



WEST VIRGINIA CHAMBER

October 12, 2012

Via U.S. Mail and email to Kevin.R.Coyne@wv.gov

WV Department of Environmental Protection
Division of Water and Waste Management
Water Quality Standards Program
Attn: Kevin Coyne
601 57th Street, SE
Charleston, WV 25304

Re: Comments on Potential Revisions to Water Quality Standards

Dear Mr. Coyne:

Thank you for the opportunity to provide comments for potential revisions to West Virginia's water quality standards to be considered as part of the 2014 Triennial Review process. These comments are filed on behalf of the West Virginia Chamber of Commerce ("the Chamber"). The Chamber is West Virginia's largest, most influential general business organization, representing all business sectors in every region of the State. Members range from small business enterprises to mid-sizes manufacturers to tourism destinations to energy companies to Fortune 500 corporations. However, small businesses are the core of our membership - making up 85 percent of the Chamber's companies and firms.

The Chamber asks the West Virginia Department of Environmental Protection ("DEP") to consider the following proposed revisions to the existing water quality standards.

1. Interpretation of Category A Use Designation for All Waters of the State

The Chamber and other representatives of the regulated community have repeatedly commented in past years that DEP lacks legal authority and a scientific justification for its interpretation that all State waters are considered to qualify as Category A waters (public drinking water supplies). West Virginia's water quality standards create a presumption of only two uses that apply to all waters of the State: propagation and maintenance of aquatic life (Category B) and water contact recreation (Category C). W. Va. C.S.R. § 47-2-6.1. Except for these two presumptive uses, only "existing uses" are protected. "Existing uses" are only those uses "actually attained in a water on or after November 28, 1975." W. Va. C.S.R. § 47-2-4.1.a.

No provision of West Virginia's water quality standards designates all waters of the State as Category A waters, and DEP has not demonstrated that all waters of the State have been used

as drinking water sources at some time since November 28, 1975. Moreover, the West Virginia Legislature has repeatedly rejected attempts by the Environmental Quality Board, who previously had authority over water quality standards, to amend the water quality standards regulations to officially designate all waters of the State as Category A waters. This reflects the desire of the West Virginia Legislature that all waters of the State should *not* be presumed to be drinking water sources. Yet, the agency still persists in implementing by policy an interpretation that is not supported by either the existing regulations or the Legislature.

DEP's position that all State waters are considered Category A results in imposition of more stringent effluent limits when it is not necessary for the protection of human health. This is contrary to the declaration set forth in the West Virginia Water Pollution Control Act that calls for water quality standards that are consistent with public health and also the "expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development." W. Va. Code § 22-11-2. Instead of striking an appropriate balance, DEP's interpretation discourages development and investment by imposing standards more stringent than necessary to protect public health.

The Chamber urges the DEP apply the Category A use designations in accordance with the existing statutory and regulatory framework.

2. Selenium

In 2009, the West Virginia Legislature acknowledged what an ever growing body of scientific literature already recognized and continues to recognize – that the existing EPA recommended selenium water quality standards adopted in West Virginia are not scientifically supportable:

The Legislature finds that there are concerns within West Virginia regarding the applicability of the research underlying the federal selenium criteria to a state such as West Virginia which has high precipitation rates and free-flowing streams and that the alleged environmental impacts that were documented in applicable federal research have not been observed in West Virginia[.]

W. Va. Code § 22-11-6(3). Many facilities have had to install very expensive and complex treatment systems to achieve compliance with the existing flawed selenium standards.

The Chamber acknowledges that DEP has undertaken some efforts to study the effects of certain selenium concentrations in West Virginia waters, but the agency seems reluctant to move forward with proposed new selenium criteria. That reluctance seems grounded in EPA's purported efforts to develop a new set of nationally recommended selenium criteria. DEP should not continue to wait for EPA to propose new criteria for multiple reasons.

First EPA has delayed the release of its proposed criteria on multiple occasions over the past several years. EPA may not ever propose revised selenium criteria, and West Virginia facilities should not have to continue to incur possibly unnecessary costs to achieve compliance with scientifically unsupportable criteria.

