11-2003

19th Annual Environmental Law Institute

Office of Continuing Legal Education at the University of Kentucky College of Law

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19th Annual

ENVIRONMENTAL LAW INSTITUTE

November 2003
19th Annual
ENVIRONMENTAL LAW INSTITUTE
November 2003
Presented by
OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW

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2002-2003

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LEGISLATIVE UPDATE:

THE KENTUCKY GENERAL ASSEMBLY
2002 REGULAR SESSION
2003 REGULAR SESSION

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HB 174
Solid Waste Management – Chapter 342

KRS 224.43, a new section created setting an environmental remediation fee of $1.75 per ton of waste generated or collected at transfer stations that is to be disposed of at municipal solid waste disposal facilities. Effective January 1, 2003.

KRS 224.43, a new section created establishing the Kentucky Pride Fund trust fund to receive the remediation fees, state appropriations, gifts, grants and federal funds and interest on funds. The trust to be administered by the Cabinet and $5,000,000 of the funds deposited into the trust will be retained by the Cabinet subject to these conditions:

- Up to $2,500,000 can be used to fund direct costs of to identify, characterize, assess and develop implementation plans to close solid waste disposal sites that ceased accepting waste after July 1, 1992.

- $2,500,000 shall be used to pay debt service on bonds sold by the Kentucky Infrastructure Authority in the amount of at least $25,000,000 with the proceeds deposited to the fund and utilized for undertaking closure and corrective action at previously permitted solid waste disposal facilities or abandoned solid waste sites.

- Up to $1,000,000 in interest on all monies deposited in the fund shall be distributed to the Kentucky Environmental Education Council for implementation of the environmental education center component of the Environmental Education Master Plan.

- The remaining balance of the funds from the environmental remediation fee shall be used by the Cabinet for the elimination of illegal open dumps.

$2,500,000 is to be transferred annually from the Road Fund, KRS 48.010(13)(g), and $2,500,000 transferred annually from the Highway Construction Contingency Fund to the Kentucky Pride Fund to be reserved and distributed for anti-litter control programs.

The Solid Waste Reduction and Management Plan Advisory Committee was stricken.

Timing for counties to establish universal collection was extended to October 1, 2003. All persons providing collection service must register with the counties in which they provide service.

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1 Chapter references are to 2002 ADVANCE LEGISLATIVE SERVICE (Michie 2002).
**HB 244**
**Hazardous Waste Program – Chapter 54**
KRS 224.46-580(7) amended to extend until June 30, 2004, the collection of the annual hazardous waste assessment from hazardous waste generators.

KRS 224.46-580(8)(d) created stating that emissions control dust and sludge from primary production of steel that is recycled by high temperature metals recovery or managed by stabilization of metals is exempt from the fee.

**HB 367**
**Agricultural Water Quality – Chapter 191**
KRS 224.71-100 to KRS 224.71-140, a new section created requiring that any documents relating to agricultural operations’ agricultural water quality plans, conservation plans, or forest stewardship management plans submitted to local conservation district office or a state agency shall be confidential and their disclosure to anyone other than state or federal officials is prohibited. However, if any person engaged in an agricultural operation is deemed a “bad actor” under KRS 224.71-130(2), the privilege of confidentiality given under this section to documents relating to the bad actor’s agricultural operation shall be lost.

**HB 422**
**Waste Tire Program – Chapter 46**
KRS 224.50-868(1) amended such that the collection of a fee on new tires of $1.00 is extended through July 31, 2006. The scope of fund uses was expanded to include costs associated with waste tire amnesty programs.

**HB 618**
**Vehicle Emissions Testing – Chapter 229**
KRS 77, a new section created that requires the pollution control district board in a county approving a consolidated local government, which is in attainment at the time of approval of the consolidation, for ozone, carbon monoxide and nitrogen dioxide to eliminate any vehicle emissions testing program.

**SB 193**
**Petroleum Storage Tanks – Chapter 361**
KRS 224.60-140(1) amended splitting the Petroleum Storage Tank Environmental Assurance Fund into two sub accounts: the Financial Responsibility Account and the Petroleum Storage Tank Account, with the Financial Responsibility Account receiving $0.004 of the $0.014 paid on each gallon of gasoline or special fuels received in the state pursuant to KRS 224.60-145 and the Petroleum Storage Tank Account receiving $0.01 of the $0.014.

KRS 224.60-130(2) amended such that Operators seeking coverage under the Petroleum Storage Tank Account must file for eligibility and financial assistance before January 15, 2004. In order to be eligible for reimbursement, corrective action projects must be carried out before July 15, 2009.
KRS 224.60-137 amended such that when funds are available the University of Kentucky will update the 1995 study and recommend amendments to standards for levels of petroleum contamination, including lead and other additives, requiring corrective action to adequately protect human health, safety and the environment. And to require the Cabinet to develop an inventory of facilities eligible for reimbursement from the Financial Responsibility Account and the Petroleum Storage Tank Account and the current status of each facility within the corrective action process.

**SB 257**

Kentucky State Board on Electric Generation and Transmission Siting – Chapter 365

KRS 278, a new section created that establishes the Kentucky State Board on Electric Generation and Transmission Siting consisting of seven members, three members of the PSC, the Secretary of Natural Resources and Environmental Protection Cabinet, two ad hoc public members from the county where the proposed facility is to be located, (the chairman of the planning commission with jurisdiction of the area where the facility is to be located or the county judge executive or mayor of the city if there is not a planning commission with jurisdiction, one ad hoc member who is a resident of the county in which the facility is to be located). The Board is attached to the Public Service Commission for Administrative purposes. The Chairman of the Public Service Commission is chairman of the Board.

A new section of KRS 278 is created that requires a person seeking to construct a merchant electric generating facility to apply for and receive a construction certificate from the Board. The application must include, among other things:

- Full description of the site including a map showing distance of the site from residential neighborhoods, residential structures, schools and public and private parks that are located within a 2 mile radius.

- A statement that the proposed site is at least 1000 feet from the property boundary and 2000 feet from any residential neighborhood, school hospital or nursing home facility, unless a facility capable of generating 10 MW or more is currently on the site.

- An analysis of the proposed facility’s projected effect on the electric transmission system in Kentucky.

- An analysis of the proposed facility’s economic impact on the affected region and the state.

- A site assessment report that includes: a site description including location of buildings, transmission lines and other structures; location and use of access ways; internal roads and railways; existing or proposed utilities to serve the facility; evaluation of the noise levels expected to be produced by the facility; an evaluation of the compatibility of the facility with scenic surroundings; the potential changes in property for property owners adjacent to the facility resulting from the construction and operation of the facility; the impact of the facility’s operation on road and rail traffic to and within the facility.
including anticipated levels of fugitive dust created and any anticipated degradation of roads and lands within the vicinity of the facility.

A new section of KRS 278 created that requires any person seeking to construct a non-regulated transmission line to apply for and receive a construction certificate issued by the Board. The application must included, among other things:

- A full description of the proposed route of the transmission line and its appurtenances including initial design voltages, length of line, termination points and capacities, and substation connections.

- A map showing the location of the proposed line and all proposed structures that will support it, existing property lines and names of persons who own property over which the line will cross, the distance of the proposed line from residential neighborhoods, schools and public and private parks within one mile of the proposed facility.

A new section of KRS 278 created to require a person seeking to construct a merchant electric generating facility to submit a cumulative environmental assessment which shall contain a description with appropriate analytical support of:

- Air pollutants -- Types and quantities of air pollutants that will be emitted and a description of the methods used to control those emissions.

- Water Pollutants -- Types and quantities of water pollutants that will be discharged from the facility into the waters of the Commonwealth and a description of the methods used to control those discharges.

- Wastes -- Types and quantities of waste that will be generated by the facility and the methods to be used to manage and dispose of such wastes.

- Water withdrawal -- Identification of the source and anticipated water volume needed to support the facility construction and operation and a description of the methods used for managing water usage and withdrawal.

**SCR 17**

**Kentucky Watershed Task Force – Chapter 112**

Created the Kentucky Watershed Task Force to study the need for managing the state’s water on a watershed basis; the necessity of seeking agreements with border states on the management of water in shared watersheds and the possibility of seeking agreements with the owners of impounded waters, except for owners of private water impounds, to manage the impounded water to further state and local water management goals.
2003 Regular Session

HB 18
Air Pollution – Chapter 10
KRS 224.20.720 amended such that State vehicles and official vehicles routinely operating in a county with a vehicle emissions control program are to be inspected on the same frequency as private vehicles.

HB 524
Oil and Gas Wells – Chapter 150
KRS 353.500 amended such that Government responsibility for oil and gas exploration, production, development, gathering and transmission rests with the State. The Department (Department of Mines and Minerals) shall promulgate regulations relating to all aspects of oil and gas exploration, production, development, gathering and transportation to the exclusion of all other non-state governmental entities.

KRS 353.520(2) amended such that the prohibition on the waste of oil and gas includes unnecessary loss by spillage or venting and not just surface loss.

KRS 353.560 amended to delete the “Water Pollution Control Commission” and added U.S. Environmental Protection Agency and Natural Resources and Environmental Protection Cabinet.

KRS 353.580 amended to revise the notice requirements for applying for drilling permit extension and noting that permit extension does not open issues of well location or mediation.

KRS 353.590 amended to establish bonding requirement for a single well for domestic use.

KRS 353.610 amended the wording of boundary for setback purposes from “boundary” to “mineral boundary.”

KRS 353.620 amended to eliminate reference to “any premises” to “adjacent premises directly affected” by setback distances for wells drilled closer to a boundary or another well than prescribed in KRS 353.610.

KRS 353.630 amended deeming consent of unknown or unlocatable owners in pooling acreage if publications requirements of KRS 353.640(1) have been met.

KRS 353.660 amended to require the submission of electronic copies of electrical surveys and logs if requested by the Department.

2 Chapter references are to 2003 ADVANCE LEGISLATIVE SERVICE (Michie 2003).
SB 81
Pesticides – Chapter 72
KRS 217B.170 00 amended to eliminate backpack sprayers and ground driven hand propelled applicators from the fee structure for equipment used in the business of applying pesticides.

SB 162
Chemical Weapons Treatment Materials Disposal – Chapter 149
KRS 224.50.130(6) added requiring that no site for treatment or disposal of chemical weapons shall be permitted except on a pilot scale.

KRS 224.50.130(7) added requiring that no permit or authorization to construct or operate a hazardous waste site to treat or dispose of chemical weapons will be issued unless the applicant certifies that:

- The infrastructure identified in the final emergency response plan has been or will be completed prior to operation of the facility.
- The applicant has provided the host county sufficient funding for reasonable direct and indirect costs of the creation and maintenance of the position of host community liaison.

SB 165
Underground and Surface Mines – Chapter 87
KRS 352.480 amended to allow the commissioner to make available, for copying, final or abandoned mine maps in response to a written request by any person. The Department may also make public or divulge any portion of a mine map submitted to the Department by a licensee or operator.
2003
CASE LAW UPDATE

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Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) (Hayden II)

ISSUE:
Whether §404 of the Clean Water Act ("Act") authorizes the Corps of Engineers ("Corps") to issue permits for the discharge of dredged or fill materials into navigable waters for the creation of valley fills in connection with coal mining activities when the valley fills serve no purpose other than to dispose of excess overburden from mining activities.

HOLDING:
The Fourth Circuit held that the Corps' authorization under §404 of the Act to Martin County Coal was not arbitrary, capricious, an abuse of discretion or otherwise contrary to the Clean Water Act. The court vacated the permanent injunction issued by the District Court forbidding the issuance of §404 permits for mining valley fills.

FACTS:
The Corps issued authorization under §404 Nationwide Permit #21 to Martin County Coal Company ("Martin County") as part of the permitting process for a mountain top mining operation located in West Virginia. The Corps' authorization allowed Martin County to construct 27 valley fills and bury 6.3 miles of stream.

Kentuckians for the Commonwealth ("Kentuckians") commenced an action in the District Court for the Southern District of West Virginia. Kentuckians claimed that the Corps' issuance of the permit was arbitrary, capricious, and an abuse of discretion and otherwise contrary to the law. Kentuckians sought to have Martin County's authorization under the §404 Nationwide Permit #21 revoked. They argued that the excess overburden to be placed in the valleys creating the valley fills was not "fill material" as used in §404 of the Act, but was "waste" that was excluded from the Corps' regulation. Kentuckians argued that "waste" could only be regulated under §402 of the Act that was administered by the Environmental Protection Agency ("EPA").

Prior to issuance of the authorization to Martin County, the Corps and the EPA had issued notice of intent to revise their rules to better clarify the use of the word "fill material" in the regulations ("New Rule"). Among the clarifications was that discharge of mining overburden would be regulated by the Corps under §404 and that effluent discharges from sedimentation ponds into the waters of the United States would continue to be regulated by the EPA.

The District Court found that "fill material" as used in §404 of the Act referred to material that was placed for some beneficial primary purpose: construction work; infrastructure; improvement and development in waters of the United States; and not waste material discharged solely to dispose of waste. The District Court issued a permanent injunction enjoining the Corps' Huntington District Office from issuing any further §404 permits that had no primary purpose but the disposal of waste.

The District Court also found that the New Rule proposed by the Corps and the EPA was ultra vires.
DISCUSSION:
The Fourth Circuit first held that the District Court’s permanent injunction was over broad. Kentuckian’s alleged injury related only to the Martin County authorization and they sought to have that authorization revoked or suspended pending EPA review. The Corps argued that since Kentuckians had only challenged a specific permit issuance, the injunction issued, reaching future permits issued in a five-state area was over broad. Kentuckians argued that since the scope of the violation involved ongoing ultra vires actions by the Corps throughout the Huntington District, the scope of the injunctive relief should be determined by the scope of the Corps’ violation. The Court vacated the injunction concluding that the injunction was far broader in scope than that required to provide complete relief to the plaintiffs and did not carefully address the circumstances of the case. The Court also found that the District Court gratuitously addressed the New Rule reaching beyond the issues before it to find the New Rule was inconsistent with the Act.

Addressing the heart of the action the Court conducted a Chevron analysis and determined that applying traditional tools of statutory construction the District Court could not have concluded that Congress intended “fill material” to mean only material placed for some beneficial purpose. The Court conducted a de novo review as to whether Congress had spoken clearly as to the meaning of “fill material” concluding that Congress had not defined “fill material” as material deposited for some beneficial primary purpose. Guided by the standard that a reviewing court can set aside an agency’s interpretation of its own regulation only if that interpretation is clearly erroneous or inconsistent with the regulation, the Court concluded that the Corps’ interpretation of the meaning of “fill material” in §404 “as all material that displaces water or changes the bottom elevation of a water body except for ‘waste’ – meaning garbage, sewage, and effluent” was a permissible construction of §404.
**Tennessee Valley Authority v. Whitman,**
336 F.3d 1236, 2003 U.S. App. LEXIS 12830 (11th Cir. 2003)

**ISSUE:**
Whether the decision of the Environmental Appeals Board finding that Tennessee Valley Authority ("TVA") had violated the Clean Air Act ("Act") and failed to respond to EPA Administrative Compliance Orders ("ACO") was unlawful and a product of arbitrary and capricious decision making.

**HOLDING:**
The court held that the Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for imposing severe civil and criminal penalties and that since the ACO lacks finality the Court of Appeals lacks jurisdiction to review the validity of ACOs.

**FACTS:**
TVA had undertaken rehabilitation projects at nine of its coal fired power plants without permits. The EPA issued ACOs requiring TVA to complete several major compliance initiatives. TVA refused to comply with the ACOs. Believing that TVA could not be sued in federal court, the EPA established an ad hoc procedure within the Environmental Appeals Board ("EAB") to provide the appearances of an adjudication. The EAB affirmed the EPA's ACO concluding that TVA had violated the Act when it began its rehabilitation projects without permits.

TVA appealed the decision of the EPA and the EAB to the Eleventh Circuit pursuant to the Administrative Procedures Act's ("APA") judicial review provisions, arguing that the EPA order was unlawful and the product of arbitrary and capricious decision making.

**DISCUSSION:**
The court outlined the four options available to the EPA when it finds a regulated party has engaged in unlawful activity. The EPA can:

1) request the Attorney General commence a criminal prosecution;
2) file suit in district court seeking injunctive relief and the imposition of civil fines;
3) conduct a formal adjudication of liability consistent with the APA and assess civil penalties; or
4) issue an ACO directing compliance.

The court noted that options 1-3 provide the defendant an opportunity to make legal and factual arguments in an independent forum. Under the Act an ACO can be issued if any of the following requirements are met:

a) the ACO must be based upon "any information available to the Administrator;"
b) the ACO must be issued thirty days after the issuance of a Notice of Violation; and
c) the regulated party must be given an “opportunity to confer” with the Administrator.

The court expressed concern that the ACO has an injunction-like status and is issued without an adjudication or meaningful judicial review. Further, the court found that an ACO can be issued on the basis of “any information available to the Administrator,” concluding that this information could include a staff report, newspaper clipping, anonymous phone tip or anything else that could be considered “information.” Lastly, the court was troubled that a violation of an ACO is a freestanding violation and that such a violation can itself serve as the basis for imposition of significant civil penalties or imprisonment.

The court looked at the conflict between §7603 and §7413 of the Clean Air Act. Section 7603 allows the EPA to issue emergency orders in limited situations where a pollution source presents an “imminent and substantial endangerment to public health or welfare or the environment.” In these instances the Act provides that the EPA may bring suit for appropriate relief; however, if it is not practical to assure prompt protection of persons or the environment, the EPA may issue an order with injunction-like powers. This order is only effective for a short period of time and can only be extended by a federal court. On the other hand, §7413 of the Act governing ACOs allows the EPA to issue ACOs of unlimited duration without going to court or identifying a public emergency. In addition, §7413 states that any person who knowingly violates any order issued under §7413 shall, upon conviction, be subject to a fine or imprisonment.

The court proceeded to look at the cases addressing ACOs concluding that there are two categories of cases. First, cases where the courts have recognized that ACOs have the status of law but fail to deal with the Constitutional issues that arise as a result of that status. In the second group of cases the courts have under-appreciated the legal significance of ACOs and ignored or readout the penalty provisions of the statute.

Dealing with the Constitutional issue head on, the court concluded that the statutory scheme established by Congress – in which the head of an executive agency has the power to issue an order that has the status of law after finding, on the basis of any information available, that a Clean Air Act violation has been committed – is repugnant to the Due Process Clause of the Fifth Amendment. Before the government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal. Finding that the improvised hearing process implemented in the case of TVA was insufficient to save the process, the court held the Clean Air Act unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties.

In addition, the court found that ACOs fails to meet the two part test for finality outlined in Bennett v. Spear, 520 U.S. 154 (1997), requiring the action be the “consummation” of the agency’s decision making process and the action be one by which rights and obligations are determined or from which legal consequences flow. Since the ACO is not a final agency decision, the court concluded that Courts of Appeals lack jurisdiction to review the validity of ACOs and the EPA must prove the existence of Clean Air Act violations in district court.
U.S. v. Deaton, 332 F.3d 698 (4th Cir. 2003)

ISSUE:
Whether the Corps of Engineers’ ("Corps") jurisdiction over navigable waterways under the Clean Water Act ("Act") extends to wetlands adjacent to a roadside ditch that eventually discharges into a navigable-in-fact waterway.

HOLDING:
The court upheld the decision of the district court requiring remediation, finding that the Corps of Engineers’ jurisdiction under the Clean Water Act was sufficient to reach the roadside ditch and adjacent wetlands.

FACTS:
Deaton purchased twelve acres of land on which to develop a residential subdivision. The property was poorly drained and there was a large low wet area in the middle of the property where water stood in the winter months and after heavy rainfall. The property sloped gently downhill toward a county road, Morris Leonard Road. A drainage ditch runs alongside the road between the pavement and Deaton’s property. Deaton calls the ditch the “Morris Leonard Road ditch” while the Corps calls it the “John Adkins Prong of Perdue Creek.” The Fourth Circuit chose to call it the “roadside ditch.” There was disagreement on how much water flows through the ditch and how consistent is the flow. There was agreement that water entering the ditch meanders thirty-two miles to Chesapeake Bay.

The Wicomico County Health Department denied Deaton’s application for a sewage disposal permit due to the drainage problems on the property. Deaton decided to dig a drainage ditch across the property to alleviate the problem. The U.S. Soil Conservation Service advised Deaton that a large part of the property contained non-tidal wetlands and Deaton would need a permit from the Corps before digging the ditch. Ignoring this advice Deaton hired a contractor to dig the drainage ditch. The contractor dumped the dirt excavated onto the side of the ditch in a practice known as sidecasting. The Corps discovered the ditching and issued a stop-work order and warned Deaton about dumping fill material in the wetlands. The government eventually filed a civil complaint against Deaton alleging that Deaton had violated the Clean Water Act by discharging fill material into wetlands without a permit. The district court concluded that sidecasting did not constitute discharge of a pollutant and granted Deaton summary judgment. The Fourth Circuit reversed the district court and remanded the case. Not long after remand, the Supreme Court decided Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001). Deaton sought reconsideration by the district court in light of Solid Waste arguing that the Clean Water Act could not be read to extend to the roadside ditch and adjacent wetlands. The district court denied reconsideration. Deaton appealed.

DISCUSSION:
The court first addressed Deaton’s claim that interpreting the Clean Water Act to reach the roadside ditch exceeds the authority of Congress under the Commerce Clause. The court
concluded that, under the Commerce Clause, Congress had the authority to prevent the use of navigable waters for injurious purposes; further, that the Corps’ regulatory interpretation of the term “waters of the United States” to encompass nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress’ power. The court determined that it should defer to the Corps’ interpretation of its own regulations that the Corps reading the regulations to include the roadside ditch within its jurisdiction is a reasonable interpretation of the Clean Water Act.

Deaton argued that even if the Act permits the Corps to regulate nonnavigable tributaries of navigable waters, the roadside ditch is not such a tributary. The court looked at the use of the word “tributaries” in the Corps’ regulations, concluding that while the Corps has not always chosen to regulate all tributaries, it has always used the word “tributaries” to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters. The roadside ditch was thus a tributary subject to Corps’ jurisdiction, and the adjacent wetlands were also subject to Corps’ jurisdiction. The court found that there was sufficient nexus between a navigable waterway and its nonnavigable tributaries and that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. The result of this nexus is that the Act reaches the roadside ditch and its adjacent wetlands.

Deaton also attacked the indicator used by the Corps in designating part of the property as wetlands based on the Corps’ 1987 Wetlands Delineation Manual. The court found that since Deaton did not challenge the Manual as plainly erroneous or inconsistent with the regulations, the court was bound to defer to the Manual’s interpretation of the regulations.

Lastly, Deaton challenged the district court’s remediation order that required Deaton to fill in the ditch. He argued that they should be required to move the discharged material to a non-wetlands part of the property rather than filling in the ditch. The court upheld the district court’s remediation order concurring with the district court’s finding that hauling the dirt away would likely cause ecological damage would allow Deaton to benefit from the violation of the Act.
U.S. v. Rapanos,

ISSUE:
Whether the district court correctly determined, in light of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001), that the Corps of Engineers’ (“Corps”) jurisdiction over wetlands did not extend to wetlands that were not adjacent to navigable waters.

HOLDING:
The court reversed the decision of the district court and reinstated Rapanos’ criminal conviction for unlawfully filling wetlands.

FACTS:
Rapanos intended to sell one hundred and seventy-five acres for development. The plot contained (based on Rapanos’ own consultant) between 49 and 59 acres of wetlands. Rapanos began destroying the wetlands on the property filling them with dirt. When a search warrant was executed agents found only 29 acres of wetlands remaining on the property.

The property was located in Williams Township, Bay County, Michigan. The wetlands are eleven to twenty miles from the nearest navigable-in-fact waters. The wetlands connect to the Labozinski Drain (a 100 year-old man-made drain) which flows into Hoppler Creek which in turn flows into Kawkawlin River which is navigable. The government argued that there was a direct and significant link between the wetlands on Rapanos’ property and the navigable waterway, thus the wetlands in question are covered by the Clean Water Act (“Act”).

Rapanos was convicted of unlawfully filling wetlands. Following various appeals, on remand, the district court set aside the conviction and dismissed the case finding that Solid Waste, 531 U.S. 159 (2001) had changed the scope of federal jurisdiction under the Act, and that the wetlands on Rapanos’ property were not directly adjacent to navigable waters, thus outside the government’s scope of regulation.

DISCUSSION:
The court looked at the range of Corps’ jurisdiction as addressed by the Supreme Court, first turning to United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) where the Supreme Court found that Corps of Engineers’ jurisdiction extended to protect wetlands adjacent to waters that are protected by the Act, including wetlands adjacent to other bodies of water over which the Corps has jurisdiction. Exactly what waters were within the Corps’ jurisdiction remained to be answered. The outside limit of jurisdiction was established in Solid Waste where the Supreme Court determined that the Corps’ Migratory Bird Rule extending their jurisdiction to wetlands with no hydrological connection to waterways was an unreasonable application of the Act.
Disagreeing with the broad reading of *Solid Waste* by the district court, the Sixth Circuit looked to the Fourth Circuit decision in *U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003) finding that for Corps’ jurisdiction to extend to the Rapanos’ property there must be a significant nexus between the wetlands and navigable waters. Applying this test to the facts the court found that because there existed a hydrological connection between the wetlands on Rapanos’ property, the Drain and the Kawkawlin river, there was ample nexus to establish jurisdiction.

The court reversed the decision of the district court and reinstated the conviction of Rapanos.
Regional Airport Authority of Louisville and Jefferson County v. LFG, LLC, 2003 U.S. Dist. LEXIS 11904 (W.D. Ky. 2003)

ISSUE:
Whether contamination of an industrial site by a previous owner constituted a private nuisance, a public nuisance or negligence per se as to a subsequent owner required to expend funds to clean up the contamination.

HOLDING:
Contamination of an industrial site by a previous owner does not constitute a private nuisance as to a subsequent owner. The Plaintiff did not establish the unusual or special damages necessary to recover under a public nuisance. The Plaintiff did not establish that he was the type of party the statute violated by the defendant was intended to protect, and the injury suffered by the Plaintiff was not the type of injury the statute intended to prevent. Thus there was no recovery on the basis of negligence per se.

FACTS:
The Regional Airport Authority of Louisville and Jefferson County ("RAA") acquired a property owned by LFG, LLC ("LFG"). LFG had acquired the site from Navistar, formerly International Harvester Company, who had operated a foundry, forge and assembly plant on the site. Prior to acquisition of the site RAA conducted an environmental investigation of the site. Subsequent to the acquisition, RAA conducted another site evaluation and identified site contamination including asbestos. RAA spent significant amounts of money cleaning up the environmental contamination. RAA filed suit against Navistar and LFG to recover the clean up costs.

DISCUSSION:
The court first looked at the private nuisance claim. The court resolved that RAA was urging the court to extend private nuisance beyond its traditional purpose of resolving conflicts between competing and simultaneous uses of neighboring property, to recognize a cause of action by a current owner of a parcel of land against the former owner of the same parcel for environmental contamination. Noting that in more traditional nuisance actions the Kentucky courts have not allowed land owners to recover for a private nuisance where the land was purchased with the knowledge of the existence of the nuisance, the court determined that a Kentucky court would not recognize a cause of action for private nuisance between subsequent owners of the same land and dismissed this count.

In regard to the public nuisance claim, the court found that a public nuisance is a condition that is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting from an act not warranted by law or from neglect of a duty imposed by law. The court concluded that the contamination of the site did not constitute a public nuisance because the contamination was not public since it occurred in a place of business into which there is no general right on the part of the public to go. The court went on to assume, arguendo, that the contamination constituted a public nuisance and concluded that for RAA to recover for a
public nuisance it must demonstrate unusual or special damages, different from those sustained by the community at large. RAA’s expenditures to clean up the environmental contamination of the site, if considered damages, relate to RAA’s private rights over the site and not its public rights. Thus the court dismissed RAA’s public nuisance claim.

Lastly, in evaluating negligence per se, the court allowed that violation of a statute, administrative regulation or ordinance could give rise to an action for negligence per se. However, such a determination of negligence per se requires that the plaintiff be a member of the class of persons intended to be protected by the regulation, and the injury suffered must be of the type that the regulation was designed to prevent. The court concluded that KRS Chapter 77, APCD regulations and EPA regulations were intended to protect the public air contamination and that violations of the statutes and regulations causing RAA to suffer asbestos clean up costs were not the type of injury the statutes and regulations were intended to prevent. Thus RAA was not entitled to relief under a claim of negligence per se.
Kentec Coal Co., Inc. v. Commonwealth,

(THE OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY)

ISSUE:
Whether the statutory requirement or the Kentucky Natural Resources and Environmental Protection Cabinet’s (“the Cabinet”) regulatory requirement that a proposed penalty be prepaid prior to a hearing on the magnitude of the penalty is constitutional.

HOLDING:
The court concluded that KRS 350.0301 and KAR 7:092 were unconstitutional violations of due process, equal protection, and the ban against arbitrary state action contained at Section Two of the Kentucky Constitution. The court held that the Cabinet’s assessment of a penalty without a hearing, due to the unique circumstances of the third-party disturbance at issue, was unreasonable and arbitrary and in violation of Section Two of the Kentucky Constitution.

FACTS:
Kentec Coal Company was assessed a penalty by the Cabinet for a postmining land use violation. A house was constructed on a mine site leased and permitted by Kentec. The increment in question was permitted for a postmining land use of forestry land or hayland/pasture and the house constituted a violation of the permit. After being advised by the Cabinet that a post mining land use revision was required, Kentec failed to apply for such a revision. Kentec was issued a non-compliance order and subsequently a cessation order which remained unabated for thirty days. The Cabinet then noticed Kentec of a proposed penalty assessment of $29,700. Kentec failed to appear at an assessment conference. Kentec then requested a formal hearing regarding the penalty but failed to prepay the penalty as required by KRS 350.0301 and 405 KAR 7:092. Kentec’s petition was dismissed and the penalty assessment was upheld by the Secretary and subsequently by the Franklin Circuit Court.

DISCUSSION:
Kentec argued that KRS 350.0301 and 405 KAR 7:092 are unconstitutional as they denied Kentec due process and equal protection by requiring the prepayment of the penalty assessment as a prerequisite to a formal hearing regarding that very penalty assessment. The court first turned to Franklin v. Natural Resources and Environmental Protection Cabinet, 799 S.W.2d 1 (Ky. 1990). In Franklin the court found that the predecessor regulation to KRS 350.0301 violated the Due Process and Equal Protection clauses of the Constitutions of the United States and Kentucky because it denied the due process hearing based solely on a party’s financial inability to pay the penalties he sought to appeal. KRS 350.0301, enacted in response to Franklin, provided for bifurcated hearings with individual hearings dealing with the actual violation and penalty assessment, but the statute required the prepayment of the proposed assessment before the penalty portion of the hearing. The court concluded that the statutory and regulatory changes enacted in response to Franklin presented an impermissible monetary bar to access to the fundamental due process right to a hearing and were thus unconstitutional.
violations of the due process, equal protection and the ban on arbitrary state action in Section Two of the Kentucky Constitution.

Kentec argued that the issuance of the noncompliance and cessation order by the Cabinet were erroneous and arbitrary in light of the Cabinet’s third-party disturbance policy. The court concluded that given the circumstances of the case, it would be impossible for Kentec to comply with the noncompliance and cessation order within the time allowed by the Cabinet and, even if it could, any meaningful action by the Cabinet would be rendered moot. The court found that the Cabinet’s assessment of a penalty without a hearing was unreasonable and arbitrary and also in violation of Section Two of the Kentucky Constitution.
Upchurch v. Cumberland County Fiscal Court,

(THESE OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF
THE COMMONWEALTH OF KENTUCKY)

ISSUE:
Whether a county Ordinance restricting the construction and operation of poultry facilities
was appropriately enacted under the County’s police powers and “Home Rule” statute or must the
restrictions have been enacted under a Planning and Zoning scheme.

HOLDING:
The Court held that an ordinance establishing the conditions for the construction and
operation of a poultry facility was properly enacted under the County’s powers as enumerated in
KRS 67.083.

FACTS:
The Upchurches planned to develop a confined poultry production facility on a parcel of land
located in Cumberland County. Following their purchase of the property the Cumberland
County Fiscal Court enacted Ordinance No. 1998-03 (“Ordinance”) setting restrictions on the
construction and operation of such poultry facilities. Under the Ordinance the Upchurches were
required to obtain a construction and operation permit for the facility. The Ordinance restricted
the location of the poultry facility and litter storage areas in relation to dwellings, schools, public
parks, churches and incorporated city limits. The Ordinance also established minimum setback
distances from lakes, rivers, blue line streams, springs, sinkholes and roadways. Finally, the
Ordinance established that the facility must be located in an agricultural zone on a tract of land
of at least 15 acres. Cumberland County does not have a comprehensive planning and zoning
scheme.

DISCUSSION:
Upchurch challenged the Ordinance arguing that KRS Chapter 100 establishes the
requirements for enacting land use regulations. It was admitted that Cumberland County did not
have a comprehensive planning and zoning scheme and in enacting the ordinance had not met
any of the requirements of KRS Chapter 100 for establishing such land use regulations. The
County argued that the Ordinance was not enacted under KRS Chapter 100 but was enacted
under KRS 67.083(3), a “Home Rule” statute, that vested in a county government the power to
enact legislation to protect the health and welfare of its citizens.

The court held that the Ordinance was a valid ordinance properly enacted pursuant to KRS
67.083(3). In reaching this conclusion the court found that control of animals and protection of
the public, including control of public sanitation and vectors, were powers granted under the
“Home Rule” statute. In supporting its conclusion, the court found that the Ordinance did not
designate any particular place for the location of a poultry facility, as would a zoning ordinance.
Rather, the Ordinance required the owner of a poultry facility within the county to comply with
the specific conditions of the Ordinance, requirements that were reasonably related to the specific powers in KRS 67.083(3).
ISSUE:
What is the applicable statute of limitations for contamination of landowners’ properties by PCBs discharged by an industrial polluter and to what time period do damages apply? Do the landowners have a claim for negligent trespass? Do the landowners have a valid claim based on the creation of a permanent nuisance? Was the award of punitive damages the result of passion and prejudice?

HOLDING:
The court reversed judgment for the plaintiff landowners against Rockwell. In so reversing the court found that the landowners filed their claim within the five-year statute of limitations following their notice of the contamination. The court extended the “discovery rule” from personal injury cases to property damage cases. However, the court found there was no negligent trespass and there was no permanent nuisance as a result of the contamination. Lastly, the court found that the statements of the plaintiff’s counsel at closing were improper.

FACTS:
This case involved contamination injury to a number of properties in Logan County, Kentucky. At trial there were 50 separate awards to landowners of compensatory damages totaling $7,566,118 and punitive damages totaling $210,000,000. Polychlorinated Biphenyls (“PCBs”), in an amount insufficient to present a health hazard, were found on the properties. Rockwell International Corporation allowed the PCBs to flow from their plant into Town Branch from which it carried onto the properties during periods of flooding. The case was on remand from the Supreme Court where the Appeals Court was directed to consider a number of issues not decided on the initial appeal.

DISCUSSION:
The first issue the court was directed to address was determining the applicable statute of limitations and whether the landowner claims were barred by the statute. The plaintiffs argued that they discovered the damage to their properties in September 1988 and that the damage to their property became permanent at that time. Rockwell argued that as the damage was permanent and had occurred prior to the discovery by the plaintiffs they were barred from seeking damages beyond the statutory period. The court chose to extend the “discovery rule” to property injury cases, tolling the statute of limitations until the injury is discovered. The court determined that the landowners discovered the injury to their property in September 1988 and that their suit was filed within the five-year statutory period following the discovery.
Rockwell argued that since the plaintiffs alleged the damage to their property was permanent and had occurred prior to the immediately proceeding period of the statute of limitations, there was no recovery. The court found it "illogical" that the statute of limitations would be tolled but that the plaintiff's ability to recover damages was limited to the immediately proceeding statute of limitations period, and concluded that since the Plaintiffs had a viable cause of action they were entitled to recover damages for injuries that occurred outside of the five-year limitation period preceding the filing of their complaint.

The court was to determine whether the landowners had a valid claim for negligent trespass. The court concluded that while the landowners established that Rockwell had negligently trespassed on their properties they had failed to establish that the property had suffered any injury resulting from the trespass, as no persons who have come upon the land have been harmed, no farm animals or pets have been sickened, nor have any crops been lost. The land and the buildings thereon continue to be used as they were before the presence of PCBs was discovered.

Turning to the issue of a permanent nuisance, the court quickly dispatched the argument stating that in Kentucky nuisance is primarily concerned with some use of property by a defendant which causes sufficient annoyance to an adjacent property possessor that interferes with the use of the adjacent land to such a degree that its value is materially reduced. The court concluded that there was no rational basis for a finding that the discharge of minute quantities of PCBs onto the landowner's property resulted in any interference with their use and enjoyment of the properties. Furthermore, the law does not allow relief on the basis of an unsubstantiated phobia.

Lastly, turning to statements of the plaintiff's attorney during summation where the attorney repeatedly and gratuitously referred to Rockwell's location in "Seal Beach, California," and referred to Rockwell's position regarding PCB contamination stating "we're not worried out in Seal Beach where everybody has got a tan and a $60.00 haircut and life is good," the court found that the statements of counsel were outside the record, and otherwise improper, and were calculated to inflame the passions and excite the prejudices of the jurors inducing them to disregard the evidence, and go to an extreme and unjustifiable length in arriving at a verdict. Based on the inflammatory nature of the counsel's comments the court held that Rockwell was entitled to have the punitive damages award set aside.
ETHICAL CONCERNS FOR THE ENVIRONMENTAL LAWYER:

THE SARBANES-OXLEY ACT AND ENVIRONMENTAL REPORTING

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SECTION B
ETHICAL CONCERNS FOR THE ENVIRONMENTAL LAWYER:

THE SARBANES-OXLEY ACT AND ENVIRONMENTAL REPORTING

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SECTION B
Congress adopted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (the "Act") in an effort to restore investor confidence in light of public scandals such as Enron and Worldcom. Though only applicable to publicly-traded companies, the Act sets forth a new standard of conduct concerning disclosure of liabilities that may ripple down to privately-held companies.

The Act has various implications for the environmental lawyer. First, the Act sets forth new standards for reporting liabilities, including environmental liabilities. Second, the Act sets imposes obligations on attorneys to report potential violations of law by representatives of the client "up the ladder," a significant intrusion on the attorney-client privilege. Last, potential liabilities implicit in the Act create a need to ensure that all publicly-available information is completely accurate in order to stave off any claims that a company is concealing potential liabilities. Though treated in the popular press as a new securities law, the Act has far-reaching effects that all environmental lawyers need to consider.

I. Overview of the Sarbanes-Oxley Act

A. Applicability

The Act is applicable to companies currently registered under the Securities Exchange Act of 1934 or who apply to register securities under the Securities Exchange Act of 1934.

B. Basic Requirements of the Act

The Act includes provisions on three broad topics—(1) auditors; (2) internal corporate governance; and (3) corporate attorneys. Though this outline will focus on the third topic, it includes the basic provisions of the Act concerning auditors and corporate governance.
1. **Auditors**

The Act created the Public Company Accounting Oversight Board ("PCAOB"). The PCAOB was created to regulate accounting industry standards applicable to outside audits of public companies' books. *See Section 101 of the Act.*

All accounting firms preparing or issuing audit reports for public companies must be registered with the PCAOB. *See Section 102 of the Act.*

Registered firms performing audits for a client may not provide some non-auditing services to those clients, including bookkeeping, appraisal and valuation services, and actuarial services. *See Section 201 of the Act.* These provisions are intended to preserve auditor independence in reviewing the books of a public company.

Registered firms must comply with rules enacted by the PCAOB in order to maintain their certification, including rules concerning document retention and destruction. *See Section 103 of the Act.*

The PCAOB has the power to periodically audit registered firms to ensure compliance. Firms auditing more than 100 public companies are subject to an annual compliance audit; firms auditing less than 100 public companies are subject to a compliance audit every three years. *See Sections 104-105 of the Act.*

The PCAOB has the power to levy civil penalties of up to $750,000 against an individual and $15,000,000 against corporate-type entities, in conjunction with the SEC.

2. **Corporate Governance**

The Act sets forth several requirements to ensure that public companies, in making disclosures in publicly-available securities filings, do not mislead investors about the financial condition of the company. These requirements include (1) enhanced certification requirements; (2) requirements applicable to public companies' audit committees; and (3) restrictions on executive compensation. The Act also includes civil and criminal penalties for violation of the corporate governance provisions.

a. **Certification Requirements**

The Act required the SEC to adopt rules (now codified as Exchange Act Rules 13a-14 and 15d-14) requiring the CEO and CFO of all public companies to certify the accuracy of all annual and quarterly reports filed with the SEC. The certification must include the following: (1) They have read the report; (2) The report, to their knowledge, does not contain any material misstatements; and (3) The report fairly presents the financial
situation of the company. See Section 302 of the Act; Exchange Act Rules 13a-14 and 15d-14.

Every periodic report containing financial statements must be accompanied by a written statement from the CEO and CFO certifying that statements comply with securities laws and fairly present the financial condition of the company. This requirement overlaps with the requirements in Section 302, but it imposes criminal penalties of up to $5,000,000 in fines and 20 years in prison. See Section 906 of the Act.

Public companies must maintain controls on procedures for making disclosures, and do an evaluation of their internal disclosure controls within 90 days before filing quarterly reports. See Exchange Act Rules 13a-15 and 15d-15.

b. Requirements Applicable to Audit Committees

The Act includes a requirement that all members of the audit committee be "independent," i.e., that the committees members must not be internal to the public company such as a member of management or receive compensation from the public company other than director or committee fees. See Section 301 of the Act.

The Act allows the SEC to adopt rules requiring the stock exchanges and the NASDAQ to deny the listing of securities of any issuer not in compliance with the audit committee provisions. See Section 301 of the Act; Securities Act Release 33-8220.

The Act requires the audit committee to contract for outside auditing services on behalf of the public company instead of management. See Section 301 of the Act.

The audit committee must establish a system to allow employees of the public company to make confidential reports concerning questionable practices. See Section 301 of the Act.

The Act requires audit committees to disclose whether any of its members is a "financial expert," and if so, whether that expert is "independent" of management. See Section 407 of the Act; Securities Act Release 33-8177.

c. Requirements Applicable to Executive Compensation

If a public company is required to restate its public financial reports as a result of "misconduct," the Act requires the CEO and CFO to disgorge any bonuses or profits from sale of company stock gained in the 12 months after filing the inaccurate financial report. See Section 304 of the Act.
Corporate executives cannot trade company stock during blackout periods imposed on the company's employee stock plan. Any profits obtained on such trades must be returned to the company. See Section 306 of the Act.

Directors and officers must disclose any transactions they make in their company's stock ("insider" transactions) within two business days after completion of the transaction. See Section 403 of the Act.

Public companies may no longer make personal loans to directors and officers. See Section 402 of the Act.

d.   Penalties

The Act lengthens the statute of limitations for civil securities fraud actions from one year to two years from discovery of the violations, with an overall bar against civil actions after five years from the occurrence of the violation. See Section 804 of the Act.

The Act amends the Bankruptcy Code to prevent discharge of indebtedness due to judgements or settlements of securities violations. See Section 803 of the Act.

The Act lowers the standard required for the SEC to bar an officer or director of a public company from serving in either of those positions in another public company from "substantial unfitness" to "unfitness." The SEC may also now bar an officer or director in an administrative cease and desist proceeding. See Sections 305 and 1105 of the Act.

The Act also creates a number of new crimes, including a new securities fraud crime substantially the same as existing criminal liability under Rule 10b-5. Maximum jail time is increased from five to 20 years, and maximum fines are increased from $1,000,000 to $5,000,000 for individuals, and from $2,500,000 to $25,000,000 for corporate-type entities. See Sections 802, 807, 903, 1102, 1106, and 1107 of the Act.

3.   Attorneys

The Act requires the SEC to enact rules to govern the conduct of attorneys "practicing before the Commission," including rules requiring attorneys to report potential violations of securities or other laws "up the ladder" to senior management in order to ensure that those managers are fully aware of all potential liabilities to report in securities filings. See Section 307 of the Act. The SEC enacted those rules in January 2003. See Securities Act Release 33-8185.
The SEC, as part of the rules it plans to enact to carry out Section 307 of the Act, has proposed a rule to require attorneys who have knowledge that, notwithstanding any up the ladder reporting, the company filed any materially false or misleading information with the SEC, to effect a "noisy withdrawal" from that representation. The SEC has put implementation of the proposed "noisy withdrawal" rule on hold pending further comment.

II. The Sarbanes-Oxley Act and Environmental Reporting

The provisions of the Act (and accompanying regulations) affecting certification of a company's financial condition do not specify any mechanism for determining whether an environmental liability is "material." Material effects of compliance with environmental laws and material pending or threatened litigation proceedings are required to be reported pursuant to Items 101, 103 and 303 of Regulation S-K, 17 C.F.R. § 229, and are subject to generally-accepted standards developed in light of that regulation. Those rules have not changed in the wake of the Act. However, some groups are concerned that the increased emphasis on corporate disclosures will increase the scrutiny on environmental liabilities and whether they are indeed material.

A. Standard for Materiality

There is no hard and fast rule for determining whether a potential liability is material. The Securities Exchange Act of 1934 defines "material" as anything that would influence a reasonable investor's decision to invest in a company.

Item 101 of Regulation S-K requires public companies to disclosure the material effects of compliance with environmental laws.

Item 103 of Regulation S-K requires a description of all pending material legal proceedings. Item 103 normally requires any non-routine liability to be disclosed, as well as any damage claims that exceed 10 percent of the net worth of a company OR probable liability that is equal to or greater than $100,000, though the SEC claims that $100,000 is not a bright-line test. Item 103 is the most violated requirement.

Item 303 of Regulation S-K requires a public company to disclose any known trends or uncertainties that are reasonably likely to have a material impact on operations.

B. Alternative Proposals for Determining Materiality

1. ASTM

Some groups have petitioned the SEC to formally enact as regulations under the Act the American Society of Testing and Materials ("ASTM") Standard Guide for Disclosure of Environmental Liabilities (ASTM E2137-01) established in March 2002 for estimating and disclosing environmental liabilities. According to the rulemaking petition, adoption of the ASTM standards would provide a uniform and comprehensive approach to estimating environmental liabilities and
expanding the scope of conditions requiring disclosure. Should the SEC decide to enact regulations enshrining the ASTM standards, companies may be faced with expanded disclosure obligations if they do not currently adhere to the ASTM standards.

