

October 18, 2016

## Testimony in Opposition to Proposed Expansion Permit for Juniper Ridge Landfill

The Board Order dated May 27, 2016 disputes the relevancy of including the issue of Environmental Justice in Board proceedings. The only reason given for rejecting environmental justice as relevant criteria for this licensing decision is that it should have been addressed in the Public Benefit Determination that already took place.

However, the issue of environmental justice is not included in the criteria required for determination of Public Benefit, which is based upon whether the facility meets capacity needs for the State, promotes the solid waste management hierarchy, and is not inconsistent with local and state waste collection storage, transportation, processing or disposal. Health, welfare, and environmental justice are relevant to the licensing decision independent of the determination of Public Benefit.

Licensing criteria for this solid waste facility requires BOTH a Public Benefit Determination AND a finding “the facility will not pollute any water of the State, contaminate the ambient air, constitute a hazard to health or welfare or create a nuisance,” specified in Title 38, Chapter 13, Subchapter 1-A, Article 3, Section 1310-N.

During the Intervenor Hearings and Testimony before LURC in 2007 on the Plum Creek Rezoning Proposal, issues of health and welfare, and their relation to environmental justice were included as relevant to the proceedings, especially relating to impact on water quality and health hazards.

Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Environmental Justice is lacking when low-income and tribal communities experience disproportionate environmental harms and risks resulting from to exposures, cumulative impacts, and greater vulnerability to environmental hazards.

Lack of consideration of environmental justice has led to disproportionately high and adverse health and environmental effects resulting from policies and polluting activities that place an undue burden on low-income and tribal communities living in proximity to JRL and downstream from leachate discharge locations.

### **Sustenance Fishing and Clean Water Act**

The proposed expansion could create greater burdens on communities in the Penobscot watershed who are already negatively impacted by cumulative exposure to toxins. Much of the JRL expansion site is in NOAA mapped Atlantic Salmon Mapped Critical Habitat, and increased volumes of leachate would be discharged into waterways subject to changing Clean Water Act regulations.

A health assessment for the Penobscot Indian Nation done in 2010 by the Agency for Toxic Substances and Disease Registry found that community members who eat more than two Penobscot River fish per month could be exposed to harmful mercury levels. The assessment recommended that children under 8 years old or women who are pregnant or breastfeeding not eat any fish from the river. Dioxins, furans and PCBs were found in Penobscot River fish and turtle at levels that pose increased cancer risk.

The EPA is currently considering revised Clean Water Act water quality standards that would apply to certain Maine water bodies, including those impacted by the proposed JRL expansion.

(See attached overview of the EPA recommendations.)

Proposed Federally Promulgated Water Quality Standard rules 131.43 would require a “mixing zone” and that effluents into the Penobscot River not interfere with the migration of wildlife.

The EPA is also proposing human health criteria (HHC) for waters subject to sustenance fishing rights under the Maine Implementing Act. Maine’s current HHC for toxic pollutants are intended to protect residents consuming up to 32.4 grams per day of fish. The best available information indicates that the human health criteria to protect tribal sustenance fishing in Maine should be based on a much higher fish consumption rate.

The federal and state statutes that settled Indian land claims in Maine provide for the four federally recognized tribes to engage in sustenance fishing in waters in Indian lands and all waters subject to the reserved fishing right under MIA.

Section 101(a)(2) of the Clean Water Act establishes the national goal that water quality should provide for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water. States must establish WQS for waters under their jurisdiction that protect these goals, including designated uses and criteria to protect the uses.

In decisions issued in February, March, and June 2015, EPA disapproved a number of Maine Water Quality Standards as not adequately protective of human health or aquatic life. EPA concluded that the settlement acts protect sustenance fishing practices in those waters; that under the Clean Water Act sustenance fishing is a designated use; and that criteria must be adequate to protect that use.

Executive Order 12898 “Federal Actions To address Environmental Justice in Minority Populations and Low-Income Populations” directs federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law.

