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Clean Water Act/Toxic Pollutants: Kentucky Supreme Court Addresses Adequacy of a Power Plant's Effluent Limits

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The Supreme Court of Kentucky ("Court") in an April 27th decision addressed whether the effluent limits in a Clean Water Act National Pollution Discharge Elimination System ("NPDES") permit issued by the Commonwealth of Kentucky, Energy and Environment Cabinet Division of Water ("Division") to a Louisville Gas and Electric Company ("LG&E") coal-fired steam electric generation and transmission facility in Trimble County, Kentucky were adequate. See *Louisville Gas and Electric Company v. Kentucky Waterways Alliance, et al.* 2015-SC-000461-DG.

A focus of the opinion was whether the NPDES permit should have included requirements for the removal of toxic pollutants such as mercury, arsenic, and selenium.

LG&E applied for an amended NPDES permit for the addition of another generating unit to its plant. The company's NPDES permit application proposed that the new unit's wastewater be treated in the same manner as the existing facility.

The current facility's NPDES permit applied what are described as the United States Environmental Protection Agency's ("EPA") 1982 Guidelines ("Guidelines") to the wastewater (i.e., effluent) that is discharged. They specify the treatment requirements/limits found in the wastewater to be discharged.

The Guidelines are an example of a Clean Water Act National Categorical Standard for a facility that falls within a specific industrial category. They are applicable to the LG&E plant since it fits within the scope of the Steam Electric Generating Facility category.

EPA is stated to have determined in 1982 that it was necessary to defer placing limits in the Guidelines for toxic pollutants in this category's wastewater. As a result, the Court's opinion notes that most facilities of these types:

...met the imposed limits, in significant part at least, by storing their various low-volume waste-water streams in settling ponds. There, many of the conventional pollutants would settle out prior to the discharge of the remaining effluent liquid into a body of water, such as the Ohio River. That had long been the method LG&E employed at its Trimble County facility. There, waste-water, including the FGD effluent, was stored temporarily in a gypsum storage basin to allow various solids and non-dissolved metals to settle. The remaining liquid effluent was eventually discharged into the Ohio.

EPA had deferred establishing limits for the toxic pollutants in such wastewater because the technology for effectively reducing the small amounts in which they occurred was not yet sufficiently developed.

EPA had begun working in 2009 on new Guidelines for the steam electricity generating category during the time LG&E was applying for a modified permit to add the additional unit.

During the public comment phase of LG&E's application for an NPDES permit modification the Kentucky Waterways Alliance ("KWA") and other groups opposed the permit on several grounds. One reason was its failure to require the removal of certain dissolved toxic pollutants such as mercury, arsenic, and selenium from the FGD waste-stream. In other words, they objected to allowing LG&E to meet the effluent limits found in the 1982 Guidelines.

The permit ultimately issued by the Division in 2010 did not include limits on toxic discharges.

KWA and other groups administratively appealed the permit arguing that the failure to include technologies currently available to remove toxic metals from the wastewater rendered the permit invalid.

The Administrative Appeal on this issue was rejected based on a view that the 1982 Guidelines established the applicable effluent limits for such wastewater. The hearing officer addressing the appeal determined the Division was not required to include in LG&E's permit any technology-based limits on the toxic pollutants of concern to KWA.

A Circuit Court subsequently agreed with KWA that the absence of the technology-based effluent limit for the specified toxic pollutants violated the Clean Water Act. It concluded that statutory and regulatory provisions meant to guard against 'gaps' in the EPA's Guidelines by requiring permittees who run up against such gaps in the Guidelines use their 'best professional judgment' ("BPJ") to supply an appropriate, albeit permit – specific, technology-based effluent limits on their own. The Circuit Court also rejected an alternative contention that "even if the permit writer were deemed obliged to conduct a BPJ analysis, she had in effect done so in this case.

The permit was remanded to the Kentucky agency for further proceedings.

The Court of Appeals agreed with the Circuit Court as to both the limited scope of the 1982 Guidelines and the nature of the permitter's duty to determine an appropriate technology-based effluent limit for toxic pollutants the Guidelines did not address. It also concluded that the Circuit Court correctly found that the permit writer failed to perform an adequate BPJ analysis.

The Supreme Court of Kentucky granted Motions for Discretionary Review.

After addressing a jurisdictional issue it held that the Division had not been obligated to include technology-based effluent limits for toxic pollutants in the LG&E permit. In so finding the Court initially undertook a detailed analysis of the NPDES permit issuance procedure and the Clean Water Act provisions that drive effluent limits. In particular, the decision addresses the EPA regulations describing the process for imposing technology-based treatment requirements in permits.

The Court in upholding the Division's issuance of the amended permit stated:

In the face of the 1982 Guideline's express determination that TBELs for the toxic pollutants of concern to the Alliance were not possible, the renewed permit was not required to include best-professional-judgment based TBELs for those pollutants. The Cabinet's determination that the LG&E permit should proceed under 40 C.F.R. § 125.3(c)(1), as opposed to (c)(3), was a reasonable interpretation of the regulation and merits our deference. Furthermore, while technology-based means of limiting the three pollutants at issue may have become available since 1982, the Cabinet's Division of Water permit writer did not abuse her discretion when she deferred any such BPJ assessment in reasonable anticipation of imminent EPA revision of the Guideline.

The Court of Appeals decision was reversed and the permit issued to LG&E was reinstated.

[A copy of the decision can be downloaded here.](#)