



SMG Reg Watch

January 2013 / Scott R. Smith and Kori J. Andrews

Reg Watch is a periodic summary of regulations that we are currently tracking. The regulations we watch address energy, environmental, health, safety, educational issues relating to sustainability and public utilities.

This is not an all encompassing list of all regulations being considered at the state or federal level. Contact me if you want to add additional issues, need copies of the proposed or final regulations or have questions about these or other regulations you've heard about.

DO YOU KNOW SOMEONE WHO WANTS TO RECEIVE THESE UPDATES?

Contact us at scottr.smith@smithmanage.com.

QUESTIONS, COMMENTS, ADDITIONAL INFORMATION

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Scott's Thoughts

In last month's Reg Watch, I highlighted the Kentucky Energy and Environmental Cabinet's proposed Surface Water Quality Standards. These regulations were deferred in both December and January's meeting of the Administrative Regulations Review Subcommittee. At issue continues to be the proposed definition of "eutrophication and how this definition is intertwined into the Surface Water Quality Standards. Once decided, this regulation will affect agriculture, waste water treatment plants and their rate payers, the development community and others. The regulations are scheduled to be considered on February 11th.

At the federal level, EPA has announced their legislative priorities for this fall. Water Quality continues to be at the forefront of EPA's agenda. Further, EPA is requesting public comment on their priority enforcement areas for 2014-16. These enforcement areas include CAFOs, municipal infrastructure issues, and energy extraction concerns.

More information about each of these topics and additional environmental issues that have arisen this month are highlighted below.

Kentucky Regulations Under Consideration February 11, 2013

The following administrative regulations were deferred to the February 11, 2013, meeting of the Subcommittee:

ENERGY AND ENVIRONMENT CABINET: Department for Environmental Protection: Division of Water: Water Quality

Water Quality Standards

[401 KAR 10:001](#). Definitions for 401 KAR Chapter 10. (Not Amended After Comments)(Deferred from December)

[401 KAR 10:026](#). This regulation applies the designated uses described in 401 KAR 10:031 to the surface waters of the Commonwealth. (Not Amended After Comments) (Deferred from December). It also makes all surface waters subject to the general criteria specified in 401 KAR 10:031, Section 2.

[401 KAR 10:030](#). This regulation and 401 KAR 10:001, 10:026, 10:029, and 10:031 establish procedures to protect the surface waters of the Commonwealth, and thus protect water resources. It establishes a methodology to implement the antidegradation policy contained in 401 KAR 10:029 by establishing procedures to control water pollution in waters affected by that policy. (Not Amended After Comments) (Deferred from December).

[401 KAR 10:031](#). This regulation and 401 KAR 10:001, 10:026, 10:029, and 10:030 establish procedures to protect the surface waters of the Commonwealth, and thus protect water resources. This regulation establishes water quality standards that consist of designated legitimate uses of the surface waters of the Commonwealth and the

associated water quality criteria necessary to protect those uses. These water quality standards are minimum requirements that apply to all surface waters in the Commonwealth of Kentucky in order to maintain and protect them for designated uses. These water quality standards are subject to periodic review and revision in accordance with the Clean Water Act, 33 U.S.C. 1251-1387, 40 C.F.R. 131, and KRS Chapter 224. (Amended After Comments) (Deferred from December).

Federal Regulation Review

EPA, Effluent Limitations Guideline Standards for CAFOs.

Section 610 Review of NPDES Permit Regulation and Effluent Limitations Guidelines Standards for CAFOs

Extension of public comment period: On October 31, 2012 the EPA published a request for comments on a Regulatory Flexibility Act section 610 review titled, Section 610 Review of NPDES Permit Regulation and Effluent Limitations Guidelines Standards for Concentrated Animal Feeding Operations (CAFOs). As initially published in the Federal Register, written comments were to be submitted to the EPA on or before December 31, 2012 (a 60-day public comment period). Since publication, the EPA has received a request for additional time to submit comments. Therefore, the EPA is extending the public comment period for 60 days until March 1, 2013.

DATES: The public comment period for the review published October 31, 2012 (77 FR 65840) is being extended for 60 days to March 1, 2013 in order to provide the public additional time to submit comments and supporting information.

EPA, Fall 2013 Regulatory Agenda:

Semiannual regulatory flexibility agenda and semiannual regulatory agenda

Semiannual regulatory agenda: The Environmental Protection Agency (EPA) publishes the semiannual regulatory agenda online (the e-Agenda) at <http://www.reginfo.gov> and at www.regulations.gov to update the public about:

Regulations and major policies currently under development; reviews of existing regulations and major policies; and rules and major policy makings completed or canceled since the publication of the last agenda.