ASTM E2137-01 gives a public company mechanism by which to estimate the amount of potential liabilities, particularly when there are uncertainties inherent in the potential liabilities. ASTM E2137-01 sets forth four methods for calculating liabilities—(1) expected costs; (2) most likely value; (3) range of value; and (4) known minimum value. The method to be used depends on the amount of information available and the degree of uncertainty.

2. ISO 14000

ISO 14000 standards are a set of internationally-recognized standards for environmental process management developed by the International Organization for Standardization. The Act provides that public companies must maintain controls on procedures for making disclosures, and do an evaluation of their internal disclosure controls within 90 days before filing quarterly reports. See Exchange Act Rules 13a-15 and 15d-15. ISO 14000 processes and ISO certification under ISO 14001 give public companies a mechanism to monitor their environmental management systems to ensure that they can give proper assurances under Exchange Act Rules 13a-15 and 15d-15. Unlike ASTM E2137-01, there has not been a push to codify ISO 14000 standards into regulations as a method to achieve prima facie compliance.

3. Other Standards

Other standards which attempt to give meaning to the materiality requirement include: American Institute of Certified Public Accountants Statement of Position 96-1, Environmental Remediation Liabilities; Financial Accounting Standards Board Statement of Financial Accounting Standards No. 5, Accounting for Contingencies; and Financial Accounting Standards Board Interpretation No. 14, Reasonable Estimation of the Amount of a Loss.

III. The Sarbanes-Oxley Act and the Attorney-Client Privilege

Section 307 of the Act authorizes the SEC to enact rules "setting forth minimum standards of professional conduct for attorneys practicing before the Commission." The SEC has taken steps to exercise its authority under Section 307 of the Act by enacting a rule requiring attorneys for public corporations to report potential violations of law "up the ladder" to senior management and by proposing a rule requiring a "noisy withdrawal" by an attorney for a public company if senior management does not appropriately react to the up the ladder reporting of potential violations. Both the current up the ladder reporting rule and the proposed noisy withdrawal rule have implications for the attorney-client privilege.
A. Threshold Issue—"Practicing Before the Commission"

Section 307 of the Act limits the SEC's authority to those attorneys "practicing before the Commission." The SEC has claimed jurisdiction over all lawyers preparing and issuing securities, representing a public company in any way before the SEC, making or preparing disclosures to the SEC, or otherwise providing advice on documents to be filed with the SEC. See 17 CFR § 205.2(a). The last two provisions pull in attorneys preparing disclosures of any type to the SEC, including disclosures of environmental liabilities. Thus, even though most environmental attorneys do not consider themselves to be securities lawyers, if those lawyers aid in preparing environmental disclosures they are "practicing before the Commission" for the purposes of Section 307 of the Act and all rules enacted under that Section. There are no cases at this time challenging the SEC's interpretation of the extent of its power under Section 307 of the Act.

B. Up the Ladder Reporting Rules

The Up the Ladder Reporting Rule requires attorneys aware of evidence of a material violation of law to report that evidence to the CEO or chief legal officer of the public company. This rule is of particular importance to environmental attorneys, who normally deal with environmental managers and not persons at the senior management level. This rule does not directly affect the attorney-client privilege (though it does interfere in the attorney-client relationship) because it does not directly require a breach of the privilege. However, other parts of the Rule are of concern.

The Rule permits, but does not require, attorneys to reveal client confidences to the SEC without the client's consent if the attorney believes that a material violation of law will occur. See 17 CFR § 203.5(d)(2). Any attorney who chooses to breach the confidence and reveal client confidences in such a manner would in most states be guilty of a violation of ethics rules on confidentiality of client information (as distinct from the evidentiary privilege). The SEC takes the position that its rules preempt all other conflicting law, and that this preemption gives any attorney cover from an ethics complaint. See 17 CFR § 205.1; 17 CFR § 205.6(c). However, it is not clear that state ethics rules would recognize any federal preemption since this rule is not mandatory. See, e.g., SCR 3.130(1.6), Commentary 20-22 (setting forth the principle that disclosure of client confidences based on other law is only appropriate in Kentucky when compelled and that there is a presumption against interpreting other law to compel disclosure). In other words, in most states an attorney risks an ethics violation if he or she attempts to rely on the SEC for authority to breach client confidences.

Also, the SEC has given itself the power to sanction attorneys who do not comply with the Up the Ladder Reporting Rule. While this provision could only be invoked if the SEC determines that a public company committed a material violation of law, the SEC could use this provision to force attorneys to defend their own actions, and, in turn, reveal client confidences to the SEC in their own defense.
C. Proposed Noisy Withdrawal Rules

The proposed Noisy Withdrawal Rule would require attorneys who reasonably believe that a material violation of law is ongoing or about to occur and that the material violation of law is likely to result in substantial injury to the public company or its investors must (1) withdraw from the representation; (2) provide written notice to the SEC that the attorney had withdrawn from the representation for "professional considerations"; and (3) disaffirm to the SEC any filing which contains any material misrepresentations. The last provision applies to in-house attorneys, but in-house attorneys are not required to quit their jobs.

This proposed Rule is designed to give notice to the SEC of potential violations of law, which implicitly reveals a client confidence. The SEC has contended that the proposed Rule is consistent with ABA Model Rules 1.16(a)(1) and 4.1, Comment 3, which allow an attorney to withdraw from a representation if the attorney's services are or will be used in commission of a fraud or crime. See also SCR 3.130(1.16) and 3.130(4.1) (equivalent Kentucky ethics rules). However, some commentators have opined that the circumstances permitting withdrawal in Model Rules 1.16(a)(1) and 4.21 are sufficiently broad to protect client confidences, whereas a withdrawal under the SEC proposed Rule will give the SEC much more information concerning the conduct of the client.

Given the outcry over the proposed Noisy Withdrawal rule, the SEC has tabled the Rule for now and is offering for comment an alternate proposal which would allow the attorney to withdraw upon notice to the public company. The public company would then have the burden to notify the SEC of the withdrawal. This proposal has also been criticized on the same grounds as the original proposal, i.e., that the SEC notice provisions reveal client confidences no matter who is compelled to make the disclosure.

IV. The Sarbanes-Oxley Act and Public Information

In addition to the direct implications of the Act, U.S. EPA's roll-out of the ECHO Database, along with other publicly-available data from U.S. EPA and equivalent state agencies, may have implications for the reporting of environmental liabilities in securities filings.

A. Publicly-Available Information

The ECHO Database (Enforcement and Compliance History Online) provides the public easy access to facility enforcement and compliance information for approximately 800,000 facilities for the past two years. Facilities regulated under the Clean Air Act Stationary Source Program, Clean Water Act, National Pollutant Elimination Discharge System, and Resource Conservation and Recovery Act are included in the ECHO Database. Information on the ECHO Database is available on the U.S. EPA website at http://www.epa.gov/echo/.

The ECHO Database is updated once a month, but some commentators have noticed a longer lag time between posting of a proposed penalty assessment and correction to a
final, negotiated penalty assessment, which could be much lower. An EPA spokesperson has admitted that "there may be a small percentage of cases where EPA shows the proposed penalty where the company has settled for a lesser amount." See "Sarbanes-Oxley Act Forces Corporations to Focus on Environmental Disclosure Rules," 34 ENVIRONMENT REPORTER 36 at 2048-2049 (September 12, 2003).

Other regulatory agencies commonly post enforcement records on their websites, and any member of the public can easily obtain enforcement information about public companies from regulatory agencies through the Freedom of Information Act and its state equivalents.

B. Interaction of Publicly-Available Information and the Materiality Requirement

Item 103 of Regulation S-K of the Securities Exchange Act of 1934 requires a public company to disclose any non-routine liability, as well as any damage claims that exceed 10 percent of the net worth of a company OR probable liability that is equal to or greater than $100,000. See Section II.A, supra. The ECHO Database will include information on proposed penalty assessments, and that information will be available to the public and the SEC. If a proposed penalty is listed in excess of $100,000, the SEC and stockholders will be able to find that information to use as a double-check against disclosures. If that proposed penalty is not disclosed pursuant to Item 103, the SEC or stockholders may be under the impression that the public company failed to properly disclose liabilities, even if the ultimate liability ended up being less than $100,000. This danger heightens the need for public companies to periodically review the accuracy of information in the ECHO Database and similar databases to make sure accurate penalty information is posted.
DIVISION OF WATER
TRIENNIAL REVIEW OF
WATER QUALITY STANDARDS

Lloyd R. Cress
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Lexington, Kentucky

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SECTION C
DIVISION OF WATER
TRIENNIAL REVIEW OF WATER QUALITY STANDARDS

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SECTION C
Overview

Water quality standards establish the regulatory goals for instream water quality to be attained through limitations on individual discharges through effluent limitations and permit conditions. The Clean Water Act vests states with primary responsibility for establishing water quality standards subject to federal review and approval. If USEPA disapproves state water quality standards the federal agency is obligated to promulgate replacement federal standards. States must conduct a public review of their water quality standards at least every three years. Kentucky’s Natural Resources and Environmental Protection Cabinet Division of Water is currently engaged in its triennial review of water quality standards.

NREPC Proposed Revision of Water Quality Standards

See summary at Tab 1.

Antidegradation Issue

The Clean Water Act does not specifically address antidegradation. USEPA has promulgated 40 CFR 131.12 requiring states to adopt and implement antidegradation policies and implementation procedures that provide three levels of protection of water quality - Tier 3 outstanding national resource waters where virtually no activity lowering water quality is permitted; Tier 2 high quality waters where activity lowering quality is permitted only if it is necessary to accommodate important social and economic development; and Tier 1 use protected waters where lowering water quality is permitted as long as water quality standards are met. USEPA has not adopted federal regulations establishing procedures for implementation of the antidegradation program.

NREPC Division of Water adopted antidegradation implementation regulation 401 KAR 5:030 in 1995 which was partially approved and partially disapproved by USEPA in 1997. The Division of Water revised 401 KAR 5:030 in 1999 and USEPA partially approved and partially disapproved the regulation in 2000. USEPA’s partial disapproval was based upon its position that the criteria for identification of high quality waters were inadequate and resulted in an insufficient number of streams being identified as high quality. In 2001 environmental advocacy groups filed with USEPA a notice of their intent to initiate a citizen suit challenging USEPA’s failure to promulgate a replacement antidegradation implementation regulation for Kentucky. In November 2002 USEPA proposed a replacement federal antidegradation implementation regulation for Kentucky which was very general and lacked detailed procedures.

NREPC proposed significant revisions to 401 KAR 5:030 in the October, 2003 Administrative Register (See Tab 2). The proposed revisions included the following:

(i) creation of a new high quality water category and a new impaired water category;
(ii) elimination of the use-protected category;
(iii) exemption of coal mining discharges to exceptional and high quality waters from review under the antidegradation program;
(iv) assignment of all waters identified on the CWA Section 305 (b) Report to Congress as impaired for any pollutant to the impaired water category for all pollutants thereby obviating the requirement for antidegradation review;
(v) clarification that the exemption from antidegradation review for existing discharges that are expanded by 20% or less is based upon previously permitted rather than previous actual discharge levels;
(vi) requirement that new or expanded discharges to high quality waters that do not accept special effluent limitations (½ the otherwise allowable water quality-based limitation) demonstrate that no technologically or economically feasible alternatives exist (with alternatives considered to be economically feasible if the cost does not exceed 120% of original proposal) and that allowing lower water quality is necessary to accommodate important economic or social development (without utilization of the USEPA guidance document);
(vii) default to high quality water category for all waters not specifically categorized;
(viii) conclusive presumption that approval of a POTW’s regional facility plan demonstrates compliance with the alternatives analysis and socioeconomic demonstration requirements for new and expanded discharges by POTW to high quality waters.

The Division of Water’s proposed revisions to 401 KAR 5:030 have encountered opposition from both environmental advocates (See Tab 3) and business interests (See Tab 4).
SUMMARY OF PROPOSED AMENDMENTS TO

5:002 Summary  This amendment revises 401 KAR 5:002 to include two (2) new definitions and deletes one (1) definition that is no longer necessary. The two (2) new definitions are for the term, "E. coli" or "Escherichia coli" and the category, "high quality water". The previously included category, "Use protected water", has been deleted in this amendment because the category name, "Impaired water", is now being used. The term, "impairment", already exists in the definitions regulation; therefore, there was no need to include a definition for "Impaired" in this amendment. This administrative regulation is being amended to accompany the amended water quality standards, 401 KAR 5:026, 5:029, 5:030, and 5:031, filed on the same date.

5:026 Summary  This amendment revises designated use information for three (3) previously listed surface waters, replaces one (1) previously listed surface water, and adds twelve (12) previously unlisted surface waters. Two (2) of the three (3) revisions were to correct errors in the previous triennial review in which cold water aquatic habitat use was mistakenly changed to warm water aquatic habitat use in the Nolin and Rough rivers below their respective reservoirs. This amendment is necessary to update surface water information and assign use designations for previously unlisted surface waters. This administrative regulation is being amended as part of the triennial review.

5:029 Summary  This amendment restricts location of a mixing zone which would jeopardize endangered or threatened aquatic species listed in the Federal Endangered Species Act. This amendment also prohibits mixing zones for new discharges of Bioaccumulative Chemicals of Concern (BCCs) and phases out mixing zones for existing discharges of these substances. This amendment is necessary to establish revised measures to protect human health and aquatic life.

5:030 Summary  This amendment revises surface water categories to include the new category of high quality water as a default category and the newly named impaired water. It also sets forth antidegradation review requirements for several types of discharges. The amendment reorganizes much of the Section 1 text and includes 166 surface waters newly classified as exceptional water that are reorganized into a new table. The new table includes waterway segments for each listed water. Two (2) new documents are incorporated by reference and two (2) documents previously incorporated by reference have been removed from this administrative regulation. This amendment is necessary to address outstanding U.S. EPA disapproval. The U.S. EPA has disapproved this regulation after promulgation twice on August 7, 1997 and August 20, 2000. At Volume 67 Federal Register No 220 p 68971 on November 14, U.S. EPA proposed a substitute rule that is substantially the same as 401 KAR 5:029(1). The proposal, if enacted, will leave Kentucky without implementation procedures for its antidegradation program.

5:031 Summary  This amendment updates water quality criteria to reflect scientific developments. Three (3) tables previously divided in this administrative regulation have been consolidated into one (1) table and placed in Section 6 of this administrative regulation. Dilution flows for non-carcinogenic substances in fish tissue and radionuclides were modified from $7Q_{10}$ to harmonic mean flow in order to more accurately reflect the duration of exposure under which these human health criteria were developed. This amendment is necessary to revise criteria to protect human health and to meet federal recommendations.

Tab One
VOLUME 30, NUMBER 4 – OCTOBER 1, 2003

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. There is no federal statute or regulation mandating that Kentucky implement a water pollution control program. For Kentucky to maintain its delegation over the NPDES permit program, the Clean Water Act requires that Kentucky review its water quality standards every three years and comply with the programmatic requirements of 40 C.F.R. Part 131, including the antidegradation policy.


3. Minimum or uniform standards contained in the federal mandate. The Clean Water Act requires designated uses, criteria, standards and antidegradation policies in water quality standards.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements than those required by the federal mandate? No.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. There is no stricter standard or additional or different responsibilities or requirements.

FISCAL NOTE ON LOCAL GOVERNMENT

1. Does this administrative regulation relate to any aspect of a local government, including any service provided by that local government? Yes

2. State what unit, part, or division of local government this administrative regulation will affect. This administrative regulation may affect the wastewater treatment operations of local government if they have new or expanded discharges into surface waters of the Commonwealth.

3. State, in detail, the aspect or service of local government to which this administrative regulation relates, including identification of the applicable state or federal statute or regulation that mandates the aspect or service or authorizes the action taken by the administrative regulation. This amended administrative regulation relates to local governments' wastewater treatment service. KRS 224.10-100, 224.70-100, and 224.70-110 mandate action taken by this administrative regulation.

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a local government for the first full year the administrative regulation is to be in effect. If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Table 1

<table>
<thead>
<tr>
<th>Stream</th>
<th>Segment</th>
<th>River Miles</th>
<th>County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Red River</td>
<td>Upstream to Island off SR 1067 to Downstream Wild River Boundary at SR 746</td>
<td>49.2-68.6</td>
<td>Menifee/Wolfe</td>
</tr>
<tr>
<td>Underground River System</td>
<td>Within Mammoth Cave National Park Boundary</td>
<td></td>
<td>Edmonson/Hart/Barren</td>
</tr>
<tr>
<td>Big South Fork of Cumberland River</td>
<td>Downstream Wild River Boundary to Tennessee Stateline</td>
<td>45.0-55.2</td>
<td>McCreaey</td>
</tr>
</tbody>
</table>

(a) Categorization criteria. A surface water shall be categorized as an outstanding national resource water if the surface water meets, at a minimum, the requirements for an outstanding state resource water as provided in 401 KAR 5:031, Section 8, and if the surface water demon-
strates national ecological or recreational significance.

(c) Implementation procedure. Water quality shall be maintained and protected in outstanding national resource water. A new discharger or expanded discharge which may result in permanent or long-term changes in water quality is prohibited. The cabinet may approve temporary or short-term changes in water quality if the changes to the outstanding national resource water have no demonstrable impact on the ability of the water to support the designated uses.

(2) Exceptional water. Surface waters of the Commonwealth categorized as exceptional water are listed in Table 2 of this subsection.

<table>
<thead>
<tr>
<th>Stream</th>
<th>Segment</th>
<th>River Miles</th>
<th>County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hobbs Fork*</td>
<td>Mouth to Headwaters</td>
<td>0.0-3.8</td>
<td>Martin</td>
</tr>
<tr>
<td>Hobbs Fork Unidentified Tributary*</td>
<td>Hobbs Fork to Headwaters</td>
<td>0.0-0.55</td>
<td>Martin</td>
</tr>
<tr>
<td>Lower Pigeon Branch*</td>
<td>Left Fork to Headwaters</td>
<td>0.5-1.7</td>
<td>Pike</td>
</tr>
<tr>
<td>Russell Fork*</td>
<td>Clinch Field RR Yard off HWY 80 to Virginia Stateline</td>
<td>14.4-16</td>
<td>Pike</td>
</tr>
<tr>
<td>Toms Branch*</td>
<td>Mouth to Headwaters</td>
<td>0.0-1.4</td>
<td>Pike</td>
</tr>
<tr>
<td>LITTLE SANDY RIVER BASIN</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Big Caney Creek*</td>
<td>Clay Fork to Headwaters</td>
<td>0.0-4.7</td>
<td>Carter</td>
</tr>
<tr>
<td>Big Sinking Creek*</td>
<td>SR 966 to Clay Fork and Arab Fork</td>
<td>10.7-15.2</td>
<td>Carter</td>
</tr>
<tr>
<td>Meadow Branch*</td>
<td>Mouth to Headwaters</td>
<td>0.0-1.4</td>
<td>Elliott</td>
</tr>
<tr>
<td>Middle Fork Little Sandy River*</td>
<td>Mouth to Sheepskin Branch</td>
<td>0.0-3.6</td>
<td>Elliott</td>
</tr>
<tr>
<td>Nichols Fork*</td>
<td>Green Branch to Headwaters</td>
<td>0.0-1.9</td>
<td>Elliott</td>
</tr>
<tr>
<td>Laurel Creek*</td>
<td>Carter School Rd Bridge to Headwaters</td>
<td>7.6-14.4</td>
<td>Elliott</td>
</tr>
<tr>
<td>LICKING RIVER BASIN</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Blackwater Creek*</td>
<td>Eaton Creek to Greasy Fork</td>
<td>3.8-11.4</td>
<td>Morgan</td>
</tr>
<tr>
<td>Bolts Fork</td>
<td>Mouth to Landuse Change</td>
<td>0.0-2.1</td>
<td>Menifee</td>
</tr>
<tr>
<td>Brushy Fork</td>
<td>Cave Run Lake Backwaters to Headwaters</td>
<td>0.6-5.0</td>
<td>Menifee</td>
</tr>
<tr>
<td>Brushy Fork*</td>
<td>Mouth to Headwaters</td>
<td>0.0-5.7</td>
<td>Pendleton</td>
</tr>
<tr>
<td>Bucket Branch*</td>
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<td>0.0-1.9</td>
<td>Morgan</td>
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<td>Craney Creek</td>
<td>Mouth to Headwaters</td>
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<td>Rowan</td>
</tr>
<tr>
<td>Devils Fork*</td>
<td>Mouth to Headwaters</td>
<td>0.0-7.8</td>
<td>Morgan</td>
</tr>
<tr>
<td>Grovers Creek*</td>
<td>Kincaid Lake Backwaters to Unidentified Tributary</td>
<td>0.5-3.4</td>
<td>Pendleton</td>
</tr>
<tr>
<td>Licking River</td>
<td>SR 211 to unnamed Rd off Slatey Point Rd</td>
<td>154.5-165.0</td>
<td>Bath/Rowan</td>
</tr>
<tr>
<td>North Fork of Licking River*</td>
<td>Cave Run Lake Backwaters to Devils Fork</td>
<td>9.9-14.2</td>
<td>Morgan</td>
</tr>
<tr>
<td>Slabcamp Creek</td>
<td>Mouth to Headwaters</td>
<td>0.0-3.4</td>
<td>Rowan</td>
</tr>
<tr>
<td>South Fork Grassy Creek*</td>
<td>Mouth to Greasy Creek</td>
<td>0.0-19.6</td>
<td>Pendleton</td>
</tr>
<tr>
<td>Welch Fork*</td>
<td>Mouth to First Road Crossing</td>
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<td>Menifee</td>
</tr>
<tr>
<td>West Creek*</td>
<td>Mouth to Headwaters</td>
<td>0.0-9.5</td>
<td>Robertson</td>
</tr>
<tr>
<td>KENTUCKY RIVER BASIN</td>
<td></td>
<td></td>
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</tr>
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<td>Big Double Creek*</td>
<td>Mouth to Headwaters</td>
<td>0.0-6.5</td>
<td>Clay</td>
</tr>
<tr>
<td>Big Branch*</td>
<td>Mouth to Right Fork and Left Fork Creek</td>
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<td>Leslie</td>
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<tr>
<td>Buffalo Creek*</td>
<td>Mouth to Right Fork and Left Fork</td>
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<tr>
<td>Cavanaugh Creek*</td>
<td>South Fork of Station Camp Creek to Foxtown Rd</td>
<td>0.0-5.3</td>
<td>Jackson</td>
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<tr>
<td>Cawood Branch*</td>
<td>Mouth to Headwaters</td>
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<td>Leslie</td>
</tr>
<tr>
<td>Cedar Creek Unidentified Tributary*</td>
<td>Mouth to Headwaters</td>
<td>0.0-1.4</td>
<td>Owen</td>
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<td>Chester Creek*</td>
<td>Mouth to Headwaters</td>
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<td>Wolfe</td>
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<tr>
<td>Clear Creek*</td>
<td>Mouth to East Fork Clear Creek</td>
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<td>Clemons Fork*</td>
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<td>Breathitt</td>
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<tr>
<td>Coles Fork*</td>
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<td>Breathitt</td>
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<tr>
<td>Drennon Creek*</td>
<td>Flat Bottom Road Crossing to Town Branch</td>
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<td>East Fork of Indian Creek*</td>
<td>West Fork of Indian Creek to Headwaters</td>
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<td>Henry</td>
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<td>Evans Fork*</td>
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<td>0.0-2.9</td>
<td>Estill</td>
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<tr>
<td>Falling Rock Branch*</td>
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<td>0.0-6.6</td>
<td>Breathitt</td>
</tr>
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</table>

C - 6
<table>
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<th>Creek Name*</th>
<th>Location</th>
<th>Distance</th>
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<tr>
<td>Gladie Creek</td>
<td>Mouth to Headwaters</td>
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<td>Menifee</td>
</tr>
<tr>
<td>Glenns Creek Unidentified Tributary</td>
<td>Landuse Change to Headwaters</td>
<td>0.2-1.3</td>
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<td>Goose Creek</td>
<td>Mouth to Laurel Creek</td>
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<td>Griers Creek</td>
<td>Urban Area to Unidentified Tributary</td>
<td>2.9-3.4</td>
<td>Woodford</td>
</tr>
<tr>
<td>Grindstone Creek*</td>
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<td>0.0-2.2</td>
<td>Franklin</td>
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<td>Hardwick Creek</td>
<td>Mouth to Little Hardwick Creek</td>
<td>0.0-3.2</td>
<td>Powell</td>
</tr>
<tr>
<td>Hell For Certain</td>
<td>Mouth to Big Fork</td>
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<td>Leslie</td>
</tr>
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<td>Hines Creek*</td>
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<td>Honey Branch</td>
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<td>Leslie</td>
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<td>Hopper Cave* Branch</td>
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<td>Jackson</td>
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<td>John Carpenter Fork*</td>
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<td>0.0-1.5</td>
<td>Breathitt</td>
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<td>Left Fork Big Double Creek*</td>
<td>Mouth to Headwaters</td>
<td>0.0-1.5</td>
<td>Clay</td>
</tr>
<tr>
<td>Line Fork*</td>
<td>Defeated Creek to Headwaters</td>
<td>11.6-27.5</td>
<td>Letcher</td>
</tr>
<tr>
<td>Line Fork Unidentified Tributary* (LCW)</td>
<td>Mouth to Headwaters</td>
<td>0.0-0.55</td>
<td>Letcher</td>
</tr>
<tr>
<td>Little Millseat Branch*</td>
<td>Mouth to Headwaters</td>
<td>0.0-1.2</td>
<td>Breathitt</td>
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**SALT RIVER BASIN**

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<tr>
<td>Jackie Branch*</td>
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<td>-----------------------------------------------------------------------------</td>
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<td>Watts Creek</td>
<td>Lake to Headwaters</td>
<td>2.2-4.3</td>
<td>Harlan</td>
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</tbody>
</table>

*Waterbodies in the cabinet's reference reach network

(a) Categorization criteria. A surface water shall be categorized as an exceptional water if any of the following criteria are met:
1. Surface water is designated as a Kentucky Wild River and is not categorized as an outstanding national resource water;
2. Surface water is designated as an outstanding state resource water that does not support a federally threatened or endangered aquatic species;
3. Surface water contains either of the following:
   a. A fish community that is rated "excellent" by the use of the Index of Biotic Integrity included in "Development and Application of the Kentucky Index of Biotic Integrity (KIBI), 2003, incorporated by reference in Section 3 of this administrative regulation; or
   b. A macroinvertebrate community that is rated "excellent" by the Macroinvertebrate Bioassessment Index included in "The Kentucky Macroinvertebrate Bioassessment Index, 2003, incorporated by reference in Section 3 of this administrative regulation; or
4. Surface water in the cabinet's reference reach network.

(b) Implementation procedure.
1. Dischargers listed in clauses a through e of this subparagraph are subject to control by existing cabinet programs including the Kentucky Pollution Discharge Elimination System program. Subparagraphs 2 through 9 of this paragraph shall not apply to those dischargers identified in clauses a through e of this paragraph, but the cabinet shall assure water quality necessary to fully protect existing uses.
   a. Storm water discharge;
   b. Coal mining discharge subject to regulation under the Surface Mining Control and Reclamation Act and 33 U.S.C. 1344;
   c. Domestic sewage discharge from a single-family residence;
   d. Concentrated animal feeding operations; and
   e. KPDES permit renewals that result in less than a twenty (20) percent increase in pollutant loading from the previously permitted pollutant loading.
2. Zones of initial dilution are prohibited in exceptional water unless assigned before the effective date of this administrative regulation.

3. A KPDES permit for a new discharger or expanded discharge into exceptional water shall contain effluent limitations for the entire effluent and shall have an effluent quality of:
   a. A chronic whole effluent toxicity limitation shall apply unless an acute whole effluent toxicity limitation is more stringent; and
   b. Chloride limitations shall be based on the domestic water supply criteria of 250 mg/l.

4. A KPDES permit for a new domestic sewage discharger or expanded domestic sewage discharge into exceptional water shall contain effluent limitations for the entire effluent and shall have an effluent quality of:
   a. No greater than ten (10) mg/l five (5) day carbonaceous biochemical oxygen demand;
   b. No greater than two (2) mg/l ammonia-nitrogen;
   c. No greater than 0.010 mg/l total residual chlorine;
   d. No greater than ten (10) mg/l total suspended solids;
   e. No greater than one (1) mg/l total phosphorus;
   f. A minimum of seven (7) mg/l dissolved oxygen;
   g. An arithmetic mean value for fecal coliform bacteria not to exceed 200 colonies per 100 milliliters during a period of thirty (30) consecutive days or 400 colonies per 100 milliliters during a period of seven (7) consecutive days, or an arithmetic mean for Escherichia coli bacteria not to exceed 130 colonies per 100 milliliters during a period of thirty (30) consecutive days or 230 colonies per 100 milliliters during a period of seven (7) consecutive days; and
   h. The discharge shall not cause the average instream dissolved oxygen concentration to be less than six and zero-tenths (6.0) mg/l.

5. A KPDES permit for a new non-domestic discharger or an expanded non-domestic discharge into exceptional water shall be restricted to no more than one-half (1/2) of the water quality based limitations that would have been permitted at standard design conditions.

6. If the permit applicant accepts the effluent limitations required by this paragraph, the KPDES permit shall be issued with these effluent limitations and additional requirements of the Ken-
the Kentucky Pollution Discharge Elimination System program without further antidegradation review.

7. If the permit applicant does not accept the effluent limitations required by this paragraph, the applicant shall demonstrate to the satisfaction of the cabinet that no technologically or economically feasible alternatives exist and that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the water is located. An alternative treatment shall be deemed economically feasible, if the capital and operating cost does not exceed 120 percent of the capital and operating cost of the discharge proposal. For purposes of this administrative regulation, the approval of a POTW's regional facility plan pursuant to 401 KAR 5:006 shall demonstrate compliance with the alternatives analysis and socioeconomic demonstration for a regional facility. The alternatives analysis and socioeconomic demonstration shall consider the following:

a. Discharge to other treatment facilities;

b. Use of other discharge locations;

c. Water reuse or recycle;

d. Process and treatment alternatives;

e. On-site or subsurface disposal;

f. Any other examination of alternatives to lowering water quality deemed appropriate by the cabinet or the applicant.

8. A permit applicant who has failed to demonstrate to the satisfaction of the cabinet the necessity for lowering water quality shall meet the effluent limitations required by this paragraph and additional requirements of the Kentucky Pollution Discharge Elimination System program.

9. A permit applicant who demonstrates to the satisfaction of the cabinet the necessity for lowering water quality shall meet the water quality based limitations as outlined in 401 KAR 5:031.

(3) High quality water.

(a) Categorization criteria. A surface water shall be categorized as a high quality water if the surface water fully supports all applicable designated uses and if the surface water is not listed in Table 1 or 2 of this section as an outstanding national resource water or an exceptional water.

(b) Implementation procedure.

1. Dischargers listed in clauses a through e of this subparagraph are subject to control by existing cabinet programs including the Kentucky Pollution Discharge Elimination System program. Subparagraphs 2 through 6 of this paragraph shall not apply to those dischargers identified in clauses a through e of this paragraph, but the cabinet shall assure water quality necessary to fully protect existing uses. Facilities that discharge pollutants not found in Table 1 of Section 6 of 401 KAR 5:031 are subject to control by existing cabinet programs and must demonstrate to the satisfaction of the cabinet an alternatives analysis and socioeconomic demonstration pursuant to this paragraph.

a. Storm water discharge;

b. Coal mining discharge subject to regulation under the Surface Mining Control and Reclamation Act and 33 U.S.C. 1344;

c. Domestic sewage discharge from a single-family residence;

d. Concentrated animal feeding operations; and

e. KPDES permit renewals that result in less than a twenty (20) percent increase in pollutant loading from the previously permitted pollutant loading.

2. The pollutants of the entire effluent of a KPDES permit for discharge into high quality water shall be restricted to no more than one-half (1/2) of the water quality based limitations that would have been permitted under standard design conditions for pollutants listed in Table 1 of Section 6 of 401 KAR 5:031.

3. If the permit applicant accepts the effluent limitations required by this paragraph, the KPDES permit shall be issued with these effluent limitations and any additional requirements established by the cabinet for the Kentucky Pollution Discharge Elimination System program without further antidegradation review.

4. If the permit applicant does not accept the effluent limitations required by this paragraph, the applicant may request water quality based limitations permitted at standard design conditions. In making this request, the applicant shall demonstrate to the satisfaction of the cabinet that no technologically or economically feasible alternatives exist and that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the water is located. An alternative treatment shall be deemed economically feasible, if the capital and operating cost does not exceed 120 percent of the capital and operating cost of the discharge proposal. For purposes of this administrative regulation, the approval of a POTW's regional facility plan pursuant to 401 KAR 5:006 shall demonstrate compliance with the alternatives analysis and socioeconomic demonstration for a regional facility. The alternatives analysis and socioeconomic demonstration shall consider the following:

a. Discharge to other treatment facilities;

b. Use of other discharge locations;

c. Water reuse or recycle;

d. Process and treatment alternatives;

e. On-site or subsurface disposal;

f. Any other examination of alternatives to lowering water quality deemed appropriate by the cabinet or the applicant.

g. The positive or beneficial effect of the facility on an existing environmental or public health problem;

h. The increase or avoidance of a decrease in employment;

i. The increase in production level;

j. The increase in operational efficiency;

k. Industrial or commercial benefit to the community; and

l. Any other economic or social benefit to the community.

5. A permit applicant who has failed to demonstrate to the satisfaction of the cabinet the necessity for lowering water quality shall meet the effluent limitations required by this paragraph and additional requirements of the Kentucky Pollution Discharge Elimination System program.

6. A permit applicant who demonstrates to the satisfaction of the cabinet the necessity for lowering water quality shall meet the water quality based limitations as outlined in 401 KAR 5:031.

(4) Impaired water.

(a) Categorization criteria. A surface water categorized as impaired for applicable designated uses shall be a water identified pursuant to 33 U.S.C. 1315. Surface water categorized as impaired shall be assessed by the cabinet as not fully supporting any applicable designated uses.

(b) Implementation procedure. All existing uses shall be protected and the level of water quality necessary to protect those existing uses shall be assured in impaired water. The process to allow a discharge into an impaired water and to assure protection of the water is regulated by the requirements in the Kentucky Pollution Discharge Elimination System Program, Implementation of Antidegradation Policy. The following procedures shall govern implementation of the antidegradation policy of 401 KAR 5:030, Section 1, for a point source discharge.

1. Categorization. Surface waters shall be placed into one (1) of three (3) categories:

(a) Outstanding national resource waters:

1. Surface water designated as a Kentucky Wild River unless it is categorized as an outstanding national resource water;

2. Outstanding state resource water that does not support a federally threatened or endangered aquatic species;

3. Surface water that fully supports all applicable designated uses and contains:

a. A fish community that is rated "excellent" by the use of the Index of Biotic Integrity included in "Methods for Assessing Biological Integrity of Surface Waters," incorporated by reference in this section;

b. A macroinvertebrate community that is rated "excellent" by the Macroinvertebrate Bioassessment Index included in "Methods for Assessing Biological Integrity of Surface Waters," incorporated by reference in this section;

(c) Exceptional waters:

1. Surface water designated as a Kentucky Wild River unless it is categorized as an outstanding national resource water;

2. Outstanding state resource water that does not support a federally threatened or endangered aquatic species;

3. Surface water that fully supports all applicable designated uses and contains:

a. A fish community that is rated "excellent" by the use of the Index of Biotic Integrity included in "Methods for Assessing Biological Integrity of Surface Waters," incorporated by reference in this section;

b. A macroinvertebrate community that is rated "excellent" by the Macroinvertebrate Bioassessment Index included in "Methods for Assessing Biological Integrity of Surface Waters," incorporated by reference in this section;

4. Water in the cabinet's reference reach network;

5. Use-protected water as water not listed in Section 3 of this administrative regulation as outstanding national resource water or exceptional water.
(2) Procedure for implementing the antidegradation policy in outstanding national resource waters.

(3) Water quality shall be maintained and protected in outstanding national resource waters.

(b) The cabinet may approve temporary or short-term changes in water quality if the changes to the waters in question have no demonstrable impact on the ability of the waters to support their designated uses.

(3) Procedure for implementing the antidegradation policy in exceptional waters.

(a) A KPDES permit for an unpermitted or expanded discharge shall contain effluent limitations for the entire effluent that are as follows:

1. Domestic discharges shall have an effluent quality of:
   a. No greater than ten (10) mg/l five (5) day biochemical oxygen demand;
   b. No greater than two (2) mg/l ammonia-nitrogen;
   c. No greater than 0.010 mg/l total residual chlorine;
   d. No greater than ten (10) mg/l total suspended solids;
   e. No greater than one (1) mg/l total phosphorus;
   f. A minimum seven (7) mg/l dissolved oxygen;
   g. A chronic whole effluent toxicity limit unless an acute whole effluent toxicity limit is more stringent.

2. Chloride limits shall be based on the domestic water supply criterion of 250 mg/l.

3. Toxic discharges shall be exempt from antidegradation implementation procedures for exceptional waters but shall be subject to control by existing cabinet programs.

4. Chronic whole effluent toxicity limits shall apply unless an acute whole effluent toxicity limit is more stringent.

5. Waste discharges that are not domestic waste or stormwater discharges shall be restricted to no more than one-half (1/2) of the limitation that would have been permitted for use-protected waters at standard design conditions.

6. KPDES permit renewals that result in less than twenty (20) percent increase in pollutant loading are exempt from implementation procedures for exceptional waters and shall be regulated by the requirements in subsection (4)(a) and (b) of this administrative regulation.

If the permit applicant determines that it can meet effluent limitations required by paragraph (a) of this subsection, the KPDES permit shall issue the effluent limitations without further antidegradation review as described in subsection (4) of this section for use-protected waters. If a KPDES permit applicant cannot meet the effluent limitations the applicant may request a less stringent limitation. In making this request, the applicant shall demonstrate to the satisfaction of the cabinet that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located following the guidelines in "Interim Economic Guidance for Water Quality Standards Workbook", EPA, March 1995 incorporated by reference in Section 4 of this administrative regulation and include an alternative analysis that shall consider the following:

1. Discharge to other treatment facilities;
2. Use of other discharge locations;
3. Water reuse or recycle;
4. Process and treatment alternatives; and
5. On-site or subsurface disposal. In allowing the resultant lowering of water quality, the cabinet shall ensure water quality necessary to fully protect existing uses.

(c) Zones of initial dilution are prohibited in exceptional waters unless assigned before the effective date of this administrative regulation.

(4) Procedure for implementing the antidegradation policy in use-protected waters for point source discharges. All surface waters not listed in Section 3 of this administrative regulation as outstanding national resource waters or exceptional waters shall be categorized as use-protected waters.

(a) All existing uses shall be protected and the level of water quality necessary to protect the uses shall be assured in use-protected waters.

(b) The process to allow a discharge to a use-protected water and to assure the water's protection is regulated by the requirements in the Kentucky Pollution Discharge Elimination System Program.

(c) The antidegradation procedures shall not preempt the power or authority of a local government to provide by ordinance for a higher level of protection through antidegradation implementation for discharges located within that local government's jurisdiction to surface waters of the Commonwealth.

Section 2. Procedure for Recategorizing Water [Waters]. This section shall apply to the recategorization of surface water [waters] to outstanding national resource water [waters] and exceptional water [waters]. The redesignation of water [waters] to outstanding state resource water [waters] shall be governed by the procedures in 401 KAR 5:026.

(1) The cabinet may propose to recategorize certain water [waters] to outstanding national resource water [waters] and exceptional water [waters].

(a) If the cabinet proposes to recategorize these waters, it shall provide notice and an opportunity for public hearing.

(b) The cabinet shall provide the documentation requirements of this section for those surface waters it proposes to recategorize.

(2) A person may request recategorization of a surface water to an outstanding national resource water or exceptional water by filing a petition with the cabinet.

(a) The petition shall include the name and address of the petitioner and the information and documentation necessary to recategorize the particular water as required by subsection (4) of this section;

(b) The petitioner shall have the burden of proof that the recategorization is appropriate.

(c) The cabinet shall provide notice of the petition and an opportunity for a public hearing.

(d) The cabinet shall review the petition, supporting documentation, and any comments received from the public to determine if the proposed water qualifies for recategorization.

(e) The cabinet shall document the determination to grant or deny recategorization as a result of a petition, and shall provide a copy of the decision to the petitioner and other interested parties.

(3) If a water is to be recategorized, the cabinet shall publish notice of the recategorization. Any permit issued after the date of publication shall be issued with limitations based on the new category. When the cabinet reviews its water quality standards pursuant to the provisions of Section 303 of the Clean Water Act, the cabinet shall propose to have all recategorized water [waters] promulgated as an amendment to this administrative regulation.

(4) The following information, documentation, and data shall support a petition for recategorization:

(a) A petition for outstanding national resource water [waters] shall include:

1. A United States Geological Survey 7.5 minute topographic map or its equivalent as approved by the cabinet showing those surface waters to be recategorized including a description consisting of a river mile index with any existing and proposed discharge points;

2. Existing uses and water quality data for the surface water [waters] for which the recategorization is proposed. If adequate data are unavailable, additional studies may be required by the cabinet;

3. Descriptions of general land uses and specific land uses adjacent to the surface water [waters] for which the recategorization is proposed;

4. The existing and designated uses of the water [waters] upstream and downstream of the proposed recategorized water [waters];

5. General physical characteristics of the surface water including width, depth, bottom composition, and slope;

6. The frequency of occasions when there is no natural flow in the surface water, and the 7Q10 and harmonic mean flow values for
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the surface water and adjacent surface waters;
7. An assessment of the existing and potential aquatic life
habitat in the surface water [waters] under consideration and the
adjacent upstream surface waters. The existing aquatic life shall be
documented including the occurrence of individuals or populations,
indices of diversity and well-being, and abundance of species of
any unique native biota;
8. A documented rationale as to why the water [waters] qualify
for the recategorization; and
9. The rationale used to support the national significance of the
water.
(b) A petition for exceptional water [waters] shall include the
following:
1. A United States Geological Survey 7.5 minute topographic
map or its equivalent as approved by the cabinet showing the surface
water [waters] to be recategorized including a description consisting of a river mile index with existing and proposed dis­
charge points;
2. Descriptions of general land uses, including mining, agricul­
tural, recreational, low, medium, and high density residential,
commercial, and industrial, and specific land uses adjacent to the
surface waters [waters] for which the recategorization is proposed;
3. The frequency of occasions when there is no natural flow in
the surface water, and the 7Qx and annual mean flow values for
the surface water; and
4. Fish or benthic macroinvertebrate collection data and an
Index of Biotic Integrity or Macroinvertebrate Bioassessment Index
calculation from a waterbody if criteria specified in Section 1(2)(d)3
[3(c)] of this administrative regulation are utilized.

Section 3. [Surface Water Categories. Surface waters catego­
rized for antidegradation purposes are listed in the following tables.
The county columns indicate the county in which the mouth or
outlet of the surface water is located.

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<td>Underground River System</td>
<td>Within Mammoth Cave National Park Boundary</td>
<td>Edmonson/Hart/Barran</td>
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<td>Big South Fork of Cumberland River</td>
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<td>Clear Creek</td>
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<td>Source to Buckhorn Creek</td>
<td>River Mile 4.1</td>
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<td>Blood River</td>
<td>River Mile 15.9 to River Mile 13.5</td>
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<td>Drennon Creek</td>
<td>Source to West Fork of Indian Creek</td>
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<td>Dicks Creek</td>
<td>Source to West Fork of Indian Creek</td>
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<td>Glade Creek</td>
<td>Source to Red River</td>
<td>River Mile 8.6 to River Mile 7.0</td>
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<td>Goose Creek</td>
<td>Laurel Fork to Red Bird River</td>
<td>River Mile 7.0</td>
<td>Clay</td>
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<td>Hardwick Creek</td>
<td>Little Hardwick Creek to Red River</td>
<td>River Mile 6.6</td>
<td>Powell</td>
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<td>Indian Creek</td>
<td>Source to West Fork of River Creek</td>
<td>River Mile 6.5</td>
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<td>River Mile 5.7 to River Mile 17.3</td>
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<td>Ludlow Creek</td>
<td>Falls Branch to Red River</td>
<td>River Mile 4.0</td>
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<td>Middle Fork of Kentucky River</td>
<td>Upper Twin Creek to North Fork of Kentucky River</td>
<td>Upper Twin Creek to North Fork of Kentucky River</td>
<td>Lee</td>
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<td>Greasy Creek to Buckhorn Reservoir backwater</td>
<td>Greasy Creek to Buckhorn Reservoir backwater</td>
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<td>Musselman Creek</td>
<td>River Mile 8.4 to River Mile 6.6</td>
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<td>Red Bird River</td>
<td>Big Creek to Goose Creek</td>
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<td>Right Fork of Buffalo Creek</td>
<td>Source to Buffalo Creek</td>
<td>River Mile 7.6</td>
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<td>Sexton Creek to River Mile 11.5</td>
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<td>Sand Lick Fork to Middle Fork of Red River</td>
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<td>Source to River Mile 5.3</td>
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<td>Wilson Creek</td>
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<td>Russell Creek</td>
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<td>Tramper Fork</td>
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<td>River Mile 26.5 to River Mile 16.3</td>
<td>River Mile 16.3</td>
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<td>Whippoorwill Creek</td>
<td>Source to Red River</td>
<td>River Mile 15.4</td>
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<td>River Mile 13.5</td>
<td>Callaway</td>
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</tbody>
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C - 13
Section A. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) "Development and Application of the Kentucky Index of Biotic Integrity (KIBI)", 2003, Kentucky Division of Water, Natural Resources and Environmental Protection Cabinet;

(b) "The Kentucky Macroinvertebrate Bioassessment Index", 2003, Kentucky Division of Water, Natural Resources and Environmental Protection Cabinet; and "Methods for Assessing Biological Integrity of Surface Water", October 1993, Kentucky Division of Water, Natural Resources and Environmental Protection Cabinet;


(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Division of Water, 14 Reilly Road, Frankfort, Kentucky, Monday through Friday, 8 a.m. to 4:30 p.m.

