Anacostia Riverkeeper · Clean Water Action · DC Appleseed Center for Law and Justice · DC Environmental Network · Earthjustice · National Parks Conservation Association · Nature Forward· Potomac Riverkeeper Network · Rock Creek Conservancy · The Nature Conservancy · Waterkeepers Chesapeake

September 8, 2023

Department of Energy and Environment
Water Quality Division
1200 First Street NE, 5th Floor
Washington, D.C. 20002
Via email to WQS@dc.gov

Re: 2021 Proposed Water Quality Standards

To Whom It May Concern:

Thank you for the opportunity to comment on the Department of Energy and Environment's ("DOEE") proposed changes to water quality standards as part of its 2021 triennial review under the Clean Water Act ("CWA"). These comments are submitted by: Anacostia Riverkeeper, Clean Water Action, DC Appleseed Center for Law and Justice, DC Environmental Network, Earthjustice, National Parks Conservation Association, Nature Forward, Potomac Riverkeeper Network, Rock Creek Conservancy, The Nature Conservancy, and Waterkeepers Chesapeake (collectively "Commenters").

In this triennial review, DOEE is proposing to add a numeric equivalent for ambient turbidity, adopt numeric criteria for diazinon, add mercury to the list of referenced conversion factors, update the District's ground water standards, and make corrections to the silver ground water criterion. Commenters generally support these changes, and urge DOEE to further clarify and strengthen its turbidity criterion, adopt numeric criteria for nutrients, and adopt a higher fish consumption rate that is protective of subsistence fishing communities.

I. APPLICABLE LEGAL STANDARDS

A. State Water Quality Standards

The CWA requires that states review, and if appropriate modify, their water quality standards at least once every three years. These standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."[1] Moreover, the standards "shall be such as to protect the public health or welfare, enhance the quality of water . . ." and take "into consideration their use and value for . . . recreational purposes."[2]

[1] 33 U.S.C. § 1313(c)(2)(A).
[2] *Id.*

B. Federal Water Quality Criteria

Under the CWA, the U.S. Environmental Protection Agency ("EPA") has a duty to, "from time to time," revise its criteria for water quality.[3] These "304(a) guidance" criteria constitute EPA's broadly applicable recommendations to states, but states are not required to adopt the criteria when revising their water quality standards.[4] Instead, EPA has directed states as follows:

> States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use . . . . In establishing criteria, States should:
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> (1) Establish numerical values based on:
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> (i) 304(a) Guidance; or
>
> (ii) 304(a) Guidance modified to reflect site-specific conditions; or
>
> (iii) Other scientifically defensible methods . . . .[5]

Therefore, states have authority to either modify EPA's federal 304(a) criteria in order to accommodate their site-specific conditions, or even use other scientifically defensible methods. The overriding regulatory duty for states is to enact "sufficient parameters or constituents to protect the designated use," with standards "based on sound scientific rationale."[6] States must assess their own site-specific needs in order to fulfill this duty. "[I]f a State does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall provide an explanation when it submits the results of its triennial review."[7]

C. Federal Criteria and Guidance on Nutrients

EPA states, and the District has long understood, that nutrients cause serious water quality problems.[8] Nutrient pollution feeds algal blooms that choke waterways, deplete oxygen

[3] 33 U.S.C. § 1314(a).
[4] *Id.*; 40 CFR § 131.11(b)(1).
[5] 40 CFR § 131.11.
[6] 40 CFR § 131.11(a).
[7] 40 C.F.R. § 131.20.
[8] EPA, National Strategy for the Development of Regional Nutrient Criteria (June 1998), https://www.epa.gov/sites/default/files/2019-12/documents/national-strategy-development-regional-factsheet-1998.pdf; Maryland DoE & DOEE, Anacostia River Nutrients and

for fish and aquatic organisms, reduce underwater vegetation, and alter the makeup of ecosystems.[9] At its worst, nutrient pollution can result in toxic or hazardous algal blooms that make people, pets, and wildlife sick.[10]

Accordingly, in 2000, EPA published 304(a) numeric criteria for nutrients (including nitrogen and phosphorus) by ecoregion, and provided states with guidance to develop their own criteria.[11] EPA encouraged states to adopt numeric nutrient criteria by 2003.[12] EPA has continued to expand its toolkit of resources to assist states in adopting and implementing numeric nutrient criteria in the years since,[13] and as recently as 2022, EPA again pushed for more robust adoption of numeric nutrient criteria.[14] So far, 29 states and territories have adopted numeric nutrient criteria for some waters, but the District has not.[15]

