

# WHOSE STANDARDS CONTROL? *MAINE* *V. MCCARTHY* AND THE FEDERAL, STATE, AND TRIBAL BATTLE OVER WATER QUALITY REGULATION

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## ABSTRACT

*This Note considers the longstanding clash between the United States government and state governments over the management of intrastate waters through the lens of Maine v. McCarthy, an ongoing federal lawsuit. McCarthy confronts whether the United States Environmental Protection Agency can require state water quality standards to specifically safeguard the health and cultural practices of Maine's Indian tribes, particularly sustenance fishing. A panoply of legal and political factors gave rise to and shaped the course of the litigation, ranging from tribal sovereignty to agency discretion and political gamesmanship. After evaluating the litigants' arguments and examining previous regulatory collisions between the Environmental Protection Agency and state governments, this Note argues that the Environmental Protection Agency has the authority to dictate changes to Maine's water quality standards, regardless of preexisting agreements granting Maine regulatory control over state waters.*

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## I. INTRODUCTION

For centuries, Maine's federally recognized Indian tribes have fought an uphill battle to preserve their way of life. In the eighteenth century, tribes entered into treaties with British colonies, only to see those same colonies declare war against the tribes, then later seek military support from the tribes.<sup>1</sup> Much of the tribes' ancestral lands have been acquired through patently unfair agreements.<sup>2</sup> Major congressional enactments failed to extend

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1. See William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA L. REV. 815, 827-28 (2004) (describing how the Colony of Massachusetts waged war on the Penobscot Nation in 1755 during the Seven Years' War, but then asked the Penobscots to be an ally against Great Britain in the American Revolution).

2. See *id.* at 828 (describing the loss of Passamaquoddy and Penobscot territory through colonial treaties, and one such treaty where 200,000 acres were conveyed in exchange for blue cloth, corn, salt, rum, and gunpowder and gunshot).

legal protections to Indian tribes, despite an obvious and vocal tribal legislative presence.<sup>3</sup>

Until the 1990s, Maine's Indian reservations were socially and economically isolated.<sup>4</sup> Federal projects designed to address this isolation increased Indian contact with other Maine communities, but diminished cultural continuity within the tribes.<sup>5</sup> Now, Maine's tribes are locked in a struggle to preserve their sustenance fishing practices, and the federal government's Environmental Protection Agency has stepped forward to defend a major tribal cultural tradition.<sup>6</sup>

As the 1970's approached, the United States recognized that it needed cleaner, healthier waterways. A record high number of fish kills were reported nationwide in 1969 due to pollution discharges, killing over 41 million fish.<sup>7</sup> In 1971, a task force launched by Ralph Nader reported that bacteria levels in the Hudson River were 170 times the safe limit.<sup>8</sup> In 1970, the U.S. Bureau of Water Hygiene reported that 30% of drinking water samples contained chemicals exceeding the recommended Public Health Service limits.<sup>9</sup> In response, Congress passed the Clean Water Act (CWA) in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>10</sup> To achieve that objective, the CWA set a national goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."<sup>11</sup>

3. *Id.* at 816 (noting how Indian tribes are not mentioned in several major federal statutes, such as the Clean Air Act of 1970, the Fair Labor and Standards Act, the Employment Retirement Income Security Act, and the Americans with Disabilities Act).

4. See Margot Kempers, *There's Losing and Winning: Ironies of the Maine Indian Land Claim*, 13 LEGAL STUD. F. 267, 274 (1989).

5. See *id.* (describing the fracturing of Penobscot culture once a federally-funded bridge connecting the tribe's reservation to Old Town, ME and tribal members became more exposed to "white society").

6. Nok-Noi Ricker, *For Third Time This Year, EPA Cracks Down on Maine Water Quality Rules*, BANGOR DAILY NEWS (June 24, 2015), <http://bangordaily-news.com/2015/06/24/news/state/for-third-time-this-year-epa-cracks-down-on-maine-water-quality-rules/> (discussing the EPA's rejection of statewide water quality standards due to Clean Water Act noncompliance and insufficient protection of tribal sustenance fishing uses).

7. Pub. Broad. Serv., *A Brief History of the Clean Water Act*, SCIENCE & HEALTH (Dec. 20, 2002), <http://www.pbs.org/now/science/cleanwater.html>.

8. ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT 20 YEARS LATER* 5 (1993) (referencing Nader's report and statistics showing that Hudson River bacteria levels were 170 times the safe limit).

9. *Id.*

10. Christine Malumphy & Randall Yates, *Muddying Tribal Waters: Maine v. Johnson, Internal Tribal Affairs, and Point Source Discharge Permitting in Indian Country*, 35 ECOLOGY L. Q. 263, 264 (2008) (quoting 33 U.S.C. § 1251(a) (2015)).

11. 33 U.S.C. § 1251(a)(2).

The CWA is administered by the United States Environmental Protection Agency (EPA or Agency).<sup>12</sup> The EPA sets the basic structure for regulating pollutant discharges into “waters of the United States,”<sup>13</sup> and it also regulates water quality standards<sup>14</sup> (WQS) for surface waters.<sup>15</sup> The CWA includes a federal permitting mechanism that facilitates states’ attainment of specific water quality standards.<sup>16</sup> Alternatively, states can implement their own permitting programs if those programs meet certain conditions established by the EPA.<sup>17</sup> While the CWA articulates the process by which states can develop adequate water quality standards, conflicts occasionally arise between the federal and state governments over the sufficiency of state standards.<sup>18</sup> These conflicts also implicate Indian tribal governments,

12. *Id.* § 1251(e); see EPA, *Summary of the Clean Water Act*, LAWS & REGULATIONS, <http://www2.epa.gov/laws-regulations/summary-clean-water-act> (last visited May 10, 2017).

13. The reach of the term “water of the United States” is broadly defined in the CWA and post-enactment litigation. It refers to:

[N]avigable waters, tributaries to navigable waters, interstate waters, the oceans out to 200 miles, and intrastate waters which are used: by interstate travelers for recreation or other purposes, as a source of fish or shellfish sold in interstate commerce, or used for industrial purposes by industries engaged in interstate commerce.

EPA, *NPDES Permit Basics*, NATIONAL POLLUTION AND DISCHARGE ELIMINATION SYSTEM (NPDES), <https://www.epa.gov/npdes/npdes-permit-basics> (last visited May 10, 2017).

14. Water quality standards consist of (1) a waterbody’s designated use (such as recreation or supporting marine species), (2) water quality criteria (scientific information listing concentrations of specific chemicals at levels that protect aquatic life and human health), which protect a waterbody’s designated use, and (3) antidegradation requirements. EPA, *WATER QUALITY STANDARDS HANDBOOK*, ch.1, at 1–2, ch. 3, at 1 (2014) [hereinafter *WQS HANDBOOK*], <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>.

15. EPA, *Summary of the Clean Water Act*, *supra* note 12. Surface waters comprise every reservoir, river, stream, and lake in the United States, except for the Great Lakes. EPA, *Surface Waters Information*, ECOLOGICAL RESOURCE DATA, <https://archive.epa.gov/emap/archive-emap/web/html/index-43.html> (last visited May 10, 2017).

16. Malumphy & Yates, *supra* note 10, at 265. The permitting mechanism is referred to as a National Pollutant Discharge Elimination System (NPDES) permit. EPA, *NPDES Permit Basics*, *supra* note 13. A NPDES permit grants a point source the right to discharge pollutants into a water of the United States. *Id.* To help states attain specified water quality standards, the NPDES permit limits what pollutants can be discharged, lists monitoring and reporting requirements, and contains other provisions to ensure that discharges do not adversely affect water quality and human health. *Id.*

17. See 33 U.S.C. § 1342(b) (2015). The Governor of each state seeking to administer its own permit program for discharges into waters within its jurisdiction may submit to the EPA a complete description of the program it proposes to establish under state law or under an interstate compact. *Id.* The state must also submit a statement from its Attorney General showing that its state laws or the interstate compact provide adequate authority to carry out the described permit program. *Id.*

18. See, e.g., Howard Hutchinson, *The Current New Mexico Water Quality Standards and Major Issues Facing New Mexico’s Water Quality Control Commission*, 2006 N.M. WATER RE-

which puts the issue at the intersection of federal regulations, federal and state administrative law, and tribal relations.<sup>19</sup>

This Note examines the competition for jurisdiction over water quality standards through the pending case of *Maine v. McCarthy*.<sup>20</sup> Maine challenged the EPA's demand that the state amend its water quality standards to accommodate the sustenance fishing rights and health interests of multiple tribal nations within state borders.<sup>21</sup> Maine argued that it has regulatory jurisdiction over all intrastate waters and all Indian waters under the Maine Implementing Act (MIA), the Maine Indian Claims Settlement Act of 1980 (MICSA), and the First Circuit's decision in *Maine v. Johnson*.<sup>22</sup> The EPA responded that Maine's jurisdiction to establish water quality standards on tribal waters is limited.<sup>23</sup> Maine's state water quality standards must still receive EPA approval and fully comply with the Clean Water Act before they can be implemented.<sup>24</sup> The EPA argues it will not fully endorse Maine's standards because, after consultation with the United States Department of the Interior (DOI), the Agency determined that the standards failed to adequately protect the sustenance fishing interests of Maine's various Indian tribes.<sup>25</sup> Support for this argument derives from the EPA's assessment of the Wabanki Cultural Lifeways Exposure Scenario, which is a report that describes how Maine's Indian tribes traditionally used state natural resources.<sup>26</sup> The Wabanki Cultural Lifeways Exposure Scenario helped the EPA evaluate whether traditional tribal natural resource uses

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SOURCES RES. INST. 12 (noting the EPA's failure to provide formal comments on New Mexico's revised water quality standards, which violates CWA provisions requiring the EPA to approve or disapprove of WQS revisions within specified timeframes).

19. See EPA, ANALYSIS SUPPORTING EPA'S FEBRUARY 2, 2015 DECISION TO APPROVE, DISAPPROVE, & MAKE NO DECISION ON, VARIOUS MAINE WATER QUALITY STANDARDS, INCLUDING THOSE APPLIED TO WATERS OF INDIAN LANDS IN MAINE 2 (2015) [hereinafter ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION], [http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060g.pdf](http://www.ecy.wa.gov/programs/wq/ruleddev/wac173201A/comments/0060g.pdf).

20. *Maine v. McCarthy*, No. 1:14-CV-00264-JDL, 2016 WL 6833935 (D. Me. Nov. 18, 2016) (dismissing Count III of the second amended complaint). The case remains pending as to the first two counts; Count I is the appeal of EPA's disapproval of Maine's WQS. Second Amended Complaint ¶¶ 144–46, *Maine*, No. 1:14-CV-00264-JDL (D. Me. Oct. 8, 2015), 2015 WL 12915138.

21. Second Amended Complaint, *supra* note 20, ¶ 2; ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 2.

22. Second Amended Complaint, *supra* note 20, ¶ 2; ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 1–2.

23. ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 12.

24. *Id.*

25. *Id.* at 2–3.

