

Public Notice of the EPA’s Proposals to 1) Withdraw its February 2, 2015 Clean Water Act Section 303(c) Approval of Maine’s “Fishing” Designated Use for All Waters in Indian Lands with the Interpretation that for Such Waters the Use Means “Sustenance Fishing”; 2) Withdraw its February 2, 2015 Clean Water Act Section 303(c) Approval of Provisions in the Maine Implementing Act as a Sustenance Fishing Designated Use for Certain Reservation Waters; 3) Approve Maine’s “Fishing” Designated Use for All Waters in Indian Lands Without the Interpretation that for Such Waters the Use Means “Sustenance Fishing”; and 4) Withdraw its February 2, 2015, Clean Water Act Section 303(c) Disapprovals of Human Health Criteria for Waters in Indian Lands.

Summary

On February 2, 2015, the EPA approved many of Maine’s new and revised water quality standards (WQS), and disapproved some of them, as they applied to waters in Indian lands in Maine. Among the approvals were the EPA’s interpretation and approval of Maine’s “fishing” designated use to mean “sustenance fishing” for all waters in Indian lands (i.e., all waters associated with reservations and trust lands of the four federally-recognized Indian tribes in Maine). The EPA also interpreted certain provisions in the Maine Implementing Act (MIA) (specifically 30 MRSA § 6207, sub-§§ 4 and 9) as a sustenance fishing designated use for the inland waters of the Penobscot Nation’s and the Passamaquoddy Tribe’s reservations, and approved those provisions accordingly. The EPA made these interpretations despite the fact that the State had never described or defined its fishing use to mean sustenance fishing in any waters. The EPA then disapproved a number of Maine’s human health criteria (HHC) as being inadequate to protect the sustenance fishing designated uses (SFDU) that the EPA unilaterally interpreted and approved.

Maine challenged the EPA’s approvals of the SFDUs and the EPA’s disapprovals of the HHC in federal district court in *Maine v. Wheeler*, 1:14-cv-00264-JDL (D. Maine).¹ On July 27, 2018, the EPA filed a motion for a voluntary remand of the challenged decisions, based on the EPA’s stated intention to change, and not defend, its decisions interpreting and approving the SFDUs and its decisions disapproving the HHC. The court granted the EPA’s motion for remand on December 3, 2018, and stayed the case until December 3, 2019, pending the EPA’s reconsideration of its decisions.

Pursuant to the court’s remand, and in accordance with CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, EPA proposes to withdraw its 2015 approvals of the SFDUs, primarily because those decisions exceeded EPA’s statutory authority and failed to appropriately defer to the State’s interpretation of its water quality standards, and to approve Maine’s “fishing” designated use for waters in Indian lands without EPA’s prior interpretation that it means sustenance fishing in such waters. EPA also proposes to withdraw its 2015 disapprovals of HHC for waters in Indian lands because the disapprovals were based on the SFDU decisions that EPA now proposes to withdraw.

¹ The EPA promulgated federal HHC to replace the disapproved HHC on December 19, 2016 (81 Fed. Reg. 92486); these federal HHC have not been challenged in court.

Request for Comment

EPA is requesting comment on its proposal to withdraw EPA's 2015 interpretation and approvals of Maine's "fishing" designated use as a "sustenance fishing" designated use for all waters in Indian lands; and EPA's interpretation and approval of certain provisions in MIA as a sustenance fishing designated use for the inland waters of the Penobscot Nation's and the Passamaquoddy Tribe's reservations; and to withdraw EPA's associated disapprovals of HHC in waters in Indian lands. EPA also seeks comment on its proposal to approve Maine's "fishing" designated use for waters in Indian lands without EPA's interpretation that it means sustenance fishing in such waters. The more detailed bases for EPA's proposals are outlined in the Technical Support Document available at <https://www.epa.gov/wqs-tech/proposed-withdrawal-certain-epa-actions-related-maines-fishing-designated-use>.

