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Federal Water Quality Coalition

December 28, 2015

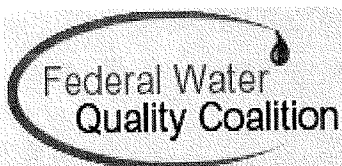
Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

**Re: Comments of Federal Water Quality Coalition on Proposed Revision
of Certain Federal Water Quality Criteria Applicable to Washington,
Docket ID No. EPA-HQ-OW-2015-0174**

Dear Sir or Madam:

The Federal Water Quality Coalition ("FWQC" or the "Coalition") appreciates the opportunity to file comments with EPA regarding the Agency's proposed rule revising certain water quality criteria for Washington State (the "Proposed WA Criteria" or the "Notice"). The proposal was issued in the Federal Register on September 14, 2015 (80 Fed. Reg. 55063), and on October 28, 2015, the comment period was extended to December 28, 2015 (80 Fed. Reg. 65980).

The FWQC is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made by the EPA and States under the federal Clean Water Act. The FWQC membership includes entities in the aluminum, agricultural, automobile, chemical, coke and coal chemicals, electric utility, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: Alcoa, Inc; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Bristol-Myers Squibb; City of Superior (WI); Edison Electric Institute; Eli Lilly and Company; Freeport-McMoRan Copper & Gold; General Electric Company; Hecla Mining Company; Indiana Coal Council; Johnson & Johnson; Kennecott Utah Copper LLC; Mid America CropLife Association; Monsanto Company; National Association of Home Builders; Orange County (CA) Sanitation District; Pfizer Inc.; Rayonier Advanced Materials; Rubber Manufacturers Association; Shell; Utility Water Act Group; Western Coalition of Arid States; Western States Petroleum Association; and Weyerhaeuser Corporation.



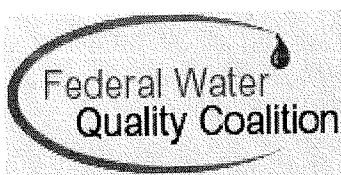
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FWQC member entities or their members own and operate facilities located in Washington State and elsewhere around the country. Those facilities operate pursuant to permits that impose control requirements with respect to wastewater discharges. Many of those permits include effluent limits based on water quality criteria developed for the protection of human health. The criteria being developed by EPA for Washington State will determine the effluent limits in permits for FWQC members in Washington State, and we expect that they will serve as a precedent for how human health criteria issues are addressed in permits for FWQC members in other States. The FWQC therefore has a direct interest in the Proposed WA Criteria that are being developed by EPA.

In its proposal, EPA states a determination that existing human health criteria for Washington State – issued by EPA more than 20 years ago – are not protective of designated uses in Washington waters. EPA then goes on to state because those criteria are no longer protective, the Agency “determines...that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for Washington.” EPA then specifies the proposed criteria that it plans to adopt, in place of the existing criteria. In setting forth these regulatory determinations and proposed standards, EPA commits fundamental errors of fact, law and policy. The proposal should not be adopted. Our reasons for this position are set forth below.¹ In addition, the FWQC has joined a set of comments that are being submitted by a broad group of local and national groups of regulated parties, so we endorse the positions and concerns set forth in those comments as well.

As an initial matter, it is important to recognize that the Federal Register notice containing the Proposed WA Criteria ignores the most important aspect of EPA’s decision: the Agency’s position that it would not approve the criteria that were proposed by the State of Washington for these same parameters. That position was stated in an EPA letter of March 23, 2015. If EPA would have approved the State criteria – which we think EPA should have done – then obviously, Federal criteria would not be “necessary,” and the Agency would have no basis for proceeding forward with its Proposed WA Criteria. Yet remarkably, the EPA proposal makes no mention of the State proposal or of EPA’s reasons for stating that it would not approve that proposal. Instead, EPA pretends that the only issue

¹ Beyond the issues raised below, we note one additional issue of scientific concern. For some of the parameters covered in the proposal, EPA uses bioaccumulation values (bioaccumulation factors or bioconcentration factors) that were developed as part of the new recommended Federal human health criteria that were issued in June 2015. Unfortunately, EPA has not provided adequate documentation to support the selection of these values for the State of Washington. The sources of the data used are not clear, and the procedures and choices that EPA used to derive the bioaccumulation values cannot be determined. In order for us to comment effectively, EPA first needs to make that information available for public review.



for review is whether the existing criteria – issued by EPA in 1992, in the National Toxics Rule – are still adequately protective. If they are not, according to EPA, then new Federal criteria are “necessary” and must be issued. But that is clearly not the case. By ignoring the State’s 2015 proposal, EPA has deprived itself of any basis for issuing Federal standards.