Under environmental justice principles, it is the duty of state and federal agencies to utilize their delegated authorities to minimize the inherent risk that tribal communities face. The primary charge of environmental justice mandates is to avoid disparate harm to specific populations, who are often overly exposed to pollution due in part to their geographic locations and cultural practices.

### **Additional Relevant Statute and Rule - Health Hazards, Welfare & Environmental Justice**

Title 38, Chapter 2, Subchapter 1, 341-B specifies that,  
*“The purpose of the Board of Environmental Protection is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.”*

Lack of ability for meaningful community representation in the process, beginning at the earliest possible time, has resulted in lack of protection from environmental and health hazards for people disproportionately bearing burden of health hazards.

It is important that the issue of environmental justice and its relation to health hazards and public welfare be included as relevant issues in this proceeding in order to ensure meaningful and fair public participation in department decisions.

Title 38, Chapter 13, Section §1310-N, licensing criteria for solid waste facilities state, *“The department may not issue a license for a solid waste facility if it finds that the proposed facility will cause an unreasonable*

*threat to the quality of a classified body of surface water,” and,  
“... The department may not issue a license for a solid waste disposal facility when it finds that the proposed facility overlies a significant sand and gravel aquifer or when the department finds that the proposed facility poses an unreasonable threat to the quality of a significant sand and gravel aquifer it does not overlie, or to an underlying fractured bedrock aquifer.”*

In its technical review of the application, CES expressed uncertainty regarding the location of the bedrock groundwater divide and cautioned against relying upon it when assessing the need for monitoring of residential wells.

The proposed expansion would increase the amount of waste being managed at JRL, and will increase the amount of leachate being generated. The increased pressure on local water supplies needs to be taken into consideration in licensing decisions.

Any major expansion will increase pressure on groundwater supplies, streams, and wetlands adjacent to the facility, in case of a leak in the liner or major precipitation event, as well as increase the volume of leachate being generated, treated and released into the Penobscot River in Old Town.

Chapter 400 of DEP Maine Solid Waste Management Rules Licensing Criteria, Section 3.D, “Licensing Criteria for Solid Waste Facilities,” specifies that the Department shall issue a license for a solid waste facility only when it finds, based upon substantial evidence in the record, that the solid waste facility will not contaminate any water of the State, contaminate the ambient air, constitute a hazard to health or welfare, or create a nuisance.

Title 38, Chapter 13, Subchapter 1, Section 1302 states,  
*“...The Legislature finds that it is in the best interests of the State to prefer waste management options with lower health and environmental risk and to ensure that such options are neither foreclosed nor limited by the State’s commitment to disposal methods.*

*...The Legislature finally declares that the provisions of this chapter shall be construed liberally to address the findings and accomplish the policies in this section.”*

Expansion of JRL creates potential for multiple and cumulative exposures to health and environmental hazards in already overburdened communities.

Landfill expansion increases risk for methane and other fugitive emissions to negatively impact air quality, as well as increased volumes of leachate and pressures on the liner system that could negatively impact water quality.

Rates of cancer and asthma are already elevated in the communities both in proximity to and downstream from JRL. The accumulation of negative environmental conditions within communities creates risks to health and welfare that in the case of the proposed JRL expansion, falls disproportionately on low-income and tribal communities.

Maine statute is clear that health and welfare must be protected in order for a facility to be licensed, and that these should not be excluded from issues of discussion during proceedings on matters affecting people across the state.