HENRY C. LIST, Secretary
APPROVED BY AGENCY: September 10, 2003
FILEd WITH LRC: September 12, 2003 at 9 a.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on October 23, 2003 at 7 p.m. (Eastern time) at the Franklin County Extension Office, 101 Lakeview Court, Frankfort, Kentucky. Individuals interested in being heard at this hearing shall notify this agency in writing by October 16, 2003, five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend is received by that date, the hearing may be canceled. This hearing is open to the public. Anyone who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. If you request a transcript, you may be required to pay for it. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until October 31, 2003. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Jeffrey W. Pratt, Director, Division of Water, Department for Environmental Protection, 14 Reilly Road, Frankfort, Kentucky 40601, (502) 564-3410, fax (502) 564-0111.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Jeffrey W. Pratt, Director

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation implements the antidegradation policy of amended 401 KAR 5:029 by establishing procedures to control water pollution in waters affected by that policy. This administrative regulation provides categorization criteria, lists many surface waters assigned to specific categories, and establishes procedures for categorization.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to manage water resources and to provide for the prevention, abatement, and control of water pollution.

(c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation conforms to KRS 224.10-100 which requires the Natural Resources and Environmental Protection Cabinet to develop and conduct a comprehensive program for the management of water resources and to provide for the prevention, abatement, and control of water pollution. KRS 224.76-100 declares that the policy of the Commonwealth is to conserve its waters for legitimate uses and to safeguard from pollution the uncontaminated waters of the Commonwealth, prevent the creation of any new pollution in the waters of the Commonwealth, and abate any existing pollution. This administrative regulation and 401 KAR 5:002, 5:026, 5:029, and 5:031 establish procedures to protect the surface waters of the Commonwealth, and thus manage water resources and prevent water pollution. This administrative regulation establishes a methodology to implement the antidegradation policy contained in 401 KAR 5:002 by establishing procedures to control water pollution in waters affected by that policy.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation will assist in the administration of the statutes by implementing the antidegradation policy for the protection of surface waters of the Commonwealth as required by the authorizing statutes.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: This amendment revises surface water categories to include the new categories of high quality water and impaired water. The amendment reorganizes much of the Section 1 text. This amendment also includes 166 surface waters newly categorized as exceptional water that are reorganized into a new table and includes the waterway segments for each water. Two new documents are incorporated by reference and two documents previously incorporated by reference have been removed from this administrative regulation.

(b) The necessity of the amendment to this administrative regulation: This amendment is necessary to address outstanding U.S. EPA disapproval. The U.S. EPA disapproved this regulation after promulgation on August 7, 1997 and did not act on the disapproved provision on August 20, 2000. At 67 Fed. Reg. 68971 (November 14, 2002), U.S. EPA proposed a substitute rule that is sub-
stantially the same as 401 KAR 5:029(1). The proposal, if enacted, will leave Kentucky without implementation procedures for its antidegradation program.

(c) How the amendment conforms to the content of the authorizing statutes: This amendment conforms to KRS 224.10-100 which requires the Natural Resources and Environmental Protection Cabinet to develop and conduct a comprehensive program for the management of water resources and to provide for the prevention, abatement, and control of water pollution. KRS 224.70-100 declares that the policy of the Commonwealth is to conserve its waters for legitimate uses and to: safeguard from pollution the uncontaminated waters of the Commonwealth, prevent the creation of any new pollution in the waters of the Commonwealth, and abate any existing pollution. This amendment establishes procedures to protect the surface waters of the Commonwealth, and thus protect water resources. This amendment establishes a methodology to implement the antidegradation policy contained in 401 KAR 5:029 by establishing procedures to control point source water pollution in waters affected by that policy.

(d) How the amendment will assist in the effective administration of the statutes: This amendment will assist in the administration of the statutes by providing a revised scheme of antidegradation categories and listing 166 surface waters newly categorized as exceptional water. This is a crucial reference tool to establish the categories of the newly assigned exceptional waters and is supportive to achieving compliance with this administrative regulation.

(3) List the type and number of individual, businesses, organizations, state and local governments affected by this administrative regulation:

(a) The cabinet concludes the amendments to KRS 224.10-100 will substantially increase the volume of domestic sewage discharges into waters of the Commonwealth in an amount that can be reasonably anticipated. The cabinet concludes new sewage discharges are more likely to occur than discharges that were anticipated in the original antidegradation review.

(b) The cabinet concludes the amendments will substantially increase the volume of aquatic animals, including aquatic plants and invertebrates, discharged into surface waters in amounts that can be reasonably anticipated. The cabinet concludes the amendments will result in a substantial increase in the costs of the cabinet to conduct, review, and implement the antidegradation requirements of the administrative regulation.

(c) The cabinet concludes the amendments will substantially increase the volume of domestic and non-domestic discharges into surface waters in amounts that can be reasonably anticipated. The cabinet concludes new discharges of effluent into surface waters due to the implementation of this administrative regulation, if new, or by the change, if it is an amendment: Fees or funding increases are not anticipated to be necessary to implement the antidegradation policy contained in 401 KAR 5:029.

The cabinet concludes the amendments will increase the costs of the cabinet to conduct, review, and implement the antidegradation requirements of the administrative regulation, if new, or by the change, if it is an amendment: Fees or funding increases are not anticipated to be necessary to implement the antidegradation policy contained in 401 KAR 5:029.

(9) TIERING: Is tiering applied? Yes, tiering is used in this administrative regulation. Storm water discharges are not subject to antidegradation analysis. The cabinet concluded that excellent and high quality water receiving discharges related solely to storm water are protected under existing cabinet programs. This is consistent with the existing requirements of this administrative regulation. Coal mining discharge is not subject to additional antidegradation review in exceptional and high quality water; however, coal mining is subject to regulation under the Surface Mining Control and Reclamation Act and 404 Dredge and Fill permits issued by the U.S. Army Corps of Engineers, which include 401 Water Quality Certifications issued by this cabinet. The cabinet concludes that additional antidegradation analysis is not necessary for excellent and high quality water. Domestic sewage discharge from a single-family residence is also not subject to additional antidegradation review in exceptional and high quality water if the cabinet deems that no feasible alternatives exist. The cabinet considers alternatives analysis for domestic sewage dischargers. Concentrated Animal Feeding Operations must already comply with a no discharge to waters of the Commonwealth permit; therefore, the cabinet concluded that Concentrated Animal Feeding Operations located next to excellent and high quality water are protected under existing cabinet programs and need not be subjected to additional antidegradation analysis. Operations that expand by less than twenty percent over currently permitted pollutant loadings are not subject to further antidegradation analysis. This is consistent with the existing requirements of this administrative regulation. The cabinet shall assure water quality necessary to fully protect existing uses. The cabinet concluded that a POTW's approval of a regional facility plan pursuant to 401 KAR 5:006 (201 Planning Document) will demonstrate compliance with the alternatives analysis and socioeconomic demonstration.

(4) Provide an assessment of how the above group or groups will be affected by the implementation of this administrative regulation: It is anticipated that the implementation of this administrative regulation, if new, or by the change, if it is an amendment: The permit limitations imposed on new or expanded point source dischargers into water bodies could result in additional treatment outlays, training costs, and operational changes. New or expanded dischargers may incur costs of alternative and pollution prevention and socioeconomic analyses. Direct and indirect savings will be realized through reduced drinking water treatment costs; maintenance of good agricultural water; maintenance of fisheries; and healthy recreational waters. This requirement already exists in state and federal law. The amended administrative regulation does not create additional obligations for dischargers. This amended administrative regulation sets forth specific implementation procedures to comply with already existing antidegradation requirements.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: Given current budgetary limitations, additional workload will be absorbed within existing levels of funding and staffing.

(b) On a continuing basis: The cabinet, in implementing the requirements of this amended administrative regulation, will internalize most associated costs with normal budget appropriations. Socioeconomic demonstrations will be reviewed and determinations made as to their adequacy. Costs may increase if the division's findings are contested.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The source of revenue will be the General Fund and federal funds, as appropriated by the Kentucky General Assembly.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation: If new, or by the change, if it is an amendment: Fees or funding increases are not anticipated to be necessary to the implementation of this amendment.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation does not establish any fees nor directly or indirectly increase any fees.

(9) TIERING: Is tiering applied? Yes, tiering is used in this administrative regulation. Storm water discharges are not subject to antidegradation analysis. The cabinet concluded that excellent and high quality water receiving discharges related solely to storm water are protected under existing cabinet programs. This is consistent with the existing requirements of this administrative regulation. Coal mining discharge is not subject to additional antidegradation review in exceptional and high quality water; however, coal mining is subject to regulation under the Surface Mining Control and Reclamation Act and 404 Dredge and Fill permits issued by the U.S. Army Corps of Engineers, which include 401 Water Quality Certifications issued by this cabinet. The 404 permits require the investigation of alternatives and the selection of technologically and economically feasible alternatives with the least environmental impact and socioeconomic demonstrations for coal mining activities. Given these evaluations, the cabinet has concluded that additional antidegradation analysis is not necessary for excellent and high quality water. Domestic sewage discharge from a single-family residence is also not subject to additional antidegradation review in exceptional and high quality water if the cabinet deems that no feasible alternatives exist. The cabinet considers alternatives analysis for domestic sewage dischargers. Concentrated Animal Feeding Operations must already comply with a no discharge to waters of the Commonwealth permit; therefore, the cabinet concluded that Concentrated Animal Feeding Operations located next to excellent and high quality water are protected under existing cabinet programs and need not be subjected to additional antidegradation analysis. Operations that expand by less than twenty percent over currently permitted pollutant loadings are not subject to further antidegradation analysis. This is consistent with the existing requirements of this administrative regulation. The cabinet shall assure water quality necessary to fully protect existing uses. The cabinet concluded that the approval of a regional facility plan pursuant to 401 KAR 5:006 (201 Planning Document) may be used by publicly owned treatment works to demonstrate compliance with the alternatives analysis and socioeconomic demonstration.
VOLUME 30, NUMBER 4 - OCTOBER 1, 2003

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate. There is no federal statute or regulation mandating that Kentucky implement a water pollution control program. For Kentucky to maintain its delegation over the NPDES permit program, the Clean Water Act requires that Kentucky review its water quality standards every three years and comply with the programmatic requirements of 40 C.F.R. Part 131, including the requirement for implementing an antidegradation policy. The federal regulations require the adoption of an antidegradation policy for delegated states. The U.S. Environmental Protection Agency does provide guidance to the states, but individual decisions concerning the states water quality programs are left to the states.


3. Minimum or uniform standards contained in the federal mandate. The Clean Water Act requires designated uses, criteria, standards and antidegradation policies in water quality standards.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements than those required by the federal mandate? No.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. There is no stricter standard or additional or different responsibilities or requirements.

FISCAL NOTE ON LOCAL GOVERNMENT

1. Does this administrative regulation relate to any aspect of a local government, including any service provided by that local government? Yes.

2. State what unit, part, or division of local government this administrative regulation will affect. This amended administrative regulation may affect the wastewater treatment divisions of local government if they will have new or expanded discharges into outstanding national resource waters, exceptional waters, or high quality waters.

3. State, in detail, the aspect or service of local government to which this administrative regulation relates, including identification of the applicable state or federal statute or regulation that mandates the aspect or service or authorizes the action taken by the administrative regulation. This amended administrative regulation relates to local governments' wastewater treatment service. KRS 224.10-100, 224.70-100, and 224.70-110 mandate action taken by this administrative regulation.

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a local government for the first full year the administrative regulation is to be in effect. If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Cannot be determined.

Expenditures (+/-): Cannot be determined.

Other Explanation: Wastewater treatment costs may increase for those local governments that will have new or expanded discharges into exceptional waters and high quality waters. Local governments withdrawing drinking water from these waters may have lower treatment costs, because these waters should have lower pollutant loads. The permit limitations imposed on new or expanded point source dischargers into water bodies could result in additional treatment outlays, training costs, and operational changes. New or expanded dischargers may incur costs of alternatives and pollution prevention analyses. Direct and indirect savings will be realized through reduced drinking water treatment costs, maintenance of good agricultural water, maintenance of fisheries, and healthy recreational waters. This requirement already exists in state and federal law. The amended administrative regulation does not create additional obligations for dischargers. This amended administrative regulation sets forth specific implementing procedures to comply with already existing antidegradation requirements. This administrative regulation allows regional publicly-owned treatment works to use their Regional Facility Plan (201 Planning Document) as an exception to compliance with the socioeconomic demonstration and alternatives analysis.

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET

Department for Environmental Protection

Division of Water

(AMENDMENT)

401 KAR 5:031. Surface water standards.

RELATES TO: KRS 146.200 to 146.360, 146.410 to 146.535, 146.550 to 146.570, 146.600 to 146.619, 146.990, 224.01-010, 224.01-100, 224.10-100, 224.16-050, 224.16-070, 224.70-100 to 224.70-140, 224.71-100 to 224.71-145, 224.73-100 to 224.73-120, 224.40, 224.41, 224.46, 224.50, 224.60, 224.70-71, 224.73.


NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 requires the Natural Resources and Environmental Protection Cabinet to develop and conduct a comprehensive program for the management of water resources and to provide for the prevention, abatement, and control of water pollution. This administrative regulation and 401 KAR 5:002, 5:026, 5:029, and 5:030 establish procedures to protect the surface waters of the Commonwealth, and fish and wildlife. This administrative regulation establishes water quality standards which consist of designated legitimate uses of the surface waters of the Commonwealth and the associated water quality criteria necessary to protect those uses. These water quality standards are minimum requirements that apply to all surface waters in the Commonwealth of Kentucky in order to maintain and protect them for designated uses. These water quality standards are subject to periodic review and revision in accordance with federal and state laws.

Section 1. Nutrient Limits. In lakes and reservoirs and their tributaries, and other surface waters where eutrophication problems may exist, nitrogen, phosphorus, carbon, and contributing trace element discharges shall be limited in accordance with:

(1) The scope of the problem;

(2) The geography of the affected area; and

(3) Relative contributions from existing and proposed sources.

Section 2. Minimum Criteria Applicable to All Surface Waters. (1) The following minimum water quality criteria are applicable to all surface waters including mixing zones, with the exception that toxicity to aquatic life in mixing zones shall be subject to the provisions of 401 KAR 5:029, Section 4. Surface waters shall not be aesthetically or otherwise degraded by substances that:

(a) Settle to form objectionable deposits;

(b) Float as debris, scum, or other matter to form a nuisance;

(c) Produce objectionable color, odor, taste, or turbidity;

(d) Injure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life;

(e) Produce undesirable aquatic life or result in the dominance of nuisance species;

(f) Cause fish flesh tainting. The concentration of all phenolic compounds which cause fish flesh tainting shall not exceed five (5) µg/l as an instream value;

(g) Cause the following changes in radionuclides: 1. The gross total alpha particle activity, including radium-226 but excluding radon and uranium, to exceed fifteen (15) pCi/l;

2. Combined radium-226 and radium-228 to exceed five (5) pCi/l. Specific determinations of radium-226 and radium-228 are not necessary if dissolved gross alpha particle activity does not exceed five (5) pCi/l;

3. The concentration of total gross beta particle activity to exceed fifty (50) pCi/l;

4. The concentration of tritium to exceed twenty thousand (20,000) pCi/l;

5. The concentration of total Strontium-90 to exceed eight (8) pCi/l;

6. The concentration of uranium to exceed thirty (30) µg/l.
October 23, 2003

RE: Comments on the proposed changes to 401 KAR 5:002, 5:026, 5:029, 5:030 and 5:031

Dear Mr. Pratt:

Kentucky Waterways Alliance, Inc. (KWA) and the Environmental Law & Policy Center of the Midwest (ELPC) submit these comments on the proposed changes to 401 KAR 5:002, 5:026, 5:029, 5:030 and 5:031. KWA is a statewide nonprofit membership organization dedicated to protecting and restoring Kentucky’s waterways and their watersheds by building effective alliances for their stewardship. ELPC is a regional nonprofit organization that has worked to protect and improve water quality through improved implementation of the Clean Water Act in a number of states in the Mississippi River and Great Lakes watersheds.

The administrative regulations proposed by the Division of Water (DOW) on October 1, 2003, do not begin to establish the bare minimum protections of Kentucky waters that are required by the Clean Water Act (CWA), 33 U.S.C. §1251 et seq. The proposed regulations offer only very minor improvements to Kentucky’s antidegradation implementation procedures. They improperly exclude a large number of Kentucky waters from federally-mandated protections against degradation of water quality that has not been shown to be economically or socially necessary. Even worse, the protections the draft purports to afford the waters that are covered are largely illusory.

No valid KPDES permits can be issued for new or increased discharges into Kentucky waters until legal antidegradation standards and implementation regulations are established by or for the Commonwealth of Kentucky. The DOW must cease issuing permits that should be governed by valid antidegradation regulations until such rules are established. If DOW is unwilling to do this, United States Environmental Protection Agency (U.S. EPA), pursuant to 40 CFR 123.44, must prevent the issuance of permits that allow any lowering in quality of Kentucky waters. Alternatively, U.S. EPA should remove the federal delegation to Kentucky over permitting under the National Pollutant Discharge Elimination System (NPDES) pursuant to 40 CFR 123.63.

This is DOW’s third attempt to promulgate antidegradation regulations to maintain water quality and to remove U.S. EPA’s 1997 disapproval of this critical portion of Kentucky’s regulations. Unfortunately, the DOW has been unable or unwilling to propose proper regulations required by the Clean Water Act. Three strikes and you’re out. Accordingly, U.S. EPA should establish antidegradation standards and implementation rules under 33 U.S.C. §1313(c).
We do generally support changes to 401 KAR 5:002, 5:026, 5:029 and 5:031 as detailed in our comments below. There are, however, a number of other changes that are needed to these provisions that were not proposed by DOW.

**Background and General Comments**

KWA and ELPC supports the following proposed changes or additions to the regulations:

- Adding approximately 166 waterways to the list of Exceptional Waters.
- Adding 5 waterways to the list of Outstanding State Resource Waters.
- Adding a standard for *E. coli* to meet safe recreational standards.
- Updating and or adding criteria in 401 KAR 5:031 for parameters based on EPA’s updated recommendations.
- Prohibiting new mixing zones for bio-accumulative toxins and phasing out existing mixing zones for these toxic pollutants within 10 years.
- Using a default designation of “high quality” for waters not otherwise classified but we believe that all waters should be protected from unnecessary new pollution.

However, with its proposed changes to 401 KAR 5:030 it appears that the DOW ignored the approximately 400 comment letters specifically related to antidegradation implementation procedures that were submitted to the U.S. EPA months ago. Equally disheartening, DOW continues to ignore federal regulations at 40 CFR 131.12(a)(2) that requires each state to establish a policy and implementation rules to prohibit degradation of water quality unless it is necessary to allow such degradation to accommodate important social or economic development. These protections against unnecessary lowering of water quality, which requires a consideration of alternatives and proof that the proposed new pollution loading is necessary to accommodate important economic or social development, known as “Tier II” protections, do not now exist in Kentucky. The only Tier II protections DOW has been willing to establish were deficient and properly disapproved by EPA in 1997 and again in 2000.

While the new proposed administrative regulations are a minor improvement over the Division’s last try (the 1999 submittal to U.S. EPA), they do not come close to protecting Kentucky waters or complying with the law. In particular, this proposal fails in part because:

- It continues to follow the deficient “designational” or “waterbody-by-waterbody” approach to coverage instead of protecting all of Kentucky’s waters.
- Many waters are denied all Tier II antidegradation protection even if they have high biological quality or great value as a recreation resource.
- Antidegradation protections for "Exceptional" and "High Quality" waters are further compromised by a list of exemptions, waivers and “loopholes” to the extent that there are basically no real protections offered by the proposal for any waters.

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Rules are not set forth for considering NPDES applications proposing new loadings of pollutants and provisions for allowing public participation in the decision are not set forth.

Nothing is provided regarding how Kentucky is going to implement antidegradation with regard to water quality certifications under Section 401 of the Clean Water Act.

In general, under the proposed regulations, Exceptional Waters, which DOW has implied receive “Tier II ½” protections that are better than Tier II protections, actually receive only a small portion of the basic federally-mandated Tier II protections. The protections for High Quality Water amount to even less.

I. All Kentucky waters should be protected against unnecessary degradation.

401 KAR 5:030 should require the application of antidegradation on a parameter-by-parameter basis and require application of the parameter-based review even to those waters on the 303(d) list for parameters not violating standards.

The necessity of creating this administrative regulation is to implement and comply with KRS 224.70-100. KRS 224.70-100 declares that the policy of the Commonwealth is to conserve its waters for legitimate uses and to: safeguard from pollution the uncontaminated waters of the Commonwealth, prevent the creation of any new pollution in the waters of the Commonwealth, … (emphasis added). The Statute makes it clear that the Cabinet’s regulatory duty is to keep new contaminates out of the waters of the Commonwealth, not to create shortcuts for allowing new or increased pollution.

A. Levels of water quality should be protected on a parameter-by-parameter basis.

In the proposed changes to 401 KAR 5:030 DOW continues to take a waterbody-by-waterbody (or “designational”) approach to Tier II protection coverage, rather than use the parameter-by-parameter (or “pollutant-by-pollutant”) approach. Under the designational approach, the DOW has designated a subset of its waters as “high quality” and protects only these “high quality” water bodies from unnecessary degradation. Under a parameter-by-parameter approach, levels of water quality better than the minimum necessary to meet standards are protected even if the water body is partially impaired. For example, a water body that has low levels of cyanide is protected from unnecessary new loadings of cyanide even if the water body is suffering from excess loadings of fecal coliform.

The DOW should accept the parameter-by-parameter approach. Limiting the protection against unnecessary pollution to “high quality” waters is inconsistent both with attaining the goals of the Clean Water Act and the language of 40 CFR 131.12(a)(2).

The basic goal of the Clean Water Act - to restore and maintain the integrity of the nation’s waters (§101(a)) - is certainly not advanced by allowing an unnecessary new loading of a pollutant to be added to a water body just because the water is already in need of restoration with regard to a different pollutant. U.S. EPA’s major guidance document on water quality standards,
the Water Quality Standards Handbook, EPA-823-B-94-005a (2d. Ed. 1994) ("Handbook") makes clear that the parameter-by-parameter approach is generally needed to meet the goals of the Clean Water Act:

_EPA believes it is best to apply antidegradation on a parameter-by-parameter basis. Otherwise there is potential for a large number of waters not to receive antidegradation protection, which is important to attaining the goals of the Clean Water Act to restore and maintain the integrity of the Nation’s waters._ (at 4–7)

40 CFR 131.12(a)(2) does not suggest its coverage is limited to "high quality" waters. The regulation does not read "waters which fully support propagation of fish, shellfish, and wildlife and recreation in and on the water, should be protected." What it actually says is that where there are levels of quality that quality should be protected. Thus, where the "level" of cyanide is low enough "to support propagation of fish, shellfish, and wildlife and recreation in and on the water" that "quality" should be protected. It is impossible to read the waterbody-by-waterbody approach into the words of the current version of 131.12(a)(2). Section 131.12(a)(2) speaks of "levels" of water quality and requires that such "quality" is to be maintained unless it is really necessary to allow degradation.

The only principled argument for the designational approach is that it allows states to focus resources on waters that they think are most important. But the fact that a water body is not meeting one or more water quality standards does not make the water any more or less important to the people of Kentucky. Directing state resources away from waters simply because they are failing to meet one or more water quality standards makes about as much sense as saying that the police should patrol less in areas where there has already been criminal activity.

There are much better ways to focus resources other than to deny arbitrarily Tier II protections to broad classes of waters. Obviously, other things being equal, big new loadings of pollutants should get more attention from the DOW than smaller sources. Proposals for new loadings of pollutants that will persist in the environment might be given more attention than proposals for new or increased loadings of pollutants that rapidly dissipate. Waters containing sensitive species

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1 U.S. EPA mentions in the Handbook that it has not strictly required the parameter-by-parameter approach stating:

_{However, if a State has an official interpretation that differs from this interpretation, EPA will evaluate the State interpretation for conformance with the statutory and regulatory intent of the antidegradation policy. EPA has accepted approaches that do not use a strict pollutant-by-pollutant basis. (Id.).}_{

That U.S. EPA has in the past not strictly required the parameter-by-parameter approach does not prove the waterbody-by-waterbody approach is appropriate or legal. Moreover, when U.S. EPA wrote the antidegradation standards it used the parameter-by-parameter approach. The antidegradation regulations applicable to the Great Lakes, unlike 131.12(a)(2), do use the term "high quality" but "high quality waters" is defined so as to make clear that quality is to be treated on a parameter-by-parameter basis and that a water is "high quality" if it has high quality for any water quality parameter:

_High quality waters are water bodies in which, on a parameter by parameter basis, the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. 40 CFR pt 132 App. E.II.A._
should receive more protection and the DOW might more carefully review proposed new pollution loadings to waters heavily used for recreation or near population areas.

It is possible to tailor the extent of resources used in considering the need for allowing a particular proposed loading to fit the situation posed by that loading or type of loading. But in determining the extent of Tier II analysis necessary, a case-by-case approach is needed that takes into account all relevant factors, rather than allowing an open season on vast reaches of many Kentucky waters for unnecessary new pollution.

B. It is irrational to limit Tier II protections to water meeting all applicable water quality standards; protection must be granted to impaired waters.

Under proposed 401 KAR 5:030 Section 1 (3) and (4) all waters listed as impaired for any applicable designated use are denied Tier II protection. This makes no sense and directly conflicts with the recent decision in Ohio Valley Environmental Coalition v. Horinko, 2003 U.S. Dist. Lexis 15359 (S.D. W.Va. 2003). Whether a water body meets or fails to meet all water quality standards has little to do with whether a water body is deserving of protection from degradation. Indeed, as recognized by the court in Ohio Valley Environmental Coalition, the mere fact that a water has one or more impairments does not show that the water does not have overall high quality.

A water body is impaired if it does not meet the standards applicable to the particular use designation applicable to it. For example, a water body designated as a primary contact recreational water (see present 401 KAR 5:031 Section 6 proposed to be renumbered as Section 7) might be impaired even though it is actually cleaner than a water body that is not listed as impaired because the second water is designated as secondary contact recreation water. If Kentucky designated all of its water as a source of untreated drinking water, most everything would be impaired. Conversely, if Kentucky removed all the recreational use designations from its waters, the bacterial impairments would all go away without improving water quality a bit or making the water bodies more or less worthy of Tier II protection.

There are, in fact, many Kentucky waters with rare and important aquatic communities that certainly are deserving of at least Tier II protection although they are impaired for one or more pollutant. For example:

- The Upper Green River is listed as impaired for primary contact recreation due to pathogens from RM 183.5 – 250.2. Yet this Section of the river has one of most biologically diverse populations of aquatic life in the entire United States (4th), and is ranked as the most diverse waterway in the entire Ohio River basin. More than 150 species of fish, 71 species of mussels – twenty-nine of which are imperiled or vulnerable and 7 of which are listed as federally endangered rely upon the river for aquatic habitat. Still, this river will not receive protections against unnecessary new pollution under the current proposal.

- Bucks Branch of Jellico Creek in Whitley/McCreary Counties is currently recognized by DOW as an Outstanding State Resource Water (OSRW) because it provides habitat for federally-listed endangered species but it is also listed as impaired for

2 See 35 Ill. Adm. Code 302.105(c)(2); Ohio Administrative Code 3745-1-05(C)(8)
primary contact and aquatic life due to low pH from resource extraction. Thus, under DOW's current proposal this "outstanding" water would not receive any Tier II protection.

- The South Fork of Bayou de Chien Creek in Graves County is also classified as OSRW because of federally listed species in the stream, yet it is listed as impaired and nonsupport for aquatic life due to siltation from agriculture related sources. Rather than protect the federally endangered species and work with area farmers to address the NPS problems in the watershed, DOW offers rules with no Tier II protection for this stream from new point sources or other regulated activities.

It is irrational to deny Tier II protections to such waters simply because they fail to meet one or more of the water quality standards for a particular use some portion of the time.

II. Even the water that the proposal purports to protect as "Exceptional" or "High Quality" does not receive real protection because of huge exemptions and loopholes provided in the proposed regulations.

The proposed regulations (401 KAR 5:030 Section 1 (2)) would redesignate a number of waters as "Exceptional". KWA and ELPC recognizes and supports the additional listing of 166 water segments to this category in the proposed regulations. We believe that when biological or water quality data supports the inclusion of waters into this category that it is incumbent upon the Cabinet to propose such additions and provide such waters with protections that exceed the federal Tier II minimum. We support the additional monitoring the Cabinet has undertaken as a part of the Watershed Framework Initiative and believe that a better understanding of the quality of our waters is a critical factor in protecting it.

While we support the redesignations, they are of very little comfort. That is because the proposed regulation does nothing to correct the existing loopholes in Kentucky’s protections of waters that the DOW has designated as “Exceptional”. These loopholes are so large that there is effectively little or no additional protection of Exceptional waters.

The proposed regulations also create the category of “High Quality Water” (proposed 401 KAR 5:030 Section 1 (3)) and purport to give these waters Tier II protections. Adoption of Tier II protections is a necessary part of addressing the current U.S. EPA disapproval of Kentucky’s regulations and is required by federal law under the Clean Water Act. However, in fact, the protections the DOW proposes to give such High Quality water are virtually nil. Actually, the

3 This an example of the DOW’s current permitting program for coal mining not even protecting existing uses, let alone offering anything like Tier II protection.

4 Conversely, under DOW’s proposed regulations White Oak Creek in Greenup County is “High Quality” water because the creek is meeting secondary contact standards according to DOW’s most recent assessment. Similarly, Paddy’s Run in Jefferson County is designated for primary and secondary contact recreation only and is not listed as impaired for either of these uses. Therefore Paddy’s Run is a “High Quality” stream under the DOW’s proposed regulation. While we agree that White Oak Creek and Paddy’s Run should be protected from new pollution, it is absurd to allow the Green River and other waters to be degraded so that the DOW can focus on White Oak Creek and Paddy’s Run.
loopholes in protection for both Exceptional and High Quality water are so large that they will allow virtually all applications for new loadings to any water to avoid any Tier II review.

A. The exemptions from Tier II Protection for polluting activities (proposed 401 KAR 5:030 Section 1 (2) (b) 1 a. through d. and Section 1 (3) (b) 1 a. through d. that frequently operate under a general permit are illegal and irrational.

The provisions for the implementation procedures for both Exceptional and High Quality waters begin with a list of activities that are totally excluded from Tier II coverage: storm water activities, coal mining discharge, domestic sewage from a single family residences and concentrated animal feeding operations (CAFOs). We recognize that these types of discharges - listed in clauses a. through d. of proposed 401 KAR 5:030 Section 1(2)(b)1 and clauses a. thorough d. of proposed 401 KAR 5:030 Section 1 (3)(b)1 - are subject to some control by existing Cabinet programs including the KPDES program and that under current regulations the Cabinet is supposed to always fully protect existing uses. This does not mean, however, that such discharges are or can be exempted from being covered by the Tier II protections of 40 CFR 131.12 (1)(b). 40 C.F.R. 131.12(1)(b) does not recognize any of the exceptions to antidegradation provided by the proposed rules. Contrary to the implications of DOW’s discussion of its proposal in the Regulatory Impact Analysis and Tiering Statement (RIATS), Kentucky’s existing regulation of these activities certainly does not fulfill the federal antidegradation requirements.

1. Wholesale permitting of new and increased loadings under general permits cannot satisfy CWA antidegradation requirements.

The four types of polluting activities that DOW proposes to exempt generically from Tier II requirements, to the extent they are regulated now at all, are normally handled under general permits. The existing Kentucky treatment of these activities is absolutely no substitute for the federally required Tier II protections.

First, it cannot go without mention that the current Kentucky regulatory use of general permits is illegal, even without consideration of the Tier II antidegradation requirements. The facts are clear that the current regulatory system does not protect existing uses from damage from CAFOs, stormwater and coal mining\(^5\) and allows discharges that cause or contribute to violations of

\(^5\) Resource Extraction accounts for 15% or over 366 miles of impaired waterways as a result of coal mining activities. If existing cabinet permit programs including the general coal permit served to maintain the quality of Kentucky rivers and streams additional listings of impaired waters due to resource extraction would be almost nonexistent. Instead we see from the 2002 303(d) list an increasing number of stream miles in every watershed where surface mining is active that do not support basic uses due to resource extraction. A few examples include:

Bear Creek of the South Fork of the Cumberland River, RM 0.0 – 3.2 is nonsupport for aquatic life due to resource extraction (surface mining and subsurface mining). Yet this creek then flows into the Big South Fork degrading water quality in the ONRW designated Big South Fork of the Cumberland River.

Stoney Fork of Straight Creek, in Bell County (RM 0.0 to 2.4) is use nonsupport for aquatic life. Resource extraction is listed as one of the causes of the impairment, yet in October 2002 the cabinet proposed and subsequently renewed an individual KPDES permit that was virtually identical to the general permit for resource extraction on this creek.

Left Fork of Millstone Creek in Breathitt County (RM 1.5 – 2.7) is nonsupport for aquatic life because of siltation and low pH problems due to resource extraction.

General storm water permits, Phase I cities of Louisville and Lexington:
numeric and narrative water quality standards. Thus, the current scheme is allowing violations of 40 CFR 122.44(d) and the Tier I protections required by 40 CFR 131.12(a)(1). Moreover, the existing Kentucky general permits do not require the individual DOW review and opportunity for public comment required by the Clean Water Act. See Environmental Defense Center, Inc. v. U.S. EPA, 2003 U.S. App. Lexis 19073 (9th Cir. 2003).

Further, it is doubtful that activities licensed under a general permit can ever satisfy CWA Tier II requirements unless individualized consideration is given to new or increased loading. As was explained by the court in Ohio Valley Environmental Coalition:

Under § 131.12(a)(2), water quality cannot be lowered unless doing so is "necessary to accommodate important economic or social development in the area in which the waters are located." This standard, by its terms, is location-specific. When a general permit is issued under Section 402 or Section 404, the State simply does not know the specific locations of discharges that might be covered by the general permit; discharge locations are not known until individuals seek permission to discharge under the general permit. In light of this fact, the court does not understand how the State could determine, at the time the general permit is issued, that each potential discharge that might some day be covered by the general permit is "necessary to accommodate important economic or social development in the area in which the waters are located."

§131.12(a)(2). (emphasis in original)

Assuming hypothetically that general permits can be developed that will satisfy Tier II requirements under some circumstances, it is inconceivable that Kentucky’s current permits for stormwater, coal mining, individual residences or CAFOs do so. The DOW did not have any valid antidegradation rules in place when these permitting schemes were developed and made no pretense of applying Tier II principles in developing the permits. The existing permits do not take into account the individual facts regarding the loadings, alternatives and the nature of the receiving water that must be considered for any valid scheme.

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Town Branch of Elkhorn Creek in Fayette County (RM 0.0 – 11.5) is nonsupport for swimming and partial support for aquatic life due in part to urban runoff and storm sewers.

Floyds Fork (RM 0.0 – 67.0) along with most of it’s major tributaries including Chenoweth Run (RM 0.0 – 9.1), Curry’s Fork (0.0 – 4.8), Long Fork (RM 0.0 – 9.5), Pennsylvania Run (RM 0.0 – 3.1) are all listed as nonsupport for swimming and most are also listed as partial support for aquatic life due in part to urban runoff and storm sewers.

The Phase II general storm water (MS4) permit system is so new that there are no good new examples to use herein, however requiring the use of BMPs while a good first step is not the thoughtful consideration that is suppose to accompany an antidegradation analysis.

CAFO General Permits:
In the Licking River Basin a long-term problem with intensive animal feeding operations has used significant 319(h) funding and was designated a Clean Water Action Priority Watershed in Kentucky. Fleming Creek and most of it’s major tributaries are designated as aquatic life and/or swimming non-support due to these operations. Fleming Creek (RM 0.0 – 39.2) and tributaries including Allison Creek (RM 0.0 – 4.7), Cassidy Creek (RM 0.0 – 3.9), Craintown Branch (RM 0.0 – 3.5), Logan Run (RM 0.0 – 2.3), Poplar Creek (RM 0.0 – 3.1), Sleepy Run (RM 0.0 – 2.8), Town Branch (RM 0.0 – 4.0), Wilson Run (RM 0.0 – 5.1) and an unnamed tributary at RM 4.28 of Fleming Creek (RM 0.0 – 2.8) are all listed as impaired with the only source being animal feeding operations.

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2. Existing Kentucky Regulations do not provide Tier II protection as to the activities that DOW proposes to exempt.

The statements made in DOW’s RIATS in defense of these broad exemptions from Tier II protections are invalid. First, contrary to the RIATS, it is simply false that any Kentucky waters receive anything like Tier II protections from Kentucky’s existing storm water programs. Kentucky waters receive only a “one size fits all” set of protections consisting of certain under-enforced best management practices requirements.

The discussion of the coal mining loophole in the RIATS seems calculated to mislead. It implies that Tier II protections are not needed as to coal mining because coal mining is subject to regulation under the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 and Section 401 of the Clean Water Act. But the DOW must know full well that SMCRA was never designed to give antidegradation protections for sensitive waters and was designed instead to require minimum technology-based standards for coal mining operations. Section 404 does not apply to all coal mining operations and, when it applies to a mining operation, may apply only to a small portion of the activities that potentially will degrade water quality. Even as to that portion of the mining activities to which Section 404 is applied, the analysis done by the Corps of Engineers was never conceived as a substitute for Tier II antidegradation analysis. DOW’s reference to the CWA Section 401 must be whimsical given that DOW does not propose in this proposal or elsewhere any Tier II standards or implementation rules of Tier II to govern 401 certifications for Kentucky waters.

Similarly, existing CAFO regulatory programs do not serve the function that the required Tier II protections are to provide. CAFOs are not subject to “no discharge” requirements, they are allowed to discharge under high rainfall conditions (the so-called 25 year rainfall that seems to happen every year) and waste generated at CAFOs is frequently sprayed on fields from which it runs into streams, causing serious water quality degradation. 40 CFR 131.12(a)(2) does not make any exception for CAFOs and the DOW cannot legally allow CAFOs to begin operation if they may lead to new pollutant loadings without requiring compliance with Tier II protection.6

B. The exemption from Tier II Protection for expansion of existing loadings (401 KAR 5:030 Section 1 (2) (b) 1e. and Section 1 (3) (b) 1e. is arbitrary and illegal.

The proposed regulation also provides a complete exemption for certain expansions of existing discharges. As to both Exceptional waters and High Quality water, the proposed regulation exempts:

KPDES permit renewals that result in less than a twenty (20) percent increase in pollutant loading from the previously permitted pollutant loading.

This exception is completely improper.

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6 Just what the DOW means to say in the RIATS about domestic waste from single-family residences is unclear. It is clear that 40 CFR 131.12 provides no exceptions to Tier II protections for such discharges and that protections equivalent to Tier II protections are not currently in place in Kentucky as to such discharges.
First, the language is ambiguous in the situation in which there is more than one existing permit for discharges to the water. Arguably if permit holder A has a permit to discharge 100 units of a pollutant and B also has a permit to discharge 100 units, A could seek a renewed permit that raised its discharge by 39 units because that increase would be less than 20% of the "previously permitted pollutant loading." We believe the exception is only intended to allow increases of 20% by that applicant, but the wording is unclear.

Equally unclear, does the current regulation mean that the increased loading of each pollutant must be less than 20% of the current loading of that pollutant or could a discharger ask to discharge more than 20% more of some pollutants if its total flow stayed under 20% more than its current flow? The typical case will perhaps be sewage treatment plant expansions that have roughly the same mix of pollutants as the plant expands. But how does this exception treat the situation in which the expanded plant, while expanding its design average flow by under 20%, will increase its discharge of some pollutants by more than 20%? In other words, is this exception applied on a parameter-by-parameter basis?

But the ambiguous drafting is not the biggest problem here. All NPDES permits or 401 certifications allowing for new or increased loadings should be subject to at least some antidegradation review. As a matter of law, any detectable increase in pollutants constitutes degradation. Columbus & Franklin County Metropolitan Park District v. Shank, 65 Ohio St. 86, 600 N.E.2d 1042, 1055 (Ohio 1992). All new loadings constitute degradation and are significant.

Allowing any degradation that has not been shown to be necessary to accommodate important development conflicts with the goals of the Clean Water Act. Letting polluters appropriate even small bites of a public resource, clean water, on a "first come, first served basis" until clean water becomes scarce, is not in the public interest and makes no sense as a matter of economics or environmental protection. The first applicant that comes along should not be able to exhaust unnecessarily a portion of a public resource when a later applicant, that needs to use the available capacity, may come that would supply more economic or social development to the area.

Moreover, as a practical matter, there is little value to a "significance" threshold or "de minimis" exception. A limitation or exception from the antidegradation demonstration requirement does not help permit writers or applicants at all if it is as hard to determine whether something is "insignificant" or fits into an exemption, as it is to do an antidegradation demonstration. A proper analysis of whether something is significant or de minimis involves gauging at least seven factors:

- assimilation capacity of the stream that will be removed by the proposed new pollution
- assimilation capacity of the stream that will remain if the new pollution is allowed
- total amount of the discharge
- sensitivity and rarity of the aquatic species that might be affected
- toxicity and scientific uncertainty associated with the pollutants involved
- likelihood that others will need to use the requested assimilation capacity and
- ease with which potential alternatives might be identified.

It is as easy to perform and document a simple antidegradation analysis as it is to weigh these factors and document a decision that the new loading is insignificant.

Further, alternatives to allowing new pollution always should always be considered. Guidance by U.S. EPA Region VIII allowed for a very limited "significance" provision in a state
antidegradation regulation. The threshold in the Region VIII Guidance for significance is that the new pollution must use less than 5% of the remaining assimilation capacity. More importantly the Region VIII Guidance provides that analysis of alternatives should be done even for degradations using less than 5% of the capacity.\footnote{EPA Region VIII Guidance: ANTIDEGRADATION IMPLEMENTATION requirements, Options and EPA Recommendations Pertaining to State/Tribal Antidegradation Programs, August 1993 (page 18).}

The proposed broad exemptions for 20% increases cannot properly be characterized as de minimis. In Ohio Valley Environmental Coalition the court held that allowing \textit{cumulative} discharges of 20% of total assimilative capacity as “de minimis” was unjustified. Actually, in many cases, a 20% increase in the existing discharge could take up 100% or more of the remaining assimilative capacity. In cases where there is already a large discharge, a 20% increase could involve a huge increased loading.

Moreover, it is unclear if this exception will only apply to renewals at the end of a 5-year permit period. Could a discharger come in for a “renewal” within the life of its permit and use the 20% allowance?

The RIATS attempts to defend this exemption with the claim that publicly owned sewage treatment works (POTWs) expansions are regulated through approvals of regional facility plans pursuant to 401 KAR 5:006. It does not seem, however, that the 20% exemption is limited to POTW expansions. If it is supposed to be, the language certainly must be clarified. Moreover, approvals of POTW regional facility plans do not consider all the factors that should be considered under 131.12(a)(2) and there are huge numbers of existing POTWs that did not go through any sort of alternatives analysis at all.

In summary, the exemption from Tier II protection for expansion of existing loadings (401 KAR 5:030 Section 1(2)(b)1e. and Section 1(3)(b)1e. is unjustifiable and illegal.

C. The provisions regarding mixing zones and whole effluent toxicity in Exceptional and High Quality Water are not sufficiently protective.

It is good that it is proposed to prohibit new zones of initial dilution (ZID) in Exceptional waters (proposed 401 KAR 5:030 Section 1 (2)(b)2) although we would like to see ZIDs eliminated or at least more strictly limited.

The provision requiring chronic whole effluent toxicity limits, proposed Section 1(2)(b)3, for Exceptional use waters is not written clearly. What is the limit to be placed in the permits? If this means only that there should not be chronic toxicity at the edge of the mixing zone, it does no more than what the DOW should require of all KPDES permits.

Chronic WET testing should be required for all dischargers that might have toxic discharges no matter the water to which they discharge to prevent violations of the general toxicity standard. 401 KAR 5:031 Section 4 (1) (j).
D. The exemption from Tier II Protection for permit applicants willing to accept certain discharge limits (proposed 401 KAR 5:030 Section 1 (2) (b)4-5 and Section 1 (3)(b)2) is illegal and irrational.

The proposed regulations provide still another exemption from proper Tier II coverage for permit applicants willing to accept certain KPDES permit effluent limits. Here the proposed protections (or rather lack of protections) for Exceptional and High Quality water differ in that Exceptional water receives some protection against certain pollutants that are frequently discharged by domestic sewage treatment plants (CBOD5, ammonia-nitrogen, total residual chlorine, total suspended solids, phosphorus, fecal coliform) while High Quality waters apparently have little or no Tier II protections against domestic sewage discharges.

1. The Protections for Exceptional Waters are totally inadequate.
   a. Domestic Wastewater Loophole

   There are yet more loopholes that will allow permit applicants for new or increased loadings to Exceptional water to avoid ever having to show that the new or increased pollution is necessary. Under proposed 401 KAR 5:030 Section 1(2)(b)4, new or increased discharges by domestic sewage dischargers to Exceptional water bodies are permitted if the permit has certain specified effluent limits on carbonaceous biochemical oxygen demand (CBOD5), ammonia, total residual chloride, total suspended solids, phosphorus, dissolved oxygen, whole effluent toxicity, and fecal coliform.

   If the specified effluent limits, that allow short-circuiting a proper antidegradation analysis for Exceptional waters were stringent and invariably protective, 401 KAR 5:030 Section 1(2) (b) 4 might protect Exceptional waters. But the effluent limits set forth in the proposed rule do not provide protection that is extraordinary or even adequate in many cases. The specified ammonia limit of 2 mg/L is much looser than limits that can routinely be met by sewage treatment plants with advanced treatment and is not sufficiently tight to prevent toxic conditions under many pH and temperature conditions. See U.S. EPA Ammonia National Criteria Document (1999). Similarly, the effluent limit of 1 mg/L total phosphorus is the minimum treatment standard required of every discharger to the Great Lakes watershed and, according to applicable EPA nutrient standard guidance documents, is many times the concentration of phosphorus that should be in Kentucky waters. See e.g., Ambient Water Quality Criteria Recommendations, Lakes and Reservoirs Nutrient Ecoregion IX, EPA 822-B-00-011 (Dec. 2000); Ambient Water Quality Criteria Recommendations, Rivers and Streams in Nutrient Ecoregion XI, EPA 822-B-00-020 (Dec. 2000). Indeed, none of the proposed effluent limits that allow a discharger to avoid showing a need to discharge more pollutants into Exceptional waters are exceptional.