There are further flaws in the rationale that EPA provides for its decisions in the WA proposal. It appears that the Agency’s decision is premised on three foundations: (1) “reserved fishing rates” for Indian tribes, under treaties with the Federal Government; (2) concerns about “unsuppressed fish consumption rates;” and (3) attainment and maintenance of downstream water quality standards in Oregon. None of these three – taken separately or together – forms a sufficient basis for the Agency’s proposal.

On the “reserved fishing rights” issue, EPA states its position in several different, conflicting ways. None of these positions is actually supported by relevant law. For instance, the Agency appears to start its regulatory logic with this statement:

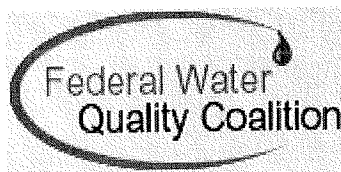
Where a population exercising such uses has a legal right to do so, the criteria protecting such uses must be consistent with such right.

No legal authority is cited for that proposition. Is there a Federal law that provides that rule? It is certainly not stated in the CWA. And, if there is a Federal law that contains that rule, how is that to be implemented if it conflicts with the requirements in the CWA? EPA answers none of these questions, simply laying out the principle as if it is incontrovertible.

EPA then goes on to specify the “legal rights” that it is apparently talking about:

In Washington, many tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes, including treaty reserved rights to fish at all usual and accustomed fishing grounds and stations in waters under state jurisdiction, which cover the majority of waters in the state. Such rights include not only a right to take those fish, but necessarily include an attendant right to not be exposed to unacceptable health risks by consuming those fish.

Again, EPA cites no authority. And if one were to actually review the treaties that EPA is referring to, one would find that the rights as stated here by EPA are not contained in those documents. While the treaties do provide a right for Tribal members to fish in certain areas, there is no statement of a right “not to be exposed to unacceptable health risks by consuming those fish.” And EPA points to no case where the treaties have been interpreted to provide such a right. In fact, the Agency has taken the position - in a case in Washington State - that the treaties do not affect its authority under the CWA or impose any additional obligations – and the court upheld EPA’s position in that case. *Sierra Club v. McLerran*, 45 ELR 20052, Case No. 11-CV-1759-BJR (W.D. Wash., March 16,



2015). Remarkably, EPA makes no mention in the Notice of that case or of its position in that case.

After laying out its reading of the treaties, EPA then states why it believes that the treaties are relevant in this context:

In determining whether WQS comply with the CWA and EPA's regulations, when setting criteria to support the most sensitive use in Washington, it is necessary to consider other applicable laws, including federal treaties.

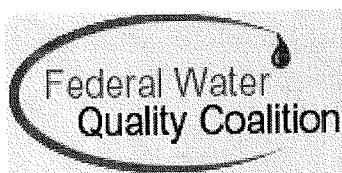
Again, no authority is cited for this proposition. In fact, this claim is simply inconsistent with the Agency's position in other situations. For example, when EPA's approval of the NPDES program for Arizona was challenged as not complying with the Endangered Species Act, the Agency contended that it was compelled to follow the requirements of the CWA, and that the ESA could not force it to act in a manner contrary to the CWA's clear requirements. That position was upheld by the Supreme Court, in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Yet here, EPA is arguing the exact opposite – that in making CWA decisions, it must consider all other possibly applicable laws – and treaties. And, even though those treaties have existed for more than 100 years, and EPA has existed for 45 years, the Agency has never stated this position before. It is hard to take seriously this unsupported, completely new argument, especially when it is simply inconsistent with EPA's clearly held views in previous cases.

That new argument about limits on EPA's CWA authority is then made the basis for EPA making its decision as to what criteria are "protective" of Washington's designated uses. However, in stating the grounds for that decision, EPA lays out its argument in several different ways. Those arguments do not all match up – and they are stated in "soft" ways that cast doubt on how strongly EPA really believes its own argument. For example, here is one way that the argument is stated:

In order to effectuate reserved fishing rights, including the rights that federal treaties afford to tribes in Washington, EPA proposes to derive criteria that will protect the tribe's reserved fishing rights in Washington, treating the tribal population exercising those rights as the target general population (see section IV.A).

So here, EPA believes that its action is needed "to effectuate" treaty rights. But then the Agency states the issue differently:

In order to effectuate and harmonize these reserved rights, including treaty rights, with the CWA, EPA determined that such rights appropriately must be considered when determining which



criteria are necessary to adequately protect Washington's fish and shellfish harvesting designated uses (see sections IV.C.a and IV.C.b).

