



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JAN 26 2018

Mr. Scott G. Mandirola, Director
Division of Water & Waste Management
601 57th Street, Southeast
Charleston, WV 25304

Dear Mr. Mandirola:

During its 2017 Regular Session, the West Virginia Legislature amended Section 22-11-7b of the West Virginia Code. This State statute authorizes the Secretary of the West Virginia Department of Environmental Protection (WVDEP) to implement and enforce the State's water quality standards. The WVDEP General Counsel certified on July 11, 2017 that the amendments to the statute were duly adopted by the West Virginia Legislature in accordance with State law. On the same date, WVDEP forwarded the amended provisions to the Environmental Protection Agency, Region III (EPA), for review pursuant to Section 303(c)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. §1313(c)(2)(A), and 40 C.F.R. §131.20(c).

House Bill 2506 amended W. Va. Code §22-11-7b(c) to require the use of harmonic mean flow to calculate National Pollutant Discharge Elimination System (NPDES) permit limits for the implementation of human health criteria that protect the drinking water use in West Virginia surface waters. This bill also authorized WVDEP, at the Secretary's discretion, to allow overlapping mixing zones when setting permit limits for those criteria, so long as the overlapping mixing zone does not extend more than one-half mile above a public water intake. The amendment requires that at locations where mixing zones are allowed to overlap, permittees will indicate on required signage that mixing zones overlap in a particular vicinity. This bill was passed by the Legislature on March 28, 2017 and signed into law by the Governor on April 8, 2017.

EPA is approving the adoption in W. Va. Code §22-11-7b(c) of the use of harmonic mean flow to calculate NPDES water quality-based permit limits for West Virginia's human health criteria that protect the drinking water use, pursuant to CWA §303(c) and the implementing regulation at 40 CFR §131. The use of harmonic mean flow is consistent with EPA guidance in its Water Quality Standards Handbook, Chapter 5 General Policies, EPA 820-B-14-004, September 2014. EPA also indicated in the Federal Register notice announcing revisions to the Agency's methodology for deriving human health criteria in 2000 (65 FR 66443, 11/3/2000) that harmonic mean flow should be used to implement human health criteria in NPDES permitting. EPA made this recommendation because, by and large, human health criteria are designed to protect an individual over a lifetime of exposure, and so EPA attempts to match the longest stream flow averaging period (i.e., harmonic mean flow) with the criteria which is protective over a human lifetime.



EPA is also approving pursuant to CWA §303(c) and the implementing regulation at 40 CFR §131, the provision of W. Va. Code §22-11-7b(c) that allows overlapping mixing zones for human health criteria that protect the drinking water use in surface waters. This statutory provision nullifies the prohibition against overlapping mixing zones found in the state regulations at W.Va. Code of State Regs. § 47-2-5.2.h.5. A discharger must still meet all the other requirements at W.Va. Code of State Regs. § 47-2-5 in order to qualify for a mixing zone, but the wholesale prohibition against overlapping mixing zones no longer applies. EPA recommends that WVDEP amend the regulations to revise W.Va. Code of State Regs. § 47-2-5.2.h.5 to conform with the State statute and to prevent confusion.

In addition, EPA recommends that before allowing overlapping mixing zones for these criteria in a particular NPDES permit, WVDEP evaluate the cumulative effects of multiple mixing zones within the same waterbody. The potential additive or synergistic effects of certain pollutants could result in the designated use of the waterbody as a whole not being protected. Under West Virginia's mixing zone regulations, WVDEP still must size mixing zones to prevent significant human health risks and must consider the cumulative effects of multiple discharges and mixing zones on the drinking water intake. See W.Va. Code of State Regs. § 47-2-5.2.c.

EPA is taking no action on the signage provision of W. Va. Code §22-11-7b(c) as we find that this provision is not a water quality standard subject to EPA review under Section 303(c) of the CWA. We make this determination consistent with the four-part test described in "What is a New or Revised Water Quality Standard Under CWA Section 303(c)? Frequently Asked Questions" (EPA Publication No. 820512017, October 2012).

Senate Bill 697 amended W. Va. Code §22-11-7b(f) to modify the directive to the WVDEP Secretary to promulgate rules on how to measure whether the waters of the State meet the narrative water quality standards that prohibit toxic effects and adverse impacts to aquatic life. (See W.Va. Code of State Regs. §§ 47-2-3.2.e & 47-2-3.2.i). This bill was passed by the Legislature and signed into law by the Governor on April 8, 2017. The West Virginia Legislature first adopted the directive to the Secretary to promulgate rules to measure the biologic component of the narrative water quality standard in 2012 through Senate Bill 562. It is EPA's understanding that WVDEP's efforts to develop such rules is ongoing.

