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# Tribal Fishing Rights & Water Quality Standards under the Clean Water Act

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# U.S. EPA



# States



# Tribes/Fishing Rights



# Water Quality



# Background & Overview

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- EPA's 1984 Indian Policy
- Tribal Treatment as a State ("TAS") Status
- Tribal Water Quality Standards ("WQS") in Indian Country
- Recent Developments – 2016
  - EPA's Reinterpretation of TAS Provision
  - Expansion of TAS Authorities for Tribes
  - Proposal: Baseline WQS in Indian Country
- State Water Quality Standards in Areas of Treaty Fishing Rights: Subject to EPA Review
- EPA's New Treaty Rights Guidance (2016)
- Interagency MOU on Treaty Rights (2016)

# EPA's 1984 Indian Policy – Key Principles

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1. Work with Indian tribes on a **government-to-government** basis
2. Under principles of **sovereignty and self-government**, tribes may wish to set their own standards and policies
3. Encourage and facilitate **tribal assumption of regulatory and program management** responsibilities for reservation lands
4. Identify and **remove** existing legal and procedural **impediments**
5. Ensure through **consultation** that tribal concerns and interests are considered whenever actions may affect reservation environments
6. Incentivize **cooperation** between tribal, state, and local governments
7. Enlist **federal agencies** with responsibilities in Indian country
8. Ensure statutory and regulatory **compliance** in Indian country
9. **Integrate these principles** into agency planning and management, and into ongoing policy and regulation development

# Tribal Treatment as a State (“TAS”) Status

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- EPA is authorized to treat Indian tribes in a similar manner as a state (“TAS”) for implementing and managing certain environmental programs, including CWA
- Basic requirements for a tribe applying for TAS:
  - federally recognized;
  - governing body carrying out substantial governmental duties and powers;
  - appropriate authority; and
  - capable of carrying out the functions of the program

# TAS Under Clean Water Act

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- CWA authorizes EPA to grant TAS status to tribes with reservations (formal or informal) for various purposes.
  - administering principal CWA regulatory programs;
  - receiving grants under CWA authorities
- EPA has approved **54** tribes to administer a WQS program
- EPA has approved WQS for **42** of these tribes
  - Pueblo of Santa Ana WQS (August 2015)
  - Twenty-Nine Palms Band of Mission Indians WQS (August 2015)
  - Coeur D’Alene WQS (June 2014)
- Courts have recognized tribal authority to set WQS:
  - *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996)
  - *State of Montana v. E.P.A.*, 137 F.3d 1135 (9th Cir. 1998)

# Revised Interpretation of the CWA's TAS Provision (§ 518)

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- On May 26, 2016, EPA issued a revised interpretation of TAS under the Clean Water Act
  - Streamlines application process
  - Eliminates need for applicant tribes to demonstrate inherent authority to regulate surface water quality on their reservations, including nonmember conduct on fee lands
  - Brings CWA in line with CAA
  - Consistent with case law
  - Retains opportunities for public input, including by states and local governments
- Will the reinterpretation be subject to challenge?
  - Opposed by several States

# Baseline Federal WQS Proposal

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- Only 42 of the 300+ tribes with reservation lands have federally-approved *tribal* WQS in place
- EPA has issued *federal* WQS for particular reservation waters on only one occasion (Colville)
- On September 19, 2016, EPA issued an advance notice of proposed rulemaking (ANPRM) to establish federal baseline WQS for reservation waters without EPA-approved WQS
- Comment period closed on December 28, 2016
- Questions:
  - What about unique circumstances?
  - “Opt-in” / “opt-out”?
  - Implications for TAS applications?
  - Status of rulemaking moving forward?



# EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights



## EPA TREATY RIGHTS GUIDANCE (FEB. 2016)

# EPA Treaty Rights Guidance (2016)

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- “EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so.”
- Guidance applies to “EPA decisions focused on specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas.”
- Tribal consultation will “help ensure that EPA’s actions do not conflict with treaty rights, and ... that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.”

