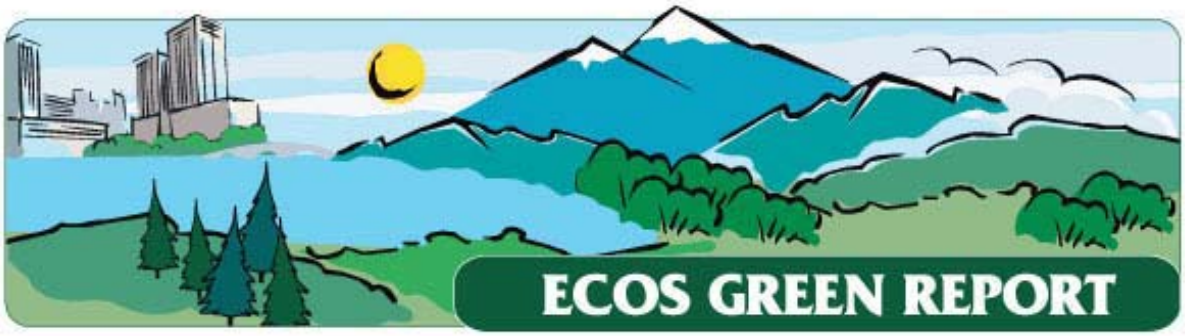




# RECENT U.S. EPA POSITIONS ON INTERIM GUIDANCE, RULES, AND POLICIES

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## STATEMENT OF ISSUE

The U.S. Environmental Protection Agency (EPA) has been adopting a growing number of policies and undocumented changes in administrative processes that present several potential problems for states. These policies include:

1. The issuance of interim guidance coupled with objection authority;
2. Reinterpretations and application of existing draft policies; and
3. Implementation of rules that neglect State Implementation Plans (SIPs).

This report presents known cases of these policies, and discusses some of their consequences. The report is not intended to be a legal review, but instead a review of recent actions and policies, and their implications for state and federal roles in implementing national environmental policies.

## INTRODUCTION

EPA began in late 2009 to adopt new policies that affect the states' implementation of delegated programs in new ways. Furthermore, these policies seem to conflict with procedures of the federal government and with requirements of some of the federal environmental acts. There are at least three types of policies, listed above and summarized in the following paragraphs. Specific examples are referenced in this report.

In one policy, EPA issued an interim guidance pursuant to some new standard, but before the new standard was final. In the interim guidance documents, EPA has included the traditional disclaimers that come with an interim guidance, such as states are not legally required to enforce interim guidance prior to finalizing the new standard, the guidance is not official EPA policy, and so forth. However, EPA transmittal memos to Regional

offices included instructions for the Regions to object to permits if the state does not include the interim guidance in new permits.

In the second policy example, EPA reinterpreted an existing draft policy and changed it, which placed more stringent guidelines on a state's permitting of certain facilities, but did so without establishing the new interpretation in a formal rulemaking process.

In the third policy example (the most recent), EPA appears to be requiring states to implement new ambient air quality standards before the state completes revisions to its SIP. States that are SIP-approved are provided up to a three-year time period in which they can revise implementation of a new state regulation under the Clean Air Act[1], however, the agency is requiring states to include the new standard in any new permit before the SIP is completed.

For states, the issues here may be less on the environmental substance of the underlying rules than on the processes that EPA is apparently using to force implementation of the rules. States may not be able to implement these policies for at least two reasons: the state may be required to conduct its own rulemaking procedures and complete them before it can implement the EPA policy in its own state, or the state may have a "no more stringent than the federal rule" policy. If the state cannot overcome these obstacles right away, it may be forced to choose whether it will comply with either EPA's policy or its own state laws.

ECOS has no formal position on the rules themselves or on the policies used to implement them. This paper is intended to assist ECOS in determining whether a position is needed, and if so, what it might address.

## FORMAL RULEMAKING PROCESS

All rules promulgated by EPA must follow the formal rulemaking process and be in accordance with the Administrative Procedure Act (APA). EPA is required by law to create regulations according to the rules and processes defined by the APA. The APA defines a rule or regulation as:

> "The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[2]."