Comments on these proposals must be submitted no later than January 21, 2020, to mainewqscomments@epa.gov.

Technical Support Document

The EPA's Proposed Withdrawals of EPA's February 2, 2015, Interpretation and Clean Water Act Section 303(c) Approvals of a Sustenance Fishing Designated Use for Waters in Indian Lands in Maine; Proposed Approval of Maine's Fishing Designated Use Without EPA's Interpretation that it Means Sustenance Fishing for Waters in Indian Lands in Maine; and Proposed Withdrawal of EPA's February 2, 2015 Clean Water Act Section 303(c) Disapproval of Human Health Criteria for Waters in Indian Lands in Maine.

November 6, 2019

I. Introduction

On February 2, 2015, the EPA approved many of Maine's new and revised water quality standards (WQS), and disapproved some of them, as they applied to waters in Indian lands in Maine. Among the approvals were the EPA's interpretation and approval of Maine's "fishing" designated use to mean "sustenance fishing" for all waters in Indian lands (i.e., all waters associated with reservations and trust lands of the four federally-recognized Indian tribes in Maine). The EPA also interpreted certain provisions in the Maine Implementing Act (MIA) (specifically 30 MRSA § 6207, sub-§§ 4 and 9) as a sustenance fishing designated use for the inland waters of the Penobscot Nation's and the Passamaquoddy Tribe's reservations, and approved those provisions accordingly. The EPA made these interpretations despite the fact that the State had never described or defined its fishing use to mean sustenance fishing in any waters. The EPA then disapproved a number of Maine's human health criteria (HHC) as being inadequate to protect the sustenance fishing designated uses (SFDU) that the EPA unilaterally interpreted and approved.

Maine challenged the EPA's approvals of the SFDUs and the EPA's disapprovals of the HHC in federal district court in *Maine v. Wheeler*, 1:14-cv-00264-JDL (D. Maine).² On July 27, 2018, the EPA filed a motion for a voluntary remand of the challenged decisions, based on the EPA's stated intention to change, and not defend, its decisions interpreting and approving the SFDUs and its decisions disapproving the HHC. The court granted the EPA's motion for remand on December 3, 2018, and stayed the case until December 3, 2019, pending the EPA's reconsideration of its decisions.

Pursuant to the court's remand, and in accordance with CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, EPA proposes to withdraw its 2015 approvals of the SFDUs, primarily because those decisions exceeded EPA's statutory authority and failed to appropriately defer to the State's interpretation of its water quality standards, and to approve Maine's "fishing" designated use for waters in Indian lands without EPA's prior interpretation that it means sustenance fishing in such waters. EPA also proposes to withdraw its 2015 disapprovals of HHC for waters in Indian lands because the disapprovals were based on the SFDU decisions that EPA now proposes to withdraw.

II. Background

A. Clean Water Act Requirements for Water Quality Standards

Under Clean Water Act (CWA) section 303(c) and EPA's implementing regulations at 40 C.F.R. Part 131, states have the primary responsibility for reviewing, establishing, and revising water quality standards (WQS), which include the designated uses of a waterbody or waterbody

² The EPA promulgated federal HHC to replace the disapproved HHC on December 19, 2016 (81 Fed. Reg. 92486); these federal HHC have not been challenged in court.

segment and the water quality criteria necessary to protect those designated uses. EPA's regulations at 40 C.F.R. § 131.11(a)(1) provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use."

CWA section 303(c)(2)(B) requires states to adopt numeric water quality criteria for toxic pollutants listed pursuant to section 307(a)(1), 33 U.S.C. § 1317(a)(1), for which EPA has published national recommended criteria under section 304(a), 33 U.S.C. § 1314(a), where the discharge or presence of these toxics could reasonably be expected to interfere with the designated uses adopted by the state. In adopting such criteria, states can establish numeric water quality criteria based on one of the following: (1) section 304(a) criteria; (2) section 304(a) criteria modified to reflect site-specific conditions; or, (3) other scientifically defensible methods. 40 C.F.R. § 131.11(b). For pollutants not addressed by section 303(c)(2)(B), states can establish narrative criteria where numeric criteria cannot be established, or to supplement numeric criteria.