# MEMORANDUM OF UNDERSTANDING



among the

U.S. Department of the Interior,

U.S. Department of Agriculture,

U.S. Department of Justice ,

U.S. Department of Commerce,

U.S. Department of Defense,

U.S. Environmental Protection Agency,

U.S. Department of Transportation,

White House Council on Environmental Quality,

Advisory Council on Historic Preservation

**REGARDING INTERAGENCY COORDINATION AND COLLABORATION  
FOR THE PROTECTION OF TRIBAL TREATY RIGHTS**

# Interagency MOU on Treaty Rights (2016)

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- Purpose and Principles of MOU:

“To affirm our commitment to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decisionmaking processes and enhanced interagency coordination and collaboration.”
- Agencies commit “to integrate consideration of tribal treaty rights into their decisionmaking processes to ensure that agency actions are consistent with” treaty rights.

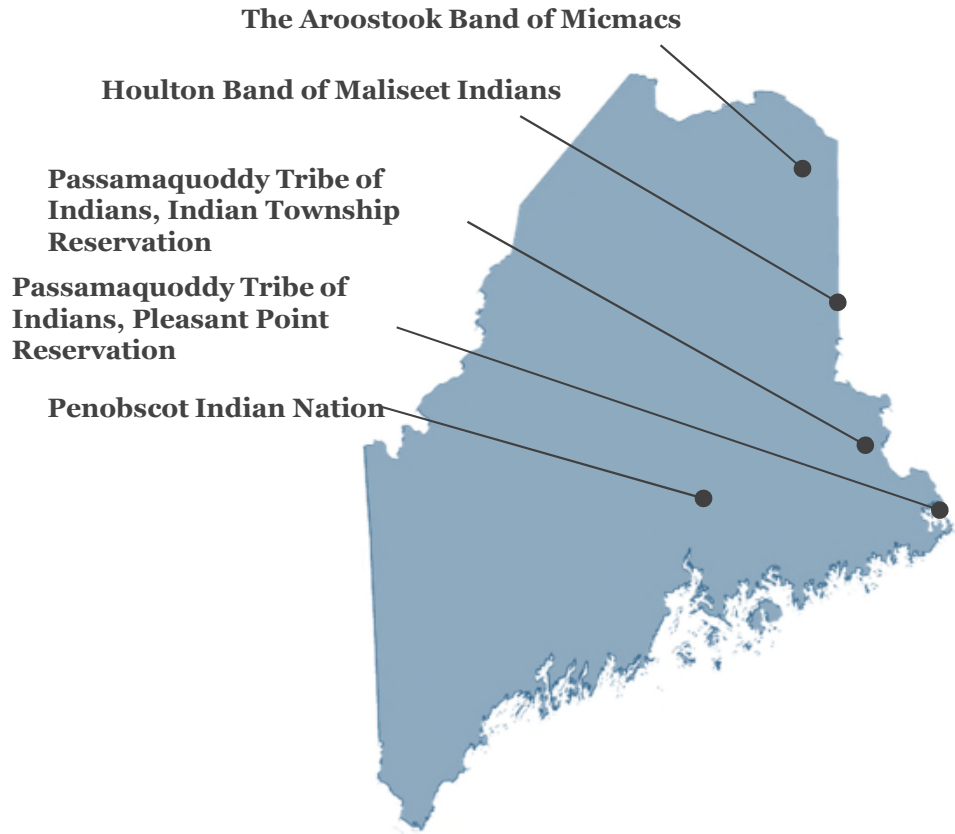
# Case Study:

## Water Quality Standards in Maine

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- July 2014: Maine's mandatory duty suit against EPA
- Feb. 2015: EPA disapproves certain state WQS for Indian lands
- Dec. 2016: EPA promulgates federal WQS
- Feb. 2017: Maine petitions for reconsideration
  - Petition for rulemaking under APA, 5 U.S.C. 553(e)
- August 2017: EPA announces intent to reconsider
  - Requests additional stay of 120 days

# Federally Recognized Tribes in Maine



**The Aroostook Band of Micmacs**



**Houlton Band of Maliseet Indians**



**Passamaquoddy Tribe, Indian Twnshp**



**Passamaquoddy Tribe, Pleasant Point**



**Penobscot Indian Nation**

# Unique Jurisdictional Framework under 1980 Maine Indian Claims Settlement Act

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- Indian land claims extinguished
- \$ 80 million to settle claims
- State law largely applies to tribes and their lands:

## **§6204. LAWS OF THE STATE TO APPLY TO INDIAN LANDS**

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

30 M.R.S.A. 6204 (ratified by 25 U.S.C. 1725(b)(1)) (emphasis added)

# Unique Jurisdictional Regime

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- *Maine v. Johnson*, 498 F. 3d 37 (1<sup>st</sup> Cir. 2007)
  - State has authority to administer water pollution permitting program for point sources under the CWA (i.e., “NPDES” permits), even on Indian lands
- Feb. 2015: EPA partial disapproval decision
  - Confirms State also has authority to adopt water quality standards under the CWA for Indian lands in Maine, subject to EPA’s authority to review and approve/disapprove
- Silent on whether tribes could have concurrent authority



