



DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION VIII
REGIONAL ENVIRONMENTAL AND ENERGY OFFICE - WESTERN
US CUSTOM HOUSE
721 19TH STREET, ROOM 427
DENVER, CO 80202

27 March 2018

Trisha Oeth, Administrator
Colorado Water Quality Control Commission
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South, A-5
Denver, CO 80246

Via email: cdphe.wqcc@state.co.us and trisha.oeth@state.co.us

On behalf of the Department of Defense (DOD) in Colorado I am writing in response to the proposed revision to Regulation No. 42 Site-Specific Water Quality Classifications and Standards for Groundwater. The DOD has two main concerns with this proposed regulation: 1) it is not applicable to all releases of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic acid (PFOS), including acid and conjugate base as well as linear and branched isoforms, within the State, and 2) it may not qualify as a cleanup standard, referred to as an Applicable or Relevant and Appropriate Requirement (ARAR), under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

In general, in order for a state standard to be enforceable against federal facilities, it must be non-discriminatory (i.e., apply to all entities in the state), properly promulgated, and fall within a federal waiver of sovereign immunity. In reviewing the Statement of Basis (Sec. 42.37), the U.S. Air Force and Peterson Air Force Base are identified as the sole entity and site currently investigating the extent of contamination from sources on base. This proposed regulation is not uniformly applied to all regulated entities throughout the State and potentially singles out DOD and its components for disparate treatment. Sufficient justification for narrowing the scope of the standards to releases at this specific site have not been made. Failure to extend the proposed application to all potential sites and entities state-wide demonstrates the discriminatory

nature of the proposed standard. Federal sovereign immunity is only waived when state regulation is non-discriminatory.

DOD conducts its environmental restoration program in accordance with CERCLA and its implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). Under CERCLA and the NCP, once the need for remedial action is established by a CERCLA risk assessment, state cleanup standards are evaluated as ARARs under CERCLA and the NCP. Remedial options must meet two threshold criteria: protection of human health and compliance with ARARs (although there is an ARAR waiver process for certain circumstances). An example of a risk-based (protective) cleanup level is 0.4 µg/L (400 ppt) in groundwater that is used as drinking water, based on the EPA Reference Dose for PFOS/PFOA. Then a State cleanup level is evaluated on a site-specific basis on whether it should be considered an ARAR. In general, a State requirement must be: 1) properly promulgated, 2) more stringent than Federal standards, 3) legally “applicable” or “relevant and appropriate” as described in the NCP, and 4) timely identified, to qualify as an ARAR. While a detailed analysis has not been performed, it appears that the Colorado regulation may not qualify as an ARAR. For example, it does not meet the “properly promulgated” criterion as the standard is not of general applicability.

If you have questions or need additional information, please contact Julia Miller at 303-844-0952. Thank you for the opportunity to provide input.

Sincerely,



Mark Mahoney
Department of Defense
Regional Environmental Coordinator, Region 8