EPA, Release of Draft Document Related to the Review of the National Ambient Air Quality Standards for Lead

Availability of draft documents for public comment: On or about January 8, 2013, the Office of Air Quality Planning and Standards (OAQPS) will make available for public review the draft document titled, *Policy Assessment for the Review of the Lead National Ambient Air Quality Standards, External Review Draft* (PA). This document was prepared as part of the current review of the national ambient air quality standards (NAAQS) for lead (Pb).

DATES: Comments should be received on or before February 4.

EPA, Approval and Promulgation of Implementation Plans; Kentucky; 110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour

Ozone National Ambient Air Quality Standards

Proposed rule: EPA is proposing to approve in part, conditionally approve in part, and disapprove in part, the July 17, 2012, State Implementation Plan (SIP) submission provided by the Commonwealth of Kentucky, through the Division of Air Quality (DAQ) of the Kentucky Energy and Environment Cabinet. Kentucky DAQ submitted the July 17, 2012, SIP submission as a replacement to its original September 8, 2009, SIP submission. Specifically, this proposal pertains to the Clean Air Act (CAA or Act) requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS) infrastructure SIP. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an "infrastructure" SIP. Kentucky DAQ made a SIP submission demonstrating that the Kentucky SIP contains provisions that ensure the 2008 8-hour

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ozone NAAQS are implemented, enforced, and maintained in the Commonwealth (hereafter referred to as “infrastructure submission”). EPA is now proposing three related actions on Kentucky DAQ’s infrastructure SIP submission. First, EPA is proposing to determine that Kentucky DAQ’s infrastructure submission, provided to EPA on July 17, 2012, satisfies certain required infrastructure elements for the 2008 8-hour ozone NAAQS. Second, with respect to the infrastructure requirements related to specific prevention of significant deterioration (PSD) requirements, EPA is proposing to approve, in part and conditionally approve in part, the infrastructure SIP submission based on a December 19, 2012, Kentucky DAQ commitment to submit specific enforceable measures for approval into the SIP to address specific PSD program deficiencies. Third, EPA is proposing to disapprove Kentucky DAQ’s infrastructure SIP submission with respect to certain interstate transport requirements for the 2008 8-hour ozone NAAQS because the submission does not address the statutory provisions with respect to the relevant NAAQS and thus does not satisfy the criteria for approval. The CAA requires EPA to act on this portion of the SIP submission even though under a recent court decision (which is not yet final as EPA has requested rehearing), Kentucky DAQ was not yet required to submit a SIP submission to address these interstate transport requirements. Moreover, under that same court decision, this disapproval does not trigger an obligation for EPA to promulgate a Federal Implementation plan (FIP) to address these interstate transport requirements.

DATES: Written comments must be received on or before February 7, 2013.

U.S. Army Corps of Engineers, [Nationwide Permit Program](#)

Final rule: The U.S. Army Corps of Engineers is amending its nationwide permit regulations so that district engineers can issue nationwide permit verification letters that expire on the same date a nationwide permit expires. This amendment will provide regulatory flexibility and efficiency, by allowing district engineers to issue nationwide

permit verifications that are valid for the same period of time a nationwide permit is in effect. We are also amending these regulations to reflect the 45-day pre-construction notification review period that has been in effect for the nationwide permit “preconstruction notification” general condition since June 7, 2000.

DATES: *Effective Date:* February 27, 2013.

[EPA, Public Comment on EPA’s National Enforcement Initiatives for Fiscal Years 2014-2016](#)

Notice of public comment period: EPA is soliciting public comment and recommendations on national enforcement initiatives to be undertaken in fiscal years 2014–2016. EPA selects these priority areas every three years in order to focus federal resources on the most important environmental problems where noncompliance is a significant contributing factor and where federal enforcement attention can make a difference. For the FY 2011–2013 time period, the U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, has six national enforcement initiatives. These initiatives are (1) Municipal Infrastructure—addressing sewage discharges from combined sewer systems, sanitary sewer systems, and municipal separate storm sewer systems; (2) Mineral Processing—addressing hazardous waste at phosphoric acid facilities and high risk mineral processing sites; (3) New Source Review—controlling emissions from coal fired utility sector, cement plants, glass plants, and acid production plants; (4) Air Toxics—addressing toxic emissions from high risk facilities by examining leak detection and repair (LDAR), flares, and excess emission sources; (5) Energy Extraction—addressing land-based natural gas extraction facilities, including corporate-wide evaluations; and (6) Concentrated Animal Feeding Operations—addressing animal waste discharges from large animal feeding facilities. For more information on the current initiatives, full descriptions can be found on our Web site: <http://www.epa.gov/compliance/data/planning/initiatives/index.html>. In addition to these sector-based

