



October 10, 2017

Secretary Austin Caperton
WV Department of Environmental Protection
Submitted via DEP.Comments@wv.gov

RE: Public Comment on WVDEP Rules with Federal Counterparts

West Virginia Rivers Coalition, along with the listed organizational co-signatories, submit these comments for the WVDEP Rules with Federal Counterparts report's consideration of public comments.

Water quality criteria that are more or less stringent than EPA recommendations

EPA issues National Recommended Water Quality Criteria, but states are not required to adopt every criterion recommended by EPA. Rather, states may use them as guidance in developing their own criteria.

DEP prepared a table that documents whether West Virginia criteria are more or less stringent than National Recommended Water Quality Criteria. According to this table, many pollutants are more stringent, but many more are less stringent. Each particular criterion has its own history regarding West Virginia rulemaking, and any potential changes to a particular criterion would need to first review this history, including the scientific basis, state-specific calculations, and justification for diverging from the National Recommended Water Quality Criteria. Only after this review is completed would it be appropriate to consider strengthening or weakening West Virginia criteria to match the National Recommended Water Quality Criteria.

Further, even if the Legislature makes changes to West Virginia water quality criteria, these changes cannot take effect until approved by EPA. EPA approval can take months or years. If a large number of criteria were changed at the same time, it would be unrealistic for EPA to be able to quickly review the supporting material and make efficient approval/disapproval decisions.

Adding to the complexity of setting appropriate state-specific criteria is the fact that EPA has recently updated its human health-related National Recommended Water Quality Criteria for a large number of pollutants, and DEP is now considering the best approach for addressing these changes in West Virginia. EPA adjusted certain scientific information and assumptions used in calculating these criteria, which has resulted in some National Recommended Water Quality Criteria going up, and others going down. We recommend that DEP and the Legislature use a consistent, systematic approach to updating West Virginia's human health-related criteria, rather than simply lowering criteria for pollutants targeted by members of the regulated community whose permits may be weakened by loosening the criteria.

DEP's table comparing West Virginia criteria to National Recommended Water Quality Criteria appears not to include National Recommended Water Quality Criteria for organoleptic effects.

<https://www.epa.gov/wqc/national-recommended-water-quality-criteria-organoleptic-effects>. For example, EPA recommends a criterion of 0.3 mg/L for iron; West Virginia's Category A iron criterion of 1.0 is much less stringent than the EPA-recommended criterion, but this is not reflected in DEP's table (which states that West Virginia has a human health criteria, while EPA does not).

The appropriate mechanism and process for considering updates to West Virginia water quality standards is during the state's required triennial review process, which began in September 2017. Through the remainder of 2017 and into 2018 the WVDEP is receiving comments and will be facilitating public discussion and review of potential revisions. Any revisions would be filed as a proposed rule in Summer 2018.

Protection for "Future" Uses of Surface Waters

The West Virginia Water Pollution Control Act provides that water quality standards shall protect "present and prospective future uses." W.Va. Code 22-11-7b(c). In its June 30, 2017 letter to DEP, the West Virginia Chamber of Commerce objects to this language and asserts that this means that WVDEP may be required to protect all waters for all potential future uses, which would require setting aside assimilative capacity. We support the language in W.Va. Code 22-11-7b(c) as written. It is entirely appropriate for state standards to protect both "present and prospective future uses" of state rivers and streams.

It is important to distinguish between setting water quality standards and applying those standards in permits, antidegradation calculations, and TMDLs to protect and restore waters. The paragraph with the phrase "future uses" applies to the establishment of standards, and not to their application.

Just because a cold-water stream is polluted and does not currently support trout does not mean that Category B2 criteria for trout waters should be changed. Just because drinking water intakes are not located on a stream does not mean that Category A criteria for public water supplies should be changed.

In addition, DEP should carefully consider how adjusting this paragraph to remove prospective future uses would affect antidegradation implementation and TMDLs.

To implement antidegradation for Tier 2 waters, only a portion of remaining assimilative capacity can typically be used by new and expanded discharges, and the remaining assimilative capacity is tied to the water quality criterion. Adjusting this paragraph to remove prospective future uses could result in a weakening of criteria, which would, in turn, allow additional degradation of state waters.

TMDLs are required to set aside part of the total maximum daily load for future growth. DEP should carefully consider how adjusting this paragraph to remove prospective future uses would affect future growth allocations in TMDLs.

The federal Clean Water Act regulations anticipate that uses will be designated not only based on present uses, but on what uses are *attainable*. 40 C.F.R. § 131.10. Under federal regulations a use is considered to be *attainable* if it can be achieved through the imposition of effluent limits for point source discharges and best management practices to control non-point source pollution. *Id.* at § 131.10(d). The designation of uses based only on what is currently being achieved is antithetical to the

goals of the federal Clean Water Act. 33 U.S.C. § 1251, 1311. Moreover, it will restrict future development and economic opportunities in the state by making it difficult to safeguard new sources of public drinking water or other uses that require high water quality.

Stormwater Benchmarks

In its June 30, 2017 letter to DEP, the West Virginia Chamber of Commerce objects to the stormwater benchmarks used in industrial stormwater permits. This issue is not related to whether West Virginia laws or rules are more stringent than federal laws or rules, because these benchmarks are only provided in EPA guidance and in EPA's multi-sector general permit.

It is notable, however, that the benchmark values used by DEP are the same as those recommended by EPA. If it were appropriate to consider this comparison during this comment period, the conclusion would have to be that West Virginia benchmarks are consistent with EPA benchmarks.

Alternative Bonding System/Water Treatment at Bond Forfeiture Sites

The proposed rules attempt to eliminate the state's responsibility to issue NPDES permits and maintain compliance with CWA effluent limits on Special Reclamation, bond forfeiture sites. Doing so would be flatly contrary to federal law as interpreted by federal courts in the Northern District of West Virginia, *West Virginia Highlands Conservancy v. Huffman*, 588 F.Supp.2d 678 (N.D. W.Va. 2009), the Southern District of West Virginia, 651 F.Supp.2d 512 (S.D. W.Va. 2009) and the Fourth Circuit Court of Appeals 625 F.3d 159 (4th Cir. 2010). As the Fourth Circuit Court of appeals plainly held "WVDEP must obtain NPDES permits for . . . bond forfeiture sites." *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159, 165 (4th Cir. 2010). If the WVDEP ceases to issue or comply with NPDES permits at its bond forfeiture sites it will be swiftly met with litigation from EPA and/or citizen groups to enforce federal law as interpreted by these courts. Removal of such a clearly established federal requirement will do nothing but subject the state of West Virginia to the needless and unjustified expense of federal lawsuits—which it will lose.

Thank you for the consideration of these comments as the agency prepares its final report Joint Committee on Government and Finance and the Legislative Rule-Making Rule Committee.

Signed,

Angie Rosser, Executive Director
West Virginia Rivers Coalition

Mike Becher
Appalachian Mountain Advocates

Natalie Thompson
Ohio Valley Environmental Coalition

John Bird, Conservation Chair
West Virginia Chapter of the Sierra Club

Brent Walls
Upper Potomac Riverkeeper

Jonathan Rosenbaum, President
League of Women Voters of WV

Cindy Ellis
West Virginia Highlands Conservancy

Gary Zuckett, Executive Director
West Virginia Citizen Action Group

Keena Mullins, Vice President
West Virginia Environmental Council

Karen Yarnell, Chair
West Virginia Wilderness Coalition