Under the APA, the agency must publish all proposed new regulations in the *Federal Register* at least 30 days before they take effect, and it must provide a mechanism for public comment, offering amendments, or allowing states to object to the regulation. Perhaps most importantly, "[i]t also provides standards for judicial review if a person has been adversely affected or aggrieved by an agency action.[3]"

[1] U.S. EPA, "What is a State Implementation Plan (SIP)," 2010
[2] http://www.archives.gov/federal-register/laws/administrative-procedure/551.html
[3] 5 USC §551 et seq. (1946)

## INTERIM GUIDANCE

An interim guidance is EPA's interpretation of a standard or rule that is not yet final. Interim guidances are not new devices; the agency has used them for years. However, in 2010 the agency has begun coupling them with "objection authority," which also has been used for many years. Objection authority is the authority of EPA to protest a state-issued permit for cause. This is a time-limited process, but if the state does not change the permit to suit the agency's protest, EPA can "take" the permit permanently. Unlike many states, EPA is under no statutory requirement to act on the permit within a fixed period of time. However, ECOS is unable to find any prior examples where the agency has coupled interim guidances with objection authority. This appears to be a new policy.

The use of interim guidance and objection authority has been used in the following documents (these cases are discussed more fully later in the paper):

1) Final Interim Guidance, Appalachian Surface Coal Mining;
2) Interim Guidance for National Pollutant Discharge Elimination System (NPDES) Flue Gas Desulfurization Permitting;
3) Interim Guidance to Strengthen NPDES Program (refer to Appendix A); and
4) Review of CWA 402 Permitting of Surface Coal Mines in Appalachia.

These interim guidance documents have resulted in a series of court challenges against EPA. The following cases have challenged the implementation of interim guidance under the APA:

1. *National Mining Association v. EPA*;
2. *Huffman v. Jackson, et al.*; and
3. *Kentucky Coal Association v. EPA.*

In a related matter, *New Hope Power Company, et al. v. U.S. Army Corps of Engineers* provides a precedent in which the Corps' memos narrowing permitting standards were overturned. In this particular case, the court ruled that the Corps had not established administrative procedures for reversing a prior determination regarding the status of a parcel of land as a "prior converted cropland[4]" and therefore exempt from wetlands rules.

By coupling an interim guidance with the authority to object to permits based upon compliance with the guidance, EPA is essentially enforcing law that has yet to complete the formal rulemaking process. States have their own procedures for rule promulgations, and may not be able to impose an interim rule/guidance from EPA without first completing the state rule process. Some states may be limited by "no more stringent than" legislation of policies that would make it impossible for the state to include an interim federal guidance (as opposed to a final rule) in a permit. States are also limited in options for challenging interim actions. Courts have held that since EPA guidance documents are not final actions of the agency, they are not subject to judicial review.[5] In

[4] http://docs.justia.com/cases/federal/district-courts/district-of columbia/dcdce/1:2009cv02413/140078/23/
[5] *Inside EPA*, "Despite High Legal Bar, Industry Seeks to Block EPA's Mining Guidance," 2010

addition, an EPA objection to a state-issued permit is not "final" until the agency acts on the permit. If the agency takes no action, it is not "final" and therefore may not be judicially reviewable. A state in such a situation finds itself unable to enforce federal law without breaking its own laws. It also may find itself dealing with a federal agency that is not following it own rules, or has found an "escape clause" for not doing so.

***Final Interim Guidance in Appalachian Surface Coal Mining***

EPA issued "The Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" on April 1, 2010 (refer to section under current litigation for ongoing lawsuits as a result of this guidance). The "Summary Guidance" and "Detailed Guidance" memoranda were effective immediately. These memoranda aimed to clarify EPA's roles and expectations in coordinating with its federal and state partners, with regard to environmental review of Appalachian surface coal mining operations.