   Further, the proposed rule is very unclear as to whether domestic sewage dischargers have to meet any special effluent limits as to pollutants other than the pollutants listed in Section 1 (2) (b)4 to avoid having to show a need to discharge into Exceptional waters. Do domestic sewerage dischargers have to meet the ½ WQBEL limits? There are domestic sewage dischargers with significant discharges of zinc, copper and other pollutants not mentioned by Section 1(2)(b)4. We have been told that it is intended by DOW that domestic sewage dischargers will have to meet the ½ the WQBEL requirement for pollutants not covered by Section 1(2)(b)4 to qualify for the exemption from having to prove necessity, but the proposed rule does not seem to say that.

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On the other hand, given that industrial dischargers also often discharge ammonia, phosphorus, chlorine, and CBOD5, clarification is needed as whether industrial dischargers must meet at least the effluent limits required of domestic sewage dischargers for these pollutants in order to skip having to show need for adding pollutant loadings to an Exceptional water. The proposal does not appear to require this. It appears that industrial dischargers may avoid Tier II review while discharging more ammonia-nitrogen, phosphorus, CBOD5 and other pollutants than the levels specified in Section 1(2)(b)4. 8 What justification, however, is there for not requiring industrial dischargers who want to discharge into Exceptional waters to meet the effluent limits set forth by the rule for ammonia-nitrogen, P, CBOD5, etc. for domestic sewage treatment plants?

b. 50% of WQBEL loophole for non-domestic waste dischargers.

Non-domestic waste dischargers also are given a short cut that will allow them to avoid making any showing of need before DOW licenses them to add a pollutant loading to Exceptional Kentucky water. Non-domestic dischargers need only to accept limits equivalent to one-half of the WQBEL to obtain a pass. As mentioned, to qualify for the loophole, non-domestic waste dischargers should at least have to meet the (generous) effluent limits for ammonia-nitrogen, CBOD5, TRC, P, TSS, and DO required of domestic sewage dischargers to qualify for the shortcut.

First, there are no numeric limits for nutrients, including phosphorus. Accordingly, non-domestic dischargers apparently need not limit their discharge of phosphorus at all and still can qualify for an exemption from any requirement to show that their discharge is economically or socially necessary.

But even as to the pollutants for which the ½ WQBEL is at all meaningful, Section 1(2)(b)6 is a huge loophole from Tier II (let alone purported Tier II ½) protections. If there is substantial dilution available when the permit is considered, a ½ WQBEL effluent limit may be practically no limit at all. If there is little dilution available, this is in effect a de minimis that can approach 50% of the total assimilation value, clearly not anything that can properly be called “de minimis” in Latin, English or law. All of the comments above regarding allowing a 20% increase of pollution from existing pollution sources that has not been proven to be necessary apply with equal or greater force to this loophole allowing unnecessary new pollution as long as it stays under 50% of the WQBEL.

2. High Quality Water gets no protection from domestic sewage discharge given proposed 401 KAR 5:030 Section 1(3)(b)2.

The DOW’s proposed protections for Exceptional waters are far weaker than the federal minimum Tier II protections. For High Quality water (i.e. water meeting all applicable water quality standards but not designated as Exceptional) the DOW proposes protections that are still further below the minimum. A huge loophole apparently allows discharge of most of the pollutants associated with domestic sewage to be discharged into High Quality waters without any showing of need or consideration of alternatives. Under Section 1(3)(b)2 and 3, a permit applicant need only agree to a permit with limits at “no more than one-half (1/2) of the water quality based limitations that would have been permitted under standard design conditions for

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8 We assume that an industrial discharger that discharges ammonia-nitrogen that wants to avoid Tier II review would have to meet the ½ WQBEL limit of Section 1 (2)(b)5.

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pollutants listed in Table 1 of Section 6 of 401 KAR 5:031.” Absent from Table 1 is any mention of ammonia-nitrogen, phosphorus or BOD.

Limiting protection of High Quality waters to protections against the pollutants listed in Table 1 also further weakens Tier II protections against non-domestic waste dischargers. There are, of course, thousands of potential water pollutants not listed in Table 1. High Quality waters receive no Tier II antidegradation protection against these pollutants.

Finally, all of the loopholes that DOW proposes to allow an applicant to add new pollution to Exceptional water without antidegradation review, are also proposed for applicants seeking to degrade High Quality water. These loopholes are as illegal as to High Quality water as they are to Exceptional water.

E. The Proposed Rules do not propose the correct standards for consideration of proposals to degrade.

If, given all the loopholes and shortcuts, a Tier II analysis were ever to be done in Kentucky, it is unlikely it would be done properly. The rules establish a presumption that the fairly loose effluent limits provided for CBOD5, ammonia-nitrogen, total residual chlorine, total suspended solids and phosphorus will be adopted for POTWs and that the ½ WQBEL limits will be adopted for other dischargers. Thus, there will probably never be a free consideration of alternatives to the discharge but only an effort by the applicant’s engineers to show that one of the presumed effluent limits should be waived because it raises costs 120% or more.

The rule is correct that an alternative is feasible if it only cost 120% of the discharge proposal, but it must be made clear that something that cost much more than 120% of the discharge proposal may also be feasible. As the 1995 USEPA Interim Economic Guidance for Water Quality Standards (http://www.epa.gov/ostwater/econ/ makes clear, that an alternative is much more expensive does not make it impossible if the economic or social development can still be achieved.

All alternatives should be considered on a pollutant-by-pollutant basis. The choice should not simply be discharge or no discharge. An alternative (e.g. enhanced treatment) that reduces the toxicity or other potential environmental damage of a discharge should be required if it is feasible.

DOW is correct in using the 1995 USEPA Interim Economic Guidance for Water Quality Standards in considering discharges to Exceptional water. DOW should also use the Interim Economic Guidance as to all other Tier II alternatives analyses and socioeconomic demonstrations unless DOW can come up with some other analytical method that is as protective and gives as much real guidance to applicants, the public and DOW. The proposed rule does not provide a standard as to high quality water.

III. The regulations need much more implementation procedures.

It is perhaps understandable that the DOW would not want to spend time drafting regulations spelling out the procedures for proving that a loading is necessary to accommodate important economic or social development. Given the small scope of Tier II coverage and the myriad of

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loopholes allowing unrestricted degradation of virtually all Kentucky’s waters, rules regarding how an applicant is to show that degradation is necessary will almost never be used. Similarly, rules regarding how the federally required opportunity for public participation in Tier II decisions is to be facilitated would probably get less work than the Maytag repairman given all the loopholes avoiding Tier II review under DOW’s proposal.

Nonetheless, it should be noted that, after this proposed set of antidegradation regulations is replaced with something that complies with federal and state law, Kentucky will need rules that spell out what sort of showing must be made to justify lowering water quality levels. It will also be necessary to set forth how the public will get a chance to comment on such proposed degradation. How will the DOW give notice of proposals to lower water quality? What sort of findings need to be made and in what sort of documents will be provided to the public? It would naturally be preferable that the procedures necessary to make the decision required under 40 CFR 131.12(a)(2) be integrated into existing Kentucky procedures to the extent consistent with allowing full public participation in these decisions.

IV. The Proposed Regulation makes no provision for antidegradation in 401 certifications.

A state’s antidegradation policy must be fully implemented in making water quality certification decisions under Section 401 of the Clean Water Act and must also be applied in other existing state regulatory schemes. See USEPA, WQS Handbook (2d Ed.) 4.8.1. The proposed rules, however, do not even attempt to fulfill this necessary function.

V. Additional changes to the mixing zone rules (401 KAR 5:029 Section 4) are needed.

DOW in this proposal only proposes to change the mixing zone regulations to phase out mixing zones for bio-accumulative pollutants. We support the change that is proposed, but also believe that there are other serious flaws in Kentucky’s regulation of mixing zones that must be addressed.

There should be no new mixing zones in any of Kentucky’s waters and a schedule should be developed to phase out existing mixing zones. By definition a mixing zone permits the discharge of pollutants in concentrations above the limits set for the protection of uses in the water body and essentially designates a portion of the water body for the illegal use of waste assimilation. A mixing zone, therefore, does not protect or maintain the existing water quality. In fact, we question the Cabinet’s continued ability to protect existing and designated uses in segments of streams where mixing zones have been permitted.

Certainly there should be no new mixing zones in waters meeting water quality standards without a more rigorous examination of alternatives, a finding by the Cabinet that to allow this new or expanded discharge will require a lowering of the existing water quality and a clear and compelling basis for social and economic benefit to the community and to downstream users. In other words there should be no more new mixing zones without a rigorous and proper antidegradation analysis.

401 KAR 5:029 Section 1 (2) (b) 2. Prohibits the establishment of Zones of Initial Dilution (ZID) in an Exceptional water unless assigned before the effective date of this administrative regulation. KWA supports the prohibition of new ZIDs in Exceptional waters. We believe that the permitting of new ZIDs, wherein discharge limits exceed the acute values set to protect human health and

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aquatic life, in waters that exceed all water quality criteria would be inappropriate and inconsistent with the statutory duty to maintain the quality of the waters of the Commonwealth and protect existing uses. Many of the waters designated as Exceptional waters are known to support rich pollutant-intolerant populations of aquatic life. It the Cabinet’s duty not to just to maintain some aquatic life in the streams but to maintain the existing healthy diverse, population of native aquatic species.

401 KAR 5:029 Section 4 (3) (a) states: “The Cabinet shall require the applicant to provide a technical evaluation for a zone of initial dilution;” This is not particularly reassuring. Exactly what justification does an applicant need to provide to obtain a five-year permit to discharge toxic substances into Kentucky’s waters at levels known to cause death or “unacceptable” harmful effects with short term exposure of ninety-six (96) hours or less?

401 KAR 5:029 Section 4 (4) states: “Unless assigned on or before the effective date of this administrative regulation, a zone of initial dilution for a pollutant shall be available only to a submerged high-rate multiport outfall structure and shall be limited in size to the most restrictive of the following:......” There should be no new zones of initial dilution (ZIDs) in any Kentucky waters and certainly no new ZIDs in Tier II waters.

If for any reason a ZID is approved and assigned for a new or expanded permit, then regular monitoring should be required of the permittee at the edge of the assigned ZID and at the edge of the assigned mixing zone for compliance. KWA recognizes that this may be physically difficult in some instances but nonetheless this must be a required compliance feature in the permit when such toxic levels of pollutants are permitted by DOW to enter into Kentucky’s waters.

Furthermore, there should no mixing zone or ZID in any stream with a low 7Q10 flow of zero or in any other water where the mixing zone will take up more that ¼ of the stream. Such streams have no capacity to dilute toxic pollutants for at least some portion of the year.

401 KAR 5:029 Section 4. (5) states: “The location of a mixing zone shall not interfere with fish spawning or nursery areas, fish migration routes, public water supply intakes, or bathing areas, nor preclude the free passage of fish or other aquatic life, nor jeopardize the continued existence of any endangered or threatened aquatic species listed under Section 4 of the Federal Endangered Species Act, 16 U.S.C. 1531 et seq., nor result in the destruction or adverse modification of such species’ critical habitat…” KWA supports the new language in this subSection. However, we do not believe that any mixing zone should be assigned to a waterway with known populations of federally listed threatened or endangered species. KWA and ELPC remain unconvinced that the same water quality criteria developed and adopted for the protection of any warm water aquatic habitat is protective of water quality conditions necessary to fully protect federally listed species. Therefore a waiver of these criteria makes even less sense in a regulatory or legal scheme. If DOW continues to permit mixing zones in waters with federally listed species we believe a more rigorous antidegradation analysis and a higher standard should be set for alternatives analysis and social/economic benefit demonstrations. Even if a permit applicant can satisfy these more stringent requirements we believe that additional, regular on-going in-stream biological assessments funded by the permittee to a third party qualified to contact such analysis should be required to continually monitor the federally listed species in the waterbody.

401 KAR 5:029 Section 4 (10) provides that “Unless assigned by the Cabinet on or before the effective date of this administrative regulation, there shall be no mixing zones for bioaccumulative

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chemicals of concern. ..." KWA and ELPC support the proposed additional restrictions on mixing zones. The very nature of bioaccumulative chemicals of concern makes these toxic pollutants unsuitable for discharge in mixing zones. We urge the Cabinet to expedite the proposed ten-year phasing out of these toxic chemicals and at a minimum to set up a compliance schedule for the phase out in any permit renewals.

VI. Other comments on proposed regulations

401 KAR 5:031. Surface water standards.
401 KAR 5:031 Section 6, Table 1 contains some numeric limits we believe are inconsistent with EPA’s Nationally Recommended Water Quality Criteria: 2002 (EPA-822-R-02-047). We request that the DOW adopt the more stringent criteria below from this reference or provide a rational why citizens of this Commonwealth should accept less stringent limits.

- WAH criteria for Chloride (p. 23) CMC=860,000 and CCC=230,000
- No criteria is proposed for fish consumption for methylmercury (CAS 22967926) limit is listed as 0.3 mg/kg
- WAH criteria for Mercury (p. 12) is CMC=1.4 and CCC=0.77
- Criteria for human health protection (DWS) for Total Dissolved Solids should be 250 mg/l not 750 mg/l

In addition, DOW has not adopted drinking water – human health criteria for a number of parameters recommended by the Safe Drinking Water Act (SDWA). We ask that DOW adopt the following numeric limits for DWS or explain why they chose not to so protect Kentucky citizens.

- Aluminum, SDWA limits are 0.05 – 2 mg/l
- Copper SDWA limit is 1 mg/l
- Cyanide, Free SDWA limit is 2 mg/l
- Iron SDWA limit for Iron is 0.3 mg/l
- Manganese SDWA limit is 0.05 mg/l
- Selenium SDWA limit is 0.05 mg/l
- Silver SDWA limit is 0.1 mg/l
- Toluene SDWA limit is 1 mg/l
- Zinc SDWA limit is 5 mg/l

We also note that DOW has not adopted standards for all the priority pollutants listed in reference #9 nor have they adopted standards for all the SDWA pollutants in reference #10 and we urge DOW to adopt these additional standards.

As noted previously, DOW has not adopted criteria for nutrients (phosphorus and nitrogen) yet there are two documents applicable to Kentucky. Rivers and Streams in Nutrient Ecoregion XI, EPA-822-B-00-020 provides EPA’s recommended criteria for nutrients for eastern Kentucky. Rivers and Streams in Nutrient Ecoregion IX, EPA-822-B-00-019 provides recommended criteria for nutrients in central and western Kentucky. In these documents EPA makes it clear that:

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9 EPA Nationally Recommended Water Quality Criteria 2002, EPA-822-R-02-047, November 2002

10 http://www.epa.gov/safewater/mcl.html

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These criteria provide EPA’s recommendations to States and authorized Tribes for use in establishing their water quality standards consistent with Section 303(c) of CWA. EPA recommends the following approaches, in order of preference:

1. Wherever possible, develop nutrient criteria that fully reflect localized conditions and protect specific designated uses using the process described in EPA’s Technical Guidance Manuals for nutrient criteria development. Such criteria may be expressed either as numeric criteria or as procedures to translate a State or Tribal narrative criterion into a quantified endpoint in State or Tribal water quality standards.
2. Adopt EPA’s Section 304(a) water quality criteria for nutrients, either as numeric criteria or as procedures to translate a State or Tribal narrative nutrient criterion into a quantified endpoint.
3. Develop nutrient criteria protective of designated uses using other scientifically defensible methods and appropriate water quality data.

EPA recommendations published under Section 304(a) of the CWA serve several purposes, including providing guidance to States and Tribes in adopting water quality standards for nutrients that ultimately provide a basis for controlling discharges or releases of pollutants. State water quality inventories and listings of impaired waters consistently rank nutrient over-enrichment as a top contributor to use impairments. EPA’s water quality standards regulations at 40 CFR §131.11(a) require States and Tribes to adopt criteria that contain sufficient parameters and constituents to protect the designated uses of their waters. EPA expects States and Tribes to address nutrient over-enrichment in their water quality standards, and to build on existing State and Tribal initiated efforts where possible.

DOW should adopt nutrient criteria as soon as possible as excess nutrients are responsible for approximately 400 of the assessed impaired river miles in Kentucky and are a significant contributor to the “Dead Zone” in Gulf of Mexico. DOW should immediately require that new discharges be designed to discharge the lowest levels of nutrients that can be practically achieved. Diversion of nutrient-laden discharges to farm fields, golf courses, restored wetlands and other areas where the nutrients can be of benefit should be implemented to the extent possible.

401 KAR 5:031 Section 7 details standards for the protection of primary contact recreation. The Division proposes to add a second use support test of Escherichia coli (e coli). KWA and ELPC support this alternative use support criteria since it is a more accurate indication of human pathogen problems in the stream and since US EPA has published criteria based on e coli.

KWA further urges the DOW to adopt an e coli standard for the other designated uses that have a pathogen standard i.e. secondary contact recreation and domestic water supply, in this triennial review.

401 KAR 5:031 Section 8. (2) (b) details protections for OSRW waters. How can existing water quality be maintained if an OSRW receives only Tier I protections? Tier I protections are designed to protect uses but do not purport to maintain existing water quality. The regulation is deliberately misleading as written. OSRW waters with federally listed species should be at a minimum listed and protected as Tier II waters to maintain existing water quality.
General provisions.
401 KAR 5:029 Section 1. (2) applies to High Quality (Tier II) and Exceptional Waters (Tier II ½) and states that the existing water quality shall be maintained and protected unless the cabinet finds.... However, this is not true in practice nor is the Cabinet’s intent in the implementation of this Section in 401 KAR 5:030 to maintain and protect existing water quality. Instead the regulation contains a long list of reasons permits that will lower existing water quality are exempt from antidegradation considerations. Equally alarming is the second list of pre-determined KPDES permit limitations that short-cut the entire consideration of alternatives, a finding that it is necessary to lower water quality and an analysis of social and economic benefits to the community. (See our more detailed comments above on the illegal and improper exemptions and “short-cuts” in 401 KAR 5:030)

401 KAR 5:029 Section 5 provides for water quality based variances for coal remining operations. Such variances should only be granted when the applicant will improve the quality of the water in the receiving water. The Cabinet already has provisions and exceptions for the withdrawal of contaminated water.

Conclusion

While some of the changes proposed are good and do make small advances in protecting the waters of the Commonwealth, the changes to the critical antidegradation implementation procedure still fall far short of the requirements mandated under the Clean Water Act. The Division of Water must cease granting permits that allow new or increased discharges until valid antidegradation regulations are adopted.

Sincerely,

Judith D. Petersen
Executive Director, KWA

Albert F. Ettinger
Senior Staff Attorney, ELPC

CC: G. Tracy Mehan III, US EPA Office of Water
J. I. Palmer, Jr., EPA Region 4, Regional Administrator
James D. Giattina, EPA Region 4, Director, Water Management Division

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BEFORE THE NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
DIVISION OF WATER

ORAL TESTIMONY

OF THE
KENTUCKY CHAMBER OF COMMERCE

ON
PROPOSED REVISIONS OF
KENTUCKY WATER QUALITY STANDARDS

FRANKFORT, KENTUCKY
OCTOBER 23, 2003
My name is Lloyd Cress and I am the Environmental Director for the Kentucky Chamber of Commerce on whose behalf this statement is presented. The Kentucky Chamber of Commerce is an association representing business interests with thousands of members across Kentucky. The Kentucky Chamber has been deeply involved in the formulation of Kentucky’s policy on water quality issues for many years and welcomes the opportunity to present its views on the Division of Water’s proposed revisions to its water quality standards.

The Kentucky Chamber’s comments at this hearing will address only the general issues raised by the Division’s antidegradation proposal. The Kentucky Chamber will submit additional written comments regarding specific issues prior to the close of the public comment period.

The formulation of an antidegradation implementation regulation that is both acceptable to USEPA and consistent with Kentucky law has been one of the most intractable issues confronted by the Natural Resources and Environmental Protection Cabinet in the recent past. This conflict should not be unexpected since Kentucky’s water pollution control statute provides very limited authority for the implementation of an antidegradation program. Kentucky’s statutes direct the Cabinet to promulgate regulations which prevent and abate water pollution and define water pollution in terms of interference with legitimate uses of the waters of the Commonwealth. Thus the Cabinet’s statutory mandate is to conserve waters for use rather than to preserve existing water quality without regard to use.

Notwithstanding the difficulty of satisfying both federal and state requirements, the Division of Water in 1999 succeeded in developing an antidegradation implementation program which secured full approval by USEPA except in one very limited aspect. In August 2000 USEPA approved all provisions of Kentucky’s present antidegradation regulation 401 KAR
5:030 relating to Tier I use-protected waters and all provisions relating to Tier III outstanding national resource waters. USEPA also approved 401 KAR 5:030 as it related to Tier II high quality waters except for the selection criteria for the elevation of Tier I waters to Tier II or Tier III status. The Division of Water could easily remedy the single deficiency identified by USEPA in its August 2000 review of Kentucky’s antidegradation implementation regulation by broadening the Tier II selection criteria to include all waters of the Commonwealth that the Division of Water determines to have quality better than mandated by state water quality standards.

Unfortunately the Division of Water’s current antidegradation proposal does not build on the previous progress toward federal approval but instead embarks on a very different approach to antidegradation implementation. This different approach incorporates a four-tier categorization system instead of USEPA’s three-tier system, eliminates the use-protected category despite its full approval by USEPA and includes a 120% test for economic infeasibility of alternatives which is far more stringent than the test utilized in other states. The Division of Water’s proposed revision of 401 KAR 5:030 represents an abandonment of the progress made to date on antidegradation implementation and will likely further delay resolution of this issue.

As the Division of Water and the general public deliberate this important issue regarding the management of Kentucky’s water resources, it is important to bear in mind that the agency’s decision does not involve a choice between clean water and polluted water since the KPDES permit program requires that new and expanded wastewater discharges be consistent with Kentucky’s water quality standards. Accordingly, Kentuckians can be assured that such new and
expanded discharges will not jeopardize our clean water goals even in the absence of an antidegradation program.

Instead the antidegradation program involves a choice between clean water and cleaner water and provides an opportunity for Kentucky to make value judgments as to the social and economic burdens that must be borne if our choice is to have cleaner water rather than clean water. Since Kentucky's environmental values will be fully protected without regard to the antidegradation program, the Kentucky Chamber of Commerce urges the Division of Water to structure its antidegradation program in a manner that does not impose unnecessary burdens on further social and economic development in Kentucky. The Kentucky Chamber of Commerce believes that this objective can best be achieved by a narrow revision of its present regulation in a manner tailored to respond to USEPA's limited disapproval of the present regulation.
BEFORE THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
DIVISION OF WATER

WRITTEN COMMENTS
OF THE
KENTUCKY CHAMBER OF COMMERCE
ON
PROPOSED REVISIONS OF
KENTUCKY WATER QUALITY STANDARDS
FRANKFORT, KENTUCKY
OCTOBER 30, 2003
The Kentucky Chamber of Commerce requests that the following comments be considered in the promulgation of revised water quality standards for Kentucky.

**401 KAR 5:029 Section 1 (2).** This regulation imposes procedural requirements that must be satisfied prior to “allowing lower quality” but does not delineate conditions that represent a lowering of water quality. The term “lower water quality” could be interpreted to mean any increase in mass loading of substances in the water body. Such an interpretation would be unreasonable, however, since many substances have a positive effect on water quality and the absence of all substances in the water body would render it incapable of supporting aquatic life. The Kentucky Chamber believes that it is more reasonable to interpret the term “lower water quality” in light of the Clean Water Act objective “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” Consistent with that interpretation, the Kentucky Chamber suggests that 401 KAR 5:029 or 401 KAR 5:030 be amended to include the following provision:

> “Water quality shall be deemed to be maintained and protected if the Division determines that the activity under consideration will not result in a lowering in the Index of Biotic Integrity or the Macroinvertebrate Bioassessment Index for the stream, will not inhibit recreation in and on the water, and will not cause or contribute to a violation of the water quality standards established under 401 KAR 5:031.”

Additionally, the Kentucky Chamber requests that the Division confirm its understanding that the final sentence of 401 KAR 5:029 Section 1(2) relates only to the pollutant for which the Division has approved a lowering of water quality.

**401 KAR 5:209 Section 4(5).** The Kentucky Chamber suggests that this regulation not be revised in the manner proposed. USEPA has fully approved 401 KAR 5:029 including its provisions relating to mixing zones and revision of the regulation will raise unnecessary issues as to its approval
status. It is the Kentucky Chamber’s understanding that the proposed revision reflects a potential change in ORSANCO standards that is under consideration. The Kentucky Chamber urges the Division to withhold action on this issue until final action has been taken by ORSANCO.

If the Division proceeds with its proposed revision, the Kentucky Chamber urges the Division to exempt from the provisions those mixing zones that have been previously established. Additionally, the Kentucky Chamber urges the Division to delete the reference in the final sentence to “adverse modification of such species’ critical habitat” since the concept is too vague to be meaningfully applied through the KPDES permit program.

401 KAR 5:029 Section 4(10). The Kentucky Chamber suggests that this regulation not be revised in the manner proposed. USEPA has fully approved 401 KAR 5:029 including its provisions relating to mixing zones and revision of the regulation will raise unnecessary issues as to its approval status. It is the Kentucky Chamber’s understanding that the proposed revision reflects a potential change in ORSANCO standards that is under consideration. The Kentucky Chamber urges the Division to withhold action on this issue until final action has been taken by ORSANCO.

401 KAR 5:030 Section 1 - The Kentucky Chamber recommends that the second sentence of the introductory paragraph be deleted. The KPDES permit program was intended to be a comprehensive state-wide program to regulate wastewater discharges and their effect on the water quality of receiving streams. Unlike other Cabinet programs, the protection of in-stream water quality has always been viewed as a matter for state rather than local control. Since streams flow through many local jurisdictions, local regulation of in-stream water quality raises the potential for inter-jurisdictional conflicts that would not be in the best interest of the state or its environment. Local
land use control through planning and zoning affords sufficient opportunity for local decision-making without involvement in the regulation of in-stream water quality.

401 KAR 5:030 Section 1(2). The Kentucky Chamber suggests that the Division of Water implement a three-tier antidegradation implementation program consistent with USEPA policies rather than the proposed four-tier program. This could be accomplished by categorizing the exceptional waters as high quality waters and utilizing the implementation procedures proposed for high quality waters.

401 KAR Section 1(2)(b)1.e. This provision should apply to permit modifications as well as permit renewals.

401 KAR 5:030 Section 1(2)(b)3., 4., 5.. These special effluent limitations are intended to be optional for permit applicants that desire to avoid Tier II review; however, the proposed wording could be interpreted to be mandatory. The Kentucky Chamber suggests that each of these provisions be prefaced by the wording “Except as provided in 7. below.”

401 KAR 5:030 Section 1(2)(b.)7. The initial sentence, as proposed, could be interpreted to impose separate tests for technical infeasibility of alternatives and for economic infeasibility of alternatives as well as separate requirements for demonstration of necessity and economic or social development. The Kentucky Chamber suggests that the sentence be revised to provide:

“If the permit applicant does not accept the effluent limitations set forth in this paragraph, the applicant shall demonstrate to the satisfaction of the Cabinet that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the water is located based upon an alternatives analysis and socioeconomic demonstration.”
The Kentucky Chamber opposes the proposed requirement that no technologically or economically feasible alternative exist and that the test for economic infeasibility be 120% of the capital and operating cost of the discharge proposal. This provision is far more stringent than required by USEPA’s antidegradation policies and far more stringent than the requirements of states that compete with Kentucky for economic development. Accordingly, the Kentucky Chamber strongly urges the Division to delete such provisions and to replace them with the concept of “reasonably available alternatives consistent with the objectives of the project application.”

The Kentucky Chamber does not believe that the federal guidelines referenced in this provision constitute a reasonable basis for evaluating the social and economic desirability of applications and urges the Division to delete references to such guidelines. Additionally, the Kentucky Chamber is of the opinion that evaluation of the social and economic desirability of proposed projects involves consideration of matters that are not within the areas of expertise of the Division of Water. The Kentucky Chamber suggests that the Division of Water defer to the judgment of the Cabinet for Economic Development in the evaluation of social and economic demonstrations.

401 KAR 5:030 Section 1(2)(b)8. The Kentucky Chamber does not believe that a failure to demonstrate the necessity for lowering water quality should result in imposition of the special effluent limitations required by this paragraph but rather should result in the issuance of a KPDES permit with effluent limitations that would not lower water quality. Since the special effluent limitations apply to the entire effluent, their imposition could have a perverse effect.

401 KAR 5:030 Section 1(3)(a). The Kentucky Chamber understands that the reference to “fully supports all designated uses” is intended to exclude all waters that are considered “impaired” under
401 KAR 5:030 Section 1(4). This should be clarified by adding the wording “or is not an impaired water under subsection (4).”

**401 KAR 5:030 Section 1(3)(b)1.** The second sentence is confusing and conflicts with the remainder of this provision. Since all discharges include substances not found in Table 1, this sentence would have the effect of subjecting all new and expanded discharges to Tier II review without exception. Clearly this was not the intent of the provision and the Kentucky Chamber recommends that the sentence be deleted.

**401 KAR 5:030 Section 1(3)(b)1.e.** This provision should apply to permit modifications as well as permit renewals.

**401 KAR 5:030 Section 1(3)(b)2.** These special effluent limitations are intended to be optional for permit applicants that desire to avoid Tier II review; however, the proposed wording could be interpreted to be mandatory. The Kentucky Chamber suggests that the provision be prefaced by the wording “Except as provided in 4. below.”

**401 KAR 5:030 Section 1(3)(b)4.** The second sentence, as proposed, could be interpreted to impose separate tests for technical infeasibility of alternatives and for economic infeasibility of alternatives as well as separate requirements for demonstration of necessity and economic or social development. The Kentucky Chamber suggests that the sentence be revised to provide:

“If the permit applicant does not accept the effluent limitations set forth in this paragraph, the applicant shall demonstrate to the satisfaction of the Cabinet that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the water is located based upon an alternatives analysis and socioeconomic demonstration.”
The Kentucky Chamber opposes the proposed requirement that no technologically or economically feasible alternative exists and that the test for economic infeasibility be 120% of the capital and operating cost of the discharge proposal. This provision is far more stringent than required by USEPA’s antidegradation policies and far more stringent than the requirements of states that compete with Kentucky for economic development. Accordingly, the Kentucky Chamber strongly urges the Division to delete such provisions and to replace them with the concept of “reasonably available alternatives consistent with the objectives of the project application.”

The Kentucky Chamber is of the opinion that evaluation of the social and economic desirability of proposed projects involves consideration of matters that are not within the areas of expertise of the Division of Water. The Kentucky Chamber suggest that the Division of Water defer to the judgment of the Cabinet for Economic Development in the evaluation of social and economic demonstrations.

**401 KAR 5:030 Section 1(3)(b)5.** The Kentucky Chamber does not believe that a failure to demonstrate the necessity for lowering water quality should result in imposition of the special effluent limitations required by this paragraph but rather should result in the issuance of a KPDES permit with effluent limitations that would not lower water quality. Since the special effluent limitations apply to the entire effluent, their imposition could have a perverse effect.

**401 KAR 5:030 Section 1(4)(a).** Waters which are, in fact, impaired but which have not been identified pursuant to 33 USC 1315 should also be categorized as impaired for purposes of antidegradation review. The Kentucky Chamber suggests that permit applicants be afforded the opportunity to document stream impairment as a part of the KPDES permit procedure. Accordingly,
the Kentucky Chamber suggests that the following sentence be added to 401 KAR 5:030 Section 1(4)(a):

"Impaired water shall include any water which the Division of Water, on the basis of all available information, determines to have quality that does not comply with all applicable water quality standards."

**401 KAR 5:030 Section 3(1)(c).** This interim federal guidance document has been in existence for nearly 10 years but has not been afforded regulatory effect by USEPA. The Kentucky Chamber does not believe that the document is appropriate for regulatory decisions in Kentucky and recommends that references to the document be deleted.

**401 KAR 5:030 General Comments.** This proposed regulation reflects an effort by the Division of Water to balance its overall impact on new and expanded discharges in Kentucky by imposing more stringent requirements generally but ameliorating their effect in certain instances. The Kentucky Chamber is greatly concerned that, through the process of USEPA approval/disapproval and judicial review, some of the provisions of the regulation may be voided leaving the remainder of the regulation in a form that would never have been promulgated as a stand-alone regulation. The Kentucky Chamber strongly urges the Division of Water to avoid such unintended consequences by adding to 401 KAR 5:030 the following provision:

"The provisions of this regulation are interdependent and interrelated and shall be deemed nonseverable for all purposes."

Since the proposed revisions to 401 KAR 5:030 will not become effective for federal purposes until they have been approved by USEPA, it is important that the revised regulation not become applicable at the state level until federal approval/disapproval action has been completed. Otherwise, there would temporarily be different state and federal water quality standards and KPDES
permit actions taken under the revised state regulation might be rendered meaningless by the subsequent federal action. To avoid this potentially chaotic result, the Kentucky Chamber suggests that the regulation include a provision restricting its applicability to KPDES permit applications submitted on and after approval/disapproval action by USEPA. An additional provision should be included in the final regulation confirming that KPDES permit applications submitted prior to USEPA approval/disapproval action shall continue to be processed under 401 KAR 5:030 in its present form.

In January 2003 USEPA issued its final Water Quality Trading Policy and specifically approved its use in administration of the Clean Water Act antidegradation program. Although USEPA stated that the Water Quality Trading Policy could be utilized without additional regulatory action, the Kentucky Chamber believes that the Division of Water should specifically provide in 401 KAR 5:030 for utilization of the USEPA Water Quality Trading Policy.

Alternatively, the Kentucky Chamber requests that the Division of Water confirm that USEPA’s Water Quality Trading Policy can be utilized by permit applicants in complying with 401 KAR 5:030 without further regulatory action.

401 KAR 5:031 Section 2(2).” Since these criteria are based upon the protection of human health from the consumption of fish tissue, there is no rational basis for applying them in waters that do not have the physical capacity to serve as a fishery resource. The Kentucky Chamber recommends that the regulation be revised to include a provision allowing regulated entities to demonstrate that specific waters do not have the physical capability to serve as a fishery resource and providing that such criteria would not be applicable to such waters.
BANKRUPTCY ISSUES FOR ENVIRONMENTAL LAWYERS

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BANKRUPTCY ISSUES FOR ENVIRONMENTAL LAWYERS

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SECTION D
I. Overview of Bankruptcy Process
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II. Key Bankruptcy Issues

      (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

      (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

      (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

      (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

      (4) any act to create, perfect, or enforce any lien against property of the estate;

      (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

      (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

      (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

      (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.
(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section—
   (A) of the commencement or continuation of an action or proceeding for—
   (i) the establishment of paternity; or
   (ii) the establishment or modification of an order for alimony, maintenance, or support; or
   (B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;


(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker,
financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46
(including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
(2) the stay of any other act under subsection (a) of this section continues until the
earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual
or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant
relief from the stay provided under subsection (a) of this section, such as by terminating, annulling,
modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of
such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this
section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection
(a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the
date that is 90 days after the entry of the order for relief (or such later date as the court may
determine for cause by order entered within that 90-day period)--

(A) the debtor has filed a plan of reorganization that has a reasonable
possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim
is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured
statutory lien), which payments are in an amount equal to interest at a current fair market rate on
the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of
any act against property of the estate under subsection (a) of this section, such stay is terminated
with respect to the party in interest making such request, unless the court, after notice and a hearing,
orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and
determination under subsection (d) of this section. A hearing under this subsection may be a
preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this
section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

1. Generally the automatic stay prohibits civil suits and civil enforcement actions See In re 229 Main Street Limited Partnership, 262 F.3d 1 (1st Cir. 2001); B.F. Goodrich v. Betkoski, 99 F.3d 505 (2nd Cir. 1996).

2. When a governmental unit uses its police and regulations power to prevent environmental misconduct, such actions are excepted from the automatic stay. See Safety-Kleen Inc. v. Wyche, 274 F.3d 846 (4th Cir. 2001). In Penn Terra Ltd. v. Dep’t of Env’tl. Resources, 733 F.2d 267 (3rd Cir. 1984), a coal mine operator entered into a consent order to abate violations. When the operator filed a petition for bankruptcy, the regulatory agency sought an injunction in state court to enforce the consent order. The court found that the injunction was within the state’s police and regulatory powers “to rectify harmful environmental hazards.” Penn Terra, 733 F.2d at 274. The court also stated that the injunction “was meant to prevent future harm to, and to restore, the environment.” Id. at 278.

B. Abandonment – 11 U.S.C. §554

1. Debtors are generally permitted to abandon property which is “burdensome” or of inconsequential value to the estate. Property that is contaminated and/or requires
environmental remediation may have limited or negative value to the estate, and a debtor may wish to abandon the property rather than address the environmental issues.

2. At odds with the abandonment provision is 28 U.S.C. §959(b), which requires the trustee and a debtor-in-possession to “manage and operate the property in his possession . . . according to the requirements of the valid laws of the State.” Courts have stated that debtors are obligated to comply with law, especially environmental laws. See, e.g., Cumberland Farms, Inc. v. Florida Dep’t of Env’tl. Protection, 116 F.3d 16, 19-20 (1st Cir. 1997) (“it is by now abundantly clear that in state-regulated areas such as protection of the environment, a bankruptcy court must comply with the laws of the state involved. Debtors in possession . . . do not have carte blanche to ignore state and local laws protecting the environment against pollution.”) (citations omitted); In re Envt’l Waste Control, Inc., 125 B.R. 546, 550-51 (N.D. Ind. 1991) (“[T]he established case law is clear that a bankruptcy trustee or debtor . . . is obligated to comply with environmental laws, particularly in regards to property in its possession . . . . The law requires the debtor to take action to fulfill that obligation, regardless of its financial situation.”).

3. In 1986, the U.S. Supreme Court gave effect to §959 in Midlantic National Bank v. N.J. Dept. of Environmental Protection, 474 U.S. 494 (1986), held that a bankruptcy trustee did not have “carte blanche” to abandon property in violation of environmental laws which protect the “public’s health and safety from imminent and identifiable harm.” Limiting the trustee’s abandonment powers the Court held as follows:

[the Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public’s health and safety . . . . [W]e hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identifiable hazards.]

Midlantic, 474 U.S. at 507.

4. Since Midlantic, courts have generally addressed the issue of what constitutes “imminent and identifiable harm” and found that:

“To determine whether the violations of the environmental regulations present an immediate risk to the public’s health and safety, courts have focused on the following factors:

(i) whether the hazardous waste facility was in compliance with all applicable regulations at the time that the debtor ceased operations;

(ii) whether conditions at the hazardous waste facility are regressing or in any way immediately threaten the public;
(iii) whether the applicable environmental regulators previously have taken action to require cleanup;

(iv) whether the site is listed on the state or national list of contaminated sites;

(v) whether the environmental hazards are known or simply speculative.

See, e.g., L.F. Jennings Oil Co., 4 F.3d at 890 (site was not listed on state’s list of contaminated sites); Borden, Inc. v. Wells Fargo Bus. Credit (In re Smith-Douglass, Inc.), 856 F.2d 12, 17 (4th Cir. 1988) (lack of imminent harm or danger to public was evidenced by failure of the state EPA to take enforcement action despite existence of violations, state inspection, and receipt of reports from the debtor). However, the state’s failure to act is not dispositive. In re FCX, Inc., 96 B.R. 49, 54 (Bankr. E.D. N.C. 1989) (“For the purposes of an abandonment controversy, the court, not EPA or the state, must determine if there is an immediate threat to public health and safety.”).

The Sixth Circuit applied Midlantic in In re Wall Tube & Metal Products Co., 831 F.2d 118, 122 (6th Cir. 1987) where the court stated: “It follows that if the . . . trustee could not have abandoned the estate in contravention of the State’s environmental law, neither then should he have maintained or possessed the estate in continuous violation of that same law.” Referring to §959(b) the court recognized that the Supreme Court “noted Congress’ intentions that the trustee’s efforts ‘to marshal and distribute the assets of the estate’ give way to the governmental interest in public health and safety.” In re Wall Tube, 831 F.2d at 122. Finally, the court stated that it would not allow creditors to benefit “while the debtor violates the law.” Id. at 123.

C. Claims in Bankruptcy

1. What is a claim?

   a. 11 U.S.C. §101(5) provides:

   "claim" means—

   (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

b. The Supreme Court in Ohio v. Kovacs, 469 U.S. §274 (1985) held that an injunctive order under environmental law which could be satisfied through the payment of money was a claim under the Bankruptcy Code.

c. However, since Kovacs, many courts have held that injunctions, including injunctions related to environmental claims, which have an alternative right to payment are not dischargeable because they are not claims. See generally In re Chateaugay, 944 F.2d 997 (2nd Cir. 1991); In re Torwico Elecs., Inc., 8 F.3d 146 (3rd Cir. 1993) (“the state’s attempt ... to force a party to clean up a waste site which poses an ongoing hazard is not a ‘claim’ as defined by the Bankruptcy Code.”).

2. **When does a claim arise for purposes of bankruptcy law?**

See Ames and Bowles, Jr. The When and Where of Environmental Claims in Bankruptcy, 15 ABI Journal 8 (1996) (attached hereto as Exhibit A). See also In re M. Frenville Co., 744 F.2d 332 (3rd Cir. 1984) (Non-CERCLA case where 3rd Circuit held that a claim would not arise until claimant had right to commence lawsuit.)

3. **11 U.S.C. §502(e) contribution and indemnification claims for non-debtor PRP.**

11 U.S.C. §502(e) provides:

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that--

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.
(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

This provision has been frequently used by Chapter 11 debtors in possession or bankruptcy trustees to defeat environmental claims that parties may have against debtors for contributing and indemnification under CERCLA and other environmental laws.


Under 11 U.S.C. §503(b)(1)(A), creditors can receive a priority claim in the debtor’s bankruptcy for “the actual, necessary costs and expenses of preserving the estate,” including expenses for services provided to or damages incurred by a debtor related to costs of operating a debtor’s business or assets.

Environmental claims may be given administrative priority. See generally In re Hemingway Transport, Inc., 73 B.R. 494 (Bkrtcy. D. Mass. 1987), aff’d, 126 B.R. 656 (D. Mass 1991), aff’d in part, rev’d in part, 993 F.2d 915 (1st Cir. 1993) (allowing post-bankruptcy petition purchaser of property from the administrative debt of property cleanup, cost paid to the government by the purchaser); In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988) (lessor of property denied administrative claim for clean up costs paid post-bankruptcy petition to the government for contamination caused by debtor lessee because debtor did not own contaminated property and therefore payments did not benefit debtor’s estate); In re Mahoney-Troast Constr. Co., 189 B.R. 57, 61 (Bankr. D. N.J. 1995) (“it appears amply clear that expenses incurred post-petition to clean up continuing environmental hazards created pre-petition may be granted administrative expense priority”); In re Coal Stripping, Inc., 222 B.R. 78, 82 (Bankr. W.D. Pa. 1998) (actual reclamation costs incurred post-petition entitled to administrative priority even though debtor did not operate in Chapter 11).

III. Claims Against Secured Lenders – 11 U.S.C. §506(c) – Contribution Claims and Liability of Secured Creditors Under CERCLA.

A. CERCLA Liability of Secured Creditors: Prior to 1996, Lenders had a serious issue as to whether they could be considered an operator under CERCLA for purposes of clean up liability. See generally Kelley v. EPA, 15 3d 1100 (D.C. Cir. 1994). However, in 1996 the Asset Conservation, Lender Liability and Deport Insurance Protection Act of 1996 ("1996 Act") was passed which greatly limits a secured creditor’s liability for clean up costs under CERCLA See generally 42 U.S.C. §960 (20)(E) and (20)(F), copies of which are attached as Exhibit B; See also
East Bay Municipal Utility District v. U.S. Dept. of Commerce, 142 F.3d 479 (D.C. Cir. 1998); U.S. v. Presses, 1998 W.L. 937235 (W.D. Pa. 1998). In addition to protecting lenders, fiduciaries which held contaminated property were also protected.

B. 11 U.S.C. §506(c)

Under 11 U.S.C. §506(c) a bankruptcy trustee or Chapter 11 debtor in possession may recover from the collateral securing a secured creditor’s claim “the reasonable and necessary costs and expenses of preserving or dispensing of such property to the extent of any benefit to the holder of such claim.” See generally In re Cuyahoga Equipt. Corp., 980 F.2d 110 (2nd Cir. 1992). Prior to 2000, most courts permitted parties other than the trustee to assert 506(c) claims against secured creditors. However, in the case of Hartford Underwriters Ins. v. Union Planters Bank NA, 530 U.S. 1 (2000), the Supreme Court limited the 506(c) surcharge powers to debtors in possession and trustees. This greatly reduces the number of 11 U.S.C. §506(c) motions against secured creditors, especially because many debtors waive their 506(c) rights as part of their post petition financing.

Section 506(c) prevents a secured creditor from obtaining a windfall. If remediation of a property or other reduction of liability or shifting of costs associated with the property results in an increased value, then it is not equitable for a secured creditor to reap the benefits of the increased value while another party bears the cost. As discussed below, courts have used § 506(c) and concerns for environmental harm to justify use of a secured creditor’s collateral to address environmental cleanup.

In In re Guterl Special Steel Corp., 198 B.R. 128 (Bankr. W.D. Pa. 1996), the court faced the difficult question of how to fund an environmental cleanup when the majority of the debtor's assets had already been distributed to a secured creditor. While recognizing that post-petition administrative expenses generally are chargeable only against unencumbered estate assets, the court recognized a common law exception codified at as § 506(c). Therefore, if EPA cleaned up the site, it would be entitled to an administrative claim for reasonable and necessary cleanup costs against the property remaining in the estate to the extent that the creditor having a security interest in the property had benefited. The secured creditors would benefit, the court found, by the increased value of the property if and when it became marketable as a result of remediation. The court did not have before it at that time any demand on funds in excess of the remaining estate funds. Despite this fact, however, the court stated:

[W]e would be inclined to look favorably upon a request by EPA (or the trustee, if he has to clean up the site) to grant it an administrative claim against estate funds previously distributed to [the secured creditor] and to any other creditor and to direct them to disgorge funds previously received to help pay remediation costs.

Id. at 137.

