Stat. 1777, 1777-78 (1916).

On April 7, 1916, however, a commercial fishing corporation had begun erecting a large fish trap, without the consent of the United States or the Metlakahtlans, within the navigable waters surrounding Annette Island. *Alaska Pac. Fisheries v. United States*, 240 F. 274, 277 (9th Cir. 1917). On May 2, 1916, federal officials served notice of the Presidential proclamation on the commercial

fishing corporation and then sought an injunction against the company from continuing to build the trap. *Id* at 277. The resulting litigation led to the Supreme Court’s decision, which concluded the Metlakahtlan reservation included the waters and submerged lands surrounding the Annette Islands. *Cf. Egan*, 369 U.S. at 49 (“In 1918, without reference to the [Presidential] proclamation, this Court upheld the right of the Metlakatlangs to exclude others from the waters surrounding their islands on the ground that these waters were included within the original reservation by Congress.”).

In contrast, the Settlement Acts were intended to resolve completely and finally the land claims brought by the Maine Tribes, and to establish in statute a clear jurisdictional relationship between the State and the Tribes. 25 U.S.C. § 1721(b); 30 M.R.S.A. § 6202. Further, the text and legislative history of the Settlement Acts reflects no intent to preserve a fishery that could serve as the Nation’s economic base. In 1980, the Main Stem did not have a fishery that would have been capable of sustaining the Nation in any way that resembled the 19th century circumstances of the Metlakahtlan Indians. (J.A. 1505, 1562-64.) For all of these reasons, *Alaska Pacific Fisheries* is inapposite and inapplicable.

B. This Circuit’s Decision in *Maine v. Johnson* did not Address the Boundaries of the Reservation.

The panel decision does not conflict with *Maine v. Johnson*. Among other disputes, the parties to the *Maine v. Johnson* litigation contested the scope of the

Reservation as it affected Maine’s authority under the Clean Water Act (“CWA”) to issue permits for discharges into navigable waters. This Court’s resulting decision expressly recognized that conflict, but had no occasion to decide the issue: “The territorial boundaries are disputed but, for purposes of this case, we assume (without deciding) that each of the disputed discharge points lies within the tribes’ territories.” *Johnson*, 498 F.3d at 40 n.3.

In contrast, the parties in this case agreed that the boundary question was ripe for decision, the issue was litigated, and a determination was reached. It is therefore puzzling that the Nation, after agreeing the issue was ripe, now claims that at least some of the boundary question was decided twelve years ago. It was not. In *Johnson*, this Court affirmed the State’s authority under the CWA regardless of the exact boundaries of the Reservation based on the plain language of the Settlement Acts. *Id.* at 42-47. As the panel properly held, *Maine v. Johnson* is not controlling. (Op. 22-23.)

III. “An Act to Protect Sustenance Fishing” does not Affect the Issues in this Case or the Jurisdictional Relationship between Maine and the Tribes in MIA and MICSA.

In its June 25, 2019, Order requesting that State Defendants file this response, the Court took judicial notice of “An Act to Protect Sustenance Fishing,” P.L. 2019, ch. 463, and requested that State Defendants address what effect it has on the *en banc* petitions. By its own terms, and as expressly noted in its legislative

history, the Act does not alter the jurisdictional relationship between Maine and the Tribes in MIA and MICSA. (Add. 59, 61-62.) The Act thus does not affect the issues in this case, the *en banc* petitions, or the correctness of the panel decision. However, the Act does reflect renewed efforts by the State of Maine and the Maine Tribes to work collaboratively on issues of tribal significance and underscores that the Nation's sustenance fishing rights are not threatened by the State.

As background, in 2015 EPA—although recognizing the State's authority to set WQS statewide (including in tribal areas)—disapproved certain existing Maine WQS as insufficient to protect a new designated use of tribal sustenance fishing created by EPA in that action. EPA subsequently proposed and promulgated new federal WQS to replace the disapproved Maine WQS and to protect its newly-created tribal sustenance fishing designated use.⁶ Maine challenged EPA's decisions, and the Nation and the Houlton Band of Maliseets intervened. *See generally Maine v. Wheeler*, No. 14-cv-264-JDL (D. Me. filed July 7, 2014). Throughout the litigation, the State maintained that although it *could* enact its own sustenance fishing designated use that provided greater protection for sustenance fishing, EPA could not require the State to do so. In 2018, EPA decided not to defend its challenged 2015 disapprovals and requested a voluntary remand of the

⁶ *See* Proposal of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 23239 (proposed Apr. 20, 2016); Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016).

matter back to the agency to reconsider its 2015 decisions. The Maine District Court granted the request; currently, the case is stayed until December of 2019. EPA has not yet acted on remand. (Add. 69-72.)

With the election of the 129th Maine Legislature and Governor Janet Mills in November of 2018 came renewed attention and efforts towards collaboration with the Maine Tribes. As part of those efforts, the new administration and the Maine Tribes, along with EPA, “began discussing how to break the impasse” with respect to WQS, without any party giving up its legal positions and arguments. (Add. 27.) The Act is the result of those efforts and will provide greater protection to all Maine citizens, tribal and non-tribal alike.

The Act creates a new designated use of sustenance fishing outside the Settlement Acts and within Maine’s Water Classification Program to “protect[] human consumption of fish for nutritional and cultural purposes” in designated waterbodies. P.L. 2019, ch. 463, § 4. The waterbodies to which the sustenance fishing use applies are those the four Maine Tribes identified as having particular significance to their communities. P.L. 2019, ch. 463, §§ 6-16. These waters, which include the Main Stem, *see id.* § 6, include segments “where there is or may be sustenance fishing or increased fish consumption by members of the Indian tribes in Maine or other Maine citizens.” (Add. 10, 58.)

In order to improve the water quality of the affected waterbodies, the Act directs DEP to adopt water quality criteria through rulemaking assuming certain elevated assumptions, including an increased fish consumption rate. The Act had overwhelming support (Add. 11-56), and was signed into law, as amended, on June 21, 2019.

Because the Act was the result of lengthy negotiations, DEP, EPA, and the Maine Tribes agreed upon a summary of the legislation to reflect their shared understanding of the intent, effects, and limits of the Act. (Add. 30-32, 41, 55-56, 58-59.) That summary was included almost verbatim in the Act's legislative history and explains, in pertinent part, that:

Nothing in this bill is intended to alter or affect in any way any provision of any of the State's state and federal Indian settlement acts, including the state Indian settlement acts in the Maine Revised Statutes, Title 30, chapters 601 and 603. No part of this bill is intended to relate to or affect in any way any claims or disputes regarding any definition of Indian country, territory, lands, waters, reservations, or rights of any kind under any other provision of state or federal law.

(Add. 59.) The Act accordingly states that “nothing in the designation in this article of a sustenance fishing designated use may be construed to[c]reate any other right or protection[or l]imit any right or protection otherwise existing in law.” P.L. 2019, ch. 463, § 5.

In sum, although not affecting this case, the Act's framework for enhancing water quality will have a positive impact on the Main Stem and protect Maine

citizens who engage in sustenance fishing on the Penobscot River. The enhanced protections for sustenance fishing are a positive development in the Tribal-State relationship and show that the State and Maine Tribes can work together within the current jurisdictional delineation of MIA and MICSA.

CONCLUSION

For all the foregoing reasons the Court should deny the *en banc* petitions and affirm the panel decision.

Dated: July 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 3,876 words in 14-point Times New Roman font (excluding the parts of the response exempted by Rule 32(a)(7)).

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CERTIFICATE OF SERVICE

I, Kimberly L. Patwardhan, hereby certify that on July 15, 2019, I electronically filed the Response of State Defendants to Rehearing En Banc Petitions of the United States and the Penobscot Nation with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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ADDENDUM

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129th MAINE LEGISLATURE

FIRST REGULAR SESSION-2019

Legislative Document

No. 1775

H.P. 1262

House of Representatives, May 23, 2019

An Act To Protect Sustenance Fishing

Reference to the Committee on Environment and Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "Robert B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Speaker GIDEON of Freeport. (GOVERNOR'S BILL)
Cosponsored by President JACKSON of Aroostook and
Representatives: COLLINGS of Portland, DUNPHY of Old Town, GRAMLICH of Old
Orchard Beach, NEWELL of the Passamaquoddy Tribe, TALBOT ROSS of Portland,
TUCKER of Brunswick, Senator: CARSON of Cumberland.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 38 MRSA §420, sub-§1-B, ¶A**, as enacted by PL 2001, c. 418, §3, is
3 amended to read:

4 A. The ambient criteria for mercury are as follows:

5 (1) Ambient water quality criteria for aquatic life:

6 (a) Freshwater acute: 1.7 micrograms per liter;

7 (b) Freshwater chronic: 0.91 micrograms per liter;

8 (c) Saltwater acute: 2.1 micrograms per liter; and

9 (d) Saltwater chronic: 1.1 micrograms per liter; and

10 (2) Fish tissue residue criterion for human health: 0.2 milligrams per kilogram
11 in the edible portion of fish for all waters, except for those water body segments
12 subject to a sustenance fishing designated use pursuant to article 4-A, which must
13 have a fish tissue residue criterion for human health of 0.03 milligrams per
14 kilogram in the edible portion of fish.

15 **Sec. 2. 38 MRSA §465-A, sub-§1, ¶C**, as amended by PL 2013, c. 193, §4, is
16 further amended to read:

17 C. There may be no new direct discharge of pollutants into Class GPA waters. ~~The~~
18 Notwithstanding paragraph D, section 466-A or any other provision of law to the
19 contrary, the following are exempt from this provision:

20 (1) Chemical discharges for the purpose of restoring water quality approved by
21 the department;

22 (2) Aquatic pesticide or chemical discharges approved by the department and
23 conducted by the department, the Department of Inland Fisheries and Wildlife or
24 an agent of either agency for the purpose of restoring biological communities
25 affected by an invasive species;

26 (3) Storm water discharges that are in compliance with state and local
27 requirements;

28 (4) Discharges of aquatic pesticides approved by the department for the control
29 of mosquito-borne diseases in the interest of public health and safety using
30 materials and methods that provide for protection of nontarget species. When the
31 department issues a license for the discharge of aquatic pesticides authorized
32 under this subparagraph, the department shall notify the municipality in which
33 the application is licensed to occur and post the notice on the department's
34 publicly accessible website; and

35 (5) Discharges of pesticides approved by the department that are:

36 (a) Unintended and an incidental result of the spraying of pesticides;

37 (b) Applied in compliance with federal labeling restrictions; and

1 (c) Applied in compliance with statute, Board of Pesticides Control rules and
2 best management practices.

3 Discharges into these waters licensed prior to January 1, 1986 are allowed to continue
4 only until practical alternatives exist. Materials may not be placed on or removed
5 from the shores or banks of a Class GPA water body in such a manner that materials
6 may fall or be washed into the water or that contaminated drainage may flow or leach
7 into those waters, except as permitted pursuant to section 480-C. A change of land
8 use in the watershed of a Class GPA water body may not, by itself or in combination
9 with other activities, cause water quality degradation that impairs the characteristics
10 and designated uses of downstream GPA waters or causes an increase in the trophic
11 state of those GPA waters.

12 **Sec. 3. 38 MRSA §465-A, sub-§1, ¶D** is enacted to read:

13 D. The following waters are subject to a sustenance fishing designated use pursuant
14 to section 466-A: Conroy Lake in Monticello; Grand Lake Matagamon in Trout
15 Brook Township and T.6 R.8 W.E.L.S.; Mattamiscontis Lake in T.3 R.9 N.W.P. and
16 T.2 R.9 N.W.P.; Grand Falls Flowage, Berry Brook Flowage, George Brook
17 Flowage, Huntley Brook Flowage, Lewey Lake, The Basin, The Narrows, Long Lake
18 and Big Lake, adjacent to Indian Township; and Sysladobsis Lake in T.5 N.D.

19 **Sec. 4. 38 MRSA §466, sub-§10-A** is enacted to read:

20 **10-A. Sustenance fishing designated use.** "Sustenance fishing designated use" is a
21 subcategory of the applicable fishing designated use that protects human consumption of
22 fish for nutritional and cultural purposes and applies only to those water body segments
23 that are identified in this article as subject to a sustenance fishing designated use.

24 **Sec. 5. 38 MRSA §466-A** is enacted to read:

25 **§466-A. Sustenance fishing designated use**

26 **1. Water quality criteria.** To protect the sustenance fishing designated use
27 designated under this article, the department shall calculate and establish water quality
28 criteria for human health using a fish consumption rate of 200 grams per day and a cancer
29 risk level of one in 1,000,000, except that the cancer risk level for inorganic arsenic is
30 governed by section 420, subsection 2, paragraph J.

31 **2. Criteria deemed protective.** For all purposes, the sustenance fishing designated
32 use established under this article is deemed protected through the water quality criteria
33 for human health calculated and established by the department for the water body
34 segments subject to a sustenance fishing designated use under this article.

35 **3. Limitation; construction.** Nothing in this section and nothing in the designation
36 in this article of a sustenance fishing designated use may be construed to:

37 A. Create any other right or protection, including a right to any particular quantity or
38 quality of fish;

39 B. Limit any right or protection otherwise existing in law; or

1 C. Alter or affect the regulation of mercury in discharges, which is governed
2 exclusively by section 413, subsection 11 and section 420, subsection 1-B.

3 **Sec. 6. 38 MRSA §467, sub-§7, ¶A**, as amended by PL 2003, c. 317, §12, is
4 further amended to read:

5 A. Penobscot River, main stem.

6 (1) From the confluence of the East Branch and the West Branch to the
7 confluence of the Mattawamkeag River, including all impoundments - Class C.
8 This segment is subject to a sustenance fishing designated use pursuant to section
9 466-A.

10 (2) From the confluence of the Mattawamkeag River to the confluence of
11 Cambolasse Stream - Class B. This segment is subject to a sustenance fishing
12 designated use pursuant to section 466-A.

13 (3) From the confluence of Cambolasse Stream to the West Enfield Dam - Class
14 B. This segment is subject to a sustenance fishing designated use pursuant to
15 section 466-A.

16 (5) From the West Enfield Dam, ~~including the Stillwater Branch~~, to the ~~Veazie~~
17 ~~Milford~~ Dam, including all impoundments, ~~and the Stillwater Branch~~ - Class B.
18 That portion of this segment upstream of the Milford Dam and upstream of the
19 Gilman Falls Dam at Route 43 is subject to a sustenance fishing designated use
20 pursuant to section 466-A.

21 (6) From the ~~Veazie~~ Milford Dam, but not including the ~~Veazie~~ Milford Dam, to
22 the Maine Central Railroad bridge in Bangor-Brewer - Class B. Further, the
23 Legislature finds that the free-flowing habitat of this river segment provides
24 irreplaceable social and economic benefits and that this use must be maintained.

25 (7) From the Maine Central Railroad bridge in Bangor to a line extended in an
26 east-west direction from a point 1.25 miles upstream of the confluence of Reeds
27 Brook in Hampden - Class B. Further, the Legislature finds that the free-flowing
28 habitat of this river segment provides irreplaceable social and economic benefits
29 and that this use must be maintained.

30 **Sec. 7. 38 MRSA §467, sub-§7, ¶B**, as repealed and replaced by PL 1989, c.
31 764, §7, is amended to read:

32 B. Penobscot River, East Branch Drainage.

33 (1) East Branch of the Penobscot River, main stem.

34 (a) Above its confluence with Grand Lake Mattagamon - Class A.

35 (b) From the dam at the outlet of Grand Lake Mattagamon to a point located
36 1,000 feet downstream from the dam - Class A. This segment is subject to a
37 sustenance fishing designated use pursuant to section 466-A.

38 (c) From a point located 1,000 feet downstream from the dam at the outlet of
39 Grand Lake Mattagamon to its confluence with the West Branch - Class AA.

1 This segment is subject to a sustenance fishing designated use pursuant to
2 section 466-A.

3 (d) That portion of the East Branch in T.6 R.8 W.E.L.S. is subject to a
4 sustenance fishing designated use pursuant to section 466-A.

5 (2) East Branch of the Penobscot River, tributaries - Class A unless otherwise
6 specified.

