



# West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • [www.wvcoal.com](http://www.wvcoal.com)

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**October 12, 2012**

**Mr. Kevin Coyne**  
**West Virginia Department of Environmental Protection**  
**Division of Water & Waste Management**  
**601 57<sup>th</sup> Street**  
**Charleston, WV 25304**  
**Via Electronic Mail: [Kevin.R.Coyne@wv.gov](mailto:Kevin.R.Coyne@wv.gov)**

**Dear Mr. Coyne:**

Pursuant to the public notice published by the West Virginia Department of Environmental Protection (WV DEP), attached to this letter please find the comments and observations of the West Virginia Coal Association (WVCA) regarding the agency's planned rulemaking efforts for the 2014 triennial review of West Virginia's water quality standards.

The West Virginia Coal Association (WVCA) is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's producing members account for 98 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

Overall, WV DEP is to be commended for the pronounced improvements to the water quality standards rulemaking process since assuming that duty from the Environmental Quality Board (EQB) in 2005. The professional manner in which WV DEP considers revisions to the program continually improves as does the agency's commitment to science, public involvement and adherence to the public policy goals established by the West Virginia Legislature. WVCA believes the 2014 triennial review provides yet another opportunity for WV DEP to advance the effectiveness of the program by addressing several areas of concern the agency inherited from the EQB.

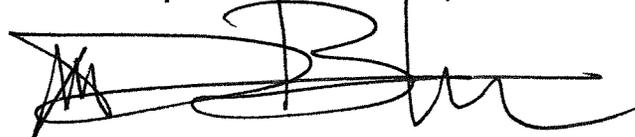
WVCA's comments and suggestions will focus on several areas where action by WV DEP is overdue to address historic issues with the water quality standards program. These are long standing areas of confusion, created not by the current agency or administration, that have impacted the practical function of the water quality standards program, and more importantly, the Clean Water Act (CWA) Section 402 NPDES permitting process for decades. In most cases, these specific instances lack any rational basis and have no equal in corresponding federal regulations implemented by the federal Environmental Protection Agency (EPA) or the water quality standards programs of other states.

These areas include specific water quality standards where the state maintains outdated criteria, long ago replaced by more scientifically defensible standards, revisions to specific standards that would increase practical environmental and stream protection, application of designated use that needlessly complicates the assignment of effluent limitations and, in at least two instances, where WV DEP maintains EQB-created interpretations of state standards that are in direct contravention of the public policy of the state as expressed by the West Virginia Legislature. The interpretative issues of concern deserve distinct attention from the agency, as they represent not only instances where WV DEP ignores the will and intent of the Legislature but also cases where the agency perpetuates what is essentially illegal rulemaking by maintaining positions and "standards" that were never subject to the public comment and review process. Positions relative to use designations such as those identified in our subsequent comments are perhaps the worst examples of how West Virginia's regulatory climate discourages new investments and hastens the departure of existing operations.

**WVCA's comments regarding a specific water quality standard or interpretation of existing standards should in no way be construed by WV DEP as advocating that the agency delay any current initiatives until the completion of triennial review in 2014.**

WVCA appreciates the opportunity to provide these comments regarding possible revisions to the state's water quality standards rule to the WV DEP.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', written over a horizontal line.

**Jason D. Bostic  
Vice-President**

**COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION:**

**2014 TRIENNIAL REVIEW OF WEST VIRGINIA'S WATER QUALITY STANDARDS**

**General Comments**

While the West Virginia Department of Environmental Protection (WV DEP) has greatly improved the water quality standards rulemaking process since assuming that duty from the Environmental Quality Board (EQB) in 2005, there remains several areas where the agency needs to correct historical issues inherited from the Board. In these areas, WV DEP can build on the notable progress made to date by providing more rationality to the program.