26. *Id.* at 3; BARBARA HARPER & DARREN RANCO, WABANKI TRADITIONAL CULTURAL LIFEWAYS EXPOSURE SCENARIO (2009).

were compatible with water quality standards in waters that encompassed Indian territories.<sup>27</sup>

Maine also claims that the EPA's rejection of its water quality standards is arbitrary and capricious as well as an abuse of agency discretion in violation of the Administrative Procedure Act (APA).<sup>28</sup> The State refutes the EPA's argument that MIA and MICSA were established to create a land base where Maine's Indian tribes could practice cultural traditions, including tribal sustenance fishing practices.<sup>29</sup> Maine also argues that the EPA has wrongfully asserted that MIA grants Indian tribes a broad tribal sustenance fishing right.<sup>30</sup>

Part II of this Note summarizes the factual backgrounds of Maine's Indian tribes, their historical fishing practices, and the events leading up to *Maine v. McCarthy*. Part III discusses the Clean Water Act, MICSA, and MIA for the purposes of understanding the central laws operating in the case. These laws overlap, and guide each litigant's arguments. Part IV discusses the claims and arguments advanced by Maine and the EPA in the United States District Court for the District of Maine. Part V predicts the District Court's outcome of the case. Finally, Part VI offers some concluding thoughts and explains how *Maine v. McCarthy* illustrates an age-old battle between states and the federal government over the management of natural resources.

## II. HISTORICAL BACKGROUND TO *MAINE v. MCCARTHY*

### A. History of Tribal Fishing in Maine

For centuries, sustenance fishing has been a cultural pillar for Maine's Indian tribes.<sup>31</sup> The name of a Maine tribe, the Passamaquoddy, originates from the word "pest mohkaty k," which literally means "pollock-spearer" or "those of the place where the pollock are plentiful."<sup>32</sup> The Penobscot Na-

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27. HARPER & RANCO, *supra* note 26, at 7.

28. Second Amended Complaint, *supra* note 20, ¶ 146.

29. *Id.*

30. *Id.*

31. See *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181, 198 (D. Me. 2015) (noting how in the early 1800's, the Penobscot Indians would routinely obtain at least half of their annual fish stocks from the Penobscot River until European settlers reduced availability). The federally recognized tribes that reside within Maine's borders can be referred to collectively as the Wabanaki. The Wabanaki Tribes are comprised of the Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation. Maine Indian Tribal-State Council, *Section: Education Resources*, RESOURCES, <http://www.mitsc.org/resources.php?do=section&name=?education+Resources> (last visited May 10, 2017).

32. Whitney Austin Walstad, Note, *Maine v. Johnson: A Step in the Wrong Direction for the Tribal Sovereignty of the Passamaquoddy Tribe and the Penobscot Nation*, 32 AM. INDIAN L.

tion, like the Passamaquoddy Tribe, depend on fish as a principal food source, and their culture is closely tied to Maine's river systems.<sup>33</sup> Penobscot Indians have referred to themselves as "people of where the river broadens out," and until the mid-eighteenth century they controlled the entire Penobscot watershed, which spans more than five million acres.<sup>34</sup> Jesuit missionaries, among the first Europeans to encounter the Micmac Indians (now the Aroostook Band of Micmacs) in the early seventeenth century, noted the extent to which the tribe relied on smelt, herring, salmon, and sturgeon as a staple food source from the spring through the early fall season.<sup>35</sup> Archeological investigations revealed that the ancestors of today's Maine's tribes had mastered the art of deep sea and coastal fishing thousands of years before European contact.<sup>36</sup>

The archaeological record of around 3,800 years ago depicts an Indian diet relying more on anadromous fish, with a reduced consumption of marine fish species and shellfish.<sup>37</sup> Beginning 3,000 years ago, climate cooling diminished stocks of certain fish, such as cod, but also ushered in an increased abundance of other species such as flounder.<sup>38</sup> Swordfish was completely abandoned as a dietary staple, and marine fishing was largely conducted year-round, west of Passamaquoddy Bay.<sup>39</sup> These findings and numerous archeological discoveries demonstrate that fishing is one of the most valuable and venerated aspects of Maine's Indian culture. There is more at stake in *Maine v. McCarthy* than the ability of today's Maine tribes to safely harvest fish from the state's rivers. In some ways, the case is a referendum on the historical significance of Indian fishing practices, and the EPA's interest in respecting this longstanding cultural activity.

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REV. 487, 488 (2007). Pollock are a fish species resembling cod and haddock, and range throughout the Atlantic Ocean and the cold waters of the Gulf of Maine. See *Pollock*, MAINE SEA GRANT, <http://seagrant.umaine.edu/maine-seafood-guide/pollock> (last visited Apr. 28, 2016).

33. Walstad, *supra* note 32, at 488–89.

34. Rodgers, *supra* note 1, at 827 (citing FRANK G. SPECK, *PENOBSCOT MAN: THE LIFE HISTORY OF A FOREST TRIBE IN MAINE* 7 (1976)).

35. David V. Burley, *Proto-Historic Ecological Effects of the Fur Trade on Micmac Culture in Northeastern New Brunswick*, 28 *ETHNOHISTORY* 203, 204 (1981) (reciting the accounts of Jesuit missionary Pierre Biard with respect to Micmac subsistence practices and the tribe's emphasis on exploiting the annual fish spawning routes to achieve food security in the spring, summer, and early fall).

36. See HARPER & RANCO, *supra* note 26, at 24 (noting mastery of many techniques), 26 (noting evidence of deep sea fishing and coastal fishing equipment from the Archaic Period).

37. *E.g., id.* (citing BRUCE J. BORQUE, *TWELVE THOUSAND YEARS: AMERICAN INDIANS IN MAINE* (2001)).

38. *Id.* at 26–27.

39. *Id.*

## B. *Maine-Tribe Relations Before MICSA and Maine v. McCarthy*

Relations between Maine and its Indian tribes were strained for many years before *Maine v. McCarthy* and the enactment of MICSA and MIA.<sup>40</sup> Between Maine's founding as a state in 1820 and a series of court decisions in the 1970s, the state's Indian tribes exercised limited independence and were regularly subjected to paternalistic maneuvers by the State.<sup>41</sup> Until the 1970s, Maine courts regarded the Indian tribes within state borders "as completely subject to the state as any other inhabitants can be."<sup>42</sup> Maine has long asserted authority to govern Indian tribes and tribal waters, but case law has largely foreclosed that claim.<sup>43</sup> Maine has enacted a series of laws that control tribal resources and determine tribal citizenship for the purposes of public school enrollment.<sup>44</sup> Tribal members were not allowed to vote in federal elections until 1954, and could not vote in Maine state and local elections until 1967.<sup>45</sup> State bonds were not issued to an Indian tribe until 1967, and that change was only effectuated so Maine could receive a federal grant for the construction of reservation housing.<sup>46</sup> In June of that year, to qualify for federal funds, Maine voters approved a \$384,000 bond issue to initiate school construction and modernization efforts at the State's three Indian reservations.<sup>47</sup> Maine's Department of Health and Welfare

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40. *See id.*

41. John Dieffenbacher-Krall, *Tribal-State Relations*, 28 *PAGE ENVTL. L. REV.* 366, 370 (2011). As of 1975, Maine had enacted 350 laws relating to the Passamaquoddy Tribe alone. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 374 (1st Cir. 1975) (noting legislation was passed regulating Passamaquoddy agriculture, appropriations, education, housing, health care, legal representation, and indigent relief).

42. *Maine v. Johnson*, 498 F.3d 37, 41 (1st Cir. 2007) (quoting *State v. Newell*, 24 A. 943, 944 (Me. 1892)).

43. *See Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979) (stating that Maine's longstanding involvement with the Passamaquoddy Tribe could not deprive the Tribe of its immunity from suit, and that states generally cannot divest a tribe of its sovereign immunity); *see also United States v. Wheeler*, 435 U.S. 313, 322-23 (9th Cir. 1978) (stating that tribes retain their sovereign powers unless a treaty removes those powers or Congress withdraws them through passage of a statute).

44. Dieffenbacher-Krall, *supra* note 41, at 370.

45. Penobscot Nation, *Timeline*, *PENOBSCOT CULTURE & HISTORY OF THE NATION*, [http://www.penobscotculture.com/index.php?option=com\\_content&view=article&id=14&Itemid=25](http://www.penobscotculture.com/index.php?option=com_content&view=article&id=14&Itemid=25) (last visited May 10, 2017); William Cardoso, *Indians Seek "Red Power": Granted Maine Lands in 1794, But Still Fighting for Control*, *BOSTON GLOBE*, July 14, 1968, at 2 ("Not until 1954 were Maine Indians allowed to vote, even though Congress declared their right 31 years before Maine became the last state to enfranchise these citizens.").

46. *See Cardoso, supra* note 45, at 2.

47. *Id.*

was the supervising authority for state reservations until 1966, but it did little more than offer ineffective welfare assistance to indigent Indians.<sup>48</sup>

Maine and its Indian nations improved relations in the 1960s when the state legislature granted tribes the power to create local housing authorities that could apply for federal housing assistance.<sup>49</sup> Starting in 1965 state tribal representatives received salary and allowance increases.<sup>50</sup> Tribal representatives' seating and speaking privileges were also restored in 1975 after a 34-year lapse.<sup>51</sup> Maine also provided funding to help tribes assume control over programs administered by Maine's Department of Indian Affairs.<sup>52</sup> In 1999, the state legislature amended a joint rule allowing tribal representatives to co-sponsor bills.<sup>53</sup> Overall, though, Maine's Indians remained subject to the political and economic whims of the State.

### C. *Recent Disputes Over Water Quality, Regulatory Authority, and Tribal Fishing Rights*

The EPA attempted to bolster tribal regulatory authority at the First Circuit Court of Appeals in *Maine v. Johnson*.<sup>54</sup> There, the EPA conceded that Maine could regulate nineteen liquid waste discharge facilities, owned by non-Indians, which were located outside of the Penobscot Nation's and Passamaquoddy Tribe's territorial waters, but discharged waste into those waters.<sup>55</sup> Maine's regulatory authority included implementing the federal NPDES discharge permit program associated with the facilities.<sup>56</sup> The EPA rejected Maine's discharge permit program for two tribal-owned facilities located on tribal lands that discharged into navigable waters.<sup>57</sup> The EPA argued that regulating those facilities was an internal tribal matter, which Maine could not control.<sup>58</sup> For these specific facilities, the EPA retained permitting authority.<sup>59</sup> The EPA also raised the concern that Maine's permitting program might not promote water quality standards

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48. Andrea Schermer, *The Passamaquoddys—Maine's Stepchildren*, BOSTON GLOBE, Nov. 19, 1967, at A5.

49. *Id.*

50. See S. Glenn Starbird, Jr., *Brief History of Indian Legislative Representatives*, ME. ST. LEGISLATURE, <http://legislature.maine.gov/9261> (updated by Donald Soctomah 1999).

51. *Id.*

52. See Schermer, *supra* note 48, at A5.

53. Starbird, *supra* note 50.

54. 498 F.3d 37 (1st Cir. 2007).

55. *Id.* at 40.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 40–41.

that protect Penobscot and Passamaquoddy sustenance fishing interests.<sup>60</sup> As a result, the EPA proposed that Maine reform its standards to comply with the CWA, and safeguard tribal water uses.<sup>61</sup> The First Circuit concluded that Maine law applied to all of the facilities, unless the internal tribal matter exception applied.<sup>62</sup> But the exception was not applicable there, because discharging pollutants into navigable waters was dissimilar to the subjects the internal tribal matter exception applied to—the use of settlement funds, tribal elections, tribal governance structure, and tribal property dispersal.<sup>63</sup> Therefore, the EPA’s order concerning the two tribal-owned facilities was vacated,<sup>64</sup> and Maine was deemed to have jurisdiction over tribal waters, discharge permits, and the setting of water quality standards on those waters.<sup>65</sup>

In March 2015, perhaps with *Johnson* in mind, Maine Governor Paul LePage described the EPA’s demand that Maine revise its water quality standards as an act of retribution.<sup>66</sup> The Governor publicly announced that the State’s Department of Environmental Protection (DEP) would disregard the EPA’s demand and continue to issue discharge permits based on the prior standards.<sup>67</sup> The Maine Attorney General’s Office also criticized the EPA,<sup>68</sup> and numerous public and private entities that discharge effluent into the Penobscot River voiced fears that stricter standards would compel municipalities to raise property taxes to pay for enhanced discharge controls.<sup>69</sup> Stricter standards might also force companies to bear increased compliance costs, or reduce production at the risk of terminating employees.<sup>70</sup>

Tribal leaders, on the other hand, approved of the EPA’s order for water quality reform, and viewed the Agency’s demand as a reflection of the federal government’s obligation to hold Indian lands in trust for the benefit

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60. *Id.* at 41.

61. *Id.*

62. *Id.* at 46.

63. *Id.*

64. *Id.* at 49.

65. *Id.*

66. Colin Woodard, *LePage Calls EPA’s Tribal Waters Ruling ‘Outrageous,’* PORTLAND PRESS HERALD (Mar. 2, 2015), <http://www.pressherald.com/2015/03/02/?maine-governor-on-epas-tribal-waters-ruling-its-an-outrage/>.

67. *Id.*

68. See Marina Villeneuve, *State, Feds Argue Over Tribe Water Rights*, THE WASH. TIMES (Aug. 17, 2016), <http://www.washingtontimes.com/news/2016/aug/17/?state-feds-argue-over-tribe-water-rights/> (stating that Maine Attorney General Janet Mills has argued Maine’s water quality standards are among some of the most stringent in the country and that the EPA has overstepped its regulatory bounds).

69. Woodard, *supra* note 66, at 5.

70. *Id.*

of tribes.<sup>71</sup> Members of the Penobscot Nation referenced a number of federal cases<sup>72</sup> to advance the proposition that the EPA must honor its trust responsibility to Maine's Indian tribes and disregard the State's claims to sole authority over water quality standards.<sup>73</sup> The Penobscot Nation, Passamaquoddy Tribe, and Aroostook Band of Micmacs also withdrew their representatives from the state legislature as a symbol of their support for the federal government's involvement in the water quality debate.<sup>74</sup> The major difference between the EPA's views and tribal views of the EPA's jurisdiction is that the Agency would allow Maine to propose and implement new standards in Indian waters, while the tribes contend that Maine had no jurisdictional or regulatory authority to establish new standards in those waters.<sup>75</sup>

Governor LePage's position curiously shifted in August 2015 when, after expressing his frustration with the EPA's "aggressive regulatory overreach," he suggested in a letter to Maine's congressional delegation that he might return the State's authority to set water quality standards—delegated under the Clean Water Act—to the EPA.<sup>76</sup> If Maine were to surrender that authority, it would be the first state to return full regulatory control over water quality standards to the EPA.<sup>77</sup> The possible regulatory restructuring was unwelcome news to Maine municipalities and paper companies (the very entities Governor LePage initially wanted to protect), because it would dissolve their working relationships with local water quality regulators, and place polluters at the EPA's mercy to dictate state waterway management.<sup>78</sup>

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71. *Id.* at 4.

72. EPA, RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE'S JANUARY 14, 2013, SUBMISSION TO EPA FOR APPROVAL OF CERTAIN OF THE STATE'S NEW & REVISED WATER QUALITY STANDARDS (WQS) THAT WOULD APPLY IN WATERS THROUGHOUT MAINE, INCLUDING WITHIN INDIAN TERRITORIES OR LANDS 8 (2015) [hereinafter RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE]. Those cases include, but are not limited to, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Mitchell*, 463 U.S. 206 (1983).

73. *Id.*

74. Colin Woodard, *Tribes Will No Longer Recognize Maine's Authority to Define Their Rights*, PORTLAND PRESS HERALD (May 27, 2015), <http://www.pressherald.com/2015/05/27/maine-tribes-will-no-longer-recognizing-authority-of-state-officials/>.

75. See RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE, *supra* note 72, at 3–5, 18–20 (discussing the EPA's position that numerous federal cases Maine tribes referenced to support the proposition that Maine does not have legal jurisdiction to set WQS are not applicable to the unique jurisdictional arrangement in *Maine v. McCarthy*).

76. Colin Woodard, *Fed Up with EPA, LePage Retaliates with Threat*, PORTLAND PRESS HERALD (Sept. 11, 2015), <http://www.pressherald.com/2015/09/11/fed-up-with-epa-lepage-retaliates-with-threat/>.

77. *Id.*

78. *Id.*

The EPA's New England regional office, which is already overburdened with permitting duties, would assume the responsibility of issuing permits if Maine relinquishes its authority.<sup>79</sup> When asked for a reaction to the Governor's statement, Penobscot Nation Chief Kirk Francis welcomed a renunciation of Maine's regulatory authority and suggested that the change would fortify the United States' federal trust obligations to the Penobscot Nation.<sup>80</sup> But welcome news is often fleeting.

On May 10, 2017, the Penobscot Nation and the Houlton Band of Maliseet Indians filed a surreply in opposition to the EPA's motion for a 90-day stay of proceedings.<sup>81</sup> The tribes argued that further delay in the proceedings would only prolong the start of long-awaited water quality standards.<sup>82</sup> Moreover, the tribes claimed the EPA had not satisfied the legal standard to be issued a stay.<sup>83</sup> The EPA requested the stay to determine how to respond to administrative petitions asking the Agency to reconsider its proposed water quality standards.<sup>84</sup> Despite the tribes' opposition to the EPA's motion, the District Court granted the 90-day stay.<sup>85</sup> While the EPA has not expressed any intention to revoke the water quality standards it proposed during the Obama administration, the EPA's sudden openness to external administrative opinions is a noteworthy development that should be monitored closely.

### III. OVERVIEW OF MICSA, MIA, AND THE CLEAN WATER ACT

Maine requests that the United States District Court set aside as unlawful and void the EPA's water quality standards disapprovals. Centrally, Maine claims that under both MICSA and MIA, Maine can apply state water quality standards to Indian waters in the same way that it applies those standards to all other intrastate waters.<sup>86</sup> The EPA relies largely on its regulatory authority under the Clean Water Act, its expertise as a federal agency, and scientific studies to support its decision to reform Maine's

79. *Id.*

80. *Id.*

81. Houlton Band of Maliseet Indians' and Penobscot Nation's Surreply in Opposition to EPA's Motion for a 90-Day Stay of Proceedings, *Maine v. Pruitt*, No. 1:14-CV-00264-JDL (D. Me. May 12, 2017).

82. *Id.* at 1 ("Given the already generous briefing schedule and the complete lack of new evidence or argument presented by the reconsideration petitions, a stay would only serve to delay the implementation of long-awaited water quality standards intended to protect both the health and culture of tribal sustenance fishers . . .").

83. *Id.* at 4–6.

84. Order on the Defendants' Motion to Stay Proceedings for 90 Days, *Maine v. Pruitt*, No. 1:14-CV-00264-JDL (D. Me. May 12, 2017).

85. *Id.*

86. Second Amended Complaint, *supra* note 20, ¶ 3.

water quality standards insofar as they impact Indian tribes.<sup>87</sup> To better understand the merits of Maine's and the EPA's arguments, MICSA, MIA, and the CWA must be individually examined.

### A. *Maine Indian Claims Settlement Act of 1980 and the Maine Implementing Act*

Congress passed MICSA to resolve litigation in which the Penobscot Indian Nation, Passamaquoddy Tribe (collectively, the Southern Tribes), and Houlton Band of Maliseet Indians<sup>88</sup> asserted claims to money damages<sup>89</sup> and ancestral lands constituting nearly two-thirds of Maine's land mass.<sup>90</sup> Legal minds differ about MICSA's fairness to tribes.<sup>91</sup> To be sure, restrictive provisions in MICSA require Maine's tribes to relinquish valua-

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87. See *infra* Part III.B, Part IV.B, and Part V.C.

88. The Houlton Band of Maliseet Indians and Aroostook Band of Micmacs comprise Maine's Northern Tribes. State Program Requirements; Approval of Maine's National Pollutant Discharge Elimination System (NPDES) Permitting Program, 78 Fed. Reg. 13,339, 13,340 (proposed Feb. 27, 2013).

89. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 487 (Me. 1983).

90. See 25 U.S.C. § 1721(a)(7) (2015) (stating that MICSA represents a good-faith effort by Congress to resolve the Native American land claims); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007) (discussing when the Penobscot Nation and the Passamaquoddy Tribe filed suit against the State of Maine over ancestral land ownership); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707–08 (1st Cir. 1999) (explaining how the ancestral land claims were settled with the passage of the MICSA and MIA).

91. Compare 25 U.S.C. § 1721(a)(7) (stating that MICSA promotes a fair settlement of the tribes' ancestral land claims, and implying that litigation, as opposed to legislation, to address the land claims would promote hostility and ultimately produce detrimental results for the tribes), with Douglas Luckerman, *Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands*, 37 NEW ENG. L. REV. 635, 636 (2003) (arguing that tribal rights seem to disappear in the text of MICSA and other East Coast settlement acts), and Malumphy & Yates, *supra* note 10, at 266 (stating that MICSA and MIA grant Maine more authority than is normal for states to have over Indian tribes, and that MICSA and MIA diminish tribal sovereign immunity relative to other state-tribal agreements). The Rhode Island Indian Claims Settlement Act (25 U.S.C. §§ 1701–1716), in contrast, allows the Narragansett Tribe to set its own hunting and fishing regulations on settlement lands, and those regulations need not comply with all Rhode Island regulations. See 25 U.S.C. § 1706 (a)(3) (“[T]he [Narragansett Tribe] shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island.”).

ble rights.<sup>92</sup> But with respect to sustenance fishing rights, MICSA is more favorable than other land claim settlement acts.<sup>93</sup>

States generally lack civil regulatory jurisdiction within Indian lands.<sup>94</sup> MICSA, however, subjects Maine's Indian tribes, their lands, and their natural resources to the civil and criminal jurisdiction of the State. More specifically:

Except as provided in section 1727(e) and section 1724(d)(4) 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.<sup>95</sup>

According to MICSA § 1725(b)(1), the Passamaquoddy Tribe and Penobscot Nation, as well as their members and land and natural resources, are subject to Maine's jurisdiction as provided in MIA.<sup>96</sup> Both MICSA and MIA define land and natural resources to include tribal water and water

92. See John Sanders, *A Tiny Fish and a Big Problem: Natives, Elvers, and The Maine Indian Claims Settlement Act of 1980*, 57 WM. & MARY L. REV. 2287, 2312 (2016) (discussing how, because of MICSA, Maine's tribes were excluded from the U.S. Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and the Indian Gaming Regulatory Act, both of which granted tribes the ability to have casinos).

