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EPA UPDATE

EPA Issues Cooling Water Intake Structure Rule for Existing Facilities

By Larry Kane, Indianapolis Office

EPA’s final rule setting technological requirements for cooling water intake structures at existing steam electric generation facilities and manufacturing facilities was published on Aug. 15, 2014. (See 79 Fed. Reg. 48300.) The rule, referred to in this article as the “2014 316(b) Rule,” is intended to implement the requirement of 316(b) of the Clean Water Act (CWA) for cooling water intake structures that withdraw cooling water from waters of the United States to utilize the best technology available (BTA) for minimizing adverse environmental impact. The new rule also includes minor amendments to the 316(b) requirements for new facilities.

EPA’s 2014 316(b) Rule represents the agency’s effort to discharge its obligations under a settlement of protracted litigation over previously issued rules. The original litigation dating back to early 1993 led to EPA’s adoption of the so-called Phase I rule (for new facilities) in late 2001, the Phase II rule (for existing steam electric generating facilities with large cooling water withdrawal rates) in mid-2004, and the Phase III rule (for smaller existing power plants and manufacturing facilities) in mid-2006.
A second lawsuit was filed in 2006 challenging the adequacy of the Phase III rule. A further settlement agreement addressing both litigation matters eventually led to the promulgation of the 2014 316(b) Rule. By all indications, litigation over implementation of Section 316(b) is far from over. Thus far, six petitions for review of the new rule have been filed: industry petitions have been filed in the 4th Circuit Court of Appeals (Cooling Water Intake Structure Coalition), 5th Circuit (UWAG and Entergy), and 7th Circuit (American Petroleum Institute), while petitions by environmental advocates have been filed in the 1st Circuit (Environment America), 2nd Circuit (Riverkeeper, NRDC, et al.), and 9th Circuit (Sierra Club). All petitions have been consolidated into a single appeal in the 4th Circuit Court of Appeals by random drawing.

A brief summary of the new rule follows.

**Existing Facilities – 40 CFR Part 125, Subpart J**

An existing facility is defined (40 CFR 125.92(k)) as a facility that commenced construction on or before Jan. 17, 2002, and includes any modification or addition of a new unit at such a facility regardless of the time of construction of the modification or new unit. However, the construction of a new, standalone facility built adjacent to another facility owned by the same entity would be a new facility subject to Subpart I of Part 125 rather than a new unit at an existing facility.

**Subpart J Applicability.** An existing facility is subject to the requirements of Subpart J if: (i) the facility is a point source; (ii) the facility’s cooling water intake structures (CWISs) have a cumulative design intake flow (DIF) of more than 2 million gallons per day (MGD) for withdrawal of water from waters of the United States; and (iii) 25 percent or more of the water withdrawn by the facility on an average annual basis (“actual intake flow”) is used exclusively for cooling purposes. (Further references in this article to an “existing facility” will implicitly mean an existing facility that is subject to Subpart J.)

On or after Oct. 14, 2014, the owner or operator of an existing facility is subject to the Best Technology Available (BTA) standards for impingement mortality and for entrainment, under subsections (c) and (d), respectively, of 40 CFR 125.94.

- **Impingement Mortality Standard for Existing Facilities**

  Section 125.94(c) provides existing facilities with some flexibility in meeting the new rule’s impingement mortality standard for CWISs. Facilities may select from the following menu of alternatives to comply with the standard:

  - A closed-cycle recirculating system for the cooling water used at the facility;
  - A maximum design through-screen intake velocity for the facility’s CWIS of 0.5 feet per second under all operating conditions;
  - Demonstration that the facility’s CWIS has an actual maximum through-screen intake velocity of 0.5 feet per second;
  - Modified traveling screens determined on a case-by-case basis by the permitting agency to be BTA;
  - A system of technologies, management practices, and operational measures determined, on a case-by-case basis by the permitting agency to be BTA;
  - Achievement of an impingement mortality performance standard of no more than 24 percent mortality, including latent or delayed mortality, as an average measured over a rolling 12-month period.

  The seventh alternative, involving an offshore velocity cap, is not germane to inland facilities. In addition to implementation of one of the above alternatives, the permitting agency may impose additional measures, where applicable, to protect shellfish or fragile species. Fragile species are those with an impingement survival rate of less than 30 percent. An example provided in the rule of a fragile species is gizzard shad.
A permitting agency may establish less stringent measures for BTA in two circumstances: (1) for a facility whose rates of impingement are so low that additional controls are not warranted; or (2) for an existing electric generating facility with an annual average capacity utilization rate of less than 8 percent averaged over a period of 24 consecutive months.

**Entrainment Standard for Existing Facilities**

Flexibility is also provided to existing facilities in addressing entrainment. Section 125.94(d) requires that the permitting agency establish BTA standards for entrainment on a site-specific basis. Such case-specific entrainment standards are to be based on the determination of the permitting agency that the standard will achieve “the maximum reduction in entrainment warranted” after consideration of factors relevant for minimizing adverse environmental impact at a particular facility.

**Impingement and Entrainment Standards for New Units at Existing Facilities**

The impingement and entrainment standards for BTA at new units require a facility to reduce the design intake flow for the new unit to a level commensurate with that attainable by a closed-cycle recirculating system for the same amount of cooling. As an alternative to the foregoing standard, a new unit at an existing facility must demonstrate to the permitting agency that the technologies and operational measures employed will reduce the adverse environmental impact from any CWIS supplying cooling water to the new unit to a level comparable to that which would be achieved by the primary standard. As a part of this demonstration, it must be shown that the entrainment reduction is equal to or greater than 90 percent of the reduction that would be achieved under the primary standard.

**Additional Measures for Protection of Threatened or Endangered Species**

EPA has introduced, without precedent, a novel feature to the agency’s 316(b) rules relating to the Endangered Species Act that is likely to be controversial. In addition to implementing the regular BTA standards, a permitting agency, including a state permitting agency, may establish conditions in the NPDES permit for a Subpart J-regulated facility to protect Federally-listed threatened or endangered species. Indirect notice of these new features first appears through a “Note to § 125.90” appearing on 79 Fed. Reg. 48430, which states,

This regulation does not authorize take, as defined by the Endangered Species Act, 16 U.S.C. 1532(19).

The U.S. Fish and Wildlife Service . . . determined that any impingement (including entrapment) or entrainment of Federally-listed species constitutes take. Such take may be authorized pursuant to the conditions of a permit issued under 16 U.S.C. 1539(a) or where consistent with an Incidental Take Statement contained in a Biological Opinion pursuant to 16 U.S.C. 1536(o).

Section 125.98(b)(1) correspondingly requires that each permit with conditions implementing Subpart J must include the following permit condition: “Nothing in this permit authorizes take for the purposes of a facility’s compliance with the Endangered Species Act.”

The authority to include additional permit conditions to address threatened or endangered species is primarily stated in 40 CFR 125.94(g), which provides that the Director may include additional control measures, monitoring requirements, and reporting requirements “to minimize incidental take of such species” or to “reduce or remove more than minor detrimental effects” posed to such species and designated critical habitat by use of the CWIS. (Emphasis added.)

Similarly, though more abbreviated statements are sprinkled through much of Subpart J, Section 125.94(g) goes on to observe that such additional permit conditions to protect Federally-listed species “may include measures or requirements identified by an appropriate field office of the U.S. Fish and Wildlife Service . . . during the 60-day review period” to occur prior to public notice of a draft permit. This sounds very much like an ESA consultation with the U.S. Fish and Wildlife Service.
Since “Director” may be a state permitting agency administrator and the new rule nowhere provides expressly that the ESA-related provisions apply only to permits issued by EPA, it can be assumed that the rule intends these provisions to apply to state-issued NPDES permits as well. From EPA’s discussion of this issue at Section VIII.K of the preamble to the 2014 316(b) Rule, it is clear that this is more than assumption. EPA goes so far as to expressly state in the preamble that EPA will use “the full extent of its CWA authority to object to a State . . . permit where EPA finds . . . that a State . . . permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.” 79 Fed. Reg. 48383.

• Permit Implementation

Technical information required as part of a permit application to support BTA determinations by a permitting agency continue to be specified in 40 CFR 122.21(r). The informational requirements set forth in § 122.21(r) for existing facilities have substantially expanded due to the transfer to § 122.21(r) of technical information requirements to support compliance with the BTA standards for impingement mortality and entrainment previously contained in 40 CFR 125.95 (which have been substantially revised in the 2014 Rule).

An existing facility with a current NPDES permit that expires after July 14, 2018, must include all information required in the applicable portions of § 122.21(r) in its application for a renewal permit. For permits issued after Oct. 14, 2014, the permitting agency may include specific conditions requiring submittal by the facility of all information required by § 122.21(r) to establish requirements to implement the impingement mortality and entrainment previously contained in 40 CFR 125.95 (which have been substantially revised in the 2014 Rule).

The implementation process for the Subpart J standards for existing facilities is explained in 40 CFR § 125.98. Any NPDES permit issued to an existing facility subject to Subpart J after July 14, 2018, must include conditions that implement the impingement mortality and entrainment standards of Section 125.94. Authority is provided under Subpart J to permitting agencies to require control measures going beyond those required to meet the basic BTA standards for impingement mortality and entrainment if needed, in the determination of the permitting agency, to protect threatened or endangered species, migratory, sport or commercial species, or fragile species.

A permit issued after July 14, 2018, will include a compliance schedule for attaining the BTA standards for impingement mortality and entrainment “as soon as practicable.” However, a new unit at an existing facility, regardless of when the permit relating to such a new unit is issued, must comply with BTA standards applicable to the new unit upon commencement of the new unit’s operation.