At least once every three years, states are required to review their applicable WQS and, as appropriate, modify these standards or adopt new standards. 40 C.F.R. § 131.20. If a state does not adopt new or revised criteria for parameters for which EPA has published new or updated section 304(a) criteria, the state must provide an explanation when it submits the results of its review. *Id.* CWA section 303(c) requires states to submit new or revised WQS to the EPA for review to determine whether the revisions to surface WQS are consistent with the CWA and EPA's implementing regulations. In addition, the state must follow its own legal procedures for adopting such standards, 40 C.F.R. § 131.5, and submit a certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law. 40 C.F.R. § 131.6(e).

The EPA has developed a frequently asked questions document that sets forth an interpretation of what constitutes a new or revised WQS that the Agency has the CWA section 303(c) authority and duty to approve or disapprove.³ The document outlines a four-part test the Agency uses for determining what constitutes a new or revised WQS:

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?
2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters for the United States?
3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
4. Does the provision establish a new WQS or revise an existing WQS?

³ EPA, *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*, October 2012.

If all four questions are answered “yes,” then the provision likely constitutes a new or revised WQS that is subject to EPA review under CWA section 303(c)(3).

B. Overview of EPA’s February 2015 Review and Decisions on Maine’s Water Quality Standards for Waters in Indian Lands

On January 9, 2013 and February 27, 2014, Maine submitted several new and revised WQS to EPA for review and approval, along with an explicit request that EPA approve its state WQS under the federal CWA to apply to all waters in Maine, including waters in the territories of the federally recognized Indian tribes in Maine (the Penobscot Nation, Passamaquoddy Tribe, Houlton Band of Maliseet Indians, and Aroostook Band of Micmacs). Outside Maine, states generally do not have authority to set environmental standards under statutes administered by the EPA in Indian reservations. But in 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA) to resolve litigation in which the Penobscot Nation and Passamaquoddy Tribe asserted land claims to a large portion of the State of Maine.⁴ MICSA ratified a state statute passed in 1979, the Maine Implementing Act (MIA), which was designed to embody the agreement reached between the State and the Penobscot and Passamaquoddy Tribes.⁵ In 1981, MIA was amended to include provisions for land to be taken into trust for the Houlton Band of Maliseet Indians, as provided for in MICSA.⁶

In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to the status of the Aroostook Band of Micmacs.⁷ In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA.⁸ One principal purpose of both statutes was to give the Micmacs the same settlement that had been provided to the Maliseets in MICSA.⁹ In 2007, the Federal Court of Appeals for the First Circuit confirmed that the Micmacs and Maliseets are subject to the same jurisdictional provisions in MICSA.¹⁰ Together, these state and federal statutes are referred to as the “Settlement Acts.”

MICSA included a grant of authority to the State to apply state law, with certain exceptions, to the Tribes in Maine and their lands. In response to Maine’s 2013 and 2014 submittals, on February 2, 2015, the EPA determined that the unique provisions of MICSA authorize Maine to set WQS under the CWA in the waters of the Tribes’ reservations and trust lands (referred to herein as “waters in Indian lands”).

After determining that Maine could set WQS for waters in Indian lands, the EPA evaluated Maine’s new and revised WQS submitted to the EPA from 2003-2014 and other provisions of state law that had not been submitted to EPA. Among these WQS, the EPA reviewed Maine’s classifications and designated uses for those waters. In its February 2015 decisions, EPA approved Maine’s fishing designated use after unilaterally recharacterizing it to mean sustenance fishing as applied to all waters in Indian lands, even though the State had never described or

⁴ Pub. L. No. 96-420, 94 Stat. 1785 (Oct. 10, 1980)

⁵ 30 M.R.S.A. §§ 6201, *et seq.*

⁶ 30 M.R.S.A. § 6205-A; Pub. L. No. 96-420, 94 Stat. 1785, § 5.

