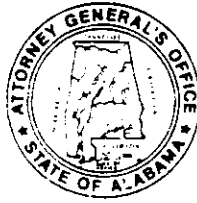


OFFICE OF THE ATTORNEY GENERAL



JIMMY EVANS
ATTORNEY GENERAL
STATE OF ALABAMA

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 242-7300

August 20, 1991

Admiral E. R. Zumwalt, Jr.
1500 Wilson Boulevard
Arlington, Virginia 22209

Dear Admiral Zumwalt:

The Attorney General has asked me to send you the enclosed draft letter and petition for rule-making, both of which were prepared by our office for filing with the U.S. Environmental Protection Agency (EPA). These draft documents address several issues, including the failure of EPA to consider data on racial groups and Vietnam Veterans in developing water pollution criteria and standards under the Clean Water Act.

Our office would welcome any comments or constructive criticism for improving these draft documents. We intend to further revise the petition before filing to consider any comments we receive.

I will be in Washington next week, and if your schedule permits, I would be delighted to meet with you or your staff and answer any questions you may have about the issues raised in our draft petition. If you need additional information, please contact me by calling (205)242-7401.

On behalf of our office, I thank you for your continued interest in improving the quality of our nations' waters and reducing the cancer risks posed by environmental pollution.

Sincerely,

A handwritten signature in cursive script that reads "Scott Schwarz".

SCOTT J. SCHWARZ
EXECUTIVE ASSISTANT
to the ATTORNEY GENERAL

SJS/sdc
0016E
Enclosure

OFFICE OF THE ATTORNEY GENERAL

DRAFT NUMBER

1



JIMMY EVANS
ATTORNEY GENERAL
STATE OF ALABAMA

Certified Mail
Return Receipt Requested

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 242-7300

August 19, 1991

Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

RE: 60-Day Notice of Intent to Sue Over Failure to
Publish, Revise and Fully Develop Federal Water
Quality Criteria

Dear Mr. Reilly:

Pursuant to Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and 40 CFR Part 135, the State of Alabama by and through its Attorney General, hereby notifies you its intent to file suit, pursuant to Section 505(a)(2) of the Clean Water Act, as a result of your failure to perform certain nondiscretionary duties as required by section 304(a)(1) of the Act. The actions taken and not taken which constitute a failure to perform your nondiscretionary duty are discussed below.

Section 304(a)(1) of the CWA requires the Administrator to develop and publish within one year after October 18, 1972, (and from time to time thereafter revise) criteria for water quality "accurately reflecting the latest scientific knowledge...on the kind and extent of all identifiable effects on health and welfare...which may be expected from the presence of pollutants in any body of water." 33 U.S.C. § 1314(a)(1).

In developing and publishing water quality criteria for various toxic pollutants, EPA has failed to perform its nondiscretionary duty to consider the latest available scientific information on the groups most vulnerable to toxic pollution due to above-average exposure conditions. Based on EPA's own reports, these groups include, but may not be limited to, Asian-Americans, African Americans, Sport Anglers and Subsistence Fishers. The federal water quality for dioxin also fails to address prior exposure to dioxin amongst Vietnam Veterans.

Honorable William K. Reilly
August 19, 1991
Page 2

In developing the water quality criteria for carcinogenic pollutants, EPA has also violated its nondiscretionary duty by basing its numerical health-based recommendations on nonhealth related factors such as attainability and feasibility. Section 304(a) of the Clean Water Act precludes EPA from considering such factors in developing water quality criteria.

EPA has also failed to revise its water quality criteria to consider the latest scientific knowledge on the human health effects associated with ingestion of known or probable carcinogens in drinking water. As a result, the criteria are inconsistent with the Agency's regulations, recommendations and statements under the Safe Drinking Water Act. Specifically, in regulations under the Safe Drinking Water Act, EPA has determined that zero is the recommended maximum contaminant level goal (MCLG) for known or probable carcinogens (Category I carcinogens) in drinking water. EPA has failed to revise its federal water quality criteria to reflect that determination and to otherwise be consistent with regulations issued by EPA under the Safe Drinking Water Act.

For these reasons, you have violated your nondiscretionary duty under Section 304(a)(1) of the Clean Water Act to develop and publish, and thereafter to revise, criteria for water accurately reflecting the latest scientific knowledge on the kind and extent of all identifiable effects on human health and welfare which may be expected from the presence of pollutants water. As Attorney General, I also reserve the right to challenge EPA's federal criteria under other federal and state laws.