7 (a) All tributaries, any portion of which is located within the boundaries of
8 Baxter State Park - Class AA.

9 (b) Sawtelle Brook, from a point located 1,000 feet downstream from the
10 dam at the outlet of Sawtelle Deadwater to its confluence with the Seboeis
11 River - Class AA.

12 (c) Seboeis River, from the outlet of Snowshoe Lake to its confluence with
13 the East Branch - Class AA.

14 (d) Wassataquoik Stream, from the boundary of Baxter State Park to its
15 confluence with the East Branch - Class AA.

16 (e) Webster Brook, from a point located 1,000 feet downstream from the
17 dam at the outlet of Telos Lake to its confluence with Webster Lake - Class
18 AA.

19 **Sec. 8. 38 MRSA §467, sub-§7, ¶D**, as amended by PL 1999, c. 277, §11, is
20 further amended to read:

21 D. Mattawamkeag River Drainage.

22 (1) Mattawamkeag River, main stem.

23 (a) From the confluence of the East Branch and the West Branch to the
24 Kingman-Mattawamkeag boundary - Class A.

25 (b) From the Kingman-Mattawamkeag boundary to its confluence with the
26 Penobscot River - Class AA.

27 (2) Mattawamkeag River, tributaries - Class A unless otherwise specified.

28 (a) East Branch Mattawamkeag River above Red Bridge - Class B.

29 (b) West Branch Mattawamkeag River from Interstate 95 to its confluence
30 with Mattawamkeag Lake - Class B. This segment is subject to a sustenance
31 fishing designated use pursuant to section 466-A.

32 (b-1) West Branch of the Mattawamkeag River from its source at
33 Rockabema Lake to Interstate 95 - Class A. This segment is subject to a
34 sustenance fishing designated use pursuant to section 466-A.

35 (c) Fish Stream - Class B.

36 **Sec. 9. 38 MRSA §467, sub-§13**, as amended by PL 2009, c. 163, §9, is further
37 amended to read:

38 **13. St. Croix River Basin.**

1 A. St. Croix River, main stem.

2 (1) Except as otherwise provided, from the outlet of Chiputneticook Lakes to its
3 confluence with the Woodland Lake impoundment, those waters lying within the
4 State - Class A. This segment is subject to a sustenance fishing designated use
5 pursuant to section 466-A.

6 (2) Those waters impounded in the Grand Falls Flowage including those waters
7 between Route 1 (Princeton and Indian Township) and Grand Falls Dam - Class
8 GPA. These waters are subject to a sustenance fishing designated use pursuant to
9 section 466-A.

10 (3) Woodland Lake impoundment - Class C.

11 (4) From the Woodland Dam to tidewater, those waters lying within the State,
12 including all impoundments - Class C.

13 B. St. Croix River, tributaries, those waters lying within the State - Class B unless
14 otherwise specified.

15 (1) All tributaries entering upstream from the dam at Calais, the drainage areas
16 of which are wholly within the State - Class A unless otherwise classified.

17 (2) Tomah Stream - Class AA. This stream is subject to a sustenance fishing
18 designated use pursuant to section 466-A.

19 (3) Monument Brook - Class A.

20 (4) Waters connecting the Chiputneticook Lakes, including The Thoroughfare,
21 Forest City Stream and Mud Lake Stream - Class A.

22 (5) Berry Brook, George Brook, Huntley Brook, Musquash Stream, Flipper
23 Creek, Patten Pond Stream and all segments of the West Branch of the St. Croix
24 River between the West Grand Lake Dam and Route 1 - Class A. These waters
25 are subject to a sustenance fishing designated use pursuant to section 466-A.

26 **Sec. 10. 38 MRSA §467, sub-§15, ¶A,** as repealed and replaced by PL 1989, c.
27 764, §16, is amended to read:

28 A. St. John River, main stem.

29 (1) From the confluence of the Northwest Branch and the Southwest Branch to a
30 point located one mile above the foot of Big Rapids in Allagash - Class AA. This
31 segment is subject to a sustenance fishing designated use pursuant to section
32 466-A.

33 (2) From a point located one mile above the foot of Big Rapids in Allagash to
34 the international bridge in Fort Kent, those waters lying within the State,
35 including all impoundments - Class A.

36 (3) From the international bridge in Fort Kent to the international bridge in
37 Madawaska, those waters lying within the State, including all impoundments -
38 Class B.

(4) From the international bridge in Madawaska to where the international boundary leaves the river in Hamlin, those waters lying within the State, including all impoundments - Class C.

Sec. 11. 38 MRSA §467, sub-§15, ¶C, as amended by PL 2017, c. 137, Pt. B, §9, is further amended to read:

C. Aroostook River Drainage.

(1) Aroostook River, main stem.

(a) From the confluence of Millinocket Stream and Munsungan Stream to the Route 11 bridge - Class AA. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(b) From the Route 11 bridge to the Sheridan Dam - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(c) From the Sheridan Dam to its confluence with Presque Isle Stream, including all impoundments - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(d) From its confluence with Presque Isle Stream to a point located 3.0 miles upstream of the intake of the Caribou water supply, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(e) From a point located 3.0 miles upstream of the intake of the Caribou water supply to a point located 100 yards downstream of the intake of the Caribou water supply, including all impoundments - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(f) From a point located 100 yards downstream of the intake of the Caribou water supply to the international boundary, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(2) Aroostook River, tributaries, those waters lying within the State - Class A unless otherwise specified.

(a) All tributaries of the Aroostook River entering below the confluence of the Machias River that are not otherwise classified - Class B.

(b) Little Machias River and its tributaries - Class A.

(c) Little Madawaska River and its tributaries, including Madawaska Lake tributaries above the Caribou-Connor Township line - Class A.

(d) Machias River, from the outlet of Big Machias Lake to the Aroostook River - Class AA. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(e) Millinocket Stream, from the outlet of Millinocket Lake to its confluence with Munsungan Stream - Class AA.

- 1 (f) Munsungan Stream, from the outlet of Little Munsungan Lake to its
2 confluence with Millinocket Stream - Class AA.
- 3 (g) Presque Isle Stream and its tributaries above the Mapleton-Presque Isle
4 town line - Class A.
- 5 (h) St. Croix Stream from its confluence with Hall Brook in T.9, R.5,
6 W.E.L.S. to its confluence with the Aroostook River - Class AA.
- 7 (j) Scopan Stream from the outlet of Scopan Lake to its confluence with the
8 Aroostook River - Class C.
- 9 (k) Limestone Stream from the Long Road bridge to the Canadian border -
10 Class C.
- 11 (l) Beaver Brook and its tributaries (T.14 R.6 W.E.L.S., T.14 R.5 W.E.L.S.,
12 T.13 R.5 W.E.L.S., Portage Lake, Ashland, Castle Hill) - Class A.
- 13 (m) Gardner Brook and its tributaries (T.14 R.5 W.E.L.S., T.13 R.5
14 W.E.L.S., Wade) - Class A.

15 **Sec. 12. 38 MRSA §467, sub-§15, ¶E**, as amended by PL 2015, c. 12, §1, is
16 further amended to read:

17 E. Meduxnekeag River Drainage.

18 (1) Meduxnekeag River, main stem.

19 (a) From the outlet of Meduxnekeag Lake to the international boundary -
20 Class B. This segment is subject to a sustenance fishing designated use
21 pursuant to section 466-A.

22 (2) Meduxnekeag River, tributaries - Class B unless otherwise specified.

23 (a) North Branch of the Meduxnekeag River and its tributaries above the
24 Monticello - T.C, R.2, W.E.L.S. boundary - Class A.

25 (a-1) The North Branch of the Meduxnekeag River and its tributaries,
26 including Dead Stream, from the source in T.8 R.3 W.E.L.S. to the
27 international boundary are subject to a sustenance fishing designated use
28 pursuant to 466-A.

29 (b) Moose Brook and its tributaries, upstream of the Ludlow Road in
30 Ludlow - Class A.

31 (c) South Branch of the Meduxnekeag River and its tributaries, upstream of
32 the Oliver Road in Cary - Class A.

33 (d) Captain Ambrose Bear Stream and tributaries upstream of the Burnt
34 Brow Bridge in Hammond - Class A.

35 (e) All tributaries from the outlet of Meduxnekeag Lake to the international
36 boundary are subject to a sustenance fishing designated use pursuant to
37 466-A.

1 **Sec. 13. 38 MRSA §467, sub-§15, ¶F**, as amended by PL 2017, c. 137, Pt. B,
2 §10, is further amended to read:

3 F. St. John River, minor tributaries, those waters lying within the State - Class A
4 unless otherwise specified.

5 (1) Except as otherwise classified, all minor tributaries of the St. John River
6 entering below the international bridge in Fort Kent, those waters lying within the
7 State - Class B.

8 (2) Baker Stream and Baker Branch of the St. John River, from the headwaters at
9 the Upper First St. John Pond to their confluence with the Southwest Branch -
10 Class AA.

11 (3) Big Black River, from the international boundary to its confluence with the
12 St. John River - Class AA.

13 (4) Northwest Branch, from the outlet of Beaver Pond in T.12, R.17, W.E.L.S. to
14 its confluence with the St. John River - Class AA.

15 (5) Prestile Stream from its source to Route 1A in Mars Hill - Class A. This
16 segment is subject to a sustenance fishing designated use pursuant to section
17 466-A.

18 (a) Prestile Stream from Route 1A in Mars Hill to the international boundary
19 - Class B. This segment is subject to a sustenance fishing designated use
20 pursuant to section 466-A.

21 (6) Southwest Branch, from a point located 5 miles downstream of the
22 international boundary to its confluence with the Baker Branch - Class AA.

23 (7) Violette Stream and its tributaries, from its source to the confluence with
24 Caniba Brook - Class A.

25 **Sec. 14. 38 MRSA §468, sub-§8, ¶P** is enacted to read:

26 P. Perry.

27 (1) Boyden Stream - Class B. This segment is subject to a sustenance fishing
28 designated use pursuant to section 466-A.

29 **Sec. 15. 38 MRSA §469, sub-§7, ¶H-1** is enacted to read:

30 H-1. Perry.

31 (1) Tidal waters south of a line running from Gleason Point easterly to the
32 international boundary, thence southerly to the town line with Quoddy, thence
33 westerly to the Old Eastport Road, including Boyden Stream and the Little River
34 - Class SB. These waters are subject to a sustenance fishing designated use
35 pursuant to section 466-A.

36 **Sec. 16. Rulemaking.** The Department of Environmental Protection shall adopt
37 rules no later than March 1, 2020 that calculate and establish water quality criteria
38 protective of human health for toxic pollutants and the sustenance fishing designated use

1 as established pursuant to this Act. Rules adopted under this section are routine technical
2 rules as defined in the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A.

3 **SUMMARY**

4 This bill creates a sustenance fishing designated use as a subcategory of the
5 applicable fishing designated use for certain specified water body segments within
6 Maine's water classification program where there is or may be sustenance fishing or
7 increased fish consumption by members of the Indian tribes in Maine or other Maine
8 citizens. This bill also requires that the Department of Environmental Protection adopt
9 routine technical rules no later than March 1, 2020 that calculate and establish water
10 quality criteria protective of human health for toxic pollutants and the sustenance fishing
11 designated use as established by this bill. This bill limits the scope of the sustenance
12 fishing designated use created by this bill by providing that, for all purposes, the
13 sustenance fishing designated use created by this bill is deemed protected through water
14 quality criteria for human health calculated and established for the identified water body
15 segments.

Office of the Chief and Council

Kirk E. Francis
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Testimony in support of LD 1775,
An Act To Protect Sustenance Fishing

Chief Kirk E. Francis
May 29, 2019

Senator Carson, Representative Tucker, and distinguished members of the Environment and Natural Resources Committee: My name is Kirk Francis, I am the Chief of the Penobscot Nation.

I submit this testimony in support of LD 1775, "An Act To Protect Sustenance Fishing."

The Penobscot Nation has occupied and cared for the Penobscot River since time immemorial. Our principal community and the seat of our government, Panawanskek, is situated in the river and is also known as Indian Island. The name of our tribe, Pa'nawampske'wiak, translated as "people of where the river broadens out," references the rich fishing grounds near Indian Island that sustained us for thousands of years. Our creation stories illustrate the special relationship we have always shared with the river. It is the foundation of our clan system. The gathering of fish, wildlife, and plants for sustenance has forever been a traditional cultural practice of the Penobscot Nation and the other Wabanaki tribes. These practices are still exercised today by our people.

The pollution of the waters covered by this bill has greatly damaged our cultural practices and the health of or people who engage in them. Members of the Penobscot Nation and the other Wabanaki tribes face cancer levels and other health threats at a greater rate than Maine's general population.

In January of 2015, the Department of Interior submitted a letter to the US EPA that affirmed the sustenance fishing rights of the Maine tribes. I have that 11 page letter if the committee would like to see it.

Also In 2015, the Environmental Protect Agency concluded that Maine's water quality standards did not adequately protect the Nation's sustenance practices in the Penobscot River and other water bodies. EPA and the Department of the Interior recognized that the Nation had inherent federally protected rights to exercise sustenance living practices, including sustenance fishing. EPA and DOI further

recognized the critical relationship between those rights and the water quality sufficient to support them. EPA therefore determined that Maine was required to revisit the fish consumption rate and cancer risk rates it used to calculate water quality criteria in waters in and adjacent to Indian territories in Maine. Since that time, Maine and its DEP have been litigating against the EPA and the Penobscot Nation seeking a declaration that Maine was not required to take these steps.

With this bill, the DEP and the current administration have shown a willingness to set aside arguments about whether Maine *must* take these steps, and have recognized that Maine *should* take these steps. Maine, through its DEP, has sought to collaborate with the Penobscot Nation and the other Wabanaki tribes to advance LD 1775. The result will be cleaner water quality for all those that use these waters. I am hopeful that it will also mark the beginning of additional areas of cooperation to steward and protect our shared resources.

The Nation's sustenance practices are essential to its cultural survival and the survival of its members. The Nation will continue to safeguard its inherent rights to engage in those practices, and to achieve the water quality necessary to support them. Nothing in this bill attempts to address the location or the scope of those rights. Instead, LD 1775 sets aside these areas of inherent sovereignty about which the Nation and Maine are not yet in full agreement, and puts forth an important collaborative step toward protection of these water bodies that will benefit all Maine citizens.

EPA Region 1 has indicated that if the proposed legislation is adopted in its current form, it is optimistic that it could potentially result in approval in connection with its 2015 decisions on Maine's water quality standard that have been remanded by the federal district court to EPA. The Nation is similarly optimistic that if the proposed legislation is adopted in its current form, it could potentially avert any remaining litigation between the Nation and Maine in that proceeding.

The Penobscot Nation agrees with the Maine DEP and the sponsors of LD 1775 that it is critically important to establish cleaner water quality standards for the water body segments identified in LD 1775. This is good for the Penobscot Nation and it is good for Maine and all its citizens.

Please vote "ought to pass" on LD 1775.



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 30 2015

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

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

Dear Mr. Garbow:

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

1. Overview of Tribal Fishing Rights in Maine Indian Waters

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

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

² 30 M.R.S. §§ 6201 *et seq.*

³ 30 M.R.S. §§ 7201 *et seq.*

⁴ 25 U.S.C. §§ 1721 *et seq.*

federal Aroostook Band of Micmacs Settlement Act⁵ (collectively the “Settlement Acts”).⁶

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

The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters⁸ are expressly reserved⁹ fishing rights: the Maine Implementing Act

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

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

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

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

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

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

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

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

These statutorily-acknowledged fishing rights are rooted in treaty guarantees¹¹ that were upheld through the Settlement Acts. The Passamaquoddy Tribe’s 1794 treaty with the State of Massachusetts explicitly reserves a Passamaquoddy fishing right in the St. Croix River (then known as the Schoodic River): the treaty guarantees “to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation.”¹² The Penobscot treaties of 1818 (with Massachusetts) and 1820 (with Maine) do not expressly mention fishing rights because they did not cede the Penobscot River, explicitly retaining islands and granting to non-members only the right to “pass and repass” the River. The Penobscot Nation had historically relied on fishing, and the islands mentioned in the Treaty would have been of little value if they were not accompanied by fishing grounds.¹³

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

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

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

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

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

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

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

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

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

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

¹⁴ 30 M.R.S. § 6207(1).