⁷ 30 M.R.S.A. §§ 7201, *et seq.*

⁸ Act Nov. 26, 1991, P.L. 102-171, 105 Stat. 1143.

⁹ See ABMSA § 2(a)(4) and (5)

¹⁰ *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007)

defined its fishing use to mean sustenance fishing in any waters. The EPA also deemed certain provisions of MIA first established in 1979 (that had not been submitted to EPA) to be new or revised WQS and approved them as a sustenance fishing designated use for inland reservation waters. The EPA then disapproved many of Maine's HHC for toxic pollutants as applied to waters in Indian lands because they were based on fish consumption data that did not represent the higher fish consumption rates associated with the Tribes' sustenance fishing practices, and therefore did not support the sustenance fishing designated uses that EPA interpreted and approved.¹¹

C. EPA's Feb 2015 Sustenance Fishing Designated Use Approvals

1. Interpretation and Approval of Maine's "Fishing" Designated Use as "Sustenance Fishing" for All Waters in Indian Lands

The EPA evaluated the Settlement Acts and found that they provided for sustenance fishing by the Tribes in the waters of their reservations and trust lands. The EPA then unilaterally interpreted Maine's fishing designated use to mean sustenance fishing for those waters and approved it for CWA purposes.

The rationale the EPA articulated in the designated use approval decision was based on a new legal framework within which the EPA and states must "harmonize" treaties and other federal laws (such as MICSA) that provide for sustenance fishing by tribes with the CWA when establishing or reviewing WQS, including designated uses and HHC.¹² Under this framework, the EPA stated that it was harmonizing MICSA's language providing for the Tribes' sustenance fishing practices with the CWA by concluding that Maine's fishing designated use must be interpreted to mean sustenance fishing when applied to waters in Indian lands.

EPA's creation of a sustenance fishing designated use through interpretation and approval of the state's general fishing designated use was one of the bases for EPA's subsequent actions. The EPA stated that to protect that sustenance fishing use, HHC would need to provide the same level of protection to tribal populations engaged in sustenance fishing as to the State's general population, by treating tribal populations as the "target general population" and selecting a fish

¹¹ See also, Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (March 16, 2015); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (June 5, 2015); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Avery Day, Acting Commissioner, Maine Department of Environmental Protection, "Re: Water Quality Standards in Maine" (September 21, 2015); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Paul Mercer, Commissioner, Maine Department of Environmental Protection, "Re: Withdrawal of Disapprovals, and Issuance of Approvals, of Maine's Human Health Criteria for Copper, Absestos, Barium, Nitrates, Iron and Manganese" (Jan. 19, 2016); Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Paul Mercer, Commissioner, Maine Department of Environmental Protection, "Re: Withdrawal of Disapprovals, and Issuance of Approvals, of Maine's Human Health Criteria for Multiple Pollutants" (April 11, 2016).

¹² Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, "Re: Review and Decision on Water Quality Standards Revisions" (Feb. 2, 2015), Attachment A at 2.

consumption rate (FCR) that reflects a sustenance level of consumption.¹³ This rationale led the EPA to disapprove most of Maine's HHC because they were based on a FCR that EPA concluded did not reflect an adequate sustenance level of consumption.¹⁴

2. Approval of Provisions of the Maine Implementing Act as a Sustenance Fishing Designated Use for Inland Reservation Waters