In order to facilitate a resolution of this matter, a petition for rule-making describing our concerns in greater detail and offering suggested criteria and regulatory changes is enclosed. Our office will be happy to meet with you or your staff to discuss our concerns should you determine that such a meeting is appropriate.

Sincerely,

JAMES H. EVANS
ATTORNEY GENERAL

JHE/SJS/sdc
0016E
Attachment
xc: Attorney General Richard L. Thornburgh

latest scientific information on the groups in the population most vulnerable to toxic pollutants. Specifically, we request EPA to consider available data on Asian Americans, African Americans, subsistence fishers, recreational anglers and Vietnam Veterans.

The Petition also requests EPA to revise the criteria for carcinogenic pollutants so that these criteria are based solely on the risk to human health, and exclude all considerations of cost and feasibility.

Finally, the Petition requests EPA to issue regulations prohibiting polluters from discharging known or probable carcinogenic chemicals into public drinking water supplies once EPA determines that there is strong evidence associating cancer with the ingestion of such chemicals.

II. Interest of the Petitioner

The Attorney General is authorized to institute and prosecute, in the name of the state, all civil actions and other proceedings necessary to protect the rights and interest of the State of Alabama, pursuant to Section 36-15-12, Code of Alabama 1975 and in exercise of the State's parens patriae authority. It has long been established that a state, in its sovereign capacity, may institute proceedings on behalf of its citizens to protect their rights. The exercise of the state's parens patriae authority is especially appropriate where the public interest involves the protection of human health and the environment. See Alabama ex rel. Baxley v. Corps of Engineers of the United States Army, 411 F.Supp. 1261 (N.D. Ala. 1976) (Alabama Attorney General has standing to bring an injunctive

action based on the state's interest in protecting fish and wildlife populations from destruction); and Sierra Club v. Abston Constr. Co., 620 F.2d 41, 43 (5th Cir. 1980) (Alabama Attorney General was permitted to intervene in support of plaintiff's environmental action under the Clean Water Act).

III. Overview of the Clean Water Act

A. Objective and Goals of the Act

The Clean Water Act provides the statutory framework for the water quality criteria and regulations at issue in this petition. The objective of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the Act establishes a national goal that the discharge of pollutants into navigable waters be eliminated by 1985, and an interim national goal that wherever attainable water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water be achieved by 1983. 33 U.S.C. § 1251(a)(1) and (2). The Act also establishes a national policy that the discharge of toxic pollutants in toxic amounts be prohibited. See, 33 U.S.C. § 1251(a)(3).

B. Section 303 State Water Quality Standards

State water quality standards, developed under Section 303 of the Clean Water Act, provide one of the principle mechanisms for controlling and eliminating water pollution under the Clean Water Act. The Act requires that water pollution permits contain effluent limits necessary to meet all state water quality standards. 33 U.S.C. § 1311(b)(1)(c).

In developing state water quality standards, the state must first designate the use for which the water body is to be protected (e.g. public water supply, recreation, shellfish harvesting, fish and wildlife, agriculture, etc.). In addition, state standards must contain criteria, which are maximum concentrations of pollutants or narrative statements necessary to preserve or achieve the designated uses. See 33 U.S.C. § 1313(c)(2)(A) and 40 C.F.R., §§ 1313, 131.6 and 131.11.

The 1987 Amendments to the Clean Water Act added a new provision directing states to adopt numeric water quality criteria for each toxic pollutant as necessary to support the designated use. 33 U.S.C. § 1313(c)(2)(B). The new provision required that each:

...State shall adopt criteria for all toxic pollutants ... the discharge or presence of which in the affected water could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants.

33 U.S.C. § 1313(c)(2)(B).

C. Section 304(a) of Federal Water Quality Criteria

Under Section 304(a)(1) of the Clean Water Act, the Administrator of EPA is required to develop and publish (and from time to time thereafter revise) "criteria for water quality accurately reflecting the latest scientific knowledge ... on the kind and extent of all identifiable effects on health and welfare ... which may be expected from the presence of pollutants in any body of water" 33 U.S.C. 1314(a)(1). The Act also requires that "such criteria and

information and revision thereof shall be issued to the state and shall be published in the Federal Register and otherwise made available to the public." 33 U.S.C. 1314(a)(3).