*In conducting this review and examination of West Virginia's water quality standards program, WV DEP is guided not only by science but also by the principles of public policy as established by the West Virginia Legislature.* With respect to water quality standards and Clean Water Act (CWA) Section 402 permitting, this declaration of public policy is contained in the West Virginia Water Pollution Control Act (WV WPCA):

It is declared to be the public policy of the state of West Virginia to maintain reasonable standards of purity and quality of the water the state consistent (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.<sup>1</sup>

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<sup>1</sup> W.Va. Code 22-11-2.

WVCA believes in several instances, detailed in subsequent comments, WV DEP maintains water quality standards far beyond “reasonable standards of purity and quality” that certainly do not promote “healthy industrial development” that is necessary or consistent with “the expansion of employment opportunities.” In the case of the agency’s interpretation of certain use designations, its position is the very antithesis of these stated goals and policy-- one that is not necessary to protect or enhance the public health and welfare and at the same time needlessly discourages development and investment.

Further guidance regarding rulemaking is provided by the Legislature to the agency in WV DEP’s authorizing statute:

...legislative rules promulgated by the Director...may include provisions which are more stringent than the counterpart federal rule or program to the extent that such provisions are reasonably necessary to protect, preserve or enhance the quality of West Virginia’s environment or human health or safety, taking into consideration the scientific evidence, specific environmental characteristics of West Virginia or an area thereof, or stated legislative findings, policies or purposes relied upon by the director in making such determination. In the case of specific rules which have a technical basis, the director shall also provide the specific technical basis upon which the director has relied.<sup>2</sup>

As our detailed comments explain, in many cases WV DEP has maintained standards and interpretations that completely fail to satisfy the Legislature’s specific constraints on the agency’s rulemaking authority. Consider beryllium (*see subsequent comments*) where WV DEP maintains criteria that were rejected by the federal Environmental Protection

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<sup>2</sup> W.Va. Code 22-1-3a.

Agency (EPA) and replaced with a more scientifically defensible standard several years ago. Such a standard is not “reasonably necessary to protect, preserve or enhance the quality of West Virginia’s environment” nor has WV DEP “provided the specific technical basis upon which the director has relied” to maintain this flawed standard to the Legislature.

In other cases, WV DEP has shunned the responsibility conferred on it by the Legislature by ignoring substantial evidence that current standards do not reflect “reasonable standards of purity and quality.” Rather than undertaking research and rulemaking to develop a standard which “takes into consideration the scientific evidence, specific environmental characteristics of West Virginia or an area thereof”, the agency submissively waits for revision of federally-recommended standards. As a federal judge recently observed “...Section 303 of the [federal] CWA allocates primary authority for the development of water quality standards to the states.”<sup>3</sup> When scientific information and the guiding public policy of the state demonstrate a need, WV DEP should exercise this “primary authority” and develop standards specifically for West Virginia.

WVCA urges WV DEP to consider any revisions to the state’s water quality standards in the context of the public policy enunciated by the Legislature and the directives established for the agency in statute.

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<sup>3</sup> *State of West Virginia, et.al. v. Jackson*, F.Supp.2d, 2012 WL 3090245 (D.D.C., July 31, 2012).

## Aluminum Criteria

While West Virginia has made great strides in revising its water quality standards for aluminum to reflect the prevailing natural conditions within the state's waters, WVCA believes that further efforts are necessary to adopt truly protective criteria. Because aluminum is a very common, naturally occurring element, many streams in the state exceed the numeric criteria for aluminum, with no corresponding signs of impairment to the aquatic life. The result is a CWA Section 303(d) list of "impaired waters" with several streams identified as impaired for aluminum, mandating the preparation of Total Maximum Daily Load (TMDL) at state expense, to bring those waters into compliance with a flawed standard. Additionally, reliance on the current aluminum standard has burdened NPDES permit holders as they struggle to maintain compliance with a standard that, from an aquatic life use protection standpoint, is meaningless.

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. Similar hardness-based criteria should be adopted for aluminum to reflect the actual toxicity of the constituent.

