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August 1, 2016

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U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W. 4203M
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2016-0145

RE: 81 FR 31344, National Pollutant Discharge Elimination System (NPDES): Applications and Program Updates (Proposed Rule)

On behalf of the Commonwealth of Kentucky, the Division of Water (Division) respectfully submits the following comments, pursuant to the request for public comment published in the *Federal Register* on May 18, 2016, 81 FR 31344, regarding EPA's proposed amendments to the National Pollutant Discharge Elimination System (NPDES) permitting program.

EPA fails to propose a distinct rule but allows comment on options more appropriate in an advanced notice of rulemaking.[1] As such, states cannot fully evaluate the resource impacts of implementation of the rulemaking, such as additional staffing needs and necessary programmatic needs. EPA also underestimates the cumulative resource implications of this proposed rulemaking[2] along with other recent regulatory changes and proposals, such as the August 2015 Update of the National Water Quality Standards Regulation, §316 Cooling Water Intake Rule, the Steam Electric Rule, the NPDES Electronic Reporting Rule, pesticide permitting, the sufficiently sensitive methods rule, enhanced public notifications for Combined Sewer Overflows, the coal ash rule, the Concentrated Animal Feeding Operations Rule, and the soon to be finalized new Small Municipal Separate Storm Sewer System Remand Rule. This proposed rulemaking would force states to redirect limited resources without a corresponding benefit to the environment and specifically water quality. The Division is concerned that EPA has not conducted a resource assessment to identify staffing and other needs with regards to the NPDES program, nor has EPA proposed any other options that would otherwise reduce the permit backlog. The Division provides the following to the extent that it can comment.

The proposed options would allow EPA to review and object to permits found deficient.[3] However, EPA acknowledges the need for administratively continued permits[4] with its reasons being: 1) the complex analysis necessary to develop NPDES permits, and 2) balancing permits against a number of competing priorities which the agency has limited resources to meet. These reasons persist and are not corrected by

[1] The EPA provides Option 1 and Option 2 for Paragraph (k)(1) of 40 CFR 123.44. 81 FR 31372.
[2] "It is EPA's view that these revisions would generally not result in new or increased workload or information collection by authorized states or the regulated community." 81 FR 31345.
[3] 81 FR 31372.
[4] *In re: Sierra Club, Inc., et al.*, 2013 WL 1955877.

the proposed rule. Instead this proposal seeks comment "on the potential parameters or criteria that EPA could use to more clearly define or limit the scope of this administratively continued objection process..."[5]

EPA proposes to designate certain administratively continued permits as "proposed permits."[6] The proposed new definition expands "proposed permit" to include a final state-issued NPDES permit and allows EPA to designate the permit as a "proposed permit" under 40 CFR 123.44(k). As justification for the proposed changes the EPA maintains that, "[u]nder EPA's existing regulations, there is no mechanism by which to invoke EPA's permit review and objection authority to avoid indefinite delays in permit reissuance."[7] EPA's attempt to revive its objection authority through this proposal could have the practical implication of suspending or revoking a permit. Furthermore, the proposed definitional changes are contrary to the Administrative Procedures Act (APA)[8] which specifically applies to NPDES permits.[9] The APA provisions governing the withdrawal, suspension, revocation, or annulment of permits requires "notice by the agency in writing of the facts or conduct which may warrant the action...and an opportunity to demonstrate or achieve compliance with all lawful requirements."[10] EPA's proposal is an improper attempt to circumvent the process outlined in the APA.

Under this proposal, EPA would have the ability to mandate that proposed permits contain language, conditions, or effluent requirements that EPA has been unsuccessful at developing on a national level, or for which EPA has not initiated rulemaking. Consequently, states may find themselves expending limited resources in developing or defending permit conditions. EPA maintains a Memorandum of Agreement (MOA)[11] with Kentucky regarding the NPDES program, and both agencies participate in the priority permits listing to address permits that are administratively continued. EPA has not demonstrated why the current review process with the states and facilities is insufficient. EPA states that it would expect to exercise this authority sparingly, and only when permits involve "environmental and public health issues, where other means of working with the state to reissue an updated permit have failed".[12] It is difficult to envision when an NPDES permit would not involve environmental and public health issues considering the nature of the program, nor does the vague proposed language establish what "other means of working with the state"[13] would entail before the EPA would implement this provision. The Division believes that this proposal would lead to arbitrary oversight as it is currently written.