Federal water quality criteria consist of two essential types of information: (1) a discussion of available scientific data on the effects of pollutants on public health and welfare, aquatic life and recreation, and (2) quantitative concentrations or qualitative assessments of the pollutants in water which will generally ensure water quality adequate to support specific water use. 45 Fed. Reg. 79318 (Nov. 28, 1980).

Under a consent decree in NRDC v. Train, federal water quality criteria for toxic pollutants must state "recommended maximum permissible concentrations (including where appropriate zero) consistent with the protection of aquatic organisms, human health and recreational activities." See NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976).

Federal water quality criteria are not rules and have no regulatory impact. They are intended to assist states in developing enforceable state standards.

D. EPA Approval of State Standards

Whenever states review or adopt new water quality criteria, EPA is required to determine whether such standards are consistent with the applicable requirements of the Clean Water Act. 33 U.S.C. 1313(c)(3). If the state criteria are not consistent with the Act, the Administrator must, within ninety days of the state submission, notify the state, and specify the changes needed to meet such requirements. If such

changes are not made within ninety days, the Administrator is required to promulgate such criteria for the state.

EPA's regulations encourage states to rely on Section 304 federal water quality criteria in developing state criteria. These regulations provide that states are to develop numerical criteria based on:

- (i) 304 (a) Guidance; or
- (ii) 304 (a) Guidance Modified to reflect site-specific conditions, or
- (iii) other scientifically defensible methods.

40 C.F.R. § 131.11(b)(1)

IV. Risk Assessments May Discriminate Based on Race and Economic Status.

EPA's federal criteria for toxic pollutants are derived based on elaborate studies called risk assessments, which are designed to estimate the number of additional cancers in humans caused by exposure to pollutants under average exposure conditions.

EPA's risk assessments assume that an average person consumes 6.5 grams per day of fresh water fish. That fish consumption estimate is based on the nationwide average consumption rate for commercially and recreationally harvested freshwater and esturine finfish and shellfish, as determined through analysis of a 1973-1974 seafood consumption survey.

At the time EPA developed its federal water quality criteria for toxic pollutants, it failed to consider available information indicating that certain groups are subjected to higher exposure conditions because they consume significantly

more fish than the national average. For example, EPA failed to consider data indicating a higher fish consumption rate amongst Blacks and Asian Americans. A 1980 report prepared to assist EPA in developing federal criteria listed the mean and 95th percentile fish consumption rates for various racial groups as follows:

<u>Race</u>	<u>Mean</u>	<u>Fish Consumption (grams/person/day)</u>
		<u>Upper 95th Percentile</u>
Caucasian	14.2	41.2
Black	16.0	45.2
Asian-American	21.0	67.3
Other	13.2	29.4

According to another recent EPA report, "consumption of fish by Asian-American people is significantly higher than that of other groups." Exposure Factors Handbook, July, 1989 at 2-33.

EPA has also recently acknowledged that subsistence and recreational fishers represent other groups that are particularly vulnerable to exposure by consumption of contaminated fish from one location.¹ EPA has determined, however, that states need only consider representative state-specific data on fish consumption. Under this reasoning, neither EPA nor the states must develop water quality standards designed to protect the most vulnerable segment of the population. See letter from Greer Tidwell, EPA to Leigh Pegues, ADEM, July 18, 1991, Enclosure 1, page 5.

¹See Exposure Factors Handbook, July 1989, 2-28; Technical Support Document for EPA's September 17, 1990, Approval/Disapproval of Maryland's Water Quality Standards Revision, p. 18-19; and Technical Support Document for EPA's Virginia's Approval of Water Quality Standards Revisions, p. 16-17.

By contrast, in developing air quality standards for lead during the 1970's, EPA recognized that protection of the most sensitive group within the population had to be a major consideration. As a result, EPA developed ambient air quality standards for lead designed to protect 99.5 percent of the most sensitive population, consisting of preschool children.

The comparison between EPA's conduct in developing health-based criteria and standards under the Clean Air Act and health-based water quality criteria under the Clean Water Act is particularly relevant because of the similar language controlling EPA's duties under these two statutes.²

The State of Alabama and the public have an interest in assuring that it is provided with the latest scientific information regarding the health effects of toxic pollutants on all subgroups of the overall population. This information is essential to assure that the states environmental programs protect the individuals and groups most vulnerable to pollution.