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

Although the term "sustenance" is not defined in the Settlement Acts, it is reasonable to conclude that the term encompasses, at a minimum, the notion of tribal members taking fish to nourish and sustain themselves. Moreover, the Indian law canons of construction require that ambiguous terms in statutes must be construed "most favorably towards tribal interests."¹⁶ Where fishing rights of traditional fishing tribes are concerned, this rule of liberal construction applies with special force: one court has held that treaties must be construed "in the sense in which they would naturally be understood by the Indians . . . especially the reference to the right of taking fish."¹⁷ The term "sustenance" in section 6207(4) of the Maine Implementing Act should thus be construed broadly¹⁸ to incorporate at least the right of tribal members to take sufficient fish to nourish and sustain them,¹⁹ with no specific quantitative limits other than the conservation necessity limit that the statutory language specifically places on the tribal fishing right.²⁰ When interpreting the scope of the Maine tribes' fishing right as the tribes would understand them, EPA should consider that the tribes' ability to fish was, and continues to be, essential to their livelihood and culture.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even more importantly, however, the Northern Tribes²⁶ have more than the right of a Maine citizen to fish – they have the right to do so on lands set aside and held in trust for them. The establishment of trust land is one of the most important functions the United States performs for tribes. Trust lands provide a permanent land base, protecting these lands against loss,²⁷ and providing territory over which tribes may exercise governmental authority, albeit subject to the constraints imposed by the Settlement Acts.²⁸ Trust lands also protect and sustain tribal culture and ways of life, including tribal sustenance fishing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³³ See *supra* note 30 and accompanying text.

³⁴ 198 U.S. 371, 384 (1905).

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

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

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

³⁵ 763 F.2d 1032, 1034-35 (9th Cir. 1985).

³⁶ 141 F.3d 635, 639-40 (6th Cir. 1989).

³⁷ 443 U.S. 658, 679 (1979).

³⁸ *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979).

³⁹ 723 F.2d 1394, 1409-10 (9th Cir. 1983). See also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).

⁴⁰ The leading federal Indian law treatise explains:

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

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

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

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

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

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

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

⁴⁴ *Id.* at 78-79.

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

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

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

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

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

In its decision, EPA announced that when reviewing proposed permits under the Clean Water Act⁴⁹ it would "require the state to address the tribes' uses [for sustenance fishing] consistent with the requirements of the CWA."⁵⁰ EPA's 2003 analysis of tribal fishing rights and federal review authority under the Clean Water Act was cogent and the agency should follow through on this policy in reviewing Maine's WQS.⁵¹

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

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

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

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

⁵⁰ 68 Fed. Reg. at 65,068.

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

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

4. Conclusion

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

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

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

Sincerely,


Hilary C. Tompkins
Solicitor

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

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

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

AARON M. FREY
ATTORNEY GENERAL



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OFFICE OF THE ATTORNEY GENERAL
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May 29, 2019

Hon. Brownie Carson, Senate Chair
Hon. Ralph Tucker, House Chair
Joint Standing Committee on Environment and Natural Resources
Cross Building, Room 216
Augusta, Maine 04332

RE: **LD 1775 – An Act to Protect Sustenance Fishing**

Dear Senator Carson and Representative Tucker:

I am writing in support of LD 1775, *An Act to Protect Sustenance Fishing*.

I believe this bill represents a positive step forward for the State from multiple standpoints.

It is positive environmentally. The bill creates new protections for a number of specified water segments where there is or may be sustenance fishing or increased fish consumption by members of the Indian tribes in Maine or other Maine citizens. It is consistent with the letter and spirit of the Clean Water Act and Maine's existing State water laws and moves the bar forward environmentally for the benefit of all Maine citizens.

Passage of this bill would also be a positive development with respect to the State's relationship with the Indian tribes. The new sustenance fishing protections in the bill are entirely within Maine's water classification laws and outside of the context of the Maine Indian settlement acts and any historical disputes under those acts. The bill is also the result of a collaborative effort led by the Maine DEP over the last several months that directly involved the Indian tribes in Maine, EPA, and members of our office. DEP Commissioner Reid conducted extensive outreach with each of the four Indian tribes, who in turn provided critical input regarding the drafting of the bill and the scope of the covered waters.

The bill is also a positive step forward with respect to Maine's relationship with EPA, which reviews changes to Maine's water quality standards under the Clean Water Act. EPA also directly participated in and fully supported this collaborative effort. Based on feedback to date, I

Hon. Brownie Carson, Senate Chair

Hon. Ralph Tucker, House Chair

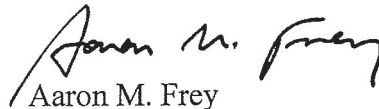
May 29, 2019

Page 2

am optimistic that this legislation, if enacted, would be approved by EPA and would significantly factor into EPA's reconsideration of its decisions in its pending legal dispute with Maine over water quality standards in a way that will hopefully end that litigation.

I strongly urge you to vote "Ought to Pass" on LD 1775.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron M. Frey".

Aaron M. Frey
Attorney General



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



GERALD D. REID
COMMISSIONER

**TESTIMONY OF
GERALD REID, COMMISSIONER**

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPEAKING IN SUPPORT OF L.D. 1775

AN ACT TO PROTECT SUSTENANCE FISHING

SPONSORED BY REP. GIDEON

**BEFORE THE JOINT STANDING COMMITTEE
ON
ENVIRONMENT AND NATURAL RESOURCES**

DATE OF HEARING:

MAY 29, 2019

Chairman Carson, Chairman Tucker, members of the Committee, it is my pleasure to be here today to offer this testimony in support of L.D. 1775, which would protect water quality needed for sustenance fishing in certain waters.

Several years ago, a dispute arose among the State of Maine, the U.S. EPA, the Penobscot Nation and the Houlton Band of Maliseet Indians related to

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LD 1775, An Act To Protect Sustenance Fishing
Testimony of: Gerald Reid/DEP
Public Hearing: March 29, 2019
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sustenance fishing and the regulation of water quality. The parties disagreed on the rights and authority that each held under provisions of the Maine Indian Land Claims Settlement Acts and the Clean Water Act. Eventually the EPA disapproved certain water quality standards and adopted a federal regulation containing new water quality standards that it determined were necessary to protect tribal sustenance fishing in waters within and adjacent to Indian Territory in Maine. The State challenged EPA's disapprovals in court on jurisdictional and procedural grounds, and the Penobscot Nation and Houlton Band of Maliseet Indians intervened. That lawsuit is still pending but is currently stayed.

In February of this year, the four parties to that litigation, together with the Passamaquoddy Tribe and the Aroostook Band of Micmacs, began discussing how to break the impasse. The idea was to come to an agreement on what water quality standards were appropriate and where they should apply, but not require any of the parties to give up their positions on the legal and jurisdictional positions that had formed the basis of the dispute. In other words, we wanted to find a way to put aside the legal arguments and move ahead to accomplish something important. This bill is the product of those negotiations.

The bill does three major things. First, it establishes a new designated use of sustenance fishing in Maine's Water Classification Law. In order to avoid potential confusion about the meaning and effect of this new designated use, the bill carefully limits and defines the term. Specifically, it provides that the sustenance fishing designated use is deemed protected for all purposes

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through water quality criteria for human health that are derived using a fish consumption rate of 200 grams per day, and a cancer risk rate of one in 1,000,000 for toxic pollutants other than inorganic arsenic, which is treated differently under Maine law. The bill does not change how mercury in discharges is regulated, because mercury, like inorganic arsenic, is also subject to its own unique statutory provisions, and is present in Maine waters largely as a result of air deposition from out of state sources. The bill directs DEP to adopt the required water quality criteria by March 1, 2020 through routine technical rulemaking.

Typically, a fish consumption rate would be based on data showing the actual rate of consumption of fish from specific waters that is occurring. In the current context, we concluded that methodology did not make sense, because Tribal members are not consuming the levels of fish that they would in the absence of concerns about the health effects of toxic contamination. We decided that under these unique circumstances the fish consumption rate should be set as matter of public policy, through the legislative process. EPA has national guidelines that consider a fish consumption rate of 142 grams per day as protective of sustenance fishing, and the States of Oregon and Washington have adopted fish consumption rates of 175 grams per day for this purpose. Our proposed rate of 200 grams per day was a conscious choice to establish in Maine the most protective fish consumption rate in the country for those select waters where we believe it is appropriate. We looked carefully at potential impacts to the regulated community from the adoption of a 200 gram per day fish consumption rate and determined them to be minimal to non-existent.

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Second, the bill specifically identifies and lists those waterbodies to which the new designated use will apply. The Tribes identified these waterbodies as having particular significance to their communities for the purpose of fishing. There is not necessarily any connection between the chosen waterbodies and the Tribes' Reservations or Territories. To be clear, the waterbodies where these new water quality standards will apply are open to fishing by Tribal and non-Tribal members alike, so all Maine citizens will benefit from their protections. Attached to my testimony are a series of maps that depict the covered waters, both collectively and as requested by each of the four Tribes.

Third, the bill amends the ambient water quality criteria that establish the level of mercury that is considered safe for human health. Specifically, it adjusts the fish tissue residue criterion, for the identified waters, from 0.20 to 0.03 milligrams per kilogram to reflect the more protective 200 grams per day fish consumption rate.

If this bill is enacted in its current form, I expect that it will be approved by EPA and allow for the settlement of the lawsuit still pending in federal court. I should emphasize that enactment in its current form is particularly important here, because even well-intentioned amendments run the risk of upsetting the six-party agreement that this bill language reflects.

Having said that, it is likely that certain technical amendments to the bill language will be necessary to reconcile L.D. 1775 with provisions in L.D.

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1743, *An Act To Reclassify Certain Waters Of The State*. The Committee's analyst, Dan Tartakoff, is aware of this issue. DEP recommends that, assuming such amendments are made, the Committee also replace the current bill summary with the full version of the six parties' original, negotiated summary of this proposed legislation. This summary, with some minor corrections from the Revisor's Office, is attached to my testimony. Including that negotiated summary would be very helpful in memorializing and explaining the six parties' agreement and shared understanding of the intent, effect, and limits of this bill through the legislative process.

I want to thank the Chiefs and Natural Resources staffs of the four Tribes for their collaboration and patience with the process. This bill, together with L.D. 1743 (the Reclassification bill) are examples of how the State and the Tribes can work together constructively to address important issues of common concern, in this case improving water quality. It is a way to begin rebuilding trust and goodwill following years of disagreements and litigation, and I look forward to continuing to work with the Tribes on other similar projects.

Thank you and I would be happy to answer any questions you may have.