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approaches, EPA could choose to focus a national initiative on a strategic area that would improve the Agency's ability to conduct its enforcement and compliance program. For example, EPA is investing in a new approach called Next Generation Compliance to dramatically improve compliance by, among other things, employing advances in emissions monitoring and information technology; expanding transparency by making information publicly available. This availability of information will empower communities to play an active role in compliance oversight and improve the performance of both the government and regulated entities. The public is invited to comment on extending the current six national enforcement initiatives for the 2014–2016 cycle. The public is also invited to propose new sectors or other important strategic areas for consideration. Commenters should keep in mind the Agency's resource constraints, given that final decisions will need to consider the Agency's funding level. Final selection will be incorporated into the EPA Office of Enforcement and Compliance Assurance Final National Program Manager Guidance (that provides national program direction for all EPA regional offices) to be released in the Spring 2013. EPA will consider these comments as it moves forward in the decision-making process, but will not respond to all comments received.

DATES: Comments must be received on or before February 27, 2013.

[EPA, National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines](#)

Final rule: The EPA is finalizing amendments to the national emission standards for hazardous air pollutants for stationary reciprocating internal combustion engines. The final amendments include alternative testing options for certain large spark ignition (generally natural gas-fueled) stationary reciprocating internal combustion engines, management practices for a subset of existing spark ignition stationary reciprocating internal combustion engines in sparsely populated

areas and alternative monitoring and compliance options for the same engines in populated areas. The EPA is establishing management practices for existing compression ignition engines on offshore vessels. The EPA is also finalizing limits on the hours that stationary emergency engines may be used for emergency demand response and establishing fuel and reporting requirements for certain emergency engines used for emergency demand response. The final amendments also correct minor technical or editing errors in the current regulations for stationary reciprocating internal combustion engines.

DATES: This final rule is effective on April 1, 2013. The incorporation by reference of certain publications listed in this final rule is approved by the Director of the Federal Register as of April 1, 2013.

[EPA, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers and Process Heaters](#)

Final rule; notice of final action on reconsideration: In this action the EPA is taking final action on its reconsideration of certain issues in the emission standards for the control of hazardous air pollutants from new and existing industrial, commercial, and institutional boilers and process heaters at major sources of hazardous air pollutants, which were issued under section 112 of the Clean Air Act. As part of this action, the EPA is making technical corrections to the final rule to clarify definitions, references, applicability and compliance issues raised by petitioners and other stakeholders affected by this rule. On March 21, 2011, the EPA promulgated national emission standards for this source category. On that same day, the EPA also published a notice announcing its intent to reconsider certain provisions of the final rule. Following these actions, the Administrator received several petitions for reconsideration. After consideration of the petitions received, on December 23, 2011, the EPA proposed revisions to certain provisions of the March 21, 2011, final rule, and requested public comment on several provisions of the

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final rule. The EPA is now taking final action on the proposed reconsideration.

DATES: The May 18, 2011 (76 FR28661), delay of the effective date revising subpart DDDDD at 76 FR 15451 (March 21, 2011) is lifted January 31, 2013. The amendments in this rule to 40 CFR part 63, subpart DDDDD are effective as of April 1, 2013.

Federal Courts Review

Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al. (Certiorari to the US Court of Appeals for the 9th Circuit, Argued 12/4/2012, Decided 01/08/2013):

Held: The flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a “discharge of a pollutant” under the CWA. See *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U. S. 95, 109– 112 (holding that the transfer of polluted water between “two parts of the same water body” does not constitute a discharge of pollutants under the CWA). The Ninth Circuit’s decision cannot be squared with this holding.

The NRDC and Baykeeper alternatively argue that, based on the terms of the District’s NPDES permit, the exceedances detected at the monitoring stations sufficed to establish the District’s liability under the CWA for its upstream discharges. This argument, which failed below, is not embraced within the narrow question on which certiorari was granted. The Court therefore does not address it. (673 F. 3d 880, reversed and remanded.)

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