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September 26, 2016

Mr. Joel Beauvais
Deputy Assistant Administrator
Office of Water
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave NW, 4201M
Washington, DC 20460

SENT ELECTRONICALLY

RE: State Ambient Water Quality Criteria for the Protection of Human Health – Fish Consumption

Dear Mr. Beauvais:

The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act (“CWA”). ACWA writes to request a meeting with you and your staff to discuss EPA’s recent activity on the development of ambient water quality criteria for the protection of human health at the state level, specifically with regard to fish consumption, and the concerns that several of ACWA’s member states have raised.

Several ACWA states raised similar concerns regarding the agency’s recent positions and decisions pertaining to the establishment of state ambient water quality criteria for the protection of human health criteria based on fish consumption. First, ACWA member states are concerned that EPA is failing to recognize the co-regulator relationship with the states established in the CWA. Second, these members believe EPA is improperly relying on guidance and FAQ documents that did not go through the appropriate notice and comment process. Third, these states feel that EPA’s actions are creating a dynamic that pits states against federal and tribal representatives and their policy preferences.

There are numerous other concerns regarding EPA’s actions on this issue. The following examples address the most significant of these concerns:

1. EPA effectively changed designated uses in waters from “fishing” and/or “harvest” to “sustenance fishing” in some states. EPA has explained that their reasoning amounts to an “interpretation” of state fishing and/or harvest designated uses to “include sustenance fishing”

due to “tribal treaty rights”. As this interpretation amounts to a change in designated use, EPA is required under the CWA to submit documentation justifying the change and hold one or more public hearings.¹ EPA has not done so.

Further, ACWA member states are concerned that the approach the agency is taking in accounting for sensitive or “highly exposed” populations is flawed and we would like an opportunity to understand the agency’s thinking on this issue. In human health criteria development, highly exposed populations are considered and accounted for when the input values for the human health criteria equations are determined for criteria calculation (e.g., choice of a fish consumption rate or other inputs to the equation). EPA’s 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (“2000 Methodology”) clearly describes the approach to addressing sensitive populations in the context of criteria that protect an entire designated use, such as fishing, not multiple categories of the same designated use, as EPA has done by unilaterally including sustenance fishing.

2. Another concern raised by ACWA member states is the incremental cancer risk rate for fish consumption of 10^{-6} . This risk rate seems contrary to the recommendation in the 2000 Methodology, which recommends states adopt a risk level of 10^{-6} or 10^{-5} for the general population and ensure that highly exposed populations do not exceed a risk level of 10^{-4} . EPA uses the analysis of the “sustenance fishing” designated use addressed above stating that 10^{-5} is not adequately protective. EPA explains that because tribal sustenance fishers are to be targeted as the general population for the purpose of establishing criteria to protect the designated use, they must be protected at the rate of 10^{-6} . We understand the 2000 Methodology as reserving to the states the choice of an incremental lifetime risk of cancer. The 2000 Methodology explains that this choice is a risk-management decision and acknowledges that such decisions “... are, in many cases, better made at the State, Tribal or regional level.” ACWA would like to understand why this acknowledgment did not apply in some of these cases.

3. Further, several ACWA member states are concerned that EPA is relying on its 2013 *Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions* (“2013 FAQ Document”) to assert that states must protect sustenance fishing based on unsuppressed fish consumption rates (“FCR”). The 2000 Methodology (which went through the formal rulemaking process) made no mention of unsuppressed FCRs. In contrast, the 2013 FAQ Document did not go through a formal rulemaking process. Therefore, these states believe that they did not have an opportunity to provide feedback on the 2013 FAQ Document before it was posted to the EPA website. States are concerned that EPA is treating the 2013 FAQ Document as a rule and we would like to better understand the agency’s approach.

¹ See 40 CFR § 130.10 and 40 CFR § 130.20(b).

ACWA requests a meeting with you and your staff to discuss the concerns listed above as well as EPA's general policy direction with respect to the development of ambient water quality criteria for the protection of human health at the state level, specifically regarding fish consumption.

I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter LaFlamme". The signature is fluid and cursive, with a large initial "P" and "L".

Peter LaFlamme
ACWA President
Director, Watershed Management Division
Vermont Department of Environmental Conservation

Cc:

Ellen Gilisnky
Senior Policy Advisor

Elizabeth (Betsy) Southerland
Director