Other states have adopted similar hardness-based aluminum standards. New Mexico recently adopted a hardness-based standard that was approved by EPA in April 2012.<sup>4</sup> The State of Colorado received EPA approval of its hardness-based standard in August 2011.<sup>5</sup>

On September 21, 2011, WVCA provided a formal submission to WV DEP regarding the state's aluminum standard. The submission contained a proposed update of West Virginia's aluminum criteria to a hardness-based standard using the same methods used in calculating the revised standards for Colorado and New Mexico. WVCA has attached this submission and supporting scientific rationale to these comments in its entirety as attachment "C". WVCA urges WV DEP to adopt a hardness-based standard for aluminum to better protect aquatic life and simplify NPDES compliance with the aluminum criteria.

### **Beryllium Criteria**

In the case of beryllium, WV DEP has maintained water quality criteria that was proposed, but then specifically rejected, by EPA. West Virginia's public drinking water supply/Category A criterion for beryllium is 0.0077 µg/l. However, the national recommended criterion for beryllium for the protection of human health is 4 µg/l, which is the maximum contaminant level (MCL) for drinking water. The West Virginia beryllium criterion is nearly three orders of magnitude below the EPA recommended standard.

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<sup>4</sup> See generally attachment "A", Letter dated April 30, 2012 from EPA Region VI to the New Mexico Surface Water Quality Bureau.

<sup>5</sup> See generally attachment "B", Letter dated August 4, 2011 from EPA Region VIII to the Colorado Water Quality Control Commission.

The current West Virginia criterion appears to be based upon a proposed federally recommended criterion published in 1991.<sup>6</sup> **This proposed rule was never adopted by EPA, and the proposed criterion of 0.0077 µg/l does not appear in any past version of EPA's nationally recommended water quality criteria.** This discarded federal recommendation remains in effect for the state and as virtue of its misplaced and illegal application of Category A use designation (see subsequent comments), is being applied on all streams to all NPDES permits by WV DEP.

Following the publication of the proposed human health water quality criteria, EPA promulgated the beryllium MCL of 0.004 mg/l in July 1992. West Virginia adopted its current beryllium criterion of 0.0077 µg/l in 1993; a full year *after* EPA adopted the beryllium MCL that remains the national recommended criterion to this day. Therefore, West Virginia's beryllium criterion was not based upon the best available science in 1993, and it certainly is no more scientifically justifiable now.

WVCA urges DEP to adopt the beryllium MCL of 0.004 mg/l as the human health Category A criterion. This standard has been reaffirmed by EPA 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.<sup>7</sup>

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<sup>6</sup> 56 Federal Register 58420, November 6, 1991, pg. 58442.

<sup>7</sup> 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>

## Selenium Criteria

An ever-growing body of scientific evidence and data confirms that continued application of the current selenium criteria to West Virginia waters is misplaced and offers no measurable improvement to environmental protection while causing widespread and extraordinarily expensive compliance issues. EPA previously determined the current standard is incorrect and has been struggling to complete a rulemaking to revise the federally recommended selenium standards. The West Virginia Legislature has previously concluded the current federally-recommended selenium limits may not be appropriate for West Virginia:

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...<sup>8</sup>

WVCA continues to believe WV DEP should contemplate revisions to the current standards for selenium. Despite near universal acknowledgement that the current selenium criteria is incorrect, and ignoring the findings of the Legislature, WV DEP has yet to take any action on its own initiative to develop a sensible, protective criteria for West Virginia. The agency has even demonstrated a hesitancy to act on site-specific criteria applications that would simply apply the selenium criteria in terms of dissolved vs. total measurements. This inaction has occurred as selenium has become a modern equivalent of the aquatic life use

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<sup>8</sup> W.Va. Code 22-11-6.

standard for manganese, where treatment was undertaken just for the sake of satisfying a baseless standard that most states chose NOT to adopt.

WVCA recommends WV DEP, in accordance with its charge from the Legislature as the agency vested with developing water quality standards for the state, enlist the assistance of state research resources such as those available at the West Virginia Water Research Institute, West Virginia University and Marshall University and actively pursue revisions to West Virginia's water quality standard for selenium instead of simply waiting for EPA to take action on a federally-recommended criteria.