New Facilities – Subpart I

The 2014 316(b) Rule makes a small number of revisions to 316(b) requirements for new facilities as set forth in Subpart I of 40 CFR Part 125. These appear to be relatively minor fine-tuning revisions.

EPA Plugs Test Method Loophole for NPDES Permits

By Andy Bowman, Indianapolis Office

On Aug. 19, 2014, EPA published notice of a final rule that requires National Pollutant Discharge Elimination System (NPDES) permit applicants to use “sufficiently sensitive” analytical test methods when collecting data to be included in a permit application. The rule also now mandates that state permitting authorities must prescribe that only “sufficiently sensitive” test methods be used by dischargers when monitoring for compliance with permit limitations. The new rules are effective Sept. 18, 2014. States will have one year to make necessary changes to revise their NPDES regulations in conformance with EPA’s rule or two years if statutory changes are needed.
EPA’s rule codifies a 2007 guidance document on analytical methods for mercury and expands the requirements to all pollutants. EPA took this step because it has approved multiple analytical methods for Clean Water Act (CWA) pollutants under 40 CFR Part 136. Certain analytical test methods, particularly newer methods, have greater sensitivities and lower minimum levels or method detection limits (MDL) than other methods for the same pollutant. This situation has led to the potential for a NPDES applicant or discharger to select a less sensitive method with a minimum level higher than the applicable water quality criterion or effluent limitation and thereby mask the presence of a pollutant in its discharge.

This loophole has now been effectively closed by the new rules. If a permit applicant does not use a sufficiently sensitive analytical method, the permitting agency may now deem the application incomplete and require the submittal of new data. By mandating that permits require use of sufficiently sensitive analytical methods for compliance monitoring, failure to do so could result in an enforcement action.

Under the new rule, an EPA-approved analytical method is considered “sufficiently sensitive” where:

- The method’s minimum level is at or below the applicable water quality criterion or permit limitation; or
- The method has the lowest minimum level of the available EPA-approved methods; or
- In the case of permit applications, the method’s minimum level is above the applicable water quality criterion but the amount of the pollutant in the discharge is high enough that the method detects and quantifies the level of the pollutant.

This rule does not require the use of the most sensitive method as long as the selected method meets the “sufficiently sensitive” criteria. The requirement to use a sufficiently sensitive EPA-approved method does not apply where no EPA-approved method exists. In those cases any suitable method may be used as long as a description of the method is provided to the permitting agency.

NPDES permit holders will need to work with their laboratories to ensure that the appropriate analytical method is used. Permit holders should anticipate that the “sufficiently sensitive” requirement will be included in permits upon renewal once the state regulations are revised.

The new rule only applies to direct dischargers. Facilities that are indirect dischargers to a Publicly Owned Treatment Works (POTW) are not subject to the rule. The rule is available at 79 Federal Register 49001 and http://cfpub.epa.gov/npdes/ssmethods.cfm.

**Fifth Circuit holds Notices of Violation are Not Final Agency Actions**

*By Kate E. Beatty, Indianapolis Office*

On July 3, 2014, the Fifth Circuit Court of Appeals issued a unanimous opinion which held that notices of violation issued by EPA to two coal-fired plants were not “final agency actions.” *Luminant Generation Co., LLC, et al., v. United States Environmental Protection Agency*, No. 12-60694. This ruling aligns with the precedents set by the Third and Ninth Circuit courts.

Luminant Generation Company, L.L.C. (Luminant) operates two coal-fired plants in Texas. In 2008, EPA started sending Luminant requests to determine compliance with the Clean Air Act. In 2012, EPA issued a notice of violation (NOV) asserting that Luminant and its parent company violated the Clean Air Act’s Prevention of Significant Deterioration (PSD) provision; Texas’s State Implementation Plan (SIP); Texas’s PSD provisions; Title V of the Act; and Texas’s Title V program. Luminant filed petitions for review of the 2012 NOV; however, EPA moved to dismiss on the grounds that the NOV was not a “final action.” EPA issued a second NOV in 2013, purporting to amend the 2012 NOV to include only the allegations that Luminant violated the Clean Air Act’s PSD provisions and Texas’s PSD provisions. Luminant petitioned for review of the 2013 NOV and again EPA moved to dismiss on the grounds that the court lacked subject
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matter jurisdiction because the NOVs were not “final actions.”

The court explained that the term “final action” under section 7607(b)(1) has the same meaning as “final agency action” under the Administrative Procedures Act. Therefore, for the action to constitute a “final agency action,” the following two conditions must be met: “[f]irst, the action must mark the consummation of the agency’s decision making process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.”