Should EPA finalize this rulemaking, states would be left with no other recourse than to pursue litigation of EPA's revised NDPES regulations. If EPA determines to pursue this proposal, at a minimum EPA should make the following revisions in the final rule. First, EPA must establish clear criteria to clarify the circumstance under which EPA would exercise such an extraordinary and inappropriate action to federalize a delegated state permitting action. Additionally, the final rule must include provisions regarding judicial review opportunity for delegated states of any EPA decision or determination to object to an NPDES permit at the time of EPA objection.

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[5] 81 FR 31358.
[6] 81 FR 31356-31358.
[7] 81 FR 31356.
[8] 5 U.S.C. § 558(c).
[9] *Sierra Club, Hawaii Chapter v. City and County of Honolulu,* 415 F.Supp.2d 1119 (D.Hawaii 2005).
[10] 5 U.S.C. §558(c)(1)(2).
[11] National Pollutant Discharge Elimination System Memorandum of Agreement between the Commonwealth of Kentucky and the United States Environmental Protection Agency Region 4, executed February 14, 2008.
[12] 81 FR 31356.
[13] 81 FR 31356.

EPA is proposing to use the objection process to expedite the issuance of new permits for permits that have been administratively continued; however, experience demonstrates that the objection process does not facilitate permit resolutions. In fact, Kentucky has experienced numerous instances of EPA objections of delegated state draft NPDES permits that have taken up to six years for EPA to resolve its objection, with no opportunity for judicial recourse in the interim. Practically, the current permitting process allows EPA to suspend indefinitely the permitting process via a permit objection with no established timetable for final EPA action to take place or judicial recourse for any party to effectuate an EPA action. The objection process is unacceptable and the lack of timeliness in resolving objections runs contrary to EPA's stated intention with this proposed rule to reduce permit backlogs. There is no demonstrated evidence of EPA taking timely action in response to its permit objections that would indicate the proposed NPDES regulation revisions would remedy the issue that EPA identifies as a problem.

The backlog of administratively continued permits is most appropriately addressed by a delegated state NPDES programs rather than an overreach which would federalize administratively continued permits. EPA is clearly and intentionally establishing a regulatory framework to pick and choose permits it wants to federalize based on political motivation and policy agendas, or by selecting permits derived from third party litigation/petition in sue-and-settle cases where the delegated state is not a part of the litigation process.

If EPA desires to effectively address the issue of permit backlog, then EPA should: (1) first demonstrate that EPA can effectively and consistently take timely action themselves on permit actions; (2) EPA must take timely action on updates to applicable effluent guidelines which can and do create permit delays and litigation burdens on delegated states; and (3) EPA must provide states with the sufficient CWA 106 funds to fully implement NPDES programs. Currently, EPA has delegated NPDES program authority to states without providing sufficient federal funding requiring states to fill the funding gap with state funds. This is the case for the majority of delegated state NPDES programs.

In summary, the Division respectfully requests that EPA abandon this specific proposal in its entirety.

40 CFR 122.44 – Establishing limitations, standards, and other permit conditions

Reasonable Potential Analysis (RPA)

The proposed language in 40 CFR 122.44(d)(1)(ii) would require the permitting authority to use procedures that account for "relevant qualitative or quantitative data, analyses, or other information on pollutants or pollutant parameters to assess the need for a water quality-based effluent limitation"[14] (WQBELs) in its' Reasonable Potential Analysis (RPA). The additional language would give EPA significantly greater oversight regarding states' RPA determinations, and EPA's expanded role in that area would be problematic for several reasons.

- The new terms are vague and leave unclear what "qualitative or quantitative data" would be considered "relevant", or what "other information" would be required, or how the permitting authority would use this data to assess the need for a WQBEL.
- The language does not address what policy or procedure would apply in those instances when EPA's opinion of "relevant data" conflicts with that of the delegated state permitting authority.
- EPA may expect delegated state programs to adopt broader use of third-party data, including data that does not meet a reasonable standard for quality-assured data.

[14] 81 FR 31371.