In reviewing the amendment to W. Va. Code §22-11-7b(f), EPA referred to letters exchanged between EPA and WVDEP in 2012, included here as Enclosures 1 & 2 (Enclosure 1 is letter dated November 6, 2012 from EPA Region III's Regional Administrator to the WVDEP Secretary; Enclosure 2 is letter dated December 20, 2012 from WVDEP Secretary to EPA Region III's Regional Administrator). Those letters were regarding the amendment in Senate Bill 562. In the December 20, 2012 letter, WVDEP stated that the amendment adopted in Senate Bill 562 simply authorized WVDEP to propose legislative rules and gave direction to WVDEP as to the parameters of any such proposed legislative rules. WVDEP asserted that Senate Bill 562 did not change or revise WV's approved water quality standards. The amendment in Senate Bill 697 revises the directive to promulgate rules adopted in Senate Bill 562. Whenever WVDEP adopts such assessment rules, EPA will have to consider whether the rules constitute water quality standards subject to review and approval under Section 303(c) of the CWA.

If you have any questions regarding this matter, please contact me or have your staff contact Denise Hakowski at (215)814-5726,

Sincerely,

A handwritten signature in cursive script, appearing to read "Catharine McManus".

Catharine McManus, Acting Director
Water Protection Division

Enclosures (2)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

NOV 06 2012

The Honorable Randy C. Huffman, Secretary
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304

Dear Secretary Huffman:

I am writing to request information regarding the West Virginia Department of Environmental Protection's (WVDEP) interpretation of the recently enacted Senate Bill 562 (SB562). This legislation directs WVDEP to propose rules to "measure compliance" with the "biologic component" of the West Virginia narrative water quality standard (WQS). We understand the legislation as instructing WVDEP to propose rules to interpret existing WQS, specifically, CSR §§ 47-2-3.2.e & 47-2-3.2.i. The U.S. Environmental Protection Agency (EPA) would be pleased to work with you to identify a path forward to implement the legislation in a way that is consistent with both West Virginia and Federal law.

Under the Clean Water Act (CWA), revisions to state WQS are required to be approved by the EPA before becoming effective for purposes of Federal law, including implementation of the National Pollutant Discharge Elimination System (NPDES) and Total Maximum Daily Load (TMDL) programs. A description of how EPA evaluates and determines the types of legislative and/or regulatory provisions that constitute new or revised WQS that the EPA has the authority and duty to approve or disapprove can be found at:
<http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm>.

To date, WVDEP has not submitted SB562 to the EPA pursuant to CWA regulations. However, various WVDEP actions and statements appear to rely directly on the text of SB562 as immediately revising one or more components of West Virginia's WQS. These include your April 6, 2012, letter to Mr. Jon M. Capacasa, Director of Region III's Water Protection Division (copy enclosed). In your letter, you stated that, in light of SB562, WVDEP is postponing ongoing work on the Upper Kanawha River Watershed ionic stress TMDL, and other TMDLs to address previously identified biologic impairments based upon West Virginia's existing WQS. This postponement may suggest an interpretation that SB562 is changing the level of protection and thus constitutes a WQS change, especially since your letter does not explain how SB562 precludes the use of existing methodologies to establish TMDLs at a level necessary to implement applicable WQS.

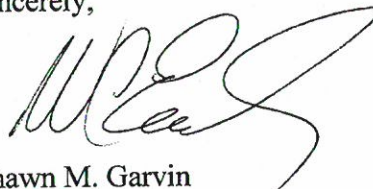
SB562 emphasizes that WVDEP should focus on ensuring the holistic health of the aquatic ecosystem and a "balanced aquatic community that is diverse in species composition." We note that West Virginia's Environmental Quality Board recently stated in connection with West Virginia's existing WQS that: "Macro invertebrate community composition is a very important component of the health of aquatic ecosystems in West Virginia streams." It is EPA's view that the best way to achieve the goals of SB562 is by protection of all components of the aquatic ecosystem, including plants, macroinvertebrates, mussels, amphibians, water-dependent birds, and fish.

I am hopeful that we can reach a better understanding on the impact of SB562 on West Virginia's WQS and agreement on the resumption of the work on these important TMDLs to improve water quality in impaired streams. Please advise EPA whether WVDEP intends to submit SB562 to the EPA as a WQS revision, or provide a letter explaining WVDEP's interpretation of SB562, including whether and to what extent the legislation has any effect on existing WQS beyond an instruction to develop assessment methodologies, WVDEP's views on SB562's effect on use of current methodologies, and when and how WVDEP intends to adopt regulations pursuant to SB562 for use in implementing CWA programs.

We look forward to working with WVDEP as you develop regulations and related program components that achieve this goal in a manner consistent with Federal and West Virginia law, and I offer the assistance of my staff to work with you on these important issues.

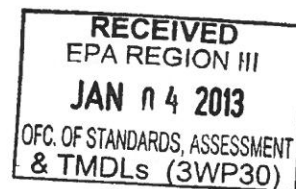
If you have any questions, please do not hesitate to contact me or have your staff contact Mrs. Laura Mohollen, EPA's West Virginia Liaison, at (215) 814-3295.

