

JANET T. MILLS
ATTORNEY GENERAL



REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

415 CONGRESS ST., STE. 301
PORTLAND, MAINE 04101
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

March 17, 2015

By certified mail

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington DC 20460

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington DC 20530

Re: **60-Day Notice of Maine's Intent to Sue EPA Over EPA's Action Dated
February 2, 2015**

Dear Administrator McCarthy and Attorney General Holder:

By this letter, the State of Maine ("Maine") hereby provides notice of its intent to sue the United States Environmental Protection Agency ("EPA") and/or the United States over EPA's recent action dated February 2, 2015, which, among other things, unlawfully disapproves many of Maine's water quality standards. EPA's action also unlawfully usurps Maine's role in promulgating such standards under the Clean Water Act, and creates a two-tiered water quality regulatory system in violation of the *Maine Indian Land Claims Settlement Act*, 25 U.S.C. § 1721 *et seq.* ("MICSA") and the *Act to Implement the Maine Indian Land Claims Settlement Act*, set forth in Maine law at 30 M.R.S. §§ 6201 *et seq.* ("MIA") (collectively the "Settlement Acts").

In 1980 the Federal Government, Maine, and several Maine Indian Tribes negotiated a comprehensive settlement of Indian land claims to an area consisting of approximately two-thirds of Maine's land mass. Congress approved that settlement in MICSA, which also ratified and confirmed MIA. Together, these Settlement Acts create and define a nationally unique state-tribal relationship, and unambiguously confirm Maine's regulatory authority over Indian lands and natural resources. 30 M.R.S. § 6204; 25 U.S.C. § 1725(b)(1). Under the Settlement Acts, Maine's authority to regulate environmental matters applies uniformly throughout the State, without distinction as to tribal and non-tribal lands and natural resources, and this premise is foundational to the Settlement Acts. When the First Circuit Court of Appeals was called upon to interpret and apply these provisions in a case involving EPA's refusal to recognize Maine's authority to implement the Clean Water Act in Indian territory, the Court held that the Settlement

Acts are “about as explicit ... as is possible” in conferring environmental regulatory authority on the State over Indian lands and natural resources. *Maine v. Johnson*, 498 F.3d 37, 43 (1st Cir. 2007).

Under the Clean Water Act, Maine also has the responsibility to set water quality standards for all of its intrastate waters, including all waters in Maine’s Indian lands. In order to ensure that these standards are consistent with the Clean Water Act, Maine periodically submits its new and revised water quality standards to EPA for review and approval. 33 U.S.C. § 1313. For many years, EPA approved Maine’s standards without distinction as to Indian lands and waters, as the Clean Water Act and the Settlement Acts each require. However, beginning around 2004, EPA for the first time began inserting limiting language into its approval letters stating that those decisions did “not extend to waters that are within Indian territories or lands.” Despite the First Circuit’s emphatic ruling against EPA in the *Johnson* case, and despite Maine’s repeated requests that EPA approve Maine’s water quality standards throughout the State, EPA continued to refuse to approve these standards for waters in Indian lands based on EPA’s unfounded jurisdictional concerns. At roughly the same time, and without Maine’s knowledge, EPA also provided ongoing assistance to Maine’s tribes in pursuit of separate tribal water quality goals – in some cases pursuant to the terms of a confidentiality agreement obligating EPA to use its best efforts to avoid freedom of access disclosures, which ensured that Maine was kept in the dark.

As a consequence, and in order to force EPA to fulfill its mandatory duties under the Clean Water Act, Maine filed a lawsuit against EPA in July 2014 asking for, among other things, a court order requiring EPA to 1) honor Maine’s environmental regulatory jurisdiction to set water quality standards for all intrastate waters, including waters in Indian lands, and 2) act on all of Maine’s outstanding standards for such Indian waters. During the briefing on Maine’s lawsuit, and perhaps in recognition of the weaknesses of EPA’s historical jurisdictional position, EPA finally conceded what *Johnson* had already decided years earlier – that Maine does indeed have the environmental regulatory authority under the Settlement Acts to set water quality standards for all Maine waters, including those in Indian lands. Also during briefing, and presumably in order to avoid the embarrassment of a court ordering the relief formally requested by Maine, EPA committed to finally acting on Maine’s outstanding water quality standards by the end of January 2015. Based on these developments, and in light of the Settlement Acts and the *Johnson* decision, Maine expected that EPA would finally end its decade-long delay and approve all of Maine’s outstanding water quality standards for waters in Indian lands, as they had already been approved for non-tribal waters. As we now know, this was never EPA’s intention.

