

September 13, 2021

Via Email: Brundage.jennifer@epa.gov
Jennifer Brundage
US Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Potential Revisions to Federal Water Quality Standards
Regulations to Protect Tribal Reserved Rights

Dear Ms. Brundage:

I serve as legal counsel for the Penobscot Nation (the Nation) and have been asked by the Nation to provide you with brief comments on the EPA's consideration of potential revisions to nationally-applicable water quality standards (WQS) to ensure the protection of tribal reserved rights to aquatic resources in "waters where states have jurisdiction to establish WQS." The Nation expects to provide formal, detailed comments on the proposed rule when the EPA publishes it in the federal register.

The Nation's initial comments are as follows:

- *No preclusion of tribal concurrent jurisdiction:* The Penobscot Nation does not concede that Maine has jurisdiction to establish WQS within the Nation's reservation waters in the Penobscot River to the exclusion of the Penobscot Nation. The Nation has pending before EPA an application for "treatment as state" to set WQS within those reservation waters to protect its reserved sustenance fishing, hunting, and trapping rights. Thus, in developing the proposed rule, the Nation asks the EPA to employ language recognizing that there may instances where states and tribes have concurrent jurisdiction to establish WQS and that, in accordance with EPA policy, tribal authority continues to have primacy in such instances.
- *Referencing the Nation's reserved rights:* As set forth in the EPA's Notification of Consultation, consistent with the formal opinions of the Department of the Interior, the EPA has recognized that the Penobscot Nation has reserved rights to sustenance fishing in its reservation waters in the Penobscot River. *See* Opinion of Solicitor Hilary Tompkins to Avi S. Garbow, EPA General Counsel (Jan. 30, 2015); EPA Decision on Maine's Water Quality Standards Revisions (Feb. 2, 2015) and "Attachment A" (analysis supporting decision). The Nation asks that the EPA specifically reference the Nation's reserved rights to sustenance fishing, hunting, and trapping within its reservation waters of the Penobscot River in the preamble to the proposed rule.

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- *Requirement that states and EPA not impair tribal reserved rights when establishing, revising and evaluating WQS.* The Nation supports this concept and its incorporation into the proposed rule.
- *Requirement that if reserved rights exist in a specific area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection.* The Nation supports this concept and its incorporation into the proposed rule.
- *Requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe.* The Nation supports this concept and its incorporation into the proposed rule.
- *Incorporating the following:*
 - *Designated uses that explicitly incorporate protection of resources covered by tribal reserved rights.*
 - *Criteria that protect tribal reserved rights in waters where those rights apply.*
 - *Assignment of Tier 3, anti-degradation protection in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.*The Nation supports the incorporation of these items into the proposed rule.

The Nation agrees with the goals of this proposed rule: to provide for the sustainable protection of tribal reserved rights and clarity and transparency about how states exercising jurisdiction over WQS and EPA must protect tribal reserved rights when establishing and revising WQS.

Sincerely,

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.

Counsel for Penobscot Nation

Cc: Hon. Kirk Francis, Chief, Penobscot Nation
Mark A. Chavaree, General Counsel, Penobscot Nation