

JANET T. MILLS
ATTORNEY GENERAL



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July 23, 2013

RECEIVED

JUL 29 2013

By certified mail

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington DC 20460

OFFICE OF THE REGIONAL ADMINISTRATOR

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

**Re: 60-Day Notice of Intent to Sue for Failure to Perform Nondiscretionary
Duties under the Clean Water Act**

Dear Administrator McCarthy and Attorney General Holder:

In 1980 the Federal Government, the State of Maine ("Maine"), the Penobscot Indian Nation and the Passamaquoddy Tribe 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 the *Maine Indian Land Claims Settlement Act*, 25 U.S.C. § 1721 *et seq.*, which ratified and confirmed the *Act to Implement the Maine Indian Land Claims Settlement Act*, set forth in Maine law at 30 M.R.S. §§ 6201 *et seq.* ("the Settlement Acts"). These laws create and define a nationally unique state-tribal relationship.

Of particular relevance to this letter, the Settlement Acts unambiguously confirm Maine's regulatory authority over Indian lands and natural resources. 30 M.R.S. § 6204; 25 U.S.C. § 1725(b)(1). These laws provide that 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 the U.S. Environmental Protection Agency's ("EPA") 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).

Consistent with Federal law, each year Maine submits to EPA new and amended water quality standards for EPA's review and approval. 33 U.S.C. § 1313. For many years EPA approved these standards without distinction as to Indian lands and waters, as the Settlement Acts require. However, shortly before the *Johnson* case was filed, EPA for the first time began inserting language into its approval letters stating that its decision "does 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 repeatedly and explicitly requesting that EPA approve its water quality standards as being effective throughout the State as the Settlement Acts require, EPA continues to refuse to approve these standards as to "Indian territories."

On May 16, 2013, EPA failed to take action approving Maine's most recent submission, filed on January 14, 2013, seeking approval of revisions to Maine's surface water quality standards for waters "within Indian territories...." (enclosed as Exhibit A).

Title 33 U.S.C. § 1313(c)(3) provides:

If the Administrator, within sixty days after the date of submission of the revised or new [WQS], determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

EPA made no finding of inadequate authority to administer or enforce the program within Indian territories. Indeed, the *Johnson* decision would preclude such a finding. Neither has EPA specified any changes to Maine's standards that it might claim are necessary in order meet the requirements of the Clean Water Act. EPA, in its own words, states that it "will retain responsibility under Section 303(c) and 303(d) of the Clean Water Act for those waters." Those provisions of the Clean Water Act afford EPA that authority only if a state fails to adopt EPA's requested changes, but EPA has made no such requests here; therefore EPA has no authority to "retain responsibility" under these circumstances. Simply put, EPA is acting outside of the law.

Maine has repeatedly requested in writing that EPA identify which water bodies it considers to be "within Indian territories" in Maine, and to explain what water quality standards it believes apply to those water bodies if in fact Maine's do not. EPA has refused to answer these fundamental questions. EPA's failure to act or otherwise explain itself creates uncertainty for Maine, the Maine Tribes, Maine's towns, Maine's citizens and Maine's regulated community as to how the Clean Water Act is to be implemented and enforced in the vicinity of "Indian territories" in Maine. More broadly, EPA is promoting the misconception that some different set of rules, rather than the State's generally applicable statutes and regulations, applies to Indian lands and natural resources in Maine. This misconception flies in the face of the federal court's

ruling in *Johnson* and fundamentally undermines one of the core purposes of the Settlements Acts.

Against this background, Maine hereby provides this notice of its intent to sue EPA for failure to perform a nondiscretionary duty pursuant to 33 U.S.C. § 1365(b)(1) of the Federal Water Pollution Control Act, specifically for its failure to act on Maine's January 14, 2013, application for approval of new and revised water quality standards as it relates to Indian lands and waters, all as required by 33 U.S.C. § 1313.

The identity of the person giving this Notice is the State of Maine, which is a sovereign state, and which is represented in this matter by its Attorney General, Janet T. Mills, whose address and contact information 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

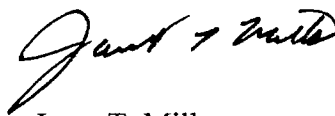
Counsel of record in this matter and their contact information are as follows:

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If EPA does not comply with its non-discretionary duty to act on Maine's application for approval of its water quality standards Indian territories within 60 days, Maine intends to file suit in federal court to compel EPA to comply with the law.