# Sustenance Fishing Rights under Maine Settlement Acts

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Penobscot and Passamaquoddy (Southern Tribes):

- Statutorily reserved right to take fish for individual sustenance on their reservations based on aboriginal fishing right
- Large after-acquired trust land holdings where fishing subject to regulation by state-tribal commission that must consider sustenance practices

Maliseet and Micmac (Northern Tribes):

- All after acquired trust land subject to state direct regulation of take
- Purpose of trust lands to provide land base for continuation of unique sustenance culture, including fishing

# Reservation Boundary Dispute: *Penobscot Nation v. Mills* (1<sup>st</sup> Cir. 2017)

- DOJ intervened on tribe's side in district court
- District court made two rulings:
  - 1) Penobscot Indian Reservation, as defined in Maine Implementing Act and MICSA, includes the islands, but not the waters, of Main Stem
  - 2) Tribal rights to fish for individual sustenance extends to Main Stem
- First Circuit:
  - 1) affirms the first ruling based on “plain text”
  - 2) vacates and orders dismissal of second ruling (standing and ripeness)
- 30 M.R.S.A. 6203(8):
  - “Penobscot Indian Reservation’ means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with [states]....”
- 30 M.R.S.A. 6207(4):
  - “Notwithstanding [state law], the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance....”

# EPA's Partial Disapproval (Feb. 2015)

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- Disapproves certain of Maine's Human Health Criteria as they apply to waters on Indian lands
- Step One: Designated Use = tribal sustenance fishing
  - Two theories:
    - For MICSA waters, approves the sustenance fishing right in MICSA as a designated use
    - For other waters, interprets State's designated use of "fishing"
- Step Two: Must Adequately Protect that Use
  - Tribal sustenance fishing population = target general population
    - Not merely a subpopulation of high consumers
  - Data for Fish Consumption Rate (FCR) must be unsuppressed
    - i.e., unsuppressed by concerns about the safety of eating the fish available to consume

# EPA's Disapproval (cont'd)

- **Step Three: Fish Consumption Rate**
  - Best available data for unsuppressed sustenance fishing practices = Wabanaki Lifeways study
    - Examined tribes' historic sustenance practices
    - Peer reviewed anthropological and archeological assessment
    - FCR in range of 286 – 514 g/day depending on diet
    - Penobscot's tribal WQS use 286 g/day
  - Maine: 32.4 g/day and 10<sup>-6</sup> cancer risk (except for arsenic)
    - Based on FCR data from 1990 study of state-licenses sport fishers with some tribal respondents
- **Department of the Interior Solicitor's Opinion**
  - Relationship between sustenance fishing right and water quality
- **Remedy: State had 90 days to revise; declined**
- **Dec. 2016: EPA promulgated federal WQS; effective 1/17**
- **Federal standards not yet included in the legal challenge**

# Maine's arguments include...

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- Prior EPA approvals already included Indian lands
- Same standards should apply to Indian and non-Indian lands
- Violates jurisdictional arrangement in the settlement acts
- EPA fails to identify the waters that will be affected, disrupting settled expectations, creating uncertainty
- EPA misreads/misapplies scope of tribal fishing rights under MICSA
- State never created or endorsed a designated use of sustenance fishing
- EPA's "harmonization" of tribal fishing rights with water quality standards inconsistent with CWA
- For fish consumption, should use survey of Maine resident recreational anglers, which includes tribal fishers
- Wabanaki study inappropriate
- Maine's water quality standards should be approved for all waters

# Questions/Implications

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- Will EPA reconsider?
  - EPA: “federal agencies have inherent authority to reconsider past decisions and to review, replace, or repeal a decision to the extent permitted by law and supported by reasoned explanation” (*see FCC v. Fox Television Stations*, 556 U.S. 502 (2009))
  - Notice-and-comment rulemaking will be required
- On what grounds?
  - EPA: “has not yet determined which, if any, challenged EPA decision ... will be withdrawn or otherwise changed”
- How would reconsideration in Maine affect similar issues pending in other states, such as Washington and Idaho?

# Thank you...

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