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Delivered via Electronic Mail

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Re: Alabama Water Quality Criteria for Toxic Pollutants to Protect Human Health

Dear Administrator Regan and Regional Administrator Blackman:

On January 19, 2022, the Environmental Defense Alliance, Waterkeepers Alabama, and the Alabama Rivers Alliance submitted to EPA a petition for determination that new or revised water quality criteria for toxic pollutants in Alabama waters are necessary to protect human health and to meet the requirements of the Clean Water Act.

The Water Quality Act of 1987[1] significantly amended the Clean Water Act with respect to the regulation of toxic pollutants. Congress had become dissatisfied with the piecemeal, slow progress being made by States in setting water quality standards for toxics. Congress reacted by legislating new requirements and deadlines directing the States to establish criteria for toxic pollutants, especially for those priority toxic pollutants that could reasonably be expected to interfere with the designated uses of waters.[2] In § 308(d) of the Water Quality Act of 1987,[3] Congress amended the Clean Water Act and mandated:

> Whenever a State *reviews water quality standards* pursuant to paragraph (1) of this subsection,[4] or *revises or adopts new standards* pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses.

(Italics added). Thus, Congress expressly required that States adopt new or revised toxic pollutant criteria necessary to protect the designated uses of waters whenever the State conducts a triennial review of water quality standards <u>and</u> whenever the State adopts new or revised water quality standards.

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[1] Pub. L. No. 100-4, § 308(d), 101 Stat. 39 (1987).

[2] *Water Quality Standards: Establishment of Numeric Criteria for Priority Toxic Pollutants; States' compliance – Final Rule*, 57 Fed. Reg. 60856 (Dec. 22, 1992).

[3] Codified at 33 U.S.C. § 1313(c)(2)(B).

[4] These reviews of water quality standards are required every three years and are known as "triennial reviews." 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20(a).

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In 1988, the EPA published guidance for the States to implement the new statutory mandate.[5] The guidance allowed States three options to comply with the new mandate:

(1) Adopt Statewide numeric criteria in State water quality standards for all section 307(a) toxic pollutants for which EPA has developed criteria guidance, regardless of whether the pollutants are known to be present;

(2) Adopt specific numeric criteria in State water quality standards for section 307(a) toxic pollutants as necessary to support designated uses where such pollutants are discharged or are present in the affected waters and could reasonably be expected to interfere with designated uses;

(3) Adopt a procedure to be applied to a narrative water quality standard provision that prohibits toxicity in receiving waters. Such a procedure would be used by the State in calculating derived numeric criteria, which criteria shall be used for all purposes under section 303(c) of the CWA. At a minimum, such criteria need to be developed for Section 307(a) toxic pollutants, as necessary to support designated uses, where these pollutants are discharged or present in the affected waters and could reasonably be expected to interfere with designated uses.

In a letter dated September 26, 1990, EPA notified Alabama of EPA's intention to propose federal water quality criteria for toxic pollutants applicable to waters in Alabama because of Alabama's failure to comply with Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B). On February 20, 1991, Alabama adopted water quality criteria for 108

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[5] Memorandum from Rebecca W. Hanmer, Acting Assistant Administrator for Water, to Water Management Division Directors, EPA Regions I-X, and Directors, State Water Pollution Control Agencies, Transmittal of Final "Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B)" (Dec. 12, 1988).

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toxic pollutants to protect human health in accordance with option 1 of the EPA guidance. *Amendments to the Water Quality Standards Regulation to Establish the Numeric Criteria for Priority Toxic Pollutants Necessary to Bring All States into Compliance with Section 303(c)(2)(B) – Proposed Rule*, 56 Fed. Reg. 58420, 58460 (Nov. 19, 1991). On November 19, 1991, EPA published notice that Alabama had complied with the Clean Water Act requirements to adopt criteria for toxic pollutants. *Id.*, at 58428. *Accord, Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance – Final Rule*, 57 Fed. Reg. 60848, 60856 (Dec. 22, 1992).[6] Alabama has amended its toxic pollutant criteria several times between February 20, 1991 and November 25, 2008, including a July 20, 1994 amendment that reflected an increase in the fish consumption rate from 6.5 grams per day to 30 grams per day.[7]

As discussed above, whenever a State conducts a triennial review of water quality standards <u>and</u> whenever a State adopts new or revised water quality standards, the State is required to adopt new or revised water quality criteria for toxic pollutants necessary to protect the designated uses of waters. This requires that states undertake a review of all available information and data to determine whether the discharge or the presence of a toxic pollutant is interfering or is likely to interfere with the attainment of the designated

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[6] This rule is commonly identified as the "National Toxics Rule."