The guidance document contained the following direction to the EPA regional staff:

> Page 2 of 31, Footnote 3, "…It (the guidance) does not impose legally binding requirements on EPA, the US Army Corps of Engineers (Corps), the states, or the regulated community, and may not apply to a particular situation depending on the circumstances."
>
> Page 8 of 31, "As noted below, however, where discussions with the state do not produce a proposed permit that, in the Region's judgment, satisfies the requirements of the Act *[i.e., the interim guidance]*, an objection to the issuance of the proposed permit would be an appropriate response."
>
> Page 13 of 31, "Where EPA concludes that the state's explanation is not adequate, or the state fails to provide an explanation of how it is interpreted or applied its narrative water quality standards, EPA may object to the permit in accordance with the provisions of the 40 CFR 123.44 (c).
>
> Page 15 of 31, "Regions should consider objecting to permits that do not assess reasonable potential effectively or fail to implement numeric and narrative standards."

For a copy of the memorandum, see:
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf.

***Interim Guidance for NPDES FGD Permitting***

EPA issued the memo, "National Pollutant Discharge Elimination System (NPDES) Permitting of Wastewater Discharges from Flue Gas Desulfurization (FGD) and Coal Combustion Residuals (CCR) Impoundments at Steam Electric Power Plants" on July 6, 2010. The memorandum sought to provide users with interim guidance directions to assist NPDES permitting authorities to establish appropriate permit requirements for wastewater discharges from Flue Gas Desulfurization (FGD) systems and coal combustion residual (CCR) impoundments at steam electric power plants that were previously outlined in the interim guidance document.

The guidance document contained the following direction to the EPA regional staff:

> Page 2 of 2 – "In cases where State permitting authorities do not consider the attached guidance in developing permit conditions, you should work with the States to make appropriate changes. After working with States you should consider using objection authorities in cases where permits do not address appropriate technology-based or water quality-based permit limits to address FGD or CCR discharges consistent with 40 CFR 122.44."

For a copy of the memorandum, see:
http://www.epa.gov/npdes/pubs/hanlonccrmemo.pdf.

***Review of CWA 402 Permitting of Surface Coal Mines in Appalachia***

EPA conducted a Permit Quality Review (PQR) for Kentucky, Ohio, Tennessee, and West Virginia. Afterwards, the agency issued a final report entitled, "Review of Clean Water Act Section 402 Permitting for Surface Coal Mines by Appalachian States: Findings and Recommendations." The report established guidance for states to "improve and strengthen oversight and review of water pollutions permits for discharge from valley fills under CWA 402…by taking appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting of surface mining operations under these programs."

The guidance document contained the following direction to the EPA regional staff:

> Page 5 of 82, "Regions should consider objecting to permits that do not assess reasonable potential effectively, or fail to implement numeric and narrative standards."
>
> Page 5 of 82, "Historically, Regions have used several tools to try and resolve concerns regarding the sufficiency of State NPDES permits, ranging from comment letters to face-to-face meetings, and we encourage Regions to continue to utilize those tools. If, however, discussions with the State do not produce a proposed permit that satisfies the requirements of

> the Act, an objection to the issuance of the proposed permit would be an appropriate response."
>
> Pages 5-6 of 82, "CWA §402 and EPA's regulations provide EPA Regional offices with the discretion to object to permits that fail to comply with such CWA requirements. In response, the State or other interested parties may request a hearing and provide additional information supporting their position. If a hearing is requested, then after the hearing EPA has discretion to reassert its objection, modify its objection, or withdraw its objection. If EPA continues to object (or if no hearing was requested) and if EPA's objections are not satisfactorily resolved by the State permitting authority, authority to issue the permit will pass to EPA."

For a copy of the memorandum, see: http://www.epa.gov/owow/wetlands/guidance/pdf/Final_Appalachian_Mining_PQR_07-13-10.pdf.

## CURRENT LITIGATION

The examples of interim guidance above have resulted in a series of recent cases challenging EPA's controversial use of guidance and objection authority. The following cases have challenged the implementation of interim guidance under the Administrative Procedure Act.

### *National Mining Association v. EPA*

On July 20, 2010 the National Mining Association (NMA) filed a complaint for declaratory and injunctive relief against EPA. The NMA brought the action under Section 702 of the APA, alleging that the actions of EPA and Corps have "unlawfully obstructed Clean Water Act permitting processes for coal mining" in the Appalachian coal region. NMA's lawsuit, filed in the Federal District Court for the District of Columbia, claims that EPA and the Corps have "circumvented clear requirements for public notice and comment of a host of federal statutes and ignored calls for peer-reviewed science as part of a deliberate policy to substitute agency 'guidance' for formal rulemaking."

