

# Water Quality Standards Litigation Update: Maine & Washington

33<sup>rd</sup> Indian Law Symposium  
University of Washington  
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# Overview

A. Introduction

B. Maine WQS: Litigation and Legislative Fix

C. Washington WQS: Litigation and Administrative Fix(?)

# Elections Have Consequences



Wikimedia Commons: Official White House Portraits

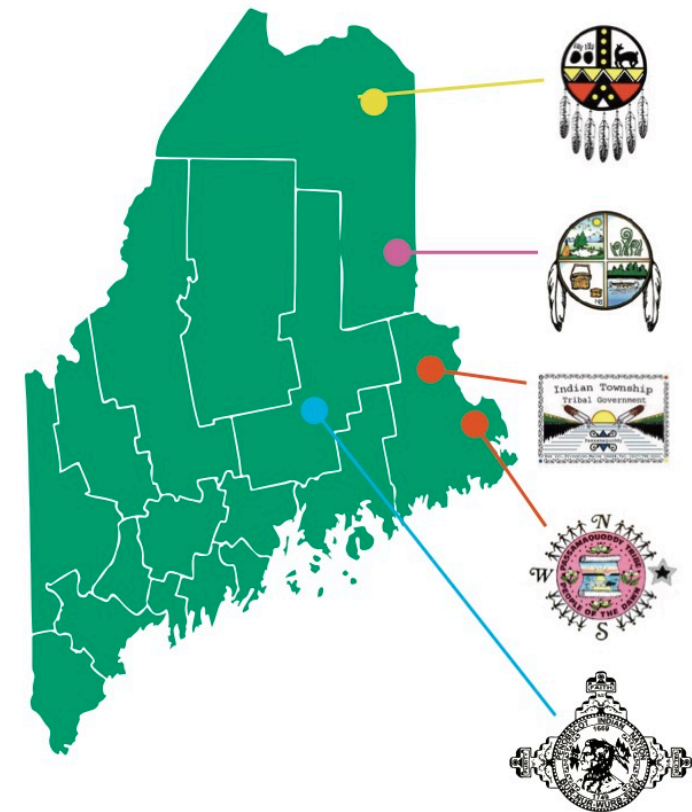


Bangor Daily News: Composite Photo

# Clean Water Act Jurisdiction in Maine

- Maine Indian Claims Settlement Act & Maine Implementing Act
- *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)
- Reserved Tribal Rights
- No WQS in Indian Waters in Maine until November 2016

Federal & State Recognized  
Tribes of Maine



- Houlton Band of Maliseet Indians
- Aroostook Band of Micmac Indians
- Passamaquoddy Tribe
- Penobscot Nation



# Maine Water Quality Standards – Human Health Criteria: A Timeline

- *Maine v. McCarthy*, Case No. 1:14-cv-00264-JDL (Filed July 7, 2014): Failure to Act
- Letter from Interior Solicitor Hilary C. Tompkins to EPA General Counsel Avi S. Garbow (January 30, 2015)
- EPA Decision on Review of Maine's Submitted Standards (February 2, 2015): Approves some WQS, disapproves others (including application of WQS in Indian Waters)
- *Maine v. McCarthy* (October 8, 2015): Complaint Amended to Challenge EPA's February 2015 Decisions
- U.S. Presidential Election: November 8, 2016
- "Maine Rule" - 81 Fed. Reg. 92,466 (Dec. 19, 2016): EPA promulgates HHC for Maine in Indian Waters (Effective January, 18, 2017)
- HBMI and Penobscot Nation Move to Intervene in *Maine v. McCarthy* (Dec. 20, 2016 and Dec. 21, 2016)
- [Note: Maine never moves to amend complaint to challenge Maine Rule itself]



Credit: The Lincoln County News (Bisi Cameron Yee photo)

# CWA Reminder: 33 U.S.C. § 1313(c) (Section 303)

## CWA 303 (c)(2)-(4)(A)

- requires states/tribes to submit WQS to EPA for approval or disapproval, and requires EPA to issue WQS for a state/tribe if the state/tribe fails to make the necessary changes to obtain approval within the statutorily specified window, i.e., 90 days after getting EPA notice

## CWA 303(c)(4)(B)

- directs EPA to issue water quality standards itself on states'/tribes' behalf "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the CWA]."