### **Category A Use Designation**

WV DEP continues to operate its NPDES permitting program under the regulatory illusion that all state waters are classified as Category A and serve in their entirety as public drinking water supplies. This myth was originally formed by the Environmental Quality Board (EQB) when it possessed water quality standards rulemaking authority and WV DEP was a willing accomplice in maintaining this illegal presumption by assigning NPDES effluent limits as though all waters were legally classified as such. When the West Virginia Legislature transferred rulemaking authority from the EQB to WV DEP in 2005, the agency simply adopted the EQB's misplaced interpretation. As we detail in subsequent paragraphs, this tortured interpretation is contrary to the official actions of the West Virginia Legislature and represents a decades old illegal rulemaking action that is ripe for action.

West Virginia's water quality standards, like those of virtually all other states, establish allowable in-stream concentrations of various criteria depending on the "use" served by a given water body. These standards also recognize and define allowable "uses" to which the criteria apply. West Virginia's federally-approved water quality standards, codified as 47 CSR 1, provide that all waters of the state are considered to serve as Category B/aquatic life use and Category C/water contact recreation use. More simply, West Virginia's water quality standards default all streams to Category B/aquatic life use or Category C/water contact recreation use. Despite the actions of WV DEP with respect to assigning Category A/public drinking water supply effluent limits to all state streams, the approved regulation is clear and unambiguous:

These rules establish general Water Use Categories and Water Quality Standards for the waters of the State. Unless otherwise designated by these rules...all waters of the State are designated for the Propagation and Maintenance of Fish and Other Aquatic Life (Category B) and for Water Contact Recreation (Category C) consistent with Clean Water Act goals...<sup>9</sup>

Category A-- Water Supply, Public. -This category is used to describe waters which, after conventional treatment, are used for human consumption...<sup>10</sup>

If there was any doubt as to the meaning of the above-cited provisions, the intent of the EQB was clearly articulated in the Board's rationale document: "above all, [the EQB

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<sup>9</sup> 47 CSR 2-6.1  
<sup>10</sup> 47 CSR 2-6.2

members] agreed that the category and criteria for public water supplies should not be applied to stream or stream segments where no one is using the waters for drinking."<sup>11</sup>

Notwithstanding the clarity of the rule and the supporting rationale offered by the EQB, WV DEP mistakenly applied the Category A use designation to all waters of the state. This regulatory practice began with the entire length of substantial streams where drinking water intakes were actually located and, as the NPDES regulatory program matured, was extended to every stream within the state.

Predictably, this application of Category A designation presented practical NPDES compliance issues as public water/human health standards are typically dramatically lower and include a more comprehensive list of parameters than required for maintaining West Virginia's legal default designation of all streams as Category B/aquatic life use and Category C/water contact recreation use.

In 1995, the EQB upheld WV DEP's misapplication of effluent limits based on the statewide Category A fallacy.<sup>12</sup> However, an administrative appeal decision CANNOT alter state water quality standards nor can the EQB sanction an effort by WV DEP to modify a water quality standard or any other legislative rule through application of permit specific effluent limits. If that were the case, there would be no need for the state's public comment and review procedure, or the legislative rulemaking process.

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<sup>11</sup> State Water Resources Board, Rationale Document for Revision of Legislative Rules. January 6, 1986. Relevant pages provided as attachment "D".

<sup>12</sup> See generally *E. I. du Pont de Nemours and Company, Inc. v. Chief, Office of Water Resources, Division of Environmental Protection*, Appeal Nos. 599 & 602 (December 13, 1995).

Apparently realizing that such an interpretation, where the EQB sanctioned WV DEP's modification of a rule without public comment and/or Legislative review was untenable, both agencies sought to officially alter the rule to fit their confused interpretation. Each and every time these efforts have been unequivocally rejected by the Legislature.