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Attachment

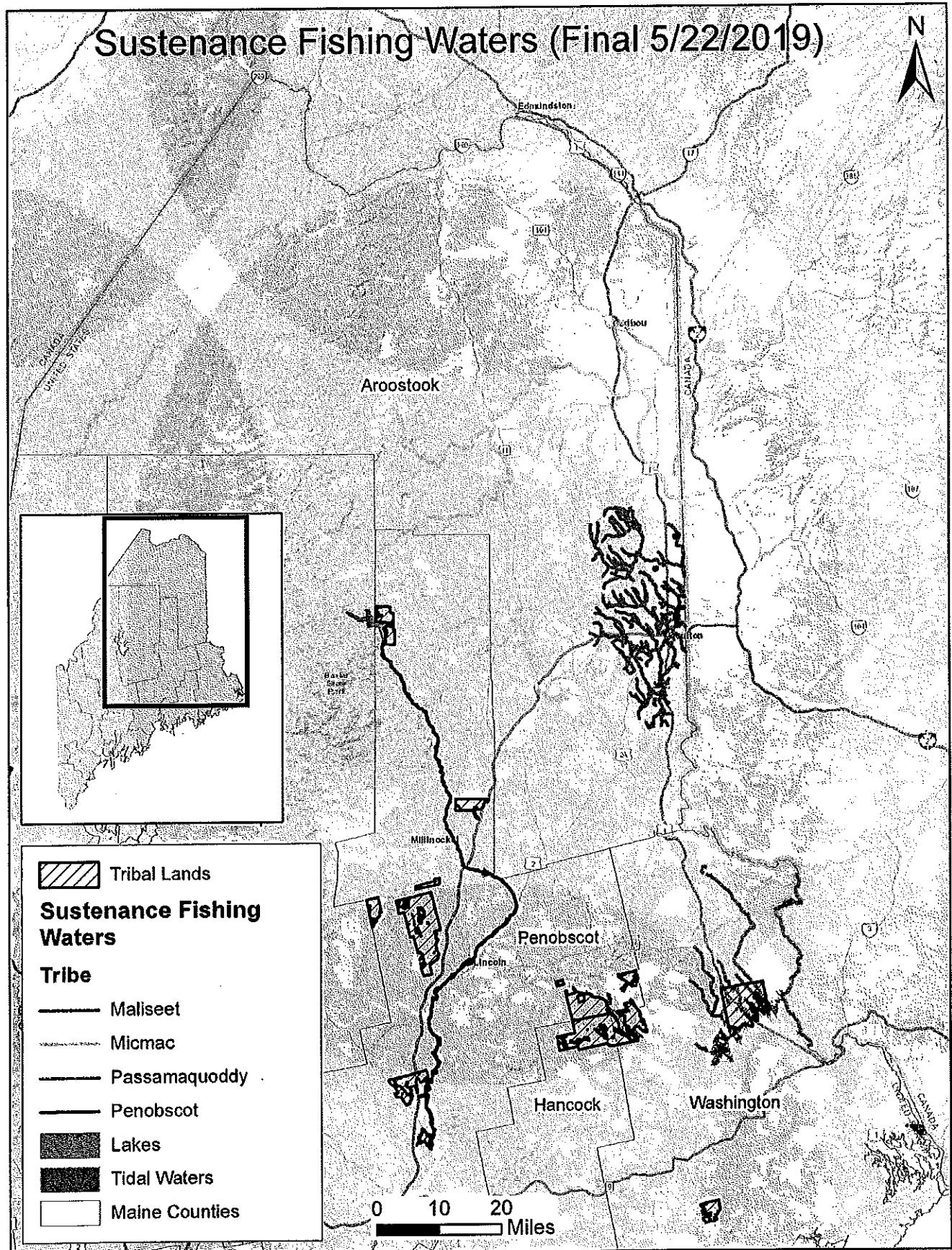
SUMMARY

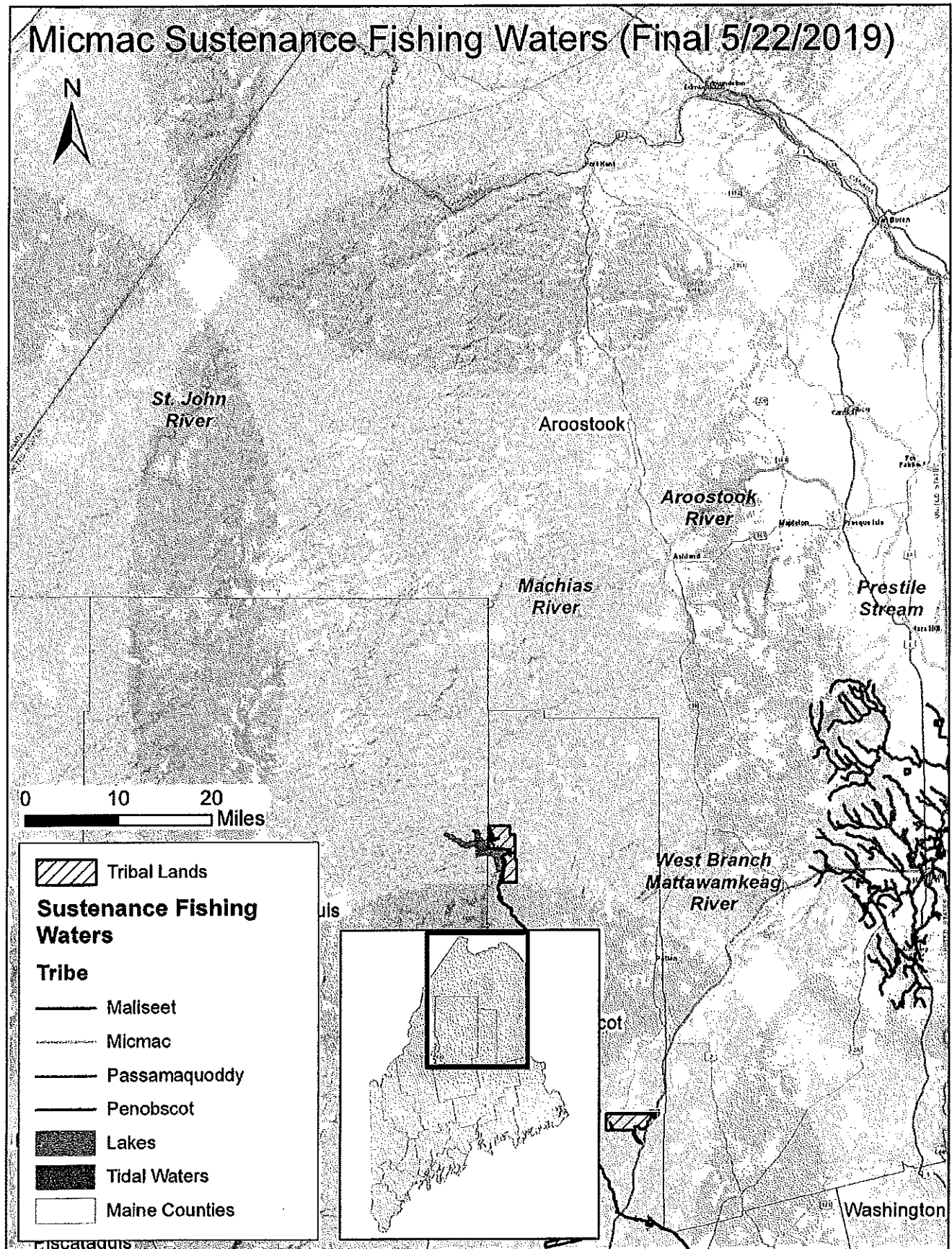
This bill creates a sustenance fishing designated use as a subcategory of the applicable fishing designated use for certain specified water body segments within Maine's water classification program, Maine Revised Statutes, Title 38, chapter 3, subchapter 1, article 4-A, where there is or may be sustenance fishing or increased fish consumption by members of the Indian tribes in Maine or other Maine citizens. This bill also requires that the Department of Environmental Protection adopt routine technical rules no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established by this bill. This bill limits the scope of the sustenance fishing designated use created by this bill by providing that, for all purposes, including for purposes of the State's water classification program, the federal Clean Water Act, and related regulations and guidance, the sustenance fishing designated use created by this bill is deemed protected through water quality criteria for human health calculated and established for the identified water body segments using, in addition to the other assumptions used in developing human health criteria generally under the Maine Revised Statutes, Title 38 section 420, subsection 2 and rules adopted by the Department of Environmental Protection, a fish consumption rate of 200 grams per day and a cancer risk level, except for inorganic arsenic which is governed by Title 38 section 420, subsection 2, paragraph J, of one in 1,000,000. The designation in this bill of specific waters subject to a sustenance fishing designated use is not intended to preclude a future designation of other such waters through a similar legislative process or as otherwise provided for by law.

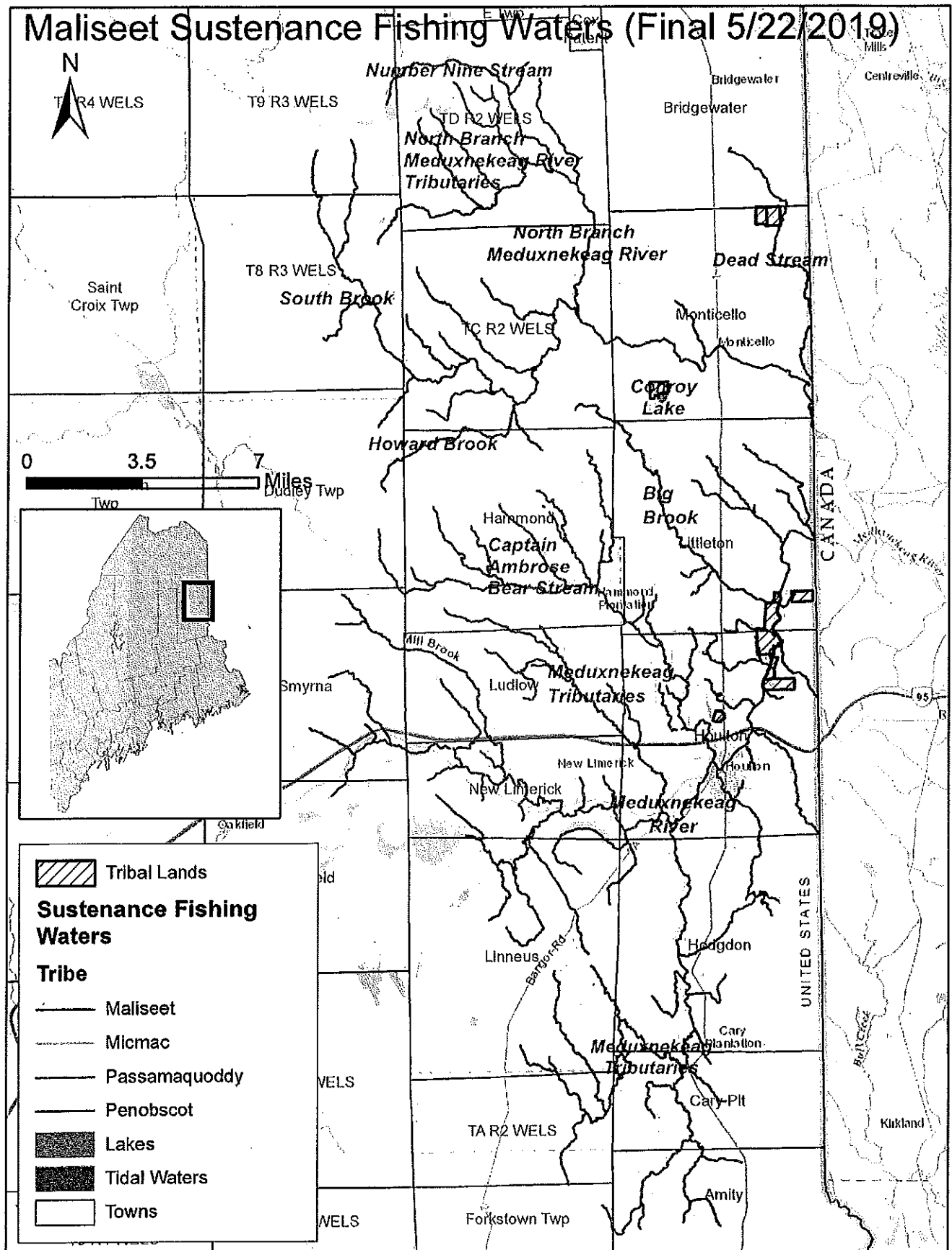
All aspects of this bill, including the sustenance fishing designated use and the identification of specific water body segments subject to that use, are intended to have meaning and effect within the State's water classification program only and for purposes of calculating and establishing water quality criteria for human health enough to protect the sustenance fishing designated use only. Nothing in this bill or the sustenance fishing designated use it establishes is intended to apply to or affect discharges of mercury, which are governed exclusively by separate provisions of law, including the Maine Revised Statutes, Title 38 section 420, subsection 1-B and section 413, subsection 11. This bill changes the human health ambient criterion specified in the Maine Revised Statutes, Title 38, section 420, subsection 1-B, paragraph A, subparagraph (2) to reflect the 200 grams per day fish consumption rate that the Department of Environmental Protection is directed to use when deriving human health criteria for toxic pollutants to protect the sustenance fishing designated use, but this change is not intended to affect the mercury discharge limits set forth in Title 38, section 420, subsection 1-B and section 413, subsection 11. Nothing in this bill is intended to alter or affect in any way any provision of any of the State's state and federal Indian

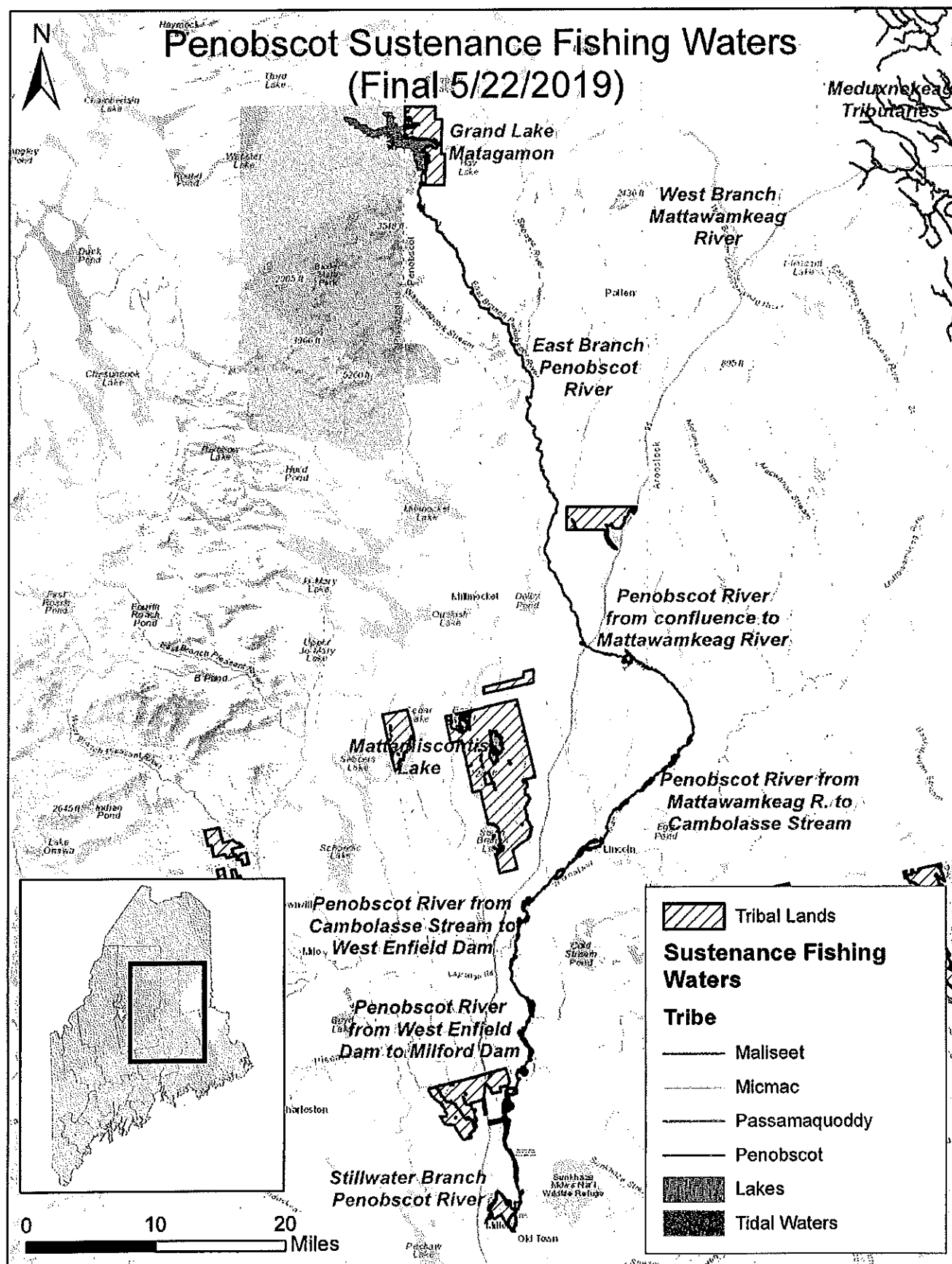
LD 1775, An Act To Protect Sustenance Fishing
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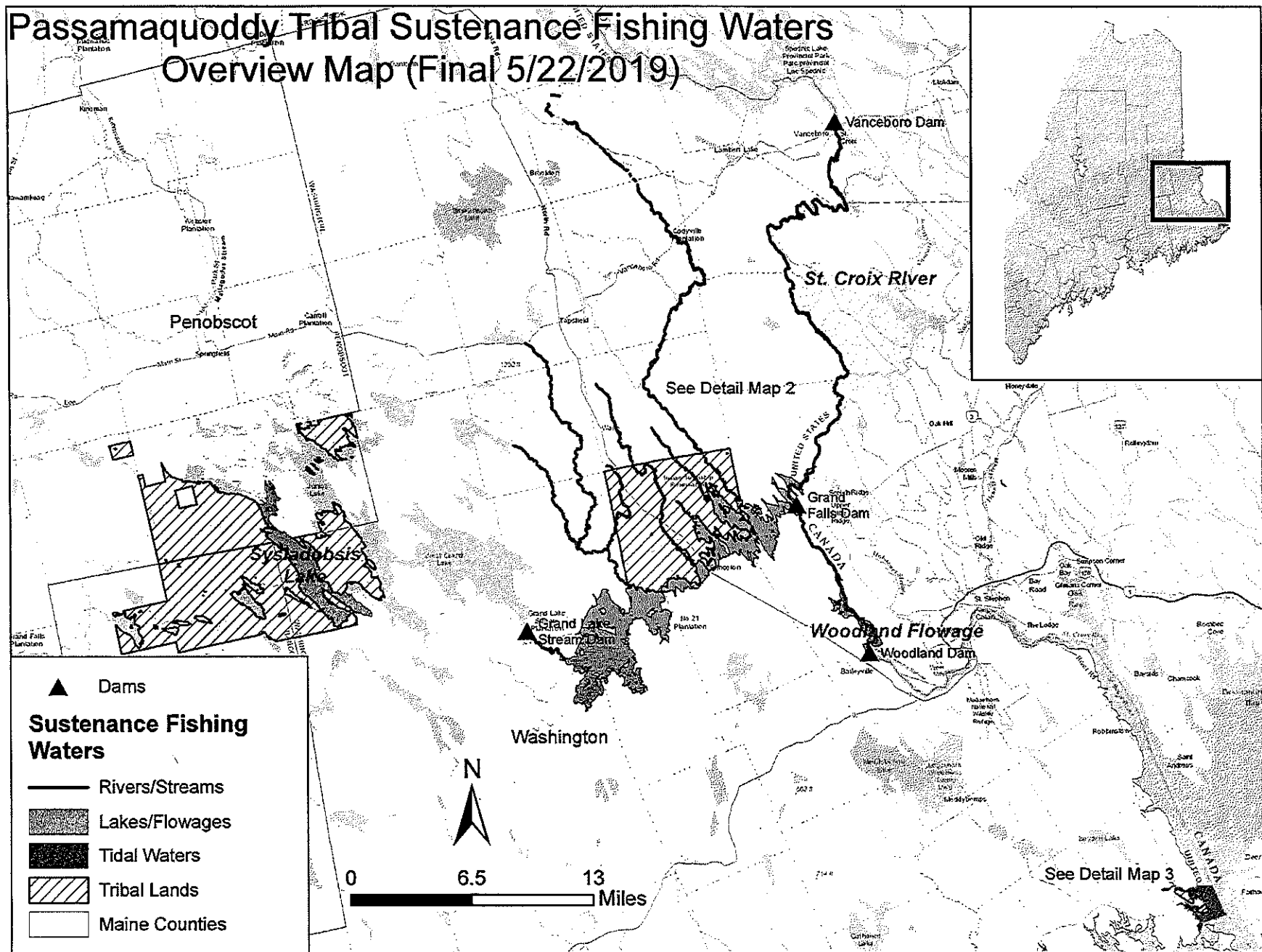
settlement acts, including the state Indian settlement acts in the Maine Revised Statutes, Title 30, chapters 601 and 603. No part of this bill is intended to relate to or affect in any way any claims or disputes regarding any definition of Indian country, territory, lands, waters, reservations, or rights of any kind under any other provision of state or federal law. No part of this bill is intended to create or limit any right or protection under any other state or federal law, including the federal Clean Water Act except as described in this section or any state or federal Indian settlement law or act, or create in any way a right to any particular quantity or quality of fish. The sole intent of this bill is to create a sustenance fishing designated use that is deemed protected for all purposes through water quality criteria for human health calculated and established, through routine technical rulemaking, using a specific minimum fish consumption rate and specified cancer risk levels for the waters expressly identified in the State's water classification program, which criteria are applicable for purposes of the State's water classification program and the federal Clean Water Act.

