

Federal Water Quality Coalition

SUMMARY AND LEGAL ANALYSIS OF EPA AND STATE AUTHORITY IN SETTING FISH CONSUMPTION RATES

I. Recent EPA Actions Related to State Fish Consumption Rates

In June of 2010, the United State Environmental Protection Agency (“EPA”) rejected certain proposed water quality standard revisions developed by the Oregon Department of Environmental Quality (“ODEQ”).¹ In calculating human health criteria for 103 toxic pollutants, ODEQ employed a fish consumption rate of 17.5 g/day, the rate offered in EPA guidance as the “default” rate to be used when states have not gathered state-specific consumption data.² EPA disapproved of ODEQ’s standards based on the use of this fish consumption rate. EPA “frame[d] the work needed address th[e] disapproval” by discussing the Oregon Environmental Quality Commission’s³ Fish Consumption Rate Review Project (“FCRRP”), which concluded that water quality standards in Oregon should be based upon a revised fish consumption rate of 175 g/day.⁴ According to EPA, the FCRRP involved a “huge amount of work” on the part of ODEQ, including substantial cooperation with EPA and Native American tribes, and “resulted in a better understanding of fish consumption patterns in Oregon as well as the concerns of many of Oregon’s stakeholders.”⁵ In sum, EPA disapproved of ODEQ’s water quality standards because the state regulator itself had reassessed local fish consumption rates and had determined that the default assumption was not reflective of in-state consumption patterns.

¹ Letter from Michael A. Bussell, Director, Office of Water and Watersheds, EPA Region 10 to Neil Mullane, Administrator, Water Quality Division, ODEQ June 1, 2010, *available at* http://www.epa.gov/region10/pdf/water/oregon-hhwqc-tds-letter_june2010.pdf (“June 2010 Letter”).

² 65 Fed. Reg. 66455, c. 2 (“We have published default fish consumption rates in the Methodology as recommendations to States and Tribes in adopting water quality standards when a State or Tribe lacks information on local fish consumption rates.”).

³ The Oregon Environmental Quality Commission “is a five-member panel of Oregonians appointed by the governor for four-year terms to serve as [O]DEQ’s policy and rulemaking board.” *See* Oregon Department of Environmental Quality, “About the Environmental Quality Commission” *available at* <http://www.deq.state.or.us/about/eqc/eqc.htm>.

⁴ June 2010 Letter, at 4.

⁵ *Id.*

ODEQ performed a further round of revisions, and, in July 2011, submitted new revised water quality standards to EPA.⁶ The 2011 ODEQ standards were based upon the 175 g/day fish consumption rate derived from the FCRRP.⁷ On October 17, 2011, EPA approved those standards.⁸ In approving ODEQ's revised standards, EPA announced that the FCRRP process would "serve as a solid example to other states in the Northwest and throughout the country as they address similar issues."⁹ Indeed, EPA has already counseled the Washington Department of Ecology ("WDE") "to use a fish intake level derived from local or regional data,"¹⁰ and specifically endorsed cooperation with ODEQ and reliance upon the FCRRP.¹¹

In Idaho, EPA has also disapproved revised human health criteria issued by the State.¹² The Idaho Department of Environmental Quality ("IDEQ") had issued the criteria on November 16, 2005, adopting EPA's nationally recommended fish consumption rate of 17.5 g/day.¹³ EPA rejected the criteria, stating that it "cannot ensure that the criteria derived based on a fish consumption rate of 17.5 g/day are based on a sound scientific rationale . . . and protect Idaho's designated uses."¹⁴ In support of the decision, EPA stated that it had identified several sources of information on local and regional fish consumption, which Idaho did not consider before using the national default fish consumption rate, and which "suggests that fish consumption among some Idaho population groups is greater than 17.5 g/day."¹⁵

As state regulators throughout the country engage in the periodic reevaluation of water quality standards required by the Clean Water Act ("CWA"), it is important to recall that it is the states' primary responsibility to perform the scientific and cost-benefit analyses necessary to develop water quality standards. EPA serves a limited role in reviewing and either approving or disapproving a state's standards as "consistent with the applicable requirements of the" CWA. EPA's recent interactions with ODEQ, WDE and IDEQ should not be misconstrued as an across-the-board mandate that states increase dramatically the fish consumption rates they employ in standard-setting. Rather, as EPA

⁶ Letter from Dennis J. McLerran, Regional Administrator, EPA Region 10 to Dick Pedersen, Director, ODEQ, Oct. 17, 2011, *available at* <http://www.epa.gov/region10/pdf/water/or-hhwqs-approval-ltr-2011.pdf> ("October 2011 Letter"), at 2.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.* at 6.

