



Commonwealth of Kentucky Energy and Environment Cabinet

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EPA Issues Decision on Kentucky's Antidegradation Policy

Approves major elements of policy, suggests wording changes

FRANKFORT, Ky. – (Nov. 10, 2010) – The U.S. Environmental Protection Agency (EPA) has issued a final decision on Kentucky's Antidegradation Policy Implementation Methodology regulation, which was submitted to EPA on Nov. 13, 2009. In a letter dated Nov. 9, 2010, to the Energy and Environment Cabinet, EPA approved the new and revised antidegradation regulation with the exception of four provisions.

"This is a major step forward for Kentucky in resolving a long-term national and state issue in the protection of the waters of the Commonwealth," said Sandy Gruzesky, Division of Water (DOW) director. "Our antidegradation implementation methodology has been the subject of litigation and national attention since its inception in 1995."

Antidegradation policy is part of the water pollution control program mandated by the Clean Water Act and implemented by the Kentucky DOW. Antidegradation policy is intended to safeguard the surface waters of the Commonwealth for their designated uses, to prevent the creation of new pollution of these waters and to abate existing pollution. A proposal to discharge to high-quality or exceptional waters requires the applicant to conduct an alternatives analysis and a socio-economic demonstration of the need for the discharge.

In its letter, EPA approved many aspects of Kentucky antidegradation regulation, including the addition of five Outstanding National Resources Waters, the addition of 37 new water segments as Outstanding State Resource Waters, and an expanded socioeconomic demonstration and alternatives analysis form including factors to be considered in conducting this analysis.

EPA also determined that the new and revised antidegradation regulation complies with the requirements of the Clean Water Act with the exception of four provisions that require further clarification. In two of the four cited provisions, EPA disapproved Kentucky's regulatory language regarding no-significant-impact discharges because the

regulation did not include specific regulatory wording regarding the cumulative effects of such discharges. In the remaining two cited provisions, EPA cited regulatory wording concerns regarding how Kentucky addresses antidegradation in general permits and in municipal stormwater (MS4) permits. EPA recommended that the agency revise these two provisions in a manner that clearly identifies which antidegradation provisions apply to general permits and MS4 permits and how those requirements will be satisfied.

DOW has been implementing the antidegradation implementation methodology consistent with EPA's recommended revisions. The DOW has been working regularly with EPA and will move expeditiously to amend the antidegradation regulation to resolve the pending issues identified in the EPA letter.

EPA partially approved previous versions of Kentucky's antidegradation implementation methodology regulation in 1997 and 2000, and fully approved Kentucky's antidegradation regulation in 2005. However, the approved 2005 regulation was the subject of litigation, with a decision rendered in September 2008. At that time, the U.S. Sixth Circuit Court of Appeals upheld in part and remanded in part Kentucky's regulation. The court upheld Kentucky's general approach to antidegradation but remanded to EPA some provisions of the regulation, citing concerns regarding the cumulative effects of "no significant impact" exemptions, and EPA's review and approval process for several categories of discharges exempted from antidegradation review.

The most recent antidegradation policy regulation was modified to address the issues remanded by the U.S. Sixth Court of Appeals with input from a stakeholder workgroup that included the parties involved in the litigation. The DOW met with this stakeholder workgroup numerous times to craft a regulation that addressed the concerns of the court and stakeholders. In resolving the court's remand, the Cabinet removed all six exemptions cited in the remand from the regulation and now requires all of those formerly excepted categories of discharges to satisfy antidegradation requirements as a part of the application and permitting process. The process resulted in an amended regulation that became effective on July 30, 2009, after review by two legislative committees. The amended regulation was submitted to EPA for approval in November 2009. EPA is required by federal law to review and approve or disapprove the antidegradation policy.

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