Other cases continue with this theme. In In re Envt’l Waste Control, Inc., 125 B.R. 546 (N.D. Ind. 1991), a secured creditor objected to use of the estate’s limited funds to environmental cleanup and monitoring. The court noted that the debtor “must proceed with environmental cleanup
and corrective action . . . notwithstanding the resulting financial burden,” 125 B.R. at 550, and stated that the secured creditor’s interest “must yield in light of the competing environmental harms.” 125 B.R. at 552. See also In re Paris Indus. Corp., 106 B.R. 339 (Bankr. D. Maine 1989) (secured lenders, debtor, and state regulators reached settlement agreement on sale of property and use of proceeds for clean up); In re Mowbray Eng’g Co., 67 B.R. 34, 35 (Bankr. M.D. Ala. 1986) (“EPA stands in the shoes of the trustee in preserving the estate and is entitled, as the trustee would be but for abandonment, to recover costs upon sale of the property prior to satisfying any secured claims against the property.”).

IV. Discharge of CERCLA and Other Environmental Claims in Bankruptcy.

Under bankruptcy law, one of the most important benefits a debtor can receive is a discharge of their pre-petition indebtedness. 11 U.S.C. §727 governs the discharge of indebtedness under Chapter 7 cases and 11 U.S.C. §1141 under Chapter 11 cases. 11 U.S.C. §523 governs the dischargeability of individual debts in both Chapter 7 and Chapter 11 cases.

Generally there are 5 issues which must be considered in determining whether a debt is dischargeable in bankruptcy proceedings.

A. Is the obligation a claim under the Bankruptcy Code?

See Section II(c)(1) of this outline.

B. Did the claim arise prior to the debtor’s bankruptcy filing?

See Section II(c)(2) of this outline.

C. Was the debt discharged under 11 U.S.C. §1141?

In Chapter 11 cases, a debtor will generally be granted a discharge of its pre-petition debts 11 U.S.C. §1141. However, if a plan provides for the liquidation of the debtor’s assets, the debtor does not engage in business after and would be denied a discharge under 11 U.S.C. §727(a). Therefore, if a non-individual debtor files a liquidating plan it will not receive a discharge unless it continues business operations. See also Articles attached hereto as Exhibit A and Exhibit B.

D. Was the debt discharged under 11 U.S.C. §727 and 523?

1. Initially it is important to note that corporations and other business entities do not receive discharges under 11 U.S.C. §727. See 11 U.S.C. §727(a)(1).

2. Further, certain environmental debts may not be dischargeable under 11 U.S.C. §523.

b. 11 U.S.C. §523(a)(7): No discharge for fines, restitution or other punitive monetary penalties assessed prior to bankruptcy.

3. Will the discharge matter if the debtors continue to own the contaminated property?

Compare In re Chateauguy, 944 F.2d 997 (2nd Cir. 1991) (continued ownership of contaminated property may subject reorganized debtor to liability under a post-confirmation injunction) with In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992) (post-confirmation liability for pre-petition contamination if imminent and substantial endangerment to public health, welfare or environment.)
EXHIBIT A

John W. Ames and C.R. Bowles, Jr.
The When and Where of Environmental Claims in Bankruptcy,
15 ABI Journal 8 (1996)
As all attorneys painfully remember, two of the first things taught in law school are when a party's claim against another party arises and where suit should be filed on that claim. While you may have received "As" in Torts and Civil Procedure, three recent cases show that in the area of bankruptcy law versus environmental claims, these fundamental legal issues are still hotly contested.

When Do Environmental Claims Arise?

As faithful readers of this column know, identifying creditors and when their claims arise are frequently-discussed issues. See "When is a Creditor a 'Known Creditor' for Notice Purposes," Vol. XV, No. 2 ABI Journal 8 (March, 1996). Recently, two cases have reviewed these issues in detail.

The first of these is In re Chicago, Milwaukee, St. Paul & Pacific R. Co. ("Chicago III"), 78 F.3d 285 (7th Cir. 1996). As noted by the court, this 1977 railroad reorganization, like the famous Energizer bunny, "keeps going and going and going." 78 F.3d at 286. In the present chapter of this environmental nightmare, the 7th Circuit had to consider whether the Union Pacific Railroad's ("UP") claims against the debtor railroad's successor in interest, CMC Heartland Partners ("CMC") arising under the 1989 Model Toxics Control Act of the State of Washington ("Model Act"), were barred by the bankruptcy discharge.

The dispute between UP and CMC grew out of UP's purchase of the Tacoma Washington Railyard from the debtor railroad's bankruptcy estate in 1980. After the purchase, UP learned of numerous environmental problems at the Tacoma railyard. At a time when UP knew of the environmental claims, a claims bar date of September 10, 1985, was established in the debtor railroad's bankruptcy. UP did not file a claim in the debtor's bankruptcy proceeding for any contingent environmental liability under either state or federal law.

In 1989, the Environmental Protection Agency (EPA) notified UP that it was a potentially responsible party under CERCLA and could be liable for the clean-up of the Tacoma railyard. In October 1990, approximately one year after the passage of the Model Act, the State of Washington notified UP that it was potentially liable for clean-up costs under the Model Act. UP did not file a claim in the debtor's bankruptcy proceeding for any contingent environmental liability under either state or federal law.

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In 1993, the 7th Circuit, in Matter of Chicago, Milwaukee, St. Paul & Pacific R. ("Chicago II"), 3 F.3d 200 (7th Cir. 1993) ruled that because UP had at least constructive knowledge of possible CERCLA claims against the debtor railroad prior to the 1985 bar date, its claims against CMC were barred due to its failure to file a proof of claim in the debtor's bankruptcy proceeding. [FN1] However, it remanded the case back to district court for further findings on whether UP's claims under the Model Act were also barred. The 7th Circuit noted that while the Model Act was not passed until four years after the bar date, there remained an unresolved question of whether UP had the same environmental liability under Washington statutes, which were in effect prior to the bar date.

In Chicago III, the 7th Circuit reviewed its Chicago I and Chicago II decisions and discussed them and the
relevant environmental statutes in some detail. The court affirmed the district court's decision not to bar UP's claims under the Model Act, holding that claims based on statutes, passed after the bankruptcy claims bar date, would not be barred due to the creditor's failure to file a timely proof of claim. The 7th Circuit also held that the Washington Environmental Statutes, which had existed prior to the bar date, did not impose liability on UP sufficient to require it to file a contingent environmental claim in the debtor railroad's bankruptcy.

The primary importance of Chicago III is its excellent review of earlier case law and underlying environmental law in the context of determining when a creditor would have knowledge sufficient to be required to file a claim in a bankruptcy proceeding. Further, its adoption of In re Penn Central Transport Co., 944 F.2d 164 (3rd Cir. 1991), holding that claims arising from statutes enacted after the final bankruptcy bar date are not barred, establishes a fairly strong line of authority that bankruptcy discharges do not bar environmental claims arising from environmental legislation passed after the debtor received a discharge.

In The Ninth Avenue Remedial Group v. Allis-Chalmers Corporation, 1996 WL 204241 (N.D. Ind. 1996), the U.S. District Court for the Northern District of Indiana was confronted with the question of when a claim arises, in the context of determining whether a purchaser of assets under an 11 U.S.C. §363 sale would be held liable for CERCLA claims related to the debtor's operations prior to the sale. The facts of this case are fairly straightforward.

In the 1970s the Ninth Avenue Dump ("Dump") in Gary, Ind., operated as a chemical and industrial waste disposal facility and was heavily contaminated. In 1981, Apex Oil Company ("Apex") purchased the owner of Ninth Avenue, Clark Oil & Refining Corp. ("Old Clark"). In 1987, Apex and Old Clark filed chapter 11 cases in the Eastern District of Missouri. In November 1987, Clark Refining & Marketing Inc. ("New Clark") purchased most of Old Clark's assets [FN2] through a sale under §363. Both the motion to approve the sale of assets and the order approving the sale contained clear and unambiguous language that the assets were being sold free and clear of any environmental claims against Old Clark.

In 1994, a voluntary association of corporations ("Association") that had been *40 ordered by the EPA to clean up the Dump sued New Clark and other entities under CERCLA for contribution to the Dump's $20 million clean-up costs. New Clark was sued as a "successor-in-interest" to Old Clark, which had once operated the Dump. New Clark moved for dismissal of the complaint and/or summary judgment on two grounds. First, New Clark argued that it had no successor liability for Old Clark's environmental problems under CERCLA. Second, it contended that the §363 sale precluded any claims by the Association for CERCLA liability arising from Old Clark's activities.

The district court denied New Clark's motion. Addressing first the CERCLA successor argument, the court held that the standard that should be applied for determining successor liability under CERCLA was the "substantial continuity of business test" set forth in Truck Drivers Union v. Tasemkin Inc., 59 F.3d 48 (7th Cir. 1995) (a non-CERCLA case). [FN3] The court held that under Tasemkin:

A successor will be liable for CERCLA claims...if the successor knew or had notice of the potential CERCLA liability and there was substantial continuity in the operation of the business before and after the sale. In addition, the court can find a successor liable...if plaintiffs show that there is identity of stocks, stockholders, and directors between the asset seller and purchaser.

However, from a bankruptcy practitioner's point of view, the most important part of the Ninth Avenue decision is its discussion of §363 and whether it can be applied to sell assets of a debtor "free and clear" of CERCLA successor liability claims.
Initially, the court noted that it could find no bankruptcy decision that discussed successor liability under CERCLA in the context of a §363 sale. The court reviewed the extensive case law concerning successor liability in the area of product liability based on assets purchased under an 11 U.S.C. §363 sale, and found that these decisions should be applicable to CERCLA successor liability cases. Id. at *13-14. After reviewing the case law and noting the two conflicting lines of authority [See, generally, In re White Motor Credit Corp., 75 B.R. 944 (Bankr. S.D. Ohio 1987) (no successor liability after a §363 sale); In re Fairchild Aircraft Corp., 184 B.R. 910, 917 (Bankr. W.D. Texas 1995) (successor liability claims allowed after a §363 sale in certain circumstances)], the court held that the issue of whether a §363 sale barred a successor liability claim depended upon whether the creditor asserting the claim could have filed that claim against the debtor that sold the property in its bankruptcy case. If such a claim could be filed, then the §363 sale would bar the claim. However, if the claim arose after "the bankruptcy proceeding concluded" then the §363 sale would not bar successor liability claims. The court went on to find that genuine issues of material fact concerning the Association's ability to file a claim in the bankruptcy proceedings remained and summary judgment was not appropriate.

The holding of this decision is important because it sets forth clear guidelines on how §363 sales should work in cases involving potential successor liability under CERCLA. [FN4] Moreover, the court apparently rejected the position, taken by some environmental creditors, that §363 sales cannot strip away environmental liability.

Where to Hear CERCLA Claims

In re Chateaugay Corp., 193 B.R. 669 (S.D. N.Y. 1996) serves as an excellent example of the vast amount of litigation that can arise in CERCLA litigation. The brief procedural facts of the case are as follows.

In July 1986, LTV and its subsidiaries, including Chateaugay, filed for reorganization under chapter 11. The bar date for the filing of claims in the LTV bankruptcy cases was November 30, 1987. None of the parties to the present action filed timely claims against LTV.

In June 1990, the EPA brought suit against 24 named defendants for clean-up costs related to the Metcoa toxic waste site. After various attempts at settlement and significant discovery, the defendants in 1995 filed a third complaint against 228 additional parties, including LTV, for CERCLA clean-up costs. The defendants later amended their claim to seek a declaratory judgment that LTV's bankruptcy did not bar the CERCLA claims. LTV did not answer the CERCLA suit but returned to the New York bankruptcy court, seeking a declaratory judgment that the claims had been discharged in the LTV bankruptcy and for a permanent injunction against the parties proceeding against LTV in the CERCLA suit in New York. The defendants then moved under 28 U.S.C. § 157(d) [FN5] for withdrawal of the reference from the bankruptcy court to the U.S. District Court for the Southern District of New York.

Initially, the district court noted that mandatory withdrawal of the reference under 28 U.S.C. §157(d) was not required because the question of whether the parties' CERCLA claims had been discharged in LTV's bankruptcy did not require the interpretation of the substantive provisions of CERCLA, but only of the Bankruptcy Code. See In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991); In re Revere Copper & Brass Inc., 172 B.R. 192 (S.D.N.Y. 1994).

The district court further held that discretionary withdrawal was not appropriate because the consideration of the CERCLA claims was a "core" matter under 28 U.S.C. §157(d) and all other factors weighed in favor of denying the motion to withdraw. The court noted, with some humor, that both sides had engaged in forum shopping by their respective filings, but held that in the interests of justice the issue of whether the CERCLA claims were barred should be decided by LTV's bankruptcy court. The district court did not state that in the event that LTV lost its declaratory judgment motion, LTV had agreed to have its liability under CERCLA decided in the original CERCLA action.

This most recent Chateaugay opinion is a complete and easily readable review of the question of withdrawal of the references and the problems that will likely be encountered in this murky procedural backwater of bankruptcy law. This case clearly stands for the proposition that the bankruptcy court is the preferred forum for

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determining whether and when an environmental claim arose, and what impact the bankruptcy proceedings had on those claims.

Conclusion

The three cases discussed above illustrate the continued importance of environmental issues in chapter 11 cases. While some commentators have noted that the underlying policies of the Bankruptcy Code have recently been "losing" to the environmental ideas of CERCLA and similar legislation, these cases, along with other recent decisions [FN6] show that the Bankruptcy Code has not been rendered totally subservient to CERCLA as of the time of this writing. This column will keep you advised on the progress of this struggle.

[FN1]. The 7th Circuit based its decision on its holding in yet another decision in this case, Matter of Chicago, Milwaukee, St. Paul & Pacific R. ("Chicago I"), 974 F.2d 775 (7th Cir. 1992), where it held that a claim arose for purposes of bankruptcy. "[W]hen a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA [claims], and when this potential claimant has, in fact conducted tests with regard to the contamination problem..." Id at 202. See also In re Jensen, 995 F.2d 925 (9th Cir. 1993).

[FN2]. Although not stated, apparently New Clark did not purchase the Dump with the other "Old Clark" assets.

[FN3]. The court noted, however, that there was a serious split of authority on the question of successor liability. See, e.g., Anspec Co. Inc. v. Johnson Controls, 922 F.2d 1240 (6th Cir. 1991) (state law determines successor liability); U.S. v. Mexico Feed & Seed Co., 980 F. 2d 478 ·(8th Cir. 1992) (CERCLA mandates successor liability); Kleen Laundry & Dry Cleaning Services v. Total Waste Management Corp., 817 F.Supp. 225 (N.D.N.H. 1993) (successor liability without knowledge of environmental violations).

[FN4]. It is important to note that this case did not directly address the issue of whether 11 U.S.C. §363 could permit a sale of contaminated real estate, free and clear of claims for CERCLA liability based on the purchaser's ownership of the contaminated property.

[FN5]. The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. 28 U.S.C. §157(d).


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EXHIBIT B

C.R. Bowles, Jr.
18 Norpak v. Eagle-Picher Industries: Rewriting or Summarizing Hemingway Transport,
17 ABI Journal 18 (1998)
The "interface" between the Bankruptcy Code and various state and federal environmental laws can best be analogized to the Titanic's now infamous meeting with an iceberg several decades ago. The problem facing bankruptcy attorneys in this area has been determining which set of laws represents the Titanic and which set represents the iceberg. Recently, the Sixth Circuit had occasion to address this issue in the case of Norpak v. Eagle-Picher Industries Inc. (In re Eagle-Picher), 131 F.3d 1185 (6th Cir. 1997), in the context of determining Eagle-Picher's objection to the claim of Norpak Corp. under the provisions of 11 U.S.C. §502(e)(1)(B).

Section 502(e)(1)(B) provides, in pertinent part:

[T]he court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that--...

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution...


In numerous cases, both chapter 11 debtors-in-possession (DIP) and chapter 7 trustees have used this provision to defeat claims of parties who are seeking contribution or indemnification from the debtor for future environmental liabilities. See, generally, In re New York Trap Rock Corp., 153 B.R. 648 (Bankr. S.D.N.Y. 1993). See, also, In re Charter Company, 862 F. 2d 1500 (11th Cir. 1989). This use of §502(e)(1)(B) has generated a great deal of case law and scholarly commentary [FN1] concerning how this section should be applied.

Courts generally have held that in order for a claim to be disallowed under §502(e)(1)(B), the debtor must be able to establish the following three elements: (1) the claim is for reimbursement or contribution; (2) the claim is asserted by an entity co-liable with the debtor on a primary creditor's claim; and (3) the claim is contingent as of the time of disallowance. [FN2] In re Dant & Russell Inc., 951 F.2d 246 (9th Cir. 1991). However, courts often have refused to apply the literal language of this section, holding that this provision is not intended to "immunize debtors from contingent liability, but instead protects debtors from multiple liability on contingent debts."

The onerous CERCLA remediation process may take years to complete, leaving PRPs [potentially responsible parties] holding the bag; that is, holding unallowable contingent claims for contribution or reimbursement against the chapter 7 estate, claims typically totaling millions of dollars. In such circumstances, §502(e)(1)(B) may operate to preclude innocent PRPs from recovering CERCLA response costs from a chapter 7 estate even though the estate clearly is responsible for all or part of the environmental contamination. If the EPA opts to refrain from participating in any distribution from the chapter 7 estate, as it may do simply by not filing a proof of claim... Thus, sometimes the fundamental policy embodied in Bankruptcy Code §502(e)(1)(B) may promote an expeditious administration of the chapter 7 estate, see In re American Continental Corp., 119 B.R. 216, 217 (Bankr. D.Ariz.1990), at the expense of a fundamental CERCLA policy: the equitable allocation of environmental clean-up costs among all responsible parties. [FN3]
The Norpak Analysis

The facts underlying Norpak's claim were typical of many environmental cases. In 1956, Vincent Corica purchased property from the debtor that it had used as a plant for the production of pulverized lead used in the production of lead-based paint ("Property"). Norpak is a company owned by Corica, and Norpak and another Corica entity currently own the Property. Not surprisingly, the debtor has been identified as a PRP that may be liable for environmental clean-up costs under both state and federal environmental laws. In order to protect any claims that it may have against the debtor, Norpak timely filed a proof of claim, for reimbursement of future environmental costs that Norpak may incur during the debtor's chapter 11 proceeding. No other environmental proofs of claim involving the Property, including claims of the Environmental Protection Agency (EPA) and state environmental officials, were filed against the debtor before the expiration of the bar date for the filing of claims. The debtor objected to the allowance of Norpak’s claim under §502(e)(1)(B).

In a brief opinion for In re Eagle-Picher Industries Inc., 177 B.R. 869 (Bankr. S.D. Ohio 1995), the bankruptcy court sustained the debtor’s objection to Norpak’s claim based in large part on an earlier decision, In re Eagle-Picher Industries Inc., 144 B.R. 765 (Bankr. S.D. Ohio 1992), which disallowed environmental claims for future clean-up costs under §502(e)(1)(B). The earlier Eagle-Picher decision relied upon the district court's analysis from In re Hemingway Transport Inc., 126 B.R. 656 (D. Mass. 1991), concerning the allowability of future environmental claims under §502(1)(e)(B). The district court in Hemingway was, however, ultimately reversed on this issue by the First Circuit. Apparently none of the parties in the Norpak litigation discussed the First Circuit’s Hemingway decision, as it is neither addressed by the bankruptcy court in its decision nor by the Sixth Circuit in its opinion. The district court affirmed the bankruptcy court's decision without a separate, published opinion.

In its appeal, Norpak challenged the bankruptcy court's decision on two grounds: (1) that the debtor is not "colliable" with Norpak for the clean-up costs associated with the Property; and (2) that Norpak's claim is not for "reimbursement or contribution" for purposes of §502(1)(e)(B).

Unlike the First Circuit in Hemingway, [FN4] the Sixth Circuit took a fairly simple approach to the question of whether the debtor was "co-liable" with Norpak for the future environmental clean-up expenses. The Sixth Circuit held that the issue of "co-liability" turned upon whether the governmental agencies, which could press environmental claims against Norpak and the debtor, still had claims against the debtor. After noting that neither the EPA nor state authorities had filed timely proofs of claim in this case, the Sixth Circuit remanded the case to the bankruptcy court to determine whether these creditors could still file "late" claims in the debtor's bankruptcy proceeding under the "excusable neglect" doctrine of Pioneer Investment Services v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993), or otherwise assert a claim against the debtor. [FN5] The court held that if neither the EPA nor the state still had viable claims against the debtor, then Norpak's claim should not be disallowed under §502(e)(1)(B), as the debtor and Norpak would not be co-liable on these claims.

The Sixth Circuit rejected Norpak's argument that its claim against the debtor was not for reimbursement or contribution. The court held that the technical label, which could be applied to Norpak's claim, would not determine the applicability of §502(e)(1)(B). [FN6]

While the majority opinion in Norpak is an important clarification of the application of §502(1)(e)(B) to future environmental claims, it is the concurrence by Chief Judge Boyce Martin that makes this opinion valuable. Writing separately to emphasize the underlying holding of Norpak, Judge Martin stated:

The majority opinion requires the disallowance of contingent claims against debtors when the debtor and claimant are potentially co-liable to a third party. Debtors could, however, argue that if that third party does actually bring a claim against the debtor, the majority opinion still allows the debtor to raise its bankruptcy as a defense. This is, in fact, what Eagle-Picher concedes it plans to do if the EPA or the New Jersey Department of Environmental Protection and Energy bring a claim against it. In doing so, Eagle-Picher is clearly relying on the hope that Norpak's claims will be disallowed, its bankruptcy defense will be accepted, and it will be able to walk away from the mess it made without bearing any responsibility for it. This cannot be allowed. To read this case as allowing such a scenario contraves Congress's clear intention in passing CERCLA. By passing CERCLA,
Congress intended to respond efficiently and expeditiously to toxic spills, and to hold those parties responsible for the release of environmental toxins liable for the costs of the clean-up. See, e.g., B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2nd Cir. 1992). Interpreting Pioneer Investment Services or the majority's opinion as allowing polluters to circumvent CERCLA's goals would be tantamount to turning a blind eye to clear Congressional mandate. Such flagrant disregard for legislative intent should not be tolerated.

131 F. 3d 1191 [emphasis in original text].

In conclusion, Norpak represents an important decision in the area of environmental/bankruptcy law. The Sixth Circuit's emphatic rejection of the possibility that debtors can escape environmental liability through a combination of governmental inaction and §502(1)(e)(B) is a clear indication that the goals of environmental clean-up laws are being given higher deference than the goals of the Bankruptcy Code. While DIPs and trustees may be able to find some solace in the fact that agreements with environmental agencies as to liability may allow the use of §502(1)(e)(B) to disallow PRP claims, it is only a small lifeboat for the passengers on the good ship Bankruptcy (a/k/a Titantic).


[FN2]. Although it has apparently never been addressed, it would appear that in cases involving highly contaminated property, such as a former lead processing plant, a PRP could argue that the claim was merely unliquidated as to its amount and not contingent as to liability, where the debtor and not the PRP, either generated or improperly disposed of the toxic waste.

[FN3]. For a detailed discussion of the Hemingway decision, see the article cited in footnote 1.

[FN4]. See 993 F. 2d at 925-934, where the First Circuit performs an intricate analysis of §502(1)(e)(B), holding that claims for future clean-up costs could not be disallowed unless either the governmental agencies responsible for the enforcement of environmental law had properly filed their own claims or a "surrogate claim" had been filed under §501(b) of the Code.

[FN5]. During the appeal of this case, the debtor and the EPA entered into a consent agreement that may have given the EPA a claim against the debtor concerning this property.

[FN6]. 131 F.3d at 1190-1191 ("If Norpak and Eagle-Picher are co-liable, then it is irrelevant that Norpak can also concoct an alternative theory on which to premise its claim against Eagle-Picher such as diminution of value of the property due to Eagle-Picher's contamination of that property.")

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Faithful readers of this column are well aware that the conflict between the "fresh start" policies of the Bankruptcy Code and the comprehensive liability policies of state and federal environmental laws has been raging for a long period of time. While this war has not lasted as long as the "Hundred Years War," it has gone on long enough for more than one battle to be fought over the same ground.


Back to the Future (Chapters X and 11)

The question of when an environmental claim arises for purposes of bankruptcy law has bedeviled federal courts for a number of years, given the difficult nature of detecting environmental contamination, and the fact that a significant number of potentially responsible parties (PRPs), which otherwise might be held liable for clean-up costs, filed bankruptcy before either a particular toxic waste site was uncovered or the clean-up laws were enacted. See, generally, In re Jensen, 995 F. 2d 925 (9th Cir. 1993). One of the most unusual issues is whether the "final decrees" entered in Bankruptcy Act reorganizations or the orders of confirmation entered in Bankruptcy Code cases discharge environmental claims that arise under laws enacted after the bankruptcy cases themselves were filed. See In re Chicago, Milwaukee, St. Paul & Pacific R. Co., 78 F.3d 385 (7th Cir. 1996); Matter of Penn Central Transport Co., 944 F.3d 164 (3rd Cir. 1996).

Recently, two decisions from federal courts in New York, In re The Duplan Corp., 229 B.R. 609 (S.D.N.Y. 1999), aff'g, 209 B.R. 324 (Bankr. S.D.N.Y. 1997) and In re Manville Forest Products Corp., 225 B.R. 862 (Bankr. S.D.N.Y. 1998), addressed this issue. In Duplan, the issue was whether a final decree in a chapter X Bankruptcy Act case discharged claims brought by PRPs under CERCLA. On August 31, 1976, Duplan filed in the Southern District of New York a proceeding under the Bankruptcy Act that was ultimately converted to a chapter X case. In June 1981, the debtor's chapter X plan was confirmed, approximately one year after CERCLA was enacted. In 1983 a final decree, closing the bankruptcy case and discharging the debtor from its prepetition liabilities was entered. The final decree also enjoined all parties from attempting to collect their prepetition obligations from the reorganized debtor.

As in all environmental/bankruptcy cases, the story does not end there. In 1989, various property owners in the Virgin Islands commenced a lawsuit for the cleanup of a contaminated aquifer. Chemicals from one of the debtor's Virgin Island plants caused part of the contamination of the aquifer. Ultimately, [FN1] some of the defendants (the primary distributees of the reorganized debtor's assets, hereinafter "defendants") in this lawsuit filed an action in the U.S. Bankruptcy Court for the Southern District of New York to enjoin parties asserting statutory CERCLA claims ("CERCLA creditors"), from proceeding, as those claims had been discharged by the final decree issued in the debtor's chapter X bankruptcy. The sole bankruptcy issue before the court was whether...
these CERCLA claims arose before the filing of the debtor's chapter X petition.

The defendants argued that under United States v. LTV Corp., 994 F.2d 997 (2d Cir. 1991) the claims arose at the time the contaminants were released as part of the operation of the debtor's plant, and that therefore the CERCLA creditors' claims arose pre-petition and were discharged by the final decree. The CERCLA creditors argued that their claims did not arise until CERCLA was enacted, several years after the debtor's bankruptcy filing, and were not covered by the chapter X discharge under the holdings of LTV Steel Co. Inc. v. Shalala, 53 F.3d 478 (2d Cir. 1995) (involving claims under the Coal Act of 1993) and Matter of Penn Central Transp. Co., 944 F. 2d 164 (3d Cir. 1991) (involving CERCLA claims). After wading through these arguments, the bankruptcy court agreed with the position of the CERCLA creditors and held that under Penn Central and Shalala, "the claims at issue here did not come into existence until CERCLA's enactment in 1980, after the filing of Duplan's petition and after the last day to file claims against the estate." In re Duplan Corp., 209 B.R. at 332-333.

On appeal, the district court affirmed the bankruptcy court, holding:

'[W]here there is no legal relationship defined at the time of petition,' that is, where the statute imposing the liability has not been enacted, 'it would be impossible to find even the remotest right to payment.' Id. at 497 (quoting [In re Chateaugay Corp.,] 154 B.R. at 419). Yet a "right to payment," as the court pointed out, is necessary to a bankruptcy claim. There is nothing in [Shalala] that indicates that its principle should not be applied in the environmental context. In its opinion, the [Shalala] court was plainly aware of [LTV Corp.] since it cited that case...And the [Shalala] court relied, in part, on Matter of Penn Central Transp. Co., 944 F.2d 164 (3d Cir. 1991), cert. denied, 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), itself a case involving CERCLA.

The importance of Duplan is that it establishes that the Penn Central line of authority, which holds that pre-CERCLA bankruptcy cases do not discharge claims for statutory contribution under CERCLA even if the pollution that gave rise to the CERCLA claims occurred prior to the filing of the debtor's petition, applies in the Second Circuit. Given that many, if not a majority, of the large pre-Code reorganizations were filed in the Second Circuit, and that old hazardous waste is still being discovered, this otherwise "quaint" Bankruptcy Act decision should have an important impact in the environmental-bankruptcy area.

*42 The second New York case, In re Manville Forest Products Corp. (MFPC), sets forth an unusual but important limitation on the Penn Central-Duplan line of authority. In MFPC, the reorganized debtor filed an adversary proceeding against the Olin Corp. to prevent Olin from pursuing certain environmental claims against the reorganized debtor. The basic facts surrounding this case are as follows. In 1966, Olin incorporated a wholly owned subsidiary ("Sub"), by transferring its forest product assets to it and receiving in return, among other considerations, a broadly worded indemnification agreement concerning liability related to any assets that Olin transferred to the Sub. This indemnification agreement was a good idea, as one of the assets transferred was a piece of contaminated real property (Plant 94). Olin obtained a similar indemnity agreement when it "spun-off" the Sub into a publicly owned company in 1974. Five years later, the Sub merged with JM Capital to become Manville Forest Products Corp.

In 1982, Manville filed its now-famous chapter 11 bankruptcy petition, and ultimately obtained confirmation of its plan of reorganization in 1984. Olin was an active participant in Manville's bankruptcy, as it filed a $7.5 million proof of claim based upon its claim for a pro rata share of tax liability related the Sub's spin-off. Olin never filed a claim related to the indemnity agreements. In 1996, the state of Louisiana made demands on both the reorganized debtor and Olin for remediation on the Plant 94 site. Olin sought indemnification under indemnity agreements it had with Manville, which triggered the bankruptcy court litigation.

In MFPC, Olin argued that since the Louisiana environmental protection statutes, which gave rise to its indemnity claims, were not enacted until after Manville filed its bankruptcy petition, Olin's contractual indemnity claims survived Manville's bankruptcy discharge, citing Shalala, Penn Central and Duplan. However, the MFPC court rejected this position based upon the nature of Olin's claim. Unlike the creditors in Shalala, Penn Central and Duplan, whose claims were posted upon a set of laws enacted post-petition, Olin's contractual indemnity
claim is based upon a pre-petition legal relationship between the debtor and Olin, the indemnity agreements. Further, Olin was an active participant in the Manville bankruptcy, and at least had the chance [FN2] "to file a proof of claim and estimate its indemnity claim under § 502(c) of the Code." 225 B.R. at 868. Based upon the pre-petition contractual relationship between the parties, the MFPC court held that Olin’s contractual indemnity claim was discharged by confirmation of the debtor’s plan.

The MFPC decision represents the most detailed analysis of when (and how) a claim arises for purposes of the Bankruptcy Code in environmental liability cases. While this case seems, on the surface, to be at odds with Duplan, upon further examination, it is a logical extension of the pre- petition/post-petition theory behind the Duplan-Penn Central line of case. The one great unanswered question of MFPC is what effect the discharge of Olin’s contract may have on any statutory contribution/indemnification claim Olin might have against the reorganized debtor under Louisiana law. If such rights exist under Louisiana law, the MFPC court must decide between two odd situations; it must either 1) determine that Olin has a post-petition claim against the reorganized debtor based upon the Duplan-Penn Central line of cases, when it has found a nearly identical contractual claim to be discharged by the confirmation of the Manville chapter 11 plan; or 2) rule that, because of the pre-petition relationship between Olin and Manville, any indemnity claim that Olin may have otherwise had against the reorganized debtor was discharged by the confirmation of Manville’s chapter 11 plan, even though in absence of Olin’s careful drafting of the indemnity agreements, Olin’s statutory indemnity claim would not have been discharged under the Duplan-Penn Central line of authority. I leave this conundrum and the city of New York to this column’s faithful readers, and travel to Cincinnati to update the proceedings in the continuing dispute between Norpak Corp. and Eagle-Picher Industries Inc. (EPI).

The Eagle Has Landed (and Taken Off Again)

When last we left the Norpak dispute, the Sixth Circuit had reversed the U.S. District Court’s decision affirming the bankruptcy court’s disallowance of Norpak’s environmental contribution claims, [FN3] and had remanded the case back to the bankruptcy court on the issue of whether EPI was co-liable with Norpak on the environmental claims of the New Jersey Department of Environmental Protection and Energy (NJDEPE) and the EPA. Norpak v. Eagle- Picher Industries Inc., 131 F.3d 1185, 1191 (6th Cir. 1997). Based on the language of this opinion, especially the concurring opinion of Chief Judge Boyce F. Martin, this author stated:

In conclusion, Norpak represents an important decision in the area of environmental/bankruptcy law. The Sixth Circuit’s emphatic rejection of the possibility that debtors can escape environmental liability through a combination of governmental inaction and §502(e)(1)(B) is a clear indication that the goals of environmental clean-up laws are being given higher deference than the goals of the Bankruptcy Code. While DIPs and trustees may be able to find some solace in the fact that agreements with environmental agencies as to liability may allow the use of §502(e)(1)(B) to disallow PRP claims, it is only a small lifeboat for the passengers on the good ship Bankruptcy (a/k/a Titanic). [FN4]

In light of the bankruptcy court’s decision on remand, §502(1)(e)(B) may be a much larger lifeboat for debtors than I originally predicted. [FN5]

On remand, the bankruptcy court, in an unpublished decision, In re Eagle- Picher Industries Inc., Case No. 1-91-00100 (Slip Op. Oct. 14, 1998) ("Eagle-Picher"), again disallowed Norpak’s claim. Addressing the issue remanded to it by the Sixth Circuit, Eagle-Picher confronted the issue of whether EPI was co-liable with Norpak as to the EPA and NJDEPE claims. Norpak argued that it was the only party liable to both the EPA and the NJDEPE because neither creditor had filed a claim in the EPI bankruptcy proceedings. Based upon this sole liability, Norpak concluded that its environmental reimbursement/contribution claims could not be disallowed under *43 § 502(e)(1)(B). [FN6] EPI argued that it had entered into a settlement agreement with the EPA in 1996, which permitted the EPA to pursue its environmental claims arising from the Norpak/EPI contaminated property, even though it had not filed a proof of claim in EPI’s chapter 11 case. Based on this agreement, the bankruptcy court found EPI had joint liability with Norpak, and that therefore Norpak’s claim should be disallowed under §502(e)(1)(B).

Norpak had followed a different path in resolving its environmental problems in 1994 when it entered into an
agreement with the NJDEPE to remediate the site at issue. The bankruptcy court’s opinion does not address the issue of whether EPI has any liability to NJDEPE. The bankruptcy court does, however, consider Norpak’s argument concerning its NJDEPE liability, but rejects its contention that it impacts the issue of EPI’s joint liability on these environmental claims. This case has been appealed to the Bankruptcy Appellate Panel for the Sixth Circuit.

The significance of the Eagle-Picher decision is that it allows debtors facing environmental liabilities additional leeway in addressing those particularly trouble-some claims. While it is no longer possible under Norpak v. Eagle-Picher Industries Inc., 131 F.3d 1185, 1191 (6th Cir. 1997) and In re Hemingway Transport Inc., 993 F.2d 915 (1st Cir. 1993), for debtors to raise a bankruptcy defense of discharge against governmental entities holding environmental claims, while at the same time disallowing claims for contribution by other PRPs arising from the same set of facts, it may be possible for a debtor to make a deal with the governmental entities (thereby creating joint liability) and to disallow the PRPs contribution claims under §502(e)(1)(B). After all, who are environmental officials more likely to pursue: a financially troubled debtor in bankruptcy, or a solvent entity sitting in the unprotected world of normal commerce? Only time will tell if this could be a viable strategy. Stay tuned to this column for further developments on this case.

[FN1]. This article omits any discussion of the twisted path this litigation took through the Virgin Island Federal District and Third Circuit Courts of Appeal to ultimately reach the Bankruptcy Court for the Southern District of New York, as such procedural riddles are beyond the scope of this piece.

[FN2]. One might ask whether this is a distinction without a difference, i.e., how could you estimate a claim under an indemnity agreement for damages arising from the possible passage of future laws?


[FN4]. Id.

[FN5]. As this case is on appeal to the Bankruptcy Appellate Panel of the Sixth Circuit, I am constrained, as an employee of the U.S. Bankruptcy Court for the Western District of Kentucky, from making any comment about the current status of this matter, and shall limit my comments to an overview of the bankruptcy court’s decision on remand. I have further chosen not to review any pleadings filed by either Norpak or EPI in this appeal.

[FN6]. See In re Dant & Russell Inc., 951 F.2d 246 (9th Cir. 1991), where the court stated:

Section 502(e)(1)(B) provides that "the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on...the claim of a creditor, to the extent that...such claim...is contingent as of the time of allowance or disallowance of such claim." 11 U.S.C. § 502(e)(1)(B). The section is not intended to "immunize debtors from contingent liability, but instead protects debtors from multiple liability on contingent debts." In re Allegheny Int'l Inc., 126 B.R. 919, 923 (W.D. Pa. 1991). In order for a claim to be disallowed under §502(e)(1)(B), therefore, the debtor must be able to show the following three elements: (1) the claim is for reimbursement or contribution; (2) the claim is asserted by an entity co-liable with the debtor on a primary creditor’s claim; and (3) the claim is contingent as of the time of disallowance.

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Old Bankruptcy Cases Never Die, They Merely Move on to Higher Courts

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D
o not throw away your old law journal articles and treatises concerning the Bankruptcy Act and early Bankruptcy Code just yet, loyal readers, as this month's Toxins-Are-Us column will address issues relating to the discharge of environmental claims in two Bankruptcy Act cases, as well as the early Code case of In re Manville Forest Products Corp. This column will also provide you with an update of an earlier Toxins-Are-Us column "A Tale of Two Cities: Recent Decisions as to When a CERCLA Claim Arises and How an Environmental Claim May be Disallowed Under §502(e)(1)(B)," published in the May 1999 issue of the ABI Journal.

Back to the Future Part II—Duplan and Manville Forest Products

On May 15, 2000, the Second Circuit Court of Appeals entered its decision in the case of In re Duplan Corp., 212 F.3d 144 (2d Cir. 2000). Although the procedural history of the environmental litigation at issue in this case is torturous and complex, the underlying substantive facts are fairly straightforward. On Aug. 31, 1976, Duplan filed a proceeding under the Bankruptcy Act that was ultimately converted to a chapter X case. A bar date for the filing of claims was established as July 10, 1979. On Dec. 11, 1980, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) became effective. In June 1981, the debtor's chapter X plan was confirmed. In 1983, a final decree closing the bankruptcy case and providing for a general discharge of Duplan's liabilities was entered. However, Duplan remained liable for administrative expenses that arose during its chapter X proceedings. The final decree also enjoined all parties from attempting to collect "claims" they had against the pre-petition debtor and the reorganized debtor.

In 1989, various property owners in the Virgin Islands commenced a lawsuit for the cleanup of a contaminated aquifer. Chemicals from one of the debtor's Virgin Island plants caused part of the contamination of the aquifer. Ultimately, some of the defendants (the primary distributers of the reorganized debtor's assets, hereinafter "defendants") in this lawsuit filed an action in the U.S. District Court for the Southern District of New York to enjoin the parties (CERCLA creditors) asserting common law and statutory CERCLA and RCRA claims (collectively, "environmental claims") from proceeding against the defendants because the environmental claims had been discharged by the final decree issued in Duplan's chapter X bankruptcy. This matter was referred to the bankruptcy court.

The bankruptcy court found that the final decree entered in the Duplan chapter X case discharged only claims that arose prior to the filing of the petition, and that the environmental claims asserted against the defendants arose at the earliest on Dec. 11, 1980, some four years after Duplan initially filed its bankruptcy. Therefore, the environmental claims did not constitute a pre-petition claim and were not discharged by the final decree. The bankruptcy court also held that the CERCLA creditor's common-law and RCRA claims were not discharged by the final decree or its accompanying permanent injunction. See In re Duplan Corp., 209 B.R. 324 (Bankr. S.D.N.Y. 1997). The defendants appealed and the bankruptcy court's order was affirmed by the district court. In re Duplan Corp., 229 B.R. 609, 611 (S.D.N.Y. 1999).
In its decision, the Second Circuit agreed with the bankruptcy court's conclusion that the earliest date the CERCLA claims arose for bankruptcy purposes was Dec. 11, 1980, the date when CERCLA became effective. The Second Circuit reaffirmed its decision of *LTV Steel Co. v. Shalala*, 53 F.3d 478 (2d Cir. 1995) (Chateaugay II), and held that claims arising out of statutes that create a "new and unique obligation arising out of previous conduct" arise, for purposes of bankruptcy law, at the earliest on their effective date and not when the actual conduct, which may provide the basis of claim, originally occurred. See 212 F.3d at 152.

However, the Second Circuit rejected both the bankruptcy and district courts' interpretation of the extent of discharge provided by the *Duplan* final decree. Unlike the lower courts, the Second Circuit found that this discharge of indebtedness set forth in the final decree entered in the *Duplan* case "terminated all of the debtor's debts and liabilities except as provided for in the final decree or in the plan." Id. at 153. The Second Circuit held that the *Duplan* chapter X plan's limitation of claims to obligations arising pre-petition did not limit the scope of the *Duplan* chapter X final decree and discharge. In making this decision, the Second Circuit reaffirmed its long-standing case law that discharges in chapter X cases must be given a broad construction with respect to claims and creditors in order to dispose of all liabilities of the debtor in reorganization. See *Matter of Sterling Homex Corp.*, 579 F.2d 206, 212 (2d Cir. 1978). Therefore, the mere fact that the CERCLA claims did not arise pre-petition did not automatically prevent them from being discharged by the final decree entered in the *Duplan* chapter X case.

However, the Second Circuit did find that the lower courts correctly determined that the final decree and chapter X plan specifically excepted, from the scope of the discharge and permanent injunction, all administrative claims that arose during the chapter X case and that Duplan was still liable for any administrative claims from its chapter X case. The Second Circuit held that since the CERCLA claims arose post-petition, they constituted administrative claims for purposes of both the Bankruptcy Act and the Bankruptcy Code. See, generally, *United States v. LTV Corp.*, 944 F.2d 997 (2d Cir. 1991) (Chateaugay I).

The Second Circuit did reverse the lower courts' rulings concerning the RCRA claims, asserted by the CERCLA creditors. The Second Circuit held that the CERCLA creditors were barred from bringing the RCRA claims as a matter of law. 212 F.3d at 155-156. The court also remanded this case to the bankruptcy court for a factual review of whether certain common-law claims related to the contamination had been discharged by the debtor's chapter X bankruptcy proceeding. Id. at 156-157. The court ruled that an environmental claim under the Bankruptcy Code arises when there has been a release or threatened release of hazardous substances, that release has caused injury in the form of contamination and the contamination is capable of detection. See, generally, *Texaco Inc. v. Sanders*, 182 B.R. 937, 951 (Bankr. S.D.N.Y. 1995).

The Second Circuit's *Duplan* decision is important for two core reasons: (1) it gives clear guidance as to when CERCLA claims and common-law environmental claims arise for purposes of both the Bankruptcy Act and Code, and (2) its holding that the scope of a discharge in a chapter X Bankruptcy Act case may include claims that had not arisen pre-petition in that case, and could breathe new life into some specific environmental lawsuits. The circuit's ruling may make it possible to discharge some CERCLA claims in certain chapter X cases depending on the discharge language of the final decree relating to administrative claims. While it is unlikely that the drafters of these chapter X plans could have ever envisioned that the administrative claims portion of these plans could be used to bring large environmental claims against the reorganized debtors, the exact wording of these provisions will be important in future environmental litigation.

Shortly before *Duplan* was decided, the Second Circuit resolved the appeal of a second case discussed in...
the "Tale of Two Cities" article: In re Manville Forest Products Corp., 209 F.3d 125 (2d. Cir. 2000). The facts underlying the Manville decision show how even the best legal drafting can turn out to be a disadvantage. In early 1967, Olin Corp. transferred its forest-products division to an entity known as Olinkraft Inc. (Sub). As part of this transaction, Sub granted Olin a broadly worded indemnification agreement concerning liability related to any asset that Olin transferred to Sub. These assets included a piece of real estate known as Plant 94, which was contaminated by a variety of toxic substances. In May 1974, Sub became an independent public company but reaffirmed its broad indemnification agreement with Olin. In January 1979, Sub merged into JM Capital, a subsidiary of the Johns-Manville Corp., and subsequently changed its name to Manville Forest Products Corp. (MFPC).

In 1982, MFPC filed its chapter 11 petition along with other Johns-Manville entities. The claims bar date in the MFPC chapter 11 was set for Dec. 29, 1983. Olin filed a proof of claim for certain taxes that it was owed by MFPC, but did not file a proof of claim under any of the indemnification agreements it had with Sub and that had been assumed by MFPC.

On March 26, 1984, MFPC's reorganization plan was confirmed. The order of confirmation provided that MFPC was discharged from any and all unsecured debts that arose prior to the confirmation of the plan. Approximately three months after MFPC's chapter 11 was confirmed, the state of Louisiana enacted the Louisiana Environmental Quality Act (LEQA), which proved a comprehensive plan for the remediation of environmental contamination. As with most state environmental acts, it imposed liability for environmental cleanup costs on current and former owners of polluted property.

In May 1996, the state of Louisiana sent demand letters to Olin to pay the cleanup costs for Plant 94. Olin demanded indemnification from MFPC (n/k/a Riverwood International Corp.) for the costs, and the matter was ultimately brought before the MFPC bankruptcy court.

The bankruptcy court found that Olin's claim for indemnification against MFPC for the Plant 94 contamination arose not under the LEQA, but under its pre-petition indemnification agreements. Therefore, the bankruptcy court rejected Olin's argument that its claim was a post-petition claim arising upon the enactment of the LEQA and found that the order of confirmation in the MFPC chapter 11 case barred Olin's claim against MFPC. See, generally, In re Manville Forest Products Corp., 225 B.R. 862 (Bankr. S.D.N.Y. 1998). Olin appealed the bankruptcy court's decision, which was affirmed by the district court on April 23, 1999, and Olin pursued its appeal to the Second Circuit.