EPA’s action, which was by letter dated February 2, 2015, consists of various EPA approvals, disapprovals, and ongoing inaction with respect to Maine’s water quality standards. As telegraphed by EPA during its briefing of Maine’s July 2014 lawsuit, EPA’s action correctly concludes that Maine has statewide environmental regulatory jurisdiction under the Settlement Acts to set water quality standards for all Maine waters, including Maine’s waters in Indian lands. However, EPA’s action then takes a surprisingly convoluted and unlawful approach in order to reach what appears to be a pre-determined result. This portion of EPA’s February 2, 2015 action is carefully built upon a series of unlawful determinations designed to get around Maine’s statewide environmental regulatory authority under the Settlement Acts. These unlawful determinations collectively form the shaky underpinnings of the result that EPA

appears to have sought all along – the disapproval of all of Maine’s human health criteria for Indian waters, even though those same standards were previously approved by EPA for the same waters immediately outside of Maine’s tribal areas. The unlawful aspects of EPA’s February 2, 2015 action that contribute to EPA’s ultimate decision to unlawfully disapprove Maine’s human health criteria standards for Indian waters include, without limitation, the following:

1. EPA unlawfully asserts that, prior to its February 2, 2015 action, none of Maine’s water quality standards were ever approved for waters in Indian lands, including those standards that were fully approved by EPA before 2004 without any qualification as to their effect on waters in Indian lands;
2. EPA unlawfully asserts that it must make a formal finding of Maine’s environmental regulatory jurisdiction over waters in Indian lands before EPA can approve any of Maine’s water quality standards for such waters;
3. EPA unlawfully asserts that the Settlement Acts must be construed in favor of the tribes and against Maine on jurisdictional issues;
4. EPA unlawfully asserts that its duties under the Clean Water Act must be informed by EPA’s interpretation of the purpose, as opposed to the actual terms, of the Settlement Acts;
5. EPA unlawfully interprets the narrow portions of MIA that permit certain Maine Indian tribes to take fish without restriction within their reservations provided that such fish takings are for individual sustenance only, as more broadly constituting a designated use of “tribal sustenance fishing” with respect to waters in Indian lands;
6. EPA unlawfully interprets Maine’s existing designated use of “fishing,” as used throughout Maine’s water classification system, as meaning “tribal sustenance fishing” with respect to waters in Indian lands;
7. EPA unlawfully usurps Maine’s role as a “State” under the Clean Water Act by establishing its own newly-created designated use of “tribal sustenance fishing” in Maine without the benefit of any public input or other required process;
8. EPA unlawfully interprets its newly-created designated use of “tribal sustenance fishing” as requiring heightened human health water quality criteria for Maine waters in Indian lands, which EPA claims will also affect discharges into other surrounding Maine waters;
9. EPA unlawfully analyzes its newly-created designated use of “tribal sustenance fishing” in the context of tribal-only population data as opposed to general Maine population data, which EPA uses for all other Maine waters; and
10. EPA unlawfully disapproves Maine’s human health water quality criteria with respect to waters in Indian lands.

In effect, EPA's February 2, 2015 action, by disapproving Maine's otherwise approved human health criteria for only those waters in Maine's Indian lands, creates a two-tiered water regulatory system that elevates the water regulatory goals of Maine's Indian tribes over the rest of Maine in violation of the Clean Water Act, the Settlement Acts, and the *Johnson* decision. To add insult to injury, EPA's February 2, 2015 action also indicates that any heightened standards ultimately implemented in Indian waters will have a regulatory reach beyond Maine's Indian waters to non-tribal waters within the same watersheds. To make matters still worse, EPA does not define the scope of what it considers to be the affected Maine waters in Indian lands. In this way, EPA's February 2, 2015 action, in addition to being unlawful, irresponsibly disrupts settled regulatory expectations and causes uncertainty with respect to Maine's long-established water classification system.

