



Appalachian Voices

Protecting the Central and Southern Appalachian Mountain Region

April 30, 2013

ATTN: Jon Trout
Division of Water
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Public comments regarding: Proposed Wastewater Lab Certification Program

Dear Mr. Trout,

These comments regarding the Kentucky Energy and Environment Cabinet's Proposed Wastewater Lab Certification Program in 401 KAR 5:320, are respectfully submitted on behalf of Appalachian Voices.

Appalachian Voices would like to commend the cabinet for proposing this certification program. Appalachian Voices was one of several organizations party to the lawsuits against several coal companies for false wastewater monitoring data that spurred the passage of KRS 224.10-670, and the subsequent development of these rules. The problem of falsely reporting wastewater data was widespread within the coal industry, and within the labs that serviced it. We greatly appreciate the cabinet's efforts including this rule, to address these problems. Accurate self-reporting is the backbone of the Clean Water Act. Without accurate data state and federal laws put in place to protect the people, streams and wildlife of Kentucky become meaningless and unenforceable. We believe that ensuring that accurate data is being submitted to state and federal agencies is a vital first step in the in the protection of the state's natural resources and so we applaud the cabinet for acting on the power given to it under KRS 224.10-670 to begin the process of promulgating standards for wastewater labs in the state. While implementing standards on wastewater laboratories is a vital step in ensuring that labs submit accurate data there are several easily correctable deficiencies that undermine the effectiveness of this proposed rule.

Discretionary duties given to the cabinet should be mandatory

Under the current proposed rule, many of the responsibilities given to the cabinet such as document reviews and on site audits are discretionary rather than mandatory. We strongly urge the cabinet to make such duties mandatory in order to provide the public and the regulated community the assurance that the regulations are being meaningfully implemented. I'm sure members of the regulated community would like assurance that they are not spending additional money on fees and tests and submitting additional paperwork only to have their certification given the rubber stamp of approval without thorough review and audits by the agency. If these standards are truly being put forth to help ensure that the coal industry accurately report their water monitoring data rather than simply to shield them from future liability for false reporting then the cabinet should assure everyone that it will perform all the duties currently proposed. In part this regulation came about because cabinet personnel were not performing their duties and thoroughly reviewing the waste water data being submitted by coal companies. Had someone at the cabinet been reviewing the Discharge Monitoring Reports

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submitted by Frasure Creek, International Coal Group and Nally & Hamilton Enterprises, enforcement actions should have been taken far before we discovered the blatant false reporting that lead to our lawsuits and eventually spurred the proposal of this certification program. We urge you to not repeat these mistakes. Without further assurances that the cabinet will fulfill those duties which are currently discretionary under this rule it has the potential of becoming the worst of both worlds. A regulation that is both costly and burdensome to those it regulates while providing the general public none of the protections they deserve. The discretionary duties that should be mandatory include:

- Section 8(1) of the regulation, should require DOW to perform annual unannounced onsite audits.
- Section 9 (2)(a) of the regulation, should require DOW to both review requested documents and complete an onsite audit.
- Section 11(1)(a-f), of the regulation, should require the cabinet to revoke certification for any of the reasons listed in section 11(1)(b-f). All of the causes of action in section 11 serious problems and should result in the revocation of certification, with the exception of Section 11(1)(a) (failure to use acceptable analytical methods), which depending on the severity of the violation may constitute ground for certification revocation.
- Section II 7.3 of the manual, should require rather than allow DOW to consider all of the information (on site evaluations, PT sample results, QC results, compliance reports and requested documents) available to verify that a laboratory is meeting the required standards.

Audits and inter-lab comparisons

In the current draft manual section II 3.10 requires that each laboratory include its audit and inter-laboratory comparisons in its Standard Operating Procedures (SOP), but there is no further requirement for a schedule of these. In order to demonstrate ongoing proficiency, the manual should include requirements that audits and inter-laboratory comparisons be completed quarterly in order to meet AALA standards.

Field sampling

The administrative rule and manual should clearly require that any entity (including KPDES permittees) doing field sample collection or field analysis to be reported for KPDES compliance purposes, should be required to either be certified or meet all the applicable standards set out in this regulation and its associated materials. Additionally, it is vital that field sampling records clearly indicate which methods are used (single grab or flow or time based composites), as well sample preservation, volume and representativeness in the chain of custody and/or field notes. This point concerns sections II 4, III 5.6, V 1.2.7 and V 1.3.7.

Standards for personnel

Section II 1 should specify minimum requirements for education and experience of laboratory staff. For example, at minimum supervisory staff should have a bachelor's degree in a science-based field, and a specified minimum number of credits in chemistry.

Each lab should have a QA/QC person who is trained and independent of daily lab operations. This person should report to the laboratory owner and not the laboratory manager, in order to ensure effective oversight. This person should have oversight and access to all QA/QC, data validation and reporting to clients and agencies.

Training records required in section II 2 of the manual should include specific requirements including records that demonstrate proficiency for each analytical method being used. Training records should also specifically include all general lab procedures as well as specific methods performed.

Training records should also be available for personnel who only complete field sampling. These records should include training on all analytical methods being used for field measurements, field sampling techniques being used as well as proper chain of custody procedures.

Strengthen requirements for instrument based methodology

The manual primarily addresses basic measurement techniques, while only touching on the more sophisticated, instrument-based methods such as spectrophotometry, gas chromatography, infrared spectroscopy and gas chromatography/mass spectrometry. Many automated instruments are commonly in use and these should require extensive training, maintenance and calibration procedure that are not addressed in the manual.

Reporting and record keeping

Section II 6 of the manual should include requirements to periodically assess the integrity of all computational and reporting systems. Section II 6.2 should require precision and accuracy statements for each data set should be reported or available even if they are not required to be submitted for compliance purposes. Also, section 11 6.3 should require that enough raw data to reconstruct reported results must be retained and easily accessible.

Alternative test methods

Sections III 1.1 any alternative test methods in addition to being approved by DOW, should also be required to be equivalent to approved test methods for performance standards such as minimum detection limit and precision and accuracy.

Traceability of standards

Section III 7.4 and section II 9 should clearly specify that all standards of any type are easily traceable.

In stream standards

Section VI of the manual “Critical Elements for In-Stream Monitoring” is currently reserved. We believe that this section in its entirety should be made available for public comment before the rule is approved.

We believe that with some corrections, this proposed certification program will go a long way towards ensuring accurate reporting of wastewater data in the coal industry and will allow for effective implementation of other existing environmental laws. We appreciate the cabinet’s efforts to correct the serious problems at many of the laboratories in Kentucky. Thank you for considering our recommendations.

Sincerely,



Eric Chance
Water Quality Specialist

On behalf of:
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