The EPA evaluated certain provisions of MIA¹⁵ that codify a tribal right of sustenance fishing in the waters of the Penobscot Nation's and Passamaquoddy's reservations to determine whether they constituted a new or revised WQS subject to EPA review and approval or disapproval under CWA section 303(c). The State did not submit these provisions of MIA to EPA for review as new or revised WQS, and EPA had never before considered MIA to contain a designated use for Clean Water Act purposes. The EPA considered its frequently asked questions document regarding how to determine what is or is not a new or revised WQS,¹⁶ and determined that certain provisions of MIA were a new WQS because they are binding under state law; they articulate a specific fishing use for the specified waters; they express the desired condition of the waters or level of protection afforded the waters by specifically providing for sustenance fishing; and they are new in that the EPA had never acted on them. The EPA therefore reviewed and approved those provisions in MIA as a sustenance fishing designated use applicable to the inland reservation waters. The EPA's analysis of how HHC should be derived to protect the use was the same as that outlined in section II.C.1. above.

D. Summary of Litigation and Current Status

On October 8, 2015, Maine filed a second amended complaint in federal district court in ongoing litigation against the EPA.¹⁷ The State sought judicial review of the EPA's February 2015 decisions interpreting and approving Maine's fishing designated use as a sustenance fishing designated use in waters in Indian lands in Maine; approving provisions of MIA as a sustenance fishing designated use for the inland reservation waters; and disapproving Maine's HHC for failure to protect the sustenance fishing designated uses that EPA interpreted and approved.

The EPA moved for a voluntary remand of its February 2015 decisions on July 27, 2018, and informed the court that it had decided to revise, rather than defend, those decisions. The court granted the EPA's motion on December 3, 2018, and stayed the case until December 3, 2019, pending the EPA's reconsideration of its decisions.

III. The EPA's Proposed Withdrawals of its 2015 Sustenance Fishing Designated Use Interpretations and Approvals

¹³ *Id.* At 3, 38.

¹⁴ *Id.* at 3.

¹⁵ Specifically, 30 M.R.S.A. § 6207, sub-§§ 4 and 9.

¹⁶ EPA, *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*, October 2012.

¹⁷ *State of Maine, et al., v. Andrew Wheeler, et al*, Civil Action No. 1:14-cv-264-JDL (D. Maine).

In accordance with CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, the EPA is now proposing to withdraw its 2015 interpretations and approvals of Maine’s fishing designated use as a “sustenance fishing” designated use for all waters in Indian lands and to withdraw the interpretation and approval of certain provisions in MIA as a sustenance fishing designated use for the inland waters of the Penobscot Nation’s and the Passamaquoddy Tribe’s reservations.

A. Withdrawal of EPA’s Interpretation and Approval of Maine’s Fishing Designated Use as a Sustenance Fishing Designated Use in Waters in Indian Lands

The EPA proposes to withdraw its interpretation and approval of Maine’s general fishing designated use as a sustenance fishing designated use in all waters in Indian lands because the approval was inconsistent with the State’s unambiguous fishing designated use and exceeded EPA’s CWA authority by recharacterizing that use. The State’s recent creation of a sustenance fishing subcategory through its legislative process underscores that the EPA’s interpretation and approval of Maine’s “fishing” designated use was incorrect and inconsistent with state law, which supports the proposed withdrawal.

Pursuant to the CWA and the EPA’s regulations at 40 C.F.R. § 131.10(a), states are responsible for specifying appropriate designated uses to be achieved and protected. But in its 2015 approval decision, the EPA unilaterally interpreted and recharacterized the State’s “fishing” designated use to be a “sustenance fishing” designated use for waters where the State has jurisdiction to set WQS and federal law provides for sustenance fishing by Tribes in those waters, regardless of how the State had promulgated or interpreted its designated use. In fact, Maine had not defined, nor did it interpret, its fishing use to mean sustenance fishing in any waters. Indeed, Maine recently launched its own process to address sustenance fishing in its WQS and legislatively created a new sustenance fishing subcategory, within the fishing use, that applies only in specific legislatively determined waterways. EPA approved that new subcategory and attendant provisions on November 6, 2019.¹⁸ EPA’s prior interpretation of the CWA that would allow for it to interpret and recharacterize a state’s designated use is inconsistent with the CWA’s carefully struck balance between the federal government and the states. *See, e.g., Miss. Comm’n on Nat. Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) (“[T]he specification of a waterway as one for fishing, swimming, or public water supply is closely tied to the zoning power Congress wanted left to the states.”).