States in particular have an obligation not to violate the Federal Civil Rights Act, which provides:

"All persons within the jurisdiction of the United States shall have the same right in every state ... to the full and equal benefit

²The Clean Air Act states that air quality criteria "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effect is and public-health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408 (a)(2). That language is almost identical to the similar provision in the Clean Water Act requiring EPA to set "criteria for water accurately reflecting the latest scientific knowledge ... on the kind and extent of all identifiable effects on health and welfare ... which may be expected from the presence of pollutants in any body of water." 33 U.S.C. § 1314(a)(1).

of all laws and proceedings for the security of person and property as is enjoyed by white citizens

42 U.S.C. § 1981. In addition, the Act provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participating in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal assistance.

42 U.S.C. § 2000(d).

Based on the information discussed above, Alabama requests EPA to develop and publish criteria containing health-based recommendations designed to protect the most vulnerable groups at risk from exposure to toxic pollutants and provide guidance which would not place States afoul of federal civil rights statutes.

V. EPA's Federal Water Quality Criteria for Dioxin Also Fails to Consider Prior Exposure Amongst Vietnam Veterans

In developing the federal criteria for dioxin, EPA has failed to consider Vietnam Veterans who were exposed to the dioxin-contaminated defoliant known as Agent Orange. Over 18 million gallons of Agent Orange and other herbicides were sprayed between 1965 and 1971 in Vietnam causing the exposure of thousands of American soldiers. Exposure to dioxin is of particular concern for American airmen who were involved in the aerial spraying of Agent Orange in what came to be known as "Operation Ranch Hand."

According to a report by Admiral E. R. Zumwalt, Jr., American ground forces in Vietnam were also exposed to dioxin from unofficial and unreported missions by combat units and

other Non-Ranch Hand Operations. As a result many Americans who served in the Vietnam War may have absorbed into their bodies much greater amounts of dioxin than the general population.³

There are approximately 124,200 veterans living in Alabama who served in the military during the Vietnam Era. Veterans involved in Operating Ranch Hand also reside in Alabama.

Many of these veterans may well have been exposed to dioxin at a level far above that of the average person. EPA has failed to consider such above-averages by Vietnam veterans in developing the federal water quality criteria for dioxin. Alabama, through its Attorney General, requests EPA to develop water quality criteria for dioxin which consider prior exposure amongst Vietnam Veterans and the related toxic or cancer-causing health effects.

VI. EPA Has Violated the Clean Water Act by Considering Factors Other Than Health in Developing Federal Water Quality Criteria for Carcinogenic Pollutants.

The obligation of each state to adopt criteria for all toxic pollutants has placed increased significance on EPA's statements regarding pollutants classified by EPA as carcinogens. EPA's federal water quality criteria identify

³See Admiral E. R. Zumwalt, Jr., "Report to the Secretary of the Department of Veterans Affairs on the Association Between Adverse Health Effects and Exposure to Agent Orange," May 5, 1990; and Kahn, "Dioxin and Dibenzofurans in Blood and Adipose Tissue of Agent Orange Exposed Vietnam Veterans and Matched Control" 259 Journal of the American Medical Association 1661 (1988).

carcinogenic pollutants as follows:

Acenaphthylene
Acrylonitrile
Aldrin
Arsenic
Benzene
Benzidine
Benzo (o) anthracene
Benzo (o) pyrene
3,4 Benzofluoranthene
Benzo (ghi) perylene
Benzo (k) fluoranthene
Beryllium
Bis (2 - chloroethyl) ether
Bis (2 - ethylhexyl) phthalate
Bromoform
Carbon tetrachloride
Chlordane
Chlorodibromomethane
2 Chloroethylvinyl ether
Chloroform
Chrysene
4,4-DDT
Dibenzo (a,h) anthracene
3,3 - Dichlorobenzidine
Dichlorobromomethane
1,2 - Dichloroethane
1,1 - Dichloroethylene
1,3 - Dichloropropene (cis)
1,3 - Dichloropropene (trans)
Dieldrin
2,4 Dinitrotoluene
Dioxin (2,3,7,8 -TCDD)
1,2 Diphenylhydrazine
Fluorene
Heptachlor
Hexachlorobenzene
Hexachlorobutadiene
Hexachlorocyclohexane (alpha, beta, and gamma)
Hexachloroethane
Ideno (1,2,3-cd) pyrene
Methyl bromide
Methyl chloride
Methylene chloride
N - Nitrosodimethylamine
N - Nitrosodi - n- propylamine
N - Nitrosodiphenylamine
PCBs
Phenanthrene
Pyrene
1,1,2,2 - Tetrachloroethane
Tetrachloroethylene
Toxaphene
1,1,2 - Trichloroethane

Trichloroethylene
2,4,6 - Trichlorophenol
Vinyl Chloride

EPA has some discretion in exercising judgments involving the health effects of carcinogenic chemicals. However, EPA may not make determinations based on improper considerations.

