

WYATT

ENVIRONMENTAL NEWS

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Editorial Contents

Wyatt Environmental News, a periodic publication of Wyatt, Tarrant & Combs, LLP, is intended to inform its readers of the latest environmental developments in Kentucky and the surrounding area. Wyatt, Tarrant & Combs, LLP hopes that the information will be helpful to the reader and welcomes suggestions as to how the publication might be improved.

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Wyatt Environmental News is edited by Lloyd Cress, a member of Wyatt's Natural Resources & Environmental Practice and former Deputy Secretary of the Kentucky Environmental and Public Protection Cabinet.

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Wyatt's Environmental Law Practice



is a team of over 20 lawyers, many of whom have helped clients for more than 30 years meet challenges and seize opportunities created by the incredible expansion of environmental law that has occurred over this same period.

Several members of the team began careers with Kentucky's environmental agencies and helped fashion early laws and policies that protect human health and the natural environment. They continue to influence developments in this area today. Collectively, this team has experience with every area of environmental law, and its members include a former Deputy Secretary of Kentucky's Environmental and Public Protection Cabinet, former General Counsel for Chevron's global mining subsidiary, former Senior Environmental Counsel for General Electric Company's Consumer & Industrial business, and former General Counsel for Cumberland Surety Insurance Company. Regular participation in bar and trade association activities keeps the team on the cutting edge of new developments, and able to effectively convey client perspectives in legislative and rulemaking proceedings. Their breadth and depth of experience

enables the Firm to provide clients with practical and creative solutions to their problems.

Having respected reputations with environmental regulators, this team effectively communicates client perspectives to appropriate government decision makers and often resolves matters by settlement. Partnering with the litigation team in this Firm, some of whom are members of the Environmental Team and focus almost entirely on environmental disputes, we are extremely effective in administrative hearings and judicial proceedings when that is required to obtain results or to defeat unmerited claims. Furthermore, with offices located in major cities in Kentucky, Tennessee, Indiana, Mississippi and Colorado, we are well positioned to handle matters throughout the region without the cost of additional local counsel.



USEPA PROPOSES PM2.5 ATTAINMENT/NONATTAINMENT DESIGNATIONS FOR KENTUCKY

On August 19, USEPA announced its proposed attainment/nonattainment designations of counties throughout the country including Kentucky for the 24-hour ambient air quality standard for fine particulates (PM2.5) adopted by the agency in 2006. The federal action responded to recommendations submitted by Kentucky in late 2007 and triggers a public comment period for the state and interested parties that will culminate in final federal action by December 18, 2008. The final federal determination will have significant consequences for PM2.5 emission sources in those areas designated nonattainment since state implementation plans will have to be developed to reduce emissions from existing sources and new and modified major sources will be subject to additional restrictions.

USEPA's attainment/nonattainment proposal deviated substantially from the 2007 recommendations of the Kentucky Division for Air Quality (DAQ). The DAQ recommendation was rendered based upon ambient air quality data accumulated in the 2004-2006 timeframe during which all ambient air quality monitors in the state reflected compliance with USEPA's 24-hour PM2.5 standard. Accordingly, DAQ recommended that all Kentucky counties be designated as attainment areas.

In contrast to DAQ's recommendation, USEPA's August 19th proposal was based upon ambient air quality data accumulated in the 2005-2007 timeframe and considered the following factors rather than merely actual monitored data:

- pollutant emissions
- air quality data
- population density and degree of urbanization
- traffic and commuting patterns
- growth
- meteorology
- geography and topography
- jurisdictional boundaries
- level of control of emission sources

Major influences on USEPA's proposed action were the boundaries of metropolitan statistical areas and the location of electric generating units. Based upon these additional factors and considering 2005-2007 data in lieu of 2004-2006 data, USEPA proposed that the following Kentucky counties be designated nonattainment for the 24-hour PM2.5 standard:

- Jefferson
- Bullitt
- Boone
- Kenton
- Campbell
- Boyd
- Lawrence (partial)
- Muhlenberg
- McCracken

USEPA did not recommend nonattainment designation for a number of other counties including Greenup, Hardin, Christian, Graves and Livingston that are near the counties proposed for nonattainment status and within the same metropolitan statistical area. The number of counties proposed for nonattainment designation in Kentucky exceeded those proposed for nonattainment designation in all other states in USEPA Region IV. The only other states in the southeast region with counties proposed for nonattainment designation for PM2.5 were Tennessee (8 counties) and Alabama (3 counties).

On a related issue, USEPA considered and rejected requests that certain air quality data accumulated in Jefferson County and McCracken County be removed from the ambient air quality data base because the monitored data had been affected by exceptional circumstances including fireworks displays and forest fires. USEPA said that the information submitted in support of the exceptional circumstances request did not demonstrate entitlement to relief.



FEDERAL APPELLATE COURT RULES ON KENTUCKY'S CLEAN WATER ACT ANTIDegradation PROGRAM

One of Kentucky's most vigorously contested and longest running environmental conflicts involves the implementation of the Clean Water Act antidegradation program. For more than twenty years, environmental groups and business organizations have disputed the legal and technical requirements of the program and the manner in which they have been incorporated into Kentucky's water quality program. Much of the uncertainty regarding Kentucky's antidegradation program was eliminated when USEPA approved the state's antidegradation program requirements in early 2005. A great deal of the remaining uncertainty was resolved on September 3rd when the United States Court of Appeals for the 6th Circuit rendered a decision upholding USEPA's approval of the basic structure of Kentucky's Clean Water Act antidegradation program but vacated and remanded to the federal agency for further consideration its approval of certain exemptions from applicability of the program. The decision (*Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466) reversed in part the decision of the United States District Court for the Western District of Kentucky which had upheld in its entirety USEPA's approval of the Kentucky program. The legal challenge to USEPA's approval of Kentucky's antidegradation program was raised by the Kentucky Waterways Alliance, the Sierra Club, Kentuckians for the Commonwealth and the Floyds Fork Environmental Association while the Commonwealth of Kentucky, the Kentucky Coal Association, Associated Industries of Kentucky (now Kentucky Association of Manufacturers), the Kentucky Chamber of Commerce and the Kentucky League of Cities all intervened in support of USEPA's action.

Under the Clean Water Act antidegradation program as outlined in USEPA's regulations, states must adopt and implement policies requiring, among other things, that, when the quality of waters exceeds levels necessary to

support propagation of aquatic life and recreational use, that quality shall be maintained and protected unless the state finds that allowing lower water quality is necessary to accommodate important social and economic development. The practical effect of the Clean Water Act antidegradation program is to require new and expanded discharges to waters having quality better than required by the standards to demonstrate the necessity for the discharge and the social and economic benefit to be derived from the proposed activity prior to the authorization of the new or expanded discharge.

Kentucky's implementation of the Clean Water Act antidegradation program has been a matter of debate and conflict for several decades and USEPA's approval of Kentucky's program in 2005 followed the agency's disapproval of parts of the program on several previous occasions. Compliance with the Clean Water Act antidegradation program can pose a significant obstacle for new and expanded business activities and has been the basis of frequent legal challenges to proposed economic development projects in Kentucky.

The threshold issue addressed by the federal appellate court involved identification of those waters having quality better than required by the standards and, therefore, subject to the antidegradation review procedures. Under the Kentucky regulations, waters that fail to meet the standards for any designated use are deemed to be impaired for all uses and are, therefore, not subject to antidegradation review. USEPA approved this aspect of the Kentucky program as a permissible (but not mandatory) interpretation of the federal antidegradation requirements. This interpretation of the antidegradation program requirements was vigorously contested by the environmental organizations who contended that a high percentage of Kentucky's waters

are impaired for one or more designated uses but not for all designated uses and that such waters would, therefore, not be afforded antidegradation protection even for those designated uses for which they are not impaired. The three-judge federal appellate court unanimously upheld USEPA's position on the issue leaving Kentucky's Clean Water Act antidegradation review program applicable only to streams that meet the criteria for all designated uses.

The environmental organizations also challenged the validity of USEPA's approval of exemptions from antidegradation review for specific activities that Kentucky had included in its program regulations. Kentucky's antidegradation program exempts the following activities on the basis that they have a de minimis effect on instream water quality:

- (1) discharges pursuant to stormwater general permits
- (2) domestic sewage discharged from single-family residences
- (3) discharges from concentrated animal feeding operations
- (4) discharges resulting from permit modifications or renewals involving an increase of 20% or less in pollutant loading
- (5) discharges that accept water quality-based permit limitations at 50% of the otherwise allowable level
- (6) domestic sewage discharges that accept special discharge limitations.

Additionally, the Kentucky antidegradation program regulation exempts from review discharges from coal mining operations regulated under the Surface Mining Control and Reclamation Act on the basis that the purpose of the antidegradation program is fulfilled by other regulatory programs including the surface mining program.

The federal appellate court held that USEPA's approval of Kentucky's exemptions from antidegradation review was invalid and remanded the issue to USEPA for further consideration. In regard to the coal-mining exemption, the three-judge panel unanimously held that Kentucky's surface mining program regulations contained no requirement that an antidegradation review be conducted. The court concluded that the separate letter by which the state agency had committed to conduct such a review had no legal force and effect, and did not provide a legal basis for exemption.

In regard to the de minimis exemptions, two of the three judges rejected USEPA's approval on the basis that the agency had failed to consider whether the effect of all of the exemptions, taken as a whole, would have a de minimis effect on water quality. The third judge rejected USEPA's approval of the de minimis exemptions on the basis that a new or expanded discharge could only be considered to have a de minimis effect if it consumed 10% or less of the remaining assimilative capacity of the stream and that all such new and expanded discharges cumulatively should be limited to consumption of 10% of the assimilative capacity of the stream.

In response to the court's remand, USEPA will likely reevaluate its approval of the Kentucky antidegradation program and work with Kentucky's Energy and Environment Cabinet to satisfy the deficiencies identified by the court. Fortunately reconsideration of the exemptions from antidegradation review can be conducted in light of a clearer understanding of the waters subject to the program as a result of the Sixth Circuit Court of Appeals decision. Until such time as USEPA acts on the court's remand, considerable uncertainty will prevail as to the legally applicable Clean Water Act antidegradation program requirements in Kentucky.





KENTUCKY COURT OF APPEALS UPHOLDS AIR PERMIT FOR NEW COAL-FIRED POWER PLANT IN MUHLENBERG COUNTY

Legal proceedings have been underway for more than five years regarding the proposal of Thoroughbred Generating to construct a large new coal-fired power plant in Muhlenberg County, Kentucky. The contested issues moved toward resolution in September when the Kentucky Court of Appeals issued a unanimous decision upholding the permit issued by the Kentucky Division for Air Quality authorizing construction of the facility. The Court of Appeals action (*Commonwealth of Kentucky v. Sierra Club*, 2007-CA-001723-MR) reversed an earlier decision by Franklin Circuit Court which had remanded the Thoroughbred permit to the agency for reconsideration and raised significant issues as to the Division for Air Quality's procedures for issuing prevention of significant deterioration (PSD) permits for construction of new major sources of air pollutants and major modifications of existing sources. The litigation regarding the Thoroughbred permit is part of a larger nationwide struggle over the construction of new coal-fired power generation capacity in the United States.

The most significant issue in the Thoroughbred case involved the manner in which the Division for Air Quality had determined best available control technology (BACT) for the proposed facility and whether the agency should have required evaluation of integrated gasification combined cycle (IGCC) technology. The opinion of the lower court, explaining the basis for its remand, asserted that the Division, in making its BACT decision, could not rely solely on technology in current usage but must anticipate future technological progress. In contrast, the appellate court decision emphasized that present technology must form the basis for the BACT decision and reversed the lower court decision regarding BACT. In its opinion, the appellate court agreed that, in determining BACT, the Division could not limit its technology review to the provisions of permits issued for other facilities but it held that BACT must reflect

technology currently available and that the Division was not required to evaluate IGCC technology.

A second major issue resolved by the Court of Appeals decision involved the procedure utilized by the Division for Air Quality to provide public notice of air quality increment consumption by PSD permits. The Division's public notice of the Thoroughbred permit application had been published in the Muhlenberg County news media and had addressed only the maximum increment consumption which would occur in Muhlenberg County. The lower court reasoned that the consumption of air quality increment by the proposed facility might foreclose further development throughout the region as well as in Muhlenberg County and that the public notice should have provided that information for areas outside of Muhlenberg County. Since the public notice procedures used by the Division for Air Quality in issuing the Thoroughbred permit were the same as those that had been used in issuing the PSD permits for other facilities, the decision of the lower court raised questions as to the procedural validity of PSD permits issued to other facilities. The Court of Appeals decision concluded that the public notice procedures followed by the Division for Air Quality in issuing the Thoroughbred permit afforded adequate opportunity for areas outside of Muhlenberg County to be informed as to the increment to be consumed by the Thoroughbred facility and reversed the decision by Franklin Circuit Court on that issue.

Although the Kentucky Court of Appeals' decision in *Commonwealth v. Sierra Club* helps to resolve the long running controversy as to construction of the Thoroughbred facility, it may not significantly impact the nation wide debate over construction of new coal-fired power plants which now centers on next generation issues such as climate change and control of carbon dioxide emissions.





DIVISION OF WATER REVISES PROPOSED WATER QUALITY STANDARDS

The Kentucky Department for Environmental Protection Division of Water has amended its recently proposed water quality standard revisions in response to public comments. The amended standards along with a statement of consideration responding to public comments were filed with the Legislative Research Commission in mid-September and are scheduled for action by the Administrative Regulation Review Subcommittee at its November meeting. The amended water quality standards could take effect as early as mid-December.

Perhaps the most significant change made by the Division of Water in response to public comments involved the proposed “tiered” approach to criteria for the protection of warmwater aquatic habitat. The Division’s proposal to amend administrative regulation 401 KAR 10:026 to establish a “modified” warmwater aquatic habitat use designation with less stringent criteria for waters that are not capable of meeting full warmwater aquatic habitat standards was vigorously criticized by environmental organizations. In response to the comments the Division withdrew its proposal to establish a modified warmwater aquatic habitat use designation.

The Division did, however, proceed with its proposal to establish a higher tier of warmwater aquatic habitat use protection by redesignating waters classified as exceptional for antidegradation purposes to be outstanding state resource waters. The effect of redesignation of such waters to be outstanding state resource waters will be to impose more stringent dissolved oxygen standards for such waters and to authorize the Division to impose on a case-by-case basis other more stringent criteria to protect the outstanding features of those waters.

The Division of Water received numerous comments from environmental organizations encouraging the Division to amend administrative regulation 401 KAR 10:030 to impose more stringent antidegradation requirements and to incorporate into regulatory form the substance of correspondence between Kentucky and USEPA regarding

Kentucky’s administration of the antidegradation program. The Division declined to address antidegradation issues in this rulemaking in light of the United States Sixth Circuit Court of Appeals decision in *Kentucky Waterways Alliance v. Johnson*, decided on September 3rd (see Article on page 3) which remanded to USEPA a number of the antidegradation issues.

The Division of Water received significant negative comment on its proposed amendment of administrative regulation 401 KAR 10:031 to impose more stringent chloride criteria both as to their technical basis and as to the potential economic impact of the proposed revision. The Division responded to the comments by withdrawing its proposed revisions to the chloride criteria but noted that the agency might revisit the issue in a future review of the water quality standards.

The Division of Water responded favorably to comments suggesting that the regulations expand the bases upon which individual dischargers can obtain variances from criteria because of unattainability of the use and amended 401 KAR 10:031 to provide for such variances. The additional bases for variances include naturally occurring pollutant concentrations, natural intermittent or low flow conditions, dams or other hydrologic modifications that cannot be remedied, and physical conditions related to the natural features of the water that preclude attainment of aquatic life use. Under the regulation, as amended, such variances could be granted as a part of the KPDES permit issuance process.

Finally, the Division withdrew its proposed incorporation by reference of the Ohio River Sanitation Commission’s pollution control standards for the Ohio River. Instead the Division chose to incorporate into 401 KAR 10:031 specific provisions of the interstate agency’s standards to render the state and interstate standards more consistent.

The water quality standard regulations are subject to further change when they are considered by the legislature’s Administrative Regulations Review Subcommittee and its Interim Joint Committee on Agriculture and Natural Resources.



KENTUCKY DEP CONTINUES PROGRESS ON PERMIT BACKLOG REDUCTION INITIATIVE

The Kentucky Department for Environmental Protection (DEP) is employing a number of innovative strategies in its continuing effort to address one of the areas of greatest public dissatisfaction with environmental regulatory programs – the failure to act on permit applications in a timely manner. DEP's permit backlog reduction initiative has been underway for approximately two years now and has achieved significant reductions in the permit backlogs in most of its regulatory programs.

Historically, the regulatory program in which the permit backlog has had the greatest adverse impact on the regulated community is in the air quality program. In most of the environmental regulatory programs, permits are required prior to conducting the regulated activity. In contrast, issuance of a permit by DEP's Division for Air Quality is a precondition to the commencement of construction of the regulated facility rather than its operation. Thus, the impact of delays in issuance of air quality permits can be much greater than delays in the issuance of other environmental permits such as wastewater discharge permits which are required prior to operation of regulated facilities.

Fortunately, DEP's Division for Air Quality has been very successful in reduction of its permit application backlog. When the permit backlog reduction initiative began in mid-2006, there were approximately 700 applications for permit actions pending before the Division and more than 70% of the applications had not been processed within the prescribed regulatory time frame (RTF). After employment of a number of innovative measures, including technical review by private contractors, increased use of general permits, and overtime work by Division employees, the Division now has approximately 140 pending permit actions of which less than 15% exceed the RTF.

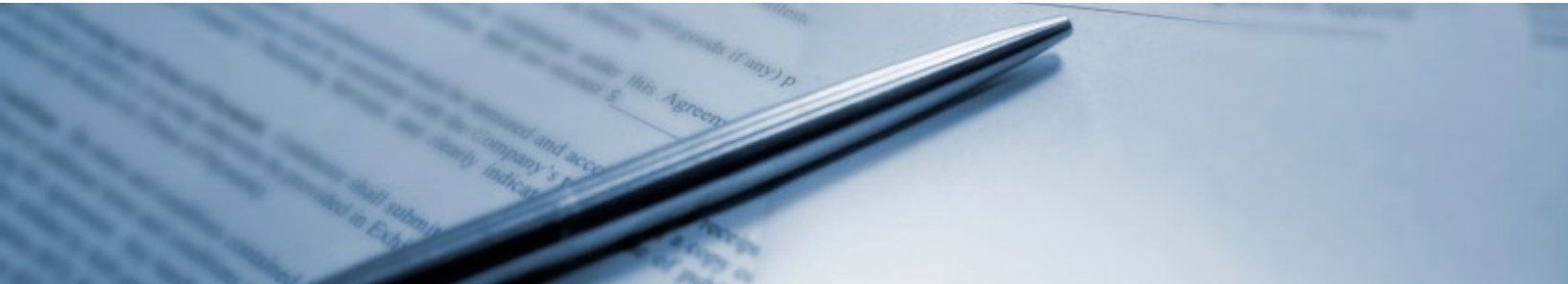
Other DEP regulatory programs have experienced similar success. For example, DEP's Division of Waste Management issues permits for landfills and other solid waste management activities. When the permit backlog reduction initiative commenced, the Division of Waste Management had more than 80 pending permit applications with more than

35% exceeding RTF. By January 2007, the Division had eliminated its permit application backlog and presently the Division has 58 solid waste permit applications pending none of which exceed the RTF.

The Division of Waste Management's hazardous waste permit backlog has proven to be a much more difficult problem to solve. In mid-2006, the Division had approximately 35 hazardous waste permit applications pending of which 8 exceeded RTF. Currently, the number of pending permit actions has been reduced to 14 with 8 still exceeding RTF. The hazardous waste permit applications exceeding RTF generally reflect complex unresolved issues as to the applicability of RCRA program requirements which preclude final action on the permit application.

