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Relaxed Ohio River Plan Highlights Looming Fights Over EPA Mercury Rules

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Ohio River regulators have relaxed their water quality rules to allow power plants and other facilities to continue to use "mixing zones" to dilute their mercury discharges, a flexibility that industry says is needed because upcoming EPA air rules to control mercury emissions result in higher wastewater discharge levels, which activists say undermine public health.

The Ohio River Valley Sanitation Commission (ORSANCO), which coordinates water-regulation activities among the eight states in the river's basin, [Oct. 14 revised its pollution control standards](#) to allow companies to apply for variances to a planned 2013 moratorium on the use of mixing zones for mercury and other bio-accumulative chemicals of concern.

Mixing zones are a defined segment of a waterbody where discharge can exceed effluent limits for the chemicals at the point of discharge, so long as dilution within the zone allows water quality standards to remain intact outside of it.

Sources say ORSANCO's decision to allow facilities to apply to continue using mixing zones came after industry raised concerns that some facilities would be unable to meet discharge requirements and stay in business because of a lack of widely available water-treatment technology for mercury -- fears that could grow as EPA rolls out expected maximum achievable control technology (MACT) requirements for mercury air emissions from power plants and industrial boilers in the coming months.

But many states, especially Northeast states, are advocating for strict MACT requirements to help them control high mercury emissions from power plants in the Midwest and South that are deposited in their waterways. At a landmark meeting last summer, state regulators urged EPA to take the novel step of considering water quality impacts of mercury emissions from power plants when setting its upcoming MACT requirements, one of several steps that states hope will result in stricter emissions limits than EPA might otherwise have set and that they hope will help achieve water quality limits for the neurotoxin.

One ORSANCO source says the commission's decision highlights a fundamental balancing act regulators face -- removing mercury from air emissions means employing flue gas desulfurization (FGD) units in power plants, which in turn create wastewater streams that contain higher levels of the toxic metal.

"The situation ORSANCO was presented with was an indication that some dischargers -- and specifically, possibly power plants -- may find the limits that ORSANCO has in its discharge regulations for water technologically unachievable," the source says, adding that commission engineers supported those findings.

And one local environmentalist opposed to the ORSANCO proposal agrees that it highlights the multi-media conflicts regulators face. "This is where there is no symbiosis between the Clean Air Act and Clean Water Act," the activist says, noting that officials need to take better care to ensure that stricter limits in one media do not simply lead to increases elsewhere. "That's exactly what happened here," the source says.

Power industry groups made a similar point in recent comments to ORSANCO, citing the need for additional time to meet effluent discharge requirements for mercury until technology becomes more widely available. "Often, a discharger may simply need additional time to develop and install a treatment technology that eventually will enable the facility to comply with a particular standard. . . . Unfortunately, there are no commercially available or technically feasible technologies to reduce mercury in FGD discharges down to the 12 [nanograms per liter] limit" ORSANCO currently mandates, the Power Industry Advisory Committee and Ohio Utility Group said in [Sept. 7 comments](#) to ORSANCO. "[U]ntil these technologies are commercially available a variance is necessary for compliance purposes for the [electrical generating units] in the Ohio River Valley."

Bioaccumulative Chemicals

Environmentalists in the Ohio River region say industry's concerns are overblown and are blasting ORSANCO's proposal, saying that mixing zones are inappropriate for bioaccumulative chemicals, which build up in the tissues of fish and other aquatic organisms as they feed on creatures lower down the foodchain.

The Kentucky Waterways Alliance (KWA) says in an [Oct. 14 statement](#) the Ohio River already is too polluted by mercury to allow companies to continue using mixing zones past October 2013, when a previously approved ORSANCO moratorium is scheduled to go into effect.

KWA points to existing advisories against consuming fish caught in the Ohio River, and says that people nevertheless consume 13 million pounds of recreationally caught fish from the river every year. "ORSANCO's own data shows the river and the fish are polluted at or above human health standards," KWA's Jason Flickner says in the press release. "This decision calls into question how committed the Commission is to the health of the river and the people who enjoy the recreation it provides."

ORSANCO sources downplay the move, noting that states affected by discharges would have to sign-off on the approval of any mixing zone variance requests and that each would be open to public notice and comment before inclusion in facilities' National Pollutant Discharge Elimination System permits.

But environmentalists are considering their options to reverse ORSANCO's decision, a strategy that could include petitioning EPA to strengthen the protections afforded to the Ohio River or intervene on environmental justice grounds, the environmentalist says.

The source says organizations are consulting with lawyers on what their next moves will be and to determine whether this issue would be appropriate to petition EPA.

Groups could petition EPA to set pollution load limits -- also known as a total maximum daily load (TMDL) -- for mercury in the Ohio River, as the agency is now doing to control nutrient pollution in the Chesapeake Bay. They also plan to encourage states to designate the river as impaired for mercury in their annual reports submitted under the Clean Water Act, designations that could boost the case for a TMDL.

"If we can get all of the states but one to list it as impaired, I think that's just more [ammunition] for EPA to come in and say, 'We're going to take over this process,'" the source says.

EPA's emphasis on the environmental justice impacts on communities that rely on rivers for subsistence fish consumption also could boost environmentalists' efforts to strengthen the Ohio River protections, although the source says activists still need to explore specifically how such concerns could be pursued.

In its landmark April 1 guidance on mountaintop mining, EPA highlighted the Clinton-era executive order on environmental justice as necessary to influence permitting decisions for the sector, pointing specifically to subsistence fish consumption as a factor to be considered. The source says that guidance was the first time activists had seen subsistence consumption noted as a criteria for permitting decisions in the region and was an area where more research was needed, although it's certainly one that groups could "play up" in any appeals to EPA.

While EPA Region III represents the agency on the commission, a regional official was not present at the Oct. 14 meeting where commissioners approved the rule change, the ORSANCO source says. Calls and e-mails to Region III were not returned by press time. -- *Nick Juliano*

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