NMA says EPA and the Corps have violated the APA, the Clean Water Act, the National Environmental Policy Act, and the Surface Mining Control and Reclamation Act by disregarding formal rulemaking procedures. The suit claims that EPA has overstepped authorities clearly granted to the states and other federal agencies and has "used technical benchmarks for assessing water quality that are both arbitrary and capricious.[6]"

According to a May 21 report by the Senate Environment and Public Works Committee Minority staff, nearly 18,000 new and existing jobs and more than 80 small businesses

[6] http://nma.org/pdf/tmp/072010_NMA_Complaint_ECP_Guidance.pdf

are jeopardized by the unlawful policy EPA and the Corps have applied to the 190 permits still awaiting action in mid-May.[7]

On September 17, 2010, the National Mining Association filed a motion in the U.S. District Court for the District of Columbia seeking to stay the April 1, 2010 Detailed Guidance Memorandum issued by EPA. It also asked the court to set aside and enjoin implementation of the June 11, 2009 Enhanced Coordination Process and the April 1, 2010 Detailed Guidance.

For a copy of NMA's complaint, see
http://nma.org/pdf/tmp/072010_NMA_Complaint_ECP_Guidance.pdf.
For a copy of all NMA v. Jackson documents, see:
http://www.nma.org/tmp/092010_epa_filing.asp.

***West Virginia, Huffman v. Jackson et al.***

On October 6, 2010, West Virginia filed a lawsuit against EPA seeking to overturn the agency's April 2010 guidance that clarified existing requirements of the Clean Water Act's section 402 and 404 permitting programs as they apply to pollution from surface coal mining operations in streams and wetlands. A similar suit was filed by the National Mining Association on September 17, 2010.

Randy Huffman, Cabinet Secretary of the West Virginia Department of Environmental Protection, acted on behalf of the State of West Virginia by filing a complaint for declaratory and injunctive relief against EPA and U.S. Army Corps of Engineers. The action was brought under Sections 702 and 706 of the APA, challenging the Enhanced Surface Coal Mining Pending Permit Coordination Procedures (ECP) issued by EPA and the Corps on June 11, 2009, and the Detailed Guidance Memorandum issued by EPA on April 1, 2010.

The complaint stated that the actions of the agency "were taken outside of formal rulemaking procedures and to *de facto* substantive rule changes in violation of the APA." It alleged that EPA wrongly implemented the guidance without first subjecting the document to public notice and comment. The suit also claims that "the ECP and the Detailed Guidance together have impermissibly altered the statutory allocation of authority under the CWA between EPA, the Corps, and the State." As of this writing, the DOJ has yet to respond to the suit.

For a copy of the complaint, see:
http://www.wvgov.org/uploads/Complaint%20finaldraft.pdf.

[7] http://nma.org/pdf/tmp/072010_Senate_Minority_Staff_Report.pdf

***West Virginia Highlands Conservancy, et al. v. Randy Huffman***

On April 23, 2009, the West Virginia Highlands Conservancy (WVCA) and the West Virginia Rivers Coalition filed suit against Randy Huffman, Secretary of the West Virginia Department of Environmental Protection.[8] The WCVA filed the suit seeking to reduce acid drain damage, claiming that the West Virginia DEP must obtain NDPES permits for cleanup activities at abandoned mining sites under the Clean Water Act.

The case was heard before the U.S. District Court, in which the court ruled in favor of WVCA. After the district court decision, the state drafted NPDES permits that were to be issued earlier this year. Despite the state's efforts to issue the required permits, a May 17, 2010 letter from EPA Region III NPDES permitting chief and the April 1, 2010 "Final Interim Guidance Appalachian Surface Coal Mining" further complicated the ability of states to obtain NPDES permits.