The court concluded that the 2012 and 2013 NOVs issued by EPA did not meet either prong of the test and therefore did not constitute final agency actions. Specifically, the court reasoned that the NOV was simply an initial finding marking only the beginning of the EPA’s analysis and did not bind EPA to any specific course of action; the notice itself does not determine the rights or obligations for Luminant and no legal consequences flow from the issuance of the notice; orders, which are final agency actions, and notices are treated differently and are two distinct types of agency action; and lastly, the Fifth Circuit was reluctant to be the first circuit to treat NOVs as final agency actions. The court specifically mentioned the Third and Ninth Circuits as two circuits that did not recognize NOVs as final action and explained that Luminant did not offer any persuasive reason to create a circuit split. The court concluded by asserting that “[r]egulated entities have a full opportunity to challenge the adequacy or sufficiency of such notices on the EPA takes final action.”

**EPA Mulls Lead-Based Paint Rules for Public and Commercial Buildings**

*By Andy Bowman, Indianapolis Office*

EPA is considering whether lead-based paint hazards created during renovation, repair and painting (RRP) activities in public and commercial buildings (P&CBs) would warrant regulation. The Toxic Substances Control Act (TSCA) requires EPA to conduct a hazard assessment for those renovation activities in P&CBs that are found to create lead-based paint hazards. In the event hazards are found to exist, TSCA directs EPA to promulgate regulations to address the hazards. EPA already regulates lead-based hazards at residences and child-occupied buildings constructed prior to 1978.


EPA previously published a document on May 30, 2014, entitled “Framework for Identifying and Evaluating Lead-Based Paint Hazards from Renovation, Repair, and Painting Activities at Public and Commercial Buildings” (Framework). The Framework described possible approaches to identification of lead-based paint hazards at P&CBs. EPA plans to model specific interior and exterior RRP activities at P&CBs to evaluate whether adverse health effects could occur.

EPA has stated that in the event it decides regulation of RRP activities at P&CBs is warranted, it will address identification of hazards, an evaluation of whether hazards occur and any proposed regulatory requirements in a single proposed rule. A decision is not expected until mid-2015 at the earliest.

Comments can be submitted on the Approach and additional supporting documents are available at [http://www.regulations.gov](http://www.regulations.gov) using docket ID No. EPA-HQ-OPPT-2010-0173.
Kentucky Update

Division of Water Revises Drinking Water Regulations

By Jennifer J. Cave, Lexington Office

The Kentucky Division of Water (DOW) has proposed amendments to three drinking water regulations: Microbiological Testing (401 KAR 8:200), Lead and Copper (401 KAR 8:300), and Bottled Water (401 KAR 8:700). The proposed regulations were filed with the Legislative Research Commission (LRC) on July 15, 2014.

401 KAR 8:200, Microbiological Monitoring, establishes monitoring requirements, analytical techniques, and maximum levels of microbiological contaminants in water used for public consumption. The proposed amendments clarify reporting requirements, establish a maximum contaminant level for *E. coli* which triggers additional assessments, requires public water systems to identify sanitary problems and take corrective action, and establishes a more accurate methodology in calculating “population served” based on the most recent census information. Although the substantive requirements of the existing regulations remain unchanged, the amendment adopts 40 CFR 141.851 through 861 (the Federal Revised Total Coliform Rule). The amendments also strike a reference to an outdated Executive Order.

401 KAR 8:300, Lead and Copper, establishes analytical methods, monitoring requirements, action levels, and lower lead levels for public water systems to control amounts of lead and copper in public drinking water. The proposed amendment incorporates the Federal Reduction of Lead in Drinking Water Act of 2011 (42 U.S.C. § 300g-6) which reduced allowable lead levels in plumbing material used for drinking water distribution and which became effective Jan. 4, 2014. The proposed amendment is required by 42 U.S.C. § 300g-6(b)(c) in order to maintain Kentucky’s primary authority and federal funding to administer its state drinking water program.

401 KAR 8:700, Bottled Water, establishes requirements for public water systems that bottle water in Kentucky for sale to consumers. KRS 224.10-100(30) and KRS 224.10-110 authorize the Cabinet to promulgate administrative regulations for the purification of water for public and semi-public use. 21 CFR 129 established federal Food and Drug Administration (FDA) standards regarding the sources, testing, and processing of bottled water. Kentucky’s definition of public water systems has always included systems in Kentucky which bottle water for purchase and consumption and are subject to requirements of 40 CFR 141 and 401 KAR Chapter 8. The regulation establishes disinfection, sampling, and testing methods and places limits on contaminants in bottled water which are essential to protect public health.

Comments were received on the proposed amendments to 401 KAR 8:200 and DOW has issued an amended regulation and Statement of Consideration. No comments were received on the proposed amendments to 401 KAR 8:300 and 8:700. All the regulations are currently scheduled for the October meeting of the Administrative Regulation Review Subcommittee of the General Assembly.

Division of Water Issues KPDES General Permits

By Jack C. Bender, Lexington Office

As discussed in prior issues of the Environmental Letter, the Kentucky Division of Water (DOW) has issued several Kentucky Pollutant Discharge Elimination System (KPDES) Draft General Permits for public notice in 2014. While some of the KPDES General Permits have a narrow scope of applicability to certain types of industrial activity, DOW also issued for public notice on Aug. 1, 2014, a Draft KPDES General Permit for stormwater runoff associated with construction activity, which will broadly apply to construction activity across the state. KPDES General Permits apply to a specific category of sources that generally involve the same or substantially similar types of operations; discharge the same types of wastewater; generally require the same effluent limitations or operating standards, impose the same type of monitoring; and are a more effective regulatory approach than developing individual permits. Thus, General Permits are particularly attractive where there are a large number of the same
types of sources in the state and facility-specific effluent limitations are not necessary to address variability in operations.

The following KPDES General Permits were issued for public notice in 2014:

- KYG04 -- Renewal of the KPDES General Permit for coal mining operations in the Eastern and Western Kentucky coal fields;
- KYR10 -- Renewal of KPDES General Permit for stormwater runoff from construction sites greater than one acre;
- KYG05 -- Renewal of KPDES General Permit for reclamation activity at abandoned mine land sites;
- KYG84 -- Renewal of KPDES General Permit for non-coal (mineral) mining operations;
- KYG50 -- Renewal of KPDES General Permit for highway maintenance and equipment facilities;
- KYG40 -- Renewal of KPDES General Permit for on-site wastewater treatment systems serving individual family residences.
- KYG11 -- New KPDES General Permit for construction material manufacturing operations (concrete and asphalt plants); and
- KYG15 -- New KPDES General Permit for general aviation airports.

While most of these KPDES General Permits remain in draft and are under review by DOW or EPA, several were recently issued. The General Permits for coal mining operations were issued Sept. 2, 2014, and become effective Oct. 1, 2014. The General Permits for general aviation airports and on-site wastewater treatment systems for individual residences were also recently issued in final.

The General Permits for coal mining are very comprehensive and have been subject of intense scrutiny by stakeholders and EPA. As reported in the July 2014 issue of the Environmental Letter, separate General Permits were developed for the Eastern and Western Kentucky coal fields. In addition to establishing effluent limitations on discharges of total suspended solids, total recoverable iron, total recoverable manganese, and pH, certain types of discharges from coal mining operations are also subject to effluent limitations for acute whole effluent toxicity, and total recoverable selenium (fish tissue). Additionally, the General Permits impose requirements on permittees with respect to instream biological monitoring and limitations, as well as instream chemical trend analyses to evaluate the potential impacts of the mining operation on the receiving water. The General Permits also include requirements relating to adaptive best management practices (BMPs) in which the effectiveness of BMPs must be evaluated and improved based upon performance triggers for instream biological and chemical testing results. Specific conductivity of effluent must also be monitored, but limitations based upon specific conductivity are not included in the Permits.

Another important consideration with respect to other permittees holding individual Permits is that the General Permit establishes a compliance schedule for existing facilities for compliance with the first-time water quality-based limitations on selenium, thus providing additional precedent for use of compliance schedules for first-time water quality-based limits. Those limitations must be achieved “as soon as possible, but not later than Jan. 1, 2016.”

Existing coal mining operations are provided 180-days after the effective date of the new General Permit to submit an electronic Notice of Intent (e-NOI) to obtain permit coverage. While the General Permit for coal mining operations applies only to one industry, other manufacturing and industrial facilities with complex effluent discharges may be interested in reviewing the types of terms and conditions that have been included in the General Permits to protect water quality as a result of prior EPA objections.
Any person that may engage in construction in Kentucky that results in a disturbance of greater than one acre would also be interested in KYR10 for stormwater runoff from construction sites. The Draft KPDES General Permit (KYR10) was made available for public comment on Aug. 1, 2014.

The Draft Permit is largely the same as the previous version of KYR10, which expired on July 31, 2014. However, the scope of applicability of KYR10 has been increased in the Draft Permit.

The General Permit would become available for construction sites that discharge to water bodies that support cold water aquatic habitat or endangered species, as well as to outstanding state resource waters.

For construction sites that discharge to such special use waters, the General Permit would impose a 50-foot buffer zone, as compared to the 25-foot buffer zone that applies to facilities that do not discharge to such special use waters. EPA recommendations for certain BMP maintenance are also referenced in the Draft Permit. Coverage under the General Permit must be applied for electronically through an e-NOI. The Draft General Permit continues to rely upon BMPs as opposed to numeric effluent limitations on total suspended solids to protect the receiving streams.

General Permits provide a quick and efficient avenue for obtaining KPDES Permit coverage for projects that qualify for General Permit coverage. For activities that do not qualify for permit coverage, individual KPDES Permits must be obtained.

Selenium and Nutrient Water Quality Standards Challenged

By Jack C. Bender, Lexington Office

As discussed in prior issues of the Environmental Letter, EPA approved Kentucky’s revised water quality standard for nutrients and the chronic water quality aquatic life criterion for selenium in November 2013. The revised water quality standards for nutrients and selenium were adopted pursuant to Kentucky’s Triennial Review of Water Quality Standards.

The chronic water quality for selenium is based upon selenium in whole fish tissue and fish egg/ovary tissue. The proposed values were derived by the Division of Water (DOW) based upon species native or naturalized to Kentucky waters.

EPA approved DOW’s revised definition of “eutrophication” at 401 KAR 10:031 Section 1(30). DOW’s revisions clarify that its nutrient standard, consistent with its long-term interpretation, prevents and prohibits nitrogen and phosphorus in discharges that would cause or contribute to a eutrophication problem.

In February 2014 several environmental interest groups sued EPA in the United States District Court for the Western District of Kentucky to challenge EPA’s approval of Kentucky’s revised water quality standards for selenium and nutrients. The plaintiffs’ claim that EPA’s approval of the standard was arbitrary and capricious because: (1) EPA improperly relied upon Kentucky’s stated interpretation of the revised provisions set forth in correspondence during the Triennial Review period; (2) the revised criteria failed to protect “fishless streams”; (3) the selenium standards fails to protect commercially and recreationally important species; and (4) the revised nutrient standard is insufficient to prevent eutrophication from occurring. On July 16, 2014, plaintiffs amended their Complaint to allege that EPA’s approval of the nutrient and selenium standards violates the Endangered Species Act because EPA allegedly failed to properly consult with the U.S. Fish and Wildlife Service before approving the standards.

The Commonwealth of Kentucky, Kentucky Chamber of Commerce, and Kentucky Coal Association have intervened in the litigation to support EPA’s approval of the standards. It is anticipated that the plaintiffs’ challenge to EPA’s approval of the revised water quality standards will be decided based upon the administrative record following briefing of the issues. Based upon the parties’ proposed briefing schedules, the matter should be submitted for a decision by the United States District Court in early 2015.

The outcome of the litigation is of significant importance to industrial facilities and municipalities
that discharge effluent containing nutrients and selenium. As discussed elsewhere in this issue of the
Environmental Letter, the recent KPDES General Permit for coal mining operations includes limitations
on the discharge of selenium based upon the new standards. Similarly, municipal wastewater treatment
plants and various types of construction activity can generate wastewater streams that contain phosphorus
and nitrogen that are subject to the revised nutrient standard.

**Staffing Changes at Department for Environmental Protection**

**By Jennifer J. Cave, Lexington Office**

Kentucky Department for Environmental Protection (DEP) Commissioner Bruce Scott reported on Aug. 20, 2014, at the Kentucky Chamber Environmental Permitting and Reporting Conference that the Cabinet had just come out of a hiring freeze. Overall, staffing has remained down 10 percent due to the freeze. He reported that the Cabinet is in the process of filling key positions. At the Division of Waste Management, Ron Gruzesky, the former head of the Solid Waste Branch, retired in July. Tony Hatton is serving as Acting Branch Manager until the position is filled. In addition, George Gilbert, who works in the Director’s Office, will be retiring at the end of October. Division of Water Director Peter Goodman reported vacancies in a number of key positions including the Drinking Water Branch and the Assistant Director position. Even with these vacancies, the Division of Water reported its lowest permitting backlog since 2011.

**INDIANA UPDATE**

**IDEM Seeks Input on Phosphorous Limit for Major Sanitary Wastewater Treatment Plants**

**By Andy Bowman, Indianapolis Office**

The Indiana Department of Environmental Management (IDEM) is seeking comment on a proposed Non-Rule Policy Document (Water -019-NPD) that will require major Indiana Publicly Owned Treatment Works (POTWs) and semi-public sanitary wastewater treatment plants with design flows of 1 million gallons per day or more to limit phosphorous discharges to 1.0 milligrams per liter (mg/l). The new limit will be included in National Pollutant Discharge Elimination System (NPDES) permits for which an application is submitted after Jan. 1, 2015. For applications due and received prior to Jan. 1, 2015, the permit will include a “report only” requirement and the new phosphorous limit will not be included until the next permit renewal.

Comments may be submitted until Oct. 24, 2014, to: Jason House, IDEM, 100 North Senate Avenue, MC 65-42, IGCN 1255, Indianapolis, IN 46204-2251 or JAHouse@idem.in.gov. The policy is available at www.in.gov/idem/files/npd-water-019.pdf.

**NATURAL RESOURCES UPDATE**

**Federal Appeals Court Holds That Selenium Discharges from Coal Mine Are Not Subject to NPDES “Permit Shield”**

**By R. Clay Larkin, Lexington Office**

The United States Court of Appeals for the Fourth Circuit held that a coal mining company could not take advantage of the Clean Water Act’s “permit shield” defense in the recent case of Southern Appalachian Mountain Stewards v. A & G Coal Corp, 758 F.3d 560 (4th Cir. July 11, 2014). The A & G Coal case involved the discharge of selenium from a mine in Virginia.