D. Federal Criteria and Guidance on Fish Consumption Rates

The CWA sets national goals to eliminate all discharges of pollutants by 1985, to attain water quality which provides for the protection and propagation of fish and shellfish by 1983

Biochemical Oxygen Demand TMDL (Apr. 2008), https://doee.dc.gov/publication/anacostia-river-nutrients-and-biochemical-oxygen-demand-bod-tmdl; DOEE, Watershed Implementation Plans – Chesapeake Bay, https://doee.dc.gov/service/watershed-implementation-plans-chesapeake-bay (last visited Aug. 30, 2023).

[9] *See generally* D.C. Wildlife Action Plan Update at 80, 95, 123-24, (July 2015), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/00_2015WildLifeActionPlan_Chapters_07_31_2015_PublicVersion_0.pdf.

[10] *Id.*; DOEE, Algae Blooms in District Waters, https://doee.dc.gov/service/algaeblooms (last visited Aug. 30, 2023).

[11] EPA, Ecoregional Nutrient Criteria for Rivers and Streams, https://www.epa.gov/nutrient-policy-data/ecoregional-nutrient-criteria-rivers-and-streams (Ecoregion IX and XI).

[12] EPA, National Strategy for the Development of Regional Nutrient Criteria (June 1998), https://www.epa.gov/sites/default/files/2019-12/documents/national-strategy-development-regional-factsheet-1998.pdf; Nutrient Criteria Development; Notice of Nutrient Criteria Technical Guidance Manual: Rivers and Streams, 65 Fed. Reg. 46167-46169 (July 27, 2000).

[13] EPA, Toolkit of Resources to Assist States with Adopting and Implementing Numeric Nutrient Criteria, https://www.epa.gov/nutrient-policy-data/toolkit-resources-assist-states-adopting-and-implementing-numeric-nutrient (last updated March 23, 2023).

[14] EPA, Nutrient Reduction Memorandum (2022), https://www.epa.gov/nutrient-policy-data/2022-epa-nutrient-reduction-memorandum.

[15] EPA, State Progress Toward Adopting Numeric Nutrient Water Quality Criteria for Nitrogen and Phosphorus, https://www.epa.gov/nutrient-policy-data/state-progress-toward-adopting-numeric-nutrient-water-quality-criteria#tb3 (last updated March 9, 2023) (including American Samoa, Arizona, California, Colorado, Florida, Georgia, Guam, Hawaii, Illinois, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, Northern Marianas Islands, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, the U.S. Virginia Islands, Utah, Vermont, Virginia, West Virginia, and Wisconsin).

(the "fishable" goal), and sets national policy to *prohibit* toxic pollutants in toxic amounts.[16] In order to ensure the attainment of these goals and implementation of this policy, the CWA imposes an obligation on states, with EPA in an oversight role, to develop water quality standards comprised of narrative or numeric water quality criteria sufficient to protect designated uses such as fishing or recreation.[17]

Protective human health water quality standards based on an accurate fish consumption rate are crucial protections for the people in the District who eat fish and shellfish. One of the ways water pollution adversely affects human health is through the consumption of fish and shellfish that have accumulated toxic water pollutants such as mercury, lead, or PCBs. Toxins, once entering the water, can accumulate in fish and shellfish tissue, ultimately exposing humans. Therefore, water quality standards for toxins must be set to ensure that humans can safely consume fish and shellfish and not overexpose themselves to accumulative toxins. In order to set a proper standard, an agency must determine the amount of fish people in the state consume daily—the fish consumption rate. If the rate is set too low, people will be exposed to unhealthy, perhaps even dangerous, levels of toxins when consuming their normal or culturally-customary amount of fish or shellfish.[18]

As early as 2000, EPA directed states to update fish consumption rates and human health criteria based on the best available local consumer data.[19] In the Human Health Guidance, EPA explained:

> The Agency intends to use the 2000 Human Health Methodology both to develop new [Ambient Water Quality Criteria ("AWQC")] for additional pollutants and to revise existing AWQC. Within the next several years, EPA intends to focus on deriving AWQC for chemicals of high priority (including, but not limited to, mercury, arsenic, PCBs, and dioxin). Furthermore, EPA anticipates that 304(a) criteria development in the future will be for bioaccumulative chemicals and pollutants considered highest priority by the Agency. The 2000 Human Health Methodology is also intended to provide States and authorized Tribes flexibility in establishing water quality standards by providing scientifically valid options for developing their own water quality criteria that consider local conditions. States and authorized Tribes are strongly encouraged to use this Methodology to derive their own AWQC.[20]

EPA further directed:

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[16] 33 U.S.C. § 1251(a)(1), (2), and (3).
[17] 33 U.S.C. § 1313(a) and (b); *see also*, 40 C.F.R. §§ 130.3, 130.10(a)(3), 131.4, 131.5, 131.10 and 131.11.
[18] *See* Catherine O'Neill, *Fishable Waters*, 1 Am. Indian L.J. 181, 184 (2013).
[19] EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (2000) at 1-1, *available at* http://perma.cc/0Ug1xn41Q88 ("Human Health Guidance").
[20] *Id*. at 1-1.

> that priority be given to identifying and adequately protecting the most highly exposed population. Thus, if the State or Tribe determines that a highly exposed population is at greater risk and would not be adequately protected by criteria based on the general population, and by the national 304(a) criteria in particular, EPA recommends that the State or Tribe adopt more stringent criteria using alternative exposure assumptions.[21]

EPA directed states to utilize a preferred hierarchy in determining exposure rates from fish consumption when states develop human health criteria for water quality, with the use of local data on specific, actual consumption rates being the highest and best source of information to underlie the criteria development.[22] Soon after EPA issued its Human Health Guidance, a federal advisory committee on environmental justice issued a report on the need for states to ensure that all populations are protected, especially those with particularly high fish consumption rates for cultural, religious, social, and/or economic reasons.[23] The Environmental Justice Report emphasized that for many native communities, immigrant communities, or communities of color, fishing and eating fish is more than simply an inexpensive way to feed one's family or an option for recreation. In fact, the report described how sharing and eating fish is an integral part of many communities' cultures, religion, or social network and as such, larger amounts of fish may be consumed by members of the community than had previously been assumed by state or federal regulators.[24] The report therefore emphasized the need to use actual data for fish and shellfish consumers in the state and to set standards that are protective of a state's varied communities.[25]

Finally, in 2015, EPA updated its ambient water quality criteria for human health under CWA section 304(a).[26] These recommended criteria are based on updated fish consumption rate estimates published by EPA in 2014.[27] Specifically, in these updated criteria EPA established the "default" fish consumption rate to be 22 grams per day, representing the 90th percentile consumption rate of U.S. adults over the age of 21.[28] But at this time EPA reiterated that it

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[21] *Id*. at 2-2.
[22] *Id.* at 4-24 to 4-27.
[23] National Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice* (2002), at 11 and 13, *available at* http://perma.cc/0D64qSMD6s8.
[24] *Id.* at 2-13.
[25] *Id.* at 30-32.
[26] EPA, Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 Fed. Reg. 36,986 (June 29, 2015).
[27] EPA, Estimated Fish Consumption Rates for the U.S. Population and Selected Subpopulations (April 2014), https://www.epa.gov/sites/default/files/2015-01/documents/fish-consumption-rates-2014.pdf.
[28] EPA, Human Health Ambient Water Quality Criteria: 2015 Update at 2 (June 2015), https://www.epa.gov/sites/default/files/2015-10/documents/human-health-2015-update-factsheet.pdf ("EPA 2015 Human Health Criteria Fact Sheet").

"recommends that states and authorized tribes consider developing criteria to protect highly exposed population groups and use local or regional data in place of a default value as more representative of their target population group(s)."[29] Moreover, EPA advised states that "[t]he preferred hierarchy is: (1) use of local data; (2) use of data reflecting similar geography/ population groups; (3) use of data from national surveys; and (4) use of EPA's default consumption rates."[30]

