



November 13, 2009

Via certified mail

Peter S. Silva, Assistant Administrator
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U.S. Environmental Protection Agency
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Dear Assistant Administrator Silva:

When the Environmental Protection Agency (“EPA”) announced last month that it would take long overdue action to regulate the discharge of pollutants, including toxic heavy metals such as mercury and selenium, from coal-fired power plants, we and our clients, Defenders of Wildlife and the Sierra Club, were hopeful that the agency would act swiftly to establish critically needed effluent limitations. We greatly appreciate efforts by you and your staff to provide state regulators with comprehensive information and guidance in setting case-by-case effluent limits governing the discharge of scrubber waste waters and other coal combustion waste streams. EPA guidance is critical to ensuring that states comply with the Clean Water Act and limit these toxic discharges in individual permits.

However, we were dismayed to learn last week that EPA is unwilling to recognize any enforceable deadline for completion of this important rulemaking. According to the Office of General Counsel, EPA and the Department of Justice are taking the position that the agency enjoys unfettered discretion to set a schedule for rulemakings that are required under the Clean Water Act. Having waited twenty-six years to set limits on the discharge of coal plant waste waters, EPA now contends that it can continue to delay regulation for any number of years to come. This position is untenable both as a matter of law and policy.

Congress’ intent in passing the Clean Water Act was to impose enforceable deadlines to ensure rapid improvement and enduring protection of water quality in the nation’s lakes, rivers, and streams. To reduce water pollution to the greatest extent feasible, the statute mandates the use of up-to-date control technologies. To this end, EPA is required to review and, if necessary, revise effluent limitation guidelines every year. *See* 33 U.S.C. § 1314(b) (mandating that EPA “shall...provide[] guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations.”)(emphasis added). Further, EPA is required to review and, if necessary, revise effluent limitations every five years. *See id.* § 1311(d) (mandating that effluent limitations “shall be reviewed at least every five years and, if appropriate, revised....”)(emphasis added).

While these provisions clearly contemplate periodic review *and* revision of the guidelines and limitations, EPA is reading these provisions to allow for revisions on a wholly discretionary timeline once the agency determines that revisions are appropriate. This reading would strip the statutory deadlines of any meaningful effect. Perversely, it would allow EPA to defer needed regulation indefinitely simply by conceding that regulation is appropriate. This result is plainly at odds with Congress' goal to eliminate all pollutant discharges as expeditiously as possible, *see id.* § 1251(a)(1). More particularly, this reading cannot be reconciled with the statutory obligation, previously recognized by EPA, to ensure that effluent limitation guidelines and limits "remain current with the state of the industry and with available control technologies." *Notice of proposed effluent guidelines plan*, 63 Fed. Reg. 29,203, 29,204 (May 28, 1998).

As a practical matter, it is essential that EPA set nationally applicable guidelines and limitations to address pollution from fluidized gas desulfurization systems or "scrubbers" as soon as possible. Many coal plants across the country are in the process of installing new scrubber systems—EPA predicts a 16% increase in scrubbed units between 2009 and 2015 alone. In the absence of federal regulation, states are routinely failing to set limits in individual permits as required by the Clean Water Act, and the discharge of toxic pollutants in scrubber wastewater is escalating dramatically. For example, the Tennessee Department of Environment and Conservation (TDEC) recently issued a permit to the TVA Kingston Fossil Plant authorizing the discharge of scrubber wastewater *without any effluent limits for toxic pollutants*. This permit will allow further degradation of water quality in a stretch of the Clinch River that was impaired for mercury even before it was severely impacted by the release of approximately one billion gallons of toxic coal ash after the collapse of the Kingston plant's surface impoundment last December. *See* TDEC, Division of Water Pollution Control, State of Tennessee NPDES Permit No. TN0080870, *available at* <http://www.tn.gov/environment/wpc/ppo/tn0080870draft.pdf>.

EPA already has missed several successive deadlines for review and revision of the applicable effluent limitation guidelines and limits. *See* Attachment A. Now, it is incumbent on the agency to comply with the Clean Water Act and finalize needed regulations as quickly as possible. Where, as here, EPA has been "grossly delinquent" in its efforts to comply with governing statutory deadlines, "EPA's justifications for seeking additional delay cannot override the clear intent of Congress (as expressed in the statute) that these duties should be fulfilled by a date certain." *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 58 (D.D.C. 2006).

Although the deadline for EPA action passed many years ago, our clients will consider settling their impending lawsuit for failure to meet those deadlines if EPA is willing to enter into a consent decree that establishes a deadline for completion of the new rules no later than mid-2012. Based on our discussions with EPA staff, we think this is a reasonable timeframe for completion of this rulemaking. While we realize the new Administration has inherited this situation, it is imperative that EPA complete this rulemaking and put new rules into effect before many more scrubbers are installed without effective treatment systems for wastewater. Accordingly, we respectfully request that EPA commit to an enforceable 2012 deadline for completion of the rulemaking process.

Sincerely,



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