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August 14, 2018

Delivered via email and Postal Service

Honorable Susan Bodine
Assistant Administrator
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Room 2201A
Washington, DC 20460

Dear Assistant Administrator:

We write to express concern about recent actions that indicate that EPA is reducing its oversight of state implementation and enforcement of the Safe Drinking Water Act and other federally authorized programs that protect public health and the environment. More specifically, the Office of Enforcement and Compliance Assurance (OECA) and Office of Water (OW) recently rejected the Inspector General's recommendation that EPA promptly establish controls to verify that states are monitoring compliance with federal drinking water standards, to avoid a repeat of the public health disaster in Flint, Michigan. Also, earlier this year, OECA issued an interim guidance document requiring that you personally approve any EPA enforcement action in cases where a state's senior leadership has objected to federal involvement, while allowing EPA regional offices to drop such actions without your review and approval. We believe these actions will lead to less EPA oversight and weaker enforcement of federal laws, and encourage you to seek comment from the citizens these laws are designed to protect before finalizing the interim guidance.

Response to Inspector General's Report

On July 19, 2018, The EPA Office of Inspector General (OIG) issued its final report on the Flint Water Crisis (Report No. 18-P-0221), which concluded that EPA's repeated unwillingness to override improper decisions by the state of Michigan and the city managers appointed by the state contributed to the of the widespread contamination of Flint's public water supply. As a result, thousands of residents were needlessly exposed to dangerous concentrations of lead and the percentage of children with elevated blood levels of this neurotoxin more than doubled.¹ The OIG's first recommendation is that EPA, "Establish controls to annually verify that the states are monitoring compliance with all Lead and Copper Rule requirements, including accurately identifying tier 1 sampling sites and maintaining continuous corrosion control."² The Office of

¹ "Elevated Blood Lead Levels in Children Associated With the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response," Hannah-Atisha, M, MD, MPH, et al., American Journal of Public Health (February 2016), available online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4985856/>

² Office of Inspector General, Report No. 18-P-0221, page 15.

Enforcement and Compliance Assurance and Office of Water have responded to this recommendation by indicating only that they will “work with the states to develop an approach or a pilot for implementing a national monitoring and oversight program for the Drinking Water Program, as appropriate...”³

The Inspector General’s Office has appropriately rejected your plan to develop “an approach” or “a pilot,” by June of next year, since these vague assurances do not reflect a commitment to the kind of annual oversight needed to ensure that health-based standards are met. We do not question the importance of working collaboratively with state agencies authorized to administer federal environmental standards. But “cooperative federalism” and “partnership” should not be used to evade EPA’s statutory responsibility to hold states accountable and take action when public health is at risk, as it so clearly was in Flint. In light of the problems that have occurred in Flint and elsewhere under the lead and copper rule, establishing annual oversight of State actions under this rule is needed. Your failure to act promptly to fully embrace the Inspector General’s straightforward recommendation for such oversight of compliance with the health based drinking water standards is discouraging after the Flint disaster. We urge you to reconsider your decision.

Interim Guidance

We also are concerned about the effect of the interim guidance you issued dated January 22, 2018,⁴ regarding EPA deferring to authorized state environmental programs regarding inspections and enforcement. We understand that you are planning to soon issue similar final guidance regarding this area.

We believe that the approach of the interim guidance generally would move EPA in the wrong direction, and indicates that the EPA has not truly learned the lessons from the Flint situation. In particular, item 4 of the guidance establishes a requirement for EPA regional offices to elevate matters to your Office for decision whenever a Region and State do not reach agreement about the appropriate response to an environmental law violation (or about whether there is a violation). However, no mention is made of the need for a Region to elevate a matter if it chooses to defer to a State’s approach, even when the evidence shows that it is failing to protect public health or the environment.

Of course, it was this second situation – EPA’s initial deference to bad state decisions – that contributed to the continuation of the lead exposures in Flint. Your interim guidance could have the effect of discouraging regions from vigorously addressing future situations like Flint, since your memorandum requires elevating matters only when a Region disagrees with a State’s action and not when a Region is deferring to State action, even when this creates a public health risk.