The limitations on EPA's discretion were discussed in a recent decision by Judge Bork, involving regulations of carcinogenic chemicals under of the Clean Air Act. Writing for the United States Court of Appeals of the District of Columbia, Judge Bork emphasized that EPA cannot "under any circumstances" consider technological feasibility in determining what is safe or what is an "acceptable" risk to human health:

... the Administrator's decision must be based upon an expert judgment with regard to the level of emission that will result in "acceptable" risk to health In this regard, the Administrator must determine what inferences should be drawn from the available scientific data and decide what risks are acceptable in the world in which we live ... This determination must be based solely upon the risk to health. The Administrator cannot under any circumstances consider cost and technological feasibility at this stage of the analysis. The latter factors have no relevance to the preliminary determination of what is safe. Of course, if the Administrator cannot find that there is an acceptable risk at any level, then the Administrator must set the level at zero.
(emphasis added)

See Natural Resources Defense Council v. U.S. E.P.A., 824 F.2d 1145 at 1164-1165 (D.C. Cir. 1987).

In announcing the federal water quality criteria, EPA acknowledged that such criteria must be based on the protection of human health. According to EPA, these criteria

by definition exclude considerations of cost or technological feasibility. See 45 Fed. Reg. at 79320 and 79369 (Nov. 28, 1980).

However, our review of EPA's criteria for carcinogenic pollutants shows that the Agency did, in fact, develop two sets of recommended criteria, one based solely on the risk to human health and another based on attainability or feasibility. The Agency's health-based recommendation for carcinogenic pollutants is zero. This is clearly set forth in a federal register notice dated November 28, 1980, which states:

Because methods do not now exist to establish the presence of a threshold for carcinogenic effects, EPA's policy is that there is no scientific basis for estimating "safe" levels for carcinogens. The criteria for carcinogens, therefore, state that the recommended concentration for maximum protection of human health is zero ... The risk estimate range is presented for information purposes and does not represent an Agency judgment on an "acceptable" risk level. (emphasis added).

45 Fed. Reg. 79318, 79323 (Nov. 28, 1980).

The federal criteria also note, however, that zero

levels may not be attainable or feasible in some cases..
(emphasis added) Therefore, the criteria documents use risk assessments to recommend feasibility-based criteria. These second set of criteria correspond to 10^{-5} , 10^{-6} and 10^{-7} cancer risk levels. A risk level of 10^{-5} indicates a probability of one additional cancer in every 100,000 people exposed; a 10^{-6} risk level indicates a probability of one additional cancer in every one million people exposed; and a 10^{-7} risk level indicates a probability of one additional cancer in every ten million people exposed. See 45 Fed. Reg. 79318 - 79379 (Nov. 28, 1980); and Ambient Water Quality Criteria Documents.

By considering feasibility and attainability in developing water quality criteria, EPA has violated its non-discretionary duty under the Clean Water Act to consider only health-related factors in developing Section 304 water quality criteria. Alabama, through its Attorney General, requests that EPA develop and publish criteria for all carcinogenic pollutants based solely on the protection of human health and excluding any considerations of cost or feasibility.

VII. EPA has Misrepresented the Purpose of Risk Assessments.

A. EPA's Statements Under the Clean Water Act

Through a series of unpublished memoranda, letters and documents, EPA has attempted to recharacterize and misrepresent the basic purpose the cancer risk estimates published in the federal water quality criteria. EPA's recent

letters and memoranda claim that cancer risk estimates represent "acceptable" cancer risk levels, or are "adequate" or "sufficient" to protect human health. Such claims are misleading since EPA's own statements demonstrate that cancer risk estimates do not represent an Agency judgment on "acceptable" risk, but rather were developed based on feasibility and cost.