93. See, e.g., Alaska Native Claims Settlement Act, 43 U.S.C. § 1603(b) (2015) (extinguishing all aboriginal titles in Alaska based on use and occupancy, as well as aboriginal fishing rights). *But see* People of Vill. of Gambell v. Clark, 746 F.2d 572, 576 (9th Cir. 1984) (citing the legislative history discussing land granted to native Alaskan tribes in lieu of subsistence hunting and fishing rights).

94. E.g., *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.").

95. 25 U.S.C. § 1725(a) (2015).

96. *Id.* § 1725(b). MIA further states:

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

ME. REV. STAT. ANN. tit. 30, § 6204 (1979).

rights, as well as hunting and fishing rights.<sup>97</sup> Additionally, MICSA § 1731 abrogates preexisting treaties between Maine and the State's Indian tribes, as well as any lawsuits that were pending in court at the time.<sup>98</sup> In drafting MICSA, Congress attempted to preclude other federal laws from interfering with the jurisdictional balance that was negotiated between the State of Maine and its Indian tribes:

[No] law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian Nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory, or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.<sup>99</sup>

Additionally, MICSA preserves the unique arrangement negotiated between Maine and its Indian tribes by expressly preventing preemption by future federal laws:

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.<sup>100</sup>

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97. 25 U.S.C. § 1722(d); ME. REV. STAT. ANN. tit. 30, § 6203(3) (1979).

98. 25 U.S.C. § 1731. Section 1731 provides:

Except as expressly provided herein, this subchapter shall constitute a general discharge and release of all obligations of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians or the United States as trustee therefor, including those actions now pending in the United States District Court for the District of Maine captioned United States of America against State of Maine (Civil Action Nos. 1966–ND and 1969–ND).

*Id.*

99. 25 U.S.C. § 1725(h).

100. *Id.* § 1735(b).

While MIA assigns a quasi-municipal status to Maine's Indian tribes,<sup>101</sup> it contains limited exceptions to Maine's jurisdiction over tribes. One exception is that "internal tribal matters" are not subject to state regulation.<sup>102</sup> Additionally, members of the Passamaquoddy Tribe and Penobscot Nation may take fish located within their reservations for sustenance purposes without being subject to certain state fishing regulations.<sup>103</sup>

This exception is one of the central issues in *Maine v. McCarthy*. Maine argues that MIA does not provide Indian tribes with any sort of special right to a higher water quality standard simply because of their right to access fish free of certain state regulatory constraints.<sup>104</sup> Allowing that right would, according to Maine, create a "nation within a nation" system in the state, which is contrary to MICSA's and MIA's goals.<sup>105</sup> The EPA, in contrast, asserts that the tribes have a reserved sustenance fishing right in MICSA<sup>106</sup> and MIA,<sup>107</sup> and that Maine must therefore reassess its water quality determinations to achieve adequate water cleanliness levels that al-

101. Joseph G.E. Gousse, Comment, *Waiting for Gluskabe: An Examination of Maine's Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 554 (2014).

102. ME. REV. STAT. ANN. tit. 30, § 6206(1) (1979) ("[I]nternal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State" [of Maine]). Maine courts have not addressed the question of whether sustenance fishing constitutes an internal tribal matter, but have for timber. *Akins v. Penobscot Nation*, 130 F.3d 482, 485, 490 (1st Cir. 1997) (holding that the issuance of timber harvesting permits by the Penobscot Nation on Penobscot lands constituted an internal tribal matter). Other jurisdictions have answered this question. *E.g.*, *United States v. Big Eagle*, 684 F. Supp. 241, 244 (D.S.D. 1988), *aff'd*, 881 F.2d 539 (8th Cir. 1989) (stating that the regulation of fishing is not a purely internal matter for exclusive tribal regulation) (quoting *United States v. Sohappay*, 770 F.2d 816, 819 n.3 (9th Cir. 1985)).

103. ME. REV. STAT. ANN. tit. 30, § 6207(4) (1979) ("Notwithstanding any rule or regulation . . . or any other law of the State, the members of the Passamaquoddy Tribe and Penobscot Nation may take fish within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.").

104. Second Amended Complaint, *supra* note 20, ¶ 44.

105. *See Report, Hearing Transcript and Related Memoranda of the Joint Select Committee on Indian Land Claims*, 109th Leg., 2d Reg. Sess. 14 (Me. 1980) (statement of David T. Flanagan on behalf of Governor Joseph E. Brennan) ("We could never have a nation within a nation in Maine. Such a result would not only be unworkable in a State our size, but it would also promote racial and ethnic hostility and resentment to the ultimate detriment of all of our people.").

106. 25 U.S.C. § 1724(h) (2015) (stating that land and natural resources held in trust for the Penobscot Nation and Passamaquoddy Tribe shall be managed in accordance with the terms established by the aforementioned tribes and the Secretary of the Interior).

107. ME. REV. STAT. ANN. tit. 30, § 6207(4) (1979).

low Indian tribes to safely exercise a vital right that is a “critical element of tribal cultural survival.”<sup>108</sup>

### B. *The Clean Water Act and its Framework for Setting Water Quality Standards*

The Clean Water Act was designed to maintain and restore the chemical, physical, and biological integrity of the United States’ surface waters<sup>109</sup> by reducing and eventually eliminating the discharge of pollutants into those waters.<sup>110</sup> Under the CWA, states are allowed to create and implement their own water quality standards, as long as those standards meet certain scientific criteria and receive EPA approval.<sup>111</sup> Under § 1314(a)(1) and (a)(3), the Agency must provide states with water quality criteria that reflect the latest scientific knowledge and serve as effective guidance for the creation of water quality standards.<sup>112</sup> Effective water quality standards typically contain both numerical and narrative criteria.<sup>113</sup> The EPA enforces water quality standards, and issues discharge permits pursuant to CWA’s National Pollutant Discharge Elimination System.<sup>114</sup> Additionally, the EPA can promulgate state water quality standards if a state’s current or proposed standards do not comply with the CWA and the state does not

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108. ANALYSIS SUPPORTING EPA’S FEB. 2, 2015 DECISION, *supra* note 19, at 2.

109. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2015).

110. Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL’Y F. 367, 368–69 (1996).

111. 40 C.F.R. § 131 (2017). According to 40 C.F.R. § 131.5(a), the criteria must be based on sound scientific rationale consistent with 40 C.F.R. § 131.11. 40 C.F.R. § 131.5(a). The EPA’s review involves a determination of several factors, including but not limited to whether a state has adopted an antidegradation policy and antidegradation implementation methods, adopted water quality standard variances, and followed relevant legal procedures for adopting and revising standards. 40 C.F.R. § 131.6.

112. Baker, *supra* note 110, at 370. At the same time, a state can consider information outside of the aforementioned EPA criteria; *see* *City of Albuquerque v. Browner*, 865 F. Supp. 733, 738 (D.N.M. 1993) (“The States . . . are equally free to use other criteria for which they have sound scientific support.”).

113. Baker, *supra* note 110, at 373. Narrative criteria are statements of acceptable pollutant concentrations that do not reference defined units or requirements. One narrative criteria the EPA used in formulating its water quality standards for Maine is, “[t]he numbers of total coliform bacteria or other specified indicator organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program.” Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466, 92,474 (Dec. 19, 2016).

114. 40 C.F.R. § 122 (2017).

adopt the EPA's water quality standards revisions.<sup>115</sup> Today, 22 states use water quality standards promulgated by the EPA.<sup>116</sup>

In 1987, Congress added Section 518 to the CWA, which allows Indian tribes to apply for treatment as a state under the CWA.<sup>117</sup> Identification as a state would grant tribes the ability to implement their own water quality standards. However, because of the existence of MICSA, this section of the statute did not apply to Maine's tribes.<sup>118</sup> To date, none of Maine's Indian tribes have promulgated their own water quality standards. It is in the shadow of the CWA—as well as MICSA and MIA—that Maine and the EPA advance their arguments in *Maine v. McCarthy*.

#### IV. ARGUMENTS IN *MAINE v. MCCARTHY*

##### A. *Maine's Claims*

##### 1. The State Has Sole Environmental Regulatory Jurisdiction Over All Intrastate Waters in Maine, Including Indian Waters

Maine asserts that the EPA's refusal to approve Maine's most recent water quality standards is (1) an unlawful exercise of agency discretion, and (2) administrative action in defiance of the pre-existing, binding settlements reached between Maine, the United States government, and Indian tribes in MICSA and MIA.<sup>119</sup> Maine also argues that the EPA is disregarding the First Circuit's *Johnson* decision.<sup>120</sup> Maine also claims the EPA is deliberately circumventing the state's regulatory control over tribal waters, a right that was established in *Johnson*, despite the Agency's knowledge that *Johnson*

115. See 40 C.F.R. § 133.22 (2017) (stating that if a state does not adopt EPA-specified water quality standard changes within 90 days after being notified to make the changes, the EPA must promulgate the standards); see also *Alaska Clean Water Alliance v. Clarke*, No. C96-1762R, 1997 WL 446499, at \*2, \*3 (W.D. Wash. July 8, 1997) (finding for the plaintiff that Congress intended for new or revised state WQS to become effective only after the EPA completed its review process and deemed the standards compliant with the CWA).

116. Those states are: Alaska, Arizona, California, District of Columbia, Florida, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. EPA, *Federally-Promulgated Water Quality Standards for Specific States, Territories, and Tribes*, WATER QUALITY STANDARDS: REGULATIONS AND RESOURCES, <http://www.epa.gov/wqs-tech/federally-promulgated-water-quality-standards-specific-states-territories-and-tribes#states> (last visited May 10, 2017)

117. 33 U.S.C. § 1377(e) (2015).