¹⁰ Letter from Jannine Jennings, Manager WQS Unit, EPA Region 10 to Kelly Susewind, WDE Water Quality Program Manager and Jim Pendowski, WDE Toxics Cleanup Program Manager, January 17, 2012 *available at* <http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/120120-fish-comments/EPA.pdf>, at 2.

¹¹ *Id.* at 3.

¹² Letter from, Michael A. Bussell, Director Office of Water and Watersheds, EPA Region 10 to Mr. Barry Burnell Water Quality Programs Administrator Idaho Department of Environmental Quality, May 10, 2012 *available at* <http://www.deq.idaho.gov/media/854335-epa-disapproval-letter-human-health-criteria-051012.pdf>.

¹³ *Id.* at 1.

¹⁴ *Id.* at 3.

¹⁵ *Id.*



itself has repeatedly emphasized, each state should have primary responsibility for selecting a fish consumption rate based on its own particular demographic and environmental characteristics.¹⁶

In Oregon and Washington, EPA has instructed the state to use fish consumption data that the state itself collected and analyzed. In Idaho, EPA stated that IDEQ had not evaluated fish consumption rate studies used in Oregon and Washington, the results of which could be applicable to Idaho.

EPA lacks authority to dictate the particular fish consumption rate or range used by a state in its standard-setting process. States must determine what rate to employ as a product of their own rulemaking processes. Those processes should recognize that a fish consumption rate is just one value in a complicated equation of very conservative values and parameters, which must be evaluated as a whole to determine if the resulting water quality criteria are protective of designated uses. To assist in states' consideration of revised fish consumption rates, what follows is a brief summary of the CWA structure governing the promulgation of water quality standards and an analysis of the limits on EPA authority to mandate that states employ a particular fish consumption rate in that process.

II. The Statutory and Regulatory Structure

State regulators – and not EPA – are primarily responsible for determining the appropriate fish consumption rate to use in devising water quality standards. The CWA allocates relevant authority between states and the federal government as such: State regulators adopt and periodically revise standards, and EPA then reviews those standards for consistency with “the applicable requirements of” the CWA.¹⁷ This statutory division of labor is codified in EPA’s implementing regulations¹⁸ and the primary role of state regulators in setting water quality standards has been affirmed by various courts.¹⁹

¹⁶ See, e.g., *id.* (“[D]eveloping a revised fish consumption rate should be based on current scientific information and local/regional data.”).

¹⁷ CWA § 303(a), 33 U.S.C. § 1313(a).

¹⁸ See 40 C.F.R. §§ 131.4(a) & (b).

¹⁹ *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) (“The EPA’s role in formulating these water quality standards is limited. When states enact water quality standards, they must also submit them to the EPA’s Regional Administrator”); *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) (“While the states and EPA share duties in achieving this goal, primary responsibility for establishing appropriate water quality standards is left to the states.” (citing *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984) & *District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980))); *Miss. Comm. on Natural Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980) (“Congress did place primary authority for establishing water quality standards with the states. . . . The varied topographies and climates in the country call for varied water quality solutions.”); *Natural Res. Def. Council, Inc. v. Fox*, 909 F. Supp. 153, 161 (S.D.N.Y. 1995) (reviewing EPA approval of state water quality standard under arbitrary and capricious standard)



EPA regulations assign to states the “responsibil[ity] for reviewing, establishing, and revising water quality standards.”²⁰ In general, “[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of” the CWA.²¹ The CWA requires state water quality standards to “be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”²²

EPA, correspondingly, describes its obligations as “to review . . . State-adopted water quality standards,” by determining, among other things: if “the State has” (1) “adopted water uses which are consistent with the” CWA; (2) “adopted criteria that protect the designated water uses;” and (3) “followed its legal procedures” for standard-setting.²³ To merit EPA approval, state water quality standards must include “criteria sufficient to protect the designated uses.”²⁴ The EPA’s own regulations provide no additional discretion for EPA to disapprove state standards that satisfy the conditions in 40 C.F.R. § 131: “If EPA determines that the State’s . . . water quality standards are consistent with the factors listed in . . . this section, EPA approves the standards.”²⁵ Only where the state has failed to issue water quality standards consistent with the specified factors may EPA disapprove those standards, and thereafter promulgate replacement federal standards if a state fails to address EPA’s grounds for disapproval.²⁶

Beyond the limited role Congress granted to EPA in the states’ standard-setting process, the CWA also casts EPA in an advisory role.²⁷ EPA serves to support and inform state standard-setting by publishing recommended criteria based on “the latest scientific knowledge” and technical guidance. Toward that end, on November 3, 2000, EPA issued “Revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health,” (the “Revised Methodology”) which superseded a 1980 guidance document.²⁸ The express purpose of the Revised Methodology was to provide

²⁰ 40 C.F.R. § 131.4.