Sincerely,  
Hillary Lister                      16 Chapel St. Augusta, ME 04330  
[hillarylister@mainematters.net](mailto:hillarylister@mainematters.net)

Key Points Relevant to JRL Permitting Decision from  
“Proposal of Certain Federal Water Quality Standards Applicable to Maine”  
( [www.federalregister.gov/articles/2016/04/20/2016-09025/proposal-of-certain-federal-water-quality-standards-applicable-to-maine#h-44](http://www.federalregister.gov/articles/2016/04/20/2016-09025/proposal-of-certain-federal-water-quality-standards-applicable-to-maine#h-44) )

A Proposed Rule by the Environmental Protection Agency on 04/20/2016

### Summary

The Environmental Protection Agency (EPA) proposes federal Clean Water Act (CWA) water quality standards (WQS) that would apply to certain waters under the state of Maine's jurisdiction. EPA proposes human health criteria (HHC) to protect the sustenance fishing use in those waters in Indian lands and for waters subject to sustenance fishing rights under the Maine Implementing Act (MIA) based on a fish consumption rate that represents an unsuppressed level of fish consumption by the four federally recognized tribes. EPA proposes six additional WQS for waters in Indian lands in Maine, two WQS for all waters in Maine including waters in Indian lands, and one WQS for waters in Maine outside of Indian lands. These proposed WQS take into account the best available science, including local and regional information, as well as applicable EPA policies, guidance, and legal requirements, to protect human health and aquatic life. EPA proposes these WQS to address various disapprovals of Maine's standards that EPA issued in February, March, and June 2015, and to address the Administrator's determination that Maine's disapproved HHC are not adequate to protect the designated use of sustenance fishing for certain waters.

#### 1. Clean Water Act (CWA)

CWA section 101(a)(2) establishes as a national goal “water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable.” These are commonly referred to as the “fishable/swimmable” goals of the CWA. EPA interprets “fishable” uses to include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish.

CWA section 303(c) (33 U.S.C. 1313(c)) directs states to adopt water quality standards (WQS) for waters under their jurisdiction subject to the CWA. CWA section 303(c)(2)(A) and EPA's implementing regulations at 40 CFR part 131 require, among other things, that a state's WQS specify appropriate designated uses of the waters, and water quality criteria to protect those uses that are based on sound scientific rationale. EPA's regulations at 40 CFR 131.11(a)(1) provide that such criteria “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” In addition, 40 CFR 131.10(b) provides that “[i]n designating uses of a water body and the appropriate criteria for those uses, the state shall take into consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.”

States are required to review applicable WQS at least once every three years and, if appropriate, revise or adopt new standards (CWA section 303(c)(1)). Any new or revised WQS must be submitted to EPA for review, to determine whether it meets the CWA's requirements, and for approval or disapproval (CWA section 303(c)(2)(A) and (c)(3)). If EPA disapproves a state's new or revised WQS, the CWA provides the state ninety days to adopt a revised WQS that meets CWA requirements, and if it fails to do so, EPA shall promptly propose and then promulgate such standard unless EPA approves a state replacement WQS first (CWA section 303(c)(3) and (c)(4)(A)). If the state adopts and EPA approves a state replacement WQS after EPA promulgates a standard, EPA then withdraws its promulgation. CWA section 303(c)(4)(B) authorizes the Administrator to determine, even in the absence of a state

submission, that a new or revised standard is necessary to meet CWA requirements. Upon making such a determination, EPA shall promptly propose, and then within ninety days promulgate, any such new or revised standard unless prior to such promulgation, the state has adopted a revised or new WQS which EPA determines to be in accordance with the CWA.

Under CWA section 304(a), EPA periodically publishes water quality criteria recommendations for states to consider when adopting water quality criteria for particular pollutants to protect the CWA section 101(a)(2) goal uses. For example, in 2015, EPA updated its 304(a) recommended criteria for human health for 94 pollutants (the 2015 criteria update).

Where EPA has published recommended criteria, states should consider adopting water quality criteria based on EPA's CWA section 304(a) criteria, section 304(a) criteria modified to reflect site-specific conditions, or other scientifically defensible methods (40 CFR 131.11(b)(1)). CWA section 303(c)(2) (B) requires states to adopt numeric criteria for all toxic pollutants listed pursuant to CWA section 307(a)(1) for which EPA has published 304(a) criteria, as necessary, to support the states' designated uses.