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

119. Second Amended Complaint, *supra* note 20, ¶ 146.

120. See *id.* ¶ 7.

grants regulatory power to Maine.<sup>121</sup> Additionally, Maine contends that the EPA is reluctant to acknowledge the state's jurisdiction over tribal waters. Although the Agency's reasoning or motive cannot be discerned, Maine points to the EPA's delay in responding to the remand order in *Johnson* for over four years,<sup>122</sup> and the Agency's failure to fully approve Maine's NPDES permitting authority over the two Indian facilities until March 2012.<sup>123</sup>

## 2. The EPA's Disapproval of Maine's Water Quality Standards for Indian Waters is Arbitrary, Capricious, an Abuse of Discretion, and Not in Accordance with Law, in Excess of EPA's Jurisdiction and Authority, and Unsupported by Substantial Evidence and Unwarranted by the Facts

Maine contends this claim is reviewable by the District Court under the APA.<sup>124</sup> The state's claim is directed at the EPA's argument that MIA and MICSA were established to create a land base from which Maine's Indian tribes could practice their cultural traditions, including sustenance fishing practices.<sup>125</sup> Maine's claim is also directed at the EPA's interpretation of MIA sections that allow the Southern Tribes to take fish in their reservations as constituting a broader right to tribal sustenance fishing.<sup>126</sup> Maine further contends that the EPA is usurping the state's role under the CWA by attempting to implement its own water quality standards without any form of public input, rather than the standards that the State previously enacted.<sup>127</sup>

The EPA's counter-argument is that MIA and MICSA confirm and expand the Indian tribes' land base, and intend to preserve tribal culture and sustenance practices.<sup>128</sup>

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121. *Id.* ¶¶ 6, 8.

122. *Id.* ¶ 110.

123. *Id.*

124. *Id.* ¶ 145; see 5 U.S.C. § 706 (2015) (discussing the scope of review for courts examining legal issues under the APA).

125. Second Amended Complaint, *supra* note 20, ¶¶ 9, 146.

126. *Id.*

127. *Id.*

128. See ANALYSIS SUPPORTING EPA'S FEB. 2, 2015, *supra* note 19, at 17 (2015) ("The settlement acts in Maine include extensive provisions to confirm and expand the Tribes' land base, and the legislative record makes it clear that a key purpose behind the land base is to preserve the Tribes' culture and support their sustenance practices."); see also H.R. REP. NO. 96-1353, at 17 (1980) ("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. To the contrary, the Settlement offers protections against this result being imposed by outside entities . . .").

## B. *The EPA's Claim*

The EPA's central claim is the following: Maine's water quality standards cannot be approved because its fish consumption rate data—reflected in its water quality standards—does not adequately protect tribal sustenance fishing.<sup>129</sup>

The EPA argues that when analyzing how water quality standards apply to sustenance fishing in Maine, the Indian tribes must be evaluated as an isolated target population to determine whether the water quality standards adequately protect tribal health and sustenance fishing rights.<sup>130</sup> Part of this isolated evaluation involves assessing the tribes' Fish Consumption Rate (FCR), which is simply an estimated average of the amount of fish tribal members eat in a given area.<sup>131</sup> The FCR is one of the various statistics the EPA uses to develop water quality criteria, which in turn are used to create water quality standards.<sup>132</sup>

Fish are primary sources of human exposure to toxic chemicals, such as PCBs, mercury, carcinogens, and dioxins.<sup>133</sup> Pursuant to EPA guidance, state agencies utilize quantitative risk assessment methods to create standards that prevent contaminants from reaching levels high enough to harm humans.<sup>134</sup> The risk assessment methods consider both contaminant toxicity and human activities, such as fishing, that create opportunities for contaminant exposure.<sup>135</sup> A permissible concentration for each chemical in

129. *Id.* at 41.

130. *Id.* at 35. The EPA's ability to select Maine Indian tribes as the target population derives from the fact that changes to water quality standards will directly affect reserved tribal fishing rights, and therefore the tribes must be evaluated as the target population rather than a high-consuming subpopulation of Maine. CATHERINE A. O'NEILL, COMMENTS TO WASHINGTON DEPARTMENT OF ECOLOGY PROPOSED REVISIONS TO WATER QUALITY STANDARDS FOR THE STATE OF WASHINGTON 17 (2016). The same rationale was adopted when the EPA adjusted Washington's water quality standards in 2015 and identified the Washington tribes as the target population. *Id.*

131. Wendee Nicole, *Meeting the Needs of the People: Fish Consumption Rates in the Pacific Northwest*, 121 ENVTL. HEALTH PERSP. A334, A335 (2013).

132. See EPA, *Human Health Water Quality Criteria and Methods for Toxics*, WATER QUALITY CRITERIA, <https://www.epa.gov/wqc/human-health-water-quality-criteria-and-methods-toxics> (last visited May 11, 2017) (discussing fish consumption rate as part of the scientific information used by the EPA to update water quality criteria); see also WQS HANDBOOK, *supra* note 14, at ch. 1 p. 2 (stating that water quality standards in part consist of water quality criteria), ch. 3 (detailing other factors that make up water quality criteria).

133. O'NEILL, *supra* note 130, at 2.

134. *Id.*

135. *Id.*

waters supporting fish must be determined.<sup>136</sup> The FCR is a key variable in this determination.<sup>137</sup>

The EPA contends that Maine's decision to set the statewide FCR at 32.4 grams/day (the equivalent of one eight-ounce fish meal per week)<sup>138</sup> was erroneous, in part because it was based on a 1990 study called the ChemRisk Study.<sup>139</sup> The EPA dismissed the study because it was neither based on localized data for specific waters on Indian lands, nor based on the target tribe populations.<sup>140</sup> The ChemRisk study data was constructed around the responses of state-licensed recreational fishermen, but the EPA noted that tribal subsistence fishers are not required to have state licenses to fish in waters on Indian land.<sup>141</sup> As a result, the EPA found the ChemRisk study lacked the response data necessary to create a plausible FCR for tribal populations.<sup>142</sup>

EPA also claimed that the ChemRisk study failed to account for unsuppressed fish consumption levels.<sup>143</sup> While the study was accumulating data, Maine's DEP issued fish consumption advisories for the main branch of the Penobscot River, where the Penobscot Nation's reservation is located.<sup>144</sup> The DEP also issued advisories for the Kennebec River and the Androscoggin River.<sup>145</sup> The health notices attached to the advisories reduced fish takes from the aforementioned river systems.<sup>146</sup> Failing to account for these irregular periods of river health and the resulting impact on sustenance fish consumption also skews the results of the ChemRisk study and renders its data questionable. As a result, the study's results are inconclusive as to what the true FCR should be for Maine's tribes who practice subsistence fishing.<sup>147</sup>

Instead of following the ChemRisk study, the EPA urges that Maine adopt water-quality standards based on the Wabanaki Cultural Lifeways Exposure Scenario (Wabanaki study), a peer-reviewed study completed in 2009.<sup>148</sup> Unlike the ChemRisk study, the Wabanaki study estimates unsup-

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136. *Id.*

137. *Id.*

138. ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 38.

139. *Id.* at 37.

140. *See id.* at 38.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 38–39.

147. *Id.*

148. *See id.* at 42.

pressed tribal fish consumption.<sup>149</sup> It combines anthropological and ecological data to illustrate the traditional cultural uses of natural resources by Maine's tribes, and it organizes those findings in a way the EPA can use to determine whether Maine water quality standards on Indian lands protect historical tribal uses.<sup>150</sup> The EPA advocates that Maine adopt the Wabanaki study because it is based on the best current scientific information, and because it presents a range of FCRs (286 grams/day to 514 grams/day), which can help Maine select a rate that illustrates traditional cultural practices in light of present-day circumstances.<sup>151</sup>

## V. PREDICTING THE RESOLUTION OF *MAINE v. MCCARTHY*

Maine can create and implement water quality standards for all intra-state waters, pursuant to the Maine Implementing Act, the Maine Indian Claims Settlement Act of 1980, and the First Circuit's decision in *Maine v. Johnson*.<sup>152</sup> Despite these jurisdictional grants, the state cannot implement water quality standards without EPA's endorsement.<sup>153</sup> The EPA can only approve state-adopted water quality standards if they are consistent with eight factors listed in 30 C.F.R. § 131.5.<sup>154</sup>

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149. *Id.*

150. *Id.* at 39–41.

151. *Id.* at 42.

152. ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 2.

153. *Id.*

154. See 40 C.F.R. § 131.5(b) (2017) ("If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (8) of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards . . . if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (8) of this section."). The eight listed factors are:

- (1) [w]hether the State has adopted designated water uses that are consistent with the requirements of the Clean Water Act; (2) [w]hether the State has adopted criteria that protect the designated water uses based on sound scientific rationale consistent with §131.11; (3) [w]hether the State has adopted an antidegradation policy that is consistent with 131.12, and whether any State adopted antidegradation implementation methods are consistent with §131.12; (4) [w]hether any State adopted WQS variance is consistent with §131.14; (5) [w]hether any State adopted provision authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits is consistent with §131.15; (6) [w]hether the State has followed applicable legal procedures for revising or adopting standards; (7) [w]hether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and (8) [w]hether the State submission meets the requirements included in §131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR part 132.

In order to validate Maine's water quality standards, the EPA must "harmonize" the purpose of the standards under the CWA with the intentions of MIA and MICSA.<sup>155</sup> A goal of both MIA and MICSA is to establish a negotiated, permanent land base for Maine's Southern Tribes so they could continue their cultural traditions, including sustenance fishing.<sup>156</sup> Although a land base has been created, the EPA claims that safe sustenance fishing—a fundamental purpose of the land base—is in jeopardy with the current water quality standards.<sup>157</sup> The EPA is correct in disapproving Maine's water quality standards, because the standards do not adequately protect tribal sustenance fishing rights and do not meet the CWA's purpose of maintaining and restoring the integrity of America's surface waters. The District Court should find for the EPA on all counts, and award relief that it deems just and appropriate. Appropriate relief includes (1) attorneys' fees and (2) the prompt preparation, publication, and enforcement of EPA-created water quality standards in accordance with CWA § 1313(c)(4).

*A. Maine Statutes & Inter-Agency Findings Support EPA's  
Claim That Maine Indian Tribes Have Sustenance  
Fishing Rights*

First, numerous state and federal sources show that Maine's Indian tribes possess a legitimate sustenance fishing right. Multiple Maine statutes preserve sustenance fishing as a core element of tribal culture and health. For example, under 12 M.R.S.A. § 10853(8), all enrolled members of the Penobscot Nation, Passamaquoddy Tribe, Houlton Band of Maliseet Indians and Aroostook Band of Micmacs receive lifetime fishing licenses and all permits needed to fish, at no charge.<sup>158</sup> Tribal members are also exempt from certain state permitting requirements when conducting commercial lobster and shellfish harvesting under 12 M.R.S.A. § 6302-A(1),<sup>159</sup> and engaging in sustenance or ceremonial tribal uses of fish under Section 6302-

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40 C.F.R. § 131.5(a).

155. See ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 28 (stating that if the EPA ignored the impact that water quality standards could have on tribes' ability to safely perform sustenance fishing practices, the Agency would be blatantly contradicting a clear purpose Congress had in ratifying MICSA and allocating Indian lands in Maine; therefore it is incumbent upon EPA when applying the provisions of the Clean Water Act to harmonize those provisions with Congress' intentions).

156. *Id.*

157. *See id.*

158. See ME. REV. STAT. ANN. tit. 12, § 10853(8) (2015) (Maine's Indian tribes also receive free hunting and trapping licenses and permits under this statute).

159. *Id.* § 6302-A(1) (2013).