Now the key term is "to effectuate and harmonize these reserved rights...with the CWA." But then the Agency changes its position, and talks about the treaty rights only as "informing" its decision, and being considered with other information about fish consumption (which we will discuss further below) in the Agency's key determination:

EPA considered the fish consumption data cited above, in conjunction with Washington's current designated uses as informed by tribal reserved rights in Washington (as discussed in section IV.A), and determined that the federal human health criteria in the NTR as applied to Washington no longer protect the relevant designated uses of Washington's waters.

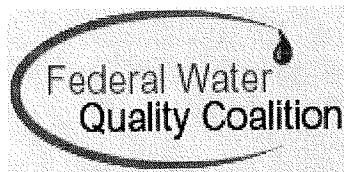
So now the tribal rights are, apparently, only a contributing factor that "informs" the Agency's decision as to what the State's designated uses should be. But that position is made even more unclear in another Agency statement, when it moves to determining the appropriate fish consumption rate to be used in developing the criteria:

While EPA encourages doing so in general, where tribal treaty or other reserved fishing rights apply, selecting a FCR that reflects unsuppressed fish consumption could be necessary in order to satisfy such rights.

Here, EPA thinks that selecting an "unsuppressed" fish consumption rate "could be" necessary in order to satisfy treaty rights. How can an agency make a decision based on whether something "could be necessary"? It is either necessary or not necessary. If the rights are so unclear that EPA cannot determine if a decision is actually "necessary" to vindicate those rights, then those rights clearly cannot form a legitimate basis for decision.

That is not, though, the last of the multiple, conflicting ways in which EPA tries to bring treaty rights into its decision. In the statement below, the Agency lays out another way in which the treaties "could be" interpreted:

EPA's 2000 Human Health Methodology did not consider how CWA decisions should account for applicable reserved fishing rights, including treaty-reserved rights. As discussed in section IV.C.a, because a FCR of 175 g/day very likely does not reflect unsuppressed consumption, using a cancer risk level of 10^{-6} ensures protection of tribal members' unsuppressed consumption. Independently, the treaties themselves could require higher levels of protection. The treaties themselves could be interpreted to require a certain level of risk; e.g., a de minimis level of risk that would most reasonably approximate conditions at the time the treaties were signed and the fishing rights were reserved. In



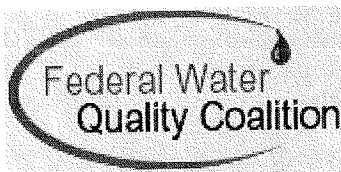
policy development regarding management of cancer risks, EPA often uses 10^{-6} as a de minimis risk level. [footnote omitted] In this case, EPA considers 10^{-6} to be sufficiently protective, and the tribes have supported this during consultation.

In that multi-layered argument, the Agency makes a number of statements that cast strong doubt on the validity of its decision. For one thing, EPA admits that its only formally issued document stating its policies for setting human health standards – the 2000 Human Health Methodology – says absolutely nothing about treaty rights.² One would think, then, that before making new regulatory decisions that try to “effectuate and harmonize” those rights with the CWA, EPA would take further formal action, through issuance of a new or revised policy, after adequate public notice and comment. But EPA seems to feel no compulsion to do that. But it also does not seem very confident of its new position. Instead of saying, as it did elsewhere in the Notice, that it needs to take certain actions in order to be consistent with treaty rights, here it says, weakly, that the treaties “could be interpreted to require...a de minimis level of risk.” Absolutely no authority is cited, even for just saying that the treaties “could be” interpreted in that fashion – even though those treaties have been in existence for more than 100 years. And then, remarkably, the Agency feels confident enough of its “interpretation” to make it extremely specific, defining a “de minimis risk” as a risk “that would most reasonably approximate conditions at the time the treaties were signed and the fishing rates were reserved.” Again, there is no citation of any authority for this claim. EPA also does not explain why, at a time that is over 100 years after those treaties were signed, 43 years after the CWA was adopted, and 15 years after the 2000 Human Health Methodology was issued, it has suddenly come to realize that these treaties mean something, in the context of water quality standards issued under the CWA, that was never stated by the Agency before. One could hardly imagine a decision with less legal basis or more susceptible to a charge of being arbitrary and capricious.