Examples of such misleading statements are contained in the following documents:

1. An internal EPA memorandum dated January 5, 1990, from LaJuana S. Welcher to Water Management Division Directors.⁴

2. Technical Support Document for EPA's September 12, 1990, approval/disapproval of Maryland's Water Quality Standards Revisions.⁵

3. Technical Support Document for EPA's February 25,

⁴This memorandum represents that the cancer risk levels in the federal criteria for dioxin were intended for human health protection and states that these levels would not require further explanation for the record by a state that chooses one of them as its regulatory approach.

⁵In this document EPA states: "Maryland's use of a 10^{-5} risk level for carcinogens is consistent with a number of state and federal regulatory actions, and provides a level of protection against cancer that is within the range EPA considers adequately protective of human health." (emphasis added)

1991, regarding approval of Virginia's Water Quality Standards Revisions, p. 19.⁶

4. Letter from Greer Tidwell, EPA to Leigh Pegues, ADEM, Enclosure I and Enclosure III.⁷

VIII. Water Quality Criteria are Inconsistent with the Safe Drinking Water Act

The fact that cancer risk estimates in the federal water quality criteria are based on improper considerations of feasibility and attainability rather than solely on human health is further confirmed by EPA's recent publication of new health-based and feasibility-based standards under the Safe Drinking Water Act for public drinking water systems.

The Safe Drinking Water Act regulates the presence of toxic pollutants in finished drinking water, i.e., drinking water at the end of the tap. Pursuant to the Act, EPA has established "maximum contaminant levels" ("MCLs"), which are

⁶In this document EPA states: "The equation used to derive the water quality criterion for 2, 3, 7, 8-TCDD based on cancer effects requires the choice of an acceptable risk level. As noted above, EPA set forth a range of criteria values corresponding to risk levels of 10^{-5} to 10^{-7} in its 1984 criteria document. The Virginia criterion is based on a 10^{-5} risk level. This risk level is frequently used in state and federal regulatory actions, and is considered by EPA to be within an adequately protective range." (emphasis added)

⁷In this document EPA states: "Use of the equations to derive human-health based water quality criteria for TCDD requires selection of an acceptable risk level. EPA ambient water quality criteria documents establish concentrations for the protection of human health which yield cancer risk levels in a range of 10^{-5} to 10^{-7} . Alabama's criteria for TCDD were derived with a 10^{-5} risk level. Selection of this level of additional cancer risk is also consistent with EPA Region IV's Position on Water Quality Standards for Toxic Pollutants dated June 26, 1989, and is therefore considered to be within a sufficiently protective range." (emphasis added)

enforceable standards specifying the maximum allowable levels of contaminants in water which is delivered to users of public water systems. Maximum contaminant levels are established based on a range of factors including not just the health effects of the contaminants, but also the technological and economic feasibility of removing the contaminant from the water supply. See 40 C.F.R. § 141.11 - 141.16 and 45 Fed. Reg at 79320 (Nov. 28, 1980).

In addition, EPA also has established "recommended maximum contaminant level goals" ("MCLG") for numerous drinking water pollutants regulated under the Safe Drinking Water Act. These maximum contaminant levels goals are non-enforceable goals derived solely on health considerations. See 40 C.F.R. § 141.11 - 141.16.40.

Under the Safe Drinking Water Act, EPA has categorized various drinking water contaminants based on evidence of carcinogenicity via ingestions. Category I contaminants (hereinafter referred to as "known or probable carcinogens") consist of those chemical which EPA has determined that there is strong evidence of carcinogenicity from drinking water ingestion. Category II contaminants are those chemicals which EPA has determined there is limited evidence of carcinogenicity from drinking water ingestion. Category III contaminants are those chemicals which there is inadequate evidence of carcinogenicity from ingestion. See 56 Fed Reg. 3526, 3533 (January 30, 1991).

For each Category I contaminant, EPA recommends zero as the "maximum contaminant level goal" in drinking water which

protects human health. In issuing these health-based "maximum contaminant level goals," EPA has re-emphasized its view that there are "no safe threshold" levels for Category I contaminants. See 56 Fed Reg. at 3534. See § 56 Fed. Reg. 3526-3597 (January 30, 1991); and 40 C.F.R. § 141.50.