Sincerely,



Janet T. Mills
Attorney General

Enclosure

cc: The Honorable Paul LePage
The Honorable Susan Collins
The Honorable Angus King
The Honorable Michael Michaud
The Honorable Chellie Pingree
Kirk Francis, Chief
Reubin Cleaves, Governor
Joseph Socobasin, Chief
Brenda Commander, Chief
Richard Getchell, Chief
Curt Spalding, EPA Region I Administrator
Commissioner Patricia Aho



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

May 16, 2013

Patricia W. Aho, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Review and Action on Water Quality Standards Revisions

Dear Commissioner Aho:

By letter of January 14, 2013, the Maine Department of Environmental Protection ("DEP") submitted revisions of the State's surface water quality standards to Region 1 of the United States Environmental Protection Agency ("EPA" or "Region") for review. The revisions were adopted by the DEP on July 13, 2012. By letter to EPA dated January 9, 2013, Maine's Assistant Attorney General in the Natural Resources Division certified the revisions as having been duly adopted pursuant to state law. The Region has completed its review of the submitted revisions to the arsenic criteria as further described below.

Pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131, I hereby approve the following water quality standards revisions to 38 MRSA §420, sub-§2 as set forth in P.L. 2011, Ch. 194 (LD 515) "An Act To Review State Water Quality Standards" and CMR 584, Surface Water Quality Criteria for Toxic Pollutants.

1. Revision of the cancer risk level used to calculate the human health criteria for arsenic from one in 1,000,000 to one in 10,000 and
2. Revision of the arsenic criteria to protect human health from 0.012 to 1.3 µg/L for the consumption of water and organisms and from 0.028 to 3.7 µg/L for the consumption of organisms only.

We are still reviewing revisions to the acrolein and phenol criteria and are not taking action on those revisions at this time.

EPA acknowledges your request to approve the revisions for all waters, including waters that are within Indian territories. Today's approval does not extend to waters that are within Indian territories. EPA intends to publish a notice explicitly seeking public input on the applicability of the revised arsenic criterion in question to waters within Indian territories before completing its review. Therefore, EPA is taking no action to approve or disapprove the State's revisions with respect to those waters at this time. In the meantime, EPA will retain responsibility under Sections 303(c) and 303(d) of the Clean Water Act for those waters.

Discussion

In implementing LD 515, DEP reviewed the available scientific literature on the factors that are used to derive water quality criteria to protect human health uses including fishing, recreation in and on the water, and, where applicable, drinking water. DEP also reviewed data specific to waters in Maine and used the information to derive arsenic criteria for Maine's waters.

Arsenic is a known carcinogen that may cause cancer in skin or internal organs such as the liver, lungs and bladder.¹ In its 304(a) criteria recommendations, EPA states that arsenic criteria should be applied as inorganic arsenic.² As is the case for all pollutants, EPA's 2000 Human Health Methodology encourages states to use local and regional data when making risk management decisions inherent in developing criteria, including decisions inherent in selecting the appropriate fish consumption rate, target risk level and bioaccumulation factor.³

Maine's revised numeric criteria for arsenic were derived using the same general methodology and equations used to calculate EPA's current 304(a) recommended criteria for carcinogens. The revised criteria and the input variables used to calculate the criteria are summarized in Table 1 below. The paragraphs that follow explain those components of the calculation that have been revised to form the basis of Maine's new arsenic criteria.

Cancer Risk Factor (RF): The State of Maine enacted LD 515 in 2011 directing DEP to revise Maine's human health water quality criteria for arsenic based on a cancer risk factor of 1 in 10,000 rather than the previous RF of 1 in 1,000,000. EPA's recommended methodology for the derivation of water quality criteria states that 1 in 1,000,000 or 1 in 100,000 may be acceptable cancer risk factors for the general population and that highly exposed populations should not exceed a 1 in 10,000 risk level.⁴

Fish Consumption Rate (FCR): Maine's previous 32.4 g/day FCR represents the 94th percentile for Native American anglers in Maine and the 95th percentile for the total angler population in Maine, based on data from a 1990 survey of licensed Maine anglers⁵. In deriving the new arsenic criteria, DEP used 138 g/day, which is the 99th percentile of this survey, to ensure that the criteria are protective of subsistence fishers, a highly exposed population. This approach is consistent with EPA recommendations for

¹ Agency for Toxic Substances and Disease Registry (ATSDR). *Toxicological Profile for Arsenic*. Atlanta, Georgia, August 2007. Available at: <http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=3>

² EPA. *National Recommended Water Quality Criteria*, human health criteria for arsenic published 1992, available at: <http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm>

³ EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004. page 2-6. Available at: <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf>

⁴ EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004. page 2-6. Available at: <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf>

⁵ Ebert, E.S., R.E. Keenan, J.W. Knight, and N.W. Harrington, *Consumption of Freshwater Fish by Maine Anglers*, proceedings of the 1992 TAPPI Environmental Conference.