....As discussed in greater detail in EPA's February 2, 2015, decision disapproving certain Maine WQS in waters in Indian lands, a key purpose of the settlement acts was to confirm and expand the Tribes' land base, in the form of both reservations and trust lands, so that the Tribes may preserve their culture and sustenance practices, including sustenance fishing. For the Passamaquoddy Tribe and Penobscot Nation, the settlement acts expressly confirmed an aboriginal right to sustenance fishing in their reservations. See 30 M.R.S. 6207(4).

The legislative record of the settlement acts makes clear that Congress also intended to ensure the tribes' continuing ability to practice their traditional sustenance lifeways, including fishing, from their trust lands. With regard to the Passamaquoddy and Penobscot trust lands, legislative intent to provide for tribal sustenance fishing practices is, for example, reflected in MIA provisions which grant tribal control of fishing in certain trust waters and require the consideration of tribal sustenance practices in the setting of fishing regulations for the remaining trust waters. See 30 M.R.S. 6207(1), (3). As for the Micmacs and Maliseets, the settlement acts similarly provide for the opportunity to continue their sustenance fishing practices, though subject to more direct state regulation than that of the Passamaquoddy or Penobscot. In its February 2, 2015, decision, EPA concluded that MICSA directly provides the state with jurisdiction to set WQS in the Northern Tribes' trust lands and that MICSA also ratifies provisions of MIA that provide the state with such authority in the Southern Tribes' territories. That decision provided a detailed explanation of the legal basis for the state's jurisdiction to set WQS in waters in Indian lands in Maine. Because of the unique jurisdictional formula Congress ratified in the settlement acts, EPA is in the unusual position of reviewing state WQS in waters in Indian lands.

.... EPA, in its March and June decisions, disapproved a number of WQS as applied to waters in Indian lands because those standards, although approved for other waters in Maine many years ago, no longer satisfy CWA requirements (i.e., they do not protect designated uses and/or are not based on sound scientific rationale). EPA proposes to promulgate six WQS related to those disapprovals, which include:

- (1) Narrative and numeric bacteria criteria for the protection of primary contact recreation and shellfishing;
- (2) ammonia criteria for protection of aquatic life in fresh waters;
- (3) a statutory exception for naturally occurring toxic substances from the requirement to regulate toxic substances at the levels recommended by EPA, as it applies to HHC, and a natural conditions clause, as

it applies to HHC;

(4) the mixing zone policy;

(5) the pH criterion for fresh waters; and

(6) tidal temperature criteria. Because EPA had previously approved these provisions for other waters in Maine, the disapprovals and corresponding proposed WQS apply to only waters in Indian lands.

## 2. Disapprovals That Apply to All Waters in Maine, Including Waters in Indian Lands

In its March and June 2015 decisions, EPA disapproved a number of new and revised WQS as applied to all waters throughout Maine, including waters in Indian lands. These are WQS that EPA had not previously acted upon for any waters. EPA proposes two WQS for all waters in Maine related to the disapprovals of

(1) a statute allowing the waiver or modification of protection and improvement laws, as it pertains to WQS; and

(2) the numeric criteria for dissolved oxygen in Class A waters. EPA proposes one WQS for waters in Maine outside of Indian lands related to the disapproval of the phenol criterion for water plus organisms.

### C. Scope of Waters

To address the disapprovals discussed in section II.B.1, EPA proposes HHC for toxic pollutants as well as six other WQS that apply only to waters in Indian lands. For the purpose of this rulemaking, “waters in Indian lands” are those waters in the tribes' reservations and trust lands as provided for in the settlement acts.

In addition, as described below in section III, EPA proposes the same HHC for toxic pollutants pursuant to a determination of necessity under CWA 303(c)(4)(B) for the following waters: (1) Waters in Indian lands in the event that a court determines that EPA's disapprovals of HHC for such waters were unauthorized and that Maine's existing HHC are in effect; and (2) waters where there is a sustenance fishing designated use outside of waters in Indian lands.