# Maine Water Quality Standards – Human Health Criteria: A Timeline (cont'd)

- State of Maine and Industry/Towns Send Administrative Petitions Requesting that EPA Reconsider and Withdraw Obama Era Decisions (February 27, 2017)
- EPA seeks series of stays in *Maine v. Wheeler* and decides to reconsider the decisions, but ultimately denies petition and does not withdraw decisions (December 8, 2017)
- Principal Deputy Solicitor Daniel Jorjani sends letter to EPA General Counsel Matthew Leopold (April 27, 2018)
- EPA and State request stay for settlement talks (June 26, 2018)
- EPA moves for voluntary remand and stay of case (July 27, 2018), which was granted on December 3, 2018
- Penobscot Nation Moves to Add Counterclaim Against State of Maine: July 29, 2018
- Maine Gubernatorial Election: November 6, 2018



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

APR 27 2018

Honorable Matthew Z. Leopold  
General Counsel  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes

Dear Mr. Leopold:

In 2014, the Environmental Protection Agency ("EPA") requested the views of the Department of the Interior (the "Department") regarding tribal fishing rights in Maine and the relationship between tribal fishing rights and water quality. The request was prompted by EPA's review of proposals from the State of Maine to implement Water Quality Standards ("WQS") within waters set aside for federally recognized tribes under State and Federal laws for uses that EPA characterized as sustenance fishing.

By letter dated January 30, 2015 (the "2015 Letter"), the Department's Solicitor responded with the Department's views on the fishing rights of the four federally recognized tribes in Maine: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs (collectively the "Maine Tribes").<sup>1</sup> These views were limited to the unique history and circumstances of the Maine Tribes. The Solicitor there noted that issues relating to at least some Indian lands and territories in the State of Maine were also the subject of ongoing litigation in the U.S. District Court for the District of Maine (the "District Court").<sup>2</sup> This litigation is still ongoing.<sup>3</sup>

Since 2015, EPA has referenced the 2015 Letter in other contexts, in particular in the promulgation of federal WQS for the State of Washington.<sup>4</sup> The Department, however, has not undertaken a similar legal and historical analysis of other tribes or states; and as a result, cannot speak to fishing rights outside the State of Maine. The conclusions of the 2015 Letter were the

<sup>1</sup> Letter from Hilary C. Tompkins, Solicitor, U.S. Dept. of the Interior, to Avi S. Garbow, General Counsel, U.S. Environmental Protection Agency (Jan. 30, 2015) (the "2015 Letter").

<sup>2</sup> 2015 Letter at 1, n. 1, citing Order on Pending Motions, *Penobscot Nation v. Mills*, 1:12-cv-0254-GZS (D. Maine Feb. 4, 2014).

<sup>3</sup> *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me.), *aff'd in part and vacated in part*, 861 F.3d 324 (1st Cir. 2017), *petition for rehearing en banc filed* (1st Cir. Sept. 14, 2017) (Nos. 16-1424, 16-1435, 16-1474, 16-1482).

<sup>4</sup> U.S. Environmental Protection Agency, Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417 (Nov. 28, 2016).



# Maine Water Quality Standards – Human Health Criteria: A Timeline (cont'd)

- Maine Legislation – “An Act to Protect Sustenance Fishing”: Governor Mills Signs Act Into Law on June 21, 2019
- EPA Approves Sustenance Fishing Designated Use: November 6, 2019
- Maine Rulemaking: Maine DEP Submits HHC for EPA Approval on April 24, 2020
- EPA Withdraws Feb. 2, 2015 Decisions: May 27, 2020
- EPA Approves Maine DEP-Submitted HHC (DEP Chapter 584): June 23, 2020
- *Maine v. McCarthy*: All parties agree to dismiss claims without prejudice
- EPA Final Rule Withdrawing “Maine Rule”: 85 Fed. Reg. 82,936 (Dec. 21, 2020)

19           **Sec. 4. 38 MRSA §466, sub-§10-A** is enacted to read:

20           **10-A. Sustenance fishing designated use.** "Sustenance fishing designated use" is a  
21 subcategory of the applicable fishing designated use that protects human consumption of  
22 fish for nutritional and cultural purposes and applies only to those water body segments  
23 that are identified in this article as subject to a sustenance fishing designated use.

