



SMG Reg Watch

October 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

Scott R. Smith, scottr.smith@smithmanage.com or koria@smithmanage.com

Scott's Thoughts

Federal regulatory issues were relatively sparse this month because of the government shut-down. However, there are several issues of note.

First, The U.S. Fish & Wildlife Service finalized and published a [rule](#) to protect critical habitat for the Fluted Kidneyshell. Critical watershed habitat has been designated for the following Kentucky streams & associated counties:

- Horse Lick Creek (Rockcastle and Jackson);
- Middle Fork Rockcastle River (Jackson);
- Rockcastle River (Pulaski, Laurel and Rockcastle);

- Buck Creek (Pulaski)
- Rock Creek (McCreary)
- Little South Fork Cumberland River (McCreary and Wayne)

Click [here](#) for a map.

The Kentucky Division of Water can now list these streams or stream segments as Outstanding State Resource Waters (OSRW). Those are surface waters designated by the Energy and Environment Cabinet pursuant to [401 KAR 10:031](#), Section 8, and includes certain unique waters of the Commonwealth, including those with ***federally threatened or endangered species***. What's interesting about KDOW's listing process is they don't have to public notice these changes. Of course they would be listed on the next addition of the 303(d) and 305(b) lists that come out every two years.

Another regulatory development is the withdrawal of the All Appropriate Inquiry Rule. This rule would have allowed the additional use of a new technical standard, ASTM E1527-13 to meet the requirements for performing "all appropriate inquiry" before purchasing real estate. Reasons for the withdrawal include difficulty in implementing, conflicting standards, and increased costs. In some cases there was a conflict between identification of recognized environmental conditions. More information on the withdrawal of this standard can be found below.

Energy issues continue to be important on a local and federal level. Ohio was one of the first states to get out in front with energy efficiency and renewable energy standards and programs

in 2008. Apparently the state is having problems meeting the aggressive programs that were instituted. This year Senator Bill Seitz (R-Cincinnati) has introduced Senate Bill 58 to overhaul the state's energy standards and programs. The Bill proposed several changes, some of which include:

- Broadening what "counts" as an energy efficiency measure;
- Creating a new opt-out program for large energy users-allowing them to forego surcharges directed toward funding grants for energy efficiency projects;
- Placing a dollar-amount cost cap, in addition to the percentage cost cap, on the utilities' required annual spending on renewable energy sources;
- Removing a provision requiring a utility to purchase half of its renewable energy from Ohio producers.

A House Bill on the same topic is expected soon. Stay tuned.

Elsewhere in energy issues, solar prices are falling. The median price for residential and commercial solar systems installed in 2012 was \$5.30 a watt for systems of up to 10 kilowatts in size, \$4.90 a watt for systems from 10 to 100 kilowatts and \$4.60 a watt for larger systems. Prices fell by another 10-15% during the first six months of 2013.

And finally, Senator Tom Harkin (D-IA) introduced S. 1563 that would create a renewable fuel pipeline loan guarantee program, make an ethanol pump installation grant program and instruct the Energy

Department to encourage the installation of at least one ethanol pump at every fueling station by 2022.

Court cases remain important in environmental regulation. This month, a federal court has issued a memorandum opinion on a lawsuit filed by several environmental groups, including Kentuckians for the Commonwealth. The lawsuit seeks to force EPA to promulgate a final coal ash rule. In the decision, the DC Circuit Court gave EPA 60 days to file a "proposed deadline for its compliance with its obligation to review and revise if necessary...regulations concerning coal ash." The case is Appalachian Voices, et al. v. EPA (Docket No. 1:12-cv-00523 RBW).

EPA has not indicated when it expects to issue a final coal ash disposal rule, but observers believe it will be issued in the first half of 2014.

Elsewhere, On Tuesday October 15, 2013, the Supreme Court agreed to review whether EPA to an unreasonable leap by determining that its regulation of greenhouse gas emissions from new motor vehicles automatically triggered a statutory requirement for EPA to regulate GHG emissions from stationary sources.

With the Court's inconsistent and unusual dealings with environmental issues, think Rapanos-wetlands and Water's of the US, the original greenhouse gas decision-the tailpipe rule and their decision on Obamacare. All of these were very unusual and surprising decisions. It's anybody's guess what they will do with this issue.

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax



A decision in EPA's favor would allow the agency to continue their programs uninterrupted. The opposite decision could have a significant ripple effect. For example the Tailoring Rule, EPA's automatic GHG permitting requirements, would no longer be in effect. What would happen to facilities that have been permitted under the Tailoring Rule? It would certainly impact project planning, construction schedules and financing.

This may be where the President's public disdain for the Court may come back to hurt him.

Along the same lines, On October 28th, Democratic Senator Joe Manchin (W.Va.) and Republican House Representative Ed Whitfield (Ky.) released a discussion draft bill intended to limit the EPA's ability to set greenhouse gas emission standards for fossil fuel-fired power plants. The House Energy and Commerce subcommittee that Rep. Whitfield chairs will hold a legislative hearing on the discussion draft on November 14th and hopes to finish consideration of the bill before this session of Congress concludes.

State Regulation Review

The following administrative regulation was deferred from the September 2013 meeting of the Subcommittee:

**ENERGY AND ENVIRONMENT CABINET:
Department for Environmental Protection:**

Lexington
1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville
1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax

Division of Water: Water Quality Standards:
[401 KAR 10:030](#). (not amended after comments) (Deferred from December) Antidegradation policy implementation methodology. This administrative regulation 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.