In making these multiple, inconsistent statements about the implications of treaty rights for water quality standards decisions, EPA sometimes mixes that issue in with the separate issue of how to determine the appropriate fish consumption rate (“FCR”), for use in those standards decisions. On that FCR issue as well, the Agency’s rationale is confusing and lacks any strong basis. As an initial matter, EPA lays out a basic principle from its 2000 Human Health Methodology:

EPA’s methodology notes a preference for the use of local data to calculate human health criteria (e.g., locally derived FCRs, drinking water

² It should be noted that the guidance does discuss subsistence populations, and it does refer to Tribes. However, those references cut against EPA’s position here, since the guidance clearly does not state that subsistence or Tribal groups should be deemed to be the “target population” for development of standards.



intake rates and body weights, and waterbody-specific bioaccumulation rates) over national default values, to better represent local conditions.

We agree that EPA's methodology does state that preference. However, the word "preference" is critical. A "preference" is not a "requirement." And yet, in the Washington situation, EPA has determined that the existing criteria are not adequate, and that the State's proposed new criteria are not approvable, based on the Agency's disagreement with how those criteria use (or don't use) local data. How can EPA base a decision on a preference? EPA never answers that question. Instead, EPA then goes on to elaborate on how it interprets that preference:

EPA also generally recommends, where sufficient data are available, selecting a FCR that reflects consumption that is not suppressed by fish availability or concerns about the safety of available fish.

Here, EPA cites no authority at all for this "recommendation," other than a Frequently Asked Questions document that the Agency has made available. So, it appears that EPA is conceding that this new "recommendation" is nowhere in the 2000 Human Health Methodology – which it refers to elsewhere – or in EPA regulations. Yet, EPA is disapproving State standards, and issuing new Federal standards, based on its new policy that an FCR is not adequate if it does not reflect "unsuppressed" fish consumption levels. As noted above, EPA makes it clear that this was part of the basis for its determination:

EPA considered the fish consumption data cited above, in conjunction with Washington's current designated uses as informed by tribal reserved rights in Washington (as discussed in section IV.A), and determined that the federal human health criteria in the NTR as applied to Washington no longer protect the relevant designated uses of Washington's waters.

There is simply no legal basis for making a water quality standards decision based on the fact that an existing or proposed standard does not reflect "unsuppressed fish consumption rates." And yet, the Agency apparently uses the "unsuppressed" argument in multiple ways here. Not only is it part of the foundation for determining that the existing criteria are not adequate; it also forms a key input in the Agency's selection of the new standard levels that are proposed in the Notice:

EPA determined that a FCR of 175 g/day very likely does not reflect unsuppressed consumption rates of tribes within the state (see section II.B.c). EPA considered this fact as well as tribal input in selecting a cancer risk level of 10^{-6} to account for this uncertainty and ensure that EPA's proposed criteria protect Washington's fishing uses, including the tribes' reserved fishing rights. See discussion in section IV.C.b.



This EPA argument raises even more issues. Now, EPA is contending that it can use the “unsuppressed” issue – nowhere mentioned in any other official Agency document – to decide the risk level that it will use in setting standards. This concept, that it can use “uncertainty” over unsuppressed consumption rates, to lower the risk level that it will accept, is also found nowhere in Agency policy. Selecting a risk level is an entirely separate issue from determining the proper fish consumption rate. In fact, the risk level is supposed to be a State policy decision, not an EPA decision. Here, the State made that decision, proposing standards based on 10^{-5} as an acceptable risk level. EPA refused to accept that State decision, and instead has proposed a 10^{-6} level, based on its own preferences. There is no basis for that preemptive action, and the Agency’s citation of concerns over “unsuppressed fish consumption rates” does nothing to strengthen EPA’s legal foundation for its action.

In addition to its use of the treaty rights and “suppression effect” arguments, EPA makes one more claim to support its Washington State decisions: that they are needed to protect waters in the State of Oregon. But those claims, as well, lack any solid foundation. Of course, downstream violations of standards need to be prevented: that much is clear from the CWA. But here, EPA nowhere actually says that there are real concerns about Washington State sources causing standards violations in Oregon. Instead, EPA focuses on some specific inputs to the Washington equation, such as the FCR:

Additionally, Oregon, much of which is downstream from Washington, used this FCR to derive statewide human health criteria, which EPA approved in 2011. Use of this FCR to derive Washington’s criteria should thus help provide for the attainment and maintenance of downstream WQS in Oregon.

