

Kentucky Antidegradation Implementation Rules – They're Gonna Happen (Someday, Somehow)

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Sad History

- Kentucky has been working on Tier 2 antidegradation rules since the early 1990s.
- The process has not run smoothly, to put it mildly.

More Sad History...

- So far, there has been
 - 2 disapprovals by U.S. EPA – in 1997 and 2000
 - An approval by U.S. EPA in 2005 followed by a federal lawsuit which resulted in the U.S. EPA approval being overturned by the Sixth Circuit Court of Appeals. *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2008)

The War is still not over

- Since the now year-old remand of the Kentucky antidegradation rules, there have been numerous interest group meetings
- The Kentucky Division of Water (KDOW) has now presented a new set of rules to U.S. EPA but a further disapproval or further litigation or both are practically inevitable.

The Major Issues: 1992 to the present

- Coverage – What waters are to be given Tier 2 protection against new or increased pollution that has not been demonstrated to be “necessary to accommodate important social or economic development?”
- De Minimis – When is a new or increased loading so insignificant that it may be exempted from Tier 2 ?

The Coverage Issue

- If Tier 2 antidegradation rules are pollutant-by-pollutant, coverage does not have to be specified as to what water bodies are covered by Tier 2 protections. All water bodies are Tier 2 as to the pollutants for which there is remaining assimilative capacity.

Parameter-by-parameter

- For example, under a parameter-by-parameter approach a water body that is impaired for aquatic life by selenium would still receive Tier 2 protections if there was assimilative capacity available for a new or increased loading of copper or ammonia was proposed. (Of course, a new or increased discharge that increased Se concentrations could not be allowed at all.)

The Waterbody-by-waterbody approach

- Kentucky has insisted on using the waterbody-by-waterbody approach which only affords Tier 2 protections to a subset of water bodies even as to pollutants for which there is remaining assimilative capacity.

KDOW failed twice to limit coverage to a small subset of its waters

- KDOW initially wanted to limit Tier 2 coverage to only a small percentage of Kentucky water bodies that had specific special designations (e.g. Wild and Scenic Rivers and designated nature preserves) or been shown by bio-monitoring to be biologically exceptional.

EPA twice disapproved Ky rules because of insufficient coverage.

- In disapproving these rules, Region 4 wrote, “The list of selection criteria adopted by the commonwealth includes waters of “*exceptional*” aesthetic or ecological value, part of undisturbed or relatively undisturbed watersheds which possess “*outstanding*” water quality characteristics, support “*unique*” flora or fauna, possess “*unusual and uncommon*” aquatic habitat, provide “*unique*” aquatic environment, contain fish communities rated as “*excellent*”, or are listed in the Commonwealth’s reference reach network. Water bodies with these characteristics are certainly Tier II waters, however, it is our position that there are other waters of the Commonwealth which should be subjected to the Tier II process prior to allowing lowering of water quality to occur in these waters. In fact, EPA has historically taken the position that ‘All parameters do not need to be better quality than the State’s ambient criteria for the water to be deemed a ‘high quality water’.’ (Water Quality Standards Handbook: Second Edition, USEPA, August 1994). Therefore, the provisions adopted by the Commonwealth set up a process for protection of what EPA considers as a subgroup of Tier II waters in Kentucky, and the newly adopted revisions do not require consideration of all candidate waters for application of the Tier II decision process.”

-Region 4 EPA letter to General James E. Bickford on August 7, 1997 re. review of the adopted revision to Kentucky’s water quality standards regulations.

Coverage in 2004 Rules

- KDOW in 2004 rules gave Tier 2 protections to all waters that fell into its categories for excellent waters but also included all water bodies that were not listed as impaired on its 303(d)/305b report.
- Environmental groups pointed out that this still left out a lot of important water bodies such as Lake Cumberland, most of the Ohio River and many other water bodies that support aquatic life and recreation

EPA approved the Coverage in the 2004 Rules

- In 2005, EPA approved the 2004 rules. Regarding coverage.
- In doing so, EPA stated that under the revised categorization scheme approximately 90.4 percent of Kentucky stream miles were protected under Tier 2.