The May 17 letter from EPA Region III NPDES permitting chief Evelyn MacKnight asked states not to issue the permits due to concerns over "the lack of a reasonable potential analysis for conductivity impacts, lax justification for the use of compliance schedules, and the need to include effluent limits.[9]" This letter confused the West Virginia state permitting authorities. According to a state source, "If there's such thing as a comment letter that objects without legally being an objection letter, that's what we got.[10]" Furthermore, the April 1 guidance set a conductivity benchmark of 500µS/cm[11] that West Virginia believes is unattainable, thus preventing the state from obtaining the appropriate NPDES permits.[12]

After the actions of EPA in the May 17 letter and April 1 guidance, the state appealed the U.S. District Court decision to the U.S. Court of Appeals for the 4th Circuit, arguing that NPDES permits should not issued for mine reclamation because the required conditions are unachievable.

On November 8, 2010, the U.S. Court of Appeals for the 4th Circuit affirmed the earlier ruling of the U.S. District Court, requiring the West Virginia DEP to obtain NPDES permits prior to engaging in cleanup activities that affect water at abandoned mine sites. The court stated that under the CWA, NPDES permits must be issued, and it was Congress's responsibility to modify requirements the states find unreasonable.

[8] http://dockets.justia.com/docket/circuit-courts/ca4/09-1474/
[9] *Inside EPA*, "EPA Mining Guidance Obstructing State Issuance of Reclamation Permits," 2010.
[10] *Inside EPA*, "EPA Mining Guidance Obstructing State Issuance of Reclamation Permits," 2010.
[11] U.S. EPA, "The Detailed Guidance: Improving EPA review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order," 2010.
[12] *Inside EPA*, "EPA Mining Guidance Obstructing State Issuance of Reclamation Permits," 2010.

***Kentucky Coal Association v. EPA***

The Kentucky Coal Association (KCA) filed suit on October 18, 2010 in the U.S. District Court for the Eastern District of Kentucky against EPA. The Complaint for Declaratory and Injunctive Relief challenges the April 1, 2010 Detailed Guidance oversight of NPDES permits under Section 402 of the Clean Water Act.

EPA has objected to 11 Eastern Kentucky water discharge permits associated with surface mining, saying they fail to protect waterways from further degradation.[13] EPA is not allowing formal legal challenges to these specific permit objections until the actions become final. According to *Inside EPA*, for individual CWA 402 permits "[w]here the state is unable to resolve the EPA objection in the 90-day period allowed, EPA will become the permitting and enforcement authority for those mining operations for the life of that permitting action. EPA is under no timeframe to take any final action in response to their objection letter.[14]"

The suit claims these permit objections are unlawful because EPA used an inconsistent approach by approving permits prior to the guidance, but rejecting similar permits after issuing the interim guidance. Thus, the state argues these actions demonstrate that the guidance is a new policy that requires an APA notice and comment period under formal rulemaking in order to implement new requirements.

For a copy of the complaint, see:
http://www.kentuckycoal.com/documents/Complaint.pdf.

***New Hope Power Company, et al. v. U.S. Army Corps of Engineers***

In a related matter, on September 29, 2010 a federal court in Florida overturned Army Corps of Engineers memos narrowing a Clean Water Act wetland permit exemption for farmland. The judgment backed the industry's argument that the Corps illegally set national policy in the memos without going through the formal rulemaking process.

The U.S. District Court for the Southern District of Florida in its summary judgment stated that the memos were a "definite shift" in the Corps' policy and "were procedurally improper." The district court backed industry's procedural arguments, overturning the memos and denying the Corps' cross-motion for summary judgment.
For a copy of the article, see: http://environmentalnewsstand.com/Inside-EPA/Inside-EPA-10/15/2010/menu-id-298.html.