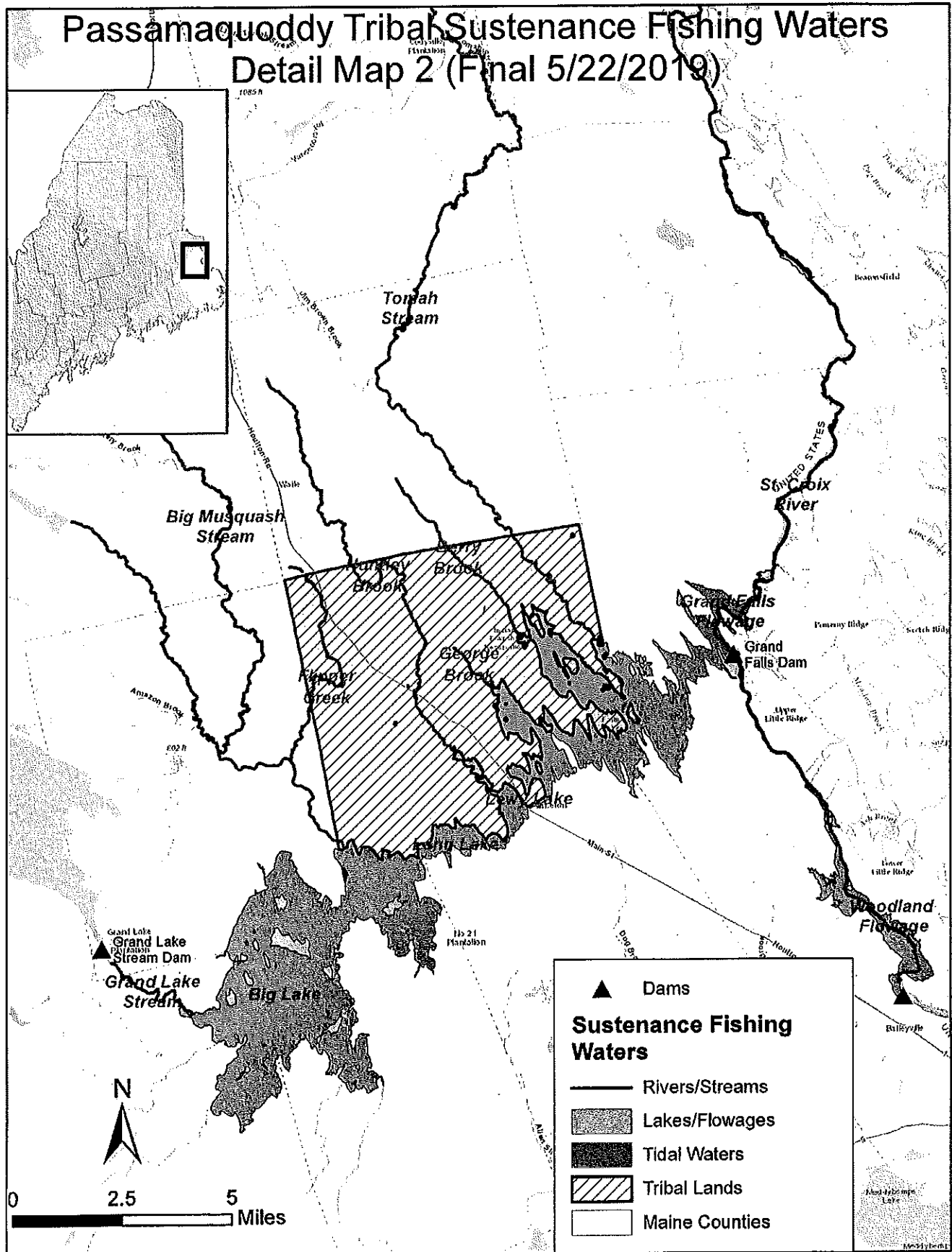


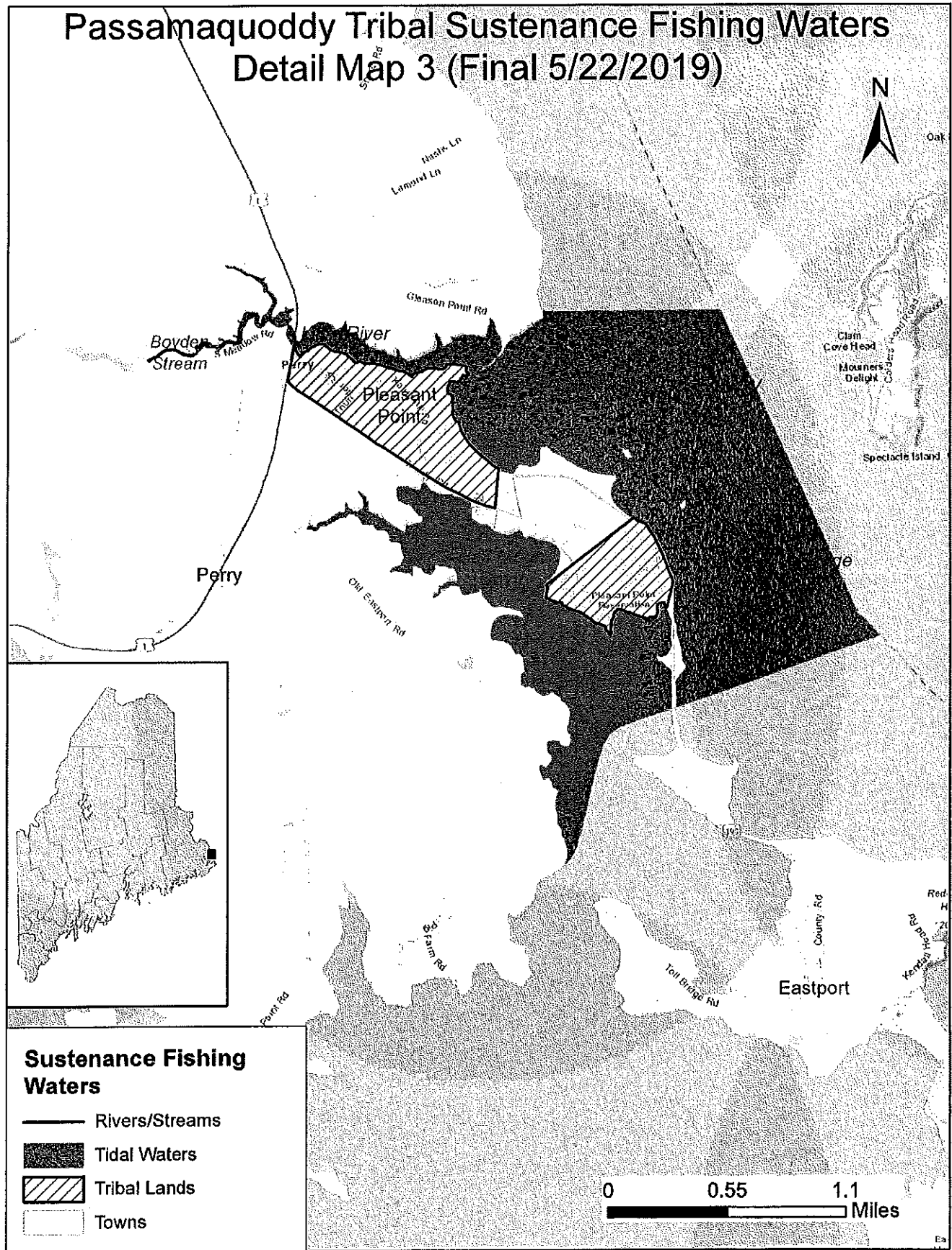














UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**Region 1 - New England
5 Post Office Square, Suite 100
Boston, MA 02109-3912**

May 24, 2019

Senator Brownie Carson, Chair
Representative Ralph Tucker, Chair
Committee on Environment and Natural Resources
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333-0100

Dear Senator Carson and Representative Tucker:

I am writing with respect to my May 10, 2019, comment letter sent to Commissioner Gerald D. Reid, Department of Environmental Protection (DEP), on the proposed legislation that Governor Mills has introduced to establish a sustenance fishing designated use subcategory in certain waters in Maine. *See Attachment 1.* In that letter I stated that if the proposed legislation is adopted in its current form, EPA Region I is optimistic that it could potentially result in approval, in connection with EPA's reconsideration of its 2015 decisions on Maine's water quality standards that have been remanded by the district court and are currently pending before the agency. This assessment holds true for the proposed legislation as recently revised by the Office of the Revisor of Statutes, L.D. 1775 (An Act To Protect Sustenance Fishing),

I would also like to make clear that my May 10th letter was based on a review of the proposed legislation which included a "Summary" section. *See Attachment 2.* It is EPA Region I's understanding that this Summary section reflects the mutual agreement and shared understanding of DEP and the Indian tribes in Maine on the intent, effect, and limits of the proposed legislation,

I, again, congratulate Commissioner Reid and DEP on the collaborative process employed in developing this proposal and the commitment to protecting water quality in Maine.

Sincerely,

A handwritten signature in cursive script that reads "Deborah A. Szaro".

Deborah A. Szaro,
Acting Regional Administrator

cc: Gerald D. Reid, Commissioner, Maine Department of Environmental Protection
Kirk Francis, Chief, Penobscot Indian Nation
Edward (Charley) Peter-Paul, Chief, Aroostook Band of Micmacs
Clarissa Sabattis, Chief, Houlton Band of Maliseet Indians
Marla Dana, Chief, Passamaquoddy Tribe, Pleasant Point
William Nicholas, Chief, Passamaquoddy Tribe, Indian Township



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 POST OFFICE SQUARE, SUITE 100
BOSTON, MA 02109-3912

May 10, 2019

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

OFFICE OF THE
REGIONAL ADMINISTRATOR

Dear Commissioner Reid:

I am writing to comment on the proposed legislation that Governor Mills has introduced to establish a sustenance fishing designated use subcategory in certain waters in Maine. Over the past several weeks, the Maine Department of Environmental Protection (DEP), with advice from the Maine Office of the Attorney General, has convened an important conversation among the four federally-recognized Indian tribes in Maine and the U.S. Environmental Protection Agency (EPA) to work toward protections for increased fish consumption by members of the Indian tribes in Maine or other Maine citizens. EPA applauds the State's efforts to update its designated uses. The CWA gives states primary responsibility in setting water quality standards, and we look forward to fulfilling our proper statutory role in reviewing standards set by the State, if this legislation is enacted. If adopted in its current form, EPA Region 1 is optimistic that it could potentially result in approval, in connection with EPA's reconsideration of its 2015 decisions on Maine's water quality standards that have been remanded by the district court and are currently pending before the Agency.

Mercury In-Stream Criterion and Point Source Regulation

You have asked for EPA Region 1's view of whether provisions in the bill addressing mercury pollution would affect Maine's approach to regulating mercury in dischargers consistent with the federal Clean Water Act.

EPA Region 1 understands that, with respect to mercury, this bill authorizes a change in the human health ambient criterion specified in 38 MRS § 420(1-B)(A)(2) to reflect a 200 grams per day fish consumption rate. It does not apply to or affect any other provision related to the regulation of mercury in discharges to surface waters set forth in 38 MRS §§ 420(1-B) and 413(11) and in DEP's implementing rule, Chapter 519: Interim Effluent Limitations and Controls for the Discharge of Mercury. These provisions establish Maine's approach to controlling mercury discharges to the surface waters of the State through implementation of pollution prevention plans, effluent testing requirements, and establishment of interim effluent limits for some discharge licensees.

EPA Region 1 has reviewed Maine's mercury permitting provisions in light of EPA's 2010 "Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion" (the "2010 Guidance"). The publication of the 2001 Clean Water Act section 304(a) methylmercury

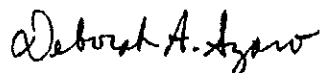
criterion was the first time EPA issued a recommended water quality criterion expressed as a fish and shellfish tissue value rather than as a water column value. Recognizing that this approach differs from traditional water column criteria and might pose implementation challenges, EPA developed the 2010 Guidance to assist states and authorized tribes. The document provides guidance on, among other things, how to use the fish tissue-based criterion recommendation in developing water quality standards for methylmercury and in implementing those standards in Total Maximum Daily Loads (TMDLs) and National Pollutant Discharge Elimination System (NPDES) permits. Maine's ambient mercury criterion is expressed in terms of a fish tissue concentration rather than a water column concentration, so the 2010 Guidance is directly relevant. Maine's approach to regulating mercury in discharges, relying on a combination of BMPs (pollution minimization plans, monitoring) and interim effluent limits where necessary, is generally consistent with one of the approaches recommended by EPA in the 2010 Guidance to implement a methylmercury fish tissue criterion. EPA Region 1 understands that when implementing 38 MRS §§ 420(1-B) and 413(1) and Chapter 519, DEP does so consistent with other applicable federal and state permitting requirements such as antibacksliding, antidegradation, and public notice and comment on permit conditions in permit reissuances and major modifications. EPA Region 1 does not anticipate that a change in the fish tissue-based ambient water quality criterion for mercury as a result of this bill would require changes in Maine's approach to permitting mercury in discharges to surface waters.

Total Maximum Daily Load for Mercury

EPA Region 1 also does not expect that a revised mercury criterion for waters identified in the bill would require new or different actions by the State under section 303(d) of the Clean Water Act. Maine is one of seven states covered by the Northeast Regional Mercury TMDL. The TMDL explains that mercury loadings from wastewater discharges are de minimis, (~2.1% of total loadings), with the vast majority of the load coming from atmospheric deposition. The TMDL sets a regional waste load allocation rather than state-specific or point source-specific allocations, recognizing that mercury reductions to achieve the WLA will be accomplished through mercury minimization plans (MMPs) and the continuation of region-wide mercury reduction efforts such as legislation to address mercury in products and to require installation of dental amalgam separators. To implement the TMDL, Maine has enacted a variety of laws to reduce and eliminate mercury in products and waste streams; and, as discussed above, it regulates mercury in wastewater discharges by requiring a combination of pollution prevention plans, monitoring, and interim effluent limits. EPA Region 1 expects that Maine will continue the efforts already underway under the current TMDL to reduce and eliminate mercury, and the adoption of a revised mercury criterion pursuant to this bill does not necessitate changes in the State's approach to regulating discharges of mercury.

In closing, let me also congratulate you and DEP on the collaborative spirit that guided your process for developing this proposal. Your direct engagement with the Indian tribes in Maine has fostered a constructive relationship among the state, the tribes, and EPA. EPA Region 1 looks forward to continuing this level of cooperative collaboration with DEP and tribal leadership in protecting water quality in Maine.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah A. Szaro". The signature is fluid and cursive, with the first name "Deborah" being more prominent.

Deborah A. Szaro, Acting Regional Administrator

cc: Kirk Francis, Chief, Penobscot Indian Nation
Edward (Charley) Peter-Paul, Chief, Aroostook Band of Micmacs
Clarissa Sabattis, Chief, Houlton Band of Maliseet Indians
Maria Dana, Chief, Passamaquoddy Tribe, Pleasant Point
William Nicholas, Chief, Passamaquoddy Tribe, Indian Township

Maine Department of Environmental Protection
FINAL Sustenance Fishing Proposal, May 2, 2019

Sec. 1. 38 MRS § 466, sub-§10-A is enacted to read:

10-A Sustenance fishing designated use. For purposes of this article only, a sustenance fishing designated use shall protect human consumption of fish for nutritional and cultural purposes and shall apply, as a subcategory of the applicable fishing designated use, to those water body segments identified in this article as being subject to a sustenance fishing designated use. To protect this sustenance fishing designated use, the Department shall calculate and establish water quality criteria for human health using a fish consumption rate of 200 grams per day and a cancer risk level, except for inorganic arsenic which is governed by 38 M.R.S. § 420(2)(J), of one in 1,000,000, and such criteria shall be deemed protective of the designated use created by this provision for all purposes. No part of this provision or the sustenance fishing designated use identified in this article creates any other right or protection, including but not limited to a right to any particular quantity or quality of fish, limits any right or protection otherwise existing in law, or alters or affects the regulation of mercury in discharges, which is governed exclusively by 38 M.R.S. §§ 420(1-B) and 413(11).