The mine, operated by A & G, held a NPDES permit authorizing the discharge of certain pollutants, but selenium was not mentioned in the permit; the permit neither authorized nor contained limits on selenium. The environmental interest group plaintiffs took samples of discharges from the mine, discovered that the discharges contained selenium, and filed suit arguing that the selenium was being discharged without a permit, in violation of the Clean Water Act (CWA).

A & G argued that it was protected from liability by the CWA’s permit shield. A federal trial court in Virginia held that A & G’s NPDES permit application did not comply with the disclosure requirements in the
National Pollutant Discharge Elimination System (NPDES) permitting regulations, and therefore, A & G could not take advantage of the permit shield. A & G appealed this decision to the Fourth Circuit Court of Appeals, which reviews decisions of federal trial courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

The permit shield of the CWA states that “compliance with a [NPDES permit] shall be deemed compliance” with the effluent limitation provisions of the CWA. See 33 U.S.C. § 1342(k). The permit shield protects permit holders who discharge pollutants that they and the relevant permitting authority had no reason to believe to be present in their discharges, or for which the permitting agency believed no effluent limitations should be established. EPA and various federal courts have held that a permit holder can only use the permit shield defense when: 1) the permit holder complies with the express terms of its permit and the permitting regulations requiring the permit holder to disclose those pollutants that might be present in its wastestream and 2) the pollutant that is not listed in the permit was still within the “reasonable contemplation” of the permitting agency when the permit was issued.

In the A & G case, it was undisputed that selenium was not listed in A & G’s NPDES permit application as a pollutant that might be present in the company’s discharges. A & G argued that it was not required to address selenium in its permit application because it had no reason to believe that selenium would be present in its discharges. The Fourth Circuit rejected this argument for two reasons. First, it noted that Virginia’s NPDES permitting regulations specifically require a permit applicant to submit an analysis of total selenium as part of its permit application, and A & G submitted no such analysis. Second, the court noted that federal NPDES regulations require that an applicant state either that a pollutant is “believed present” in the discharge or “believed absent” in the discharge. Because A & G’s application did not mention selenium at all, the court held, the permit shield was not available.

The A & G decision underscores the importance of a complete and thorough NPDES permit application for permit holders wishing to take advantage of the permit shield. The court’s opinion makes clear that an applicant who has not precisely complied with NPDES application regulations will not be able to invoke the permit shield defense, at least in the states within the Fourth Circuit.

In addition to the A & G case, other courts continue to define the scope of the NPDES permit shield. In Kentucky, the U.S. District Court for the Eastern District of Kentucky ruled in the case of Sierra Club v. ICG Hazard that discharges of selenium were subject to the permit shield defense when the permit holder was operating in compliance with the KPDES Coal General Permit, even though the Coal General Permit at issue in that case did not require the sort of detailed application and disclosure of potential pollutants at issue in A & G. The ICG Hazard case is currently on appeal to the U.S. Court of Appeals for the Sixth Circuit, which hears appeals of federal cases from Kentucky, Michigan, Ohio, and Tennessee. The case was argued nearly a year ago, but the court has not yet issued its decision.

In a case recently decided by the Ninth Circuit Court of Appeals, environmental interest groups and EPA argued for a very narrow version of the permit shield defense in the context of general NPDES permits, in the case of Alaska Community Action on Toxics v. Aurora Energy Services, LLC. In the Alaska Community Action case, the Ninth Circuit ruled that a coal loading facility’s discharge of coal particles into a waterway violated the facility’s general stormwater NPDES permit. The defendant argued that it was entitled to assert the permit shield defense, because the coal particles were not addressed in the stormwater permit but were within the reasonable contemplation of the permitting agency when the permit was issued.

On the other hand, EPA and environmental interest groups argued that the permit shield should almost never apply to a general permit, because general permits do not require detailed applications and disclosures about specific pollutants potentially present in a discharge. The court in Alaska Community Action declined to address whether a the permit shield applies to a general permit, instead holding that the stormwater permit at issue in that case expressly
barred the discharge of any non-stormwater pollutant, including coal particles.

In light of the varying decisions of the federal appellate courts, the scope of the CWA permit shield remains uncertain. We will continue to track important cases relating to the permit shield in the Environmental Letter.

D.C. Circuit Court of Appeals Issues Opinion in Appalachian Coal Mine Permit Guidance Case

By R. Clay Larkin, Lexington Office

The long-running appeal of EPA’s “Final Guidance” for Clean Water Act permitting for Appalachian coal mining operations was recently concluded when the U.S. Court of Appeals for the District of Columbia ruled that the guidance document was not a “final agency action” that could be reviewed in court. The D.C. Circuit’s opinion in the appeal, styled National Mining Association v. McCarthy, was issued on July 11, 2014, and the ruling became final on Sept. 3, 2014.

