



BRIEFING MEMO

To: Regulation 61 Workgroup/Permit Issues Forum

From: Ellen Howard Kutzer

Date: November 9, 2017

Subject: Incorporation by reference date

Summary

The Water Quality Control Division (division) recommends that Regulation #61 be updated to change the incorporation by reference date. Throughout Regulation #61, standards and requirements promulgated by the EPA are adopted and incorporated by reference. The incorporation by reference date was recently updated as part of the Regulation #61 rulemaking hearing in June 2016. As a routine matter, the division recommends that the scope of the hearing include an update to the incorporation by reference date.

Issue and Background

Regulation 61.1(2) states:

Throughout these regulations, standards and requirements promulgated by the U.S. Environmental Protection Agency have been adopted and incorporated by reference. The federal references cited herein include only those versions that were in effect as of June 14, 2016, and not later amendments to the incorporated material. (emphasis added)

As a matter of routine review, the division recommends that Regulation 61.1(2) and corresponding citations in Regulation #61 be updated to adopt and incorporate by reference updated federal references. This update is consistent with routine review and update of Regulation #61 adopted in previous rulemaking proceedings.

Discussion

Regulation 61.1(2) should be updated to indicate that all cited federal references include those versions that were effective as of the date of the rulemaking hearing (expected to be October 9, 2018). An inventory of these citations is included as Attachment A.

Additionally, the Division recommends that individual sections of Reg. 61 be updated include recent changes to the federal regulations. These include:

- References to sufficiently sensitive methods in Sections 61.4(1) and 61.8(4), as described in additional briefing memo for this rulemaking proceeding.
- Necessary updates to Section 61.8(2)(a)(ii).
- Revising 61.8(2)(a)(iii) to explicitly incorporate references to adoption of 316(b) for cooling water intake structures.



Recommended changes

The division recommends that the language in Reg. 61.8(2)(a)(ii) be updated as follows:

(ii) All applicable effluent limitations for categorical industries adopted by EPA and incorporated in this regulation by reference. Federal effluent guidelines adopted in 40 CFR Chapter I, subchapter N are hereby incorporated by reference.

The division recommends striking this text:

~~The following effluent limitations for categorical industries are hereby incorporated by reference: 40 CFR Parts 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 439, 440, 443, 446, 447, 454, 455, 457, 458, 459, 460, 461, 463, 464, 465, 466, 467, 468, 469, and 471~~

Modifying Regulation 61 to reference Subchapter N as a whole rather than the individual ELGs for categorical industries will remove the possibility for errors in incorporation through missing cross-references, which has occurred in the past.

Explicit Incorporation of regulatory provisions for cooling water intake structures (316(b))

EPA promulgated the cooling water intake structure regulations in 40 C.F.R. Parts 122 and 125, including: 40 C.F.R. §§ 122.21(r), 125.84, 125.86, 125.89, and 125 subpart J (§§ 125.90-99). Federal permitting regulations do not need to be specifically incorporated into Regulation 61 in order for the division to have the legal authority and obligation to incorporate new federal regulatory requirements into its permits. The Water Quality Control Act requires that any permit issued by the division comply with not only the Water Quality Control Act and Colorado regulations, but the federal Clean Water Act and related federal regulations. § 25-8-503(1)(a), C.R.S. Federal regulations further require the Division to act consistently with the EPA's permitting regulations, including 40 C.F.R. § 122.21. See 40 C.F.R. § 123.25(a) ("All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each," and listing 40 C.F.R. 122.21).

Regardless, for the sake of consistency, the Division recommend the following changes into Regulation 61 to ensure incorporation of all cooling water intake structure rule components:

61.8(2)(a)(iii): All applicable standards and criteria adopted by EPA in 40 CFR Parts 122 and 125, including all federal requirements for cooling water intake structures;

Proposal

Modify Regulation 61 as recommended.

Schedule:	Initial discussion	November 16, 2017
	Comments due	January 8, 2018
	Follow-up	January 18, 2018

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Attachment A
Federal References in Regulation 61

61.1(1)(a) - Refers to "Federal Act"	61.8(a)(a)(v) - Refers to "Federal Act"
61.2(7), (8), (10), (110) - Refers to "Federal Act"	61.8(2)(k)
61.2(30), (31) - Refers to U.S.C.	61.8(2)(l)(v)(A)(I)
61.3(1)(b), (c) - Refers to "Federal Act"	61.8(3)(f), (m), (r), (t) - Refers to "Federal Act"
61.3(2)(e)(ii)(A)	61.8(4)(j)
61.3(2)(e)(iii)(A), (C), (I)	61.8(5)(k)(i)(D)
61.3(2)(g)(iii)	61.8(5)(k)(ii)(D)
61.3(3)(b)	61.8(6)(a) - Refers to "Federal Act"
61.3(4)(a)	61.8(7)(a) - Refers to "Federal Act"
61.4(2)(e) - Refers to "Federal Act"	61.8(8)(b)(vii) - Refers to "Federal Act"
61.4(2)(g)(ii)	61.8(8)(b)(ix)
61.4(2)(g)(ii)(A), (B)	61.8(8)(f)(vii)
61.4(2)(g)(iii) (A), (B)	61.8(9)(c) - Refers to "Federal Act"
61.4(2)(g)(iv)	61.8(11)(a)(ii)(C)(II)
61.4(2)(h)	61.12(a), (f), (h) - Refers to "Federal Act"
61.4(2)(h)(vii)	61.13(4)(d)(xv)
61.4(2)(o)	61.14(1)(b)(i) - Refers to U.S.C.
61.4(3)(b)(i)(A)(I)	61.14(1)(b)(vi)
61.4(3)(b)(i)(C)(I), (II)	61.14(1)(b)(vii) - Refers to U.S.C.
61.4(3)(c)(i)(D)	61.17(3)(b)(ii)(B)(I)
61.4(3)(c)(ii)(C)	61.17(6)(b)(ii)(B)(I)
61.4(3)(c)(ii)(C)(I)(c)	61.17(6)(c)
61.4(3)(c)(ii)(D)(II)(a)	61.17(8)(b)(xii)(C)
61.4(4)(d)(i)	61.21(3) - Refers to "Federal Act"
61.4(7)	61.21(6)
61.4(7)(d) - Refers to "Federal Act"	
61.4(7)(e)(ii)	
61.4(7)(e)(iii)(A), (B)	
61.4(7)(e)(v)	
61.5(2)(b)(vi)	
61.5(2)(e)(iv) - Refers to "Federal Act"	
61.8(1)(a) - Refers to "Federal Act"	
61.8(1)(b)(i)	
61.8(2)(a)(ii), (iii), (iv)	