Sec. 2. 38 MRS § 420(1-B)(A)(2) is amended to read:

(2) Fish tissue residue criterion for human health: 0.2 milligrams per kilogram in the edible portion of fish for all waters, except for those water body segments subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A, which shall have a fish tissue residue criterion for human health of 0.03 milligrams per kilogram in the edible portion of fish.

Sec. 3. 38 MRS §465-A, sub-§7, ¶A, as amended by PL 2017, c. 319, §10, is further amended to read:

§465-A. STANDARDS FOR CLASSIFICATION OF LAKES AND PONDS

The department shall have one standard for the classification both of great ponds and of natural lakes and ponds less than 10 acres in size. Impoundments of rivers that are defined as great ponds pursuant to section 480-B are classified as GPA or as specifically provided in sections 467 and 468. [2017, c. 137, Pt. B, §1 (AMD).]

1. Class GPA waters. Class GPA is the sole classification both of great ponds and of natural lakes and ponds less than 10 acres in size.

A. Class GPA waters must be of such quality that they are suitable for the designated uses of drinking water after disinfection, recreation in and on the water, fishing, agriculture, industrial process and cooling water supply, hydroelectric power generation, navigation and as habitat for fish and other aquatic life. The habitat must be characterized as natural.

B. Class GPA waters must be described by their trophic state based on measures of the chlorophyll "a" content, Secchi disk transparency, total phosphorus content and other appropriate criteria. Class GPA waters must have a stable or decreasing trophic state, subject only to natural fluctuations, and must be free of culturally induced algal blooms that impair their use and enjoyment. The number of Escherichia coli bacteria in these waters may not

Maine Department of Environmental Protection
FINAL Sustenance Fishing Proposal, May 2, 2019

exceed a geometric mean of 29 CFU per 100 milliliters over a 90-day interval or 194 CFU per 100 milliliters in more than 10% of the samples in any 90-day interval.

C. There may be no new direct discharge of pollutants into Class GPA waters.

Notwithstanding any other provision of law, including subsection D and 38 MRS § 466, sub-§10-A, the following are exempt from this provision:

- (1) Chemical discharges for the purpose of restoring water quality approved by the department;
- (2) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species;
- (3) Storm water discharges that are in compliance with state and local requirements;
- (4) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; and
- (5) Discharges of pesticides approved by the department that are:
 - (a) Unintended and an incidental result of the spraying of pesticides;
 - (b) Applied in compliance with federal labeling restrictions; and
 - (c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. Materials may not be placed on or removed from the shores or banks of a Class GPA water body in such a manner that materials may fall or be washed into the water or that contaminated drainage may flow or leach into those waters, except as permitted pursuant to section 480-C. A change of land use in the watershed of a Class GPA water body may not, by itself or in combination with other activities, cause water quality degradation that impairs the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters.

D. The following lakes are subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A: Conroy Lake in Monticello; Grand Lake Matagamon in Trout Brook TWP and T6 R8 WELS; Mattamiscontis Lake in T3 R9 NWP and T2 R9 NWP; Grand Falls Flowage, Berry Brook Flowage, George Brook Flowage, Huntley Brook Flowage, Lewey Lake, The Basin, The Narrows, Long Lake and Big Lake, adjacent to Indian Township; Sysladobsis Lake in T5 ND.

Sec. 4. 38 MRS §467, sub-§7, ¶A, B, D, as repealed and replaced by PL 1999, c. 277, §9, and amended by PL 2003, c. 317, §12, is further amended to read:

Maine Department of Environmental Protection
FINAL Sustenance Fishing Proposal, May 2, 2019

A. Penobscot River, main stem.

- (1) From the confluence of the East Branch and the West Branch to the confluence of the Mattawamkeag River, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (2) From the confluence of the Mattawamkeag River to the confluence of Cambolasse Stream - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (3) From the confluence of Cambolasse Stream to the West Enfield Dam - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (5) From the West Enfield Dam, ~~including the Stillwater Branch,~~ to the ~~Veazie~~ Milford Dam, including all impoundments, and the Stillwater Branch - Class B. That portion of this segment upstream of the Milford Dam and upstream of the Gilman Falls Dam at Route 43 is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (6) From the ~~Veazie~~ Milford Dam, but not including the ~~Veazie~~ Milford Dam, to the Maine Central Railroad bridge in Bangor-Brewer - Class B. Further, the Legislature finds that the free-flowing habitat of this river segment provides irreplaceable social and economic benefits and that this use must be maintained.
- (7) From the Maine Central Railroad bridge in Bangor to a line extended in an east-west direction from a point 1.25 miles upstream of the confluence of Reeds Brook in Hampden - Class B. Further, the Legislature finds that the free-flowing habitat of this river segment provides irreplaceable social and economic benefits and that this use must be maintained.

B. Penobscot River, East Branch Drainage.

- (1) East Branch of the Penobscot River, main stem.
 - (a) Above its confluence with Grand Lake Mattagamon - Class A.
 - (b) From the dam at the outlet of Grand Lake Mattagamon to a point located 1,000 feet downstream from the dam - Class A. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
 - (c) From a point located 1,000 feet downstream from the dam at the outlet of Grand Lake Mattagamon to its confluence with the West Branch - Class AA. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

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(d) That portion of the East Branch in T6 R8 WELS is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

D. Mattawamkeag River Drainage.

(1) Mattawamkeag River, main stem.

(a) From the confluence of the East Branch and the West Branch to the Kingman-Mattawamkeag boundary - Class A.

(b) From the Kingman-Mattawamkeag boundary to its confluence with the Penobscot River - Class AA.

(2) Mattawamkeag River, tributaries - Class A unless otherwise specified.

(a) East Branch Mattawamkeag River above Red Bridge - Class B.

(b) West Branch Mattawamkeag River from Interstate 95 to its confluence with Mattawamkeag Lake - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(c) West Branch of the Mattawamkeag River from its source at Rockabema Lake to Interstate 95 - Class A. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(ed) Fish Stream - Class B.

Sec. 5. 38 MRS §467, sub-§13, as amended by PL 2009, c. 163, §9, is further amended to read:

13. St. Croix River Basin.

A. St. Croix River, main stem.

(1) Except as otherwise provided, from the outlet of Chiputneticook Lakes to its confluence with the Woodland Lake impoundment, those waters lying within the State - Class A. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(2) Those waters impounded in the Grand Falls Flowage including those waters between Route 1 (Princeton and Indian Township) and Grand Falls Dam - Class GPA. These waters are subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(3) Woodland Lake impoundment - Class C.

(4) From the Woodland Dam to tidewater, those waters lying within the State, including all impoundments - Class C.

B. St. Croix River, tributaries, those waters lying within the State - Class B unless otherwise specified.

(1) All tributaries entering upstream from the dam at Calais, the drainage areas of which are wholly within the State - Class A unless otherwise classified.

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- (2) Tomah Stream - Class AA. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (3) Monument Brook - Class A.
- (4) Waters connecting the Chiputneticook Lakes, including The Thoroughfare, Forest City Stream and Mud Lake Stream - Class A.
- (5) Berry Brook, George Brook, Huntley Brook, Musquash Stream, Flipper Creek, Patten Pond Stream, and all segments of the West Branch of the St. Croix River between the West Grand Lake Dam and Route 1— Class A. These segments are subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

Sec. 6. 38 MRS §467, sub-§15, ¶C, as amended by PL 2017, c. 137, Pt. B, §9, is further amended to read:

C. Aroostook River Drainage.

- (1) Aroostook River, main stem.
 - (a) From the confluence of Millinocket Stream and Munsungan Stream to the Route 11 bridge - Class AA. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
 - (b) From the Route 11 bridge to the Sheridan Dam - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
 - (c) From the Sheridan Dam to its confluence with Presque Isle Stream, including all impoundments - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
 - (d) From its confluence with Presque Isle Stream to a point located 3.0 miles upstream of the intake of the Caribou water supply, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
 - (e) From a point located 3.0 miles upstream of the intake of the Caribou water supply to a point located 100 yards downstream of the intake of the Caribou water supply, including all impoundments - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
 - (f) From a point located 100 yards downstream of the intake of the Caribou water supply to the international boundary, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (2) Aroostook River, tributaries, those waters lying within the State - Class A unless otherwise specified.
 - (a) All tributaries of the Aroostook River entering below the confluence of the Machias River that are not otherwise classified - Class B.

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- (b) Little Machias River and its tributaries - Class A.
- (c) Little Madawaska River and its tributaries, including Madawaska Lake tributaries above the Caribou-Connor Township line - Class A.
- (d) Machias River, from the outlet of Big Machias Lake to the Aroostook River - Class AA. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (e) Millinocket Stream, from the outlet of Millinocket Lake to its confluence with Munsungan Stream - Class AA.
- (f) Munsungan Stream, from the outlet of Little Munsungan Lake to its confluence with Millinocket Stream - Class AA.
- (g) Presque Isle Stream and its tributaries above the Mapleton-Presque Isle town line - Class A.
- (h) St. Croix Stream from its confluence with Hall Brook in T.9, R.5, W.E.L.S. to its confluence with the Aroostook River - Class AA.
- (j) Scopan Stream from the outlet of Scopan Lake to its confluence with the Aroostook River - Class C.
- (k) Limestone Stream from the Long Road bridge to the Canadian border - Class C.
- (l) Beaver Brook and its tributaries (T.14 R.6 W.E.L.S., T.14 R.5 W.E.L.S., T.13 R.5 W.E.L.S., Portage Lake, Ashland, Castle Hill) - Class A.
- (m) Gardner Brook and its tributaries (T.14 R.5 W.E.L.S., T.13 R.5 W.E.L.S., Wade) - Class A.

Sec. 7. 38 MRS §467, sub-§15, ¶A, E, F, as amended by PL 2017, c. 137, Pt. B, §9, 10 is further amended to read:

15. St. John River Basin.

A. St. John River, main stem.

- (1) From the confluence of the Northwest Branch and the Southwest Branch to a point located one mile above the foot of Big Rapids in Allagash - Class AA. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.
- (2) From a point located one mile above the foot of Big Rapids in Allagash to the international bridge in Fort Kent, those waters lying within the State, including all impoundments - Class A.
- (3) From the international bridge in Fort Kent to the international bridge in Madawaska, those waters lying within the State, including all impoundments - Class B.
- (4) From the international bridge in Madawaska to where the international boundary leaves the river in Hamlin, those waters lying within the State, including all impoundments - Class C. [1989, c. 764, §16 (RPR).]

E. Meduxnekeag River Drainage.

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(1) Meduxnekeag River, main stem.

(a) From the outlet of Meduxnekeag Lake to the international boundary - Class B.
This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(2) Meduxnekeag River, tributaries - Class B unless otherwise specified.

(a) North Branch of the Meduxnekeag River and its tributaries above the Monticello - T.C, R.2, W.E.L.S. boundary - Class A.

(b) The North Branch of the Meduxnekeag River and its tributaries, including Dead Stream, from the source in T8 R3 WELS to the international boundary is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(bc) Moose Brook and its tributaries, upstream of the Ludlow Road in Ludlow - Class A.

(ed) South Branch of the Meduxnekeag River and its tributaries, upstream of the Oliver Road in Cary - Class A.

(de) Captain Ambrose Bear Stream and tributaries upstream of the Burnt Brow Bridge in Hammond - Class A.

(f) All tributaries from the outlet of Meduxnekeag Lake to the international boundary - These segments are subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

F. St. John River, minor tributaries, those waters lying within the State - Class A unless otherwise specified.

(1) Except as otherwise classified, all minor tributaries of the St. John River entering below the international bridge in Fort Kent, those waters lying within the State - Class B.

(2) Baker Stream and Baker Branch of the St. John River, from the headwaters at the Upper First St. John Pond to their confluence with the Southwest Branch - Class AA.

(3) Big Black River, from the international boundary to its confluence with the St. John River - Class AA.

(4) Northwest Branch, from the outlet of Beaver Pond in T.12, R.17, W.E.L.S. to its confluence with the St. John River - Class AA.

(5) Prestile Stream from its source to Route 1A in Mars Hill - Class A. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

(6) Southwest Branch, from a point located 5 miles downstream of the international boundary to its confluence with the Baker Branch - Class AA.

(7) Violette Stream and its tributaries, from its source to the confluence with Caniba Brook - Class A.

Sec. 8. 38 MRS §468, sub-§8, as amended by PL 2003, c. 663, §§5, 6 is further amended to read:

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8. Washington County. Those waters draining directly or indirectly into tidal waters of Washington County, including impoundments of the Pennamaquan River, with the exception of the Dennys River Basin, the East Machias River Basin, the Machias River Basin, the Narraguagus River Basin and the Pleasant River Basin - Class B unless otherwise specified.

A. Jonesboro.

(1) Chandler River and its tributaries above the highway bridge on Route 1 - Class A.

B. Whiting.

(1) Orange River and its tributaries above the highway bridge on Route 1 - Class A.

C.

D.

E.

F.

G.

H.

I.

J. Edmunds.

(1) Hobart Stream - Class AA.

K. Steuben.

(1) Whitten Parritt Stream - Class A.

(2) Tunk Stream and tributaries upstream of Route 1 - Class A.

L. Harrington.

(1) Harrington River and tributaries - Class A.

M. Columbia.

(1) Harrington River and tributaries - Class A.

N. Addison.

(1) Indian River - Class A.

O. Jonesport.

(1) Indian River - Class A.

P. Perry.

(1) Boyden Stream - Class B. This segment is subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

Sec. 9. 38 MRS §469, sub-§7, as amended by PL 2011, c. 206, §11, is further amended to read:

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7. Washington County. All estuarine and marine waters lying within the boundaries of Washington County and that are not otherwise classified are Class SB waters.

A. Beals.

(1) Tidal waters lying east of the line extending from the westernmost point of Three Falls Point to the easternmost point of Crumple Island; thence south along longitude 67°-36'-47" W. - Class SA.

(2) Tidal waters lying south of a line extending from the easternmost point of the southern shore of the Mud Hole; thence extending along latitude 44°-29'-00" N. to the town line - Class SA. [1989, c. 764, §29 (RPR).]

B. Calais.

(1) Tidal waters of the St. Croix River and its tidal tributaries lying westerly of longitude 67°-14'-28" W. - Class SC. [1989, c. 764, §29 (RPR).]

C. Cutler.

(1) All tidal waters except those waters in Machias Bay and Little Machias Bay north of a line running from the town line due east to the southernmost point of Cross Island; thence running northeast to the southeasternmost point of Cape Wash Island; thence running northeast to the westernmost point of Deer Island; thence running due north to the mainland; and those waters lying northwest of a line running from the easternmost point of Western Head to the easternmost point of Eastern Knubble - Class SA. [1991, c. 499, §18 (AMD).]

D. Eastport.

(1) Tidal waters lying southerly of latitude 44°-54'-50" N., easterly of longitude 67°-02'-00" W. and northerly of latitude 44°-53'-15" N. - Class SC. [1989, c. 764, §29 (RPR).]

E. Edmunds.

(1) All tidal waters - Class SA. [1989, c. 764, §29 (NEW).]

F. Lubec.

(1) Tidal waters, except those lying within 500 feet of West Quoddy Head Light, south of a line beginning at a point located on the northern shore of West Quoddy Head at latitude 44°-49'-22" N., longitude 66°-59'-17" W. and running northeast to the international boundary at latitude 44°-49'-45" N., longitude 66°-57'-57" W. - Class SA.

