UNITED ST. ES ENVIRONMENTAL PROTECT N AGENCY
WASHINGTON, D.C. 20460

SEP 1 2 2007

OFFICE OF
WATER

MEMORANDUM

SUBJECT: EPA's Response to Petition Requesting Revision and Promulgation of Revised Mercury and Methylmercury Water Quality Criteria for West Virginia—**TRANSMITTAL MEMORANDUM**

FROM: Ephraim S. King, Director
Office of Science and Technology

TO: Benjamin H. Grumbles
Assistant Administrator

We request your signature on EPA's response to a petition asserting that EPA is legally bound to determine that new or revised mercury and methylmercury water quality standards are necessary to meet the requirements of the Clean Water Act (CWA). **EPA has entered into a partial settlement agreement in OVEC v. EPA committing the Agency to sign this response by *September 21, 2007* and we request your signature by that date.** The petition asks EPA to review and revise the West Virginia mercury water quality criteria for the protection of human health and aquatic life under its discretionary CWA section 303(c)(4)(B) authority.

In its response, EPA is declining the petitioners' request for the Agency to promulgate new mercury standards for the state due to resource considerations and the petitioners' failure to demonstrate that West Virginia's mercury and methylmercury standards are inconsistent with the CWA.

Background

EPA received a petition dated March 10, 2005, from Appalachian Center for the Economy & the Environment on behalf of Ohio Valley Environmental Coalition and West Virginia Highlands Conservancy (OVEC). On March 13, 2007, OVEC and the West Virginia Highlands Conservancy filed a lawsuit against EPA (1) charging that EPA failed to respond to the petition and (2) alleging that EPA failed to act within statutory timeframes on West Virginia's "resubmission" of its methylmercury water quality criteria. EPA entered into a settlement agreement with plaintiffs agreeing to respond to

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the petition by September 21, 2007. The settlement agreement did not address the plaintiffs' second claim.

The petition requests that EPA determine that a "revised or new water quality standard is necessary to meet the requirements" of the Clean Water Act (CWA) under CWA section 303(c)(4)(B), and to promulgate (1) a revised methylmercury fish tissue water quality criterion for the protection of human health in West Virginia and (2) revised mercury criteria for the protection of aquatic life in West Virginia.

EPA approved mercury water quality standards for West Virginia in 1995, including a methylmercury fish tissue criterion of 0.5 μg/g. In 2001, EPA published a recommended fish tissue criterion of 0.3 μg/g. The Plaintiff's have asserted that West Virginia's methylmercury fish criterion is "significantly less stringent" than EPA's 304(a) recommended criteria and stated that the Administrator "must prepare and publish a revised methylmercury fish tissue criterion" for West Virginia.

EPA's recommended 304(a) criteria are not legally binding and instead, serve as guidance for states to use in deriving criteria to protect states' adopted designated uses. After careful consideration of petitioners' request and supporting information, EPA has concluded that the petitioners have not demonstrated that West Virginia's water quality criteria are inconsistent with the CWA or that EPA's promulgation of new or revised criteria for West Virginia is the only way to achieve consistency with the CWA.

In addition, after reviewing several competing mercury priorities in the water quality standards program, EPA does not believe it would be a wise investment of limited Agency resources to place a priority on further evaluation of West Virginia's mercury and methylmercury water quality criteria. Accordingly, EPA is not exercising its discretion under CWA section 303(c)(4)(B) to make a determination that a revised or new water quality standard is necessary for West Virginia and is denying the petition.

Anticipated Reaction

The result of this response will likely generate little press. The petitioners' reaction will likely be negative. They may submit a second, more detailed and compelling petition or a lawsuit since they are likely to view EPA's response as a denial of their request to revise West Virginia's mercury standards. West Virginia Department of Environmental Protection's reaction is likely to be neutral considering the state is re-examining certain aspects of their methylmercury criteria. This response will provide time for the state to continue working on this initiative since no mandatory duties will be triggered either on the part of the state or EPA to revise West Virginia's mercury criteria.

Conclusion

My staff has worked closely with Region 3 staff and managers and the Office of General Counsel to draft the response to the petition detailing the reasoning for not revising West Virginia's mercury and methylmercury criteria as requested by the

petitioner. I recommend that you sign the attached letter transmitting to the petitioner EPA's response to the petition. If you have any questions or concerns, please contact me or Denise Keehner, Director of the Standards and Health Protection Division at 202-566-1566.

Attachment