II. 2021 TRIENNIAL REVIEW PROPOSED RULE

A. DOEE Should Clarify and Strengthen Its Turbidity Criterion.

As part of its 2021 Triennial Review update to the District's water quality standards, DOEE proposes to add a numeric equivalent for ambient turbidity.[31] While not changing the standard itself—20 Nephelometric Turbidity Units (NTU) "above ambient primary contact, secondary contact, and aquatic life designated uses"—DOEE proposes adding a numeric equivalent for "ambient turbidity." The District's surface waters are split across two ecoregions, requiring the generation of two separate ambient turbidity values. These two ecoregions are the Piedmont (the Potomac River northwest of the Theodore Roosevelt Bridge and its tributaries, along with Rock Creek), and the Coastal Plain (the Potomac River east of the Theodore Roosevelt Bridge and its tributaries, along with the Anacostia River and its tributaries).[32] The proposed ambient turbidity equivalents are 1 NTU for the Piedmont ecoregion and 6 NTU for the Coastal Plain ecoregion.[33]

Commenters support DOEE's efforts to provide specificity and clarity to the turbidity standard. However, Commenters urge DOEE to clarify and strengthen the proposed amendments in three ways. First, Commenters request that DOEE clarify that the newly proposed numeric ambient values, rather than an onsite sample upstream of a permitted site, must be used for determining compliance with the final turbidity standard. The "Study on the Socioeconomic, Institutional, Technological, and Environmental (SITE) Impacts of Applying and Enforcing Updates to Water Quality Standards" accompanying the 2021 triennial review explains that DOEE is proposing a numeric equivalent for ambient turbidity due to confusion and inconsistent

[29] *Id*.
[30] *Id*.
[31] DOEE, Notice of Proposed Rulemaking: Water Quality Standards and Ground Water Standards Update for the Triennial Review 2021, *available at* https://doee.dc.gov/sites/default/files/dc/sites/doee/release_content/attachments/Proposed%202021%20WQS.pdf ("NPRM").
[32] *Id*. at 1.
[33] *Id*. at 4.

application of the current standard.[34] DOEE states that, for example, the standard is sometimes incorrectly interpreted to be 20 NTU, rather than 20 NTU above ambient.[35] DOEE further states:

> The turbidity criteria are interpreted correctly for water quality certifications, which DOEE issues. Permittees may be required to take water samples 25 feet upstream and downstream of their project's limit of disturbance in surface waters to ensure that their project complies with the turbidity criterion. In these cases, the criterion is interpreted to mean that if the downstream measurement is 20 NTU above the upstream measurement, then the project is out of compliance.[36]

According to this interpretation, which DOEE states is "correct[]," a permittee would be considered in compliance with the turbidity standard as long as there is no greater than a 20 NTU difference between the measurement upstream of the project and the measurement downstream of the project. In-compliance downstream measurements could be 26 NTU (if the upstream measurement is 6 NTU), as well as 70 NTU (if the upstream measurement is 50 NTU), and even higher, with no true limit. While this interpretation could be deemed to be a correct application of the current turbidity standard, it would be an incorrect and nonsensical interpretation of the proposed standard. This type of differential interpretation does little to preserve the water quality of the surface water in question, as it sets no specific, numeric ceiling for the turbidity of water downstream from a project, so long as the turbidity upstream of the project is no more than 20 NTU lower. If the above-outlined approach is applied to the proposed standard, it would render the ambient reference values of 1 NTU for the Piedmont waters and 6 NTU for the Coastal Plain waters essentially meaningless. We ask that DOEE clarify in the final standard that differential sampling is not a permissible compliance method.

Second, in accordance with the EPA Guidance that DOEE followed, DOEE should account for seasonality in its calculation of the ambient reference value for each ecoregion; doing so may, according to Commenters' assessment, result in a lowering of the reference value for the Piedmont ecoregion from 1 NTU to 0 NTU.[37] A lower ambient reference value puts a lower ceiling on the allowable increase in turbidity from a permittee's activity and helps to better preserve surface water quality. DOEE states that its ambient equivalencies for the Piedmont and Coastal Plain ecoregions were calculated using 20 years of turbidity data and "established EPA

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[34] DOEE, Study on the Socioeconomic, Institutional, Technological, and Environmental (SITE) Impacts of Applying and Enforcing Updates to Water Quality Standards at 7 (Jan. 2023), *available at* https://doee.dc.gov/sites/default/files/dc/sites/doee/release_content/attachments/Final%20SITE%202021.pdf ("SITE Study").

[35] *Id*.

[36] *Id*.