As reported previously in the Environmental Letter, EPA issued its Final Guidance in 2011. Among its provisions, the Guidance urged EPA Regions to object to NPDES permits for coal mining operations in Appalachian states if those permits did not contain limitations on the conductivity of discharges between 300-500 microSiemens per centimeter. The Final Guidance was widely criticized by industry and state permitting agencies, and while the Guidance was being implemented by EPA, the agency objected to essentially every individual KPDES permit that Kentucky proposed to issue to surface coal mining operations.

The Kentucky Coal Association, National Mining Association, and the states of Kentucky and West Virginia, among others, challenged the guidance in federal court, arguing that the Guidance exceeded EPA’s authority under the Clean Water Act and Surface Mining Control and Reclamation Act. A federal trial court in the District of Columbia agreed that EPA had exceeded its authority under these statutes, and overturned the Guidance. EPA appealed the decision to the D.C. Circuit.

On appeal, EPA argued that the Guidance was not enforceable, and was therefore not final agency action that could be reviewed in federal court. The court agreed with EPA that the Guidance “has no legal impact,” “does not tell regulated parties what they must do,” and that state permitting authorities are “free to ignore” the Guidance. On this basis, the court upheld the Guidance, but only as a non-binding guidance document that imposes no legal requirements.

Although the states and industry were ultimately unable to have the Final Guidance overturned by the D.C. Circuit, the EPA’s position before the appellate court can be viewed as a victory for industry and state permitting authorities because EPA has acknowledged that the Final Guidance, standing alone, has no legal effect. Additionally, in recent months, the state of Kentucky and EPA have been working cooperatively to resolve both individual KPDES permit objections and to work toward approval of the recently issued KPDES Coal General Permit. More information on the Coal General Permit is available in this issue of the Environmental Letter.

OSM Considering Regulation of NOx Emissions from Coal Mines

By R. Clay Larkin, Lexington Office

The federal Office of Surface Mining Reclamation and Enforcement (OSM) announced that it is considering issuing regulations under the Surface Mining Control and Reclamation Act (SMCRA) that would prohibit the production of visible nitrogen oxide (NOx) emissions during blasting at surface coal mine operations. OSM is considering this rulemaking in response to a petition filed with the agency by Wild Earth Guardians on April 14, 2014.

In their petition, Wild Earth Guardians allege that existing regulations do not adequately address NOx emissions from blasting at coal mines, primarily in the Powder River Basin area. Wild Earth Guardians alleges that this blasting creates orange and red clouds of NOx emissions that exceed federal health and environmental standards. OSM published notice in the Federal Register on July 25, 2014 soliciting comment.
on the petition. If OSM decides to accept the petition, it would institute formal rulemaking procedures.

The petition seeks to have OSM create regulatory performance standards under 30 CFR Part 816 that would require operators to conduct blasting in such a manner as to prevent visible NO\textsubscript{x} emissions, and require operators to visually monitor all blasting activity and report any instances of visible NO\textsubscript{x} emissions to regulatory authorities within 24 hours. Although the petition cites blasting in the Powder River Basin as the basis for the need for regulation, if OSM adopts the federal standards, it can be expected that all coal-mining states would eventually be required to adopt similar standards into their state coal mining regulatory programs.

Visible dust emissions from coal mines are already subject to some regulation under SMCRA, as well as under federal and state Clean Air Act standards designed to prevent “fugitive emissions” from crossing property boundaries. However, Wild Earth Guardians asserts that the emission of NO\textsubscript{x} from these Powder River Basin operations is not adequately addressed by existing regulations.
### Regulatory Update

**Status of Pending Changes to State Environmental Regulations**

*By Robin B. Thomerson, Lexington Office*

#### Kentucky

<table>
<thead>
<tr>
<th>REGULATION(S)</th>
<th>DESCRIPTION</th>
<th>STATUS</th>
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<tbody>
<tr>
<td>401 KAR 8:200 401 KAR 8:300</td>
<td>Amendments adopting federal requirements relating to microbial contaminants in drinking water and allowable lead levels in plumbing used for drinking water distribution.</td>
<td>Proposed amendments filed July 15, 2014. Public hearing scheduled for Aug. 28, 2014. Written public comments accepted through Sept. 2, 2014. 401 KAR 8:200 – comments received; amended regulation and SOC issued. 401 KAR 8:300 – no comments received. Regulations currently scheduled for October meeting of ARRS.</td>
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Abbreviations:  
SOC: Statement of Consideration  
ARRS: Administrative Regulation Review Subcommittee of the General Assembly

#### Indiana

Pending changes to Indiana environmental regulations can be found on IDEM’s “Rules in Progress” website located at [http://www.in.gov/idem/4695.htm](http://www.in.gov/idem/4695.htm).