Any final guidance issued by your office should include requiring Regions to elevate any proposal to pull back any planned enforcement action because of state objections, especially when there are indications of serious public health or environmental risks. You should further make clear that you will support EPA enforcement– even where states object -- when the failure

³ *Id.* at 15 – 16.

⁴ Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States, from Susan Bodine to Regional Administrators.

to bring an action would create significant public health or environmental risks, weaken or significantly delay compliance with federal standards, or allow those who violate federal laws to avoid penalties and other appropriate sanctions. That should not keep EPA from deferring in the appropriate circumstances to States that are carrying out strong enforcement programs. But protection of the public health and the environment must come first.

Needless to say, significant public health and environmental risks can occur in any of the environmental programs, not just under the Lead and Copper rule in the drinking water program. Thus strong measures to address such risks should be developed and applied across the board – and included in any general enforcement guidance – not just limited to the drinking water program because a serious problem occurred in Flint.

We understand that your office is working on guidance to address other issues raised by the Flint situation. Recommendation 3 of the Inspector General’s report calls for encouraging regional staff and managers to elevate issues when there are emerging critical environmental or public health issues created by inaction or deficient action by anyone (including an authorized State). Recommendations 7 and 8 call for more EPA involvement in the resolution of issues (even in authorized States), involving atypical events, emerging public health concerns, environmental justice concerns, public health analyses, or citizen complaints. The report in recommendation 9 calls for strengthening EPA oversight of states by “establishing a clear and credible escalation policy for EPA intervention in states. The policy should provide steps the EPA will take when states do not act.”⁵

In a memorandum to the EPA Inspector General dated May 30, 2018 (responding to a draft of the Inspector General’s report), you expressed general support for recommendations 7, 8 and 9 and promised guidance on identifying high risk situations by December 2018, and guidance on elevation standards (i.e., when regions must elevate matters to EPA HQ due to public health or environmental concerns) by July 31, 2019.⁶ Those actions are welcome but will be undercut if EPA does not accept the Inspector General’s first recommendation, which is to improve oversight of compliance monitoring programs that both EPA and states depend upon to identify those serious violations that need enforcement action.

Regardless, your response to recommendations 7, 8, and 9 anticipate more direct federal involvement in enforcement of the Safe Drinking Water Act, while your interim guidance for enforcement of the Clean Air Act, Clean Water Act, and other federal statutes emphasizes deferring to state programs. Also, the development of the final general guidance and the response to the Inspector General’s report are being handled by different work-groups on different schedules. According to the January 27, 2018 interim guidance document, your office plans to issue final general guidance during FY19, after consultation with an ECOS-EPA workgroup. As noted above, the guidance documents addressing the concerns raised by Flint will also be issued at various times during FY 19, but not necessarily on the same schedule.

⁵ Office of Inspector General, Report No. 18-P-0221, pages 27 -28.

⁶ Id. at 29.

We ask that both sets of guidance documents be developed together, with appropriate recommendations developed by the workgroup addressing the Flint issues being applied to all environmental programs and reflected in your general guidance.

Need for Transparency

We also request that you create a more transparent process for the development of the general enforcement guidance. While your May 30, 2018 memorandum states that there will be a public comment period on the proposed elevation standards being developed by the workgroup addressing the Flint issues, there was no opportunity for public comment on the January 22, 2018 interim guidance and there is no apparent plan to have a public comment period on the guidance that covers enforcement of all federal environmental laws. Also, while you have been working with the ECOS-EPA workgroup on the enforcement guidance, we are not aware of any outreach being made to either national or local environmental groups.

We ask that you seek broader input on the interim guidance and any proposed final version in order to consider a range of views and ensure that you develop a well-crafted policy that protects health and the environment while maintaining EPA's statutory responsibility for oversight of states implementing federally authorized programs. In addition, we think this document should be considered significant enough to go through a formal public comment process with the establishment of a docket for receiving comments.

Please contact Eric Schaeffer at the Environmental Integrity Project should you have any comments or questions on this letter. Alternatively, please have your staff contact Jeffrey Fowley, the EIP consultant for state oversight and authorization matters. He can be reached at jfowley@verizon.net and 339-440-3855.

Sincerely,



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