A(2).<sup>160</sup> Because these statutes operate independently of MIA and MICSA, they show that Maine intends to protect tribal sustenance fishing through means other than MICSA and MIA. And if Maine's Indian tribes did not possess unique fishing rights, Maine's legislature would not have enacted laws that exempted tribes from statewide licensing and permitting requirements.

In addition, the DOI, at EPA's request, prepared a written legal opinion for the Agency to discuss the federal fishing rights belonging to Maine's tribes.<sup>161</sup> This legal opinion reinforces the EPA's argument that Maine's Indian tribes have extensive sustenance fishing rights. Moreover, because DOI is the federal government's expert agency on Indian law matters,<sup>162</sup> is charged with administering MICSA,<sup>163</sup> and has a delegated federal trust responsibility to manage Indian lands and funds,<sup>164</sup> the DOI memorandum should have significant persuasive value for the court.<sup>165</sup>

DOI first notes that the fishing rights of the Penobscot Nation and Passamaquoddy Tribe are expressly reserved rights<sup>166</sup> that the tribes have retained since aboriginal times.<sup>167</sup> DOI's opinion subsequently references MIA Section 6203(5), which defines the Passamaquoddy Indian Reservation as "those lands reserved to the Passamaquoddy Tribe by agreement

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160. See *id.* § 6302-A(2) (defining sustenance use as all noncommercial consumption or noncommercial use by any person within Passamaquoddy Tribe territory, Penobscot Nation territory, Aroostook Band Trust Land, or Houlton Band Trust Land, or at any location within Maine by a tribal member).

161. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of the Interior Office of the Solicitor, to Avi S. Garbow, Gen. Counsel, EPA (Jan. 30, 2015) (on file with the Office of the Solicitor) (quoting ME. REV. STAT. ANN. tit. 12, § 6203(5) (1985), (8) (2009)).

162. See, e.g., Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of the Interior Office of the Solicitor, to Eric Fanning, Sec'y of the Army at 1 (Dec. 4, 2016) (on file with the Office of the Solicitor) (stating that DOI has "special expertise concerning the government-to-government relationship between the United States and Indian tribes").

163. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 794 (1st Cir. 1996).

164. See Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 19 (2004).

165. See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (stating that interpretations in opinion letters do not warrant Chevron deference, but are "entitled to respect" insofar as the interpretations have the power to persuade) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

166. Memorandum from Hilary C. Tompkins to Avi S. Garbow, *supra* note 161; see *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979) (stating 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").

167. Memorandum from Hilary C. Tompkins to Avi S. Garbow, *supra* note 161, at 2 n.8, 9. More broadly, Indian tribes possess significant rights to access sources of water. *Winters v. United States*, 207 U.S. 564, 576–78 (1908) (holding that Indian tribes have an implied reserved water right to sufficient water to render their land inhabitable).

with the State of Massachusetts dated September 19, 1794,” and MIA Section 6203(8), which defines the Penobscot Indian Reservation as “the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine.”<sup>168</sup> DOI next contends that the tribes’ sustenance fishing rights on these defined lands are solidified in Section 6207(4), which says the tribes can take fish from their reservation lands for individual sustenance.<sup>169</sup> DOI acknowledges that although the term “sustenance” is not explicitly defined in MIA and MICSA, it is reasonable to infer that the term at the very least encompasses the idea that tribal members can take any amount of fish needed to feed themselves.<sup>170</sup> If this argument is not persuasive, DOI cites the Supreme Court case *Montana v. Blackfeet Tribe of Indians*<sup>171</sup> for the proposition that ambiguous statute provisions must be construed liberally and for the benefit of Indian tribes.<sup>172</sup> The Supreme Court also applied this rule of liberal construction to traditional fishing tribes in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.<sup>173</sup> There, the Court ruled that a tribal treaty must be interpreted in the way a tribe would naturally understand the treaty, especially with respect to the tribe’s right to take fish.<sup>174</sup> Here, the term “sustenance” in MIA Section 6207(4) should be construed broadly to allow the tribes’ to take sufficient amounts of food for basic nourishment and sustenance, subject to MIA’s statutory limits.

DOI also refers to MIA provisions that discuss the regulation of certain waters by the Maine Indian Tribal-State Commission (the Commission), a thirteen-member body consisting of representatives appointed by the Governor of Maine, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, and the Penobscot Nation.<sup>175</sup> The Commission continually reviews the effectiveness of MIA and the legal relationship between Maine, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, and the Penobscot Nation.<sup>176</sup> Pursuant to MIA Section 6207(3), the Commission can promulgate fishing regulations within specified waters on or adjoining the Penobscot Nation’s and Passamaquoddy Tribe’s territories, taking into con-

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168. Memorandum from Hilary C. Tompkins to Avi S. Garbow, *supra* note 161, at 2 n.8, 9.

169. *Id.* at 2 n.9.

170. *Id.* at 4.

171. 471 U.S. 759 (1985).

172. Memorandum from Hilary C. Tompkins to Avi S. Garbow, *supra* note 161, at 4 n.16; *Blackfeet Tribe*, 471 U.S. at 766.

173. 443 U.S. 658 (1979).

174. *Id.* at 676, 678.

175. ME. REV. STAT. ANN. tit. 30, § 6212(1) (2009).

176. *Id.* § 6212(3).

sideration 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.”<sup>177</sup> Based on the plain language of Section 6207(3), DOI contends that Maine’s Southern Tribes possess sustenance fishing rights within their territories.

As for Maine’s Northern Tribes, DOI argues their tribal fishing rights are not explicitly listed in MIA or MICSA, but nonetheless exist.<sup>178</sup> First, the Northern Tribes’ fishing rights are rooted in the Maine common law right of riparian owners to fish on their land, and the rights are further secured through the federal government’s public trust obligations to Indian tribes.<sup>179</sup> State statutes specific to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs provide that the tribes’ trust lands can only be transferred under limited circumstances.<sup>180</sup> Additionally, with respect to the Aroostook Band, Congress and Maine’s legislature intended to provide the tribe with sustenance fishing rights to preserve the tribe’s cultural integrity and satisfy basic nutritional needs.<sup>181</sup>

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177. *Id.* § 6207(3) (1979).

178. *See* Memorandum from Hilary C. Tompkins to Avi S. Garbow, *supra* note 161, at 4–5; *United States v. Dion*, 476 U.S. 734, 738 (1986) (stating that, as 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 do not have to be plainly stated in a treaty).

179. Memorandum from Hilary C. Tompkins to Avi S. Garbow, *supra* note 161, at 5.

180. *See* ME. REV. STAT. ANN. tit. 30, § 6205-A(3) (1981) (stating that any transfer of Houlton Band Trust Land shall be void except when Maine or the United States takes land for public use, when land is transferred from one Houlton Band member to another, when transfers are made pursuant to a special act of Congress, and when transfers are authorized by 25 U.S.C. § 1724(g)(3) (2015)); *see also id.* § 7204(3) (stating that any transfer of Aroostook Band Trust Land shall be void except when Maine or the United States takes land for public use, when there is a transfer of individual use assignment from one Aroostook Band of Micmacs member to another, when there is a transfer authorized by federal law ratifying and approving Section 7204, and when there is a transfer made pursuant to a special act of Congress).

181. *See* S. REP. NO. 102-136, at 9 (1991) (quoting Dr. Harold E.L. Prins, Bowdoin College) (“Today, without a tribal sustenance base of their own, most Micmacs in northern Maine occupy a niche at the lowest level of the social order.”). The Report accompanied S. 374 and a companion bill, H.R. 932, which garnered support from the entire Maine Congressional delegation, the Attorney General of Maine, and local communities. *Id.* The Select Committee on Indian Affairs recommended that the bill be passed. *Id.*; *see also* H.P. 995, 126th Leg. (Me. 2013) (“Notwithstanding any other rule or law of the State and subject to the limitations of subsection 7, the members of the Aroostook Band of Micmacs may take fish, within the boundaries of the Aroostook Band of Micmacs territory, for the members’ individual sustenance.”).

## B. *Canons of Construction Support EPA*

Indian law canons of construction, grounded in the unique trust relationship existing between the United States and Indian tribes,<sup>182</sup> require that ambiguous statutory terms be construed most favorably towards tribal interests.<sup>183</sup> This presumption certainly applies to the fishing rights of tribes—such as the Penobscot Nation and Passamaquoddy Tribe—who have a storied fishing tradition.<sup>184</sup> Based on a liberal interpretation of the word “sustenance,” its use in MIA Section 6207(4)<sup>185</sup> permits fish takes necessary to sustain tribal populations, with the only exception being Maine’s right to limit fish takes to ensure the conservation and long-term continuation of a fish species.<sup>186</sup> This conclusion, in conjunction with previously discussed DOI arguments, the other arguments in this section, and the knowledge that the tribes’ fishing practices are an essential part of their livelihood and cultural values, should convince the District Court to rule in favor of the

182. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians”).

183. *Id.* (“Thus, it is well established that treaties should be construed liberally in favor of the Indians . . . with ambiguous provisions interpreted to their benefit.”); see also *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (9th Cir. 1985) (“Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”); see also *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (“[Indian treaties] are to be construed, so far as possible, in the sense in which the Indians understood them, and ‘in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.’”) (citing *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942)); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997).

184. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676, 678 (1979) (stating that treaties must be interpreted “in the sense in which they would naturally be understood by the Indians . . . especially the reference to the right of taking fish.”) (quotations omitted).

185. For a repetition of the language of MIA Section 6207(4), see *supra* note 103 and accompanying text.

186. See ME. REV. STAT. ANN. tit. 30, § 6207(6) (1979) (stating that if Maine’s Commissioner of Inland Fisheries and Wildlife has reasonable grounds to believe that a tribe is adversely affecting or is likely to adversely affect fish stocks outside the boundaries of waters subject to Indian regulation, he must develop appropriate remedial standards in consultation with the tribes). Maine’s right to restrict tribal fishing in limited circumstances is consistent with the federal common law rule. See *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985) (describing findings that courts must make in order to uphold state 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”); see also *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.”).

EPA's regulation of water quality standards with sustenance fishing interests in mind.

### C. *Administrative Law Standard of Review Supports EPA*

The District Court should also rule in favor of the EPA because the Agency's disapproval of Maine's water quality standards for Indian Waters did not violate § 706(2)(A) of the Administrative Procedure Act.

To determine whether an agency decision is arbitrary and capricious, the court considers whether the agency action was based on the relevant factors and whether there was a clear error in judgment by the agency.<sup>187</sup> The agency must articulate a satisfactory explanation for its action, including a rational connection between the facts found, the appropriate consideration factors, and its ultimate conclusions reached.<sup>188</sup> A court must also grant as much deference to the agency as possible when, as in *Maine v. McCarthy*, it reviews an agency's scientific determinations and documents requiring a high level of technical expertise.<sup>189</sup>

Here, the EPA considered relevant factors. The Agency assessed Maine's water quality standards and considered (1) whether those standards satisfied CWA water quality standards requirements, (2) whether those standards satisfied the Agency's obligation to protect Indian sustenance fishing rights, and (3) whether the Agency's demand for water quality stan-

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187. See, e.g., *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 385 (1989) (holding that the Army Corps acted within the dictates of the National Environmental Policy Act and did not commit an error in judgment by taking a hard look at the proffered evidence and determining, based on a thorough scientific analysis, that a second Environmental Impact Statement was unnecessary for the dam project at issue).