EPA approved Kentucky's current RPA procedures[15] in 2000 in conformance with the 40 CFR 122.44(d). Specifying in federal rule other data considerations is duplicative of 40 CFR 122.44(d) and Kentucky's RPA procedures and therefore, unnecessary. Per the Cabinet's RPA procedures: "the Cabinet shall use procedures which account for existing controls on point and non-point sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity when evaluating whole effluent toxicity, and where appropriate, the dilution of the effluent in the receiving water."[16] There is no provision in 40 CFR 122.44(d) or in local RPA procedures that excludes the use of other available data that is useful and relevant. However, the proposed language provides EPA authority to substitute its judgment for the judgment of the delegated authority. RPA concerns are much better addressed via the permitting comment and objection provisions. It is not appropriate that EPA create an authority to question the RPA process separately from the permitting process.

Under 33 U.S.C. 1342(b), EPA delegated Section 402 permitting authority to Kentucky on September 30, 1983.[17] This delegation provides the state exclusive authority to issue NPDES permits subject only to: 1) EPA's authority to object to a draft permit (33 U.S.C. Section 1342(d)(4)); and 2) EPA's authority to withdraw the state's delegated authority under certain circumstances.[18] Thus, the responsibility of determining reasonable potential (RP) belongs to the state as the "permitting authority" and not to EPA. Numerous subsections of 40 C.F.R. 122.44(d) reinforce the state's authority to determine RP once the EPA delegates that responsibility.[19]

With these proposed changes, EPA may be responding to the ruling in *Nat'l Min. Ass'n v. Jackson*.[20] In that case, the court found that EPA's issuance of a guidance document effectively established a region-wide water quality standard based on conductivity levels, because it caused state permitting authorities to include the conductivity level as a WQBEL in permits.[21] The court concluded that, after delegating NPDES permitting authority to a state, EPA must leave determinations about reasonable potential to the state:

> Accordingly, EPA's "presumption" that, based on the scientific studies regarding conductivity, it is likely that all discharges will lead to an excursion or that the conductivity studies will be instructive on the matter...removes the reasonable potential analysis from the realm of state regulators. In other words, *by presuming anything with regard to the reasonable potential analysis, the EPA has effectively removed that determination from the state authority. And there can be no question that a plain reading of the regulation leaves that determination, and the decision as to when it must be made, solely to state permitting authorities*...Should the EPA wish to alter the manner by which a reasonable potential analysis is conducted, *it is of course free to amend the*

[15] Permitting Procedures for Determining "Reasonable Potential", Natural Resources and Environmental Protection Cabinet, Kentucky Division of Water, executed June 14, 2000.
[16] *Id.* at 1.
[17] 48 FR 45597.
[18] 33 U.S.C. Section 1342(c)(3); 40 C.F.R. 123.64.
[19] See 40 CFR 122.44(d)(ii) "[w]hen determining whether a discharge...has the reasonable potential to cause...an excursion...the permitting authority shall use procedures which account for existing controls..."; 40 CFR 122.44(d)(iii) "[w]hen the permitting authority determines...that a discharge...has the reasonable potential to cause...an excursion...the permit must contain effluent limits for that pollutant..."; 40 CFR 122.44(d)(iv) "[w]hen the permitting authority determines..."; 40 CFR 122.44(d)(vii) "[w]hen developing water quality-based effluent limits under this paragraph the permitting authority shall ensure..."
[20] 880 F. Supp. 2d 119 (D.D.C. 2012*), rev'd and remanded sub nom. Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).
[21] *Id.* at 127.

> *regulation* in a manner consistent with the APA and its own statutory authority. Until it does so, however, it cannot make the reasonable potential determination for the states.[22]

As the court noted, EPA may revise its regulation and, thus, sidestep the regulatory language-based rationale of the *National Mining* ruling. However, the proposed changes would still impermissibly insinuate EPA into what is a determination within the realm of the state's permitting authority under the Clean Water Act.[23] EPA already has certain oversight authority over a state's RPA under Section 1342(d)(4) in that it may comment on or object to a state's draft permit; this proposal would allow EPA to inappropriately insert itself in the state's individual RPA determinations, establishing a process where the EPA may substitute its judgement for that of the delegated programs. There are existing provisions for EPA to address deficient RPA determinations, both individually and collectively; therefore, the proposal is inappropriate and unnecessary.

Dilution Allowances

EPA's proposed new language in 40 C.F.R. 122.44(d)(1)(vii)(c)[24] regarding dilution allowances elicit the same basic concerns identified in the proposed changes to RPA considerations.

