

# Federal Water Quality Coalition

June 20, 2016

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 Standards Applicable to Maine,**  
**Docket ID No. EPA-HQ-OW-2015-0804**

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 Maine (the “Proposed ME Standards” or the “Notice”). The proposal was issued in the Federal Register on April 20, 2016 (81 Fed. Reg. 23239).

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.; Rubber Manufacturers Association; Shell; Utility Water Act Group; Western Coalition of Arid States; Western States Petroleum Association; and Weyerhaeuser Corporation.

FWQC member entities or their members own and operate facilities located in Maine 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 standards developed for the protection of human health. The criteria being developed by EPA for Maine will determine the effluent limits in permits for FWQC members in Maine, and we expect that they will serve as a precedent for how human health criteria issues are addressed in permits for



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FWQC members in other States. The FWQC therefore has a direct interest in the Proposed ME Standards that are being developed by EPA.

In its proposal, EPA proposes new standards for waters in Indian lands, and certain other waters in Maine. As to these waters, EPA in 2015 disapproved standards that had been adopted by the State, and the new Federal standards are intended to replace those State standards. EPA disapproved those standards based on a determination that the standards did not adequately protect designated uses. Those reasons that EPA provided for its disapproval, and the basis that EPA now provides for its own proposed standards, are closely connected. Unfortunately, those reasons are also seriously flawed, on legal and policy grounds. EPA's proposed standards are invalid, and should not be finalized. Instead, EPA should approve the State standards that were adopted previously. These comments explain the problems with EPA's proposed actions.<sup>1</sup> In particular, these comments focus on two primary concerns. First, EPA was wrong in developing new proposed human health standards based on a new, EPA-established use of "sustenance fishing" and a new requirement to apply "unsuppressed" fish consumption rates. Second, EPA's proposed ban on mixing zones for bioaccumulative pollutants is unauthorized and should be withdrawn. These issues are explained in more detail below.

#### A. NEW HUMAN HEALTH STANDARDS

EPA's decision on establishing new human health standards rests upon several different legal arguments. Each of these arguments is novel, and each of them has major legal flaws. These are the four claims by EPA: (1) the Maine tribal settlement acts modify the requirements of the Clean Water Act; (2) those acts entitle EPA to establish a new use of "sustenance fishing"; (3) this new use must be protected by treating sustenance groups as the "general population" in developing the standards; and (4) the standards must be derived using the "unsuppressed" fish consumption rates of tribal communities. We will address each of these issues in turn.

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<sup>1</sup> 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 Maine. 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.



1. Modification of the CWA by the Settlement Acts

As to the settlement acts, and their relationship to the CWA, EPA starts by making the following broad statement:

[T]he settlement acts reflect Congress' intent that the tribes in Maine must be able to engage in sustenance fishing to preserve their culture and lifeways.

In support of this proposition, EPA cites to provisions in the settlement acts that “grant tribal control of fishing in certain trust waters and require the consideration of sustenance practices in the setting of fishing regulations for the remaining trust waters.” Nothing more specific is cited. In particular, EPA cites no settlement act provisions that touch on, or modify, how water quality standards will be set by the State that will apply to those waters. Despite the lack of any specific indications that the settlement acts modify the obligations of EPA and State agencies under the CWA, EPA states that they do exactly that, although that position is stated in a very hazy and tentative way. Here is what EPA says:

[I]n assessing whether the State's WQS were approvable for waters in Indian lands, EPA must effectuate the CWA requirement that WQS must protect applicable designated uses and be based on sound science *in consideration of the fundamental purpose for which land was set aside for the tribes under the Indian settlement acts in Maine.* [italics added]

Part of that statement is a non-controversial statement of applicable law: “the CWA requirement that WQS must protect applicable designated uses and be based on sound science.” The other parts seem to be an attempt to create new law, without actually citing any legal basis. What does it mean that EPA has to “effectuate” the CWA requirement? Is that different than actually complying with the CWA requirement? Does it give EPA broader authority if it can “effectuate” instead of simply following the Act and its own regulations? Even more significantly, where does EPA get authority to modify its CWA obligations through use of “the fundamental purpose” of a series of other laws, particularly when it cannot actually cite a provision in those laws that gives it that authority?

The simple answer to all of the questions posed above is this: no, EPA does not have authority beyond what is given to it in the CWA. In fact, the lack of such authority has been stated by EPA itself, in similar disputes concerning treaties with Indian tribes in other areas of the country. In a case in Washington State, EPA argued 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.



In fact, EPA's claim to outside-of-the-CWA authority is also 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 somehow take into consideration other possibly applicable laws – or, even less directly, the “fundamental purpose” of those laws. And, even though the settlement acts have existed for more than 30 years, and the CWA has existed for 44 years, the Agency has never stated this position before. There is simply no legal basis for this unsupported, completely new argument, especially when it is squarely inconsistent with EPA's clearly stated views in previous cases.