Federal Regulation Review

Water

EPA, [Extension of Comment Period for the NPDES Electronic Reporting Rule](#)

Proposed rule; extension of comment period. Protection Agency is extending the comment period for the NPDES Electronic Reporting Rule, published on July 30, 2013. EPA is soliciting public comment on a new regulation that would require electronic reporting for current paper-based NPDES reports. This action will save time and resources for permittees, states, tribes, territories, and EPA while improving compliance and providing better protection of the Nation's waters. The proposed Clean Water Act regulation would require permittees and regulators to use existing, available information technology to electronically report information and data related to the NPDES permit program in lieu of filing written reports. In response to requests from stakeholders, this action extends the comment period for 45 days.

DATES: Comments on the preliminary plan published on July 30, 2013 (78 FR 46006), will



be accepted through December 12, 2013. Comments provided electronically will be considered timely if they are submitted by 11:59 p.m. Eastern Time on December 12, 2013.

EPA, [Best Practices for Continuous Monitoring of Temperature and Flow in Wadeable Streams](#)

Notice of public comment period and letter peer review. EPA is announcing a 30-day public comment period for the draft document titled, “Best Practices for Continuous Monitoring of Temperature and Flow in Wadeable Streams” (EPA/ 600/R-13/170). The EPA also is announcing that either ERG or Versar, EPA contractors for external scientific peer review, will select an independent group of experts to conduct a letter peer review of the draft document. The document was prepared by the National Center for Environmental Assessment (NCEA) within EPA’s Office of Research and Development. The report describes best practices for the deployment of continuous temperature and flow sensors in wadeable streams. This document addresses questions related to equipment needs, configuration, placement, installation techniques, data retrieval, and data processing. EPA is releasing the draft report for the purposes of public comment and peer review. The draft document is available via the Internet on the NCEA home page under the Recent Additions and the Data and Publications menus at www.epa.gov/ncea. This draft report is not final as described in EPA’s information quality guidelines, and does not represent and should not be construed to represent Agency policy or views. EPA intends to forward the public comments that are submitted in accordance with this notice to the

external peer reviewers for their consideration during the letter review. When finalizing the draft document, EPA intends to consider any public comments that EPA receives in accordance with this notice.

DATES: The 30-day public comment period begins October 31, 2013, and ends December 2, 2013. Technical comments should be in writing and ends December 2, 2013. Technical comments should be in writing and must be received by EPA by December 2, 2013.

Other

EPA, [Amendment to Standards and Practices for All Appropriate Inquiries](#)

Withdrawal of direct final rule. Because EPA received adverse comment, we are withdrawing the direct final rule for the Amendment to Standards and Practices for All Appropriate Inquiries published on August 15, 2013.

DATES: Effective October 29, 2013, EPA withdraws the direct final rule published at 78 FR 49690, on August 15 2013.

OSHA, [Occupational Exposure to Crystalline Silica; Extension of Comment Period; Extension of Period To Submit Notices of Intention To Appear at Public Hearings; Scheduling of Public Hearings](#)

Proposed rule; extension of comment period; extension of deadline for submitting notices of intention to appear at public hearings; scheduling of public hearings. The Occupational Safety and Health Administration (OSHA) is extending the deadline for submitting comments on the Notice of Proposed Rulemaking (NPRM) on Occupational Exposure

Lexington
1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville
1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax



to Crystalline Silica for an additional 47 days and extending the deadline for submitting notices of intention to appear at its informal public hearings for an additional 30 days. OSHA also is delaying the start of the public hearings by two weeks.

DATES: *Written comments.* Written comments on the NPRM must be submitted (postmarked, sent, or received) by Monday, January 27, 2014. *Informal public hearings.* The Agency plans to hold informal public hearings beginning on Tuesday, March 18, 2014, in Washington, DC. OSHA expects the hearings to last from 9:30 a.m. to 5:30 p.m., local time; a schedule will be released prior to the start of the hearings. The exact daily schedule may be amended at the discretion of the presiding administrative law judge (ALJ). If necessary, the hearings will continue at the same time on subsequent days. Peer reviewers of OSHA's Health Effects Literature Review and Preliminary Quantitative Risk Assessment will be present in Washington, DC to hear testimony on the second day of the hearing, March 19, 2014; see Section XV of the NPRM preamble for more information on the peer review process (78 FR 56274, 56440–56442; September 12, 2013). *Notice of intention to appear at the hearings.* Interested persons who intend to present testimony or question witnesses at the hearings must submit (transmit, send, postmark, deliver) a notice of their intention to do so by December 12, 2013. The notice of intent must indicate if the submitter requests to present testimony on March 19, 2014, in the presence of the peer reviewers. *Hearing testimony and documentary evidence.* Interested persons who request more than 10 minutes to present testimony, or who

intend to submit documentary evidence, at the hearings must submit (transmit, send, postmark, deliver) the full text of their testimony and all documentary evidence by January 27, 2014. See Section XV of the NPRM preamble for details on the format and how to file a notice of intention to appear, submit documentary evidence at the hearing, and request an appropriate amount of time to present testimony (78 FR 56274, 56440–56442; September 12, 2013).

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax

