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November 13, 2009

Mr. A. Stanley Meiburg
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Dear Mr. Meiburg:

In accordance with Clean Water Act section 303(c)(1) and 40 CFR 131.20(a) the Kentucky Energy and Environment Cabinet (the cabinet) is submitting for EPA's approval the Kentucky water quality regulations that were promulgated as part of the Kentucky Division of Water's triennial review process.

Final action was taken on the following Kentucky water quality regulations and these regulations were adopted into law on the following dates:

<u>Chapter</u>	<u>Title</u>	<u>Effective Date</u>
401 KAR 10:001	Definitions for KAR Chapter 10	January 5, 2009
401 KAR 10:026	Designation of uses of surface waters	July 6, 2009
401 KAR 10:029	General provisions	July 6, 2009
401 KAR 10:030	Antidegradation policy implementation methodology	July 30, 2009
401 KAR 10:031	Surface water standards Statement of Consideration	July 6, 2009

The cabinet's primary objectives in this triennial review were: (1) to explore a tiered approach to aquatic life use; (2) to review the current stream designated uses; (3) to update criteria to protect aquatic life and human health; (4) to correct stream segment mile points to reflect National Hydrography Dataset (NHD) at a scale of 1:24,000; and (5) to consider numeric nutrient criteria for wadeable streams and reservoirs. Stakeholder feedback indicated that a tiered approach to aquatic life use required greater consideration by all parties to proceed successfully. Therefore, the cabinet determined not to move forward in this triennial review regarding a tiered approach to aquatic life use.

Significant changes occurred regarding stream designated uses in that all existing and candidate "exceptional" and "reference reach" waters were provided Outstanding State Resource

Water (OSRW) designated use classification under 401 KAR 10:026. Additionally, with collaboration of interested parties and the U.S. Forest Service, the cabinet adopted four stream segments and one lake, with associated wetlands, as Outstanding National Resource Waters. Where appropriate, the cabinet updated numeric criteria consistent with U.S. EPA's national recommended criteria. The cabinet also corrected stream segment mile points to reflect NHD. Consideration of numeric nutrient criteria was withdrawn from this triennial review due to data gaps that existed in three ecoregions of the Commonwealth, and the need for greater resolution of cause and response relationships linked to trophic state for reservoirs.

In addition, one of the items of review was the previous removal of the warm water aquatic habitat designated use for Paddy's Run in Jefferson County and the primary contact recreation and warm water aquatic habitat designated uses for White Oak Creek in Greenup County. The cabinet determined that the conditions that resulted in the removal of these designated uses had not changed, and that those designated uses still do not apply to these two streams.

The cabinet commenced the triennial review in September 2006, holding meetings with interested stakeholders such as the Kentucky Waterways Alliance, the Kentucky Chamber of Commerce, the Kentucky Association of Manufacturers, the Kentucky League of Cities, the Kentucky Farm Bureau, Agriculture Water Quality Authority, the Cumberland Chapter of the Sierra Club, and the U.S. Forest Service. In addition, a consultation meeting between the cabinet, U.S. EPA Region IV, and U.S. Fish and Wildlife Service was held on September 28, 2006, in accordance with Section 7 of the Endangered Species Act.

The Energy and Environment Cabinet re-codified the water quality standards administrative regulations from 401 KAR Chapter 5 to Chapter 10 in June 2008. Amendments to those administrative regulations were also filed in June 2008. The public comment period began July 1, 2008, and closed on July 31, 2008. In response to comments received, the Cabinet prepared a statement of consideration (SOC) and amended the administrative regulations. Those documents were filed with the Legislative Research Commission (LRC) in September 2008.

Coincident with the 2008 triennial review of Kentucky's water quality standards, the U.S. Sixth Circuit Court of Appeals remanded 401 KAR 5:030 to US EPA Region IV. The triennial review amended regulations were tentatively scheduled to be heard as part of the October 2008 agenda of the Administrative Regulation Review Subcommittee (ARRS). However, the Cabinet requested that consideration of the regulations be deferred each month in an effort to resolve the issues surrounding the remanded antidegradation requirements in 401 KAR 10:030 (formerly 5:030).

The U.S. Sixth Circuit Court of Appeals upheld those parts of the commonwealth's antidegradation regulation that pertained to selection of waters that were afforded Tier II protection and remanded the parts of the regulation that pertained to six categorical exceptions of certain types of discharges from Tier II review. Five of the six exceptions were remanded by the Court on a finding that EPA did not have adequate information to determine that the exempted activities would not create more than *de minimis* degradation. The sixth exception, for discharges from coal mining operations, was remanded because the regulation was at variance with the

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Cabinet's procedures for administering the antidegradation review and the Court determined that EPA had relied on "unenforceable commitments" in its approval of this exception.

The Cabinet convened a workgroup consisting of the parties involved in the antidegradation litigation and other interested parties to resolve the court's remand. After much consideration, the Cabinet removed five of the existing exceptions to Teir II review. In the proposed amendment, the cabinet allows for a *de minimis* exception, which has been approved by the Court, and exceptions that do not authorize any new pollutant discharge beyond that previously authorized and thus the Cabinet believes cannot constitute additional degradation. The Cabinet also identified four categories of discharges for which antidegradation procedures will be addressed in the permits themselves or for which antidegradation requirements are satisfied by alternative protective processes.

All of the water quality regulations except for 401 KAR 10:030 were heard during the May 2009 ARRS meeting and approved. These regulations were referred to the Interim Joint Committee on Natural Resources and the Environment and became effective July 6, 2009.

The amendments to 401 KAR 10:030 were filed with LRC on May 22, 2009, and were heard by the ARRS on June 9, 2009 where they were approved. The regulations were then referred to the Interim Joint Committee on Natural Resources and the Environment and became effective on July 30, 2009.

The statement of the Executive Director of the Cabinet's Office of General Counsel is attached, certifying that the regulations were duly adopted pursuant to Kentucky law.

If there are any issues or questions that arise during your review, please contact Peter Goodmann, Assistant Director of the Division of Water, at (502) 564-3410.

Sincerely yours,



Leonard K. Peters

LKP:ptg

Enclosures