



WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION

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GENERAL COUNSEL

Paul Calamita, AQUALAW

Comments pertaining
to 47 CSR 2 are
highlighted below

By Email (DEP.Comments@wv.gov)

Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: Stringency Report on WVDEP Rules Compared to Federal Counterparts

To Whom It May Concern:

The West Virginia Municipal Water Quality Association (MWQA) submits the following comments related to the Department's Stringency Report. As we explain below we believe the Department's report fails to identify several areas where DEP's program is more stringent than federal requirements. Also, even where DEP does identify the many areas where the State is more stringent, DEP has not provided any justification for that additional stringency. We believe these errors violate W. Va. Code §22-1-3a and §29A-3-20.

The MWQA is a statewide association of public water/sewer/stormwater utilities representing a significant majority of the sewered population of West Virginia. The MWQA strives to achieve environmentally responsible solutions to water quality issues in an affordable and cost-effective manner.

Consistent with W. Va. Code §29A-3-20(a), all state executive agencies must "[p]rovide for a comment period for all ... state rules, guidelines, policies and recommendations [that] are more stringent than federal counterparts." Additionally, for legislative rules that "are more stringent than the counterpart federal rule or program[.]" W. Va. Code §22-1-3a requires the Department to:

[F]irst provide[] specific written reasons which demonstrate 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.

Unless we have missed an attachment which provides the statutorily-mandated specific explanations, the Department clearly did not do this for 47 CSR 2, *Requirements Governing Water Quality Standards*. This important rule establishes requirements for WV/NPDES Water Pollution Control permits, and also for requirements in WV/NPDES Municipal Separate Storm Sewer System (MS4) permits statewide.

Related to 47 CSR 2, *Requirements Governing Water Quality Standards*, the only documentation the Department provided for public review was a table comprised of one sentence descriptions identifying where the WV rules are more stringent – for example: “West Virginia has human health criteria [for lead], while EPA does not.” However, the Department has not provided specific written reasons demonstrating why these more stringent provisions are necessary. The table is devoid of any analysis or technical basis for the Department’s decision whatsoever. Accordingly, there has been no meaningful opportunity for the public to evaluate, never mind comment on, DEP’s specific justification for each instance where DEP’s rules are more string.

We also note that the Department failed to identify the standard conditions below in WV/NPDES Water Pollution Control Permits as being more stringent than federal requirements. We particularly request that the Department provide its justification for the additional stringency in these provisions:

Ammonia-Nitrogen Limits. The Department has included Ammonia-Nitrogen limits in many major POTW permits where there is no reasonable potential for the permittee to exceed ammonia water quality standards. The Department need to provide a specific legal justification for this practice to satisfy the statutory requirement.

Bacteria. The Department has imposed bacteria daily maximum permit limitations for POTWs. This is in stark contrast to almost every other state. For example, Virginia, Maryland, and the District of Columbia (EPA-issued) only impose monthly geometric mean-based limits. North Carolina imposes monthly and weekly geometric mean requirements. DEP’s daily maximum requirement is far more stringent than federal requirements, as evidenced by these neighboring States’ programs. DEP should either revise its permitting approach to monthly or monthly/week or it must provide a justification for why WV POTWs have to meet daily maximum limits when communities in most other states and every surrounding state do not.

CSO Effluent Limitations.

WV DEP is imposing end-of-pipe effluent limits for bacteria (and in some cases, residual chlorine) for combined sewer outfalls when other states and EPA regions which issue NPDES permits do not. DEP must explain why imposing such limits is necessary – especially given the extraordinary cost such an approach imposes statewide on 50-60 communities with combined sewers and potentially every community should this approach apply to stormwater outfalls.

Related to NPDES Municipal Separate Storm Sewer System (MS4s) Permits (e.g., No. WV0116025), the Department failed to address the following provisions which are more stringent than federal requirements and recommendations:

Generic Water Quality Compliance Language. As with NPDES Water Pollution Control Permits, there are multiple references to generic water quality standard compliance. In addition to the reasons explained above, this is also contrary to the legal standard applicable to MS4s, which is to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B)(iii).

One-Inch Capture Requirement. Imposing a numeric effluent limitation on MS4s goes beyond the federal standard, which requires MS4s to implement best management practices to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B)(iii). There is no applicable federal retention requirement. We are not aware of any other State-issued MS4 permits that impose an on-site retention standard (here it requires the land owner to capture and address the first inch of rainwater). DEP must explain why such additional stringency is necessary for West Virginia MS4 communities.

Groundwater Recharge. Neither the federal or state NPDES programs regulate groundwater – only surface water. Accordingly, the Department is without authority to include permit provisions requiring WV MS4 systems to recharge groundwater. We are not aware that such a provision is found in any other State’s MS4 permits. DEP must provide an explanation sufficient to justify this unique MS4 permit requirement.

Restoration of Ecologically Sensitive Areas. Section II.C.7.e.7.b of the Small MS4 General Permit requires that a permittee’s post-construction program include water protection elements with an approach to “[p]reserve, protect, create, and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions.” There is no basis in federal law for this requirement and it goes far beyond the Department’s NPDES program authority under state law to regulate discharges to surface waters. If DEP believes otherwise, it must provide a legal/technical justification to support the retention of this permit requirement.

Above-Ground Storage Tanks and Other Materials. Section II.C.7.c.18 of the Small MS4 General Permit requires permittees to inventory and report on all above-ground storage tanks in business/industrial areas that are not covered by an NPDES permit. This is not a federal requirement and West Virginia law requires the Department and storage tank owners/operators to do this. W. Va. Code § 22-30-4. Accordingly, the Department has no authority under state law to impose this requirement. Relatedly, the Department has also included the requirement to evaluate and document “the storage of large quantities of materials that could result in spills.” This is not a federal requirement and we are not aware of any state law basis for this requirement, either.

We believe that the Department must provide the missing statutorily-mandated justification for each of the requirements identified above as well as those requirements which DEP itself identified as being more stringent. DEP should publish the complete list and specific justification for the additional stringency for public comment.

Thank you for considering our comments.

Sincerely,

A handwritten signature in blue ink that reads "F. Paul Calamita". The signature is written in a cursive style with a large initial "F" and a long, sweeping underline.

F. Paul Calamita,
General Counsel

cc: MWQA Members