The proposed language would interfere with the state's authority to grant dilution allowances in accordance with state policy or procedures if, in accordance with the proposed language, EPA disagrees with the state's determinations regarding dilution and mixing, and where EPA is inclined to substitute its judgement for that of the delegated state programs. The proposed language does not establish what period of time that background data must cover. Additionally, EPA verbally indicated that it would include "whatever data is available to the state" and that the data considered would be "within the state's discretion," but this does not address those instances when EPA's opinion of "relevant data" conflicts with that of the state.

The proposed language raises with the Division several concerns regarding what is "relevant" data. This is further complicated by the preamble discussion that a basic background inquiry into the receiving water's assimilative capacity will be necessary every time a dilution allowance granted, and that the permitting authority would apply end-of-pipe limitations when the actual assimilative capacity of the receiving water could not be determined or estimated. EPA indicates that its intent is "to ensure the permitting authority considers existing valid and representative ambient water quality data ..." when granting a dilution allowance. These statements raise concerns regarding potential conflicts between what the permitting authority and the EPA consider "relevant" data, and potentially allows the EPA to substitute its opinion for that of the permitting authority regarding what data is "relevant."

EPA has indicated that "relevant" data would include data collected and tested by outside third parties. If EPA opines that data resulting from samples and tests of uncertain quality assurance are "relevant", states would be placed in the position of having to negotiate with EPA about an issue EPA has formally determined should be within the state's delegated authority and would be denied its delegated authority to make its own determinations regarding what data is "relevant." The proposed language would also allow EPA to displace the state's determinations on whether to grant dilution allowances in accordance with state policy or procedures if the EPA disagrees with the state's assumptions regarding dilution and mixing. The proposed language does not establish what period of time background data must cover. Additionally, EPA has indicated that it would include "whatever data is available to the state" and that the

[22] *Id.* at 142 (internal citations omitted; emphasis added).
[23] 81 FR 31372.
[24] 81 FR 31372.

data considered would be "within the state's discretion", but this does not address those instances when EPA's opinion of "relevant data" conflicts with that of the state.

The proposed language provides EPA authority to substitute its judgment for the judgment of the delegated authority. This is an issue better addressed via the permitting MOA's comment and objection provisions and is not appropriate that EPA maintain this authority to question the mixing zone determinations separately from the permitting process.

The Division respectfully suggests that this proposed revision either be deleted entirely or language be added to clarify that "relevant data" is fully within the delegated permitting authority's discretion.

40 CFR 122.21 – Application Requirements

The proposed rule requires reporting latitude and longitude to the nearest second. The Division suggests that these values should be reported in decimal degrees to at least five significant digits (within one meter) to accurately determine the location of the facility and outfalls.[25] Reporting to the nearest second may result in a location error of greater than 100 feet which may not be significant for large water bodies, but on a small water body that uncertainty could mean the difference in a segment's stream use designation, antidegradation categorization, or even place the outfall in another watershed.

The Division requests that EPA clarify the disparity in the required time period(s) regarding data required in an application for the following: application requirements for existing manufacturing, commercial mining, and silvicultural dischargers §122.21(g)(7)(ix) states: "All existing data for pollutants [...] that is collected within four and one-half years of the application must be included in the pollutant data summary submitted by the applicant. If, however, the applicant samples for a specific pollutant on a monthly or more frequent basis, it is only necessary, for such pollutant, to summarize all data collected within one year of the application."[26]

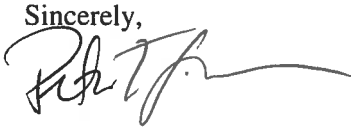
40 CFR 124.10 – Public Notices

The Division supports e-notification for permits as a more effective and cost savings means of providing real and timely notice of pending permit actions to the public. Also, the elimination of newspaper notification for permit actions could provide on-going direct annual cost savings.

Finally, due to the significant resources that will be required for state implementation of the federal rule, the Division respectfully requests that the EPA delay implementation for at least two years to give states adequate time to affect the required legal changes and allocate its resources appropriately.

Thank you for this opportunity to comment on the proposed rulemaking. If you have any questions or concerns regarding these comments, please contact me at 502-782-6956 or at Peter.Goodmann@ky.gov.

Sincerely,



Peter Goodmann, Director
Division of Water

[25] 81 FR 31369-31370.
[26] 81 FR 31369.

c: Jim Giattina, EPA Region IV
Aaron Keatley, Commissioner
Sara Beard, DOW