



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 16 2016

OFFICE OF WATER

Mr. Peter LaFlamme, President
Association of Clean Water Administrators
1634 I Street NW, Suite #750
Washington, D.C. 20006

Dear Mr. LaFlamme:

Thank you for your letter of September 26, 2016 regarding "State Ambient Water Quality Criteria for the Protection of Human Health – Fish Consumption," sent on behalf of the Association of Clean Water Administrators. The Environmental Protection Agency water programs recognize the co-regulator relationship we have in administering and implementing the Clean Water Act. As such, we value our collaborative and constructive relationships with states, and have a long track record of success with interactions under the auspices of ACWA.

You raised three specific concerns that I would like to address: 1) interpretation of state designated uses without public hearings, 2) interactions between fish consumption rates and cancer risk levels with respect to tribal populations in developing protective criteria, and 3) considering suppressed consumption as expressed in a 2013 "Frequently Asked Questions" (FAQ) document.

Regarding the first item, the EPA's interpretation of state "fishing" or "fish/shellfish harvesting" uses to include or encompass "sustenance fishing" is based on our reading of tribal reserved rights and harmonizing them with the CWA to the extent possible under the law. We have an independent obligation with respect to tribes and their reserved rights, and we acknowledge that determining what specific reserved rights mean and how we consider them in terms of determining appropriate water quality standards has evolved as consultation with affected tribes has proceeded over recent years. The harmonization of tribal reserved rights with the CWA as related to human health criteria has been the subject of federal rules for water quality standards in the states of Washington (WA) and Maine (ME), and as such has been subject to public notice and comment and public hearings. I understand there may be differences in opinion regarding the EPA's actions, but we (and the states) must recognize these reserved rights when applicable rights intersect with the EPA's actions to the extent possible under the law.

Regarding the second item, we recognize that our human health criteria guidance published in 2000 indicates that states have discretion to protect the "general population" within a cancer risk range of one in one hundred thousand to one in a million (10^{-5} to 10^{-6}), while ensuring that highly exposed populations are protected at least at a one in ten thousand (10^{-4}) risk level. The guidance also notes that states and authorized tribes can also choose a more stringent risk level, such as 10^{-7} (one in ten million), when deriving human health criteria. We understand that criteria are not established to necessarily protect every individual, nor collection of individuals, that may be characterized as a "population", at the same risk level. However, the guidance does not address tribal reserved rights. Given that these reserved rights are federal law, and applicable both to the federal government and the states, the EPA must ensure

we harmonize our CWA actions with those reserved rights to the extent possible under the law. This may not be an issue everywhere such reserved rights apply, but where the rights overlap with waters where the Clean Water Act 101(a)(2) goal of protection of fish consumers also applies, we harmonized the reserved rights with the CWA by interpreting the designated use of “fish/shellfish harvesting” or “fishing” to include or encompass subsistence (WA) or sustenance (ME) fishing.

In considering specific tribal reserved rights and organized tribal populations that collectively have a right to “sustenance” or “subsistence” fishing, it is difficult to conclude that this group should be systematically afforded a tolerable incremental cancer risk rate as much as 10 to 100 times higher than a “general population”. Therefore, the EPA decided it was consistent with the CWA, the reserved tribal rights, and the principles expressed in our guidance documents to identify the tribal populations with “sustenance fishing” or “subsistence fishing” reserved rights as the targeted “general population” for purposes of developing protective criteria in the affected waters. Where a waterbody contains a designated use based on a tribe’s legally protected ability to fish for their sustenance/subsistence in such water body, it is logical to treat that tribe as the target population.

Regarding the third item, we recognize that our human health criteria guidance published in 2000 does not specifically address suppressed or unsuppressed fish consumption rates. However, designated uses under the CWA are aspirational in nature, and not simply reflective of the status quo, and criteria should be set at levels that are protective of the most sensitive aspect of the designated use, per the CWA and the EPA’s regulations. In developing human health criteria, the EPA has consistently recommended utilizing middle to upper percentiles from surveys of actual consumption. To be truly reflective of the aspirational aspect of designated uses, however, suppression should be considered and factored in where possible. The EPA did not consider this mention of suppression in the 2013 FAQ document to be inconsistent with previous guidance, or reflect a wholly new concept. For example, the EPA’s fish consumption advisory program has always recognized the concern that current surveys may reflect the suppression effect of the public being aware of advisories to limit consumption. The EPA recently took public comment on how to account for suppression in the fish consumption survey guidance.

On a more general note, we are committed to actively engaging in dialogue with our state partners. We welcome opportunities to further discuss these and other issues. Similarly, we are committed to actively engaging with tribal governments and strongly encourage states and tribes to communicate directly with one another about these and other important water quality issues. There is no intention to create a dynamic that pits states against federal and tribal representatives. We are open to hearing multiple points of view and creating opportunities to share those perspectives. One forum we could use to further discuss these issues is the monthly “Monitoring, Standards, and Assessment” call (third Wednesday from 2:30-4:00 eastern time) our staff holds with ACWA and all 50 states. Please feel free to follow up on these matters, including scheduling further discussions, with Sara Hisel-McCoy, Director of the Standards and Health Protection Division (hisel-mccoy.sara@epa.gov; 202-566-1649).

Sincerely,



Joel Beauvais
Deputy Assistant Administrator