(2) Tidal waters west of a line running from the easternmost point of Youngs Point to the easternmost point of Leighton Neck in Pembroke - Class SA. [1989, c. 764, §29 (NEW).]

G. Milbridge.

(1) Tidal waters south of a line running from the Steuben - Milbridge town line along latitude 44°-27'-39" N. to the northernmost point of Currant Island; thence running easterly to a point 1,000 feet from mean high tide on the northernmost point of Pond Island; thence along a line running 1,000 feet from mean high tide along the east side of Pond Island to the southernmost point of the island; thence running due south - Class SA. [1999, c. 277, §30 (AMD).]

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H. Pembroke.

- (1) Tidal waters west of a line running from the easternmost point of Leighton Neck to the easternmost point of Youngs Point in Lubec - Class SA. [1989, c. 764, §29 (NEW).]

I. Perry.

- (1) Tidal waters south of a line running from Gleason Point easterly to the international boundary; thence southerly to the town line with Quoddy; thence westerly to the Old Eastport Road; including Boyden Stream and the Little River. – Class SB. These waters are subject to a sustenance fishing designated use pursuant to 38 MRS § 466, sub-§10-A.

II. Steuben.

- (1) Tidal waters southeast of a line beginning at Yellow Birch Head at latitude 44°-25'-05" N.; thence running to longitude 67°-55'-00" W.; thence running due south along longitude 67°-55'-00" W. - Class SA.
- (2) Tidal waters southwest of a line beginning at a point located south of Carrying Place Cove at latitude 44°-26'-18" N., longitude 67°-53'-14" W.; thence running along latitude 44°-26'-18" N. east to the town line - Class SA. [1989, c. 764, §29 (NEW).]

JK. Trescott.

- (1) All tidal waters - Class SA. [1989, c. 764, §29 (NEW).]

KL. Whiting.

- (1) Tidal waters of the Orange River - Class SA. [1989, c. 764, §29 (NEW).]

Sec. 10. Rulemaking. The Department of Environmental Protection shall adopt rules no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established pursuant to Sections 1-10 of this bill. Rules adopted under this section are routine technical rules as defined in the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A.

SUMMARY

This bill creates a sustenance fishing designated use as a subcategory of the applicable fishing designated use for certain specified water body segments within Maine's water classification program, Maine Revised Statutes, Title 38, chapter 3, subchapter 1, article 4-A, where there is or may be sustenance fishing or increased fish consumption by members of the Indian tribes in Maine or other Maine citizens. This bill also requires that the Department of Environmental Protection adopt routine technical rules no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established by this bill. This bill limits the scope of the sustenance fishing designated use created by this bill by providing that, for all purposes, including for purposes of Maine's water classification program, the Federal Clean Water Act, and related regulations and guidance, the sustenance fishing designated use created by this bill is deemed protected through water quality criteria for human health calculated and established for the identified water body segments using, in addition to the other assumptions used in developing human health criteria

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generally, *see* 38 M.R.S. § 420(2); 06-096 C.M.R. ch. 584, § 5, a fish consumption rate of 200 grams per day and a cancer risk level, except for inorganic arsenic which is governed by 38 MRS § 420(2)(J), of one in 1,000,000. The designation in this bill of specific waters subject to a sustenance fishing designated use is not intended to preclude a future designation of other such waters through a similar legislative process or as otherwise provided for by law.

All aspects of this bill, including the sustenance fishing designated use and the identification of specific water body segments subject to that use, are intended to have meaning and effect within Maine's water classification program only and for purposes of calculating and establishing water quality criteria for human health sufficient to protect the sustenance fishing designated use only. Nothing in this bill or the designated use of sustenance fishing it creates is intended to apply to or affect discharges of mercury, which are governed exclusively by separate provisions of law, including 38 MRS § 420(1-B) and 38 MRS § 413(11). This bill changes the human health ambient criterion specified in 38 MRS § 420(1-B)(A)(2) to reflect the 200 grams per day fish consumption rate that the Department shall use when deriving human health criteria for toxics to protect the sustenance fishing designated use, but this change is not intended to affect the mercury discharge limits set forth in 38 MRS § 420(1-B) and 38 MRS § 413(11). Nothing in this bill is intended to alter or affect in any way any provision of any of Maine's State and Federal Indian settlement acts, including the State Indian settlement acts in the Maine Revised Statutes, Title 30, chapters 601 and 603. In addition, no part of this bill is intended to relate to or affect in any way any claims or disputes regarding any definition of Indian country, territory, lands, waters, reservations, or rights of any kind under any other provision of State or Federal law. Furthermore, no part of this bill is intended to create or limit any right or protection under any other State or Federal law, including the Federal Clean Water Act (except as described in this summary) or any State or Federal Indian settlement law or act, or create in any way a right to any particular quantity or quality of fish. The sole intent of this bill is to create a sustenance fishing designated use that is deemed protected for all purposes through water quality criteria for human health calculated and established, through routine technical rulemaking, using a specific minimum fish consumption rate and specified cancer risk levels for the waters expressly identified in Maine's water classification system, which criteria are applicable for purposes of Maine's water classification program and the Federal Clean Water Act.

1 L.D. 1775
2 Date: (Filing No. H-)

3 **ENVIRONMENT AND NATURAL RESOURCES**

4 Reproduced and distributed under the direction of the Clerk of the House.

5 **STATE OF MAINE**
6 **HOUSE OF REPRESENTATIVES**
7 **129TH LEGISLATURE**
8 **FIRST REGULAR SESSION**

9 COMMITTEE AMENDMENT “ ” to H.P. 1262, L.D. 1775, Bill, “An Act To
10 Protect Sustenance Fishing”

11 Amend the bill in section 6 in paragraph A by striking out all of subparagraph (1)
12 (page 3, lines 6 to 9 in L.D.) and inserting the following:

13 '(1) From the confluence of the East Branch and the West Branch to the
14 confluence of the Mattawamkeag River, including all impoundments - Class C.
15 This segment is subject to a sustenance fishing designated use pursuant to section
16 466-A.'

17 Amend the bill in section 7 in paragraph B in subparagraph (1) by striking out all of
18 divisions (c) and (d) (page 3, lines 38 and 39 and page 4, lines 1 to 4 in L.D.) and
19 inserting the following:

20 '(c) From a point located 1,000 feet downstream from the dam at the outlet
21 of Grand Lake Mattagamon to its confluence with the ~~West Branch~~
22 Mattaceunk impoundment as it existed on July 14, 1990 - Class AA. This
23 segment is subject to a sustenance fishing designated use pursuant to section
24 466-A.

25 '(d) From its confluence with the Mattaceunk impoundment as it existed on
26 July 14, 1990 to its confluence with the West Branch - Class B. Further,
27 there may be no new direct discharges to this segment after January 1, 2019.
28 This segment is subject to a sustenance fishing designated use pursuant to
29 section 466-A.'

30 Amend the bill in section 8 in paragraph D by striking out all of subparagraph (2)
31 (page 4, lines 27 to 35 in L.D.) and inserting the following:

32 '(2) Mattawamkeag River, tributaries - Class A unless otherwise specified.

33 (a) East Branch Mattawamkeag River above Red Bridge - Class B.

COMMITTEE AMENDMENT “ ” to H.P. 1262, L.D. 1775

1 ~~(b) West Branch Mattawamkeag River from Interstate 95 to its confluence~~
2 ~~with Mattawamkeag Lake - Class B.~~

3 ~~(c) Fish Stream - Class B.~~

4 (d) West Branch Mattawamkeag River from its source at Rockabema Lake
5 to its confluence with Mattawamkeag Lake - Class A. This segment is
6 subject to a sustenance fishing designated use pursuant to section 466-A.'

7 Amend the bill by striking out all of section 14 and inserting the following:

8 'Sec. 14. 38 MRSA §468, sub-§8, ¶¶P and Q are enacted to read:

9 P. Cherryfield.

10 (1) Tunk Stream and its tributaries - Class A.

11 Q. Perry.

12 (1) Boyden Stream - Class B. This segment is subject to a sustenance fishing
13 designated use pursuant to section 466-A.'

14 Amend the bill by relettering or renumbering any nonconsecutive Part letter or
15 section number to read consecutively.

16 SUMMARY

17 To ensure proper application of the sustenance fishing designated use proposed in the
18 bill, this amendment amends the bill by updating the classifications for certain waters
19 based on water quality data and by clarifying the description of certain water body
20 segments.

21 This bill as amended creates a sustenance fishing designated use as a subcategory of
22 the applicable fishing designated use for certain specified water body segments within
23 Maine's water classification program where there is or may be sustenance fishing or
24 increased fish consumption by members of the Indian tribes in Maine or other Maine
25 citizens. This bill as amended also requires that the Department of Environmental
26 Protection adopt routine technical rules no later than March 1, 2020 that calculate and
27 establish water quality criteria protective of human health for toxic pollutants and the
28 sustenance fishing designated use as established by this bill. This bill as amended limits
29 the scope of the sustenance fishing designated use created by this bill by providing that,
30 for all purposes, including for the purposes of the State's water classification program,
31 the federal Clean Water Act and related rules, regulations and guidance, the sustenance
32 fishing designated use created by this bill as amended is deemed protected through water
33 quality criteria for human health calculated and established for the identified water body
34 segments using, in addition to the other assumptions used in developing human health
35 criteria generally under the Maine Revised Statutes, Title 38, section 420, subsection 2
36 and rules adopted by the department, a fish consumption rate of 200 grams per day and a
37 cancer risk level of one in 1,000,000, except for inorganic arsenic, the risk level for which
38 is governed by Title 38, section 420, subsection 2, paragraph J. The designation in this
39 bill as amended of specific waters subject to a sustenance fishing designated use is not

COMMITTEE AMENDMENT “ ” to H.P. 1262, L.D. 1775

1 intended to preclude a future designation of other such waters through a similar
2 legislative process or as otherwise provided by law.

3 All aspects of this bill as amended, including the sustenance fishing designated use
4 and the identification of specific water body segments subject to that use, are intended to
5 have meaning and effect within the State’s water classification program only and for
6 purposes of calculating and establishing water quality criteria for human health sufficient
7 to protect the sustenance fishing designated use only. Nothing in this bill as amended or
8 the sustenance fishing designated use it establishes is intended to apply to or affect
9 discharges of mercury, which are governed exclusively by separate provisions of law,
10 including Title 38, section 420, subsection 1-B and section 413, subsection 11. This bill
11 as amended changes the human health ambient criterion specified in Title 38, section 420,
12 subsection 1-B, paragraph A, subparagraph (2) to reflect the 200 grams per day fish
13 consumption rate that the Department of Environmental Protection is directed to use
14 when deriving human health criteria for toxic pollutants to protect the sustenance fishing
15 designated use; however, this change is not intended to affect the mercury discharge
16 limits set forth in Title 38, section 420, subsection 1-B and section 413, subsection 11.
17 Nothing in this bill as amended is intended to alter or affect in any way any provision of
18 any of the State’s state and federal Indian settlement acts, including the state Indian
19 settlement acts in Title 30, chapters 601 and 603. No part of this bill as amended is
20 intended to relate to or affect in any way any claims or disputes regarding any definition
21 of Indian country, territory, lands, waters, reservations or rights of any kind under any
22 other provision of state or federal law. No part of this bill as amended is intended to
23 create or limit any right or protection under any other state or federal law, including the
24 federal Clean Water Act, except as described in this summary, or any state or federal
25 Indian settlement law or act, or create in any way a right to any particular quantity or
26 quality of fish. The sole intent of this bill as amended is to establish a sustenance fishing
27 designated use that is deemed protected for all purposes through water quality criteria for
28 human health calculated and established through routine technical rulemaking using a
29 specific minimum fish consumption rate and specified cancer risk levels for the waters
30 expressly identified in the State’s water classification program, which criteria are
31 applicable for the purposes of the State’s water classification program and the federal
32 Clean Water Act.

APPROVED

CHAPTER

JUNE 21, 2019

463

BY GOVERNOR

PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND NINETEEN

H.P. 1262 - L.D. 1775

An Act To Protect Sustenance Fishing

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §420, sub-§1-B, ¶A, as enacted by PL 2001, c. 418, §3, is amended to read:

A. The ambient criteria for mercury are as follows:

(1) Ambient water quality criteria for aquatic life:

(a) Freshwater acute: 1.7 micrograms per liter;

(b) Freshwater chronic: 0.91 micrograms per liter;

(c) Saltwater acute: 2.1 micrograms per liter; and

(d) Saltwater chronic: 1.1 micrograms per liter; and

(2) Fish tissue residue criterion for human health: 0.2 milligrams per kilogram in the edible portion of fish for all waters, except for those water body segments subject to a sustenance fishing designated use pursuant to article 4-A, which must have a fish tissue residue criterion for human health of 0.03 milligrams per kilogram in the edible portion of fish.

Sec. 2. 38 MRSA §465-A, sub-§1, ¶C, as amended by PL 2013, c. 193, §4, is further amended to read:

C. There may be no new direct discharge of pollutants into Class GPA waters. The Notwithstanding paragraph D, section 466-A or any other provision of law to the contrary, the following are exempt from this provision:

(1) Chemical discharges for the purpose of restoring water quality approved by the department;

(2) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species;

- (3) Storm water discharges that are in compliance with state and local requirements;
- (4) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; and
- (5) Discharges of pesticides approved by the department that are:
 - (a) Unintended and an incidental result of the spraying of pesticides;
 - (b) Applied in compliance with federal labeling restrictions; and
 - (c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. Materials may not be placed on or removed from the shores or banks of a Class GPA water body in such a manner that materials may fall or be washed into the water or that contaminated drainage may flow or leach into those waters, except as permitted pursuant to section 480-C. A change of land use in the watershed of a Class GPA water body may not, by itself or in combination with other activities, cause water quality degradation that impairs the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters.

Sec. 3. 38 MRSA §465-A, sub-§1, ¶D is enacted to read:

D. The following waters are subject to a sustenance fishing designated use pursuant to section 466-A: Conroy Lake in Monticello; Grand Lake Matagamom in Trout Brook Township and T.6 R.8 W.E.L.S.; Mattamiscontis Lake in T.3 R.9 N.W.P. and T.2 R.9 N.W.P.; Grand Falls Flowage, Berry Brook Flowage, George Brook Flowage, Huntley Brook Flowage, Lewey Lake, The Basin, The Narrows, Long Lake and Big Lake, adjacent to Indian Township; and Sysladobsis Lake in T.5 N.D.

Sec. 4. 38 MRSA §466, sub-§10-A is enacted to read:

10-A. Sustenance fishing designated use. "Sustenance fishing designated use" is a subcategory of the applicable fishing designated use that protects human consumption of fish for nutritional and cultural purposes and applies only to those water body segments that are identified in this article as subject to a sustenance fishing designated use.

Sec. 5. 38 MRSA §466-A is enacted to read:

§466-A. Sustenance fishing designated use

1. Water quality criteria. To protect the sustenance fishing designated use designated under this article, the department shall calculate and establish water quality

criteria for human health using a fish consumption rate of 200 grams per day and a cancer risk level of one in 1,000,000, except that the cancer risk level for inorganic arsenic is governed by section 420, subsection 2, paragraph J.

2. Criteria deemed protective. For all purposes, the sustenance fishing designated use established under this article is deemed protected through the water quality criteria for human health calculated and established by the department for the water body segments subject to a sustenance fishing designated use under this article.

3. Limitation; construction. Nothing in this section and nothing in the designation in this article of a sustenance fishing designated use may be construed to:

A. Create any other right or protection, including a right to any particular quantity or quality of fish;

B. Limit any right or protection otherwise existing in law; or

C. Alter or affect the regulation of mercury in discharges, which is governed exclusively by section 413, subsection 11 and section 420, subsection 1-B.