[13] *Inside EPA*, "Industry Says Inconsistent EPA Permit Reviews Should Disqualify Mining Guide," 2010
[14] *Inside EPA*, "EPA Faults Kentucky Analysis In Objection to Water Permits For Mining," 2010

## REINTERPRETATION OF A DRAFT POLICY

### *Iowa League of Cities v. EPA*

*The Iowa League of Cities v. EPA* presents a slightly different matter, as it does not concern interim guidance, but a 2005 proposed Draft Peak Flow Policy that has never been finalized. The lawsuit claims EPA has reinterpreted the policy without going through the administrative rulemaking process, placing more stringent requirements on city-operated wastewater treatment facilities. According to the League, "Plants that previously had been in compliance because of the EPA's allowance for alternative approaches to address peak flow periods now find themselves at odds with federal rules.[15]"

On July 26, 2010, the Iowa League of Cities filed a petition for review alleging that EPA had reinterpreted federal rules without going through the administrative rulemaking process, which placed more stringent requirements on city-operated wastewater treatment facilities. The petition called for a review of EPA's "final rules, regulatory determinations, and reviewable final actions" involving the agency's revised interpretation of its bypass, secondary treatment, and operation and maintenance regulations. It also called for a review of "new mandates regarding the design of treatment plants and the performance of collection systems, and new permitting restrictions on allowable effluent concentrations for E. coli."

EPA has argued that it is simply implementing the more restrictive bypass and secondary treatment rule interpretations that were the basis for the 2005 policy.[16] Because EPA has not published the policy as a "final" document, it is arguing that the reinterpretations are not judicially reviewable. This strategy was revealed by FOIA documents for the implementation of the reinterpretations, and Regional Offices were to object to individual permits using the new interpretations, guarding EPA from having to defend the stricter guidelines. This way EPA would have "plausible deniability that these were just regional actions and not authorized by the EPA Administrator," according to John Hall of Hall and Associates.

The mixing zone prohibition included in the new interpretations is another matter where EPA coordinated the development of memorandum with all of the Regional offices and then internally finalized it without any public review. The final memorandum was then sent to the Regions, which were instructed to distribute it to the states and direct them not to allow bacteria mixing zones. This action is directly at odds with EPA's published positions, at least two federal regulations, and the authority granted to EPA under the APA.

On November 16, 2010, the U.S. Court of Appeals for the Eighth Circuit granted EPA's motion to dismiss the case. The court dismissed the case due to "lack of subject matter

[15] Hussmann, "Iowa League of Cities Sues EPA," 2010
[16] According to correspondence with John Hall, October 15, 2010

jurisdiction.[17]" The Iowa League of Cities motion to compel production of administrative records was denied by the court, in part because the League failed to respond to EPA's motion for dismissal.[18]

On December 2, 2010, the Iowa League of Cities filed a petition for rehearing of the lawsuit claiming that the case was improperly dismissed. The League argues that the court's instructions on when to respond to the dismissal motion were unclear.[19]

For a copy of the petition, see: http://www.newtonindependent.com/files/iowa-league-of-cities-v.-epa.pdf.

## STATE IMPLEMENTATION PLAN

A SIP is an enforceable guide that helps states meet national clean air standards. "A SIP must include all of a state's plans for meeting the National Ambient Air Quality Standards (NAAQS), which are science-based standards. There are NAAQS for six major air pollutants, including carbon monoxide, sulfur dioxide, nitrogen oxides, lead, ozone, and particulate matter.[20]" The Clean Air Act provides states with a three-year period to revise and implement their SIPs once EPA finalizes a new ambient air quality standard.[21]

On April 1, 2010, EPA issued a memorandum titled, "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards." The purpose of this memo was to respond to inquiries about Prevention of Significant Deterioration (PSD) permits under the Clean Air Act. The memo further explained the requirements of newly promulgated NAAQS standards.

The memo outlined the applicability of the new One-Hour NO2 NAAQS standard to existing permit applications. The Arkansas Department of Environmental Quality (ADEQ) has expressed concern over the implementation of this standard, stating that "[s]tate agencies are expected to implement the standard in all New Source Review/Prevention of Significant permits issued after April 11, 2010.[22]" Arkansas is a SIP-approved state, meaning that under the CAA, it is allowed the three-year period to implement the standard. However, EPA asked for an immediate implementation of the One-Hour NO2 standard in the April 1, 2010 memorandum:

> "Permits issued under 40 eFR 52.21 on or after April 12, 2010, must contain a demonstration that the source's allowable emissions will not cause or contribute to a violation of the new 1-hour N02 NAAQS. In the case of the new N02 1-hour