Plaintiffs in 2005 lawsuit against EPA for approving rules argued coverage issue

- Plaintiffs pointed out that 90.4% figure was misleading as that was percentage of assessed waters. Many unassessed waters were impaired
- Many important recreational water bodies are not protected under 2004 rules including many rivers and lakes that are the focus of state parks
- Plaintiffs also raised practical problems in approach - what about discharges to impaired waters that were upstream of Tier 2 protected waters?

EPA and Ky briefs in court on subject clouded coverage issue

- The briefs of EPA and the Commonwealth touted the advantages of a waterbody approach by quoting from EPA's 1998 advanced notice of proposed rulemaking, which notes that a properly implemented waterbody-by-waterbody approach “preserves water quality *even if criteria for certain pollutants are not attained or if criteria for certain uses may be limited, such as fish consumption*” but did not mention that the Kentucky rules did exclude many water bodies solely because they failed criteria for a single use (e.g. fish consumption).

The 6th Circuit Decision

- The 6th Circuit upheld the waterbody-by-waterbody approach deferring to EPA's interpretation of ambiguous 40 CFR 131.12(a)(2) language. 540 F.3d at 477.

6th Circuit also upheld EPA Decision as to Coverage rule adopted by Ky but court's reasoning is unclear

- The court upheld EPA decision as to coverage but stated that that “Kentucky’s implementation procedures must provide Tier II protection to all of Kentucky’s waters whose quality ‘exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.’” 540 F.3d at 480 .

2004 rules do not do what 6th Circuit thought they do

- In a petition for rehearing, the plaintiffs pointed out that in fact the Kentucky rules as approved by USEPA, do not protect all water bodies whose quality is better than the minimum level of quality needed to “support propagation of fish, shellfish, and wildlife and recreation in and on the water.” For example, although Lake Cumberland according to Kentucky is “one of the finest fishing and boating areas in the Eastern United States,”^[1] it is unsafe to eat unlimited quantities of fish caught in the lake due to mercury contamination caused by air emissions from coal-fired boilers. Thus, although Lake Cumberland supports aquatic life and recreation, it is denied Tier II protections under the 2004 Kentucky rules.

● ^[1] As advertised on the Kentucky State Parks homepage for Lake Cumberland State Resort Park, <http://parks.ky.gov/findparks/resortparks/lc/>.

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- The 6th Circuit denied rehearing without explanation. It is unknowable whether the court actually intended to endorse rules that do not extend Tier 2 coverage to all waters that support both some aquatic life uses and some recreational uses, or whether the court believed KY and USEPA representations that the 2004 Kentucky rules protected all such waters.

The 2009 draft rules expand coverage

- Perhaps recognizing that failing to give Tier 2 coverage to lakes highly touted by the Kentucky tourism department does not look good, KDOW in the draft it has created since the remand has expanded the coverage of waters protected by Tier 2 to include all waters that:
 - are not listed as impaired for any use,
 - qualify for one of the Ky designations of particularly valuable waters (ONRW, OSRW or Exceptional) or
 - are *only* listed as mercury impaired for fish consumption; this puts water bodies into protected category that are only impaired by mercury and gives coverage to a number of prominent Kentucky lakes.

Unclear what will happen on Coverage

- Unclear that EPA would approve Ky coverage now that it knows that it will protect much less than 90% of Kentucky waters once they are assessed
- 2009 draft rules still do not give Tier 2 protections to many waters that do support both recreation and aquatic life uses
- EPA thinking generally on this issue may have changed with new administration
- Number of waters that are impaired may increase drastically if ammonia standards are strengthened or numeric N and P standards are adopted

DEFEATED CREEK RD

STOP



De Minimis

- 2005 Kentucky rules created broad *de minimis* exceptions allowing new pollution without a Tier 2 demonstration

2004 rules had a wide variety of “de minimis” exceptions

- 20% growth or less of an existing discharge
- Allowed new or increased POTW discharges if POTW accepted certain default limits
- Allowed new or increased industrial discharges if limits of $\frac{1}{2}$ of the WQBEL accepted by discharger
- Exempted General Permits
- CAFOs
- Coal mining

2004 rules had no limit on cumulative piecemeal loss of assimilative capacity

- Although *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp. 732, 770-72 (S.D. W.Va. 2003) had held with regard to West Virginia rules that rules could not allow cumulative loss of significant assimilative capacity through multiple permitted discharges, 2004 Ky rules placed no limit on cumulative loss.