24           **Sec. 5. 38 MRSA §466-A** is enacted to read:

25           **§466-A. Sustenance fishing designated use**

26           **1. Water quality criteria.** To protect the sustenance fishing designated use  
27 designated under this article, the department shall calculate and establish water quality  
28 criteria for human health using a fish consumption rate of 200 grams per day and a cancer  
29 risk level of one in 1,000,000, except that the cancer risk level for inorganic arsenic is  
30 governed by section 420, subsection 2, paragraph J.

31           **2. Criteria deemed protective.** For all purposes, the sustenance fishing designated  
32 use established under this article is deemed protected through the water quality criteria  
33 for human health calculated and established by the department for the water body  
34 segments subject to a sustenance fishing designated use under this article.

35           **3. Limitation; construction.** Nothing in this section and nothing in the designation  
36 in this article of a sustenance fishing designated use may be construed to:

37           A. Create any other right or protection,  
38 quality of fish;

39           B. Limit any right or protection otherwise



Credit: Mal Leary / Maine Public



# Outcome of Maine's Legislation and Maine DEP Rulemaking

## Wabanaki Traditional Cultural Lifeways Exposure Scenario



*Netukulimk* refers to the Mikmaq way of natural resource conservation and stewardship. The root words mean getting provisions and making a livelihood from the land, and elders translate it as 'taking only what you need in order to avoid not having enough.' *Barsh, 2002*

Prepared for EPA in collaboration with the Maine Tribes by

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AESE, Inc.

and

Professor Darren Ranco, PhD,  
Environmental Studies and Native American Studies,  
Dartmouth College