²¹ CWA §303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

²² *Id.* EPA regulations consider standards to “serve the purposes of the Act” if the “water quality standards [], wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.” 40 C.F.R. § 131.2.

²³ 40 C.F.R. § 131.5(a). Section 131.5(a) also requires EPA to assess whether any “State standards which do not include the uses specified in section 101(a)(2) of the [CWA] are based upon appropriate technical and scientific data and analyses;” and whether the State standards comply with the content requirements in 40 C.F.R. §131.6. 40 C.F.R. § 131.5(a)(4)-(5).

²⁴ 40 C.F.R. § 131.6(c).

²⁵ 40 C.F.R. § 131(b). *See also* 40 C.F.R. § 131.21 (“The Regional Administrator’s approval or disapproval of a State water quality standard shall be based on the requirements of the [CWA] as described in §§ 131.5 and 131.6[.]”)

²⁶ CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5(b).

²⁷ CWA § 304(a)(2), 33 U.S.C. § 1314(a)(2).

²⁸ 65 Fed. Reg. 66444-82.



“guidance for States and authorized Tribes to help them establish water quality to protect human health.”²⁹

In the Revised Methodology, EPA acknowledges states’ “primary role” in developing water quality standards and encourages states to replace EPA default assumptions with “values more representative of local conditions” when data supports such values.³⁰ With specific regard to fish consumption rates, EPA recognizes “that fish consumption rates vary considerably” and such variation is one of the soundest bases for state authority to set water quality standards in light of local conditions.³¹ Throughout the Revised Methodology, EPA reiterates its preference that states employ their accumulated understanding of local fish consumption patterns to determine the appropriate fish consumption rate.³² Neither the Revised Methodology nor EPA regulations requires states to conduct their own study of fish consumption rates or defend their use of the EPA default rate,³³ in its formally expressed policy, EPA recommends the use of local data, it does not mandate it.

At each level of the federal water quality regulatory scheme – from statute, to regulation, to non-binding agency guidance – states are unequivocally vested with primary authority to determine fish consumption rates as a step in developing or revising their water quality standards. Faced with a proposed water quality standard that includes criteria protective of the relevant designated uses,³⁴ EPA has no authority to disapprove.

²⁹ 65 Fed. Reg. 66445, c. 2.

³⁰ 65 Fed. Reg. at 66449, c. 2.

³¹ 65 Fed. Reg. at 66452, c. 1.

³² *Id.* c.2. (“In cases where fish consumption among highly exposed population groups is of a magnitude that such a 10⁻⁴ risk level would be exceeded, a more protective risk level should be chosen. These determinations should be made by the State or authorized Tribe”); *id.* c. 3 (“We intend to support the health protection decisions made by States and authorized Tribes as long as they use the risk range that EPA has stated here and in the 2000 Human Health Methodology.”); 65 Fed. Reg. at 66454, c. 2 (“States and Tribes always have the option to undertake their own evaluations to develop water quality criteria, as long as such criteria are consistent with the CWA and the implementing Federal regulations.”); 65 Fed. Reg. 66468, c. 1 (“In all cases, States and authorized Tribes have the flexibility to use local or regional data that they believe to be more indicative of the population’s fish consumption—instead of EPA’s default rates—and we strongly encourage the use of these data.”); 65 Fed. Reg. 66468, c. 2 (“ . . . EPA strongly encourages the use of site or regional-specific studies instead of this default value, and the State’s/Tribe’s discretion in considering higher intake rates than an arithmetic mean.”).

³³ 65 Fed. Reg. at 66452, c. 2 (“[States] have flexibility in how they demonstrate” that the level of risk achieved by chosen water quality criteria “adequately protect[] . . . the most highly exposed subpopulation.”).