[37] Dividing the data by season, taking the median value for each sampling location and season, then taking the median of the 25th percentile values of the four seasons resulted in reference values of 0.31 NTU for the Piedmont ecoregion and 6.02 NTU for the Coastal Plains ecoregion. The Piedmont value, rounding down to 0 NTU, is lower here than what DOEE proposes.

methodology."[38] According to the EPA Guidance that DOEE utilized, the process for generating ambient reference values in absence of actual reference streams (which the District lacks) consists of:

1) Reducing data for all rivers and streams within an ecoregion down to a single median value for each river/stream by season;
2) Combining all river/stream medians by season and selecting the 25th percentile from the distribution of each season's median values, resulting in four median values (winter, spring, summer, fall); and
3) Calculating the median value of the 25th percentile for all four seasons, which is the reference condition calculation for the ecoregion.[39]

However, DOEE's process involved simply combining all river/stream data for the Piedmont ecoregion and all river/stream data for the Coastal Plain ecoregion and selecting the 25th percentile of each as the reference value for that ecoregion, without considering seasonal effect.[40] Commenters request that DOEE revisit its methodology and calculations for the ambient reference values, using the seasonal medians to calculate the median value of the 25th percentile for all four seasons, according to EPA's Guidance.

Finally, Commenters request that DOEE strengthen the standard of 20 NTU above ambient to a threshold of 10 NTU above ambient. Elevated turbidity is harmful to the health of surface waters. One yardstick for surface water health is the presence of submerged aquatic vegetation (SAV). SAV serves many important ecological functions, including providing habitat for juvenile and adult aquatic life, sediment stabilization, and water quality improvement.[41] In 2017, the District had a high of 1,176.15 acres of SAV in its surface waters. By 2021, total SAV acreage had declined precipitously to a total of 6.9 acres, all in the Anacostia River—a mere 1/20th of a single percent of the area it covered four years previously.[42] The District's 2022 Draft Integrated Report pointed to high levels of rainfall and the resulting increase in turbidity and flow as "the major factor" in the decrease of SAV.[43] It is possible to restore SAV in areas where

[38] NPRM, *supra* note 31, at 1.
[39] EPA, Ambient Water Quality Criteria Recommendations: Information Supporting the Development of State and Tribal Nutrient Criteria: Rivers and Streams in Nutrient Ecoregion IV, EPA 822-B-00-019 at 25-26 (Dec. 2000), *available at* https://www.epa.gov/sites/default/files/documents/rivers9.pdf ("EPA Nutrient Guidance Ecoregion IV").
[40] Email correspondence between Robyn Winz, Earthjustice, and Dr. Amir Sharifi & Rebecca Diehl, DOEE (dated between August 3, 2023, and August 25, 2023).
[41] DOEE, Draft District of Columbia Water Quality Assessment 2022 Integrated Report at 69, *available at* https://doee.dc.gov/sites/default/files/dc/sites/ddoe/release_content/attachments/2022%20IR%20Draft%2005-20-2022.pdf ("2022 Draft IR").
[42] *Id*.
[43] *Id*.

it has been lost, and limiting the potential for manmade-turbidity to negatively impact SAV growth will help in that restoration. Since natural causes of increased turbidity, such as high rainfall, are outside of DOEE's control, DOEE should seek to more strictly limit the increase of turbidity from manmade causes. Some states have adopted a more protective standard of 10 NTU above ambient threshold, including Delaware and New Hampshire, as well as New Mexico for waters with a background turbidity of 50 NTU or less.[44] Commenters advise that DOEE follow the model of these states and tighten the proposed turbidity standard from 20 NTU above ambient to 10 NTU above ambient.

B. DOEE Should Adopt Numeric Nitrogen and Phosphorus Criteria.

Commenters urge DOEE to adopt numeric nutrient criteria. Nutrient pollution is a major threat to the District's waters, and it is long past time for the District to adopt numeric criteria as recommended by EPA more than twenty years ago. Both the Anacostia and the Potomac are impaired for nutrients and not supporting the aquatic life use as a result.[45] Rock Creek has also been degraded by nutrient loading.[46] And the District contributes to nutrient pollution in the Chesapeake Bay.[47] While the District implements several programs to reduce nutrient pollution, including the Non-Point Source Management Program;[48] the Total Maximum Daily Loads (TMDLs) for the Anacostia River and other waters;[49] the Phase III Watershed Implementation

[44] EPA, 2022 Construction General Permit: List of State-Specific Water Quality Standards for Turbidity, *available at* https://www.epa.gov/system/files/documents/2022-01/list-of-state-specific-water-quality-standards.pdf.