In its 2015 approval decision, EPA stated that it was “bound to attend to and comply with both statutory frameworks [the CWA and the Settlement Acts] to the extent EPA is able to reconcile how they apply to the Agency’s review of Maine’s WQS in Indian waters,” and then concluded

¹⁸ On June 21, 2019, Governor Janet T. Mills approved a law establishing a sustenance fishing designated use subcategory of the State’s general “fishing” designated use and a new fish consumption rate (FCR) that must be used to calculate human health criteria to protect the sustenance fishing use. The law also identifies waters in Maine to which the new subcategory applies. Maine submitted the law to the EPA for approval as a new water quality standard on August 12, 2019. The EPA approved the new sustenance fishing subcategory, its application to certain waters in Maine, and related statutory provisions as new and revised WQS on November 6, 2019. This action by Maine and EPA’s approval of it are separate from the proposals set forth herein. Maine is currently in the process of revising and updating its HHC both for the sustenance fishing subcategory waters and for all other waters statewide.

that “[i]t is possible to harmonize these two statutory frameworks by recognizing that the State’s designated fishing use under the CWA must include the concept of sustenance fishing as provided for in the settlement acts.”¹⁹ EPA has now determined that it lacked statutory authority to recharacterize the State’s general fishing designated use to mean sustenance fishing. Even if EPA had this authority—which EPA now concludes that it did not—the Agency now believes that it was inappropriate and unnecessary to reinterpret the State’s fishing use to mean sustenance fishing in an attempt to “harmonize” the Settlement Acts and the CWA. Contrary to the EPA’s 2015 statement that it “must interpret the fishing use to include sustenance fishing,” the Settlement Acts do not expand EPA’s CWA authority, nor do they require Maine to designate a general fishing use with a sustenance component or EPA to recharacterize a designated use to mean sustenance fishing. The Settlement Acts similarly do not limit or prohibit EPA from taking an otherwise lawful action under the CWA, such as approval of Maine’s fishing designated use that does not mean sustenance fishing.

The EPA concludes that reinterpreting and recharacterizing the State’s designated use of fishing with no express intent in State law to be considered a designated use, went beyond the EPA’s CWA authority. Under the CWA, the designated use defines the limit of a state’s obligations in establishing criteria. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a)(1). It exceeded the EPA’s statutory authority to reinterpret and recharacterize the State’s designated use as meaning sustenance fishing when it approved the use for waters in Indian lands. Therefore, the EPA proposes to withdraw the February 2015 approval.

B. Withdrawal of EPA’s Interpretation and Approval of MIA Provisions as a Sustenance Fishing Designated Use

The EPA proposes to withdraw its interpretation and approval of certain provisions in MIA as a sustenance fishing designated use for the inland reservation waters. After reconsideration, the EPA has concluded that MIA is not a new or revised WQS and that in reaching its earlier decision, the EPA erred in interpreting MIA to represent a sustenance fishing designated use for reservation waters. When MIA was passed in 1980, Maine already had in place a fishing designated use that it had adopted for all waters in the State, and that designated use was recodified in 1986. MIA’s reference to the right to take fish for individual sustenance in reservation waters does not address or reference designated uses or water quality criteria, nor does it express or establish the desired condition or use goal of the waters to which the provisions apply. Rather, MIA refers to a type of fishing/consumption that can occur in certain waters, and it can be protected under the State’s fishing designated use. EPA’s longstanding view, consistent with the 2000 Methodology, is that populations engaged in sustenance fishing, including tribes, can be protected under a fishing designated use.²⁰ The EPA now concludes that while MIA’s provision of sustenance fishing rights in the Southern Tribes’ reservations may be a clear recognition of where sustenance fishing can occur, it does not constitute the establishment

¹⁹ Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, “Re: Review and Decision on Water Quality Standards Revisions” (Feb. 2, 2015), Attachment A at 32.