In response to the regulatory confusion created by WV DEP's flawed belief that all waters of the state are Category A/public drinking water supplies, on March 21, 1999 the West Virginia Legislature passed House Bill 2533. Signed into law by the Governor on April 2, 1999, the bill authorized the state's water quality standards to remain in place until October 1999, with the condition that:

...the Environmental Quality Board shall review, revise and propose, within this statutory deadline, and in accordance with the provisions of chapter twenty-nine-a of this code, emergency and legislative rules to address interpretive differences regarding the designation of category A waters and analyze the need for distance prohibitors for the policies of public drinking water intake...<sup>13</sup>

In response to the instructions of the Legislature contained in House Bill 2533, the EQB promulgated an emergency rule in October 1999 in which it proposed classifying all waters of the State as Category A/public drinking water supplies: "The proposed amendment clarifies that all waters of the State are protected by the drinking water supply designated use category..."<sup>14</sup> The emergency rule was filed

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<sup>13</sup> See generally Enrolled Committee Substitute for House Bill 2533, Copy provided as attachment "E"

<sup>14</sup> See generally Notice from the EQB dated October 18, 1999 regarding the filing of an emergency rule, copy provided as attachment "F".

with the Secretary of State and, in accordance with W.Va. Code 29A-3-15, was effective pending approval or disapproval by the West Virginia Legislature.

As the Legislature began its consideration of the emergency rule in the 2000 Regular Session, the Senate Judiciary Committee sought to validate the positions offered by the EQB and WV DEP that all state waters were already designated as Category A and the emergency rule did nothing more than formally codify that designation.

In response to an inquiry from the Committee, EPA responded that the October 1999 emergency rule constituted a change to West Virginia's approved water quality standards regulations and as such would require the approval of the federal agency:

The Environmental Protection Agency understands that the Environmental Quality Board has *proposed* to designate all waters of West Virginia as public drinking water supply... We hope that this letter provides West Virginia with a better understanding of what EPA Region III would expect should West Virginia decide to *pursue* a statewide re-designation of Category A (*emphasis added*).<sup>15</sup>

The letter from EPA to the Committee made it clear that, contrary to the assertions of the EQB and the NPDES permitting practices of WV DEP, West Virginia's streams were presumed to serve NOT as public drinking water supplies but instead as Category B/aquatic life use and Category C/water contact recreation use. Based on EPA's response that the EQB's emergency rule amounted to a statewide re-designation of all streams, the Legislature expressly rejected the October 1999 proposal from the EQB:

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<sup>15</sup> Letter dated February 12, 2000 from EPA Region III Associate Director- Office of Watersheds to West Virginia Senate Judiciary Chairman William Wooten. Copy provided as attachment "G".

The emergency rule relating to the environmental quality board...filed in the state register on the eighteenth day of October, one thousand nine hundred ninety-nine...is repealed and not authorized.<sup>16</sup>

Despite the clear rebuke of the October 1999 rule by the Legislature and EPA's view that under the approved water quality standards program of the state that all streams defaulted to Categories B and C, WV DEP perpetuated the EQB's deceptions regarding stream designation in NPDES permitting by assigning Category A effluent limitations to all discharges.

Arrogantly ignoring the conclusions of the Legislature (and apparently assuming that the EQB and not the Legislature served as the final rulemaking body for West Virginia), WV DEP went so far as to publicly proclaim the agency will "continue its position [regarding Category A application in NPDES permits] unless directed to do otherwise by the [Environmental Quality] Board."<sup>17</sup> This conceited and illegal interpretation on behalf of WV DEP endures to this day; needlessly confusing the assignment of NPDES effluent limitations for several parameters such as beryllium (*see previous comments*).

Subsequent to the 2000 rejection of the emergency rule, the EQB sought to bypass the Legislature and bootstrap the Category A use classification to the entire state by promulgating a procedural rule which would have created a process to remove the (nonexistent) Category A designation. With the

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<sup>16</sup> Enrolled Committee Substitute for House Bill 4223. Relevant page provided as attachment "H".