[45] D.C. Water Quality Assessment: 2020 Integrated Report at 91-92, *available at* https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/2020%20IR%2006-25-2020.pdf (Anacostia Segments 1 and 2; Potomac Segment 3).

[46] DOEE, Continued Planning Process for Water Quality Management at 5 (2018), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/CPP2018-FINAL.pdf ("Water and sediment quality in these waterbodies have been degraded by nutrient loading (nitrogen and phosphorous).").

[47] D.C., Phase III Watershed Implementation Plan for the Chesapeake Bay, Chapter 3: Nutrient and Sediment Sources (Aug. 23, 2019), https://dhs.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/FINAL%20DC%20PHASE%20III%20WIP%20-%20HQ2%20web.pdf ("DC Phase III WIP"); D.C. Chesapeake Bay Program, https://doee.dc.gov/service/chesapeakebayprogram (last visited Aug. 30, 2023); Chesapeake Bay Program, Nutrient Runoff, https://www.chesapeakebay.net/issues/threats-to-the-bay/nutrient-runoff (last visited Aug. 30, 2023).

[48] DOEE, Non-point Source Management Plan (Dec. 2019), *available at* https://doee.dc.gov/service/non-point-source-management-plan; DOEE, Non-point Source Pollution Grant Annual Reports, *available at* https://doee.dc.gov/service/non-point-source-pollution-grant-annual-report.

[49] DOEE, Anacostia River Nutrients and Biochemical Oxygen Demand TMDL (Apr. 2008), *available at* https://doee.dc.gov/publication/anacostia-river-nutrients-and-biochemical-oxygen-demand-bod-tmdl; D.C. Phase III WIP, *supra* note 47, at 21 (listing nutrient TMDLs).

Plan for the Chesapeake Bay;[50] and the Biosolids Recycling Program,[51] nutrient problems persist.[52]

Thus, DOEE should either adopt EPA's recommended numeric criteria for nitrogen and phosphorus or develop its own standards based on scientifically defensible methods.[53] At a minimum, DOEE must explain why it fails to develop numeric nutrient criteria or adopt EPA's criteria.[54]As described in the prior section, the District has implemented EPA's nutrient guidance to develop numeric standards for turbidity.[55] That the District can set numeric standards for turbidity shows that it can and should set numeric standards for nitrogen and phosphorus as well, relying on the same guidance.[56]

C. DOEE Should Adopt a Higher Fish Consumption Rate to Protect Subsistence Fishing Communities.

Commenters urge DOEE to adopt a higher fish consumption rate as part of its water quality standards because a higher rate is needed to sufficiently protect the health of subsistence fishing communities.

The District's assumed fish consumption rate, which underlies many of its water quality standards, is not addressed in its 2021 proposed water quality standards. Elsewhere, however, DOEE has acknowledged it relies on EPA's overall default national recommended fish consumption rate of 22 grams per day.[57] While 22 grams per day may be a reasonable estimate of fish consumption for the general population, it is not protective of communities that practice subsistence fishing.

Subsistence fishing along the Anacostia and Potomac rivers, practiced for generations by many Black residents, continues to be an important way to combat food insecurity in the

[50] D.C., Phase III WIP, *supra* note 47.
[51] D.C. Water, We Recycle Nutrients, https://www.dcwater.com/biosolids-agriculture (last visited Sept. 1, 2023); Blue Plains Advanced Wastewater Treatment Plant Brochure at 8 (2020), https://www.dcwater.com/sites/default/files/Blue_Plains_Plant_brochure.pdf.
[52] 2022 Draft IR, *supra* note 41, at 162-63 (Anacostia DC, Upper Segment 02, not meeting total phosphorus or nitrogen criteria), 171-173 (Potomac DC Upper Segment 3, not meeting total phosphorus or nitrogen criteria).
[53] SITE Study, *supra* note 34, at 7-8; 40 CFR § 131.11.
[54] 40 C.F.R. § 131.20; NPRM, *supra* note 31.
[55] NPRM, *supra* note 31, at 1-2.
[56] EPA Nutrient Guidance Ecoregion IV, *supra* note 39.
[57] *See, e.g.*, *Total Maximum Daily Loads for Organics and Metals in the Anacostia River Watershed* at 24 (July 2021), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/release_content/attachments/Public%20Notice%20Draft_clean_Anacostia%20TMDL%20report.pdf.