The Division of Water has also made significant progress in reducing its permit application backlog but has experienced the greatest difficulty in completing all permit actions within the RTF. Several Division of Water programs have either totally eliminated their backlogs or virtually eliminated them. These programs include the Clean Water Act Section 401 water quality certification program, the water withdrawal permit program and the drinking water program. Other Division of Water permit programs (including the stream construction and sewer extension programs) have taken major strides toward addressing their permit backlogs.

The greatest difficulty encountered by the Division of Water (and by DEP as a whole) has been in eliminating the permit application backlog in the KPDES permit program. Despite extraordinary efforts and innovative measures, such as use of outside technical services, and streamlining permit processing procedures, the KPDES permit application backlog remains at an elevated level. The Division of Water is currently devoting much of its effort to the reissuance of general KPDES permits that have expired or will soon expire. This investment of time and effort in general permits seems likely to pay dividends in the future by reducing the number of individual KPDES permits that must be processed thereby contributing to the ultimate success of the permit backlog reduction initiative.



➤ Environmental Happenings

- USEPA has issued a new final rule revising the hazardous waste program definition of solid waste which effectively excludes certain recycled materials from consideration as hazardous wastes. The new rule has not yet been published in the Federal Register but is available on USEPA's website. The new federal rule will take effect 60 days after publication in the Federal Register and should affect Kentucky's hazardous waste program shortly thereafter since Kentucky law requires the state's list of hazardous wastes to be "identical" to the federal list.

- Retirements continue to thin the ranks of experienced DEP personnel. Recent departures include Diana Andrews, Assistant Director of the Division of Air Quality; Lona Brewer, Manager of the Division for Air Quality's Program Planning and Administration Branch; and Tom VanArsdall, Manager of the Division of Water's Water Quality Branch. In the Office of General Counsel Environmental Protection Legal Division, Robin Thomerson, the chief attorney for the Division for Air Quality, is expected to retire by the end of 2008.

- The relocation of DEP personnel to 200 Fair Oaks Drive in Frankfort has been completed. The Division for Air Quality is located on the first floor, the Division of Waste Management is on the second floor and the Division of Water is on the fourth floor. As a part of the relocation, attorneys from the Office of General Counsel Environmental Protection Legal Division have moved to the office areas occupied by the program personnel to whom they provide legal assistance.

- Administrative regulation 401 KAR 9:020 imposing fees for CWA 401 water quality certifications has been approved by the legislative review committees and is now in effect. The regulation was amended to exempt from the fees certifications for certain small projects.

- The Division for Air Quality has filed with the Legislative Research Commission proposed administrative regulation 401 KAR 52:081 which would repeal 401 KAR 52:080. The regulation to be repealed sets emission limitations for approximately 16 sources at levels exempting them from Title V permit obligations. Under the proposal the sources would be given 12 months within which to transition from state-origin permit status to Title V permit status. A hearing on the proposal is scheduled for October 28, 2008.



- USEPA has reissued its multi-sector general NPDES permit for stormwater discharges associated with industrial activity. The permit does not apply in Region IV which will issue its own NPDES permit covering such discharges. The USEPA permit may provide the model for states such as Kentucky that will soon reissue their permits covering discharges from such activities.

- The Division of Water expects to propose reissuance of a number of its KPDES general permits in the near future. The Division proposed reissuance of the general KPDES permit for coal mining in early September but plans to repropose the permit because of certain technical drafting problems. The Division plans to propose reissuance of its general KPDES permits for stormwater discharges from construction and for stormwater discharges associated with other industrial activities before the end of the year. The Division's general KPDES permits for stormwater discharges expired in late 2007 and have been continued in effect by operation of law for facilities having coverage under the permit at the time of their expiration; however coverage under the expired permits does not extend to activities that had not obtained coverage prior to the expiration of the permits.

- Lauren Anderson has been appointed head of the Louisville Metro Air Pollution District. She has served as lead attorney for the agency for a number of years.

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