188. See, e.g., *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1145, 1150 (9th Cir. 2007) (stating that because the Fish and Wildlife Service articulated reasoned connections between the record and its final conclusion that the Washington western grey squirrel was not an endangered distinct population segment under the Endangered Species Act, it was not acting arbitrarily and capriciously in denying the plaintiff's petition to classify the squirrel as an endangered distinct population segment under the Act.); *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) ("A decision is arbitrary and capricious 'only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' ") (citation omitted). Review under the arbitrary and capricious standard is narrow, and the court cannot substitute its judgment for the agency's judgment. *Id.*

189. See, e.g., *Marsh*, 490 U.S. at 377 ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.' ") (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 86, 103 (1983) ("When examining this kind of scientific determination [regarding nuclear waste storage] . . . a reviewing court must generally be at its most deferential.").

dards revision—based on legal and environmental factors—infringed on Maine’s regulatory jurisdiction under MIA and MICSA.<sup>190</sup>

The EPA articulated an acceptable explanation for rejecting Maine’s water quality standards for Indian waters, and demonstrated a rational connection between the facts found and the administrative choices made.<sup>191</sup> In EPA’s February 2015 decision report, the Agency provided a brief history of Maine’s water quality standards submissions to the EPA between 2004 and 2013, summarized Maine’s authority to establish water quality standards, discussed the state water quality standards the Agency approved and disapproved, provided reasons for why specific standards were supported and denied, and offered a procedure for Maine to follow to remain compliant with the CWA and sufficiently address the water quality of Indian waters.<sup>192</sup> The Agency also thoroughly analyzed Maine’s Fish Consumption Rate data,<sup>193</sup> which proved to be inadequate for protecting tribal health and sustenance fishing. The EPA weighed the merits of Maine’s ChemRisk study against the Wabanaki study, and urged Maine to adopt the Wabanaki study because of its comprehensive analysis of water quality factors, particularly unsuppressed tribal fish consumption.<sup>194</sup>

Evidence that MICSA and MIA establish a tribal land base to preserve sustenance fishing rights reinforces the EPA’s rational basis for rejecting Maine’s water quality standards. Support for a Maine tribal land base derives in part from MICSA § 1724, which established a claims settlement fund, equally divided between the Penobscot Nation and Passamaquoddy Tribe.<sup>195</sup> The settlement fund also managed the tribes’ land and natural resources.<sup>196</sup> Separate from this fund was a land acquisition fund, initially credited with a \$54.5M deposit from the United States Treasury, that held in trust the first 150,000 acres acquired by the Secretary of the Interior for

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190. ANALYSIS SUPPORTING EPA’S FEB. 2, 2015 DECISION, *supra* note 19.

191. *Id.*

192. *Id.* at 3.

193. *Id.*; *see supra* Part IV.B (advocating for a FCR between 286 grams/day and 514 grams/day instead of 32.4 grams/day).

194. ANALYSIS SUPPORTING EPA’S FEB. 2, 2015 DECISION, *supra* note 19; *see supra* Part IV.B (identifying the Wabanaki study as a peer-reviewed study that, unlike the ChemRisk study, took into account unsuppressed tribal fish consumption, and combined anthropological and ecological data to demonstrate traditional Indian cultural uses of Maine’s natural resources).

195. 25 U.S.C. § 1724(a), (b)(1) (2015).

196. *See id.* § 1724(g)(3) (providing that the Passamaquoddy Tribe and Penobscot Nation can request that their land and/or natural resources be leased, sold, subjected to rights-of-way, exchanged for other land or natural resources of equal value, or sold by the Secretary of the Interior).

the Penobscot Nation and Passamaquoddy Tribe.<sup>197</sup> MIA established a similar land trust fund for these tribes,<sup>198</sup> ensuring the continuation of sustenance practices. Although the trust property belonging to the Passamaquoddy Tribe and Penobscot Nation can be condemned for public purposes, the proceeds from any condemnation must be deposited in the land acquisition fund and reinvested in land located within “unorganized” or “unincorporated” areas of Maine.<sup>199</sup> MICSA’s legislative history indicates that one of the legislature’s objectives was to create a permanent land base for Maine’s tribes.<sup>200</sup> Speaking before the Senate Select Committee on Indian Affairs in 1980, Richard Cohen, the Attorney General of Maine, testified that during settlement negotiations, he agreed to support the tribes’ request for funds to acquire a permanent land base.<sup>201</sup> The Attorney General also noted that the Maine legislature had approved the settlement proposal, and that the settlement is “right for Maine.”<sup>202</sup> Accepting the Attorney General’s statements as true, the District Court should conclude that MIA § 6207(4), which allows the Passamaquoddy Tribe and Penobscot Nation to “take fish, within the boundaries of their respective Indian reservations, for their individual sustenance,”<sup>203</sup> is also a provision that is acceptable, or “right,” for Maine. Based on these statutory provisions and legislative history, it is clear that Maine anticipated that a permanent land base to preserve sustenance fishing practices would be incorporated into MIA and MISCA.<sup>204</sup>

Additional support for the EPA’s argument can be found in MIA Section 6207(1), which provides that the Penobscot Nation and Passamaquoddy Tribe have the exclusive territorial authority to promulgate wildlife taking ordinances and to “exercise within their respective Indian territories all the rights incident to ownership of land under the laws of [Maine].”<sup>205</sup> The

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197. *Id.* § 1724(c), (d)(3). Land or natural resources acquired for the Houlton Band of Maliseet Indians was also held in trust by the United States pursuant to *Id.* § 1724(d)(3).

198. *See* ME. REV. STAT. ANN. tit. 30, § 6205(1)(b) (2001), (2)(b) (1999) (providing that the first 150,000 acres of land acquired by the Secretary of the Treasury, prior to January 31, 1991, for the benefit of the Passamaquoddy Tribe, and for the benefit of the Penobscot Nation, prior to January 31, 2021, are not held in common with any other person or entity).

199. 25 U.S.C. § 1724(h)(2).

200. *See Proposed Settlement of Maine Indian Land Claims: Hearing on S. 2829 Before the Select Comm. on Indian Affairs*, 96th Cong. 131–32 (1980) (statement of Cecil D. Andrus, Sec’y, United States Department of the Interior) (explaining the protracted land claim settlement negotiations between Congress and Maine’s tribes to establish a tribal land base).

201. *Id.* at 160 (statement of Richard S. Cohen, Att’y Gen. of the State of Maine).

202. *Id.* at 161.

203. ME. REV. STAT. ANN. tit. 30, § 6207(4) (1979).

204. RESPONSES TO PUBLIC COMMENTS RELATING TO MAINE, *supra* note 72, at 13.

205. ME. REV. STAT. ANN. tit. 30, § 6207(1).

EPA contends that the only limitation in MIA on the Southern Tribes' right to take fish for their individual sustenance is Maine's ability to limit the take based on a finding that Indian fishing practices are threatening stocks located outside of the Tribes' reservations.<sup>206</sup> The notion that the EPA is usurping Maine's right to devise water quality standards for intra-state waters is unreasonable; the Agency can propose and promulgate standards for a state if it deems the state's standards unacceptable as currently constituted and inconsistent with the CWA's goals.<sup>207</sup>

In disapproving of certain Maine water quality standards under the CWA, the Agency relied on the eight factors in 40 C.F.R. § 131.5 that Congress intended the Agency to evaluate.<sup>208</sup> One additional factor implicitly embedded in the CWA is the Agency's fiduciary obligation to protect tribal interests and lands held in trust for Maine's Indian tribes.<sup>209</sup> The District Court should recognize that this fiduciary duty applies to the Agency's review of state water quality standards and their responsibility to make certain that the standards do not compromise reserved tribal sustenance fishing rights.

The District Court could also find that the EPA's final agency action was acceptable in light of the "*EPA Policy for the Administration of Environmental Programs on Indian Reservations*" (*EPA Indian Policy*).<sup>210</sup> Most recently updated in 2003, the EPA Indian Policy consists of nine central principles affirming tribal sovereignty, tribal self-government, and agency obligations under the trust doctrine.<sup>211</sup> The fifth principle states that, "[t]he Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."<sup>212</sup> Water quality standards clearly affect Indian environments—they determine the amount of effluent

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206. *Id.* § 6207(6).

207. EPA, *Federally-Promulgated Water Quality Standards for Specific States, Territories, and Tribes*, *supra* note 116.

208. See *supra* note 154 and accompanying text.

209. See Kevin H. Kono, Comment, *The Trust Doctrine and the Clean Water Act: The Environmental Protection Agency's Duty to Enforce Tribal Water Quality Standards Against Upstream Polluters*, 80 OR. L. REV. 677, 700–01 (2001) (discussing the federal government's general duty to act in the best interests to protect land and water as trust assets, and that at least one court has held that the federal government has a fiduciary duty to protect Indian fishing rights in waters located in and outside of Indian reservations from anthropogenic despoliation, and how statutory mandates are supplemented by a duty to protect Indian water quality).

210. EPA, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984) <https://www.epa.gov/sites/production/files/2015-04/?documents/indian-policy-84.pdf>.

211. *Id.*

212. *Id.*

that is running through tribal waters and how much fish tribes can safely consume in a given time period—so the EPA is right to consider how those standards impact tribal interests, and the EPA should alter the standards if necessary to honor their federal trust obligations. Based on the EPA’s reasoned review of Maine’s water quality situation, the District Court should find that the Agency in no way responded in a manner that violated the APA.

#### D. MICSA’s Savings Clauses Will Not Override EPA’s WQS Disapprovals

MICSA contains multiple provisions known as “savings clauses”<sup>213</sup> that are designed to thwart the application of federal laws in Maine if those laws grant a special status or right to Indian tribes, or preempt the application of state law to intrastate tribes.<sup>214</sup> The savings clauses also prevent federal law from supplanting state laws that govern the lands and natural resources owned by Maine tribes, or land held in trust by the United States or other entities.<sup>215</sup>

But the savings clauses will not prevent the EPA from executing its CWA regulatory authority and denying Maine’s water quality standards. Under CWA Section 303, the EPA has general oversight authority to review all new or revised water quality standards submitted by states for interstate and intrastate waters.<sup>216</sup> Because this is a blanket, general authority, it does not give a special status or right to Indian tribes, nor does it disrupt Maine’s regulatory jurisdiction. Additionally, one of MICSA’s savings clauses, § 1735(b), does not apply to Section 303 of the CWA because Section 303 was passed in 1972, and § 1735(b) explicitly applies only to laws enacted on or after 1980.<sup>217</sup>

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213. ANALYSIS SUPPORTING EPA’S FEB. 2, 2015 DECISION, *supra* note 19, at 28–30.

214. *Id.*; see *supra* notes 99–100 and accompanying text.

215. ANALYSIS SUPPORTING EPA’S FEB. 2, 2015 DECISION, *supra* note 19, at 28–30.

216. See 33 U.S.C. § 1313(a)(1), (a)(2) (2015) (stating that the water quality standards adopted by states for interstate and intrastate waters that have been approved by the EPA Administrator will remain in effect unless the Administrator determines that the standards are no longer consistent with the applicable requirements of the Clean Water Act).

217. See *supra* note 100 and accompanying text.

## VI. EPA WATER QUALITY STANDARD REFORMS IN OTHER STATES TO PROTECT RESERVED SUSTENANCE FISHING RIGHTS

In recent years the EPA has rejected water quality standards in other states that do not account for tribal sustenance fishing.<sup>218</sup> These Agency decisions were also met with resistance.

In August 2015, the EPA proposed a rule revising the current water quality standards for Washington waters to ensure the water quality standards criteria<sup>219</sup> would protect fish consumers and Indian tribes from exposure to toxic and carcinogenic pollutants.<sup>220</sup> Pursuant to CWA Section 304(a), the EPA offered revised water quality standards specific to Washington for ninety-nine toxic pollutants in all waters under Washington's jurisdiction.<sup>221</sup> In Washington, numerous Indian tribes have reserved rights to take fish for subsistence purposes, as well as ceremonial and economic purposes.<sup>222</sup> In light of this cultural right, the EPA identifies Washington's Indian tribes as the target population for creating updated water quality standards.<sup>223</sup> Maine should view the Washington situation as a template for how it could resolve its own water quality jurisdictional dispute, if it, like Washington, identifies its Indian tribes as the water quality standards' target population. The EPA's actions in Washington also suggest that the Agency's legal determinations giving rise to the *Maine v. McCarthy* litigation were not inconsistent with its decisions in other tribal-state water quality conflicts, and its actions with respect to Maine should not be regarded as a radical departure from its typical enforcement of the Clean Water Act.

While there has been some resistance in the past to EPA's water quality standards in Washington,<sup>224</sup> the State has also collaborated with the

218. Second Amended Complaint, *supra* note 20, ¶¶ 137, 142 (discussing the EPA's denial of Washington's proposed water quality standards, as well as Idaho's proposed human health criteria).

219. Determining the criteria for water quality standards requires consideration of a number of inputs, including cancer risk level, body weight, drinking water intake rate, fish consumption rate (FCR), bioaccumulation factors, and relative source contribution. EPA, PROPOSED REVISION TO FEDERAL HUMAN HEALTH CRITERIA APPLICABLE TO WASHINGTON 2 (2015) [hereinafter PROPOSED REVISION APPLICABLE TO WASHINGTON], <https://www.epa.gov/sites/production/files/2016-11/documents/washington-rule-factsheet-2015.pdf>. These various inputs are examined collectively to ensure, as much as possible, that the target population's total exposure from all sources does not exceed the water quality standards criteria. *Id.*

220. *Id.*; EPA, *Water Quality Standards Regulations: Washington*, WATER QUALITY STANDARDS: REGULATIONS AND RESOURCES, [http://www2.epa.gov/wqs-tech/water-quality-standards-regulations-washington# fed](http://www2.epa.gov/wqs-tech/water-quality-standards-regulations-washington#fed) (last visited May 10, 2017).

221. PROPOSED REVISION APPLICABLE TO WASHINGTON, *supra* note 219.

222. *Id.*

223. *Id.*

224. See AFFILIATED TRIBES OF NW. INDIANS, RESOLUTION #14-56: SUPPORTING EPA PROMULGATION OF SURFACE WATER QUALITY STANDARDS FOR WASHINGTON STATE, AND OPPOSING GOVERNOR

Agency. In 1992 the EPA promulgated Washington's existing criteria for its water quality standards under a different federal statute, the National Toxics Rule, using the Agency's recommended criteria values.<sup>225</sup> The Agency's decision was prompted by Washington's water quality standards for a number of toxic pollutants not being in compliance with CWA Section 303(c)(2)(A).<sup>226</sup> To ensure the protection of human health in waters where fish and shellfish were caught and consumed, the EPA relied on data that illustrated the average per-capita FCR from inland and nearshore waters as 6.5 grams/day.<sup>227</sup> Today, however, surveys from Pacific Northwest residents and tribes, relying on more recent data, show consumption levels of fish considerably higher than the 1992 rate of 6.5 grams/day.<sup>228</sup> The average FCRs from the new surveys ranged between 63 grams/day and 214 grams/day.<sup>229</sup> The EPA considered the new data, in conjunction with the current designated uses of Washington's waters as informed by tribal reserved rights, and determined that new or revised water quality standards were necessary to protect human health and protect reserved tribal fishing rights.<sup>230</sup>

Washington retains considerable discretion in implementing the EPA's water quality standard revisions.<sup>231</sup> The State may implement the new standards through the NPDES permitting program and adopt water quality standard variances to give it time to meet the new standards and confront water quality changes in a predictable, transparent manner.<sup>232</sup>

Additional collaborative efforts between Washington and the EPA were made in 2014 when Washington Governor Jay Inslee announced legislation

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INSLEE'S POLICY DECISION TO WEAKEN CANCER PROTECTION CRITERIA (2014) (stating how Washington Governor Inslee announced in July 2014 his policy for revising state water quality standards that purportedly weaken cancer risk levels from one in one million to one in one hundred thousand).

225. Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. 55,063, 55,066 (proposed Sept. 14, 2015) (to be codified at 40 C.F.R. pt. 131).

226. *Id.* at 55,064.

227. *Id.* at 55,066. The FCR established for Washington waters in 1992 was, with the benefit of hindsight, misguided based on a survey of the average fish intake of the general United States population in 1973 and 1974. ANALYSIS SUPPORTING EPA'S FEB. 2, 2015 DECISION, *supra* note 19, at 2.

228. Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. at 55,063.

229. *Id.* at 55,066.

230. *Id.* Note, however, that the EPA's determination was not itself a final agency action, and the Agency will only take final action for Washington's water quality standards after considering public comments. *Id.* at 55,066–67.

231. *Id.* at 55,071.

232. *Id.* at 55,071–72.

to update the State's clean water standards.<sup>233</sup> The legislative proposal was supported by a coalition of local governments and businesses and created in the interest of maintaining compliance with the CWA, but the bill failed in the state senate.<sup>234</sup> Although this regulatory history was not the case in Maine, Washington was nonetheless able to balance its regulatory interests with those of the EPA and intrastate tribes and come to a water quality agreement based on a reasonable interpretation of the EPA's authority under the Clean Water Act. The EPA has clear authority to reject state water quality standards and recommend different standards if, based on the Agency's reasonable understanding of the CWA, the standards do not meet the statute's requirements. Maine should follow Washington's policy on revising water quality standards and work with the EPA, not against it.

Oregon has been operating under new water quality standards since 2011, when the standards achieved compliance with CWA Section 303(c).<sup>235</sup> Like in Maine and Washington, the new Oregon standards were adopted to ensure that state Indian tribes could safely and sustainably maintain their traditional subsistence fishing practices.<sup>236</sup> The Oregon Department of Environmental Quality (DEQ) and the Confederated Tribes of the Umatilla Indian Reservation were the main parties who drafted the revised standards.<sup>237</sup>

In 2004, Oregon's Umatilla Indian Reservation contacted the EPA to express their concern that the current fish consumption rate of 17.5 grams/day did not adequately protect tribal subsistence consumers.<sup>238</sup> Ensuing discussions amounted to an agreement that Oregon DEQ, the Umatilla Tribes, and the EPA would conduct a public process to determine the fish consumption rate appropriate for protection of subsistence fishing in Oregon's waters.<sup>239</sup> In 2008 the three governments recommended a fish consumption rate of 175 grams/day be utilized for Oregon's waters.<sup>240</sup> The

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233. Press Release, Wash. Governor Jay Inslee, Inslee Directs Ecology to Evaluate Options on Pending Clean Water Rules (July 31, 2015), [www.governor.wa.gov/news-media/inslee-directs-ecology-evaluate-options-pending-clean-water-rules](http://www.governor.wa.gov/news-media/inslee-directs-ecology-evaluate-options-pending-clean-water-rules) (describing Washington State's efforts to update clean water standards).

234. *Id.*

235. Letter from Michael A. Bussell, Director, EPA Region 10, to Neil Mullane, Administrator, Dep't of Env'tl. Quality at 1 (Oct. 17, 2011), <https://www3.epa.gov/?region10/pdf/water/or-tds-hhwqs-transmittal-ltr-2011.pdf>.

236. *EPA Approves Toughened Oregon Water Quality Standards Based on Higher 'Fish Consumption Rate,'* THE COLUMBIA BASIN FISH & WILDLIFE NEWS BULL., Oct. 21, 2011, <http://www.cbulletin.com/413443.aspx>.

237. *Id.*

238. Letter from Michael A. Bussell to Neil Mullane, *supra* note 235, at 2.

239. *Id.*

240. *Id.*

Commission agreed with this recommendation and directed DEQ to revise the human health criteria using a fish consumption rate of 175 grams/day, and to review implementation measures to be used in association with the criteria.<sup>241</sup>

As in *Maine v. McCarthy*, Oregon industries voiced concern about the adverse economic impacts of more stringent water quality regulations.<sup>242</sup> Unlike Maine's response, the Oregon DEQ implemented a variance program, and offered "new permitting implementing tools" to assist discharging facilities.<sup>243</sup> Maine, concerned about the impact of new water quality standards on its own industries, should consider the options Oregon pursued. While Oregon does not have the type of regulatory authority that Maine enjoys under MICSA and MIA, the EPA nonetheless determined that the state's water quality standards no longer met the CWA's requirements, and required modifications. Instead of embroiling itself in costly litigation, Oregon opted for a negotiated settlement between the Agency and the affected Indian tribes.<sup>244</sup> Washington, Oregon, and Maine are all states known for their environmental stewardship, but their pro-environment reputation does not allow their laws to become ossified and impervious to federal oversight.

## VII. CONCLUSION

*Maine v. McCarthy* is not so much a struggle to define the rights of the State's Northern and Southern Tribes as it is a battle over the reach of the Clean Water Act and its impacts on state autonomy. Maine claims that its unique MICSA-MIA jurisdictional structure, as well as the *Maine v. Johnson* decision, shields it from EPA requirements to sufficiently protect sustenance fishing rights. But the record and arguments show that the EPA still has the authority to deny Maine's water quality standards if the state does not comply with the CWA—MICSA and MIA notwithstanding. Even if the District Court finds for the EPA on all counts, this case will not extinguish the conflict between the federal government, states, and Indian tribes for control over certain water resources. *Maine v. McCarthy* demonstrates the reach of federal statutes into state administrative decisions, even in the presence of previously negotiated agreements between the state and federal government.

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241. *Id.*

242. *EPA Approves Toughened Oregon Water Quality Standards Based on Higher 'Fish Consumption Rate,' supra* note 236.

243. *Id.*

244. *Id.*