³⁴ Whether a given water quality standard is protective of certain designated uses is, of course, a separate question. EPA has announced its “inten[tion] to support the health protection decisions made by States . . . as long as they use” “either the 10-5 or 10-6 risk level if the State . . . has identified the most highly exposed subpopulation, has demonstrated that the chosen risk level is adequately protective of the most highly exposed subpopulation, and has completed all necessary public participation.” 65 Fed. Reg. 66452, c. 2-3. The Revised Methodology also expressly endorses the use of site-specific water quality criteria to geographically tailor standards in recognition of different consumption patterns of specific subpopulations in a state: “EPA recommends that States develop site-specific water quality criteria to reflect relevant fish consumption rates.” 65 Fed. Reg. 66455, c. 2. EPA has provided “guidance on site-specific modifications”



III. Constraints on EPA Authority to Dictate the Use of Particular Fish Consumption Rates

Under the CWA and its own regulations, EPA lacks the authority to disapprove a state's proposed revised water quality standard on the basis of the state's chosen fish consumption rate. EPA itself has formally acknowledged that it is appropriate for states to take the lead in assessing local fish consumption patterns and conducting the analyses that are involved in setting water quality standards.³⁵ As relevant here and discussed above, EPA's authority to disapprove state water quality plans is limited to those plans that include criteria insufficient to adequately protect designated uses.³⁶ In other words, EPA does not have the authority to disapprove proposed water quality standards based on the assumptions that produced the standard – such as the fish consumption rate – if the proposed criteria are protective of the relevant designated uses.

The primary legal limitation on EPA's authority to reject proposed state water quality standards is provided by the prospect of judicial review. When EPA disapproves of a proposed state water quality standard, the state has ninety (90) days to promulgate a revised standard.³⁷ If the state does not promulgate such a standard within the allotted time, authority shifts to EPA to promulgate the standard.³⁸ Once agency action disapproving the state standard and/or promulgating a federal standard is final, it becomes reviewable under the Administrative Procedure Act's "arbitrary and capricious" standard.³⁹

to the national criteria developed by EPA to assist states and authorized tribes in employing site-specific water quality criteria even where they rely upon EPA's national criteria and do not generate their own water quality standards generally. 65 Fed. Reg. 66454, c. 2.

³⁵ See *supra* n.26; 65 Fed. Reg. 66468, c. 3 ("EPA's national 304(a) criteria are health-based values only and are not intended to account for cost/benefit analyses. . . . [R]isk management decisions regarding balancing risk benefits should be made at the State or Tribal level.")

³⁶ 40 C.F.R. §§ 131.5(a)(2); 131.6(c). As noted above, all state water quality standards must conform to the CWA, and other considerations – beyond adequately protecting designated uses – are applicable to EPA review of state standard-setting actions. See 40 C.F.R. §§ 131.5 – 131.6. This analysis focuses on EPA authority to review a state's selection of a fish consumption rate used in establishing state water quality standards. It is therefore presumed herein that the state standards are otherwise in accordance with the CWA and satisfy the minimum requirements for water quality standard submissions set forth in those EPA regulatory provisions.

³⁷ CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5(b).

³⁸ *Id.*

³⁹ *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1126 (10th Cir. 2005) ("Here, the ultimate decision under review is the EPA's approval of [state statute], rather than an interpretation of the CWA. As such, we review the EPA's approval under the arbitrary and capricious standard. *Chevron* deference does not apply."); *Natural Res. Def. Council v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993) (applying arbitrary and capricious standard); *Miss. Comm. on Natural Res. v. Costle*, 625 F.2d 1269, 1274-75 (5th Cir. 1980) (applying arbitrary and capricious standard to state challenge of EPA disapproval of proposed water quality standards and imposition of EPA standards); *Miccosukee Tribe of Indians of Florida v. United States*, No. 04-21448-CIV, 2008 WL 2967654 (S.D. Fla. July 29, 2008) (finding arbitrary and capricious EPA determination that state statute was not revision to water quality standards)

A reviewing court would likely vacate an EPA disapproval of a proposed state water quality standard exclusively because of the fish consumption rate employed. Most fundamentally, EPA disapproval based exclusively on a state's fish consumption rate would contravene the statute and regulatory division of labor described above: The CWA initially tasks states – not EPA – with adopting criteria for pollutants, and EPA has acknowledged that states – not EPA – should decide how such criteria shall be determined.⁴⁰ The Tenth Circuit, in particular, has repeatedly reminded EPA that it cannot enlarge beyond the confines established by the CWA its influence over state water quality standard-setting.⁴¹ As the EPA itself has argued, “its duty under the CWA is not to determine whether the states used EPA’s recommended criterion[,] but instead to review state water quality standards and determine whether the state’s decision is *scientifically defensible and protective of designated uses*.”⁴²