<sup>17</sup> See attachment "I", copy of July 7, 2001 article appearing in the Charleston Gazette.

procedural rule filing, the EQB relied on WV DEP's illegal interpretation under the NPDES program to justify the need for the use removal process, evidently assuming that WV DEP possessed a higher rulemaking authority than the Legislature:

The current implementation of Category A by the Division of Water Resources of the [DEP] in the [NPDES] permitting program is that the designated use [of Category A Public Water Supply] applies to all waters of the state, unless it has been removed specifically by the Board. The Board supports this interpretation and application of the Public Water Supply use.<sup>18</sup>

Based on concerns raised by NPDES permit holders that the EQB was once again trying to extend the Category A designation statewide, the Legislature decided to review the procedural rule. The Legislative Rulemaking Review Committee properly concluded the EQB was seeking to bypass the Legislature entirely and codify the illegal Category A assumption by way of the procedural rule:

We have reviewed 46 C.S.R.7, "Procedural Rule Governing Reclassification of Water Designated for Public Water Supply, which was filed on January 8, 2003. This procedural rule allows the Environmental Quality Board to remove the Category A (public water supply use) that is described in the water quality standards (46 C.S.R. 1). **In effect, the Board would use a procedural rule 46 C.S.R. 7 to amend a legislative rule, 46 C.S.R. 1, without legislative review. As co-chairpersons of the Legislative Rule-Making Review Committee, we must reject any procedural rule such as 46 C.S.R. 7 that functions as a legislative rule, in derogation of West Virginia Code §§29A-3-1 et seq (emphasis added).**<sup>19</sup>

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<sup>18</sup> See generally "Statement of Circumstances Requiring Proposed Rules." Filed by the EQB on September 17, 2002. Copy provided as attachment "J".

<sup>19</sup> See generally March 5, 2004 2003 letter from Senator Mike Ross and Delegate Virginia Mahan, Co-Chairs, Legislative Rulemaking Review Committee to Edward Snyder, Chair, EQB. Copy provided as attachment "K".

Defiantly, the EQB continued to believe its own regulatory illusion regarding the drinking water designation and WV DEP blindly followed, applying effluent limits to all NPDES permits based on the Category A use. The frustration created by this “alternative reality” forced the coal industry to pursue a revision to the water quality standards culminating with the adoption by the Legislature in 2004 of a revised water quality standard for manganese.

Under the revised manganese standard, the drinking water standard (which is based on EPA’s secondary, non-enforceable, organoleptic recommended criteria) applies five miles above public and private drinking water intakes. When this revised manganese criteria was approved by EPA in 2005, the federal agency noted that application of Category A standards at the point of intake was reasonable and entirely consistent with the approach approved by EPA in other states:

The application of a criterion for the protection of public water supply at the intake point is consistent with EPA’s approvals in other states. EPA has approved applications of human health criteria at the intake or withdrawal points in other states as well. See 35 Ill. Adm. Code § 303.202; Ind. Adm. Code §2-1-3; 401 Ky. Adm. Regs. § 5:031; Ohio Adm. Code §3745-1-07; Sec. 5.<sup>20</sup>

With its approval of the revised manganese standard, EPA also reaffirmed its February 2000 interpretation of West Virginia’s legal, default use designations. More importantly, with respect to any future deliberations by WV

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<sup>20</sup> Letter dated June 29, 2005 from EPA Region III to the EQB approving the Manganese Five Mile Rule. Copy provided as attachment “L”.

DEP with respect to statewide use designations, EPA found the approach taken in the new manganese criteria- protection at the point of intake- entirely protective of the human health standard:

Therefore, this change in the water quality standard should not have an impact on the water withdrawn for drinking, the drinking water treatment processes and the cost of treating water for drinking. **All water withdrawn for drinking by private and public intakes that was covered under the designated use and thus protected by the manganese criterion prior to the Mn [manganese] 5-mile rule continues to be subject to the applicable 1 mg/L manganese criterion.** Therefore, application of the Mn 5-mile rule continues to protect the public water supply use, as defined (*emphasis added*).<sup>21</sup>

It was convenient for WV DEP to hide behind the EQB's irrational conclusions with respect to the Category A use designation while the Board held responsibility for water quality standards rulemaking authority. However, WV DEP did not disagree with or oppose the legislation to transfer that rulemaking power from EQB to the agency in 2005. Since that legislative action, WV DEP is now responsible for perpetuating both manifestations of the Category A deception: the myth, believed by no official body outside of the agency and the EQB, that state water quality standards actually assign the drinking water supply designation statewide, and the assignment of Category A-based effluent limitations to NPDES permits.