EPA's approval of the particular Ky de minimis exceptions was overturned by 6th Circuit

- EPA's approval of all of the de minimis exceptions challenged by the plaintiffs was overturned by the 6th Circuit.

Any de minimis questioned

- Judge Clay in a footnote questioned whether any de minimis exception should be allowed. 540 F.3d at 484, n. 12.

6th Circuit held cumulative effect of exceptions must be considered

- The Court stated:

The EPA measured Kentucky's § 131.12 compliance by assessing whether each individual exemption resulted [**72] in "significant" or "insignificant" degradation, but that approach avoids assessing the exemptions' cumulative effects on the State's antidegradation compliance. Because § 131.12 regulates degradation, not individual sources of degradation, see *id.* ("The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart."), the legally relevant inquiry is whether Kentucky's Tier-II-review exemptions together permit significant degradation, see *Ohio Valley*, 279 F. Supp. 2d at n.3 ("From the perspective of water quality ...it does not matter whether the number of discharges is one or one hundred; the relevant question is how much water quality is lowered by any and all discharges into a water body"). 540 F.3d at

2009 draft rules do not appear to satisfy 6th Circuit decision

- Broad exemptions for activities occurring under general permits, but it does not appear that it has been shown that general permits allow only de minimis pollution
- Analysis of cumulative effect of exceptions has not been done by KDOW
- No cumulative cap on loss of assimilative capacity from exceptions is contained in rules

A new issue raised in 2009

- What if some new loading is necessary but less than that that would be allowed by the technology based limit and the water quality based limit ? Some Kentucky dischargers (and perhaps KDOW) believe that if they justify *some* increase they should be allowed to discharge as much as they would be allowed to discharge if Tier 2 did not exist. Environmentalists strongly disagree.

Example

- For example, if the discharger demonstrates that an additional 1 pound of ammonia is necessary for important development and the amount of ammonia that would be allowed as a WQBEL is an additional 100 lbs, some Kentucky dischargers claim the permit should allow an additional 100 lbs although only 1 pound has been demonstrated to be necessary

US EPA Guidance

- U.S. EPA has said in guidance that unnecessary pollution should not be allowed under a program that demands the applicant demonstrate necessity before any lowering is allowed. EPA has said that, in those cases in which some new or increased pollution is justified, the extent of pollution allowed should still be minimized. In the Water Quality Standards Handbook, EPA provides that:

EPA's regulation also requires maintenance of high quality waters except where the State finds that degradation is "necessary to accommodate important economic and social development in the area in which the waters are located." (40 CFR Part 131.12 (a) (Emphasis added)). We believe this phrase should be interpreted to prohibit point source degradation as unnecessary to accommodate important economic and social development if it could be ***partially or*** completely prevented through implementation of existing State-required BMPs.

Section 4.5, page 4-8 (underlining in original, bold italics added)

More EPA Guidance

- In the Great Lakes Water Initiative Rules that set forth some of the basic principles applicable to antidegradation, 40 CFR pt. 132 App. F IV.A, it is stated:

“If the lowering of water quality is necessary and will support important social or economic development, the Director may allow all *or part* of the proposed lowering to occur *as necessary* to accommodate the important social or economic development.”
(emphasis added)

Still More Guidance

- Still further, in the 1998 ANPRM which has been frequently cited by EPA with regards to antidegradation, it is stated:

In conducting its antidegradation review, the State or Tribe then ensures that all feasible alternatives to allowing the degradation have been adequately evaluated, and that the least degrading reasonable alternative is implemented. Also, note that where less-degrading alternatives are more costly than the pollution controls associated with the proposal, the State or Tribe should determine whether the costs of the less-degrading alternative are reasonable.

Federal Register Vol. 63, No. 129 at 36784 (emphasis added).

2009 draft rules appear headed for EPA disapproval or Court

- Or both.