[7] The rationale for the 30 grams per day fish consumption rate has been criticized as being arbitrarily low. *See* Letter from David A. Ludder, Attorney, Legal Environmental Assistance Foundation, Inc., to John H. Hankinson, Jr., Regional Administrator, U.S. EPA Region 4 (Nov. 1, 1994) (comments regarding "EPA Review of Alabama Water Quality Criteria / Fish Consumption Rate"); Letter from David A. Ludder, Attorney, Environmental Defense Alliance, to ADEM Hearing Officer (July 16, 2015), at 2-5 (comments regarding "2015 Triennial Review of Water Quality Standards"); Petition, *In re Petition for Rulemaking to Amend ADEM Administrative Code Rule 335-6-10-.07 Water Quality Criteria for Toxic Pollutants* (EMC Rulemaking Petition 17-02, filed Oct. 18, 2016), at 8-13; Petition, *In re Petition for Determination that the Promulgation of New or Revised Water Quality Standards are Necessary in the State of Alabama to Meet the Requirements of the Clean Water Act and to Prepare and Publish Proposed Regulations Setting Forth New or Revised Water Quality Standards for the State of Alabama*, (U.S. EPA, filed Feb. 3, 2017), at 12-24.

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uses of any water body.[8] A State's failure to complete the timely review and adoption of appropriate standards required by 33 U.S.C. § 1313(c)(2)(B), constitutes a failure "to meet the requirements of the Act" and is a sufficient basis for the Administrator to make a determination under 33 U.S.C. § 1313(c)(4)(B) that new or revised water quality criteria are necessary to ensure that designated uses are adequately protected. *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance – Final Rule*, 57 Fed. Reg. 60848, 60857 (Dec. 22, 1992); *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California – Final rule*, 65 Fed. Reg. 31682, 31687 (May 18, 2000).

Since November 25, 2008, Alabama has conducted five triennial reviews of water quality standards[9] and has adopted new or revised water quality standards on at least

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[8] Such reviews are required. *See Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B)*, *supra* note 5, at 3 ("If a State is unsure whether a toxic pollutant is interfering with, or is likely to interfere with the designated use and therefore is unsure that control of the pollutant is necessary to support the designated use, the State should undertake to develop sufficient information upon which to make such a determination.").

[9] The triennial review hearing dates were June 29, 2009; July 19, 2012; July 16, 2015; July 26, 2018; and August 19, 2021. Written public comments submitted during the 2015 triennial review urged the Alabama Department of Environmental Management to adopt new and revised water quality criteria for toxic pollutants. *E.g.*, Letter from David A. Ludder, Attorney, Environmental Defense Alliance, to ADEM Hearing Officer (July 16, 2015). The Department responded on May 23, 2016 that it "will review EPA's Final Updated Ambient Water Quality Criteria for the Protection of Human Health and propose changes as appropriate." Letter from Chris L. Johnson, Chief, Water Quality Branch, ADEM, to David A. Ludder (May 23, 2016), at 10. Written public comments submitted during the 2018 triennial review also urged the Department to adopt new and revised water quality criteria for toxic pollutants. *E.g.*, Letter from David A. Ludder, Attorney, Environmental Defense Alliance, et al., to ADEM Hearing Officer (July 23, 2018). The Department responded on September 9, 2019 that it "will continue to review and evaluate all data and information . . . pertaining to the development of national recommended human health and aquatic life criteria during its 2018-2020 triennial review period." Letter from Chris L. Johnson, Chief, Water Quality Branch, ADEM, to David A. Ludder (Sepember. 9, 2019), at 4. Again, written public comments submitted during the 2021 triennial review urged the Alabama Department of Environmental Management to adopt new and revised water quality criteria for toxic pollutants. *E.g.*, Letter from David

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seven occasions.[10] During these triennial reviews and adoptions of new or revised water quality standards, Alabama failed to adopt new or revised water quality criteria for toxic pollutants as required by Clean Water Act § 303(c)(2)(B) despite the development of new and improved information and science on human exposures to toxic pollutants (*e.g.*, fish

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A. Ludder, Attorney, Environmental Defense Alliance, to Environmental Management Commission and ADEM Hearing Officer (August 18, 2021).

On October 18, 2016, two of the petitioners and others petitioned the Environmental Management Commission of the Alabama Department of Environmental Management to adopt new or revised water quality criteria for toxic pollutants. Petition, *In re Petition for Rulemaking to Amend ADEM Administrative Code Rule 335-6-10-.07 Water Quality Criteria for Toxic Pollutants*, EMC Rulemaking Petition 17-02 (filed Oct. 18, 2016). The Department advised the Commission that ADEM will consider the issues raised in the Petition in the context of the triennial review." *Memorandum from Lance R. LeFleur, Director of ADEM, to H. Lanier Brown, II, Chairman, EMC Rulemaking Committee* (Nov. 30, 2016), at 4. "[T]he Department has until 2019 to adopt new or revised criteria for which EPA has published new or updated recommendations, or provide an explanation when it submits the results of its triennial review to the Regional Administrator if nothing is adopted." *Id.*, at 3. The Commission denied the petition because "the issues raised in the Petition will be considered in the context of ADEM's triennial review of the State's water quality standards; . . .." Order, *In re Petition for Rulemaking to Amend ADEM Administrative Code Rule 335-6-10-.07 Water Quality Criteria for Toxic Pollutants* (EMC Rulemaking Petition 17-02, Dec. 16, 2016).