The recommended maximum contaminant level goals are of particular significance because EPA has previously stated that federal water quality criteria developed under the Clean Water Act are analogous to the health-based maximum contaminant level goals issued under the Safe Drinking Water Act. See 45 Fed Reg. 79320 (Nov. 28, 1980). Moreover, the inconsistency of EPA's current policy under the Clean Water Act and the Safe Drinking Act allows polluters to discharge carcinogenic chemicals into rivers and lakes designated for use as public water supplies, and then requires public water companies to pay for the removal of these chemicals prior to delivering the water to the kitchen faucet. In essence, the cost of pollution control is transferred from the polluter to the public.

IX. EPA Has Violated the Public Notice-and-Comment Requirements of the Administrative Procedures Act.

When stripped of all regulatory jargon, EPA's internal memoranda and statements recharacterizing cancer risk estimates in the federal water criteria as "acceptable" risks reflect fundamental moral determination on the value of human health and the right to life.

Under the Administrative Procedures Act, EPA must make such determinations according to rule-making procedures.

The Administrative Procedures Act defines a "rule" as:

The whole or a part of an agency statement of general or particular applicability, and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency.

5 U.S.C. § 551(4). Courts have previously held that Agency statements describing conduct that the agency intends to follow in the future are statement of "future effect designed to ... prescribe law or policy ... or procedure," and thus are rules. See Waste Management, Inc. v U.S. E.P.D., 669 F. Supp. 576, 538 (D.D.C. 1987); and Thomas v. New York, 802 F.2d 1443, 1446 (D.D. Cir. 1986).

The Administrative Procedures Act generally requires an Agency to provide public notice and an opportunity for comment whenever a substantive rule is promulgated, revised or repealed. Exceptions from the general notice-and-comment requirements apply to interpretive rules, general statements of policy and rules of agency organization, procedures or practice. 5 U.S.C. § 553(b)(A).

Interpretative rules simply restate the consistent practice of the agency, and do not create any new rights or duties. See General Motors v. Rucklshaus, 742 F.2d. 1561, 1565 (D.C. Cir. 1987) (quoting Citizens to Save Spencer County v. E.P.A., 600 F.2d 844, 877 153 (D.C. Cir. 1979). EPA's statements that cancer risk estimates are "acceptable" for protecting human health do not restate a consistent agency view on the meaning of cancer risks estimates and, therefore,

are not interpretive rules. To the contrary, EPA's recent statements directly contradict its prior statements that cancer risk estimates were presented for informational purposes only and did not reflect an Agency judgment on "acceptable" risk levels.

Moreover, the internal EPA memoranda are not mere statements of policy, or rules of agency procedure and practice. These EPA memoranda were intended to foreclose further public debate on fundamental right-to-life issues associated with the use of cancer risk levels to protect human health, as shown by EPA's statement that the use of EPA's cancer risk levels in the federal criteria would not require further explanation by any state that chooses to use them.

EPA has violated the notice and comment requirements of the Administrative Procedure Act by recharacterizing the purpose of cancer risk estimates as health-based recommendations without following proper rule-making procedures.

X. Relationship Between EPA's Actions and State Reckless Endangerment Laws

Reckless endangerment is a misdemeanor crime in Alabama. A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person. See Code of Alabama 1975, §13A-8-24. To obtain a conviction for reckless endangerment, it is not necessary to prove that the conduct which creates the substantial risk actually results in injury or places any particular person in danger. Rather, reckless

endangerment deals with potential risk and cases where persons are placed within areas of danger. Use of EPA's cancer risk estimates will sanction hundreds of additional cancer deaths. According to an internal EPA memorandum dated December 6, 1990, almost every state has adopted, has proposed or is expected to adopt state water quality standards based on the principle that there is some "acceptable" level of additional cancer deaths. The risk level of each state as reported in the EPA memorandum, and the corresponding number of cancer deaths that may be expected for each toxic pollutant if EPA's cancer risk estimates are accurate are shown below:

<u>State</u>	<u>Risk Level</u>	<u>Total Population</u> (1990 Census) (Millions)	<u>Additional Cancers</u>
Alabama	10 ⁻⁵	4.0	40
Alaska	10 ⁻⁶	.6	1
Arizona	10 ⁻⁶	3.7	4
Arkansas	10 ⁻⁶	2.4	2
California	10 ⁻⁶	29.8	30
Colorado	10 ⁻⁶	3.3	3
Connecticut	10 ⁻⁶	3.3	3
Delaware	10 ⁻⁶	0.6	1
Florida	10 ⁻⁶	12.9	13
Georgia	10 ⁻⁵	6.5	65
Hawaii	10 ⁻⁶	1.1	1
Idaho	10 ⁻⁶	1.0	1
Illinois	10 ⁻⁶	11.4	11
Indiana	10 ⁻⁵	5.5	55
Iowa	10 ⁻⁵	2.8	28
Kansas	10 ⁻⁶	2.5	2
Kentucky	10 ⁻⁶	3.7	4
Louisiana	10 ⁻⁶	4.2	4
Maine	10 ⁻⁶	1.2	1
Maryland	10 ⁻⁵	4.8	48
Massachusetts	10 ⁻⁶	6.0	6
Michigan	10 ⁻⁵	9.3	93
Minnesota	10 ⁻⁵	4.4	44
Mississippi	10 ⁻⁵	2.6	26
Missouri	10 ⁻⁶	5.1	5
Montana	10 ⁻⁶	0.8	1
Nebraska	10 ⁻⁵	1.6	16
Nevada	Not available	1.2	--

<u>State</u>	<u>Risk Level</u>	<u>Total Population (1990 Census) (Millions)</u>	<u>Additional Cancers</u>
New Hampshire	10 ⁻⁵	1.1	11
New Jersey	Not available	7.7	--
New Mexico	Not available	1.5	--
New York	Not available	18.0	--
North Carolina	10 ⁻⁶	6.6	7
North Dakota	10 ⁻⁶	0.6	1
Ohio	10 ⁻⁵	10.8	108
Oklahoma	Not Available	3.1	--
Oregon	10 ⁻⁶	2.8	--
Pennsylvania	10 ⁻⁶	11.9	12
Rhode Island	10 ⁻⁶	1.0	1
South Carolina	10 ⁻⁵	3.5	35
South Dakota	10 ⁻⁶	0.7	1
Tennessee	Not Available	4.9	--
Texas	10 ⁻⁵	17.0	170
Utah	10 ⁻⁶	1.7	2
Vermont	10 ⁻⁶	0.6	1
Virginia	10 ⁻⁵	6.2	62
Washington	Not Available	4.9	--
West Virginia	Not Available	1.8	2
Wisconsin	10 ⁻⁵	4.9	49
<u>Wyoming</u>	10 ⁻⁶	0.43	<u>0</u>
TOTAL			973

Alabama, through its Attorney General, objects to EPA's use of cancer risk estimates to establish water quality because such action appears to sanction the type of cancer-related deaths and injuries which Alabama's criminal laws are intended to prevent.

XI. Suggested Criteria and Regulatory Amendments

A. Criteria

In order to address the issues raised in this petition, we request that EPA revise, issue and publish the federal water quality criteria which take into consideration the latest scientific information on higher exposure conditions to toxic pollutants amongst Asian Americans, African Americans,

subsistence fishers, recreational anglers and Vietnam Veterans.

In addition, we request EPA to revise its criteria for carcinogenic pollutants so that these criteria are based solely on the risk to human health and exclude all considerations of cost and feasibility.

B. Regulations

The following additional regulatory language is also offered in the hopes of stimulating discussion and addressing the problems discussed above regarding the use of cancer risk estimates as criteria for public water supplies.

A. Amendments to 40 C.F.R. § 131.11

40 C.F.R. § 131.11 is amended by adding paragraphs (c) and (d) at the end thereof to read as follows:

- (c) For pollutants classified by EPA as Category I carcinogens, states must select a numerical water quality criteria of zero for the protection of human health in all waters designated for use as public water supplies.
- (d) The following toxic pollutants have been identified by EPA as Category I carcinogens.

- (1) Benzene
- (2) Carbon Tetrachloride
- (3) Chlordane
- (4) 1,2 Dichloroethane
- (5) Heptachlor
- (6) Polychlorinated Biphenyls
- (7) Tetrachloroethylene
- (8) Trichloroethylene
- (9) Vinyl Chloride

XII. Conclusion

The suggested revisions to federal water quality criteria and regulations proposed in this petition are intended

to address the concerns identified by this office in reviewing EPA's policy and regulations on water quality criteria and standards.

We respectfully request that EPA establish a docket for this rule-making, and that EPA publish this petition in the Federal Register for public comment, either as an advance notice of proposed rule-making or as proposed regulatory amendments. After evaluating all public comments, we urge EPA to make a final decision granting this rule-making petition by promulgating the requested regulatory amendments.

Respectfully submitted,

JAMES H. EVANS
Attorney General
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7401