



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

**MAY 23 2017**

OFFICE OF WATER

Mr. David Ludder  
9150 McDougal Court  
Tallahassee, Florida 32312-4208

Re: Final Response to Petition for Rulemaking on Water Quality Criteria for Toxics in the State of Florida

Dear Mr. Ludder:

We have reviewed and considered the Petition dated June 18, 2009, submitted to Administrator Jackson on behalf of the Florida Clean Water Network (FLCWN). Specifically, the Petition requests that the U.S. Environmental Protection Agency (EPA or Agency) conduct rulemaking to propose and promulgate new or revised human health water quality criteria for toxic pollutants, based on an appropriate fish consumption rate, for the state of Florida to protect public health. The EPA has decided that the use of federal rulemaking authority is not the most effective or practical means of addressing these concerns at this time. The EPA is denying the Petition for the reasons explained below. This letter constitutes the EPA's response to FLCWN's Petition.

The Clean Water Act (CWA) and the EPA's implementing regulations at 40 CFR Part 131 require states and authorized tribes to designate the use(s) for waters within their jurisdiction and to adopt water quality criteria to support and protect those uses. The EPA has provided to states and authorized tribes guidance, technical assistance, and publications of recommended criteria, including human health criteria, for a number of pollutants. In June 2015, the EPA published updated human health criteria for 94 chemical pollutants to reflect the latest scientific information and the EPA's policies, including updated fish consumption rate, body weight, drinking water intake, health toxicity values, bioaccumulation factors, and relative source contribution.<sup>1</sup>

As FLCWN's Petition points out, the Florida Department of Environmental Protection (FDEP) has been actively working on adopting new human health criteria based on a number of factors, including an updated fish consumption rate. The EPA has worked closely with the FDEP, providing both technical and programmatic guidance for the development of the criteria. Since the time of FLCWN's Petition, the FDEP has held a number of workshops and two hearings before the Florida Environmental Regulation Commission (ERC). At a hearing on July 26, 2016, the ERC approved revised water quality standards, including revised human health criteria, as

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<sup>1</sup> <https://www.epa.gov/wqc/human-health-criteria-and-methods-toxics>

submitted by the FDEP. Since that hearing, there have been a number of legal challenges at the state level brought against Florida's adoption of revised human health criteria. The EPA expects that after those legal challenges are resolved, the FDEP will submit the revised water quality standards for review and approval or disapproval by the EPA, consistent with 40 CFR Part 131 and CWA section 303(c).

The EPA agrees that human health criteria are an important component of the overall water quality standards program. The EPA has used its discretionary authority under CWA section 303(c)(4)(B) to promulgate federal human health criteria and retains its discretion to use it, as appropriate. Nonetheless, the EPA's long-standing policy, consistent with the CWA, has been that states should develop and adopt standards in the first instance. Where a state has engaged in a water quality standards rulemaking process in earnest and the EPA anticipates the state will submit new or revised standards in the near future, the EPA's general policy is to allow the statutory process envisioned under CWA sections 101(b) and 303(c)(3) to be completed. This approach enables the EPA and states to work in partnership to efficiently and effectively allocate resources to address pollution and accelerate state adoption of new and revised criteria, including human health criteria. Here, Florida has adopted such criteria that subsequently should be submitted to the EPA for review and approval or disapproval pursuant to CWA section 303(c). The EPA expects that the state's record for its human health criteria rulemaking will provide its technical basis for the criteria it adopted as well as its explanation for why it did not adopt criteria for other pollutants for which the EPA has 304(a) recommended human health criteria. The Agency believes that the use of its discretionary rulemaking authority at this time, especially in light of the significant progress made by the state of Florida, is not a practical or efficient way to accomplish the goal of revising Florida's human health criteria and federal promulgation is therefore unwarranted.

For the above reasons, and after careful consideration of the issues you raised and actions you requested, the EPA is hereby denying the Petition. In taking this action, the EPA is not making a determination under section 303(c)(4)(B) that new human health criteria are not necessary to meet CWA requirements in Florida. Rather, in this instance, the EPA is exercising its discretion to allocate its resources in a manner that supports regional and state activities to accomplish our mutual goals of protecting human health and the environment. The EPA will periodically assess progress and is not foreclosing the possibility that there may be circumstances where, despite the best efforts of all, Agency action may be appropriate, and the EPA could exercise its CWA section 303(c)(4)(B) authority.

Sincerely,

A handwritten signature in cursive script that reads "Michael Shapiro".

Michael H. Shapiro  
Acting Assistant Administrator

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

FLORIDA CLEAN WATER  
NETWORK, INC.,

Plaintiff,

v.

CASE NO. 3:16-CV-709-MCR/CJK

SCOTT PRUITT, in his official capacity  
as ADMINISTRATOR OF THE UNITED  
STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

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**DEFENDANT’S UNOPPOSED MOTION TO DISMISS**

COMES NOW, Defendant Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency (“EPA”), and moves the Court—without opposition by Plaintiff Florida Clean Water Network, Inc.—to dismiss all claims asserted in Plaintiff’s complaint as moot.

The Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), provides: “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” Further, the APA states: “[W]ithin a reasonable time, each agency shall proceed to conclude a matter presented to it.” *Id.* § 555(b).

In 2009, Plaintiff submitted to a predecessor of Defendant a Clean Water Act



rulemaking petition. As described by Plaintiff, the petition seeks to have Defendant establish new or revised water quality criteria as are determined by Defendant to be necessary and sufficient to protect the designated uses of the state of Florida's waters and human health. When Plaintiff filed its complaint in this case, Defendant had not taken action on, i.e., granted or denied, Plaintiff's petition. Invoking the judicial review provisions of the APA, which provide that "[t]he reviewing court shall ... compel agency action ... unreasonably delayed," 5 U.S.C. § 706, Plaintiff claims in its complaint that Defendant has unreasonably delayed action on Plaintiff's petition, and Plaintiff seeks an Order compelling Defendant to take action.

Although Defendant denied Plaintiff's allegations of unreasonable delay when answering the complaint, Defendant's recent action removes any need for the Court to address Plaintiff's request for relief. On May 23, 2017, Defendant's delegate, Acting Assistant Administrator Michael H. Shapiro, acted on (denied) Plaintiff's rulemaking petition.

Thus, there is no longer any live case or controversy between the parties regarding whether Defendant has unreasonably delayed acting on Plaintiff's rulemaking petition. Defendant has now acted. Any questions presented and relief requested are moot.

WHEREFORE, Defendant respectfully requests, without opposition by Plaintiff, that this Court dismiss all claims in Plaintiff's complaint as moot.

**CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 7.1(C), undersigned counsel for Defendant, Andrew J. Doyle, certifies that on May 25, 2017, he conferred with counsel for Plaintiff, David Ludder, and is authorized to represent that the relief requested by this motion will not be opposed.

Respectfully submitted this 25th day  
of May, 2017,

CHRISTOPHER P. CANOVA  
United States Attorney  
PETER FISHER  
Assistant United States Attorney

JEFFREY H. WOOD  
Acting Assistant Attorney General  
/s/ *Andrew J. Doyle*  
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*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 25, 2017, the foregoing Defendant's Unopposed Motion to Dismiss was filed electronically with the Clerk of the Court using the CM/ECF filing system, which will cause it to be served upon all counsel of record.

*/s/ Andrew J. Doyle*