In Manville, the Second Circuit held that there were two requirements for a party to have a valid pre-petition claim under the Bankruptcy Code. First, a claimant must possess a right to payment. Second, that right to payment must have arisen prior to the filing of the bankruptcy petition. 209 F.3d at 128. See, also, Chateaugay II, 53 F.3d at 497. In discussing the nature of Olin's claim, the court found that, under contract law, a right to payment arises under a written indemnification contract at the time the indemnification agreement is executed. Id. at 129. The Second Circuit found that the indemnification agreement in favor of Olin was so broad that it encompassed all types of future liability, including possible environmental liability arising from statutes that might be enacted in the future. Id. The court rejected Olin's argument that its liability should not be deemed to arise until the statute which gave it liability, the LEQA, was enacted into law, stating:

Olin's liability here is triggered by LEQA, but it flows from the indemnification agreements, which allocate risk from a category of anticipated losses without reference or limitation to particular causes of action and particular statutes. In short, Olin brought a contract cause of action based upon a pre-petition contract, not a statutory claim for indemnification under a statute enacted after confirmation.
The *Manville* case highlights a rather strange trap that parties could fall into when wording claims for reimbursement for environmental liabilities in cases involving long-discharged debtors. Basing claims on contractual indemnity provisions in the non-bankruptcy world is generally a better method of seeking indemnification than proceeding under the complex indemnity and contribution requirements of CERLA and other state and environmental laws. However, as is clearly highlighted by the Second Circuit in its *Manville* decision, reliance on certain and well-drafted contractual indemnity provisions may destroy any chance for a creditor to assert a claim against a former debtor as the indemnification provisions could be deemed to be pre-petition claims, while statutory causes of action arising from CERLA will be deemed to be post-petition claims that survive the discharge.

**The Rock Island Line Was a Mighty Dirty Road**

The final case in our review of older bankruptcy proceedings is the *Maytag Corp. v. Navistar International Transfer Corp.* F.3d, 2000 W.L. 823452 (7th Cir. June 27, 2000). In 1975, the Chicago Rock Island and Pacific Railroad Co. filed for reorganization under §77 of the Bankruptcy Act. Approximately five years later, in 1980, Rock Island was allowed to abandon its railroad operations. Four years after the abandonment of its railroad operations, Rock Island successfully confirmed a plan and emerged from bankruptcy as the Chicago Pacific Corp. In January 1989, Chicago Pacific Corp. merged with Maytag Corp.

One of the assets the Chicago Pacific Corp. had when its bankruptcy proceeding ended was a railyard in Rock Island, Ill. This railyard was sold after the completion of the Rock Island bankruptcy to Hartland Rail Corp., which leased it to another entity. In 1993, it was determined that petroleum was leaking from the railyard into a tributary of the Mississippi River. Two property owners adjacent to the railyard sued Hartland and operators of the railyard under the Oil Pollution Act of 1990 (OPA) in the Central District of Illinois, demanding contribution for cleanup costs (OPA lawsuit). All parties to the OPA lawsuit filed claims against Maytag, as a third party defendant seeking contribution under Illinois and federal law for the costs of the cleanup of the railyard site.

In response to the OPA lawsuit, Maytag moved in the U.S. District Court for the Northern District of Illinois, where the Rock Island bankruptcy had been administered, to enjoin the prosecution of the OPA lawsuit. The Northern District of Illinois granted Maytag's request for an injunction, and the other parties to the OPA lawsuit appealed.

In considering the appeal, the Seventh Circuit addressed two primary issues. First, Maytag argued that the request for contribution for the cleanup costs relating to pollutants placed in the ground before the 1984 sale of the railyard was a claim that was barred by the injunction issued when the Rock Island bankruptcy was closed. The 7th Circuit declined to address the injunction issue, remanding the case to the district court for a review of the terms of the Bankruptcy Act injunction, which arose in the Rock Island bankruptcy case.

The second argument raised by Maytag in support of the injunction was that, under general corporate law, it was not liable for Rock Island's debts because Rock Island was "liquidated" under its §77 Bankruptcy Act proceeding rather than reorganized. The district court accepted this argument as the basis for its injunction. The Seventh Circuit rejected this argument, noting that while a true liquidation could shield a subsequent purchaser of a debtor's assets from liability, in this particular case, no liquidation occurred. The Seventh Circuit rejected the district courts' finding that Rock Island liquidated its operations, and instead found that Rock Island ultimately reorganized its business affairs as the
Chicago Pacific Corp., and therefore could be held liable for any Rock Island debts that were not discharged under the terms of its bankruptcy.

The Rock Island case once again highlights the importance of the precise terms of old Bankruptcy Act case injunctions and discharges as they relate to environmental claims. In this case, the important issue was whether the debtor liquidated or reorganized in its §77 Bankruptcy Act proceedings. Reviewing the same plans, the district court found that the Rock Island bankruptcy was a liquidation, due primarily to the fact that the debtor abandoned its railroad operations, including its operation of the railyard in question. The Seventh Circuit reviewed the plan and it found that since the debtor emerged from bankruptcy as the Chicago Pacific Corp., its bankruptcy was a reorganization as opposed to a liquidation. This article will keep you updated on the fate of the Maytag litigation should it return to the Seventh Circuit in the future.

Conclusion

An ancient saying goes that those who do not understand history are doomed to repeat it. This statement rings especially true in the toxic tort area of bankruptcy proceedings. It is impossible to imagine that the bankruptcy attorneys who worked on the railroad reorganizations and in chapter X and chapter XI proceedings more than 20 and 30 years ago would ever consider that the way they drafted a particular discharge order or resulting injunction would impact the liability of a successor corporation for causes of action that had not yet even been discussed by Congress, much less enacted into law. It therefore appears that scholarship relating to the Bankruptcy Act is not yet dead but, so long as toxic waste pits continue to be discovered, will necessarily continue, much to the chagrin of a host of environmental lawyers and federal judges' law clerks.

Footnotes

1 The Second Circuit specifically noted that for purposes of this case, it was assuming that the CERCLA claims arose on the date that CERCLA became effective. The court specifically stated that "nothing in this opinion precludes a finding that the CERCLA claims actually arose after the date of enactment and after the close of the Duplan bankruptcy proceeding." 212 F.3d at 155 at N.10. Return to article
EXHIBIT C

42 U.S.C. §9601
(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

(E) Exclusion of lenders not participants in management

(i) Indicia of ownership to protect security

The term "owner or operator" does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.
(ii) Foreclosure

The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person--

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 9607(d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) Participation in management

For purposes of subparagraph (E)--

(i) the term "participate in management"--

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person--

(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or
(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility--

(aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term "participate in management" does not include--

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or
(IX) conducting a response action under section 9607(d) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) Other terms

As used in this chapter:

(i) Extension of credit

The term "extension of credit" includes a lease finance transaction--

(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 1813 of Title 12 [FN2] or with regulations issued by the National Credit Union Administration Board, as appropriate.

(ii) Financial or administrative function

The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(iii) Foreclosure; foreclose

The terms "foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a vessel or facility through--

(I)(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;
(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

(iv) Lender

The term "lender" means--

(I) an insured depository institution (as defined in section 1813 of Title 12);

(II) an insured credit union (as defined in section 1752 of Title 12);

(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

(IV) a leasing or trust company that is an affiliate of an insured depository institution;

(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(VII) a person that insures or guarantees against a default in the repayment of

an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and
(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(v) Operational function

The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(vi) Security interest

The term "security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

42 USCA s 9601
THE CLEAR SKIES INITIATIVE

- A Multiperspective Panel Analysis -

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SECTION E
Weakening the Clean Air Act

Presentation by Nat Mund

Sierra Club

Background on the Sierra Club

The Sierra Club is a non-profit membership organization dedicated to preserving, protecting, and enjoying the planet. Started by John Muir over 100 years ago, Sierra Club has a long history of working to educate the public and our political leaders on environmental policy.

We have more than 700,000 members across the country, in every state.
Clean Air Act: 30 Years of Success

Health Impacts of Air Pollution

NOx:
A critical component of ozone, linked to a broad variety of respiratory conditions, particularly asthma.

SOx:
Closely associated with fine particle pollution, linked to cardio-respiratory illnesses and premature mortalities.

Mercury:
A potent neurological toxin, associated with developmental damage in fetuses and children. Impacts are seen in adults at high enough levels.
Thirty years of progress

- EPA 2002 Air Quality Trends Report demonstrates reductions in six major pollutants since 1970
  - Pollution decreased while GDP increased
  - Greater than 95% reduction in lead
  - Reductions in NOx, SOx, fine particles
  - Still struggling to reduce ground level ozone

Thirty years of progress

- National Ambient Air Quality Standards
  - 1 hour ozone standard (1990)
  - 8 hour ozone standard (1997)
  - Fine particle standard
Thirty years of progress

- **New Source Review**
  - Requires existing sources of pollution to install modern pollution control technology when making a change that increases pollution.
  - EPA report back to VP Cheney's Energy Task force more than a 4 million tons reduced 1997-2001.
  - Environmental Integrity Project compiled data from enforcement settlements since 2000 demonstrate pollution reductions of about a million tons/ year when fully implemented.

Thirty years of progress

- **Interstate pollution**
  - "Section 126" of the Clean Air Act allows states to petition EPA to reduce pollution from upwind states.
  - In 1998, EPA issued a "SIP call" in response to NE state 126 petitions. The SIP call reduces summertime NOx by a tremendous amount, providing benefits locally and through "transported" pollution reductions.
Thirty years of progress

- Future measures
  - Tier II automobile standards
  - Diesel rules
  - Proposed non-road diesel rules
  - Proposed 8 hour standard implementation rule
  - Utility MACT

Clear Skies: Undermining the Existing Clean Air Act
Brief History

- Originally announced in concept form in February, 2002
- Introduced as legislation in July, 2002, and again in early 2003
- President Bush mentioned Clear Skies prominently in the State of the Union address
- Since then, several Congressional hearings, and rumors about its appearance on various legislative proposals

Existing Clean Air Act gets greater reductions

- EPA presentation to EEI 9/01
  - Demonstrated that existing Clean Air Act programs would get greater reductions than Clear Skies proposal (Attachment A)
- EPA Hg presentation 12/01
  - Further demonstrated that substantial reductions in mercury emissions would be achieved under existing law (Available upon request)
Ways that Clear Skies Weakens Clean Air Act

• Pollution trading - an inappropriate solution for public health concerns
  Puts into place a national “cap and trade” system, allowing power plants to buy and sell the right to pollute
  Expands a program focused on acid rain reduction (a chronic and cumulative concern) to programs focused on public health protection.
  Includes, for the first time, the trading of a toxic air pollutant (mercury)

Ways that Clear Skies Weakens Clean Air Act

• Delays implementation of 8 hour ozone standard in many areas
  For communities that “attain” the 1 hour ozone standard, but fail to meet the 8 hour standard, Clear Skies delays implementation until 2015.
  Study after study has linked this type of pollution to health concerns.
Ways that Clear Skies Weakens Clean Air Act

• Repeals utility MACT, leaving communities exposed to mercury air pollution

Under Section 112 of the Clean Air Act, EPA must control toxic air pollution sector by sector, through the "MACT" process.

MACT requires each facility in a sector to adopt pollution control technology to reduce air toxics.

EPA must produce a proposal for a utility MACT by December, 2003, and finalize it by December, 2004, with compliance by 2008.

Clear Skies repeals this requirement, replacing it with a cap and trade system that isn't fully implemented until 2018.

Ways that Clear Skies Weakens Clean Air Act

• Repeals New Source Review and haze requirements (BART) for Covered Units

Replaces existing programs designed to prevent local air pollution degradation and haze pollution with a static performance measure.

• Delays Section 126 petitions, and places additional hurdles to granting them

Prevents EPA from acting on Section 126 petitions until 2009, and from implementing a petition until 2011.

Places a new cost-effectiveness hurdle in place.
Concerns about EPA demonstrations

- EPA has produced a model that demonstrates these concerns, reflecting some disturbing assumptions about the existing Act - the “Rip van Winkle” enforcement scenario
- Only 3 counties do better under EPA’s analysis of Clear Skies than during their “base case” for 8 hour ozone

COMPARISON OF REQUIREMENTS UNDER BUSINESS-AS-USUAL AND THE STRAW PROPOSAL

<table>
<thead>
<tr>
<th>Potential Control Levels for Electric Generating Units under a Multi-Pollutant Approach</th>
<th>Business-As-Usual</th>
<th>Straw Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>NOx Phase I Cap</td>
<td>0.97 million ton cap with an annual national trading program</td>
<td>NOx Phase II: 1.87 million ton cap with an annual national trading program</td>
</tr>
<tr>
<td>NOx Phase II Cap</td>
<td>NOx Phase II: 1.87 million ton cap with an annual national trading program</td>
<td></td>
</tr>
<tr>
<td>SO2 Phase I Cap</td>
<td>SO2 Phase II: 0.6 million ton cap with an annual national trading program</td>
<td></td>
</tr>
<tr>
<td>SO2 Phase II Cap</td>
<td>SO2 Phase II: 0.6 million ton cap with an annual national trading program</td>
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Potential Control Levels for Electric Generating Units Under Business-As-Usual

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<tbody>
<tr>
<td>NOx SIP Call</td>
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<td>NOx SIP Call</td>
<td>NOx SIP Call</td>
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<tr>
<td>NOx MACT: 70ppm</td>
<td>NOx MACT: 70ppm</td>
<td>NOx MACT: 70ppm</td>
<td>NOx MACT: 70ppm</td>
<td>NOx MACT: 70ppm</td>
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</tr>
<tr>
<td>NOx 109 million ton cap in OIA region with region-wide trading program</td>
<td>NOx 109 million ton cap in OIA region with region-wide trading program</td>
<td>NOx 109 million ton cap in OIA region with region-wide trading program</td>
<td>NOx 109 million ton cap in OIA region with region-wide trading program</td>
<td></td>
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</tbody>
</table>

Source: EPA presentation to Edison Electric Institute 9/18/03. Available at http://www.epa.gov/oar/air/6pgs.pdf
Multi-Emission Approach

November 14, 2003

Landscape

- Comprehensive energy legislation, including tax, electricity, coal R&D, and renewables provisions
- Fuel diversity is linchpin to America's energy reliability
- Extensive EPA regulatory future, including new fine PM, mercury, regional haze, SO₂, ozone, and NOₓ rules
- Global climate legislative and legal initiatives pending
- Three significant multi-emission bills pending: Clean Skies Act, Clean Air Planning Act, Clean Power Act
- Increase in inconsistent state-level regulatory and legal activity on key environmental issues
Different Regions of the Country Rely on Different Fuel Mixes to Generate Electricity.

Across the U.S., a diverse mix of fuels is used to generate electricity. Several factors influence an electric company's decision to use particular fuels. These include the price and the availability of supply. This map, arranged by census region, illustrates the diversity of fuel use across the U.S. and shows how the electricity generation mix varies in various regions of the country. The map further demonstrates that major changes in the generation mix could have economic and reliability impacts, especially on a regional basis.

Coal-Based Electric Generation is Critical to Affordable and Reliable Electricity

- Since 1980, electricity generation from coal has increased 64 percent and currently accounts for 50 percent of our nation's electricity.
- At the same time, emissions from coal-based generation have declined significantly under the Clean Air Act.
- Due to its low cost and abundance, coal is uniquely positioned to meet America's growing energy needs.

Sources: Energy Information Administration, Environmental Protection Agency, Bureau of Economic Analysis.
Snapshot of Selected CAA Requirements

Further progress under the Clean Air Act is complex, burdensome and uncertain

**NSR Permits** for new sources & modifications that increase emissions

- **Ozone**
  - 1-hr Severe Area Attainment Date
  - Designate areas for 8-hr Ozone NAAQS
  - NOx SIPs due
  - OTC NOx Trading
  - NOx SIP Call
  - Assess Effectiveness of Regional Ozone Strategies SIPs due
  - Possible Regional NOx Reductions? (SIP call II)
  - Moderate 8-hr Ozone NAAQS Attainment Date

- **PM2.5**
  - Designate Areas for Fine PM NAAQS
  - Final Utility MACT
  - Compliance with Utility MACT
  - Latest attainment date for Fine PM NAAQS

- **Acid Rain, PM2.5, Haze, Toxics**

---

**CAA Regulatory Future?**

- **Professional Environmentalists:** Only "full and faithful" implementation of all Clean Air Act requirements allowed; little or no flexibility
- **Opposite extreme:** Economic, military, and energy supply/price issues should temper all new environmental regulations
- **Reality:** 30 years of CAA implementation and D.C. Circuit decisions suggest something in between
Elements of a Good M-E Approach

- Must achieve equal or greater emission reductions in an equal or quicker time frame than under current law
- Must provide regulatory certainty and not adversely impact economy or fuel diversity
- Targets should be ambitious but achievable
- Timing must allow cost-effective compliance options to develop

Clear Skies Act Benefits...

- Cleaner: Cuts sulfur dioxide, nitrogen oxides, and mercury emissions by -70 percent from current levels
- Sooner: Achieves - 35 million tons greater SO₂ and NOₓ reductions over the next decade than under existing CAA programs (EPA)
- Cheaper: Reduces costs and provides greater business certainty by eliminating multiple, overlapping regulations
- Certain: Continuous emissions monitoring and large penalties for non-compliance
Sulfur Dioxide Emissions Cut 73% from 2000 Levels, 84% from Historical High

Nitrogen Oxides Cut 67% from 2000 Levels, 76% from Historical High

Source: Environmental Protection Agency (EPA)
Note: 73% reduction covers 2000-2018 period under Clear Skies Program.
Mercury Emissions* Cut 69% from 2000 Levels and Historical High

...Compared to Uncertain Future

- Provides certainty for the environment through caps and emissions monitoring
- Provides major reductions in emissions and number of CAA non-attainment areas
- Provides lowers costs for consumers and cost impacts on shareholders
- Provides certainty for companies due to streamlined CAA, which translates to negligible disruption of fuel markets and reliable power generation
- Provides flexibility via unfettered emissions trading
- Provides adequate time to install large amounts of technology at hundreds of power plants
EPA Analysis of Clear Skies

- Fine particle and ozone non-attainment counties decline more than 90% by 2020, while the few remaining areas would be very close to the standards
- Very low increase in natural gas usage
- Coal use stable or increases in all major regions:
  - West - 2020 coal production equals 2000 production
  - Interior - 2020 coal production almost doubles 2000 production
  - Appalachia - 2020 coal production equals 2000 production

A Few of the Many Endorsements

- The Adirondack Council
- African American Environmentalist Association
- Alliance for Rural America (agriculture-related groups)
- American Public Power Association, Edison Electric Institute and Large Public Power Council
- Environmental commissioners of Arkansas, Colorado, Idaho, Minnesota, South Dakota and Texas
- Governors of Alabama, Arkansas, Georgia and Kentucky
- Labor-Environment Alliance
- National Association of Counties
- National Association of Manufacturers
- National Black Chamber of Commerce
- National Conference of Black Mayors
- Railroad and Mining Industries
- United Mineworkers of America
Clear Skies and Kentucky

Gov. Paul Patton (D):

"My administration has worked with energy producers over the years to ensure the delivery of reliable, low-cost power to the benefit of Kentucky's citizens. The framework of Clear Skies will provide regulatory certainty and result in the deepest emission reductions for SO₂, NOₓ, and mercury in the history of our nation, benefiting power producers and our citizens. I support passage of the Clear Skies Act during this session of Congress."


Clear Skies and Kentucky (2)

• By 2020, reduces emissions of SO₂ (70%), NOₓ (78%) and mercury (76%) compared to 2000 levels (EPA)

• In 2010, brings the two counties failing the fine particle standard into attainment

• Decreases sulfur deposition, a primary cause of acid rain, by 30-60%

• In 2010, 80% of coal-based generation is projected to come from units with advanced SO₂ and/or NOₓ control equipment, growing to 90% in 2020
State Considerations

• Reduces patchwork of different programs and confusion/competition issues for regulated sources
• Federal program addresses transported emissions and minimizes interstate conflicts
• Federal program takes pressure off state programs, enforcement and costs
• Significantly lowers the number of areas failing federal air quality standards
• Low-cost option for electric consumers (industry, small businesses & households)
• Flexibility allows local and state needs to be considered (e.g., fuel choices, jobs and tax base)

Fuels - Natural Gas and Coal

• Some regulations and legislative proposals make investments in coal-based plants risky:
  ✓ Lack of flexibility - restricted trading/unit-specific controls
  ✓ Lack of certainty - unknown future Hg, NOx, and SO2 requirements; NSR clarifications partial and reversible
  ✓ Compressed compliance timeframes
• Some regulations and legislative proposals would increase demand and use of natural gas that, in combination with stressed supplies, would increase gas costs for feedstocks and energy
### Clear Skies vs. Clean Air Planning Act - Emissions Caps and Timing

<table>
<thead>
<tr>
<th></th>
<th>Clear Skies</th>
<th>Current EPA (2020)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sulfur Dioxide</td>
<td>3.0 million tons - 2018</td>
<td>2.25 million tons - 2016</td>
</tr>
<tr>
<td>Nitrogen Oxides</td>
<td>1.7 million tons - 2018</td>
<td>1.7 million tons - 2013</td>
</tr>
<tr>
<td>Mercury</td>
<td>15 tons - 2018</td>
<td>10 tons - 2013</td>
</tr>
<tr>
<td>Carbon Dioxide</td>
<td>No cap</td>
<td>~2.3 billion tons - 2013</td>
</tr>
</tbody>
</table>

### Clean Air Planning Act is Problematic

- Lower and earlier emission caps would cost tens of billions more through 2020
- Increased strain on electric system and natural gas supplies because of large amount of technology installations, including untested mercury controls
- Regulating CO₂ is counter to Administration and numerous industry sector voluntary initiatives
- Limits on emissions from specific facilities and on mercury trading drive up program costs and add no environmental benefit
Clear Skies vs. Clean Air Planning Act (EEI Modeling)

- Clear Skies cost is $15-30 billion less ($1999, NPV 2004-2020)
- In 2020, Clear Skies costs $2-4 billion less
- In 2020, Clear Skies has negligible impact on use of coal and natural gas to generate electricity
- In 2020, Clean Air Planning Act could reduce coal use by about 25% and increase natural gas use about 25%

Prognosis?

- Schedule influenced by Senate Subcommittee mark-up, energy and transportation bills, and confirmation of new EPA Administrator
- House Energy & Commerce could mark up bill, but will not move absent Senate action
- Passage of Clear Skies is Administration’s top environmental priority
- 2004 Presidential politics loom large
- Clear Skies’ objectives could be implemented in large measure via regulatory programs...
CO₂ - The "Fourth E"

- International agreement prospects diminishing
- Debate and vote on Lieberman-McCain bill
- Multi-emission, energy and other legislative vehicles likely will not address climate
- DOE likely will propose revised EPAct section 1605(b) reporting guidelines for comment this fall, with final guidelines issued in 2004

Climate Change Voluntary Initiatives

- The President’s VISION program:
  ✓ Power Partners℠ - electric sector reduce GHG intensity by ~3-5 percent over 10 years
  ✓ Numerous other industries also have initiatives
- Like Clinton Administration’s Climate Challenge, VISION will demonstrate that voluntary programs can and do work
- "Report card" expected by February 2004
Lieberman-McCain GHG Bill

- Decoupled from the energy policy debate
- Senators promised fall 2003 vote on their bill requiring reduction of U.S. emissions to 2000 levels by 2010
- Original bill called for a second phase - 1990 levels by 2016, coupled with a system of tradable credits and banking in an effort to offset economic damage
- Very costly to U.S. coal industry according to EIA:
  - Reduce coal use by almost 80% by 2025
  - Increase reliance on expensive, scarce natural gas
  - Increase average price of electricity by 46% by 2025
- No comparable House legislation

Climate Change Litigation

- On August 28, EPA denied petition to regulate motor vehicle CO₂ emissions under CAA:
  - Cited a Supreme Court case against agencies using broadly worded statutory authority to regulate unusually significant economic and political issues
  - Noted that Congress has passed on regulating CO₂
- EPA also withdrew key policy statements, including prior General Counsel opinion
- These actions strengthen the government's position of avoiding regulation of CO₂
Climate Change Litigation (2)

- Six federal district court cases:
  - EPA's August 28 decision moots one case and has caused voluntary dismissal of another
  - Three NEPA cases and one Clean Air Act case remain
- The main battleground over regulation of CO₂ and other greenhouse gases shifts to the D.C. Circuit's consideration of EPA's August 28 decision:
  - Several states, cities and environmental groups have challenged EPA decision
  - Several states and Industry groups will seek to intervene in support of government
  - Other intervenors and amici likely

Summary

- A multi-emission approach provides the most promising future for national and state economies, fuel diversity, the environment, and electricity generation
- Legislation should address SO₂, NOₓ and Hg emissions, and reduce duplication and inefficiency of the CAA
- At this time, the correct approach to greenhouse gas reductions is a combination of voluntary efforts to reduce, avoid and sequester emissions, combined with R&D on future electric generation technologies
- Alternative multi-emission and/or mandatory climate bills have little chance of success
Clear Skies: A Better Way to Clean the Air

Presentation to
UK/CLE 19TH Annual Environmental Law
Sam Napolitano
Acting Director, US EPA Clean Air Markets Division
November 14, 2003
Millions of People Live in Areas that Do Not Attain the 8-Hour Ozone and Fine PM Standards (Monitoring Data)

Regional Emissions Contribute Significantly to Local Nonattainment Problems

Urban v. Regional Contribution to PM Concentrations (Annual Average, ug/m3)

- Because emissions are often transported across state boundaries, both regional and local action is needed to address air quality issues.
Power Plants Are Significant Contributors to Public Health and Environmental Challenges

- Sulfur Dioxide
  - Electric Power (43%)
  - Other stationary combustion (*)
- Nitrogen Oxides
  - Electric Power (22%)
  - Other stationary combustion (*)
- Mercury
  - Electric Power (37%)
  - Other stationary combustion (*)

* Other stationary combustion includes residential and commercial sources.

Power Plants Face a Complex Set of Requirements under the Current Clean Air Act (CAA)

**NSR Permits** for new sources & modifications that increase emissions

**Ozone**
- 1-Hr Serious Area Attainment Date
- 8-Hr Ozone NAAQS
- NO₂/NOx Call Reductions
- Possible Statewide NSPS
- Moderate 8-Hr Ozone NAAQS Attainment Date

**Mercury**
- Proposed Utility MACT
- Final Utility MACT
- Compliance with Utility MACT

**Acid Rain**
- Interstate Transport Rule to Address SSO₂/NO₂ Emissions for Fine PM NAAQS and Regional Haze
- Compliance for BART Sources under the Trading Program
- Second Regional Haze SIPs due

Note: Dotted lines indicate a range of possible dates.
1. Further action on ozone would be considered based on the 2007 assessment.
2. The SIP-submittal and attainment dates are based on the date of designation; for example, if PM or ozone are designated in 2004, the first attainment date in 2008.
EPA is required to update the new source performance standards (NSPS) for boilers and turbines every 8 years.

**Compliance for BART Sources**

**Compliance for BART Sources under the Trading Program**
Building on Lessons Learned: Reductions in the Acid Rain Program

Monitored Reductions in Wet Sulfate Deposition under the Acid Rain Program

1989-1991

1999-2001

Building on Lessons Learned: Costs Lower than Expected

Projected Costs at Full Implementation of the Acid Rain Program

Estimates at enactment

Estimates 4 years later

Estimates 8 years later

75% Lower than 1990 Projections
## Amending the CAA, Clear Skies Sets a Firm, Clear Timeline for Emissions Reductions

<table>
<thead>
<tr>
<th></th>
<th>Emissions (2000)</th>
<th>Phase 1 Cap</th>
<th>Phase 2 Cap</th>
<th>Total Reductions at Full Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sulfur Dioxide</td>
<td>11 million</td>
<td>4.5 million (2010)</td>
<td>3 million (2018)</td>
<td>73%</td>
</tr>
<tr>
<td>(tons)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nitrogen Oxides</td>
<td>5 million</td>
<td>2.1 million (2008)</td>
<td>1.7 million (2018)</td>
<td>67%</td>
</tr>
<tr>
<td>(tons)</td>
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<td>(tons)</td>
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* The Clear Skies Act provides an incentive to begin reductions upon enactment -- years before the current Clean Air Act.

### Program Objectives
- Air Quality Improvement
- Mitigation
  - Public Health
  - Environment
- Reasonable Impacts
  - Production Cost
  - Fuel Use
- Effective Implementation
  - Installation Pace
  - Technology Improvement

### Program Elements
- What to Control
- Timing
- Level
- Type of Control

**Aim:** To Strike the Right Balance...
Considering the Benefits of Clear Skies: Sulfur Dioxide Example

SO₂ Emissions in the Base Case and with Added Controls under Existing Act, Clear Skies Caps, and Clear Skies Response

EPA is measuring benefits from the Base Case to the Clear Skies Reduction line. This is a standard way to measure changes that the Agency used in 1996 for the Clean Air Power Initiative and in 1999 in the Air Quality Dialog Process, and other major rulemakings under the CAA.

Some of the Major Issues Faced...

- Practical Aspects of Implementation
  - Time to Construct Pollution Controls
  - Labor and Materials Needed for Pollution Control Construction
  - Financing of Equipment
  - Effect of Program on Power Grid Reliability
- Increases in Energy Prices
- Energy Diversity
- Changes in Coal Mining Production
- Uncertainty of Pollution Control Reductions
- Large Benefits from Air Emissions Reductions
- Differences in the “Benefits” Gained from Each Pollutant
- Providing “Proper” Incentives
Power Sector Emissions Reduced Significantly with Clear Skies Plus Existing Control Programs

Projected SO\textsubscript{2} Emissions from Power Plants with the Base Case and Clear Skies in 2020
Clear Skies with Other Air Programs Substantially Improves Fine Particle Attainment over the Next Two Decades

- There are 129 counties nationwide (114 counties in the East) that are currently estimated to exceed the annual fine particle standard of 15 \( \mu \text{m}^3 \).
- 65 million people (43 million people in the East) currently live in counties that would not meet the standard.

Most counties would be brought into attainment with the \( PM_{2.5} \) standard by 2020:

- Clear Skies and existing control programs will bring 111 counties (home to approximately 32 million people) into attainment with the fine particle standard (compared to current conditions).

Notes: Based on 1999-2001 data of counties with monitors that have three years of complete data. Additional federal and state programs must bring all counties into attainment between 2007 and 2021. The methodology used to predict nonattainment status in the West is different than that used for the East.

Clear Skies with Other Air Programs Substantially Improves Ozone Attainment over the Next Two Decades

- There are 290 counties nationwide (268 counties in the East) currently estimated to exceed the 8-hour ozone standard.
- 111 million people (87 million people in the East) currently live in counties with projected ozone concentrations greater than the 8-hour ozone standard of 85 ppb.

Most counties would be brought into attainment with the ozone standard by 2020:

- Clear Skies and existing control programs (primarily the NOx SIP Call and vehicle rules, including the proposed non-road rule) will bring 283 counties (home to approximately 77 million people) into attainment with the 8-hour ozone standard (compared to current conditions).

Notes: Based on 1999-2001 data of counties with monitors that have three years of complete data. Additional federal and state programs must bring all counties into attainment between 2007 and 2021. The methodology used to predict nonattainment status in the West is different than that used for the East.
Benefits Begin Immediately under Clear Skies

- The power sector will immediately lower SO₂ emissions to bank allowances for the future. Leads to preventing 1000s of premature deaths before 2010.
- In 2008, added pollution controls lower NOx and indirectly reduce Hg levels through new NOx and existing SO₂ pollution controls providing co-benefits.
- The first phase of SO₂ and Hg controls start in 2010. EPA estimates annual benefits of $55 billion. There are also many "unvalued" benefits.

<table>
<thead>
<tr>
<th>Examples of Benefits</th>
<th>Annual Avoided Cases in 2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Premature mortality</td>
<td>7,900 (4,700)</td>
</tr>
<tr>
<td>Chronic bronchitis</td>
<td>5,400</td>
</tr>
<tr>
<td>Hospitalization/ER visits</td>
<td>17,000</td>
</tr>
<tr>
<td>Non-fatal heart attacks</td>
<td>13,000</td>
</tr>
</tbody>
</table>

Clear Skies Delivers Increasing Environmental and Public Health Benefits

By 2020...
- Reduced fine particle and ozone exposure would result in $110 billion in annual public health benefits, including:
  - 14,100 fewer premature deaths;
  - 8,800 fewer cases of chronic bronchitis;
  - 23,000 fewer non-fatal heart attacks;and
  - 30,000 fewer hospitalizations and ER visits
- An alternative estimate projects 8,400 fewer premature deaths and annual health benefits of $21 billion.
- Visibility would be significantly improved in parks and forests
  - $3 billion in annual visibility benefits for southern and western parks alone by 2020
- Reductions in sulfur, nitrogen, and mercury deposition would improve the health of lakes, streams, and estuaries
  - Virtual elimination of chronically acidic lakes in the Northeast
- Additional human health and environmental benefits cannot currently be monetized (e.g., mercury risk reduction)
Other Unquantified Benefits Include...

Blues and Greens Show Areas of Significant Improvement by 2020.

Emissions Reductions Come from Further Controls on Coal-Fired Capacity

- In 2020 with Clear Skies, 81% of all coal-fired capacity is projected to have one or more of the following: selective catalytic reduction (SCR) for NOx, flue gas desulfurization (scrubbers) for SO2, and/or activated carbon injection (ACI) for mercury. Of this capacity, 34% is due to Clear Skies. There will be about 300 GW of coal-fired units in 2020.

- Graphics show cumulative capacity with existing controls, controls projected to be retrofitted under the NOx SIP call, NSR settlements and state enacted programs, CAA Title IV, and controls projected to be retrofitted with Clear Skies.
Projected Annual Costs of the Clear Skies Act

Total annual costs of the Clear Skies Act are projected to be $6.3 billion ($1999) in 2020.

The net present value (NPV) of the difference in costs between Clear Skies and the EPA Base Case is $52.5 billion ($1999) for the period between 2005 and 2025.

Impact on Electricity Prices and Fuel Prices

- Retail electricity prices are expected to gradually decline from today's levels but then rise over time with Clear Skies. (Prices are expected to drop initially due to the increase of excess generation capacity; in 2010 prices would begin to increase due to new capacity requirements, which lead to higher capital costs and greater natural gas use, and higher retail prices passed onto consumers.)
- Clear Skies will have a small effect on national electricity, coal, and natural gas prices.
- The impact on coal-fired capacity is small.

Note: The analysis presented represents EPA's estimates. EIA's modeling would likely show different impacts.
Projected Generation Mix in 2010 & 2020

Note: Projections are from EPA’s modeling using IPM. The base case in IPM includes Title IV, the NOx SIP Call, NSR settlements, and state-specific caps in CT, MA, MO, NC, NH, TX, and WI. The “Other” category includes generation from solar, wind, geothermal, biomass, landfill gas, and fuel cells.

Note: The analysis presented represents EPA’s estimates. EIA’s modeling would likely show different impacts.

Coal Production for Electricity Generation in 1990 and 2000 and Projected Production with Clear Skies in 2020

Note: The analysis presented represents EPA’s estimates. EIA’s modeling would likely show different impacts.
Impact of Changes in IPM Modeling Assumptions

- EPA has explored the impact of changing assumptions in the model to:
  - AEO 2003 natural gas prices
  - AEO 2003 electricity growth
  - Mercury emission modification factors (EMFs) used by EIA

- To measure the pure impact of the assumptions, as opposed to the safety valve effect, a Clear Skies Case without the safety valve was used in IPM modeling of power grid behavior and emissions. With the safety valve modeled, the impacts would be smaller than those shown. (The sensitivity analysis did not extend to air quality and benefits analysis.)

- The assumptions used in the sensitivities for natural gas prices, electricity growth and mercury removal efficiencies were those used by EIA in its 2003 modeling.

Effects of Assumptions for Natural Gas Prices, Electricity Growth, and Emission Modification Factors (EMFs)

- Projected annual costs decline or remain about the same when the model is run with EIA’s natural gas assumptions, electricity growth assumptions, and/or EMFs. Assumptions lead to building much cleaner new coal-fired capacity that leads to lower overall cost.
- Annual costs increase less than 10% by 2020.
- Coal-fired generation increases.
- Allowance prices are relatively close, except for mercury.
In Summary: Four Key Benefits of Clear Skies

• Clear Skies would provide dramatic benefits for public health, starting immediately upon passage
  – When fully implemented, Clear Skies would prolong thousands of lives each year, providing billions of dollars in economic benefits, and would save tens of millions of dollars in health care from reduced hospitalizations and ER visits alone.

• Clear Skies would make great strides to help the environment
  – Clear Skies would improve visibility in national parks and wilderness areas; reduce nitrogen loads to the Chesapeake Bay and other waters; help lakes, streams, & forests recover from acid rain damage; and reduce mercury in the environment.

• Clear Skies would improve the Clean Air Act by simplifying requirements for industry and reducing burdens on states.
  – Clear Skies would retain the health-based ambient air quality standards (NAAQS) under the Clean Air Act while strengthening a proven, mandatory market-based approach and reducing reliance on complex, less efficient requirements.

• Clear Skies would maintain energy diversity and would only have a small effect on national electricity, coal, and natural gas prices.
  – Clear Skies would deliver certainty and efficiency, achieving environmental protection while supporting economic growth.

Comparison of Proposed Multi-Pollutant Control Levels: Sulfur Dioxide

SO₂ Emissions Reductions Based on Proposed Nationwide Caps

- Clear Skies (S. 485)
- Jeffords (S. 366)
- Carper (S. 843)
Comparison of Proposed Multi-Pollutant Control Levels: Nitrogen Oxides

NOx Emissions Reductions Based on Proposed Nationwide Caps

- Clear Skies (S. 485)
- Jeffords (S. 366)
- Carper (S. 843)

Comparison of Proposed Multi-Pollutant Control Levels: Mercury

Hg Emissions Reductions Based on Proposed Nationwide Caps

- Clear Skies (S. 485)
- Jeffords (S. 366)
- Carper (S. 843)
Notes on EPA’s Analysis Using a Base Case of Existing Control Programs

- The information presented in this analysis reflects EPA’s modeling of the Clear Skies Act of 2003. EPA has updated this information to reflect modifications:
  - Revisions to the Existing Control Programs to reflect newly promulgated rules at the state and federal level since the initial analysis was undertaken.
    - The 2003 analysis reaffirms previous analytical results
      - Benefits of Clear Skies substantially outweigh the costs,
      - Resulting economic impacts of the program are reasonable given the air quality, health and environmental improvements that are gained.
  - This analysis compares the new program (Clear Skies) to a Base Case (Existing Control Programs), which is typical when calculating costs and benefits of Agency rulemakings.
    - The Existing Control Programs reflects implementation of current control programs only
      - Does not include yet-to-be developed regulations such as those to implement the National Ambient Air Quality Standards.
    - The EPA 2003 Existing Control Programs for power sector modeling includes:
      - Title IV, the NOx SIP Call, NSR settlements, and state-specific caps in Connecticut, Massachusetts, Missouri, New Hampshire, North Carolina, Texas, and Wisconsin, all finalized before March 2003.
    - The EPA 2003 Base Case for air quality modeling includes:
      - Federal and state control programs in the EPA 2003 IPM Existing Control Programs, as well as the Tier II, Heavy Duty Diesel, and Non-Road Diesel rules.
For Additional Information, Visit

Clear Skies Website
www.epa.gov/clearskies
REAL ESTATE ISSUES FOR THE ENVIRONMENTAL LAWYER

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INTRODUCTION

Any discussion of “real estate issues for the environmental lawyer” typically should include a discussion of the management of contingent environmental liability associated with the sale, ownership, operation and leasing of real property. In that context, sellers, buyers, owners, operators and tenants must consider a variety of legal and practical aspects of applicable environmental laws, as well as consider the full tier of programs on the federal, state and local level that may impact liability associated with real estate.

A primary environmental concern associated with real estate continues to be the federal superfund law, or CERCLA, 42 U.S.C. §§ 9601 et seq. This statute imposes liability on certain categories of persons based, in some instances, simply on their status in relation to the real property at issue. For example, CERCLA provides for strict liability (meaning without regard to fault) and joint and several liability (meaning one person can be held responsible for the entire cleanup cost regardless of their proportionate contribution to the problem) for certain current owners and operators of contaminated property, as well as certain past owners and operators, and those who arranged for the disposal or transportation of hazardous substances to the property at issue. See 42 U.S.C. § 9607 (a) (1). CERCLA, however, is just one of many federal, state and local programs meriting consideration and, even focusing on CERCLA alone, parties must realize that CERCLA primarily deals only with “hazardous substances,” a term expressly defined not to include petroleum. 42 U.S.C. § 9601 (14). Moreover, while recent amendments to CERCLA seek to provide additional protections against liability, they also have the potential to impose new burdens on owners/operators of real property interests.

An outline of various environmental laws that may impact real estate is attached as Appendix A to this paper. Rather than explore all such laws in depth, this paper will examine
selected real estate issues for the environmental lawyer and provide an update of applicable law, beginning with brownfields.

**BROWNFIELDS, ENVIRONMENTAL DUE DILIGENCE AND THE NEW BONA FIDE PROSPECTIVE PURCHASE**

"Brownfields" are defined as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601 (39).

The U.S. Conference of Mayors estimates that there are more than 450,000 brownfield sites nationwide. Such sites not only may detract aesthetically from our communities, but they also may pose health and environmental risks, impact a community’s tax base, and even contribute to urban sprawl. And although such properties may present attractive opportunities for redevelopment and reuse, parties interested in acquiring and/or developing such property naturally are concerned with environmental contamination and associated risks. These risks include uncertainties concerning the nature and extent of contamination and any associated remediation costs, as well as possible property value impairment, third party claims and future land use or operational restrictions. Often these risks can turn a potential inner city redevelopment project away toward greener “urban sprawl” pastures.

Even where sophisticated private parties may be willing to take a reasonable risk in a brownfields project, often lenders and other interested stakeholders may be unwilling to participate due to the uncertainty of environmental risks. As a result, some states have tried to encourage redevelopment by implementing voluntary cleanup programs, but liability concerns remain. “Despite protection from State liability as an incentive to invest in these types of sites, testimony before the committee confirmed that the fear of incurring federal liability sometimes drives developers and lenders toward open spaces.” S. Rep. No. 107-2, 107th Cong., 1st Sess., p.
Congress thus amended CERCLA in an effort to address such concerns and further encourage brownfields redevelopment.

**Congress Changes the Federal Law**

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (the "Act"), amending CERCLA. The Act, among other things:

- creates a brownfields grant program and authorizes new funding for brownfields redevelopment;
- seeks to clarify the scope of "all appropriate inquiry" under the innocent purchaser defense;
- creates a new bona fide prospective purchaser defense, and
- codifies EPA policy regarding other liability protections.

**1. Brownfields Revitalization Funding**

The Act authorizes EPA to establish a brownfields grant program and authorizes funding to identify, investigate, assess and clean up properties that are abandoned or under utilized. 42 U.S.C. § 9604 (k). However, the definition of "brownfield site" excludes from the grant program a number of types of properties or cleanup sites, and "federal brownfields expenditures are appropriately limited to sites where, due to the threat of real or perceived contamination, no reuse is likely and no federally directed or funded cleanup is underway or imminent." S. Rep. No. 107-2 at 5. Also important to note, entities eligible to receive grants under the new program include only state and local governments, quasi-governmental and clearance authorities, regional counsels, state-chartered redevelopment agencies, and Indian tribes. See 42 U.S.C. § 9604 (k).
2. New Innocent Purchaser Considerations

CERCLA provides an affirmative defense for "innocent purchasers" of real property who, prior to the date of purchase, did not know and had no reason to know of a release or threatened release of a hazardous substance on the property. To establish the defense, the purchaser must demonstrate that it took "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601 (35) (B). The Act amends this section of CERCLA in an effort to clarify its scope and better define its application.

First, the Act clarifies the scope of the defense by inserting between "deeds or other instruments" the terms "easements, leases." 42 U.S.C. § 9601 (35) (A).

Second, the Act provides that the "all appropriate inquiry" standard will be satisfied by conducting an environmental site assessment that meets specific standards to be promulgated by EPA within two years. In the interim, the following defines "all appropriate inquiry:"

For commercial property purchased before May 31, 1997, the court shall consider (1) any specialized knowledge or experience; (2) the relationship of the purchase price to the value of the property if not contaminated; (3) commonly known or reasonably ascertainable information about the property; (4) obviousness of the presence or likely presence of contamination; and (5) the ability of the purchaser to detect contamination by appropriate inspection.

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1 EPA has initiated a negotiated rulemaking proceeding to develop regulations to address the "all appropriate inquiry" standard.
For property purchased on or after May 31, 1997, and until EPA promulgates due
diligence standards, appropriate inquiry is satisfied by following the procedures of
the American Society for Testing and Materials, including an assessment in
accordance with E 1527-97, Standard Practice for Environmental Site
Assessments: Phase I Environmental Site Assessment Process.

See 42 U.S.C. § 9601 (35) (B) (iv) (I) - (II).

Third, the Act adds new obligations that a prospective purchaser must comply
with after acquiring property in order to preserve its status as an innocent purchaser. These
obligations include:

- cooperate, assist, and provide access to persons that are authorized to
  conduct response actions at the property;

- comply with any land use restrictions in connection with the response
  action at the property; and

- do not impede the effectiveness or integrity of any institutional controls
  employed at the property.

Finally, after acquiring the property the purchaser must also adhere to another
requirement - exercise “appropriate care” with respect to hazardous substances found at the
property. Such “appropriate care” includes taking reasonable steps to stop any continuing
release, prevent any threatened future release, and prevent or limit human, environmental or
natural resource exposure to any previously released hazardous substance. See 42 U.S.C. § 9601
(35)(B)(i)(II).

3. New Bona fide Perspective Purchaser Defense

A principle drawback of the CERCLA innocent purchaser defense has been the
inherent “catch 22” of the defense itself, whereby a prospective purchaser who diligently
undertakes “all appropriate inquiry” may in fact discover contamination, thus precluding
application of the defense because an innocent purchaser must establish that it had “no reason to
know” that the property was contaminated. This quandary is particularly troublesome for efforts
to encourage redevelopment of brownfields since the existence of contamination is often confirmed in due diligence.