## 2. EPA Creation of New “Sustenance Fishing” Use

After claiming that the settlement acts modify the CWA, EPA takes another step, in justifying its proposed Federal standards for Maine, that is just as problematic. The Agency argues that this implicit modification of the CWA entitles it to create a new designated use for the State. EPA does not put it quite that way, arguing that it is just “interpreting”:

In waters where the settlement acts provide for the tribes to engage in sustenance fishing, EPA interprets Maine's designated use of “fishing” to include sustenance fishing.

This is another unprecedented argument by the Agency. We find no EPA rules or guidance that allow the Agency to “interpret” a State's designated uses. That is particularly so where, as here, the State itself has stated clearly that this “interpretation” is completely wrong. It would be a different situation if EPA were stating, as it has in other situations, that the State's designated uses lack some critical component, and therefore violate the CWA. If that were true, then EPA could either force the State to modify its uses, or if the State refused, issue a Federal rule adopting that lacking component of the designated uses. But EPA has not done that here. Instead, it has claimed the power to “interpret” the current designated uses in State water quality standards, in a way contrary to the State's own interpretation. That power simply does not exist.

## 3. Deeming Sustenance Fishers to be the “General Population”

The EPA claim of a “sustenance fishing” use leads, in the Agency's logic, to yet another problematic claim of authority: to treat tribal sustenance fishers as the “general population” for purposes of the proposed standards. Here is the Agency's rationale:



Having found that sustenance fishing is a designated use in the waters in Indian lands, it is reasonable for EPA to target tribal sustenance fishers as the general population for the purpose of establishing criteria to protect that use. The same analysis applies to waters outside of Indian lands where the sustenance fishing designated use applies.

EPA provides no justification for this decision, as to who the “general population” is, other than that it is “reasonable.” The Agency does not mention its applicable guidance on this issue, probably because the guidance does not support this decision. EPA’s Human Health Methodology, issued in 2000, discusses sustenance populations, as well as Tribes. But it does not state that sustenance or Tribal groups should be deemed to be the “target population” for development of standards. Rather, the focus of standards, according to the 2000 Methodology, is appropriately on the general population; highly exposed groups can be protected through development of site-specific standards. EPA does not address these recommendations, from its own guidance, in its Maine proposal. Instead, the Agency simply states that its decision was “reasonable.” We disagree.

#### 4. Use of “Unsuppressed” Fish Consumption Rates

Having focused the proposed Maine standards on the fish consumption of sustenance Tribal groups, EPA then has to determine the appropriate fish consumption rate (FCR) for those groups, to use in calculating the numeric standards. It is here that the Agency creates yet another new legal requirement, mandating that the fish consumption rate must be an “unsuppressed” one. Here is the new policy:

EPA also generally recommends, where sufficient data are available, selecting a FCR that reflects consumption that is not suppressed by concerns about the safety of available fish or fish availability....While EPA encourages doing so in general, where sustenance fishing is a designated use of the waters (due to, for example, tribal treaty or other federal law that provides for a tribe to fish for its sustenance), in EPA’s scientific and policy judgment, selecting a FCR that reasonably represents current unsuppressed fish consumption based on the best currently available information is necessary and appropriate to ensure that such sustenance fishing use is protected. Such FCR **must consider suppression** and where adequate data are available to clearly demonstrate what that value is for the relevant population, the FCR **must** reflect that value. (emphasis added)

Here, EPA cites no authority at all for these new mandates, other than a Frequently Asked Questions document that the Agency has recently issued. It appears that EPA is conceding that this new set of requirements is nowhere in the 2000 Human Health Methodology or in EPA regulations. Yet, EPA is disapproving State





standards, and issuing new Federal standards, based on the new policy that an FCR is not adequate if it does not reflect “unsuppressed” fish consumption levels. 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.” Yet, that is what EPA is proposing to do in Maine – which provides another reason why the proposal is illegal and should be withdrawn.

#### B. BAN ON MIXING ZONES FOR BIOACCUMULATIVE POLLUTANTS

In addition to proposing new human health water quality standards for Maine, EPA also proposes a number of other changes to Maine’s water quality standards and related implementation procedures. One of those changes, which we believe is both unauthorized and unsupported as a policy matter, is a ban on mixing zones for bioaccumulative pollutants. EPA notes that it adopted such a ban years ago, for discharges within the Great Lakes Basin, as part of the Great Lakes Initiative. What EPA does not mention is that the GLI ban was issued pursuant to a separate provision of the Clean Water Act, Section 118, which provides the Agency with significant additional authority within the Great Lakes Basin, beyond the authorities that it possesses elsewhere in the country. The scope of that authority was spelled out clearly by the Court of Appeals for the D.C. Circuit, in the case of *American Iron and Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997). That authority, which was the basis for the GLI mixing zone ban, does not extend to the State of Maine, which is far from the Great Lakes, and EPA therefore does not have legal authority to ban mixing zones in Maine.

