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Via U.S. Mail and E-Mail (dep.comments@wv.gov)
West Virginia Department of Environmental Protection
Mr. Jacob P. Glance, Director
Public Information Office
601 57th St. S.E.
Charleston, WV 25304

**Re: Regulations and Policies More Stringent Than Federal Counterparts**

Dear Mr. Glance:

Thank you for the opportunity to provide comments on the spreadsheet first published by the West Virginia Department of Environmental Protection ("DEP") by public notice dated September 5, 2017, addressing the relative stringency of DEP's regulations compared to their federal counterparts pursuant to *W. Va. Code* § 29A-3-20. These comments are submitted on behalf of Murray Energy Corporation ("Murray").

Murray is the largest privately-owned coal company in the United States, producing nearly seventy-two million tons of high quality bituminous coal each year, and employing approximately 5,200 people in six states. In West Virginia, Murray or its subsidiaries operate five of the top seven underground mines and produce more than thirty million tons of coal through the efforts of nearly 3,000 employees. Murray is therefore acutely aware of the overall impact of DEP regulations on the sustainability of coal mining operations in West Virginia, and has a great interest in ensuring that the rules governing our operations are fair, rational, and no more stringent than the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* ("SMCRA") or other federal laws such as the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

## I. Scope of DEP Spreadsheet.

DEP's "Rules with Federal Counterparts – dated 9/6/2017" ("Spreadsheet") provides useful information to compare DEP's regulations to their federal counterparts. Murray believes that DEP has not, however, fully completed the task assigned by the Legislature in *W. Va. Code* § 29A-3-20. That statute requires each executive agency to "[r]eview and evaluate all state rules, *guidelines*, *policies* and *recommendations*" and determine whether each of those is more stringent than its federal counterpart. *Id.* (emphasis added). DEP's Spreadsheet only addresses DEP regulations. The Spreadsheet does not mention any of DEP's "guidelines, policies and recommendations" or their respective federal counterparts. DEP should supplement its

Spreadsheet to address its "guidelines, policies and recommendations" under each of the listed federal environmental laws and determine whether those are more stringent than their federal counterparts.

## II. Regulations Identified by DEP as More Stringent.

### A. Mining Regulations, Including Bond Release Requirements.

DEP identifies its mining regulations issued to implement SMCRA in West Virginia (Title 38, Code of State Regulations ("CSR"), Series 2) as one of the few sets of regulations designated as more stringent than required by federal law. The Spreadsheet contains a link to a separate document (the "Narrative") that provides a narrative explanation of how and why five aspects of DEP's mining regulations are more stringent. The Narrative also addresses a sixth topic – DEP's regulations governing the alternative bonding system and water treatment at bond forfeiture sites.

The Narrative notes that DEP has proposed revisions to the bonding rules as required by Senate Bill 617 passed during the 2017 legislative session, in order to "conform the requirements related to the bonding and water treatment to those of the federal counterpart **in most (but not all) instances**." (emphasis added). The Narrative, however, does not explain which bonding and water treatment provisions will be more stringent than the federal requirements even if the Legislature adopts the DEP's proposed revisions, or why those provisions should be retained in that form.

In this regard, it is accurate to state that DEP's proposed revisions to the regulations governing bond release found at 38 C.S.R. § 2-12 *will* still be more stringent than the SMCRA standards. That is because DEP has proposed to relocate, rather than revise, the provision addressing the criteria for a permittee to obtain bond release. In particular, the *existing* version of the regulations, 38 C.S.R. § 2-12.2.e,, provides that "no bond release or reduction will be granted if, at the time, water discharged from or affected by the operation requires chemical or passive treatment in order to comply with applicable effluent limitations or water quality standards," unless (1) the remaining bond is adequate to assure long term treatment of the drainage; or (2) the operator has "irrevocably committed" adequate financial resources to assure long term treatment of the drainage. DEP's proposed amendment moves this provision from 38 C.S.R. § 2-12.2.e to (new) 38 C.S.R. § 2-12.2.a.4 without making any actual revisions to the language.

Rather than merely re-order its location with the Mining Rules, DEP should *delete* proposed 38 C.S.R. § 2-12.2.a.4 and substitute in its place relevant portions of the corresponding federal rule (30 C.F.R. § 800.40), for the following reasons:

First, the existing provision does not appear either in SMCRA or in the federal regulations promulgated by the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") to implement SMCRA. Specifically, *nothing* in SMCRA ties release of a SMCRA performance bond to a permittee's compliance with "effluent limitations or water quality standards." Further, no OSM regulation does so. This makes sense because compliance with "effluent limitations and water quality standards" is regulated through permits issued under the

National Pollutant Discharge Elimination System ("NPDES") or delegated state NPDES programs, authorized and administered under the federal *Clean Water Act*, 33 U.S.C. § 1251, *et seq.* – not SMCRA.

Compliance obligations pursuant to SMCRA are separate and independent from compliance obligations under the Clean Water Act. This provision in the Mining Rules tying SMCRA bond release to NPDES permit conditions or Clean Water Act treatment obligations is not necessary to ensure that West Virginia's regulatory program continues to satisfy the programmatic requirements to maintain primacy under SMCRA. Similarly, this provision is not necessary for the DEP to maintain its delegated authority to administer the NPDES program in West Virginia.

Second, maintaining this provision in the Mining Rules continues to improperly blur the line between SMCRA and Clean Water Act compliance. As noted above, SMCRA and the Clean Water Act each establish separate and independent compliance standards. Indeed, SMCRA expressly provides that it should *not* be construed as replacing or superseding the regulatory programs created under the Clean Water Act. 30 U.S.C. § 1292(a)(3). By continuing to mix the two regulatory spheres in the Mining Rules, DEP risks creating situations where SMCRA could be applied to impose obligations more stringent than the Clean Water Act, in direct violation of this federal law. Such overlapping regulation creates confusion and uncertainty, causes problems in dealing with multiple federal agencies, and spurs litigation.

Third, during the 2017 legislative session, the Legislature passed, and Governor Justice signed into law, Senate Bill 687. That law expresses a direct Legislative decision to keep SMCRA and the Clean Water Act separate, in at least two ways. First, the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code § 22-3-1, et seq. ("WVSCMRA") was amended to eliminate any statutory basis for a requirement of compliance with effluent limitations or water quality standards as a condition precedent to bond release. Specifically, the Legislature deleted language appearing in the former version of W. Va. Code § 22-3-23(c)(2) that precluded bond release unless the "the quality of any untreated post-mining discharge complies with applicable water quality criteria[.]" Second, the Legislature made it clear that water treatment obligations and reclamation obligations must be addressed independently, by specifying that monies from the Water Trust Fund established under W. Va. Code § 22-3-11(g) ("Water Trust Fund") may only be used to construct and operate water treatment systems on bond forfeited sites where the DEP "has obtained or applied for an NPDES permit as of the effective date of [the] article." No longer will DEP be authorized to allocate money from the Special Reclamation Fund or Water Trust Fund toward water treatment systems at forfeited sites unless DEP has already obtained or applied for a NPDES permit. As the agency is aware, DEP's obligation to apply for and obtain NPDES permits for forfeited sites was required by court order and based upon rulings that the DEP was required to do so under the *Clean Water Act*, not SMCRA.

Senate Bill 687 is wholly consistent with the SMCRA regulatory sphere being completely separate and independent from the Clean Water Act regulatory realm. As a SMCRA program, the Special Reclamation Fund (out of which the Water Trust Fund was created) was not intended to

serve as a source of funding for Clean Water Act compliance. Allowing the substance of current 38 C.S.R. § 2-12.2.e to remain in place is contrary to the Legislature's clear directive that DEP should administer the mining program in a way that considers SMCRA liability independent of Clean Water Act liability. As DEP is not permitted to spend money from the Special Reclamation Fund for water treatment on forfeited sites, it makes no sense to tie SMCRA bond release to Clean Water Act compliance. Clean Water Act liability remains regardless of bond release, so permittees should be able to obtain bond release independent of Clean Water Act liability.

In addition to the statutory changes referenced above, the Legislature amended the WVSCMRA to include language directing that DEP "shall propose rules for legislative approval during the 2018 regular session of the Legislature . . . to implement the revisions to this article made during the 2017 session." W. Va. Code § 22-3-23(i). Moreover, the Legislature further stated that DEP "shall specifically consider the adoption of corresponding federal standards codified at 30 C.F.R. 700 *et. seq.*" This should eliminate any doubt that DEP should delete the existing bonding regulation discussed above and substitute the SMCRA counterpart in its place.

### B. Water Quality Standards.

DEP has identified 33 water quality standards (found at 47 CSR 2) that are more stringent than those recommended by the federal Environmental Protection Agency ("EPA"). Murray urges DEP to examine each of those water quality standards to determine whether any valid justification exists for those standards to remain more stringent than what EPA recommends.

In this regard, Murray has a particular concern with DEP's chloride water quality standard of 250 mg/l for protection of human health and water contact recreation. EPA does not recommend *any* chloride water quality standard for protection of human health and water contact recreation. Rather, EPA has established 250 mg/l as a chloride "guideline" for operators of public drinking water supply systems to consider under the Safe Drinking Water Act in assessing chloride content of water in their systems. Such secondary maximum contaminant levels ("SMCLs") only address aesthetic concerns with drinking water, such as taste, color, and odor. As stated on EPA's website, water that has a pollutant present in concentrations at the SMCL "is actually safe to drink."[1] DEP's adoption of the chloride SMCL as a human health water quality standard is therefore not only more stringent than required by the Clean Water Act, but also lacks any scientific justification.

## III. Regulations Not Identified By DEP as More Stringent.

### A. Subsidence Regulations or Policies.

Murray believes that DEP should have identified on its Spreadsheet DEP's mining regulations governing subsidence (or, the DEP's policy on applying those regulations) as more stringent than their federal counterparts. Generally speaking, SMCRA regulations require mine

[1] https://www.epa.gov/dwstandardsregulations/secondary-drinking-water-standards-guidance-nuisance-chemicals Last visited 10-9-17.

operators to take measures to minimize material damage caused by planned subsidence to non-commercial buildings and occupied residential dwellings or structures unless the property owner has waived the obligation to do so. 30 C.F.R. 817.121(a); 30 U.S.C. § 1309a. By contrast, DEP's mining regulations governing prevention of material damage caused by planned subsidence is not limited to non-commercial buildings or occupied residential dwellings. W. Va. C.S.R. §§ 38-2-12.a, 38-2-14.9, and 38-2-16.2. Moreover, DEP's mining regulations arguably do not recognize the ability of a commercial property owner to *consent* to subsidence or to *waive* its right to seek compensation for damage due to subsidence, as provided in the SMCRA regulation at 30 C.F.R. § 817.121(a).

Since the DEP interprets and applies its arguably ambiguous regulation in a manner that does not recognize the limitation of this protection to non-commercial buildings only, and does not recognize the ability of commercial property owners to grant such consents or waivers, both the DEP regulation and the DEP's policy as to this issue are more stringent than required by federal law. DEP's regulation should be amended to remove any arguable ambiguity and incorporate these corresponding SMCRA provisions, and consistent with such a change any DEP policy interpreting the present regulatory language should be dropped.

**B. Ownership and Control; Permit Blocking Regulations.**

DEP's regulations governing information concerning "ownership and control" of an applicant that is required for submittal to the agency in a permit application are more stringent than SMCRA regulations. *Compare* W. Va. C.S.R. § 38-2-3.1 to 30 C.F.R. §§ 778.11 – 778.16. Likewise, the scope of regulatory violations that may "permit block" an applicant, and the extent to which such a permit block applies to entities in an "ownership" and/or "control" relationship with the violator, are much broader, and therefore more stringent than, the SMCRA regulations. *Compare* W. Va. C.S.R. § 38-2-3.32 to 30 C.F.R § 773.8 – 773.15.

These rules should have been included on the DEP's Spreadsheet as ones that are more stringent than their federal counterparts. DEP should evaluate whether revisions to these regulations are appropriate to bring them in line with the SMCRA regulations.

**C. Division of Air Quality Regulations Applicable to Coal Facilities.**

The DEP Division of Air Quality's regulations governing the permitting and control of air emissions from coal preparation plants, coal handling operations, and coal refuse disposal areas (45 C.S.R. 5) are in certain respects more stringent than the regulations established by EPA under the federal Clean Air Act, 42 U.S.C. § 7401, et seq., that apply to coal-related facilities. Accordingly, these rules should have been included on the DEP's Spreadsheet as more stringent than their federal counterparts, and the DEP should evaluate which provisions should be changed or deleted to make them consistent with federal law.

For example, the federal New Source Performance Standards ("NSPS") regulations that apply to coal preparation plants and processing plants (found at 40 C.F.R. 60, Subpart Y) do not

apply to coal "handling operations" as defined at 45 CSR § 5-2.14, and they do not apply to coal refuse disposal areas as defined at 45 CSR § 5-2.6. Additionally, the DEP regulations establish a unique State operating permit system for coal preparation plants that is not required by the Clean Air Act. Particularly since DEP generally incorporates EPA's NSPS by reference when addressing other industrial sources of air emissions, it is fair to ask whether the Division of Air Quality's Series 5 regulations are needed at all.

## IV. DEP Guidelines, Policies, and Recommendations.

As noted above, DEP has not identified its guidelines, policies, and recommendations that are more stringent than their federal counterpart. DEP should do so and supplement its Spreadsheet accordingly. In addition to the subsidence regulatory interpretation policy noted above, Murray is aware of the following DEP guidelines, policies, and recommendations that appear to be more stringent than their federal counterparts:

### A. Assimilative Capacity "Set Aside" for Prospective Uses of State Waters.

West Virginia Code § 22-11-7b governs the process for DEP's adoption of water quality standards. This statute states in pertinent part that water quality standards "shall protect the public health and welfare, wildlife, fish and aquatic life and the present and **prospective future uses** of the water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof." (emphasis added) Murray understands that DEP has indicated that the highlighted language in this statute may be interpreted to allow DEP to "set aside" a certain amount of pollutant assimilative capacity of State waters to accommodate potential future, unknown and unidentified, uses of a particular stream or stream segment when establishing a water quality standard for that stream. Nothing in the federal Clean Water Act allows, much less requires, an approved State program to "set aside" assimilative capacity of waters to account for theoretical future uses of the water when establishing water quality standards. *See* 33 U.S.C. § 1313 (water quality standards and implementation plans). If DEP has adopted such a policy, this should be disclosed on the Spreadsheet and the agency should explain why West Virginia's regulatory program should include such a potentially restrictive and broadly discretionary feature as a part of its critical water pollution control permitting system.

### B. DEP's Multi-Sector General Permit for Industrial Storm Water Discharges.

Both EPA and DEP have adopted a multi-sector general permit ("MSGP") that governs storm water discharges from industrial facilities. The MSGPs each identify various classifications of industrial activities known as "sectors."

For certain sectors, EPA's MSGP establishes "benchmarks" for the concentration of certain pollutants in the storm water discharges. According to EPA's Industrial Stormwater Monitoring and Sampling guide, a "benchmark pollutant concentration is a level above which a stormwater discharge could adversely affect receiving water quality (and control measures must be evaluated) and, if below, the facility is not expected to have an impact on receiving water quality."

Exceedance of a benchmark is not a permit violation. Rather, it is an indicator that the permittee may need to modify its storm water controls to reduce the concentration of the pollutant in storm water discharge. As noted in Section 6.21 of EPA's MSGP, "benchmark concentrations are not effluent limitations; a benchmark exceedance, therefore, is not a permit violation."

EPA's MSGP does not establish benchmarks for all sectors. For example, EPA's MSGP does not establish any benchmarks applicable to facilities that manufacture transportation equipment, industrial, or commercial machinery (Sector AB). These facilities fall under Section P in DEP's MSGP. Unlike the EPA permit, DEP's permit *does* impose benchmarks for these Sector P facilities for the following pollutants: total suspended solids, oil/grease, and chemical oxygen demand. DEP's MSGP is therefore more stringent than the EPA's MSGP. Imposing these benchmarks for facilities that fall within Sector P in DEP's MSGP is not required by the Clean Water Act or the West Virginia Water Pollution Control Act.

In addition to DEP's MSGP being more stringent that its federal counterpart, Murray understands that DEP has in certain instances sought to impose effluent limitations for benchmark parameters as part of enforcement action against a permittee for exceedances of the benchmarks concentrations. This is improper because an exceedance of a benchmark does not necessary mean that a facility's storm water control measures are insufficient. As noted in section X.B.1 of EPA's fact sheet for its current (2015) version of the MSGP, "[e]xceedance of benchmarks does not necessarily indicate that a discharge is causing or contributing to a violation of a water quality standard exceedance[.]" Enforcement actions for exceedances of benchmark parameters involving imposition of effluent limits for those parameters is not proper, and is a policy approach that is more stringent than required by the Clean Water Act.

### C. WV/NPDES Permit Condition Requiring General Compliance with Water Quality Standards.

A WV/NPDES permit is intended to provide certainty and clarity for a permittee as to what actions are required to ensure compliance. The federal Clean Water Act contains a provision known as the "permit shield" that precludes enforcement action against a permittee based on discharges containing pollutants for which the permit does not establish effluent limits. 33 U.S.C. § 1342(k). DEP has historically included a boilerplate provision in its WV/NPDES permits that purports to require the permittee to generally comply with all State water quality standards regardless of what effluent limits are set forth in the permit: "The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the Department of Environmental Protection, Title 47, Series 2." Such a provision is not required by the Clean Water Act. To Murray's knowledge, EPA does not

include such a provision in permits that EPA issues in states that do not administer their own approved water pollution control programs.[2]

This boilerplate provision has led to litigation and unintended consequences for permittees. As just one example, the Fourth Circuit recently upheld a judgment against a coal operator for violation of the "narrative" water quality standards through discharges that increased the concentration of "ions" in a receiving stream, thus leading to elevated conductivity. *Ohio Valley Environmental Coalition v. Fola Coal Company, LLC*, 845 F.3d 133 (2017). Relying on the boilerplate provision quoted above, the court rejected the permittee's defense that its WV/NDPES permit did not contain any specific limitation on the discharge of "ions."

By including this boilerplate provision in permits, DEP has deprived permittees of their protection under the "permit shield." In addition, DEP's policy of including this boilerplate provision results in standards of compliance that are more stringent than required by the Clean Water Act.

Murray recognizes that certain statutory and regulatory changes have been undertaken to address this issue, and applauds the agency's efforts to provide needed clarity in this area. Nevertheless, to improve certainty and reduce the risk of unfounded third-party litigation, DEP should further revise its regulatory program by ceasing to include boilerplate language in WV/NPDES permits that purports to require blanket or general compliance with all water quality standards. Moreover, for much the same reasons as described above, DEP should cease including any such language as conditions to its Certifications issued under Clean Water Act § 401, pursuant to DEP regulations at 47 CSR 5A. Again, federal law does not require such boilerplate language to be included in Clean Water Act § 401 certifications, and sound policy dictates against it.

### D. Policy of Treating All Streams as Public Drinking Water Supplies.

For a number of years, DEP has implemented a policy that considers all State waters to qualify as Category A waters (public drinking water supplies). This is in contrast to West Virginia's water quality standards, that 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. CSR § 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. CSR § 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

[2] Murray understands that this provision, when found in a WV/NPDES permit, has been replicated from the WVDEP NPDES regulations and was intended to serve as a directive to *the agency* to assure compliance with water quality standards when determining the appropriate terms to be included in such a permit. Nevertheless, third parties and some federal courts have interpreted and applied this language in such a manner that it applies to the permittee rather than to the DEP.

Legislature repeatedly rejected prior attempts by the Environmental Quality Board (which previously had rule-making 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 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 than 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 to be 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. Such a policy is also more stringent than required under the Clean Water Act, and should be identified as such on the DEP Spreadsheet.

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Murray appreciates the opportunity to offer these written comments. Murray reserves the right to present additional comments at public hearings. If you have any questions concerning these comments, please feel free to contact me.

Sincerely,

C. Crellin Scott
Director of Regulatory Affairs

cc: Austin Caperton, Cabinet Secretary
Jason Bostic, West Virginia Coal Association
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