In an effort to eliminate this potential barrier to redevelopment of brownfields, the Act creates a new bona fide prospective purchaser defense. Under this defense, property owners or tenants who knowingly acquire or lease contaminated property after January 11, 2002 can still avoid CERCLA liability if they can establish by a preponderance of the evidence that:

- the disposal of hazardous substances occurred before acquisition of the property;
- as a prospective purchaser they conducted “all appropriate inquiry,” and complied with any applicable release reporting requirements;
- as an owner/operator, after acquiring the property they took “appropriate care” in relation to contamination discovered;
- as an owner/operator, after acquiring the property they cooperate, assist, and provide access to persons authorized to conduct response actions; comply with any land use restrictions and institutional controls; and comply with any EPA requests for information; and
- as an owner/operator, they are not otherwise a potentially responsible party or affiliated with any other potentially responsible party through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a potentially responsible party.

42 U.S.C. § 9601 (40).

4. Windfall Lien

Although a bona fide prospective purchaser may be protected from CERCLA’s strict liability, the Act nevertheless creates a “windfall lien” in favor of the government on property owned by the bona fide prospective purchaser. See 42 U.S.C. § 9607 (r). This lien is intended to prevent a bona fide prospective purchaser from reaping a windfall due to any increase in property value as a result of federal government cleanup efforts. Thus, if the federal
government incurs response costs at the property, the Act allows a federal windfall lien in an amount not to exceed the increase in the fair market value of the property due to the government's cleanup efforts. Id. at (r) (4).

5. Contiguous Property Owners

The Act also codifies the contiguous property defense previously published as policy in EPA's "Final Policy Toward Owners of Property with Contaminated Aquifers." See 60 F. Reg. 34790 (July 3, 1995). Under the 1995 policy, EPA agreed not to target enforcement action against an owner of property when groundwater beneath their property had been impacted from contamination that migrated onto or under their property from an adjoining parcel. This defense applied only where the owner did not contribute to the release of the hazardous substances, was not in a contractual relationship with the person responsible for the release, and where no alternative basis for imposing CERCLA liability on the owner existed. The amendments under the Act reiterate these conditions, but also impose new conditions to satisfy the defense, such as requirements to abate a release, and requirements to cooperate -- a requirement that may result in restrictions to or interference with land use.

Pursuant to this defense, EPA may issue assurances that no enforcement action will be initiated or may enter into settlements that would insulate a person meeting the requirements of the defense from a cost recovery or contribution action under CERCLA. See 42 U.S.C. § 9607 (q) (3). While this defense may relieve the innocent land owner from requirements to conduct groundwater investigations or install groundwater remediation systems (except in accordance with the 1995 policy), and may relieve such parties from undertaking full-scale response actions, it nevertheless still requires that they take reasonable steps in response to the contamination. Id. at (q) (1) (A) (iii).
Brownfields In Kentucky

Kentucky has two (2) statutory voluntary cleanup programs that offer certain protections against environmental liability in order to encourage and facilitate redevelopment of property in the Commonwealth impacted by real or perceived environmental contamination. Kentucky’s original brownfields statute offers such protections to public entities only, while the more recent “Voluntary Environmental Remediation Act” seeks to open the brownfields program to private participants as well.

1. Public Entities

In 1996, the Kentucky General Assembly enacted legislation “to encourage economic development by allowing the issuance of a No Further Remediation Letter to a public entity for a site when the remediation plan has been successfully completed.” See KRS 224.01-450. The issuance of a no further remediation letter acts as a release from further responsibilities and “shall be considered prima facie evidence that the site does not constitute a threat to human health and the environment and does not require additional remediation....” KRS 224.01-465(1).

In order to obtain a no further remediation letter, a public entity must submit an application to the Kentucky Natural Resources and Environmental Protection Cabinet (“Cabinet”) that contains, among other things, an environmental site assessment sufficient to characterize the extent of any contamination at the site, and a proposed remediation plan for the site consistent with the proposed reuse of the site. With regard to the latter, Kentucky’s cleanup statutes expressly recognize that risk-based remediation and risk management tools, such as engineering and institutional controls, may be employed where appropriate as an alternative to more costly traditional cleanups such as removal and off-site disposal of contamination. See KRS 224.01-400 (18).
If the Cabinet approves the no further remediation letter application, the public entity must undertake or cause to be undertaken all actions pursuant to the remediation plan before the Cabinet will issue the no further remediation letter. See KRS 224.01-460. Moreover, once issued, the Cabinet may void the release from liability if 1) the site is not managed in compliance with the statute or the approved remediation plan; or 2) the Cabinet determines that any facts upon which the remediation plan was based were either unknown at the time the release was issued, or were known but not disclosed, or were false. See KRS 224.01-465 (4).

Although Kentucky’s brownfields statute requires that a “public entity” submit the no further remediation letter application, the statute provides that any release from liability runs in favor of any mortgagee, trustee, transferee or successor in interest of the public entity, as well as any financial institution that, after the issuance of the letter, acquires ownership, operation, management or control of the property. KRS 224.01-465(3).

2. Private Parties

Recognizing the limits of the original brownfields program, in 2001 the Kentucky General Assembly enacted Kentucky’s Voluntary Environmental Remediation Act, also known as “VERA”. Similar to the public entity statute, this program is “intended to establish an efficient and predictable process, within the context of KRS 224.01-400 and 224.01-405, to promote voluntary cleanup and redevelopment of properties suspected of environmental contamination.” KRS 224.01-510. Under VERA, any person may apply to enter certain property into the program by submitting a Voluntary Environmental Remediation Program (“VERP”) application and a nonrefundable application fee. Certain properties, such as NPL sites, TSD facilities, property at which an environmental emergency exists, and property subject to enforcement or certain closure/corrective action requirements, are ineligible for the program.
After receipt and acceptance of an application, the applicant and the Cabinet shall enter into an agreed order setting forth mutual responsibilities with respect to the project, including requirements for site characterization and corrective action as well as a remediation compliance schedule. See KRS 224.01 514-518. Upon successful completion of the corrective action plan and submittal of a completion report, the Cabinet shall issue to the applicant a covenant not to sue. KRS 224.01-526. The covenant not to sue, however, does not apply to a number of enumerated items under the statute, including criminal liability, petroleum storage tanks, natural resources damages, unknown conditions, and claims based on changes in standards, among others. See KRS 224.01 526 (7).

Pursuant to VERA, the Kentucky General Assembly also required the Cabinet, within one year of its effective date (June 21, 2001), to promulgate regulations establishing standards for Kentucky’s general cleanup statute and defining tiered remediation management options that account for current and proposed land use, zoning, and the nature and extent of contamination. The current standards contained in the EPA’s Region IX Preliminary Remediation Goals are established as screening levels (not cleanup standards) to be used by the Cabinet. See KRS 223.01-530.

In response to VERA’s mandate, the Cabinet submitted proposed regulations to the Kentucky Legislative Research Commission on June 28, 2002. That regulatory package included “Kentucky Risk Assessment Guidance” and sought to detail requirements for site characterization plans, site characterization reports, corrective action options, and other aspects of site closure. The regulatory package resulted in significant public comment and opposition, and as a result the proposed regulations were withdrawn on January 14, 2003.
The recent amendments to CERCLA and the statutory and regulatory activity regarding brownfields in Kentucky emphasizes the evolving trend toward risk management of environmentally impacted property where some measure of contamination is left in place. In such situations, determining what type of clean-up or risk management is appropriate based upon the reasonably anticipated future land use is critically important to understanding and using appropriate engineering and/or institutional controls at a site. For example, a portion of the property may be paved or otherwise capped to manage risks associated with soil contamination left in place, while a slurry wall or groundwater treatment system may be implemented in order to manage risks associated with groundwater contamination. Such engineering controls may require routine periodic inspection or operation and maintenance attention, and may include various site restrictions and affirmative obligations applicable to the sites and occupants. Such institutional controls may also include access agreements for remediation and/or monitoring activities by PRPs.

Recent efforts have sought to codify the use and application of institutional controls at sites where contamination may be managed in place. For example, ASTM International (fka The American Society for Testing and Materials), has issued a guidance document entitled “Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls” E2091-00, in an effort to provide guidance concerning the correlation of institutional controls and risk based corrective action. In this context, The ASTM guide defines institutional controls as follows:

Legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern, or to prevent activities that could interfere with the effectiveness of a response action, to ensure maintenance
of a condition of 'acceptable risk' or 'no significant risk' to human health and the environment.

See ASTM Standard E2091-00, Section 3.1.2. Such "institutional controls" may include proprietary controls (i.e., traditional property law), state and local government controls (i.e., zoning, water/well use advisories), statutory enforcement tools (i.e., consent decrees and other agency orders or permits), informational devices (i.e., deed notice or restriction), as well as access controls.

In an apparent attempt to address the perceived need for further codification, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") recently promulgated the Uniform Environmental Covenants Act, ("UECA") a model environmental covenant law that could be adopted by all fifty states. The NCCUSL approved the final UECA at its 112th Annual Meeting on August 6, 2003.

The UECA defines the nature and rights attendant to an environmental covenant in this context, and sets forth uniform provisions that an environmental covenant "must" contain. The UECA also suggests "other information, restrictions, and requirements" that the covenant "may" contain.

The UECA also addresses the validity of the environmental covenant, seeking to eliminate many of the common law impediments that may undermine confidence in such institutional controls. The Act additionally addresses notice and recording requirements, as well as duration, amendment, and enforcement of an environmental covenant.
APPENDIX A

REAL ESTATE & ENVIRONMENTAL ISSUES

I. The Law


1. strict, joint and several liability

2. scope of PRPs


3. innocent landowner defense

[a] “all appropriate inquiry”

[b] due care requirements

[c] United States v. 150 Acres of Land, 204 F. 3d 698 (6th Cir. 2000) (inheritance/bequest)


4. EPA enforcement policies under CERCLA


   1. waste management and permitting requirements
   2. citizens suits enjoining "imminent and substantial endangerment"
      [a] "against any person . . . contributing to . . ."
   3. underground storage tanks ("USTs")
      [a] lender safe harbor - 40 CFR § 280.200

   1. prohibits the discharge of pollutants . . .
      [a] KPDES permit
   2. storm water permitting requirements
      [a] Phase II storm water regulations - 64 Fed. Reg. 68721 (Dec. 8, 1999)
   3. Section 404 dredge and fill permits

D. Clean Air Act - 42 U.S.C. § 7401 et. seq.
   1. permit and compliance status
   2. operational flexibility
   3. PSD/non-attainment areas
   4. MACT

E. OSHA
   1. asbestos containing material
   2. disclosure, management and abatement requirements

F. Endangered Species Act
   1. prohibition against "taking" endangered species
   2. potential impact on development
G. Comparable State and Local Laws/Regulations

1. KRS 224.01-400
2. KRS 224.01-530
3. Local water district WHPA plans
4. Local wastewater discharge regulations
5. Metro APCD

II. Environmental Due Diligence

A. Buyer’s Concerns
1. innocent purchaser defense
2. identify environmental conditions, impacts and use restrictions
   [a] avoid liability for pre-existing conditions
   [b] ensure operational flexibility

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3. Phase I ESA - ASTM E 1527
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A. Identifying Risks
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   [b] due diligence

2. Allocating Risk
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3. Contract Language

[a] definitions
[b] exceptions/schedules
[c] environmental standards/presumptions
What You Should Know About Environmental Due Diligence
Becoming an Informed Consumer of Phase I Environmental Site Assessments
Susan C. Bush, PG
Third Rock Consultants, LLC

Abstract

A Phase I Environmental Site Assessment (ESA) is commonly performed on a parcel of commercial real estate to allow the purchaser to satisfy one of the requirements to qualify for the innocent landowner defense to CERCLA liability; and to avoid the acquisition of expensive environmental liabilities. While there are a variety of different protocols available, E 1527-00 Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process set by the American Society for Testing & Materials (ASTM) is the most commonly used method today. Users of Phase I ESA’s lulled by the apparent security of a unit price and a widely accepted generic procedure subject themselves to significant risk if the Phase I ESA does not account for the complexity of the historical use and the future planned use of the property. To keep cost reasonable, the standard Phase I ESA is limited in scope, and therefore, the environmental professional must draw conclusions based on limited data. This paper will discuss the limitations of a Phase I ESA and will provide guidance for selecting the appropriate environmental professional.
What You Should Know About Environmental Due Diligence  
Becoming an Informed Consumer of Phase I ESAs  
By: Susan C. Bush, PG

INTRODUCTION

Purchasing or leasing property includes the risk of acquiring liability for environmental conditions caused by previous owners. Many times the cost of addressing these environmental problems can become a significant expense, or in some cases, exceed the value of the property. The most common protocol for evaluating a property is E1527-00 Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process set by the American Society for Testing & Materials (ASTM).

The purpose of this standard is to define good commercial and customary practice for conducting an environmental site assessment (ESA) on commercial property with respect to contaminants within the scope of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and petroleum products. The objectives of this standard are 1) to memorialize in writing good commercial and customary practices for ESAs, 2) to facilitate high quality, standardized ESAs, 3) to ensure the standard of appropriate inquiry is practical and reasonable, and 4) to clarify an industry standard for appropriate inquiry in an effort to guide the legal interpretation of CERCLA’s innocent landowner defense. A properly conducted Phase I ESA can provide the user with a good general indication of the past and existing conditions on a property that could indicate the presence of recognized environmental conditions. A person should be able to decide based on the information provided in a Phase I ESA whether to proceed with a project or investigate further.

LIMITATIONS OF A PHASE I ESA

While most people dealing in real estate transactions are familiar with ASTM E 1527 standard practice for performing Phase I ESA’s, few have actually read the standard and understand its limitations. One of the objectives in developing the standard was to ensure that the standard for appropriate inquiry was reasonable and practical. The ASTM standard was developed to achieve a balance between the competing goals of
limiting the cost and time demands of performing and environmental assessment and the reduction of uncertainty regarding unknown conditions on the property. By its nature, the standard Phase I ESA is limited in scope. It is the responsibility of the user to understand the scope of the standard and to ensure that the scope of Phase I ESA services is sufficient to satisfy the needs of their specific project.

The ASTM E 1527-Phase I ESA does not address any requirements of state or local laws or any federal laws other than the appropriate inquiry provisions of CERCLA’s innocent landowner defense. The standard cautions users that federal, state and local laws may impose environmental assessment obligations that are beyond the scope of the ASTM standard practice. The practice goes on to state "Users should also be aware that there are likely to be other legal obligations with regard to hazardous substances or petroleum products discovered on a property that are not addressed in this practice and may pose risks of civil and/or criminal sanctions for non-compliance."

A Phase I ESA is not an environmental audit. An environmental audit is the investigative process to determine whether or not an existing facility is in compliance with applicable environmental laws and regulations. A Phase I ESA is not as rigorous or exhaustive as an environmental audit. A Phase I ESA may include the results of a prior environmental audit, or an environmental audit can include an environmental assessment based on the requirements of the project. It is important to understand this distinction when real estate transactions involve facilities subject to environmental laws and regulations.

The ASTM Standard does not require the environmental professional to check title records for Environmental Liens or Activity and Land Use Restrictions. It is the responsibility of the user to hire a title professional to review these records and report the findings to the environmental professional. This is an increasingly important point to remember as institutional controls and engineered controlled
corrective action options become more popular forms of addressing contaminated properties.

Most state Brownfield programs allow the land use restrictions and engineered controls to address contaminated properties. Engineered controls for contaminated sites such as caps require routine inspection and maintenance in perpetuity. These duties are generally the responsibility of the property owner. Brownfield programs also allow land use and activity restrictions to address contaminated property. These programs typically employ tiered clean-up levels that are dependant upon the land use. Higher levels of contamination may be allowed to remain on an industrial property, and therefore, land use controls such as deed restrictions are used to ensure that the property is not converted to an inappropriate land use such as residential. In addition, there may be activity restrictions placed on portions of a contaminated property, such as prohibiting any type of surface disturbance in an area of contamination that has been capped.

The availability of record information on property is highly variable between sources. The ASTM Standard does not require the environmental professional to identify, obtain, and review every possible record that may exist for a property. The ASTM Standard specifies what information must be reviewed from standard sources, and requires the environmental professional to only review those records that are reasonably ascertainable from those sources. The ASTM Standard defines reasonably ascertainable as 1) information that is publicly available, 2) information that can be obtained from its source within reasonable time and expense constraints, and 3) information that is practically reviewable. The phrase reasonable time and expense in the ASTM Standard means that the information can be obtained in 20 days from the date of the request and at a nominal charge that is intended to cover the source’s cost of retrieving and duplicating the information. Information is considered practically reviewable if it can be reviewed for information relative to the property without the need for extraordinary analysis of irrelevant data.
What You Should Know About Environmental Due Diligence
Becoming an Informed Consumer of Phase I ESAs
By: Susan C. Bush, PG

There are other environmental considerations that the user of a Phase I ESA may wish to address that are not covered under the current ASTM Standard. These environmental considerations are commonly referred to as non-scope considerations. While these non-scope considerations are not necessarily related to environmental contamination, they can still represent a significant financial liability and delay and limit future development plans for a property. Non-scope considerations include but are not limited to:

- Asbestos Containing Materials
- Radon
- Lead-Based Paint
- Lead in Drinking Water
- Wetlands
- Regulatory Compliance
- Cultural and Historic Resources
- Industrial Hygiene
- Health and Safety
- Ecological Resources
- Endangered Species
- Indoor Air Quality
- High Voltage Power Lines

Whether or not it is appropriate to include any of the non-scope considerations into a Phase I ESA is entirely dependant upon the specific needs of the project, the nature of the property being assessed, and the level of risk the prospective purchaser is comfortable assuming. The user should consult with the environmental professional and then determine what scope of services is appropriate for the particular project. The following table is intended to assist in selecting some non-scope considerations that may be appropriate for inclusion in a Phase I ESA based on the type of property and future use.
What You Should Know About Environmental Due Diligence  
Becoming an Informed Consumer of Phase I ESAs  
By: Susan C. Bush, PG

<table>
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<tr>
<th>Type of Property or Future Use</th>
<th>Phase I ESA Non-Scope Considerations</th>
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<td>Wetlands, Endangered Species, Cultural &amp; Historic Resources, Ecological Resources</td>
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SELECTING AN ENVIRONMENTAL PROFESSIONAL

Commonly lenders require a Phase I ESA when arranging a property loan, just as they do a title search. Because Phase I ESA’s have become a familiar part of the loan routine, many prospective purchasers view them as a pre-defined, unit-priced commodity. A Phase I ESA should be viewed as a professional service and not as a commodity. The first thing to remember is to hire a professional.

In the past few years, the market has become saturated with providers of Phase I ESA’s. This has resulted in a price-driven market where high volume and minimal effort on the part of the Phase I ESA provider has dominated. The expertise and qualifications of individuals performing Phase I ESA services is highly variable. Their training can range from a three-day course to a degreed professional with over 20 years of experience. Since many users of Phase I ESA services consider it a commodity, where the only difference in the service is price, it is not uncommon for users to “shop around,” and the only question they ask the environmental professional they are considering hiring is “how much”? The result can be a Phase I ESA that is inexpensive when invoiced, but financially disastrous when recognized environmental conditions are overlooked resulting in environmental litigation later.
Although there is a recognized standard for performing Phase I ESA's, the quality and scope of Phase I ESA's produced varies widely. This is due to the fact that the ASTM Standard allows a great deal of flexibility in performing the Phase I ESA and leaves many decisions to the judgment of the environmental professional. The ASTM Standard states that an environmental professional, which is defined as a person possessing sufficient training and experience necessary to conduct a site reconnaissance, interviews and other activities in accordance with the ASTM Standard, must perform the Phase I ESA. The environmental professional must also be capable of evaluating the information generated by the Phase I ESA and rendering opinions and conclusions regarding the presence of recognized environmental conditions on the property.

Although some states have prescribed minimum qualifications for performing a Phase I ESA, most states, including Kentucky have not. An ESA requires interdisciplinary skills and it is therefore difficult to prescribe a narrow set of qualifications. ASTM Standard E 1527 offers several good criteria for evaluating the technical competence of an environmental professional. A person contemplating hiring an environmental professional to complete a Phase I ESA would be well advised to consider some of the points below.

1. Formal education of the individual,
2. Any environmental site assessment training in the classroom or field,
3. Length of time the individual has been conducting Phase I ESAs,
4. Experience of the individual in performing the scope of services required for the type of property being evaluated,
5. Familiarity of the individual with the current Practice E 1527, (This practice has undergone several revisions since it’s initial development)
6. Sample reports prepared by the individual, and
7. References who have used the individual’s services.
If a firm employs the environmental professional, some additional criteria that can assist you in your evaluation of the firm include:

1. Quality assurance/quality control procedures used in the review of the Phase I ESA conducted by individuals employed by the firm.
2. The firm’s internal risk management program to manage the risk associated with the conduct of Phase I ESAs.
3. The firm’s standard terms and conditions, including any limitations to liability.
4. The firm’s errors and omissions professional liability insurance policy including the amount of coverage, limits, deductibles, and exclusions.

Many environmental professionals providing Phase I ESA services advertise the fact that they do not perform Phase II or Phase III services. They view this as a positive point because there is no impetus for them to identify recognized environmental conditions on a property simply to generate additional work through a Phase II investigation. While many users may view this as a positive factor when selecting an environmental professional, there is also a down side. If recognized environmental conditions are identified as a result of a Phase I ESA, the user will have to hire another firm or individual to provide Phase II services should they wish to continue with the evaluation of the property. The firm or individual performing the Phase II service will have to spend additional time becoming familiar with the property and the results of the Phase I ESA adding cost and time delays to the project. Performing Phase II investigations provides valuable experience in the conduct of a Phase I ESA. Persons experienced conducting Phase II investigations have a better understanding of contaminant release mechanisms, contaminants migration pathways, and where they are commonly found. This experience will allow them to identify potential recognized environmental conditions on a property more readily than someone lacking this experience. It is ultimately up to the Phase I ESA user to decide which of these factors are most important in achieving the goals of the project.
The bottom line is that the user is the one ultimately responsible for making an appropriate selection when hiring an environmental professional. Select your environmental professional on qualifications first, then negotiate the price afterward.

**USERS RESPONSIBILITIES**

ASTM Standard E 1527 also includes responsibilities of the user in assisting with the identification of recognized environmental conditions on a property. If the user has any specialized knowledge of the property that is germane to recognized environmental conditions, the user is required to communicate this information to the environmental professional. This information should be provided prior to the performance of the site reconnaissance performed by the environmental professional. In addition, if the user is aware that the purchase price of the property is significantly less than that of comparable properties, it is incumbent upon the user to ascertain the reason for the price differential.

The user should provide the environmental professional with the reason why the user wants to have a Phase I ESA performed on a property. If this information is not provided, the ASTM Standard allows the environmental professional to assume it is to qualify for the innocent landowner defense to CERCLA liability and state such in the report. Another reason for performing a Phase I ESA may be to identify environmental conditions that could adversely impact the planned future use of the property. If this is the case, the environmental professional and user may need to modify the scope of services of the Phase I ESA to appropriately evaluate the property in light of its intended future use.

The user and the environmental professional should work jointly to define the appropriate scope of a Phase I ESA. Each Phase I may differ based on the complexity of the property being evaluated, the future intended use of the property, and the level of risk that the user is willing to assume.
One of the most important things to remember is to begin the Phase I ESA as early in the process as possible. Too often the Phase I ESA is a last minute consideration just before the scheduled closing date. Waiting to the last minute does not afford the environmental professional adequate time to thoroughly review existing documentation on the property and to consider the unique aspects of the project. Few governmental agencies can locate records for the property, duplicate them, and forward them to the environmental professional in less than a week. Tight time constraints placed on the environmental professional may result in important information not being evaluated. In addition, if recognized environmental conditions are identified as a result of the Phase I ESA, the user doesn’t have ample time to conduct further evaluation of the property. These types of delays just prior to a scheduled closing can kill the real estate transaction. Performing a Phase I ESA should not be a lengthy project, but allowing 30 days is a reasonable and prudent time frame. More time may be necessary to complete a complex Phase I ESA such as those performed on properties with a long industrial history.
TIPS AND POINTERS FOR CONDUCTING AN EFFECTIVE ADMINISTRATIVE HEARING

James L. Dickinson
Administrative Hearing Officer
Frankfort, Kentucky

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TIPS AND POINTERS FOR
CONDUCTING AN
EFFECTIVE ADMINISTRATIVE HEARING

THE RACETRACK \ OVERVIEW OF THE OFFICE OF ADMINISTRATIVE HEARINGS

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TIPS AND POINTERS FOR CONDUCTING AN EFFECTIVE ADMINISTRATIVE HEARING (WITH APOLOGIES TO THE HORSE INDUSTRY)

by
James L. Dickinson
Administrative Hearing Officer

THE RACETRACK OVERVIEW OF THE OFFICE OF ADMINISTRATIVE HEARINGS CONTACT INFORMATION

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Frankfort, KY 40601

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502.564.4973

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Steve Blanton,
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Lisa Booth – Hearing Officer Assistant for James Dickinson and Janet Thompson
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Ellen Gotshall—Hearing Officer Assistant for Alan Wagers and Steve Blanton
Ellen_Gotshall@mail.state.ky.us
Rita Hardin—Penalty Assessment Conference Coordinator
Rita.Hardin@mail.state.ky.us
I. LOADING THE GATE-FILING OF PETITION AND TIME FOR FILING

A. Petitions from an adverse final determination must be filed within thirty days of receipt of final decision or actual notice
KRS 224.40-410(2) and 401 KAR 100:010 § 13
Suggestion-In your petition or entry of appearance include your e-mail address along with regular mail address and phone number.

B. Timely filing is jurisdictional –
828 S.W.2d 657 (1992)
Fox v. House
YOU CAN USE THE FAX. 502-564-4973 (follow with a hard copy)
400 KAR 1:090 § 4.

C. What constitutes actual notice \ newspaper advertisements.
1. In permit construction cases, deadline in newspaper may extend the filing period for someone who has received a letter notifying him or her of the Cabinet’s decision to issue a construction permit.
SORE v. Natural Resources and Environmental Protection Cabinet
DWM-21955-042 (Prehearing Conference Report 1995)
2. Surface mining anomaly
Some decisions characterized as being final aren’t really final at all.
Appolo Fuels, Inc v Natural Resources and Environmental Protection Cabinet, PDH-22738-042 (Rendered 1996)
Citizen complaint letters \ referral for investigation

D. Surface Mining Cases (A special note).
Kentec v. Natural Resources and Environmental Protection Cabinet
Pending Motion for Discretionary Review – Prepayment provision of 405 KAR 7:092 § 3 struck down. Case is not yet final.

E. Filing upon receipt of an NOV – Should you file?
1. Cabinet’s position \ Not a final determination. Final determination is made when violation is abated and agency conference with violator has taken place.
2. Position taken by some in the environmental community.
Filing has the effect of resolving issues quickly.
3. But premature filing may have the effect of delaying settlement of the case within the agency. On the other hand, Cabinet has sometimes waited almost five years to file an Administrative Complaint.

F. When to Intervene and status of Intervenors when principal parties are trying to settle. 401 KAR 100:010 § 11.

G. Naming of a Third Party Defendant.
Can’t be done without Cabinet consent.
I. Petitions initiated by client: Unauthorized practice of law issues.
Petitions will be accepted with a warning letter.
If retained after petition has been filed you need to promptly file entry of appearance and amended petition.

II. THEY'RE OFF-FIRST PREHEARING CONFERENCE
Contrary to the wording of 224.10-420 (1), a formal hearing is NEVER scheduled in the Administrative Summons. There will ALWAYS be at least one prehearing conference.
A. Time for filing of amended petition.
   1. Without leave prior to filing of Answer
   2. Thereafter, at anytime with leave of Hearing Officer so long as it does not have the effect of delaying the case or causing prejudice to the Respondent.
   4. Multiple Amended Petitions can be dangerous to your case and exasperating to the Hearing Officer.
B. Acquainting the Hearing officer with the issues: detailed vs. cursory petitions
C. Scheduling of formal: status conference
   1. Please bring your calendar
   2. Consult with client prior to conference as to his schedule and whether he is willing to mediate.
D. Keeping the hearing officer in the loop: Failing to appear
   1. Don't settle the case and then forget to tell the Hearing Officer.
   2. Show cause procedures.

III. THE FIRST TURN- REFERRAL TO MEDIATION –
A. An overview of 400 KAR 7:090 § 7
B. Tips for an effective mediation conference
   1. Don't agree to mediation simply because you think it may please the Hearing Officer. You are making a commitment to explore settlement of case in good faith.
   2. Avoid the temptation of viewing mediation as an opportunity to conduct discovery.
   3. Have a representative with full authority to settle present at conference or make sure you have clear authority to settle.
   4. File complete answers to forms submitted in mediation packet. Your opponents and hearing officer will not see them. This is definitely not the time to be coy.
   5. Mediation is NOT arbitration – don't try the case.
   6. In private sessions with mediator be candid as to your expectations and what you can reasonably expect from the process.
7. Don’t expect to win everything. Remember the goal in mediation is to create as much as possible a win-win situation. It is not a “I win \ you lose” process.

IV. DOWN THE BACK STRETCH-DISCOVERY ISSUES
A. Overview of 400 KAR 1:040
B. Tips for more effective discovery practice
   1. Response to Interrogatories must be filed in Office of Administrative Hearings.
   2. Timing for the filing of depositions
      We have limited storage room and overworked administrative assistants
      Don’t file depositions until you have to. See 400 KAR 1:090 § 15. Must be filed if it is being quoted or referred to in any motion or is referred to during the formal hearing.
      NOTE: Just because it is filed, it is not in the Formal Administrative Hearing record until you move for its admission as an exhibit. It is permissible to use the transcript that is in the file, if pre-filed before the hearing.
   3. Motions to compel \ Waiving of time limits for Responses to Motion to Compel. \ Filing of proposed order. 400 KAR 1:040 § 10.
      See also Motion practice under 400 KAR 7:090 § 9.
      a. When to set-
         Generally Thursday mornings are reserved for arguments concerning motions. Discussion of Hearing Officer’s calendar.
      b. Requirement of certificate of good faith effort to resolve
         But, it is not good practice to set out in motion copies of the correspondence concerning the issue.
   4. Making your motion understandable
      Utilization of bullets \ brevity is NOT a bad thing.
   5. Making the call to your opponent before the motion conference.
      Now that you have your opponent’s attention – give him \ her a call.
   6. If you resolve the issues, it is quite all right to cancel the motion hearing.
      But keep the Hearing Officer in the loop and file motion to withdraw motion to compel along with agreement.
   7. Filing of electronic copy of motion and order
      In this instance, filing of a proposed order would be helpful.

V. AT THE TURN-FINAL PREHEARING CONFERENCE \ MOTION FOR
   SUMMARY DISPOSITION \ MOTION FOR CONTINUANCE
A. Motion for Continuance – Construction of 400 KAR 1:090 § 11.
When is “good cause” an absolute requirement. As a general rule, if the motion is opposed or a continuance has been previously granted, hearing officer will want to make a finding of good cause. In addition, we have an informal policy that a case needs to be disposed of (or at least heard) within one year of filing.

B. Motion practice pertaining to Motions for Summary Disposition

1. Overview of 401 KAR 100:010 § 3(4) and 400 KAR 1:090 § 9
   Steelvest applies to administrative hearings.

2. The pesky “accompanied by an order rule.” See § 9(9) and (10). Does it really apply to Motions for Summary Disposition. Not really, but get permission first.

3. Practical Elements of Summary Disposition
   a. Statement of facts \ Putting yourself in the Hearing Officers head \ Necessity of his making a record. This is not the place to be making an argument.
   b. Alternative – Joint stipulation of facts
   c. Affidavits and depositions
      Don’t be chintzy with the extracts- give the hearing officer some context for referenced material.
   d. Brevity is king. Be kind to the Hearing Officer
   e. Attaching authorities.
      Hearing officer can readily access statutes, SW Reporters and regulations. Anything else, you need to supply a copy. DO NOT USE SPIRAL BINDERS.
   f. Submit an electronic version of Motion. (optional).

C. The Final Prehearing Memorandum

1. Must be filed – Failure to file or filing of incomplete prehearing memorandum can have a disastrous effect on your case. Rebuttal evidence and witnesses do not have to be listed.

2. If done properly can be an excellent resource for the Hearing Officer and for yourself.

3. Use it as a tool for organizing your case.

4. Don’t overlook the issues to be decided and the necessity of outlining the elements of the regulation that has to be proven.

5. First opportunity to address issue of penalty and factors supporting your case concerning amount of penalty.

D. Organization of documents \ Pre-hearing agreements

1. Meeting with the opposition. \ best opportunity to settle.

2. Joint exhibits in complex cases \ Use of file folders

3. Joint stipulations

4. Waiving of foundation requirements

5. The looming problem of digital photographs and electronic documents.

VI. THE FINAL STRETCH-FORMAL HEARING

A. The case in chief.
1. Its an administrative hearing \ not a jury trial \ Rules of admission are more flexible
   BUT don't bury the hearing officer in exhibits.

2. Educating the Hearing Officer \ KISS

3. Issues about hearsay \ limited use of objections \ Scintilla rule

4. Dual witnesses \ Calling witnesses out of order

5. Document management
   In making copies don’t forget the Hearing Officer
   If you anticipate marking up an exhibit, make an extra one that will not be marked.

B. Penalties (enforcement cases).

   (penalties factors in general – derived from EPA standards)

   Individual liability for corporate owners is a possibility in limited situations where direct control or responsibility for a hazardous waste facility is shown.

3. Specific points to keep in mind.
   a. Documentation of extent of environmental harm
   b. Documentation of remedial costs.
   c. Emergency response costs are not penalties
   d. Penalty issues probably need to be addressed during discovery as well.
   f. Other Maggard factors.

4. Making a recommendation of penalty to the Hearing Officer. Yes you are going to win, but it doesn't hurt to have a Plan B.

5. How many days to access – usually when observed, but there are exceptions. (Continuing environmental harm – damaged stream situations).

VII. COMING DOWN TO THE WIRE- POST HEARING ISSUES
   A. Identification of issues \ make the hearing officer tell you what he is thinking
   B. Writing the post hearing brief
      Filing of Findings of fact \ your chance to be a hearing officer. See comments in Section V B above. Filing of electronic documents is strongly encouraged.

VIII. CALLING ON THE STEWARDS\ FILING OF EXCEPTIONS
   A. Timing for exceptions
      1. Must be FILED (not mailed) within 14 days of receipt in Chapter 224 cases. Within 14 days of service. KRS 224.10-440. KRS 350.0301 requires exceptions to be filed says within 14 days of service.
Response can filed within 21 days of service. A DRAFT SECRETARY’S ORDER MUST BE FILED with the Exceptions.

2. Three day mail rule is NOT applicable.
3. The oddity of not being able to response in Chapter 224 cases (but some do anyway)

B. What needs to be included in exceptions the issue of preservation.
Discussion of Philpot and Swatzell below.
1. Philpot v. Tourism Development Cabinet
   2001 CA-000347 MR
   2002 WL 538467
   Chapter 13 B does not require the filing of exceptions to preserve issue for circuit court review.
   Oral arguments were held on 5/15/03. Clerk said the case is still "out to court."
   2002-SC-000374 / 2001-CA-000347 / 00-CI-00928
   Failure to file exceptions constitutes a failure to exhaust administrative remedies.
3. It would be prudent to file exceptions.

C. Procedure by which exceptions are reviewed.

IX. NO ROSES FOR YOU APPEALS
1. Appeals must be filed in the Franklin Circuit Court on Chapter 224 actions.
2. Chapter 350 cases involving an enforcement action, bond forfeiture, or penalty assessments can be filed in either the court where the mine site is located OR in the Franklin Circuit Court. KRS 350.032 \ KRS 350.0301. All other appeals from a final order (mainly permitting actions) MUST be filed in the Franklin Circuit Court.
3. Certification of record.
   Contact Jane Wingate when you need to have a record certified for Circuit Court review. Please note: All exhibits are sent to Circuit court.
IN RE: BRASHEA COAL COMPANY, INC.

I. INTRODUCTION

THIS REPORT AND PROPOSED ORDER pertains to a Motion to Dismiss filed by the Cabinet on July 17, 1995. In its Motion, the Cabinet seeks to dismiss a Petition filed by Utica Mutual Insurance Co, hereinafter referred to as Utica Mutual, which was seeking a review of the Cabinet's determination to administratively forfeit, pursuant to 405 KAR 10:050, the performance bonds associated with a surface disturbance and reclamation permit, Permit No. 097-0050, issued to Brashea Coal Company. As its justification for the dismissal, the Cabinet noted that the Petitioner had acknowledged that its Request for Administrative Hearing had not been filed within thirty (30) of its receipt of the Cabinet’s Determination to Forfeit Bond. It should be noted that the Petition was accompanied by a request that the Petition be accepted as timely filed due to the efforts of counsel to substantially comply with the
requirements of 405 KAR 7:090 §9. Accompanying the Motion was an Affidavit executed under oath by the Hon. Tom Roma, the contents of which have not been disputed by the Cabinet. In the Motion and Affidavit, counsel stated that the request had been initially mailed well before the deadline for filing, but due to an error in printing of the envelope, the Petition was returned by the U. S. Postal Office as being undeliverable due to insufficiency of address. Thereafter the Petition was promptly mailed to this Office but was received after the expiration of the deadline for a timely filing of the Petition.

A Prehearing Conference on this matter was held on August 9, 1995. Appearing for Utica Mutual was the Hon. Tom Roma; the Hon Greg Higgins appeared for Brad Smock, who is the attorney representing the Cabinet. At that time, the Hearing Officer entertained oral arguments on the record as to both the Motion to Dismiss and Motion for an Enlargement of Time in which to File Petition, which for purposes of this Report is being treated as a response to the Cabinet’s Motion. In essence, counsel for the Petitioner argues that the Petition should be accepted because he had substantially complied with the Cabinet’s regulations by initially mailing the Petition prior to the last day for a timely filing of the Petition.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the foregoing Pleadings and Motions and taking into consideration the record as a whole, the Hearing Officer makes the following Findings of Fact and Conclusions of Law.

1. The Petitioner, Utica Mutual Insurance Co, is a surety company authorized to do business in the Commonwealth of Kentucky and is the issuer of Surety Bond Su 44953 and Su 44958 which are the performance bonds issued to the Cabinet guaranteeing the complete performance of reclamation work and achievement of post mining land use on Permit No. 836-0026, Increments 15 and 20 respectively.

2. On May 10, 1995, the Cabinet issued a Determination of Bond Forfeiture with respect to Su 44953 and cited as justification for the forfeiture the Permittee’s violation of the
Cabinet's Regulations pertaining to off-permit disturbance and liability insurance. On that same day, the Cabinet also issued a Determination of Bond Forfeiture with respect to Su 44958 and stated as its justification the failure of the Permittee to abide by the Cabinet's regulations pertaining to off-permit disturbance, backfilling and grading, and maintenance of liability insurance.

3. On June 13, 1995, Tom Roma, counsel for Utica Mutual prepared and signed the Petition for Administrative Hearing and also prepared a letter addressed to Ms. Jane Wingate, Chief Clerk, Office of Administrative Hearings requesting her to file the Petition and to issue a summons.

4. On that same date, Mr. Roma's secretary prepared envelopes for mailing of the Petition. Although Mr. Roma's secretary typed the full address for Jane Wingate which included the city, state, and zip code onto her word processor for preparation in printing the envelope, the printer deleted the last line of the address.

5. Mr. Roma's secretary apparently did not detect the printing error at the time she affixed postage to the envelope and mailed it.

6. On June 20, 1995, the envelope containing the original Petition was returned due to an insufficient address. A true and correct copy of the envelope, as returned, is attached to Mr. Roma's affidavit as Exhibit "B".

7. A Petition was actually received on June 22, 1995, and was filed in the Office of Administrative Hearings. A Summons and Order Setting Prehearing Conference was issued by this Office on June 26, 1995.

8. In the Motion to Accept Late Filing, it was admitted by Mr. Roma that the Petition was not filed within thirty days of receipt of the Determinations of Bond Forfeiture.

9. The Cabinet has filed a Motion to Dismiss and relying on the provisions of 405 KAR 7:092 Section 9 has requested that the Petition be dismissed.
10. 405 KAR 7:092 Section 9 provides that any person adversely affected by a determination of the Cabinet may file with the Office of Administrative Hearings a petition for a review of that determination. According to the regulation such petitions:

"shall be filed within thirty (30) days after the petitioner has had actual notice of the determination complained of, or could reasonably have had notice. Failure to timely file a petition for review shall constitute a waiver of an administrative hearing and the petition shall be dismissed." (Emphasis added)

11. Counsel for the Petitioner seeks to avoid the consequences of this provision by arguing that he was in substantial compliance with the regulations and had timely mailed the Petition. The Petitioner also asserts that but for the unfortunate hiccup of his printer, the petition would have been timely received. No supporting authority, however, is offered for the acceptance of the late filing.

12. The terms of the regulation are mandatory and allow no latitude for a late filing. It has also been the consistent position of this Office and the Secretary that the timely filing of Petitions, when it is mandatory that they be filed within a particular period of time, is jurisdictional. When such petitions are filed late or out of time, the Hearing Officer cannot consider them. See Valley Watch, Inc., v. N.R.E.P.C., File No. DWM-22232-042.

13. The appellate courts have also addressed this issue and have similarly determined that the timely filing of a petition in accordance with an administrative agency's procedural regulations is mandatory and jurisdictional. In a case very similar to this one, the Cabinet for Human Resources (CHR) had a regulation requiring any person issued a violation to file a request for an administrative hearing within twenty days of receipt of the written

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1 The authority for this regulation is derived from KRS 350.0301 (1) which allows any person adversely affected by a Cabinet determination to petition for an administrative hearing provided that such petitions are filed within thirty days of actual notice or within thirty days of the date that the Petitioner could reasonably be expected to have notice.
notice of the violation. See 900 KAR 2:020. The Petition was mailed by the Petitioner and received one day past the last day for timely filing. Notwithstanding the arguments that the petitioner had made a good faith effort to timely file and that the court should extend its substantial compliance rationale as expressed in Ready v. Jamison, Ky., 705 S.W. 2d 479 (1986), the Supreme Court of Kentucky rejected these arguments and affirmed the dismissal of the petition. See Jenny Wiley Health Care Center v. Commonwealth, Cabinet for Human Resources, Ky., 828 S.W.2d 657 (1992).2

14. In so holding the Court noted that the rationale expressed in the Jamison decision was only applicable to procedural errors occurring after the timely and proper filing of a notice of appeal. In the case under consideration, the Court analogized the timely filing of a Petition for Administrative Hearing to that of a Notice of Appeal. In order to trigger the reviewing tribunal's jurisdiction, the applicant has a mandatory duty to strictly comply with the procedural requisites for invoking the agency jurisdiction. See Jenny Wiley v. Com, supra at 660-661. The Court also expressly rejected the argument that a timely mailing was the functional equivalent of a timely filing. The Court noted that to allow a timely mailing to substitute for timely filing would in effect be a judicial rewriting of the regulation, a drafting exercise it declined to perform. In accordance with this case is the recent decision of Fox v. House, 42. K.L.S. 13, dis. rev. pend. In that case, the Court of Appeals held that the mailing of notice of appeal by overnight express which arrived late was not substantial compliance and could not excuse the dismissal of the appeal.

15. Although there are few certainties in this life, one of them is that a failure to strictly adhere to the filing requirements of a regulation, statute or court rule will be universally fatal to the belated action. In this case, a malfunction of a computerized printer has regrettably resulted in the Petition being filed out of time. Neither substantial compliance

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2 To add insult to injury, the last day for filing fell on a Sunday when the State office was closed. The Court declined to construe KRS 446.030 (1)(a) to allow the petitioner to have his request construed as being timely filed as of first available day the office was open.
nor excusable neglect can confer jurisdiction over this action when the jurisdiction over this matter has expired as an operation of law. Based on the foregoing, the Hearing Officer has no choice but to conclude that he must recommend to the Secretary that he find that the Petitioner has waived its right to an appeal and that the Petition be dismissed.

III. RECOMMENDATION

The Hearing Officer respectfully recommends to the Secretary that he sign the attached Order finding that the Petitioner has waived its right to an Administrative Hearing and that the Petition which was not filed in conformity with 405 KAR 7:092 Section 9 be dismissed.

So RECOMMENDED this the 26th day of August, 1995.

JAMES L. DICKINSON
HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 Fountain Place
Frankfort, Kentucky 40601
(502) 564-7312

RIGHT TO FILE EXCEPTIONS AND REPLIES

Pursuant to KRS 350.0301, any party may file Exceptions to this Report and Recommendation within fourteen days of service of this Report. Any party may submit a written response to the Exceptions within twenty-one (21) days of service of the Report and Recommended Order. Thereafter, the matter shall stand submitted to Secretary, who shall consider the Report, any Exceptions and Responses, and the Recommended Order and decide the case.
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing HEARING OFFICER'S REPORT AND RECOMMENDED ORDER was, on this 15th day of August, 1995, mailed by first-class mail, postage prepaid to:

Hon. Thomas E. Roma, Jr.
Parker & O'Connell
1540 Providian Center
400 West Market Street
Louisville, KY 40202

Utica Mutual Insurance Co.
180 Gevesee Street
New Hartford, NY 13413

and hand delivered to:

Hon. S. Bradford Smock
Office of Legal Services
Natural Resources and Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

Distribution:

James L. Dickinson, Hearing Officer
Division of Field Services
Prestonsburg Regional Office
LTS
NCJ

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jld 08\17\95 (ND)
The Hearing Officer, James L. Dickinson, having submitted a Report and Recommended Order, recommending the dismissal of the above-styled action and the Secretary having considered the Report, any exceptions and replies, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows,

1. The Hearing Officer Report, dated August 31, 1995, is HEREBY ADOPTED AND INCORPORATED herein as if set forth verbatim.

2. The Petitioner has WAIVED its right to an Administrative Hearing by failing to timely file a Petition contesting the determination of bond forfeiture.