District.[58] Generations of Black fishers in the District have fished along the shores of the Potomac and Anacostia Rivers, especially the Anacostia as many Black residents were historically pushed eastward within the City.[59] Many Black fishers describe fishing as part of their familial heritage or legacy, often with grandmothers or other family members teaching the younger generation to fish.[60] Some of the more popular destinations for subsistence fishers in the District include the Anacostia River and its tributaries, Anacostia National Park, and Hains Point.[61]

The District has the highest rate of childhood food insecurity in the country, and fishing provides a critical food source for many impoverished families suffering from food insecurity.[62] Fish harvested from the Anacostia and other District waters is not only consumed by the anglers who catch them and their families. Instead, studies show that there is a "widespread" sharing of fish in extended social networks, and it is estimated that fish shared from local waters could be reaching 17,000 people in the DC-Maryland metro region.[63] A 2015 subsistence fishing survey on the lower Anacostia similarly showed that at least 17,000 people in the lower Anacostia watershed eat fish from the river every year, 7% of respondents ate fish from the river every day, and 35% ate river fish at least once per week or more.[64] And 39% of all participants reported eating all or most of their catch.[65] These District residents are being exposed to a variety of toxins with each meal of fish, including mercury, arsenic, PCBs, dioxin, and PFOS.[66]
Given the prevalence of fish consumption, EPA recommends the use of "default fish consumption rates of . . . 142.4 g/d for subsistence fishers."[67] In fact, because fish consumption rates among subsistence fishing communities often vary significantly, EPA recommends that agencies conduct local studies to identify the consumption rates for "groups that might be at greater risk of exposure to contaminants in fish due to higher consumption rates, such as

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[58] S. Fiske et al., *Ethnographic Resource Study: Subsistence Fishing on the Potomac and Anacostia Rivers* 237-238 (2020), http://npshistory.com/publications/nace/subsistence-fishing.pdf.
[59] *Id*. at 22-24.
[60] *Id*. at 228.
[61] *Id.* at 228-229.
[62] *Id*. at 237.
[63] *Id*. at 186, 237.
[64] S. Wilson, Community-Based Assessment of Exposure to Substances in the Anacostia R Region, https://www.epa.gov/sites/default/files/2016-03/documents/sacoby_iwg_presentation_sept_2014.pdf.
[65] *Id.*
[66] *See, e.g.*, Human Health Guidance, *supra* note 19, at 1-1; Piscataway Fish Consumption Advisory for PFOS, https://mde.maryland.gov/PublicHealth/Documents/Piscataway_FCA_PFOS_Summary_Final.pdf.
[67] EPA, Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories 1-8 (2000), https://www.epa.gov/sites/default/files/2015-06/documents/volume2.pdf.

subsistence fishers."[68] By adopting EPA's national default fish consumption rate, which was not developed to protect subsistence fishing communities, DOEE has ensured that subsistence fishing communities along the Potomac and Anacostia—the communities most vulnerable to the effects of fish contamination—will continue to be exposed to unhealthy levels of contamination. DOEE should follow EPA's guidance and recommendations to prioritize adopting its own fish consumption rate based on local data, or at least data from similar geographies and populations, before resorting to EPA's default rate.[69] In the absence of local or similarly situated data, DOEE should rely on national survey estimates that are protective of highly exposed groups – namely EPA's estimated fish consumption rate of approximately 142.4 grams per day for subsistence fishers.[70] In the District, the high rates of subsistence fishing and associated human health impacts obligate the District to adopt a higher fish consumption rate that is based on these local conditions and protective of the most highly exposed populations.[71]

We urge DOEE to address in detail each of the foregoing concerns before finalizing the proposed rule. Any questions regarding these comments may be directed to Anna Sewell asewell@earthjustice.org and 202-797-5233, Kathleen Riley at kriley@earthjustice.org and 202-745-5227, or Robyn Winz at rwinz@earthjustice.org and 202-797-5256.

Sincerely,

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together with:

[68] EPA, *Guidance for Conducting Fish Consumption Surveys* 12 (2016), https://www.epa.gov/sites/default/files/2017-01/documents/fc_survey_guidance.pdf.
[69] EPA 2015 Human Health Criteria Fact Sheet, *supra* note 28, at 2.
[70] *Id*.
[71] Human Health Guidance, *supra* note 19, at 2-2.

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