

Additionally, Florida did not evaluate whether new or revised HHC were needed for nine priority toxic pollutants for which EPA has CWA section 304(a) HHC recommendations.³⁵

Florida's 2016 revised and new HHC were never finalized or submitted to EPA. Then again in 2018, Florida initiated a rulemaking to consider proposed revisions to its HHC, stating its intent to conduct a State-wide fish consumption survey "to accurately determine the amount and types of fish commonly eaten by Floridians in advance of criteria development and adoption."³⁶ However, the survey plans were disrupted and ultimately terminated.³⁷

III. Florida's Current Human Health Criteria for Priority Toxic Pollutants Do Not Protect Florida's Designated Uses

As noted above, EPA's regulation at 40 CFR 131.11(a)(1) requires that water quality criteria contain sufficient parameters or constituents to protect the most sensitive designated use. Florida has itself recognized that its existing HHC "need to be updated because they do not reflect current national recommendations or state specific information."³⁸ One of the primary deficiencies with Florida's existing HHC is their reliance on EPA's national default FCR from 1992. As Florida has acknowledged, its existing HHC are based on an FCR that is far lower than national, regional or State-specific studies suggest Floridians consume.³⁹ In fact, the 1994 FCR study that Florida cited in 2016 indicated that Floridians' 90th percentile FCR was 24.18 g/day, and the 99th percentile rate was 32.75 g/day.⁴⁰ This finding is consistent with EPA's 2014 analysis of NHANES data from 2003 to 2010 which indicates that the 90th percentile consumption rate of fish and shellfish from Florida's inland and nearshore waters ranges from approximately 22 g/day to 30 g/day.⁴¹ In 2016, Florida used these same data from EPA's 2014 report⁴² as the basis for the FCRs to derive the HHC that the State ultimately did not finalize.⁴³ Without an updated FCR, Florida is not keeping pace with the current practices of Florida residents, who appear to be eating far more fish than the 6.5 g/day input indicates. Moreover, EPA has placed an emphasis on increased consumption of healthy fish for its human health benefits and is particularly concerned that people eating fish they catch for their sustenance are being disproportionately impacted.

³⁵ These nine priority toxic pollutants are: asbestos, copper, dioxin, methylmercury, nickel, n-nitrosodi-n-propylamine, n-nitrosodimethylamine, n-nitrosodiphenylamine, and zinc. EPA did not update its national 304(a) HHC recommendations in 2015 for these priority toxic pollutants, citing outstanding technical issues. See U.S. EPA. (June 29, 2015). *Final Updated Ambient Water Quality Criteria for the Protection of Human Health*, 80 FR 36986.

³⁶ Florida Department of Environmental Protection. (February 9, 2018). *Notice of Development of Rulemaking: 62-302.530 – Surface Water Quality Criteria*. https://www.flrules.org/Gateway/View_notice.asp?id=20029450 (last accessed September 9, 2022).

³⁷ Florida Department of Environmental Protection. *Fish Consumption Survey Project*. <https://floridadep.gov/dear/water-quality-standards/content/fish-consumption-survey-project> (last accessed September 15, 2022).

³⁸ Florida Department of Environmental Protection 2016. Technical Support Document: Derivation of Human Health-Based Criteria and Risk Impact Statement. See https://floridadep.gov/sites/default/files/HH_TSD.pdf

³⁹ *Id.* at 10 ("At the time the criteria were first adopted, the U.S. EPA assumed fish consumption and surface water drinking rates of 6.5 g/day and 2.0 L/day, respectively. The HHC currently listed in Rule 62- 302.530, F.A.C., were developed based on these point values. However, more recent fish consumption survey information indicates that consumption patterns have changed over time, necessitating a re-evaluation of the criteria.").

⁴⁰ *Id.* at 15.

⁴¹ U.S. EPA. 2014. *Estimated Fish Consumption Rates for the U.S. Population and Selected Subpopulations* (NHANES 2003-2010), EPA 820-R-14-002. <https://www.epa.gov/sites/default/files/2015-01/documents/fish-consumption-rates-2014.pdf>

⁴² *Id.*

⁴³ Florida Department of Environmental Protection 2016. Technical Support Document: Derivation of Human Health-Based Criteria and Risk Impact Statement. See https://floridadep.gov/sites/default/files/HH_TSD.pdf