Sincerely,

A handwritten signature in black ink, appearing to read "Shawn M. Garvin", written in a cursive style.

Shawn M. Garvin
Regional Administrator

Enclosure



west virginia department of environmental protection

Executive Office
601 57th Street, Southeast
Charleston, West Virginia 25304
Phone: (304) 926-0440
Fax: (304) 926-0446

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

December 20, 2012

Shawn M. Garvin, Regional Administrator
USEPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Re: West Virginia Senate Bill 562

Dear Mr. Garvin:

I have received your letter of November 6, 2012, requesting "information regarding the West Virginia Department of Environmental Protection's interpretation of the recently enacted Senate Bill 562 (SB562)." You suggest that SB562 constitutes a "revision" to West Virginia's water quality standards ("WQS"), and that DEP has not "submitted" SB562 to the EPA. The reason why DEP has not submitted SB562 to EPA is simple: SB562 does not constitute a "revision to West Virginia's WQS, and, therefore, is not subject to EPA's review.

As an initial matter, SB562 merely gives DEP the authority to propose legislative rules, which DEP is still in the process of preparing. See, W. Va. Code § 22-11-7b(f) (as amended by SB562) ("The secretary shall propose rules measuring compliance with the biologic component of West Virginia's narrative water quality standards. . . . The secretary shall propose rules for legislative approval in accordance with the provisions of [W. Va. Code § 29A-3-1, et seq.] that implement the provisions of this subsection."). Accordingly, SB562 does nothing to change West Virginia's WQS, which are set forth in West Virginia's Code of State Rules at 47 C.S.R. 2 and which have been previously approved by EPA.

The remainder of the language in SB562 does nothing to change West Virginia's WQS as they existed before the amendment. Rather, the remainder of SB562 merely gives direction to DEP on the parameters for the future proposed rule. As a result, that language is also not a "revision" to West Virginia's WQS that would be subject to EPA's review. DEP relied on EPA's own approach for determining what constitutes a revision to a WQS. Specifically, DEP engaged in a two-part analysis, considering (1) whether the provision related to an attainment decision; and, if so, (2) whether the provision defined, changed or established the magnitude, duration or frequency related to water quality criteria necessary to support a designated use. See, *Florida Clean Water Network, Inc. v. United States Environmental Protection Agency*, 2012 U.S. Dist. LEXIS 44539 (N.D. Fla., Mar. 30, 2012). Employing that analysis, DEP found that the statute as amended does not affect attainment decisions made by it, because the language does not serve to define, change or establish the level of protection to be applied in those attainment decisions or affect existing standards

Promoting a healthy environment.

Shawn M. Garvin, Regional Administrator
December 19, 2012
Page 2 of 2

implemented pursuant to the *West Virginia Water Pollution Control Act*, W. Va. Code § 22-11-7b. *Id.* Rather, the amended statute merely describes the sufficiency or reliability of information necessary for West Virginia to make an attainment decision; it does not change a level of protection and, thus, merely outlines methodologies, as contemplated by Section 303(d) of the federal *Clean Water Act*. *Id.* Instead, the language sets out the circumstances that must exist in order for West Virginia to make an attainment decision in the first instance and contains policy choices . . . but does not describe the condition of the water body assessed. *Id.*

Specifically, the statute as amended outlines these conditions that must exist in order for DEP to make an attainment decision:

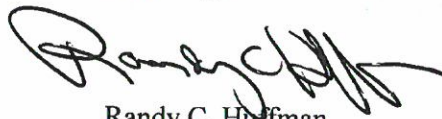
(i) [the water body] must "support[] a balanced aquatic community that is diverse in species composition; (ii) contain[] appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (iii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present.

W. Va. Code § 22-11-7b(f) (as amended by SB562). These conditions do not relate to the ambient condition in the water body, i.e. what level of pollutant (or pollutant indicator) may be in the water body before determining that the water body is not meeting all applicable WQS; instead, they relate to the information necessary to conduct an attainment decision pursuant to Section 303(d) of the CWA and its implementing federal regulation, 40 C.F.R. § 130.7(b)(5)-(6), and as such, do not constitute WQS. Accordingly, EPA has no duty or authority to review the subject amended statute. *Fl. Clean Water Network, supra.*

Thank you for your acknowledgement that "the best way to achieve the goals of SB562 is by protection of all components of the aquatic ecosystem, including plants, macroinvertebrates, mussels, amphibians, water-dependent birds, and fish." It is unfortunate that EPA has been resisting until now your description of what is protective of our WQS. After nearly four years of debate on this very matter, it is refreshing to see EPA finally agree with the State of West Virginia about how best to protect our waters.

As always, we will continue to work with your staff throughout our development of the rule mandated by the West Virginia Legislature in SB562, and we look forward to your cooperation.

Sincerely,



Randy C. Huffman
Cabinet Secretary