Table 1 – Comparison of Maine’s Previous and Revised Arsenic Criteria

Parameter	2005 criteria	2012 criteria
Cancer Risk Factor (RF)	1×10^{-6}	1×10^{-4}
Body Weight (BW)	70 kg	70 kg
Cancer Potency Factor (q1*)	1.75 mg/kg/day	1.75 mg/kg/day
Water Consumption (DW)	2 L/day	2 L/day
Bioconcentration Factor (BCF)	44 L/kg	26 L/kg
Fish Consumption Rate (FCR)	32.4 g/day	138 g/day
Inorganic Factor (IF)	none ⁶	30%
Criteria to protect human health for consuming fish and drinking water (water + organism) = $1,000 \times \frac{RF \times BW}{q1^* \times [DW + (BCF \times FCR \times IF)]}$	0.012 µg/L	1.3 µg/L
Criteria to protect human health for consuming fish only = $1,000 \times \frac{RF \times BW}{q1^* \times BCF \times FCR \times IF}$	0.028 µg/L	3.7 µg/L

estimating fish consumption rates for subsistence fishers and is appropriate to ensure that highly exposed subpopulations are not exposed to a risk level greater than 1 in 10,000.

Inorganic Factor (IF): Arsenic is present in the environment and in fish tissue in both organic and inorganic forms. Inorganic arsenic is the form that is most toxic to humans and used to develop toxicity data for cancer and other end points. The IF is the ratio of inorganic arsenic to total arsenic in fish tissue. DEP conducted its own literature search which found a range of observed IF values from 10 to 30%. According to DEP’s review, the lower end of this range is based on average results, whereas maximum amounts are observed to approach or exceed the upper end of the range depending on species and other factors. DEP chose the more protective end of this range.⁷

Bioconcentration Factor (BCF): Bioconcentration refers to the uptake and retention of a chemical by an aquatic organism from water. The BCF is the ratio of the concentration of a substance in the tissue of an aquatic organism to its concentration in the ambient water in situations where the organism is exposed through the water only and the ratio does not

⁶ The 2005 criteria did not include adjustment to the criteria based on an assumption of a ratio of inorganic to total arsenic. Therefore, IF was not included in the 2005 calculation. Instead, DEP assumed a ratio of 50% inorganic arsenic to total arsenic in developing water quality based effluent limits for dischargers subject to licensing under Maine’s National Pollution Discharge Elimination System. EPA understands that with the adoption of the new arsenic criteria, DEP will no longer make those adjustments.

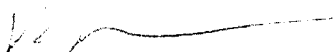
⁷ See 1/27/2011 email from Robert D. Stratton, DEP, to Ellen Weitzler and Stephen Silva, EPA.

change substantially over time. Maine has updated the BCF used for the arsenic criteria based on a 2011 BCF derivation for arsenic conducted by EPA in support of an arsenic criteria revision in Oregon.⁸ The 2011 derivation used a larger set of studies than were available in 1980 when the 44kg/L BCF (used in the 2005 Maine arsenic criteria) was developed.

EPA approves of the WQS revision to the arsenic criteria on the basis of the demonstrated use of available sound science, including state specific data, to derive the new criteria.

We look forward to continued cooperation with Maine in the development, review and approval of water quality standards pursuant to our responsibilities under the Clean Water Act. Please contact Ellen Weitzler (617-918-1582) if you have any questions.

Sincerely,


Kenneth Moraff, Acting Director
Office of Ecosystem Protection

cc: Brian Kavanah, MEDEP
Tracy Bone, EPA SSB
Jennie Bridge, EPA

⁸ EPA, Region 10, *Technical Support Document for Action on the State of Oregon's New and Revised Human Health Water Quality Criteria for Toxics and Associated Implementation Provisions Submitted July 12 and 21, 2011*, October 17, 2011