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<sup>21</sup> Letter dated June 29, 2005 from EPA Region III to the EQB approving the Manganese Five Mile Rule. Copy provided as attachment "L".

As it is now responsible for every aspect of the Category A regulatory delusion, the agency must consider a practical question created by EPA's approval of the revised manganese criterion in 2005: If application of the Category A use designation at the point of intake is protective of "all water withdrawn for drinking by public and private intakes" and if "application of the Mn 5-mile rule continues to protect the public water supply" use as EPA observed with respect to the manganese criteria, then what coherent basis does WV DEP have for maintaining the EQB's fantasy that all waters of the state have been properly designated as drinking water supplies?

An approach similar to that taken with the manganese standard, that is application of the criterion at the point of intake, has already been found by EPA to be protective and an analogous approach with respect to all Category A parameters would be similarly protective and resolve the confusion created by the agency's current illogical and illegal position.

### **Narrative Criteria Implementation / Biological Stream Measurements**

In its 2012 Regular Session, the West Virginia Legislature passed Senate Bill 562, directing WV DEP to develop rules to measure compliance with the state's narrative water quality standard.<sup>22</sup> Signed by the Governor on March 16, 2012 the bill requires WV DEP to develop a measurement tool that considers the

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<sup>22</sup> See generally Enrolled Committee Substitute for Senate Bill 562, copy provided as attachment "M".

“holistic health of the aquatic ecosystem.” WVCA believes adherence to the provisions of this legislation will improve the effectiveness of the state’s water quality program by assuring public and legislative involvement in the development of an assessment tool to measure attainment of the state’s narrative water quality standard. WV DEP historically relied on an assessment tool referred to as the West Virginia Stream Condition Index (WV SCI).

Like the provisions of House Concurrent Resolution (HCR) 111, which was adopted by the Legislature in 2010<sup>23</sup>, Senate Bill 562 expresses legislative intent with respect to the narrative water quality standard and makes it clear that singular reliance by the agency on the WV SCI is indefensible. The passage of Senate Bill 562 also reinforces previous statements and objections regarding WV DEP’s sole reliance on the WV SCI which myopically focuses on certain benthic species at the exclusion of other components of the stream ecosystem. Further, the WV SCI is not a water quality standard and has never been subject to the formal rulemaking process which would involve not only public participation but review and approval by the Legislature.

The agency’s misplaced reliance on the WV SCI created a treacherous situation beginning in 2009 when EPA, initially through CWA Section 404 permits processed by the U.S. Army Corps of Engineers, seized upon the WV SCI and other non-official biological measurements to allege violations of West Virginia’s narrative criteria. The resulting

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<sup>23</sup> See generally House Concurrent Resolution No. 111, copy provided as attachment “N”.

regulatory confusion quickly migrated to the CWA Section 402 permitting program administered by WV DEP and virtually paralyzed mine permitting activities within West Virginia.

The opportunity for stability and predictability was only recently restored to the permitting program through federal court decisions. Contained within these rulings is a clear conclusion that EPA usurped the powers reserved by Congress to individual states: “...Section 303 of the [federal] CWA allocates primary authority for the development of water quality standards to the states.”<sup>24</sup>

With the recent federal decisions making it clear that rulemaking belongs to individual states and the Legislature providing insight as to the appropriate factors that should be considered in developing narrative standards assessment methods to satisfy the public policy goals of West Virginia, WV DEP should move quickly to finalize a new narrative standards measurement.