[17] U.S. Eighth Circuit Court of Appeals: Judgment, "Iowa League of Cities v. U.S. EPA," 2010
[18] *Environmental NewsStand*, "Cities Appealing Dismissal of Lawsuit Challenging EPA Blending Policy," 2010
[19] *Environmental NewsStand*, "Cities Appealing Dismissal of Lawsuit Challenging EPA Blending Policy," 2010
[20] Sierra Club, "Introduction to State Implementation Plans," 2006
[21] *Federal Register*, "Approval and Promulgation of Implementation Plans," 2010
[22] ADEQ, "Re: Implementation of the One Hour NO2 Standard found at 40 C.F.R. 50.11(b)," 2010

> NAAQS, while the short-term standard is new, the pollutant is not, having been considered a regulated pollutant for many years pursuant to the N02 annual NAAQS. There are no exceptions under 40 CFR 52.21 in this case because as noted above, EPA has not adopted a grandfathering provision applicable to the 1-hour N02 NAAQS that would enable the required permit to be issued to prospective sources in the absence of such ambient air quality demonstration (page 3)."

For a copy of the memorandum, see:
http://www.epa.gov/region7/air/nsr/nsrmemos/psdnaaqs.pdf.

On June 11, 2010, DEQ wrote a letter to EPA expressing its objections and concerns regarding the 1-Hour NO2 Standard. ADEQ has yet to receive a reply.

## Appendix A

The following interim guidance example does not specify whether the objection authority should be used for interim rules and interim standards or for rules that have already been finalized. If the interim guidance establishes the objection authority for rules that have already been finalized, the approach is within established administrative guidelines. However, if the guidance encourages the use of the objection authority for standards set by the interim guidance, this is a problematic approach. For the purpose of this paper, the following guidance illustrates an EPA strategy that is applicable to the processes utilized for the issuance of interim guidance coupled with objection authority, reinterpretations and application of existing draft policies, and implementation of rules that neglect SIPs.

### *Interim Guidance to Strengthen Performance in the NPDES Program*

The Interim Guidance to Strengthen Performance in the NPDES Program was issued on June 22, 2010. The guidance called on EPA Regions and states to immediately implement two actions designed to strengthen performance in the Clean Water Act NPDES program. The first action is to expand NPDES annual planning to include consideration of enforcement and permitting in an integrated way, using data and analyses from other CWA programs (such as water quality standards, assessment and monitoring), and working together with states to ensure that planned activities combine to improve water quality. Under the second directive, EPA Regions across the country should take action where states have demonstrated long-standing problems with their permit quality or enforcement programs to demonstrate the deterrent value of enforcement, ensure a fair and level playing field across states, and ensure equal protection for all citizens.

The guidance document contained the following direction to the EPA regional staff:

> Page 5 of 7, “Where states have demonstrated longstanding problems with significant aspects of their permitting or enforcement programs, [R]egions across the country should object to permits or take enforcement actions in those states to ensure a fair and level playing field and equal protections for all citizens.”
>
> Page 5 of 7, “This memorandum is asking [R]egions to object to individual permits specifically as a means of calling attention to long standing programmatic issues.”
>
> Page 6 of 7, “EPA continues to have other interests in taking action in authorized states, including inspections, investigations and cases with national interest, or site-specific instances where objecting to individual or general facility permits or taking enforcement actions are necessary to protect water quality or achieve CWA objectives.”

For a copy of the memorandum, see:
http://www.epa.gov/compliance/resources/policies/civil/cwa/interim-guid-npdes-062210.pdf.

A second memorandum related to the Interim Guidance to Strengthen Performance in the NPDES Program was released October 22, 2010. The memo, "Using the Results of the NPDES Permit and Enforcement Reviews to Address Significant Issues," illustrates EPA's continued support for the use of the objection authority in regards to strengthening the NPDES program.

The guidance document contained the following direction to the EPA Regional staff:

> Page 2 of 3, "Where a state is not able or willing to make progress in addressing these important issues, a region may need to act. Actions may include prioritizing the issuance of permits, objecting to permits, conducting inspections for a particular sector or watershed, taking direct enforcement action in a state, or acting on specific recommendations identified in permit or enforcement program reviews."

The memo has yet to be released for public viewing.