[10] The history notes to Alabama's adopted water quality standards reflect the following adoptions and revisions: January 19, 2010 (335-6-11-.02 Use Classifications); January 18, 2011 (335-6-10-.11 Water Quality Criteria Applicable to Specific Lakes); 335-6-10-.12 Implementation of the Antigradation Policy; 335-6-11-.02 Use Classifications); May 23, 2011 (335-6-10-.09 Specific Water Quality Criteria & 335-6-11-.02 Use Classifications); November 27, 2012 (335-6-11-.02 Use Classifications); April 1, 2014 (335-6-10-.07 Toxic Pollutant Criteria Applicable to State Waters; 335-6-10-.08 Waste Treatment Requirements; 335-6-10-.11 Water Quality Criteria Applicable to Specific Lakes; 335-6-11-.01 The Use Classification System; & 335-6-11-.02 Use Classifications); February 3, 2017 (335-6-10-.02 Definitions; 335-6-10-.05 General Conditions Applicable to All State Waters; 335-6-10-.08 Waste Treatment Requirements; 335-6-10-.11 Water Quality Criteria Applicable to Specific Lakes; 335-6-10-.12 Implementation of the Antidegradation Policy; 335-6-11-.01 The Use Classification System; & 335-6-11-.02 Use Classifications); August 20, 2019 (335-6-11-.02 Use Classifications).

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and water consumption rates, human body weights), toxicity of toxic pollutants (reference doses and cancer potencies), and other relevant factors (bioaccumulation of toxics in aquatic organisms and non-water source contributions of toxic pollutants to human exposures). *See, e.g.*, *Revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000)*, 65 Fed. Reg. 66444 (Nov. 3, 2000); *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (EPA-822-B-00-004, Oct. 2000); *Final Updated Ambient Water Quality Criteria for the Protection of Human Health*, 80 Fed. Reg. 36986 (June 29, 2015); *Human Health Ambient Water Quality Criteria: 2015 Update* (EPA 820-F-15-001, June 2015).

The tables attached to the January 19, 2022 petition demonstrate that Alabama's criteria for toxic pollutants no longer reflect the best information and science and are insufficient to protect human health and the designated uses of Alabama waters. The information in this letter confirms that Alabama has conducted many triennial reviews of water quality standards and has adopted many new or revised water quality standards without adopting new or revised water quality criteria for toxic pollutants as required by the Clean Water Act.

New or revised water quality criteria for toxic pollutants are necessary to meet the requirements of the Clean Water Act. Alabama has failed to comply with the requirements of 33 U.S.C. § 1313(c)(2)(B). We again urge you to make a determination that new or revised water quality criteria for toxic pollutants are necessary to protect human health and the designated uses of Alabama waters.[11]

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[11] On February 3, 2017, the Environmental Defense Alliance and others filed a petition seeking a determination by the Administrator of EPA that new or revised water quality criteria for toxic pollutants in Alabama waters are necessary to protect human health and to meet the requirements of the Clean Water Act. Letter from David A. Ludder, Attorney for Petitioners, to Catherine McCabe, Acting Administrator of EPA, with accompanying Petition (February 3, 2017). On April 10, 2018, EPA denied the Petition stating as follows:

> [T]he EPA's long-standing policy, consistent with the CWA, has been that states have the primary responsibility for developing and adopting WQS for their jurisdictions while the EPA provides guidance and oversight. Here, where a state is in the process of reviewing and revising its WQS and the

The Alabama Department of Environmental Management has yet to initiate rulemaking to adopt new or revised water quality criteria for toxic pollutants. The criteria adopted by Alabama on and before November 25, 2008 are not sufficient to protect human health or the designated uses of Alabama waters.

Sincerely,

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> EPA anticipates the state will submit new or revised standards in the near future, the EPA prefers the "states-first" statutory process envisioned under CWA sections 101(b) and 303(c)(3) over the EPA exercising its backstop role under section 303(c)(4)(B). This approach enables the EPA and states to work in partnership to effectively utilize resources to address pollution and assist in the state's adoption of new and revised criteria.
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> For the above reasons, and after careful consideration of the issues you raised and actions you requested, the EPA is hereby denying the Petition. The EPA concludes that the use of federal rulemaking authority is not the most effective or practical means of addressing your concerns at this time. Accordingly, the EPA is exercising its discretion to allocate its resources in a manner that supports state activities to accomplish our mutual goals of protecting human health and aquatic life. The EPA intends to assess the progress made by the ADEM and is not foreclosing the possibility that there may be circumstances where, despite the best efforts of all, Agency action may be appropriate. In the future, if that is determined to be the case, the EPA could exercise its CWA section 303(c)(4)(B) authority.

Letter from David P. Ross, Assistant Administrator, EPA, to David A. Ludder (April 10, 2018) at 2-3 (footnotes omitted).

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