Second, whatever standards (if any) that EPA proposes will be nationally-recommended criteria. By definition, these standards will not be tailored to ensure protection of aquatic life in West Virginia waters. As the Legislature noted, nationally recommended criteria may not be suitable for West Virginia waters.

Third, the Clean Water Act places primary responsibility for developing and implementing water quality standards with the States – not EPA. As such, DEP should move forward with establishing selenium criteria that are appropriate for West Virginia waters instead of waiting on EPA to propose a “one size fits all” approach.

3. Hardness Based Aluminum Standard

During the semi-annual public meeting held on August 30, 2012, DEP identified a hardness-based aluminum criterion as one of the potential water quality standards revisions being considered during the triennial review. The Chamber encourages DEP to move forward with this review.

Aluminum is a common, naturally occurring element. Many West Virginia streams exhibit concentrations of aluminum that exceed the existing criteria with no corresponding signs of impairment to the aquatic life that the criteria are intended to protect. Nevertheless, because of the aluminum concentrations, these streams are identified on the Clean Water Act Section 303(d) list of “impaired waters,” which then requires DEP to prepare a Total Maximum Daily Load (TMDL), at state expense, to bring those waters into compliance with an apparently flawed standard. The existing aluminum standard has also burdened NPDES permit holders as they struggle to maintain compliance with a standard that appears to be more stringent than necessary to protect aquatic life.

As with many other metals, the toxicity of aluminum is inversely related to water hardness. In other words, aluminum’s toxicity to aquatic life decreases as the water hardness increases. EPA has developed hardness-dependent equations for a number of metals to reflect this relationship. For example, West Virginia has adopted EPA’s hardness-dependent equations for other metals such as cadmium, trivalent chromium, copper, lead, nickel, silver, and zinc. A similar hardness based criteria should be adopted for aluminum to reflect the actual toxicity thresholds.

Other states have adopted similar hardness-based aluminum standards. New Mexico has recently adopted a hardness-based standard that was approved by EPA in April 2012. The State of Colorado received EPA approval of its hardness-based standard in August 2011.

In September 2011, the West Virginia Coal Association provided a formal submission to DEP proposing to revise West Virginia’s aluminum criteria to reflect a hardness-based standard using the same methods applied to calculate the revised standards for Colorado and New Mexico. The study upon which the Coal Association’s proposal is based demonstrates that a hardness-based aluminum standard more accurately establishes appropriate aluminum effluent limits to ensure protection of aquatic life in West Virginia streams. This does not mean a

wholesale relaxation of the existing aluminum criteria. For streams with low hardness levels, the resulting effluent limits would likely be more stringent than imposed under the existing criteria.

4. Beryllium

DEP has also identified the existing beryllium standard as one for potential revision to match the current EPA recommended standard. The Chamber supports DEP's decision to examine this standard.

West Virginia's Category A criterion for beryllium is 0.0077 µg/l, which appears to be based on a proposed EPA criterion published in 1991 that was never adopted. In 1992, EPA adopted its existing recommended human-health criterion of 4 µg/l, which is the maximum contaminant level (MCL) for drinking water. EPA reaffirmed the 4 µg/l standard as recently as 2008 when EPA published a draft Integrated Risk Information System (IRIS) reassessment that proposed no changes to the reference dose upon which the beryllium MCL is based.¹

For some unknown reason, West Virginia appears to have adopted the 0.0077 µg/l standard in 1993 even though EPA opted to adopt the 4 µg/l standard in 1992. There is no evidence that the existing 0.0077 µg/l is scientifically supportable or reflects the best available science at least as of 1993. The Chamber requests that DEP replace the existing beryllium standard with EPA's recommended standard.

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The Chamber appreciates the opportunity to offer these written comments. The Chamber reserves the right to present additional comments at future public hearings on this topic. There are additional issues concerning West Virginia's water quality standards that Chamber members have not yet had a full opportunity to vet, and we hope you will entertain additional comments in the future. If you have any questions, please feel free to contact me.

Sincerely,



Thomas M. Boggs
Vice President

¹ See generally "Toxicological Review of Beryllium and Compounds" published by EPA in April 1998 and available at <http://www.epa.gov/iris/subst/0012.htm>