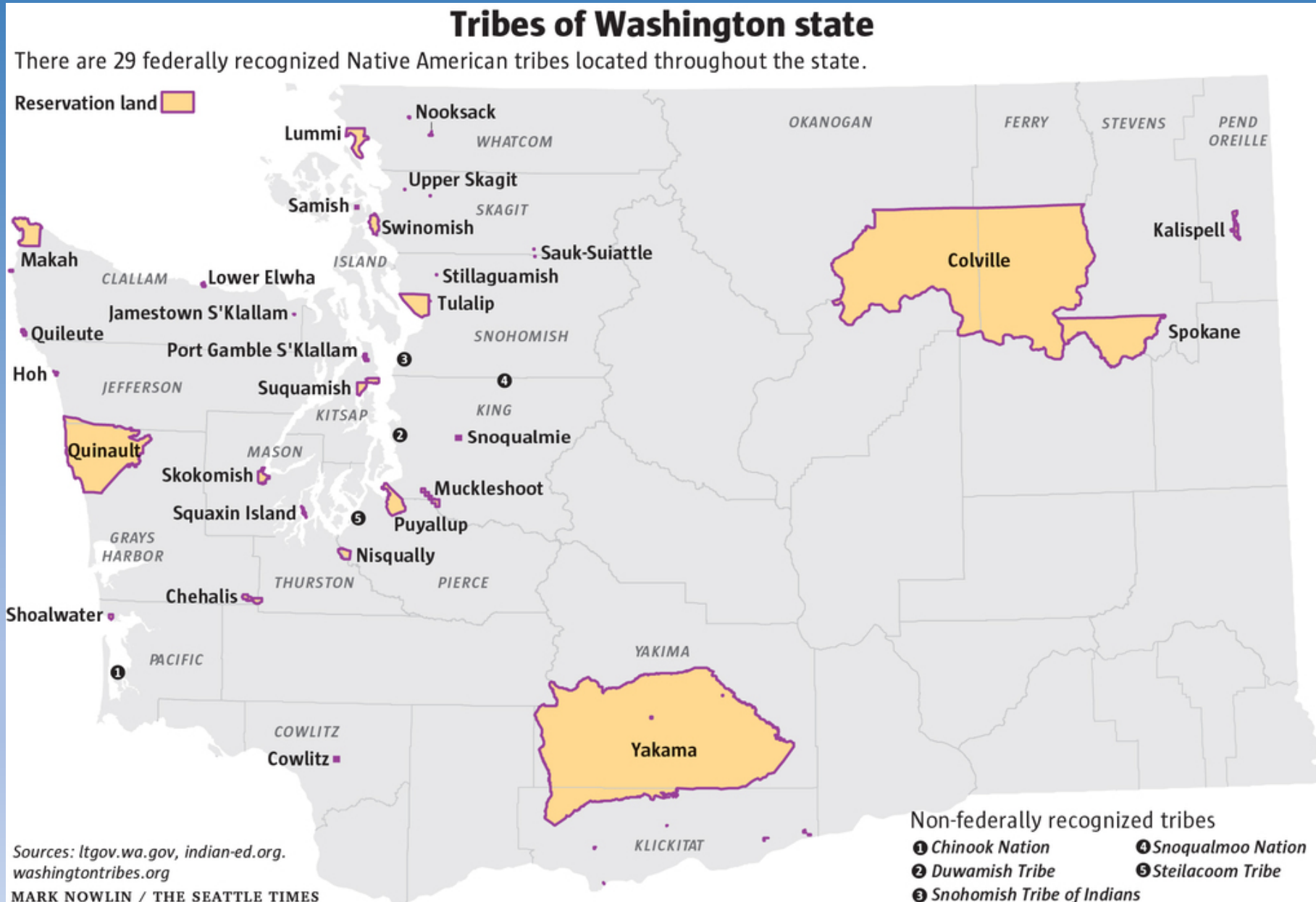
July 9, 2009

- **Amends** 38 MRSA §§ 420 (mercury), 465-A (waters subject to new DU), 466-A (DU, specifies parameters for criteria), 467 (detailed description of waters)
- Establishes **Designated Use of Sustenance Fishing** for Certain Waters in Maine: “Subcategory of the applicable fishing designated use that protects human consumption of fish for nutritional and cultural purposes ...”
- Establishes **Waters to Which HHC Apply** (i.e., where there is or may be sustenance fishing or increased fish consumption by members of the Indian tribes in Maine or other Maine citizens)
- Establishes negotiated **Fish Consumption Rate** that Maine DEP must employ in promulgating HHC
- Establishes **Cancer Risk Level** that Maine must employ in promulgated HHC

	Maine's Proposed HHC (Denied by EPA 2015)	2016 Maine Rule (Promulgated by EPA)	Maine 2019 DU Legislation / 2020 MDEP HHC Rulemaking
<b>Fish Consumption Rate</b>	32.4 g/day (most pollutants) 138 g/day (arsenic)	286 g/day (Wabanaki Study range of 286 g/day to 514 g/day)	200 g/day
<b>Cancer Risk Level</b>	One in a million (most pollutants) One in ten thousand (arsenic)	One in a million ("general target population")	One in a million (most pollutants) One in ten thousand (arsenic)
<b>Other Inputs (e.g., health toxicity values, bioaccumulation factors)</b>	Pre-2015 EPA 304(a) Guidance	Current EPA 304(a) Guidance (80 Fed. Reg. 36,986, June 29, 2015)	Current EPA 304(a) Guidance (80 Fed. Reg. 36,986, June 29, 2015)

	Maine's Proposed HHC (Proposed 2003-2014; Denied by EPA 2015)		2016 Maine Rule (Promulgated by EPA)		Maine 2019 DU Legislation / 2020 MDEP HHC Rulemaking	
<b><i>Pollutant</i></b>	Water & Organisms (µg/L)	Organisms Only (µg/L)	Water & Organisms (µg/L)	Organisms Only (µg/L)	Water & Organisms (µg/L)	Organisms Only (µg/L)
PCBs	0.000035	0.000035	0.000004	0.000004	0.0000056	0.0000056
Dioxin	2.7E-9	2.7E-9	---	---	4.5E-10	4.5E-10
Toluene	1,200	8,100	24	39	30	55