Sec. 6. 38 MRSA §467, sub-§7, ¶A, as amended by PL 2003, c. 317, §12, is further amended to read:

A. Penobscot River, main stem.

(1) From the confluence of the East Branch and the West Branch to the confluence of the Mattawamkeag River, including all impoundments - Class C B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(2) From the confluence of the Mattawamkeag River to the confluence of Cambolasse Stream - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(3) From the confluence of Cambolasse Stream to the West Enfield Dam - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(5) From the West Enfield Dam, ~~including the Stillwater Branch,~~ to the ~~Veazie~~ Milford Dam, including all impoundments, ~~and the Stillwater Branch~~ - Class B. That portion of this segment upstream of the Milford Dam and upstream of the Gilman Falls Dam at Route 43 is subject to a sustenance fishing designated use pursuant to section 466-A.

(6) From the ~~Veazie~~ Milford Dam, but not including the ~~Veazie~~ Milford Dam, to the Maine Central Railroad bridge in Bangor-Brewer - Class B. Further, the Legislature finds that the free-flowing habitat of this river segment provides irreplaceable social and economic benefits and that this use must be maintained.

(7) From the Maine Central Railroad bridge in Bangor to a line extended in an east-west direction from a point 1.25 miles upstream of the confluence of Reeds Brook in Hampden - Class B. Further, the Legislature finds that the free-flowing

habitat of this river segment provides irreplaceable social and economic benefits and that this use must be maintained.

Sec. 7. 38 MRSA §467, sub-§7, ¶B, as repealed and replaced by PL 1989, c. 764, §7, is amended to read:

B. Penobscot River, East Branch Drainage.

(1) East Branch of the Penobscot River, main stem.

(a) Above its confluence with Grand Lake Mattagamon - Class A.

(b) From the dam at the outlet of Grand Lake Mattagamon to a point located 1,000 feet downstream from the dam - Class A. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(c) From a point located 1,000 feet downstream from the dam at the outlet of Grand Lake Mattagamon to its confluence with the ~~West Branch~~ Mattaceunk impoundment as it existed on July 14, 1990 - Class AA. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(d) From its confluence with the Mattaceunk impoundment as it existed on July 14, 1990 to its confluence with the West Branch - Class B. Further, there may be no new direct discharges to this segment after January 1, 2019. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(2) East Branch of the Penobscot River, tributaries - Class A unless otherwise specified.

(a) All tributaries, any portion of which is located within the boundaries of Baxter State Park - Class AA.

(b) Sawtelle Brook, from a point located 1,000 feet downstream from the dam at the outlet of Sawtelle Deadwater to its confluence with the Seboeis River - Class AA.

(c) Seboeis River, from the outlet of Snowshoe Lake to its confluence with the East Branch - Class AA.

(d) Wassataquoik Stream, from the boundary of Baxter State Park to its confluence with the East Branch - Class AA.

(e) Webster Brook, from a point located 1,000 feet downstream from the dam at the outlet of Telos Lake to its confluence with Webster Lake - Class AA.

Sec. 8. 38 MRSA §467, sub-§7, ¶D, as amended by PL 1999, c. 277, §11, is further amended to read:

D. Mattawamkeag River Drainage.

(1) Mattawamkeag River, main stem.

(a) From the confluence of the East Branch and the West Branch to the Kingman-Mattawamkeag boundary - Class A.

- (b) From the Kingman-Mattawamkeag boundary to its confluence with the Penobscot River - Class AA.
- (2) Mattawamkeag River, tributaries - Class A unless otherwise specified.
 - (a) East Branch Mattawamkeag River above Red Bridge - Class B.
 - ~~(b) West Branch Mattawamkeag River from Interstate 95 to its confluence with Mattawamkeag Lake - Class B.~~
 - ~~(c) Fish Stream - Class B.~~
 - (d) West Branch Mattawamkeag River from its source at Rockabema Lake to its confluence with Mattawamkeag Lake - Class A. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

Sec. 9. 38 MRSA §467, sub-§13, as amended by PL 2009, c. 163, §9, is further amended to read:

13. St. Croix River Basin.

A. St. Croix River, main stem.

- (1) Except as otherwise provided, from the outlet of Chiputneticook Lakes to its confluence with the Woodland Lake impoundment, those waters lying within the State - Class A. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.
- (2) Those waters impounded in the Grand Falls Flowage including those waters between Route 1 (Princeton and Indian Township) and Grand Falls Dam - Class GPA. These waters are subject to a sustenance fishing designated use pursuant to section 466-A.
- (3) Woodland Lake impoundment - Class C.
- (4) From the Woodland Dam to tidewater, those waters lying within the State, including all impoundments - Class C.

B. St. Croix River, tributaries, those waters lying within the State - Class B unless otherwise specified.

- (1) All tributaries entering upstream from the dam at Calais, the drainage areas of which are wholly within the State - Class A unless otherwise classified.
- (2) Tomah Stream - Class AA. This stream is subject to a sustenance fishing designated use pursuant to section 466-A.
- (3) Monument Brook - Class A.
- (4) Waters connecting the Chiputneticook Lakes, including The Thoroughfare, Forest City Stream and Mud Lake Stream - Class A.
- (5) Berry Brook, George Brook, Huntley Brook, Musquash Stream, Flipper Creek, Patten Pond Stream and all segments of the West Branch of the St. Croix River between the West Grand Lake Dam and Route 1 - Class A. These waters are subject to a sustenance fishing designated use pursuant to section 466-A.

Sec. 10. 38 MRSA §467, sub-§15, ¶A, as repealed and replaced by PL 1989, c. 764, §16, is amended to read:

A. St. John River, main stem.

(1) From the confluence of the Northwest Branch and the Southwest Branch to a point located one mile above the foot of Big Rapids in Allagash - Class AA. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(2) From a point located one mile above the foot of Big Rapids in Allagash to the international bridge in Fort Kent, those waters lying within the State, including all impoundments - Class A.

(3) From the international bridge in Fort Kent to the international bridge in Madawaska, those waters lying within the State, including all impoundments - Class B.

(4) From the international bridge in Madawaska to where the international boundary leaves the river in Hamlin, those waters lying within the State, including all impoundments - Class C.

Sec. 11. 38 MRSA §467, sub-§15, ¶C, as amended by PL 2017, c. 137, Pt. B, §9, is further amended to read:

C. Aroostook River Drainage.

(1) Aroostook River, main stem.

(a) From the confluence of Millinocket Stream and Munsungan Stream to the Route 11 bridge - Class AA. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(b) From the Route 11 bridge to the Sheridan Dam - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(c) From the Sheridan Dam to its confluence with Presque Isle Stream, including all impoundments - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(d) From its confluence with Presque Isle Stream to a point located 3.0 miles upstream of the intake of the Caribou water supply, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(e) From a point located 3.0 miles upstream of the intake of the Caribou water supply to a point located 100 yards downstream of the intake of the Caribou water supply, including all impoundments - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(f) From a point located 100 yards downstream of the intake of the Caribou water supply to the international boundary, including all impoundments - Class C. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(2) Aroostook River, tributaries, those waters lying within the State - Class A unless otherwise specified.

(a) All tributaries of the Aroostook River entering below the confluence of the Machias River that are not otherwise classified - Class B.

(b) Little Machias River and its tributaries - Class A.

(c) Little Madawaska River and its tributaries, including Madawaska Lake tributaries above the Caribou-Connor Township line - Class A.

(d) Machias River, from the outlet of Big Machias Lake to the Aroostook River - Class AA. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(e) Millinocket Stream, from the outlet of Millinocket Lake to its confluence with Munsungan Stream - Class AA.

(f) Munsungan Stream, from the outlet of Little Munsungan Lake to its confluence with Millinocket Stream - Class AA.

(g) Presque Isle Stream and its tributaries above the Mapleton-Presque Isle town line - Class A.

(h) St. Croix Stream from its confluence with Hall Brook in T.9, R.5, W.E.L.S. to its confluence with the Aroostook River - Class AA.

(j) Scopan Stream from the outlet of Scopan Lake to its confluence with the Aroostook River - Class C.

(k) Limestone Stream from the Long Road bridge to the Canadian border - Class C.

(l) Beaver Brook and its tributaries (T.14 R.6 W.E.L.S., T.14 R.5 W.E.L.S., T.13 R.5 W.E.L.S., Portage Lake, Ashland, Castle Hill) - Class A.

(m) Gardner Brook and its tributaries (T.14 R.5 W.E.L.S., T.13 R.5 W.E.L.S., Wade) - Class A.

Sec. 12. 38 MRSA §467, sub-§15, ¶E, as amended by PL 2015, c. 12, §1, is further amended to read:

E. Meduxnekeag River Drainage.

(1) Meduxnekeag River, main stem.

(a) From the outlet of Meduxnekeag Lake to the international boundary - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(2) Meduxnekeag River, tributaries - Class B unless otherwise specified.

(a) North Branch of the Meduxnekeag River and its tributaries above the Monticello - T.C, R.2, W.E.L.S. boundary - Class A.

(a-1) The North Branch of the Meduxnekeag River and its tributaries, including Dead Stream, from the source in T.8 R.3 W.E.L.S. to the

international boundary are subject to a sustenance fishing designated use pursuant to 466-A.

(b) Moose Brook and its tributaries, upstream of the Ludlow Road in Ludlow - Class A.

(c) South Branch of the Meduxnekeag River and its tributaries, upstream of the Oliver Road in Cary - Class A.

(d) Captain Ambrose Bear Stream and tributaries upstream of the Burnt Brow Bridge in Hammond - Class A.

(e) All tributaries from the outlet of Meduxnekeag Lake to the international boundary are subject to a sustenance fishing designated use pursuant to 466-A.

Sec. 13. 38 MRSA §467, sub-§15, ¶F, as amended by PL 2017, c. 137, Pt. B, §10, is further amended to read:

F. St. John River, minor tributaries, those waters lying within the State - Class A unless otherwise specified.

(1) Except as otherwise classified, all minor tributaries of the St. John River entering below the international bridge in Fort Kent, those waters lying within the State - Class B.

(2) Baker Stream and Baker Branch of the St. John River, from the headwaters at the Upper First St. John Pond to their confluence with the Southwest Branch - Class AA.

(3) Big Black River, from the international boundary to its confluence with the St. John River - Class AA.

(4) Northwest Branch, from the outlet of Beaver Pond in T.12, R.17, W.E.L.S. to its confluence with the St. John River - Class AA.

(5) Prestile Stream from its source to Route 1A in Mars Hill - Class A. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(a) Prestile Stream from Route 1A in Mars Hill to the international boundary - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

(6) Southwest Branch, from a point located 5 miles downstream of the international boundary to its confluence with the Baker Branch - Class AA.

(7) Violette Stream and its tributaries, from its source to the confluence with Caniba Brook - Class A.

Sec. 14. 38 MRSA §468, sub-§8, ¶¶P and Q are enacted to read:

P. Cherryfield.

(1) Tunk Stream and its tributaries - Class A.

Q. Perry.

(1) Boyden Stream - Class B. This segment is subject to a sustenance fishing designated use pursuant to section 466-A.

Sec. 15. 38 MRSA §469, sub-§7, ¶H-1 is enacted to read:

H-1. Perry.

(1) Tidal waters south of a line running from Gleason Point easterly to the international boundary, thence southerly to the town line with Quoddy, thence westerly to the Old Eastport Road, including Boyden Stream and the Little River - Class SB. These waters are subject to a sustenance fishing designated use pursuant to section 466-A.

Sec. 16. Rulemaking. The Department of Environmental Protection shall adopt rules no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established pursuant to this Act. Rules adopted under this section are routine technical rules as defined in the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A.

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

STATE OF MAINE, *et al.*,

Plaintiffs,

v.

ANDREW WHEELER,
Administrator, U.S. Environmental
Protection Agency, *et al.*,

Defendants.

Civil Action No. 1:14-cv-264-JDL

EPA’S SECOND STATUS REPORT ON REMAND

On December 3, 2018, the Court granted the Environmental Protection Agency’s (“EPA”) motion for a voluntary remand. On January 9, 2019, the Court entered a Scheduling Order requiring that EPA file status reports at 90-day intervals. (ECF Doc. 172).¹ In accordance with the Court’s Scheduling Order, EPA previously filed its First Status Report with the Court on April 9, 2019. (ECF Doc. 178). EPA hereby respectfully submits its Second Status Report on Remand.

As discussed in the First Status Report, EPA, the State of Maine, and the Tribal-intervenors have been engaged in efforts to explore the possibility of the State of Maine taking a new approach to address sustenance fishing through a combination of legislative and regulatory

¹ Under the Scheduling Order, EPA is to “address the steps EPA has taken and intends to take during remand and the anticipated timing, including consultation with Maine and the Tribes as appropriate; its public notice of revised decisions on remand; the opportunity for public comment on such proposal; and the status of the EPA’s consideration of relevant comments it receives before reaching its final decisions on remand.” (ECF Doc. 172 at 1-2).

actions. Those efforts resulted in the Governor of Maine recently introducing a bill in the State Legislature entitled “An Act to Protect Sustenance Fishing” (“Bill”). (H.P. 1262, 129th Leg., 1st Reg. Sess. (ME 2019)).² Among other things, the Bill sets forth a “sustenance fishing designated use” subcategory of the applicable fishing designated use in certain enumerated waterbodies. (*Id.* at § 4). The Bill also directs the Maine Department of Environmental Protection (DEP) to adopt rules “no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established pursuant to this Act.” (*Id.* at § 16).

At the May 29, 2019, hearing before the joint Maine Legislature’s Environment and Natural Resources Committee, Chief Kirk Francis of the Penobscot Nation testified that “the Nation is [] optimistic that if the proposed legislation is adopted in its current form, it could potentially avert any remaining litigation between the Nation and Maine in [this] proceeding.”³ Similarly, Commissioner Gerald Reid of the Maine Department of Environmental Protection (“DEP”) testified that “if this bill is enacted in its current form, I expect that it will ... allow for the settlement of the lawsuit still pending in federal court.”⁴ Deborah A. Szaro, the acting Regional Administrator for EPA Region 1, submitted letters to both Commissioner Reid and to the Chairmen of the Committee on Environment and Natural Resources.⁵ In both letters, Ms. Szaro

² Available at <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1262&item=1&snum=129>.

³ Available at <http://legislature.maine.gov/legis/bills/getTestimonyDoc.asp?id=127871>.

⁴ Available at <http://legislature.maine.gov/legis/bills/getTestimonyDoc.asp?id=127872>.

⁵ Available at <http://legislature.maine.gov/legis/bills/getTestimonyDoc.asp?id=127874>.

stated that “if the proposed legislation is adopted in its current form, EPA Region 1 is optimistic that it could potentially result in approval, in connection with EPA’s reconsideration of its 2015 decisions on Maine’s water quality standards that have been remanded by the district court and are currently pending before the agency.”

The Maine Legislature passed the Bill on June 10, 2019.⁶ Governor Janet T. Mills signed the bill into law on June 21, 2019.⁷

EPA continues to evaluate the timing for taking actions on remand in light of the State’s ongoing effort to address sustenance fishing through the enacted legislation and the subsequent required DEP rulemaking. EPA notes that the State must submit both the new “sustenance fishing designated use” and related provisions contained in the Bill, and the subsequent DEP rulemaking, to the EPA for review and approval pursuant to Section 303(c)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c)(2)(A). Such submissions from the State would be closely related to the issues EPA must decide as part of this remand. Therefore, EPA anticipates acting either concurrently, or sequentially but close in time, on both the new state submission and the decisions on remand. Additionally, the parties are considering options on how to resolve this litigation.

As for the timing of those decisions, upon receiving the State’s submission of its new water quality standards, pursuant to CWA Section 303(c)(3), EPA must either approve the submissions within sixty days or disapprove them within ninety days. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a). Consistent with the Court’s Scheduling Order, EPA intends to consult with Maine

⁶ See <http://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280074194>

⁷ *Id.*

and the Tribes as appropriate during this time period, as well to provide public notice and the opportunity to comment on EPA's proposed revised decisions.

EPA has coordinated this Status Report with counsel for all Parties and is authorized to say that no Party objects to this Status Report.

Respectfully submitted,

/s/ Daniel R. Dertke

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Date: July 8, 2019

CERTIFICATE OF SERVICE

It is hereby certified that all counsel of record who have consented to electronic service are being served with a copy of the foregoing EPA's First Status Report on Remand this 8th day of July 2019. Any other counsel of record will be served by first class U.S. mail.

s/Daniel R. Dertke