3. The above styled action is DISMISSED with prejudice.
4. This is a FINAL and appealable Order.

SO ORDERED this the ____ day of ____________, 199__.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

PHILLIP J. SHEPHERD,
SECRETARY

APPEAL RIGHTS

Pursuant to KRS 350.032, any person aggrieved by a Final Order of the Secretary may obtain a review of the Order by filing in the Circuit Court of county within which the mine (surface mining permit) is located or in the Franklin Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days of the entry of this Order. A copy of the Petition must be served upon the Cabinet.
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing SECRETARY'S ORDER was, on this ____ day of ______________, 199__, mailed by first-class mail, postage prepaid to:

Hon. Thomas E. Roma, Jr.
Parker & O'Connell
1540 Providian Center
400 West Market Street
Louisville, KY 40202

Utica Mutual Insurance Co.
180 Gevesee Street
New Hartford, NY 13413

Brashea Coal Company, Inc.
P. O. Box 5
Manton, KY 41648

and hand delivered to:

Hon. S. Bradford Smock
Office of Legal Services
Natural Resources and
Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

DOCKET COORDINATOR

Distribution:

James L. Dickinson, Hearing Officer
Division of Field Services (Bond Forfeiture Section)
Division of Field Services
Prestonsburg Regional Office
NCJ
BF/Order File
LTS
JK

e:\docs\aof\22371.007
APPOLLO FUELS, INC.,

VS.

ORDER OF THE SECRETARY

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET,

RESPONDENT.

** * * * * * * * *

THIS MATTER being before the Secretary upon the issuance of a Report and Recommended Order of the Hearing Officer, James L. Dickinson, and the Secretary having considered the Report and Recommended Order, and any Exceptions and Responses thereto, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Hearing Officer's Report filed in the Record on May 23, 1996, is ADOPTED AS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW in this matter and is incorporated herein by reference and made a part hereof, as if set forth verbatim.

2. The Respondent's Motions to Dismiss the Petitions filed by Appolo Fuels, Inc. are GRANTED and the Petitions are DISMISSED without prejudice.

3. This is a FINAL AND APPEALABLE ORDER.
SO ORDERED this 16th day of July, 1996.

JAMES E. BICKFORD
SECRETARY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

APPEAL RIGHTS

In accordance with the provisions of KRS 350.0305 and KRS 350.032, any person or party aggrieved by a Final Order of the Secretary resulting from a hearing may obtain a review of the Final Order by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days after the entry or rendition of the Final Order, and a copy of the Petition must be served upon the Cabinet.
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing SECRETARY'S ORDER was, on this 15th day of July, 1996, mailed, postage prepaid, to:

HON JAMES R GOLDEN
DENHAM GOLDEN & NAGLE
PO BOX 398
MIDDLESBORO KY 40965

APPOLO FUELS, INC.
P.O. BOX 1727
MIDDLESBORO, KY 40965

and hand delivered to:
Hon. Ronald P. Mills
Office of Legal Services
Natural Resources and Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

Docket Coordinator

Distribution:

James L. Dickinson, Hearing Officer
Division of Permits
Middlesboro Regional Office
NCJ
WestLaw
BAF\Order File
LTS
Fed Services
JK

e:\docs\pdh\22739.010
APPolo FUELS, INC.,

VS.

HEARING OFFICER'S REPORT
AND
RECOMMENDED SECRETARY'S ORDER

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET,

RESPONDENT.

* * * * * * * * *

THIS CONSOLIDATED REPORT AND RECOMMENDED SECRETARY'S ORDER stems from consideration of Respondent's Motions to Dismiss two Petitions for Administrative Review. In the Petitions, Appolo Fuels, Inc., hereinafter "Appolo" challenged two determinations (one for each permit) of the Division of Permits, Department of Surface Mining Reclamation and Enforcement stating that Appolo in accordance with 405 KAR 18:010, Section 6, must provide a plan for protection against a sudden release of water. In its Motions to Dismiss, the Natural Resources and Environmental Protection Cabinet, hereinafter "Cabinet," argued that the one of the Petitions had not been timely filed; alternatively, the Cabinet urged the dismissal of both Petitions because they were an attempt to review a determination of the Cabinet that was not yet final.

Oral arguments on this matter were conducted at Prehearing Conference held on February 8, 1996. At that time, the Hearing Officer announced that the Cabinet's contentions concerning the reviewability of the Cabinet's determinations were well taken and that
accordingly, he would recommend to the Secretary that Appolo's Petitions be dismissed without prejudice. This Report and Recommended Order sets forth the Findings of Fact and Conclusions of Law supporting this recommendation.

I. FINDINGS OF FACT

Based upon a consideration of the Appolo's Petitions for Review and the attachments made thereto, the Cabinet's Motions to Dismiss and a consideration of the Record as a whole, the Hearing Officer makes the following Findings of Fact:

1. Appolo is a corporate entity authorized to transact business in the Commonwealth of Kentucky and is the holder of Surface Coal Mining and Reclamation Operations Permit, Nos. 807-5137 and 807-5104. As issued by the Division of Permits, the Permits authorized the performance of underground mining with surface effects. Permit No. 807-5137 was issued on December 4, 1992; Permit No. 807-5104 was issued on March 16, 1988 and renewed in October of 1993.

2. The Natural Resources and Environmental Protection Cabinet is a duly authorized agency of the Commonwealth of Kentucky and is empowered under the provisions of KRS Chapter 350 and the regulations promulgated thereto to issue Surface Coal Mining and Reclamation Operations Permits and is also authorized, among other things, to conduct mid-term reviews in accordance with 405 KAR 8:010, Section 19.

3. On December 12, 1994, the Department for Surface Mining Reclamation and Enforcement amended 405 KAR 18:010 by adding new Section 6. This new provision created a standard requiring underground coal mines to provide a buffer zone of unmined coal. The purpose of this regulations was to protect against a sudden release of accumulated waters from the underground mine. This regulation was an implementation of Reclamation Advisory Memorandum (RAM) No. 114, as issued by the Department on May 3, 1994.

4. On May 15, 1995, the Division of Permits informed Appolo that it would be conducting a mid-term review on both Permits in accordance with 405 KAR 18:010, Section
19. Subsequently, on September 29, 1995, the Division issued a letter to Appolo ordering Appolo to submit certain modifications to Permit No. 807-5137 including the following:

Item 12.2: The permittee must provide a plan for protection against a sudden release of water accumulated in underground workings to the land surface in accordance with 405 KAR 18:010, Section 6, as amended on December 12, 1994. The plan must include the calculation of the width of the unmined barrier of coal and show its (sic) location on the MRP [Mine Reclamation Plan] Map. (Brackets supplied)

5. An identical determination was made by the Cabinet with respect to Permit No. 807-5104 on November 14, 1995. As to both determinations, the Cabinet noted that the Permittee was to file with the Cabinet Mid-Term Review Modifications within seventy-five days of the date of the letter. According to the Division of Permits, failure to do so could result in enforcement action by the Division of Field Services. Neither of these letters, however, indicated that Appolo could request an Administrative Hearing.

6. With respect to the determination letter of September 29, 1995, Appolo directed a letter to the Division of Permits on October 23, 1995, requesting the Division to provide findings supporting the Order for Modification. On October 30, 1995, the Division of Permits responded to Appolo by noting that the letter of September 29, 1995, constituted the Cabinet's findings. The letter also indicated that these findings were subject to administrative and judicial review pursuant to 405 KAR 7:092, Section 8.

7. Appolo's Petition requesting a review of this determination was filed within thirty days of receipt of the Cabinet's October 30, 1995 letter. Appolo's request for a review of the Cabinet's November 14, 1995 letter was also filed within thirty days of receipt.

II. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Hearing officer makes the following Conclusions of Law for consideration by the Secretary:
8. In its Petitions, Appolo argues that the Cabinet's determinations should be rescinded on the grounds that the letters did not contain any findings as to why permit modifications to accommodate the requirements of 405 KAR 18:010, Section 6 were necessary. This argument is premised on Appolo's contention that under 405 KAR 8:010, Section 19, the Cabinet cannot order that the permit be revised or modified without first entering findings supporting its Order. Appolo also argues that the Cabinet's review process is arbitrary and capricious in that the Cabinet was not requiring other permittees, whose permits had already been through the mid-term review process, to modify their permits. Finally, Appolo contends that 405 KAR 18:010, Section 6 violates KRS 13A.130, which prohibits the promulgation of legislation more stringent than the federal regulations governing the surface mining program. It is not disputed that the Federal Surface Mining Program does not have a provision comparable to this regulation.

9. The Cabinet responded to these assertions by first arguing that one of Petitions had not been timely filed. As to both Petitions, the Cabinet further argues that notwithstanding the language in the October 30th letter which stated that the determination could be reviewed by this Office, the letters ordering modification of the permits were not the type of determinations from which Appolo could seek administrative review.

10. At this point, it should be observed that Appolo also sought Temporary Relief under 405 KAR 7:092, Section 12, on these determinations in Appolo Fuels Inc. v. N.R.E.P.C., File Nos. TRH-22738-037 and TRH-22739-037. In that action, the Hearing Officer considered arguments similar to the ones now being raised by the Cabinet and concluded that the Cabinet's argument concerning Appolo's failure to timely file a Petition was without merit. According to the Temporary Relief Hearing Officer, the company acted reasonably when it promptly requested an elaboration of the Division's order requiring Appolo to modify its Permit and thereafter filed its request within the regulatory time period. This Hearing Officer agrees with that decision. As noted, Appolo filed its Petition within thirty
days of being informed by the Division that the September 29, 1995 letter was in fact a finding and arguably subject to review. Under these facts, Appolo timely filed its Petition.

11. The only question left to be resolved then is whether the Division of Permits made a determination of sufficient finality concerning the provisions of 405 KAR 18:010 Section 6, that it can be effectively reviewed by this Office for recommendation to the Secretary. The starting point for this inquiry lies with the nature of the mid-term review and the provisions of 405 KAR 8:010, Section 6.

12. Under the provisions of 405 KAR 8:010 Section 19, the Cabinet is to conduct a review of any permit that has been issued. Such reviews are to be conducted at midterm of the permit or every five years, whichever is more frequent. Once the review is completed, the Cabinet is authorized to issue an order requiring revision or modification of the permit as may be needed to ensure that the permit remains in compliance with the regulatory program. Under 405 KAR 8:010, Section 19(4), these determinations are subject to administrative review upon the filing of a Petition for Review in accordance with 405 KAR 7:092 Section 8.

13. As noted, the Cabinet directed Appolo to submit a plan for protection against the sudden release of water from the underground workings of both permits. This requirement had first been suggested in RAM No. 114, where the Department notified the regulated community in 1994 that due to a rash of "blowouts" of large volumes of water from abandoned underground workings, it was strongly recommending that underground mines institute the practice of leaving a coal barrier that would be equal to fifty feet in width plus an additional distance equivalent to the maximum hydrostatic head that could be reasonably expected to build up on the outcrop barrier. These provisions became the heart of the new regulation. As will be discussed below, however, the regulation, itself was not quite as stringent as the RAM, nor was this formula cast in stone.

14. The central focus of Appolo's arguments with respect to the Cabinet's "order" that it should set forth a water protection plan is its contention that the Cabinet made this
request without having first made any findings.\textsuperscript{1} Ironically, it is precisely this argument which calls into question whether there is any substantive issue to be reviewed at this time.

15. Under 405 KAR 8:010, Section 19, the Cabinet is mandated to review permits to ensure their continued compliance with the regulatory program. After the issuance of these permits, 405 KAR 18:010 Section 6 became effective, and thus, it became incumbent upon the Division of Permits during the mid-term review process to remind Apollo that it would have to submit a plan indicating how it intended to comply with this new regulation. That the regulation could be retroactively applied in this instance, see KRS 350.230, cannot be disputed; nor can it be seriously disputed from the Cabinet's perspective that Appolo would be required to comply with those provisions.

16. 405 KAR 18:010, Section 6 states in pertinent part:

(1) Except where surface openings are approved in the permit, an unmined barrier of coal shall be left where the underground workings dip toward and approach the land surface. The cabinet shall waive this requirement if it determines that the proposed operation meets all other applicable requirements of 405 KAR Chapters 7-24 and KRS Chapter 350 and also meets either paragraph (a) or (b) of this subsection:

(a) The applicant has demonstrated in the permit application to the satisfaction of the cabinet, based upon the geologic and hydrologic conditions in the permit area, that accumulation of water in the underground workings cannot reasonably be expected to occur; or

(b) Adequate measures to prevent accumulation of water in the underground workings have been included in the permit

\textsuperscript{1} As previously discussed, Appolo argued that the review process itself was arbitrary and capricious in that it only ordered some but not all of the Permittees to start the process of modifying their permits. As a general rule, arguments relying on an allegation of selective enforcement are not well received. Appolo also argued that this regulation was invalid because it was allegedly more stringent than the federal regulatory program. Questions of stringency and validity of regulations are within the province of the judicial branch and are not subject to being reviewed by this Hearing Officer. See Cannonsburg Environmental Associates, LTD v. NREPC, DWM-20748-042 (1995). See also NREPC v. R.H. Minerals of Western Kentucky, File No. APD-11593--043 (1995) where the Secretary in reversing a Hearing Officer’s decision stated that “stringency” issues are not for the Hearing Officer to decide. In any event, given the fact that the Cabinet’s determinations are not reviewable, these issues have been rendered moot and will not considered.
application and have been approved by the cabinet. (Emphasis added)

17. The outcrop barrier provisions are somewhat different from most of the Cabinet's regulations in that they afford a number of options to the permittee as to how the objectives of the regulation are to be met. In addition, the regulation was specifically crafted in such a way as to deal with the question of how permittees, who had finished mining in a given area prior to the enunciation of the new provisions, were to retroactively comply with the regulation. Contrary to Appolo's concerns that it would be faced with an impossible condition, the regulation is quite clear that there are several alternatives to the requirement of maintaining a barrier of coal in conformity with the formula set forth in the regulation. It should also be noted that in addition to these alternatives, the regulation specifically provides that in the event a barrier is determined to be needed, the Cabinet on a case-by-case basis could approve a barrier less than the required minimum. In short, there is nothing absolute in this regulation. It is also clear that a final determination as to the nature of the plan is dependent upon the information submitted by the permittee.

18. Given this interpretation of the regulation, it is evident that Appolo misunderstood the import of the Cabinet's mid-term review letters. It is also clear, however, that some confusion could have been avoided if the Cabinet had pointed out in its letters that while a plan would be needed, the plan could consist of an assertion, supported by relevant data, that the permittee would be eligible for a waiver of the barrier requirement or that some amount of unmined coal less than the minimum width would be sufficient. As the Cabinet notes, this letter was not drafted by an attorney, and thus it is understandable that there may have been some confusion as to what was being requested.²

² The Division of Permits seemingly signaled its own opinion that this determination was not yet ready for an administrative review, when it omitted the language usually found in such letters stating that the Modification Order was subject to administrative review under 405 KAR 18:010, Section 19(4). Unfortunately the Division compounded the confusion when, after being pressed for a clarification of its September 29th letter, it stated in its letter of October 30 that the determination was subject to review. In contrast, the November 14, 1995 letter, which dealt with the remaining permit and was virtually identical to the September 29th letter, again made no mention of the administrative review process.
19. In any event, it is clear, notwithstanding the literal text of the letter itself, that a reviewable determination had not yet been made.\(^3\) In reality, the Cabinet was not ordering Appolo to do anything, other than to start the process of accommodating itself to this new regulation. Thus, at this stage of the mid-term review process, the Cabinet did not need to make any factual findings. The only relevant legal finding that at this juncture had been made was that a new regulation had been promulgated, and Appolo would have to demonstrate its entitlement to a waiver or demonstrate that its Permit was already in conformity with the outcrop barrier provisions. Appolo's argument that the Cabinet did not have any facts upon which to make a decision serves only to reinforces this point.

20. In the final analysis the question is one of whither what remedy? In its Petition, Appolo requests that the permitting letter be rescinded and that the matter be remanded to the Division of Permits so that it can make specific findings. In suggesting this remedy, Appolo ignores the fact that the information needed by the Division of Permits to make any kind of reviewable determination rests exclusively within the Appolo's domain. Whether the Hearing Officer agrees with Appolo's request and issues a report recommending to the Secretary that this matter be remanded or whether the Hearing Officer agrees with the Cabinet and issues a report recommending that the matter be dismissed, the result in either case will be exactly the same: Appolo will be obliged to submit information to the Division of Permits. Posited this way, there is no question that the September 29 and November 14 determinations are not reviewable.

21. In agreement with this conclusion is the recent Order of the Secretary in *Willig v. N.R.E.P.C. et al.*, File No. DOW-22769-37 (Order issued April 23, 1996,) which discussed in the context of a different issue the question of finality and the purpose underlying an administrative review of Cabinet permitting determinations. In that case, the Hearing Officer who concluded that a determination made by the Division of Water was not subject to review

\(^3\) The Temporary Relief Officer also reached the conclusion that at this point in the review process there was nothing to review. See Order Denying Temporary Relief at p. 2.
who concluded that a determination made by the Division of Water was not subject to review because it was not a final determination, cited to the well understood principals of finality as enunciated in *Abbott Laboratories v. Gardner*, 387 U.S.136, 87 S.Ct. 1507, 18 L .Ed. 2d 681 (1967). In that case, as well as several others, the key question was whether the agency had made a preliminary or final decision. If the decision was preliminary, with other action to follow, the initial determination, absent some compelling hardship, was ordinarily not subject to review. *City of Jersey City v. Hodel*, 714 F. Supp. 126 (D.N.J. 1989). The Hearing Officer in the *Willig* case also noted that adherence to this principal served the purpose of avoiding having the Secretary become enmeshed in an on-going permitting review process. Once a reviewable determination is made, then and only then, should this Office become involved in the permitting decision. The decision made by the Division of Permits, which in effect was a request for more information, is such a decision and is therefore not subject to review at this time.

22. In conclusion, although an argument can be made that the literal language of 405 KAR 8:010, Section 19 implies that a review would be available from any determination, this regulation, as well as its enabling legislation KRS 350.0301, conditions such reviews upon a finding that the petitioner is "aggrieved." There is also an implied requirement, as discussed above, that the review process would result in a final remedy, thereby avoiding a piecemeal review of an agency's ongoing review process. In the context of this case, where it is clear that the Cabinet's letters were in effect a request for more information, there is no substantive basis supporting Appolo's assertion that it was aggrieved by the Division's statements. In addition, given the fact that the Division of Permits needs additional information in order to determine whether a coal barrier is needed, there is no effective remedy to be accorded to

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4 It should be pointed out that in *Willig*, the Hearing Officer was applying the provisions of KRS 224.10-410 which specifically provides that only certain types of final permitting decisions were subject to administrative review. Irrespective of the precise language of the reviewing statute, the case is relevant to this Report with regard to its analysis of the judicial doctrine of a need for finality so that an effective remedy can be given by the Courts.
Appolo at this time. In short, once a determination is made as to what would be required for the issuance of a modified permit and assuming the Petitioner is aggrieved by that determination, it can then have the matter reviewed by this Office.

III. RECOMMENDATION

In consideration of the foregoing, the Hearing Officer respectively recommends that the Secretary sign the attached Order granting the Cabinet's Motions to Dismiss and Dismissing without prejudice Appolo's Petitions for Administrative Review.

SO RECOMMENDED this 23rd day of May, 1996.

JAMES L. DICKINSON
HEARING OFFICER

RIGHT TO FILE EXCEPTIONS

Pursuant to KRS 350.0301, any party may file Exceptions to this Report and Recommendation within fourteen days of service of this Report. Any party may submit a written response to the Exceptions within twenty-one (21) days of service of the Report and Recommended Order. Thereafter, the matter shall stand submitted to Secretary, who shall consider the Report, any Exceptions and Responses, and the Recommended Order and decide the case.
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing HEARING OFFICER'S REPORT AND RECOMMENDED SECRETARY'S ORDER was, on this 23rd day of March, 1996, mailed, postage prepaid, to:

HON JAMES R GOLDEN
DENHAM GOLDEN & NAGLE
PO BOX 398
MIDDLESBORO KY 40965

APPOLO FUELS, INC.
P.O. BOX 1727
MIDDLESBORO, KY 40965

and hand delivered to:
Hon. Ronald P. Mills
Office of Legal Services
Natural Resources and Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

Distribution:

James L. Dickinson, Hearing Officer
Division of Permits
Middlesboro Regional Office
LTS
NCJ

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This REPORT, pertains to a telephonic Prehearing Conference held on January 6, 1995, at 2:00 p.m. EST. Present for the Petitioner, Save Our Rural Environment, was the Hon. Mark Feather. Present for the Respondent, Daviess County, were the Hons. Allen Holbrook, William R. Dexter and Robert M. Kirtley. Present in person for the Respondent, Natural Resources Environmental Protection Cabinet, hereinafter Cabinet, was the Hon. Kathryn Matheny. The following recounts the events that transpired at that proceeding.
This case was initiated by the filing of a Petition and Request for Administrative Hearing by a group bearing the acronym of SORE (Save Our Rural Environment). In the initial Petition, SORE announced that it was aggrieved by a determination made by the Division of Waste Management that it would issue to Daviess County a permit authorizing the construction of a contained waste disposal landfill in Daviess County. By way of summary, SORE in its original Petition argued that the Division's determination was arbitrary and capricious in that the permit application submitted by the Respondent, Daviess County failed to set forth an (1) adequate explosive gas plan, (2) a satisfactory leachate collection system which would comply with the regulatory requirements, (3) consistent representations concerning the slope of the proposed liner and (4) adequate provisions for the testing of the leachate storage tanks. In addition to these allegations, SORE also argued that the plan was deficient in that the proposed site was unstable due to the existence of mine spoil which was inadequately compacted. Finally, the Petitioner maintained that the Cabinet failed to give sufficient consideration to the potential impact of earthquakes. The Petition/letter was filed with the Division of Waste Management on November 14, 1994.

Daviess County reacted to this Petition by immediately filing a Motion to Dismiss. In its Motion, the Respondent argued that the Petition had not been timely filed under the auspices of KRS 224.10-420 in that any Petition protesting a final determination of the Cabinet must be filed within thirty days of actual notice of the Cabinet determination or within thirty days of the date the petitioner could have reasonably had notice. In addition to this allegation, Daviess County also argued that SORE was not a person with standing to file an administrative complaint and that in any event SORE had already been heard in this matter and was not entitled to an administrative hearing on the matter. To a certain extent, Daviess County noted its frustration with the Petition in that it did not know exactly who the members were of this organization. Nevertheless based on the information that it did have, it argued that SORE was on notice as to the decision to issue the construction permit as early as September 27, 1994 and as late as October 11, 1994.
Given the urgency of the matter, an initial Prehearing Conference was held on December 9, 1994. At that time, the Petitioners had not filed a written response to the Motion to Dismiss. After some argument on the matter, this Deputy Hearing Officer directed the Petitioner to submit a Motion to Amend its Petition and to file with the Office a verified Amended Petition setting forth the names of the particular individuals of the organization who were aggrieved by the Cabinet's determination. In addition, the Deputy Hearing Officer directed the Petitioner to supply information as to when the various members knew of the Cabinet's decision to issue Daviess County a construction permit for its contained landfill. A Second Prehearing Conference was scheduled for January 6, 1995.

By the date of the Second Prehearing Conference, the Petitioner had filed a Response to the Motion to Dismiss, a Motion to Amend Petition and a verified Amended Petition in support of its Request for an Administrative Hearing. Of particular note is the fact that the verified Amended Petition, as attested by counsel for SORE, set forth the names of some, if not all, of the membership of SORE, characterized as being a citizens action group. The Amended Petition also alleged that the various members lived close or adjacent to the proposed contained landfill and specifically alleged that the construction permit as approved would present a danger to the Petitioners' health and the environment in which they lived. The specifics of the alleged deficiencies were set forth in the original Petition as filed on November 14, 1994 and have been recounted above.

Also on file at the date of the Prehearing Conference was an extensive Response as filed by Daviess County. The Cabinet, which is a Co-Respondent in this matter, has not sought to dismiss the Petition and has declined to endorse the positions taken by the opposing parties in this matter.

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1 Under the provisions of KRS 224.40-310 (6) construction cannot begin until there is a Final Order of the Secretary. Thus, while this matter is pending, Daviess County is effectively stymied from commencing any activities at the landfill site. This delay is of particular concern to the County in that the Henderson County Landfill, which is the current recipient for Daviess County's solid waste, is slated to close in July 1995.
After hearing oral arguments at the telephonic Prehearing Conference, and being otherwise sufficiently advised, the Deputy Hearing Officer announced he would issue a Report overruling the Motion to Dismiss, granting the Motion to Amend and accepting for the purposes of filing the tendered Verified Amended Petition. The Parties then discussed the necessity of a prompt formal administrative hearing and were thereafter able to agree on the dates for such a hearing as well as other prehearing events.

Since this appears to be a case of first impression, the balance of this Report will be devoted to the rationale supporting the Deputy Hearing Officer's decision. This Report will also set forth the schedule of events for this proceeding. The principal parties are to be commended for presenting well-written arguments and discussion of what is an admittedly complex issue pertaining to the procedure for the timely filing of a Petition protesting the issuance of a construction permit for a solid waste landfill.

A determination as to whether this Petition was timely filed revolves around two pertinent statutes. The first, KRS 224.10-420, is the statute most frequently invoked by those who believe they are aggrieved by a Cabinet's determination. The statute provides in pertinent part:

Any person not previously heard in connection with the issuance of any order or the making of any final determination arising under this chapter by which he considers himself aggrieved may file with the cabinet a petition.... An order or final determination includes, but is not limited to, the issuance, denial, modification, or revocation of a permit, but does not include the issuance of a letter identifying deficiencies in an application for a permit, a registration or a certification or other non final determination. This subsection does not abrogate the right to a hearing on a draft permit afforded by KRS 224.40-310.... The right to demand a hearing pursuant to this section shall be limited to a period of thirty days after the petitioner has had actual notice of the order or final determination complained of, or could reasonably have had such notice. (Emphasis added)
As pointed out by the Petitioner, this statute, which was most recently amended in 1992, pertains only to final determinations and orders of the Cabinet. In addition the statute cross references to the provisions of KRS 224.40-310 and implies that notwithstanding the lack of finality, an administrative hearing can be conducted on the Cabinet's initial determination that a construction permit should be issued to a particular applicant. This contention brings into play the second key statute, KRS 224.40-310 (6), which provides as follows:

No permit to construct or expand ... shall be issued until at least thirty days have expired following publication of the application. The applicant for a permit shall establish the date of publication by verified affidavit from the newspaper which publishes the advertisement.\(^2\)

This section also provides that in the event a hearing is requested, actual construction may not commence until the Secretary renders a final order in the matter.

From the facts of this case, which are essentially undisputed, it appears the Cabinet initially determined that the construction permit could be issued and to that effect sent on or about September 27, 1994, notification letters to a variety of concerned citizens as well as the Messenger-Inquirer, the local newspaper. The letters indicated that the newspaper notice of the decision to issue the permit would be published on September 30, 1994. Evidently, there was an error in the first notice and consequently, a second notice, dated October 11, 1994, was sent to Messenger-Inquirer. This Notice was published on October 13, 1994. Set forth in the body of the Notice was the statement, in conformity with both 401 KAR 47:140 and KRS 224.40-310, that requests for an adjudicative hearing by any person who may be aggrieved by the decision

\(^2\) The cabinet also has in place a regulation, 401 KAR 47:140 § 11 which provides that informal hearings and adjudicative hearings, or both, are available for the review of such determinations. Section 11 specifically provides that requests for an adjudicative hearing must be made within thirty days of the date of publication of the public notice of the issuance of a draft permit. The public notice, in effect, acts as a cutoff notice for the filing of such requests in that it would be difficult for any person, save perhaps, Rip Van Winkle, to contend that he could not reasonably be expected to have notice of the decision to issue the construction permit.
must be filed with the Division of Waste Management by no later than November 14, 1994. See Petitioner's Exhibit A. Thus, the Cabinet's own publication announced to the public, including the members of SORE and its counsel, that the cutoff date for the filing of a timely petition would be November 14, 1994.

Notwithstanding the language of the Notice, Daviess County earnestly argues that the citizen petitioners had notice of the Cabinet's decision to issue the permit much earlier than October 13, 1994 and by its calculations the latest date for actual knowledge of the decision was October 11, 1994. Relying on the actual knowledge language of KRS 224.10-420, Daviess County maintains that a request for a hearing at the very latest should have been filed by November 10, 1994. After due consideration of the statute and the purpose of the public notice provisions, this argument must necessarily fail because in a very real sense, as will be explained below, Daviess County is attempting to convert a shield into a sword.

It is well recognized that statutes prescribing a deadline for the initiation of an administrative proceeding are jurisdictional in nature and a person's failure to timely invoke the administrative process can deprive an agency of the statutory authority to consider a complaint. Jenny Wiley Health Care Center v. Commonwealth, Ky., 828 S.W. 2d 657 (1992). At the same time, the Cabinet has a compelling duty to consider all legitimate claims that may be filed, especially in the arena of landfill applications. It would be an understatement to say the least that the siting of a landfill is of intense concern to the body politic, especially those who may be living in the vicinity of a proposed landfill. Generally speaking, as reflected in KRS Chapter 224 and the Cabinet's regulations, the philosophy underlying the Cabinet's permitting decisions is to solicit a maximum amount of public input and to allow those aggrieved by the Cabinet's determination broad access to an administrative forum. To that end, the Cabinet's statute for the timely filing of

3 As chance would have it the thirtieth day for filing fell on Sunday, November 13, 1994, a day that the Division offices are closed. Under KRS 400 KAR 1:030 § 4, as well as KRS 446:030, if the deadline for performance of a certain event falls on a weekend or holiday, then the date for filing is extended to next available date the state office is open. In this case, the person who wrote the notice correctly calculated the last day for filing in conformity with these provisions. See Jenny Wiley Health Care Center v. Commonwealth, Ky. 828 S.W. 2d 657 at 658.
a request for hearing is a very different from the usual prescription for the filing of a request for a hearing. Under KRS 224.10-420, the time for filing is triggered by the occurrence of one or the other of two subjective events, either from the date of actual knowledge or from the date the determination could have been reasonably been known. Taken literally, where there is a dispute as to the timeliness of a petition, the subjective language of the statute could require an evidentiary hearing as to when a petitioner knew or reasonably should have known of the Cabinet's determination.

To a certain extent, the uncertainty as to the last day for filing has been mitigated by a variety of means. As the Respondent pointed out, the regulation pertaining to public comment on landfill applications sets forth a variety of mechanisms by which notice is given to those persons or entities who arguably may be aggrieved by the Cabinet's determination. These mechanisms range from the sending of letters to those individuals who have expressed an interest in the matter to the compiling of dissemination lists of those organizations and persons known to have a broad interest in the Cabinet's decisions. The sending of such letters has the effect of giving actual notice to those who may have expressed a direct concern in the proceedings. Also included in this arsenal of potential weapons for informing the public, however, is the broad requirement that all permitting decisions be published in a local newspaper of mass circulation for the county where the landfill is to be sited. Such notices have the effect of eliminating the uncertainty as to when a person should have reasonably known of the Cabinet's determination. Thus, this requirement lends some degree of certainty as to when it can be safely determined that the deadline for filing a request has expired and the decision is no longer subject to administrative review. In this case, such a newspaper notice was made which established November 14, 1994 as the cutoff date.

The Respondent argues that the Petitioners are not entitled to rely on this date given in the newspaper, but instead must file within thirty days of the date they actually knew of the decision. This argument cannot be countenanced for the very simple reason that it implies that each Petitioner is entitled only to actual notice. In other words, the Respondent is reading into
the statute the requirement that a filing must be made within 30 days of the date the Petitioner first had actual knowledge of the decision. The statute, however, is broader than the Respondent would have it. In this case, as in other permitting determinations, there can be a range of opportunities for the filing of a Request. The window of opportunity opens with the issuance and receipt of the letters that are directly sent to interested persons. It closes with the date given in the newspaper notice. During that interval, which may be considerably longer than thirty days, any person, including those who may have previously had actual knowledge, are free to file a Request for a Hearing, so long as the filing is within the deadline provided in KRS 224.40-310. Although the Respondent may not like it, the statutes do not require this Hearing Officer to engage in a calculation as to when each and every petitioner may have received actual notice. It is sufficient for purposes of determining whether a petition is timely to rely on the date given in the newspaper notice, so long as it is correctly calculated. Given the circumstances of this case, and given the fact that no further action can take place with respect to the construction of the landfill area until the expiration of the comment period, it would be absurd to construe this statute in such a way as to bar an interested petitioner from relying on the newspaper date, simply because an earlier notice of the Cabinet's proposed decision may have been received. In short the Respondent's arguments exalt form over substance and is contrary to the spirit of KRS 224.40-310, which was designed to maximize citizen participation, not to limit it.

The Respondent's remaining arguments do not require a great deal of discussion. Although the Respondent may be genuinely perplexed as to the exact identity of its opponent, it knew or should have know that an organization going by the name of SORE was actively interested in the permitting proceedings. Whatever confusion there may have been as to the composition of SORE has now been resolved with the filing of the Amended Petition which articulated the names of some or all of the citizen action group members and has set forth sufficient facts to establish the fact that one or more of them may be legitimately aggrieved by the Cabinet's determination.
The Respondent's argument that SORE and its membership have already been heard is equally without merit. The requirement of KRS 224.10-420 that a "person not previously heard" may file a petition does not bar those persons who participated in the informal hearing and comment proceedings from seeking administrative relief in this forum. In the context of the statute, "previously heard" means previously heard in a formal administrative hearing. Any other interpretation would have the effect of depriving an administrative hearing to those persons most interested in the Cabinet's determination. A result that would, to say the least, be somewhat absurd.

Having considered the Respondent's arguments and being otherwise sufficiently advised,

IT IS HEREBY ORDERED as follows,

1. The Respondent's Motion to Dismiss is DENIED; the Petitioners' Motion to Amend its Petition is GRANTED and the verified Amended Petition is deemed to be filed as of January 6, 1995.

2. A Formal Administrative Hearing on the issues presented in the Petitioner's Petition shall be held on **Monday, March 20, through Wednesday, March 22, 1995, at 9:30 a.m. CST each day at a location to be announced in Daviess County, Kentucky.** This Formal Administrative Hearing is assigned second case status. Failure to appear may result in an action adverse to the party failing to appear.

3. In the event the Formal Administrative Hearing cannot be conducted on dates set forth in paragraph 2, a Formal Administrative Hearing on the issues presented in the Petitioner's Petition shall be held on **Monday, April 24, through Friday, April 28, 1995, at 9:30 a.m. CDT each day at a location to be announced in Daviess County, Kentucky.** This Formal Administrative Hearing is assigned FIRST case status. Failure to appear may result in an action adverse to the party failing to appear.

4. On or before **February 28, 1995,** the parties shall complete discovery with any pleadings requiring a response being filed at least thirty days prior to the aforementioned cutoff date.
5. A Final Prehearing Conference shall be held on **March 6, 1995, at 10:30 a.m.** in the Main Conference Room of the Office of Administrative Hearings. The purpose of the Final Prehearing Conference will be to resolve any issues pertaining to the Formal Administrative Hearing and to consider any motions that may be filed pursuant to item 7 of this Order. The Parties may participate telephonically by calling 502-564-7312 at the designated time.

6. By **March 6, 1995**, the parties shall file with the Office and serve a Prehearing Memorandum which shall contain the following:

   (a) a succinct statement of the facts of the case and the questions of fact and questions of law;
   (b) a listing of all agreed stipulations;
   (c) a listing of all exhibits the filing party intends to use at the hearing;
   (d) a listing of all witnesses the filing party intends to call at the hearing, together with a brief summary (references to depositions not being sufficient) of the expected testimony of each witness;
   (e) a listing of all pending motions;
   (f) a listing of all anticipated motions in limine regarding evidentiary questions; and
   (g) a brief statement of the status of settlement negotiations, if any, not to exceed one page in length.

7. All Motions, including Motions for Summary Disposition must be filed in accordance with 400 KAR 1:090 Section 9. Procedures pertaining to all Motions shall be in accordance
with the aforementioned regulation. The failure by any party to comply with 400 KAR 1:090 Section 9 may result in a ruling on the motion which is adverse to such party.

SO ORDERED this ___ day of ______________, 1995.

________________________________________
JAMES L. DICKINSON
DEPUTY HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 Fountain Place
Frankfort, Kentucky 40601
(502) 564-7312

NOTICE

The Natural Resources and Environmental Protection Cabinet does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in employment or the provision of services and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities. Any individual who requires special accommodations in connection with any proceeding before the Office of Administrative Hearings should contact Jane P. Wingate at 35-36 Fountain Place, Frankfort, Kentucky 40601 or at (502) 564-7312 (telephone) or (502) 564-4973 (telefax) at least one week prior to the date the accommodations will be needed.
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing ORDER was, on this ___ day of ____________, 1995, mailed by first-class mail, postage prepaid to and

Hon. Mark S. Feather
Brown, Todd & Heyburn
3200 Providian Center
Louisville, KY 40202-3363

Hon. Robert M. Kirtley
Daviess County Attorney
Daviess County Courthouse, Room 202
212 St. Ann Street
Owensboro, KY 42301

Hon. Allen W. Holbrook
Hon. William R. Dexter
Holbrook, Sullivan, Mountjoy et al.
P. O. Box 727
Owensboro, KY 42302-0727

and hand delivered to:

Hon. Kathryn Matheny
Department of Law
Natural Resources and
Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

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DWM-18965-042
Individual Defendants. Accordingly those violations which have been not established by a
preponderance of the evidence and were actively contested by the Individual Defendants
because of the Cabinet’s allegation that they were individually liable for their commission
should be dismissed as to all Defendants.

D. Penalties

1. CWC'S Liability

244. In its Motion for Default the Cabinet has requested the maximum penalty of
twenty-five thousand dollars as authorized under KRS 224.99-010 (5) for each and every one
of the violations cited in the Administrative Complaint. Since CWC has defaulted, the Cabinet
is entitled to a recommendation that it be granted the relief it has requested. Therefore, it is
recommended that the Secretary impose an aggregate penalty of seven hundred and fifty
thousand dollars ($750,000.00) reflecting the maximum $25,000 penalty for each of the thirty
(30) affirmed violations.

2. Individual Defendants' Liability

245. The Hearing Officer determined that the Individual Defendants should be held
liable for the violations of KRS 32:010 § 2 (failure to classify), 401 KAR 35:020 § 6 (general
inspection requirements), 401 KAR 35:030 § 2 (maintenance and operation of drums), 401
KAR 35:030 §§ 3 and 4 (related equipment and testing of equipment), 401 KAR 35:030 § 6
(maintaining required aisle space), 401 KAR 35:180 (use and management of containers), and
401 KAR 32:030 § 5 (for failure to mark as hazardous waste and state accumulation time).

246. In considering the appropriate penalty to recommend for each violation, the
standard that this Hearing Officer has used in the past is derived in part from guidelines issued
by the EPA, as well as the Cabinet. Those include: 1) the seriousness of the violation, taking
into account the complete context of the violation, \textsuperscript{33} 2) the economic benefit (if any) resulting from the violation, 3) the economic impact of the penalty on the violator, including the cost of remediation, 4) the history of other violations on the site by this violator, 5) the culpability of the violator, 6) the good faith actions of the violator to remedy the violation, comply with the law or obey an order of the Cabinet, 7) such other matters as imposition of a just penalty would require, and 8) the number of days the Cabinet shows the defendant to have violated the law. See \textit{NREPC v. Maggard}, DWM-19198-038 (Secretary’s Order rendered June 1994).

247. In its Post Hearing Memorandum, the Cabinet suggested with respect to the Individual Defendants that a penalty of five hundred dollars ($500.00) be imposed for each of the violations associated with the Drum Violation Area. Since the Cabinet believes the violation was in existence since August 1988, the Cabinet also suggested that a separate penalty be imposed for each day of violation, from the date the drums were accumulated in excess of ninety days to the date the drums were shipped off site. The Cabinet’s suggested penalty would total one hundred and twenty thousand dollars ($120,000) for each Individual Defendant.

248. There are substantial difficulties with this proposed assessment, not the least of which is that the Cabinet did not consider the factors listed above, including the Defendants’ ability to pay. In addition, although it is clear that some drums had been accumulated in excess of ninety days, the evidence did not clearly establish that the drums accumulated in

\textsuperscript{33} As noted in \textit{Maggard}, \textit{infra}, seriousness of the violation should take into account such factors as: a) the susceptibility of the site to environmental harm of the type concerned in the case, b) the physical, geographic and chronological extent of the violation, c) the inherent danger to the environment or human health and safety posed by a violation of the type concerned in the case, d) the substantive nature of the violation, e.g., whether it is a reporting violation or a violation of a substantive standard of the law or regulations, and e) whether the violation is correctable and if so, the type and extent of remedial efforts required to correct the violation, taking into account any secondary harm to the environment which may be caused thereby.
April 1988, were still in the Drum Violation Area ninety days later. As Pawlak testified, some of the drums were being reused by the facility as part of the paint washing process.

249. In addition, CWC and the individual defendants were not issued the violation until March 6, 1989. Trying to back date the violation to August of 1988, and prior to the issuance of the Notice of Violation, is entirely too speculative and not supported by the evidence. Consequently, this suggested penalty is not accepted.

250. In truth, very little evidence was introduced by either side as to all of the factors listed above. Nevertheless, the Hearing Officer has considered the relative seriousness of the violations, the cooperation exhibited by Pawlak and Kupchick in correcting the violations and the appropriate amount of deterrence that can be justified with the imposition of a civil penalty. Taking into consideration the factors that have been discussed pertaining to the appropriate amount of penalty that should be imposed, the Hearing Officer, for the reasons to be discussed below, recommends that an aggregate penalty of five thousand five hundred dollars ($5,500.00) be assessed against Pawlak and an aggregate penalty of eleven thousand dollars ($11,000.00) be assessed against Kupchick. In support of this recommendation the Hearing Officer states the following.

a. As to Pawlak

251. The seriousness of these violations, Pawlak's participation, his culpability, and his responsibility for the violations have all been addressed. In addition, a penalty should be large enough to hurt, but not so large as to be devastating. The penalty should also be of an amount that it will have an appropriate deterrent effect on others, without being ridiculously large and thus meaningless to those who are of a similar economic means. One way of
summing up an appropriate penalty was stated in *U. S. E.P.A. v. Environmental Waste Management Control*, 710 F. Supp. 1172 (N.D. Ind. 1989), where the court said:

A civil penalty must provide a meaningful deterrence without being overly punitive; it should be large enough to hurt and it should deter anyone in the future from showing a similar lack of concern with compliance. Id. at 1244.

252. At the hearing, Pawlak stated that his annual income was now thirty-five thousand dollars ($35,000.00), which was not disputed. With respect to Pawlak’s present income, a penalty of $5,500.00 is significant but not devastating and therefore, has a real impact. In addition, the Hearing Officer finds little or no evidence that Pawlak benefited in any way from these violations or that the violations contributed in any significant way to his own economic well being or that of the company. The Hearing Officer also takes into account that the violations were promptly corrected and that Pawlak attempted to cooperate fully with the Division of Waste, at least with respect to these violations.

253. Turning now to the basis for Pawlak’s penalty for the specific violations, as to the violation of 401 KAR 32:010 § 2 (failure to classify) and 401 KAR 32:030 § 5 (failure to mark as hazardous and start accumulation time), the very heart and soul of the hazardous waste program is the prompt and accurate classification and marking of a hazardous waste. Recognizing, however, that waste characterization is complex and that Pawlak believed in good faith he could reuse a material he mistakenly considered to be a reusable product, a penalty of one thousand dollars ($1,000.00), for each of these violations is well supported by the evidence.

254. As to the violations of 401 KAR 35:030 § 2 (maintenance and operation of drums), 401 KAR 35:030 §§ 3 and 4 (needed equipment and testing), 401 KAR 35:030 § 6
(maintaining aisle space), and 401 KAR 35:180 (keeping drums in good condition) all of these violations in one way or another represented a grave potential threat to the environment and are only slightly less serious than the failure to classify and mark violations. Accordingly, the evidence as reviewed above warrants a penalty of eight hundred dollars ($800.00) for each of these violations.

Finally, as to the violation of 401 KAR 35:020 § 6 (general inspection requirements), this violation did not represent as grave a threat to the environment as did the failure to classify. A penalty of three dollars ($300.00) is warranted by the evidence.

b. As to Kupchick

255. Many of the same factors that apply to Pawlak, apply to Kupchick as well. Although there was some unsupported hearsay testimony that Kupchick made a significant amount of money as president, neither documentary nor direct evidence to this effect was introduced by the Cabinet. Nevertheless, Kupchick should be assessed a higher penalty because ultimately he was the sole corporate officer and sole shareholder. The company was under his direct and active command and it was his decision to bring in Pawlak as plant manager without providing him adequate training in all aspects of the plant, including environmental management. Ultimate authority brings with it ultimate responsibility. Under the facts of this case, given his higher degree of responsibility, the penalties imposed for the violations should be double those imposed on Pawlak, for an aggregate amount of eleven thousand dollars ($11,000.00).

256. In conclusion, the Hearing Officer recommends that the Secretary impose an aggregate penalty of seven hundred and fifty thousand dollars ($750,000.00) against CWC for the violations that have been proven with a preponderance of the evidence. Additionally, the
Hearing Officer recommends that Kupchick be assessed a penalty of eleven thousand dollars ($11,000.00) and that Pawlak be assessed a penalty of five thousand five hundred dollars ($5,500.00) as a civil penalty.

E. Remediation

1. Submittal of a Closure Plan

257. In its Administrative Complaint with respect to the remedial measures to be imposed by the Secretary, the Cabinet made the following request:

That each Defendant be ordered to perform all remedial measures sufficient to abate the violations cited (sic) Exhibits Nos. 1 through 11 and to perform all remedial measures necessary to remediate any and all other existing violations of Kentucky’s Water Quality and Kentucky Hazardous Waste Laws.

In its post hearing brief, the Cabinet stated that since CWC had stored a hazardous waste in excess of ninety days, CWC was obligated to submit, pursuant to 401 KAR Chapters 34 and 38, a closure permit for CWC as a hazardous waste storage facility. The Hearing Officer notes that the Cabinet did not specifically put any of the Defendants on notice that part of the requested remedial measures include the submittal of a closure plan under 401 KAR Chapter 34 and 38.\(^{34}\) The Cabinet also did not move to amend its Administrative Complaint to conform to the proof presented at the formal administrative hearing.

258. At the formal administrative hearing, the Cabinet did not present any proof that the inspectors issuing the Huff\Curry NOV ever requested that CWC submit a permit under 401 KAR Chapter 34 and 38. In addition, the evidence establishes the fact that all of the

\(^{34}\) Since the Hearing Officer has concluded that the Cabinet failed to establish the validity of the Hazardous Waste Discharge Violations, there is no need to address the question of whether CWC must submit a closure permit as a disposal facility.