²⁰ USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, Page 1-12. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA-822-B-00-004. <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf>

of a new or different water quality goal use that the EPA must review under the CWA. The State's recent legislation did not alter, amend, or even reference MIA allowing a further inference that the State did not consider the provisions in MIA to be WQS.

IV. The EPA's Proposed Approval of Maine's Fishing Designated Use Without EPA's Interpretation that it Means Sustenance Fishing in Waters in Indian Lands

In conjunction with its proposal to withdraw its February 2015 interpretation and approval of Maine's "fishing" designated use to mean "sustenance fishing" for all waters in Indian lands, EPA proposes to approve Maine's fishing designated use for waters in Indian lands without the sustenance fishing interpretation. The EPA previously approved Maine's general "fishing" designated use, now codified at 38 M.R.S.A. §§ 465-465-B, in 1986. As with all EPA approvals of Maine's WQS before 2015, the EPA's 1986 approval did not extend to waters in Indian lands. The EPA now proposes to approve this designated use for all remaining waters in Maine. Maine's "fishing" designated use includes consumption of fish, which Maine, in its discretion, has chosen to protect through the adoption, in 2006, of HHC using an FCR of 32.4 g/day. This use is consistent with the section 101(a)(2) use goals of the CWA and 40 C.F.R. §131.10(a), and the EPA therefore proposes to approve it for waters in Indian lands.²¹

V. The EPA's Proposed Withdrawal of its 2015 Disapprovals of HHC for Waters in Indian Lands

As described above, under the Clean Water Act, state WQS include the water quality criteria necessary to protect the designated uses that apply to a water body. EPA's regulations at 40 C.F.R. § 131.11(a)(1) provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use."

In its 2015 decisions, the EPA evaluated Maine's 2006 and 2013 HHC, as applied to waters in Indian lands, to determine whether they were adequate to protect the sustenance fishing designated use that the EPA had interpreted and approved for those waters. The EPA disapproved many HHC as being inadequate to protect the sustenance fishing designated use in waters in Indian lands because they were based on a fish consumption rate that did not reflect a sustenance level of fish consumption.

As a result of the EPA's proposed withdrawal of the SFDU interpretations and approvals and EPA's proposed approval of the fishing designated use without the sustenance fishing interpretation, the EPA proposes that the HHC disapprovals that were tied to the SFDU be withdrawn as well.

Maine DEP is currently in the process of revising and updating its HHC for all waters in the state, including those waters to which Maine's recently approved 2019 sustenance fishing use subcategory applies. The statute establishing Maine's sustenance fishing designated use

²¹ As described above, the State recently chose to adopt a sustenance fishing designated use subcategory. Consistent with 40 CFR § 131.11(a), EPA has approved that subcategory. The State has provided in the statute establishing that subcategory that the HHC to protect the subcategory use (in the waters where it applies) will be based on a 200 g/day FCR rather than the 32.4 g/day FCR used to derive HHC in other waters in the State.

subcategory requires DEP to adopt final HHC to address that use, following public notice and opportunity for comment, no later than March, 2020. In light of this effort, the EPA would, if it finalizes the withdrawal of the HHC disapprovals as proposed herein, evaluate the adequacy of Maine's new and revised HHC (once adopted and submitted to the EPA) to protect the applicable fishing designated use or sustenance fishing use subcategory, rather than the 2006 and 2013 criteria that it previously analyzed.²²

²² However, if an existing (2006 or 2013) HHC that the EPA had disapproved in 2015 is not revised in DEP's 2020 promulgation, EPA would review the existing HHC and act to approve or disapprove it, as appropriate.