Here, EPA is talking about only one input to calculation of standards: the fish consumption rate. And the Agency appears to be contending that unless the upstream State uses the same FCR input as the downstream State, there is a potential standards problem. But it is fundamental to the CWA that States are not required to have identical standards. What is required is that one State not create a standards violation in the next. In this situation, EPA is not claiming that Washington will create standards problems in Oregon. What EPA is saying, apparently, is that if one of the inputs to the Washington standards is different from the same input used in Oregon, then that is cause for EPA to disapprove the Washington standards. Like much in EPA’s Notice, there is simply no authority for that claim. Yet, EPA makes it again, and this time couples it with an argument that the risk levels in the two States also need to be the same:

Finally, many of Washington’s rivers are in the Columbia River basin, upstream of Oregon’s portion of the Columbia River. Oregon’s criteria are based on a FCR of 175 g/day and a cancer risk level of 10^{-6} . EPA’s proposal to derive human health criteria for Washington using a cancer risk level of 10^{-6} along with a FCR of 175 g/day helps



ensure that Washington's criteria will provide for the attainment and maintenance of Oregon's downstream WQS as required by 40 CFR 131.10(b).

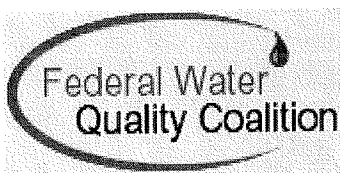
In this argument, EPA does not even claim that its policy decisions on risk level and FCR are needed to comply with the CWA. It only says that these decisions will "help provide for the attainment and maintenance of Oregon's downstream WQS." That vague statement simply avoids the key question: why did EPA need to disapprove existing and proposed Washington criteria and issue this new set of proposed standards? That type of decision can only be based on "necessity" – that this type of drastic action is needed to comply with the CWA. EPA cannot legitimately claim that it has met that test.

While EPA has based its decisions on treaty rights, the "suppression effect," and downstream issues, it is telling that it has not limited its standards to those waters where those issues could apply. In other words, the Agency has decided that its new standards should apply even for those waters where none of those issues pertain, based solely on arguments of "burden" and "difficulty":

For any remaining waters in Washington where reserved rights do not apply and that are not upstream of waters with such rights or waters in Oregon (see section IV.C.a), it would be administratively burdensome and difficult to implement separate criteria because it would create a patchwork of protection among these areas leading to potential difficulties in administering the WQS, NPDES permitting, and other programs. In addition, delineating the precise boundaries could itself be complicated. Therefore, EPA proposes to apply these criteria to all waters under Washington's jurisdiction.

In this argument, EPA provides no legal authority for the remarkable proposition that it can impose new, more stringent standards on certain waterbodies, for no other reason than that to do otherwise "could...be complicated." That is simply – and obviously – not any kind of adequate basis on which to reach a CWA decision.

Beyond the flaws in EPA's proposal that are discussed above, it is important to recognize that the Proposed WA Criteria would impose enormous costs on regulated parties, and the public, for little or no environmental benefit. As to the benefits, other parties have provided, in their comments, detailed analyses showing that the EPA proposal would make very little difference in the overall incidence of cancer among residents of Washington State. The base number of cancer cases occurring each year in the State is 38,230. Even using conservative projections, which likely overestimate the changes that could occur due to new standards, the cancer incidence could increase, due to consumption of fish, from 38,230 to 38,230.1 under a more reasonable standards proposal (which EPA would likely reject), while the incidence under EPA's proposal would be



38,230.01. Thus, the total benefit from EPEA's proposal would be less than a tenth of a cancer case per year, or 0.000002% of the overall cancer incidence in the State. And the costs of preventing that hypothetical tenth of a cancer case would be extremely large. An analysis was conducted to determine the likely impacts in Washington State if a proposal were adopted along the lines of the standards in Oregon – which are less stringent than EPA is proposing here. That analysis indicated that the total compliance costs to regulated parties in the billions of dollars. EPA has tried to claim that the compliance costs for its proposal would not be significant at all – less than \$100,000 at the most – but that estimate is simply not credible. The Agency bases this number on a very questionable assumption – that every discharger presented with substantial compliance costs will be able to obtain a variance. Given that the State of Washington has never issued a variance, and that those variances have proved extremely difficult to obtain in other States – and given EPA's own statements that variances should be rarely granted – one cannot take seriously the Agency's blanket assumption that variances will be widely granted throughout the State of Washington. The Oregon-based estimates are far more likely to be a reasonable (or even low) projection of the likely compliance costs in Washington State, and would indicate that billions of dollars would be spent for little or no benefit. This only further supports our recommendation that the Proposed WA Criteria should not be adopted.

The FWQC appreciates the opportunity to submit these comments concerning the development by EPA of water quality standards for the protection of human health in Washington State. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.



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Coordinator