As a consequence, Maine intends to sue EPA in order to challenge EPA's disapproval of Maine's human health water quality criteria with respect to the unspecified waters in Indian lands, as well as other aspects of EPA's February 2, 2015 action, including, without limitation, the unlawful EPA determinations described above. Maine believes that all of its forthcoming legal challenge to EPA's February 2, 2015 action may properly be brought as an appeal of EPA's final February 2, 2015 action pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* ("APA").

However, as an alternative to proceeding with an appeal under the APA, and in an abundance of caution, Maine also intends to assert as part of its forthcoming lawsuit against EPA, mandatory duty claims pursuant to 33 U.S.C. § 1365(a)(2). Pursuant to 33 U.S.C. §§ 1313(a) and 1313(c)(3), EPA has the non-discretionary duty to approve Maine's human health water quality criteria for all of Maine's intrastate waters, including Maine's Indian waters, when, like here, those standards were determined by EPA to meet the requirements of the Clean Water Act 1) without qualification as to their effect in Indian waters, as was the case with all of Maine's standards before 2004; and 2) for the same waters immediately outside of tribal areas. EPA violated this non-discretionary duty by, among other things, 1) attempting to revisit its pre-2004 unqualified approvals of Maine's water quality standards in order to retroactively reconsider their effect in Indian waters; and 2) disapproving Maine's human health water quality criteria with respect to waters in Indian lands after having approved those same standards for waters immediately outside of tribal areas in violation of the Settlement Acts.

With respect to these and any other mandatory duties alleged or determined to be at issue in EPA's February 2, 2015 action, Maine hereby provides this notice of its intent to sue EPA pursuant to 33 U.S.C. § 1365(b)(2). The entities giving this notice are the State of Maine, which is a sovereign state, and the Maine Department of Environmental Protection, which is an agency of the State of Maine, both of which are represented in this matter by Maine's Attorney General, Janet T. Mills. The address and contact information of the Maine Attorney General and the Commissioner of the Maine Department of Environmental Protection are as follows:

Janet T. Mills
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006
Tel.: (207)626-8599
Fax: (207)287-3145

Patricia W. Aho
Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017
Tel.: (207)287-2812
Fax: (207)287-2814

Counsel of record in this matter include the following:


Scott W. Boak
Assistant Attorney General
Natural Resources Division
6 State House Station
Augusta, ME 04333-0006
Tel. (207)626-8566
Fax: (207)626-8812
scott.boak@maine.gov

Gerald D. Reid
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333-0006
Tel. (207)626-8545
Fax: (207)626-8812
jerry.reid@maine.gov

Emily K. Green
Assistant Attorney General
Natural Resources Division
6 State House Station
Augusta, ME 04333-0006
Tel. (207)626-8868
Fax: (207)626-8812
emily.green@maine.gov

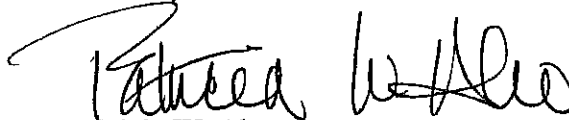
Christopher C. Taub
Assistant Attorney General
Litigation Division
6 State House Station
Augusta, ME 04333-0006
Tel. (207)626-8565
Fax: (207)626-8812
christopher.c.taub@maine.gov

Sincerely,



Janet T. Mills
Maine Attorney General

Sincerely,



Patricia W. Aho
Maine Department of
Environmental Protection

cc: The Honorable Paul LePage
The Honorable Susan Collins
The Honorable Angus King
The Honorable Bruce Poliquin
The Honorable Chellie Pingree
Kirk Francis, Chief
Frederick Moore, III, Chief
William Nicholas, Sr., Chief
Brenda Commander, Chief
Edward Peter-Paul, Chief
H. Curtis Spalding, EPA Region I Administrator