# Washington WQS: Litigation Update



# Washington WQS – Human Health Criteria: Lawsuit #1

- **No legal challenges to EPA’s 2016 Rule**, 81 Fed. Reg. 85,417 (Nov. 28, 2016), promulgating HHC for Washington
- **“Step 1”**: EPA reverses 2016 disapproval of, and approves, certain HHC proposed by the State in 2015 (May 10, 2019)
- ***State of Washington v. EPA***, Case No. 2:19-cv-00884-RAJ (W.D. Wash.): Filed June 6, 2019
  - Procedural Challenge - Section 303(c)(3)-(4)
- **Sauk-Suiattle Tribe and Quinault Indian Nation** Move to Intervene (Summer/Fall 2019)
- **Industry Groups** (Northwest Pulp & Paper Ass’n, American Forest & Paper Ass’n., et al.) Move to Intervene (Fall 2019); Boeing Participates as Amicus
- **Fully briefed** as of July 17, 2020



Credit: Northwest Indian Fish Commission



# Washington WQS – Human Health Criteria: Lawsuit #2

- “**Step 2**”: EPA Proposes to Withdraw 2016 Rule
- Tribes, NWIFC, and Environmental NGOs develop **strong administrative record** against withdrawal
- **2020 Rule**: Withdrawal of Certain Federal Water Quality Criteria Applicable to Washington, 85 Fed. Reg. 28,494 (May 13, 2020)
- ***Puget Soundkeeper Alliance v. EPA***, Case No. 2:20-cv-907-RAJ (W.D. Wash.): Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper, PCFFA, Makah Tribe, et al. filed on June 11, 2020
  - Procedural and Substantive Challenges
- No summary judgment briefing schedule



Credit: Northwest Indian Fish Commission

# What will happen to the Washington HHS in the Biden Administration?

WH.GOV

BRIEFING ROOM

## Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. Policy.** Our Nation has an abiding commitment to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments, places that secure our national memory. Where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice. In carrying out this charge, the Federal Government must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making. It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

To that end, this order directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these

MENU

**Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (January 20, 2021)**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

January 21, 2021

Jean E. Williams  
Bruce S. Gelber  
Deputy Assistant Attorneys General  
Environment and Natural Resources Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
*transmitted electronically*

Re: Abeyances in EPA Rule Cases

Dear Jean and Bruce:

In conformance with President Biden's *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* issued January 20, 2021, (Health and Environment EO), this will confirm my request on behalf of the U.S. Environmental Protection Agency (EPA) that the U.S. Department of Justice (DOJ) seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021, or seeking to establish a deadline for EPA to promulgate a regulation in connection with the subject of any such regulation, in order to provide an opportunity for new Agency leadership to review the underlying rule or matter. See *Health and Environment EO* at Section 2; see also *Memorandum for the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review*, January 20, 2021. For a case where an abeyance or stay of proceedings is not feasible, we request that DOJ seek extensions of time that are of sufficient duration to allow this review. While these rule cases are a particularly high priority, we also anticipate that a similar request may apply for additional cases in a defensive posture. For any case that you believe merits separate consideration, or for which you believe an abeyance, stay of proceedings, or sufficient extension is not feasible, please promptly notify us and the involved EPA Office of General Counsel's Associate General Counsel for a discussion.

The EPA Office of General Counsel will work with DOJ to help carry out this request. If there are questions, feel free to contact me, Jim Payne, [payne.james@epa.gov](mailto:payne.james@epa.gov), 202-672-3727, or the

**Letter from EPA's Office of General Counsel to Department of Justice Re: Abeyances in EPA Rule Cases (January 21, 2021)**



# Questions?



Credit: Columbia River Intertribal Fish Commission