It is also important to note that the scientific justification for the mixing zone ban in the Great Lakes was specific to that watershed. As the Court said in the *American Iron and Steel* case, EPA based its ban on the unique nature of the Lakes:

The EPA responds, first, that significant problems caused in the Great Lakes by the release of BCCs even in small amounts justify eliminating mixing zones for them. Even in a relatively open system, a BCC will persist in the ambient water and underlying sediment longer than will a run-of-the-mill pollutant. The Great Lakes, however, are a more-or-less closed system from which pollutants escape only over a long period of time. See Supplementary Information Document at 1 (“Lake Superior also has the longest retention time--the average time for one molecule of water to exit the system--of 173 years, while Lake Erie has the shortest at 2.7 years.”) The retentive character of the Great Lakes combined with the persistent character of BCCs is what warrants, in the EPA's opinion, the elimination of BCC mixing zones. The EPA also observes that the characterization of BCC loading reductions as “insignificant” was made by the agency's economists; the technical and policy staffs, who were aware of the environmental peculiarities of the Great Lakes, characterized those same reductions as significant.



It is clear, then, that on both legal and scientific grounds, the Great Lakes mixing zone ban provides no support for EPA's attempt to ban mixing zones in Maine.

In trying to justify the Maine mixing zone ban as a policy matter, EPA makes statements that both mislead and miss the point. Here is what EPA says:

Because fish tissue contamination tends to be a far-field problem affecting entire or downstream waterbodies rather than a near-field problem being confined to the area within a mixing zone, EPA has emphasized that it may be appropriate to restrict or eliminate mixing zones for bioaccumulative pollutants in certain situations such as where mixing zones may encroach on areas often used for fish harvesting, particularly for stationary species such as shellfish, and where there are uncertainties in the assimilative capacity of the waterbody.

EPA cites its Water Quality Standards Handbook to support these statements. But the Handbook does not justify banning mixing zones entirely. It says only that it "may be appropriate" to "restrict or eliminate" mixing zones "in certain situations," two of which are specified. But in the Maine proposal, EPA has entirely prohibited mixing zones for certain pollutants, regardless of whether fish harvesting areas are nearby, and regardless of whether there are uncertainties in the assimilative capacity of the waterbody. Even EPA's guidance, then, does not support the complete ban that EPA is proposing.

The proposed mixing zone ban is also unsupported as a scientific matter. The underlying assumption of a mixing zone ban on bioaccumulative pollutants (*e.g.*, mercury) is that discharges of these pollutants from point sources contribute a significant portion of the levels measured in biological receptors. That assumption is not borne out by relevant studies. Since EPA established a ban on bioaccumulative pollutants in the Great Lakes basin in 1995, several studies of fish tissue trends (temporal changes) have been conducted. In Lake Erie and Lake Ontario, in spite of the mixing zone ban for discharges of mercury, concentrations of mercury have actually increased in some species.<sup>2</sup> Shifts in ecological factors (*e.g.*, the presence of invasive species, changes in species-specific trophic ecology) are thought to be

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<sup>2</sup> Azim, M.E., A. Kumarappah, S.P. Bhavart, S.M. Backus, and G. Arhonditsis. 2011. Detection of spatiotemporal trends of mercury in Lake Erie fish communities: a Bayesian approach. *Environmental Science & Technology* 45: 2217 – 2226; Visha, A., N. Gandhi, S.P. Bhavsar, and G.B. Arhonditsis. 2015. A Bayesian assessment of the mercury and PCB temporal trends in lake trout (*Salvelinus namaycush*) and walleye (*Sander vitreus*) from Lake Ontario, Canada. *Ecotoxicology and Environmental Safety* 117: 174 – 186.



responsible for this temporal trend. A similar finding was observed for lake trout from Lake Huron, where trout mercury bioaccumulation factors were inversely proportional to densities of the fish's key prey species (rainbow smelt).<sup>3</sup> If EPA's goal in imposing a mixing zone ban in Maine is to minimize the bioaccumulation of persistent pollutants such as mercury, the scientific basis of this expectation is erroneous. The proposed mixing zone ban should be withdrawn.

The FWQC appreciates the opportunity to submit these comments concerning the development by EPA of water quality standards for Maine. 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.

**Fredric P. Andes**  
**Coordinator**

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<sup>3</sup> Abma, R.A., G. Paterson, A. McLeod, and G. D. Haffner. 2015. Cross-basin comparison of mercury bioaccumulation in Lake Huron lake trout emphasizes ecological characteristics. *Environmental Toxicology and Chemistry* 34: 355 – 359.