....6. Mixing Zone Policy. a. What did EPA disapprove? On June 5, 2015, EPA disapproved, for waters in Indian lands, Maine's mixing zone policy set forth in 38 M.R.S. 451. This provision allows the DEP to establish mixing zones that would allow the “reasonable” opportunity for dilution or mixture of pollutants before the receiving waters would be evaluated for WQS compliance.

States are not required to adopt mixing zone policies into their WQS, but if they do, they are subject to EPA review and approval. 40 CFR 131.13. A mixing zone is a limited area or volume of water where initial dilution of a discharge takes place, and where certain numeric criteria may be exceeded, but the designated uses of the waterbody as a whole must still be protected. EPA's guidance includes specific recommendations to ensure that mixing zones do not impair the designated uses of the waterbody as a whole. Among other things, a state mixing zone policy must ensure that pollutant concentrations in the mixing zone are not lethal to organisms passing through and do not cause significant human health risks; and that mixing zones do not endanger critical areas such as breeding or spawning grounds, drinking water intakes and sources, shellfish beds, or endangered or threatened species habitat. Maine's mixing zone law does not contain any of these or other protective safeguards to ensure the protection of designated uses. The only specific limitation on mixing zones in Maine's mixing zone statute is that they be “reasonable.” There are also no state regulations that define the boundaries of a “reasonable” mixing zone. Therefore EPA disapproved Maine's law for waters in Indian lands as being inadequate to protect designated uses.

....1. Disapprovals That Apply Only to Waters in Indian Lands in Maine

In its February 2015 decision, EPA concluded that MICSA granted the state authority to set WQS in waters in Indian lands. EPA also concluded that in 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. EPA found that those settlement acts, which include MICSA and other state and federal statutes that resolved Indian land claims in the state, provide for land to be set aside as a permanent land base for the Indian tribes in Maine, in order for the tribes to be able to continue their unique cultures, including the ability to exercise sustenance fishing practices. Accordingly, EPA interprets the state's "fishing" designated use, as applied to waters in Indian lands, to mean "sustenance fishing" and approved it as such; and EPA approved a specific sustenance fishing right reserved in one of the settlement acts as a designated use for certain tribal reservation waters. Against this backdrop, EPA approved or disapproved all of Maine's WQS as applied to waters in Indian lands after evaluating whether they satisfied CWA requirements as informed by the settlement acts.

EPA's disapprovals of WQS for waters in Indian lands in Maine were based on two distinct rationales, depending on the WQS. First, EPA disapproved Maine's HHC for toxic pollutants based on EPA's conclusion that they do not adequately protect the health of tribal sustenance fishers in waters in Indian lands, because they are not based on the higher fish consumption rates that reflect the tribes' sustenance fishing practices, and, in the case of one HHC, because the cancer risk level was not adequately protective of the sustenance fishing use. These disapprovals, discussed in EPA's February and March decisions, are specifically related to unique aspects of the tribes' use of waters in Indian lands. EPA proposes to promulgate WQS related to the HHC disapprovals as explained in section IV.A.

Second, EPA, in its March and June decisions, disapproved a number of WQS as applied to waters in Indian lands because those standards, although approved for other waters in Maine many years ago, no longer satisfy CWA requirements (i.e., they do not protect designated uses and/or are not based on sound scientific rationale). EPA proposes to promulgate six WQS related to those disapprovals, which include: (1) Narrative and numeric bacteria criteria for the protection of primary contact recreation and shellfishing; (2) ammonia criteria for protection of aquatic life in fresh waters; (3) a statutory exception for naturally occurring toxic substances from the requirement to regulate toxic substances at the levels recommended by EPA, as it applies to HHC, and a natural conditions clause, as it applies to HHC; (4) the mixing zone policy; (5) the pH criterion for fresh waters; and (6) tidal temperature criteria. Because EPA had previously approved these provisions for other waters in Maine, the disapprovals and corresponding proposed WQS apply to only waters in Indian lands.