Furthermore, EPA’s disapproval of a state’s proposed water quality standards based exclusively on the state’s selection of a fish consumption rate would likely not be accorded any additional measure of deference under the *Chevron* doctrine for two reasons. First, whereas an agency is granted deference where there is statutory ambiguity, here the CWA says nothing regarding fish consumption rates. Statutory silence does not prove ambiguity.⁴³ Second, even if the court were to find statutory ambiguity, EPA has not set forth a binding position interpreting the CWA or the relevant regulations to require the use of specific fish consumption rates or derive rates in any particular manner. As such, there has been no “agency interpretation claiming deference [that] was promulgated in the exercise of” authority delegated by the statute.⁴⁴

More specifically, EPA has not announced any interpretation or policy requiring that states use any particular fish consumption rate, range of rates or process for determining rates. Additionally, EPA has not announced a policy that it will treat the use of certain rates as presumptively producing protective human health criteria. As a matter of formal policy, the current EPA position on fish consumption rates is that announced by the Revised Methodology: States *should* select a fish consumption rate reflective of “local or regional data” “indicative of the[ir] population’s fish consumption;”⁴⁵ EPA uses the 17.5 g/day as a default rate when it must set standards and has declared that default rate

⁴⁰ CWA § 303(c)(2)(A)-(B), 33 U.S.C. § 1313(c)(2)(A)-(B).

⁴¹ *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) (“Indeed, Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states.” (internal quotations omitted)).

⁴² *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993).

⁴³ See *Prestol v. Atty. Gen. of the United States*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting government’s attempt to “manufacture[] an ambiguity from Congress’[s] failure to specifically foreclose each exception that could possibly be conjured or imagined”); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (“Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”).

⁴⁴ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

⁴⁵ 65 Fed. Reg. 66468, c. 1.



appropriate for use by states “if they *choose* to use it in lieu of their own study data.”⁴⁶ Were EPA to disapprove of state water quality standards based on a requirement absent from the statute or regulations – *i.e.*, a requirement that a particular fish consumption rates, range of rates or approach to rate-setting be used – such disapproval would amount to an impermissible end-run around notice-and-comment rulemaking requirements and would likely be rejected by a reviewing court.⁴⁷

EPA does, of course, have authority to determine whether a state water quality standard is protective of designated uses and otherwise consistent with the CWA and applicable standard-setting procedures.⁴⁸ However, the EPA has consistently argued to courts that it is justified under the statute in relying upon state determinations of scientific and technical questions, so long as those state determinations are scientifically defensible.⁴⁹ A court likely would view with skepticism EPA’s reversal of its long-held position regarding deference to states’ scientific assessments in setting water quality standards.

IV. Conclusion

Notwithstanding certain EPA positions in regard to some proposed state water quality standards, states continue to have broad latitude to in setting water quality criteria. EPA review of proposed state water quality standards is limited to assessing whether criteria used protect designated water uses and EPA has no authority to dictate how states arrive at sufficiently protective criteria. EPA has long advised states to employ fish consumption rates derived from data specifically reflective of populations within their jurisdiction if state regulators choose to collect such data, and EPA’s positions with regard to proposed regulations for Oregon and Washington do not depart from that policy. States must make the complex and multifaceted determinations necessary to establish water quality standards; the CWA and its implementing regulations permit states the flexibility to do so in a holistic, rational and local manner.

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⁴⁶ 65 Fed. Reg. 66468, c. 2 (emphasis added).

⁴⁷ *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (“[EPA may not] escape the notice and comment requirements ... by labeling a major substantive legal addition to a rule a mere interpretation.”).

⁴⁸ *See, e.g., American Wildlands v. Browner*, 260 F.3d 1192, 1197 (10th Cir. 2001) (“It is clear that Congress delegated authority to the EPA to make determinations as to when water quality standards are consistent with the Act.” (internal citation omitted)).

⁴⁹ *See, e.g., Natural Res. Def. Council v. EPA*, 16 F.3d 1395, 1401-1402 (4th Cir. 1993) (rejecting contention that “EPA should not accord an overextended deference to the states’ decisions with regard to its water quality standards” and adopting EPA position that its role was to approve those state standards that are “scientifically defensible and protective of designated uses”)