### **Trout Stream Designations**

WVDEP’s current process, again inherited from the EQB, for designating streams as trout waters and applying trout criteria is convoluted and nearly incomprehensible. WV DEP, despite its clear responsibility for these determinations, blindly relies on data and recommendations provided by the West Virginia Department of Natural Resources (WV DNR), an agency that has no environmental regulatory responsibility. Lack of clarity on this

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<sup>24</sup> *State of West Virginia, et.al. v. Jackson, et. al.* F.Supp.2d, 2012 WL 3090245 (D.D.C., July 31, 2012).

issue lead the West Virginia Legislature to completely reject two recent attempts by WV DEP to expand the “codified” list of trout streams contained in the water quality standards rule. WVCA believes the 2014 triennial review provides an opportunity for the agency to establish more practical criteria for trout stream use designation.

“Trout waters” are defined in Subsection 2.19 of 47CSR2 as “waters which sustain year-round trout populations.” Appendix A to 47CSR2 contains a list of “known trout waters.” Streams have been added or removed from this list during past rulemaking exercises without providing the public with any data or information regarding whether the streams sustain year-round trout populations. Once a stream is placed on the list, the trout stream designation cannot be disputed later in a challenge to a specific NPDES permit limit and can only be changed through the Legislature or by a wholesale rule challenge.

If a stream is not on the codified list of known trout waters contained in Appendix A, WVDEP must demonstrate that the stream sustains a year-round trout population before applying trout stream criteria to it. The process by which WVDEP makes this determination is not entirely clear. In addition to the list in Appendix A, WVDEP also reportedly maintains one or more internal lists of trout waters, which are not readily accessible to the public. In addition, WVDEP relies heavily on consultation with WV DNR. These internal lists are apparently updated between the two agencies with no public notice and comment period. Should WV DEP assign permit limits as though a receiving stream is trout water based on these internal lists that are developed with WV DNR, the permit applicant is left with

nowhere to turn. WV DEP passively points to WV DNR as the basis for the determination, positioning the applicant to dispute effluent limits with an agency that has no environmental permitting role. *This practice results in a regulatory “twilight zone” where one agency with permitting responsibility relies on another that has no regulatory obligation in determining appropriate effluent limits.* Additionally, it creates a process whereby the WV DEP simply ignores other important requirements related to true cold water trout streams, such as temperature regimes, and ignores the reality that many of the “listed” streams are not cold water streams in need of more restrictive water quality criteria. WV DEP should end this practice of relying on consultation with WV DNR without providing some form of public notice regarding the factual bases upon which WV DNR has relied when it concludes that a stream is a trout water.

Members of the regulated community often are not aware that WVDEP considers a particular stream to be a trout water until WVDEP imposes trout-based effluent limitations in an NPDES permit. This sometimes occurs after a stream or stream segment has been listed on the CWA Section 303(d) list as being impaired for one or more trout criteria. While the public can comment on draft 303(d) lists, regulated entities often do not become aware that such listings have occurred until they are directly affected when a permit writer uses the 303(d) listing as the basis for imposing more stringent effluent limits based on trout criteria. At a minimum, the water quality standards rule should state that regardless of any past designation or listing of a stream or stream segment as a trout water, including on a

303(d) list, whenever WVDEP imposes new, more stringent effluent limitations in an NPDES permit based on trout criteria, the permittee can challenge the trout stream designation in an appeal to the EQB. The water quality standards rule should make it clear that a stream or stream segment's inclusion on a 303(d) list for impairment of a trout water criterion does not prohibit a permittee from challenging trout-based effluent limits in a permit appeal to the EQB.

WVCA suggests that WV DEP use the opportunity provided by the 2014 triennial review water quality standards rule to include a fair mechanism for challenging trout water designations by appealing them to the EQB, where a thorough examination of the factual basis for the trout stream designation can be undertaken.

WV DEP should also strongly consider revising the trout stream designation to distinguish naturally reproducing native trout waters and other waters, such as reproducing non-native trout waters, waters stocked with native species of trout, and waters stocked with non-native species of trout. Such a "refined" trout stream designation would allow for the assignment of effluent limits as appropriate to protect the various classes of trout waters, acknowledging that certain trout populations may need more protective standards than others. Similar "tiered" designations exist in other states and should be reviewed by WV DEP as possible models for a revised trout stream use designation.