



west virginia department of environmental protection

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May 8, 2013

Bill Richardson
Water Protection Division (3WP30)
USEPA, Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

Re: Comments on EPA's Partial Approval and Partial Disapproval of West Virginia's
2012 Section 303(d) List

Dear Mr. Richardson:

Please accept these comments in response to EPA's request for public input regarding its decision to approve in part and disapprove in part West Virginia's 2012 Clean Water Act (CWA) Section 303(d) list of impaired waters and its decision to overlist thereon 225 additional streams or stream segments. *See*, 78 Fed. Reg. 20912 (Apr. 8, 2013). The Department of Environmental Protection (DEP) has already responded to EPA's comments relative to its draft 2012 section 303(d) list (*see*, Public Participation and Responsiveness Summary, submitted with the 2012 Integrated Report), and we incorporate that document as though fully restated herein.

As an initial matter, DEP takes issue with EPA's statement that DEP "is unable to carry out the requirements set forth in 40 C.F.R. 130.7(b)(5)" so that "EPA has an obligation to take action to ensure that the federal requirements are satisfied." *See*, March 25, 2013 letter from EPA Region 3 Administrator Shawn Garvin to DEP Cabinet Secretary Randy Huffman (March 25 Letter). DEP is neither unable nor unwilling to carry out its responsibilities under the CWA, but it is both unwilling and unable to violate its obligations under the West Virginia Water Pollution Control Act (WVWPCA) or the West Virginia Administrative Procedures Act (WVAPA). The West Virginia Legislature clearly spoke during the Regular 2012 Session when it passed Senate Bill 562, amending the WVWPCA to require DEP to establish via legislative rulemaking a procedure for determining compliance with the biologic component of the narrative water quality standard, which procedure must take into consideration the holistic health of an aquatic ecosystem. In other words, the West Virginia Legislature has made the policy decision that the biologic health of a stream or stream segment must be measured using more factors than simply a benthic macroinvertebrate score taken at one point in a watercourse. For that reason, DEP declined to include new "biological impairment" listings on the 2012 section 303(d) List, although it did not delist streams listed in previous years. By following the mandate of the West

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Virginia Legislature, DEP considered “all existing and readily available water quality-related . . . information[]” when it developed West Virginia’s 2012 section 303(d) List, in accordance with 40 C.F.R. 130.7(b)(5).

Further, DEP disagrees with EPA’s decision to overlist streams using its own misapplication of West Virginia’s Stream Condition Index (WVSCI). In the past, DEP has used WVSCI to list streams as biologically impaired when such streams have a WVSCI score of 60.6 or lower, and EPA has tacitly approved this process by approving West Virginia’s past section 303(d) Lists. However, in this case, EPA has arbitrarily chosen to overlist streams using a WVSCI score of 68. If EPA is going to overlist West Virginia streams using West Virginia’s process, it should use West Virginia’s whole process, not just the parts of the process EPA now finds acceptable. Notwithstanding the threshold difference, the following listings do not conform to the EPA modified WVSCI protocol:

Stream Name	Code	Recommendation	Reason
Gauley River	WVKG	Remove	New sample, WVSCI > 68
Panther Creek	WVBST-60	Remove	New sample, WVSCI > 68
Greenbrier River	WVKNG	Remove	New sample, WVSCI > 68
Davis Creek	WVK-39	Remove	Approved TMDL, May 2012
UNT/Little Creek RM 3.19	WVM-17-A-6	Add	WVSCI 36.85 entire length
Hog Lick Run	WVMW-2-A	Remove	Noncomparable sample
Sweep Run	WVMW-2-C	Remove	Noncomparable sample
Sugarcamp Run	WVMW-55-C	Remove	Noncomparable sample
Fork Creek	WVKC-14	Revise reach to “Mouth to 3.6”	WVSCI > 68 at MP 3.6
Moody Run	WVM-23-C	Revise reach to “Mouth to 1.2”	WVSCI > 68 at MP 1.2
Prickett Creek	WVM-19	Revise reach to “Mouth to 7.7”	WVSCI > 68 at MP 7.7
Freeman’s Creek	WVMW-36	Revise reach to “1.1 to HW”	WVSCI > 68 at MP 1.1

Relative to the threshold difference, while DEP does not agree with EPA’s action to overlist streams in light of SB 562, it also strongly objects to the use of a WVSCI score of 68 as a listing threshold. DEP acknowledges EPA’s previously stated concerns about DEP’s grey zone, but despite those stated concerns, EPA continued to approve DEP’s 303(d) Lists using that grey zone. DEP further believes arbitrarily changing a long-standing impairment threshold is inappropriate and only complicates this situation. Upon information and belief, a majority of Region 3 states have some type of uncertainty adjustment or grey zone in their listing methodologies for biologic impairment, yet EPA has capriciously eliminated such uncertainty adjustment or grey zone for West Virginia.

Finally, if EPA action is going to add streams or stream segments to West Virginia’s section 303(d) List, it should also take action to delist streams that do not fall within the criteria EPA has chosen to list streams. Specifically, in Section 7 of Enclosure 1 to the March 25 Letter, EPA states that it believes the twelve streams listed therein should be delisted, but suggests a separate, mid-cycle process to do so. As both agencies agree that delisting the twelve streams is appropriate, direct action avoids the administrative burden and uncertainty associated with the

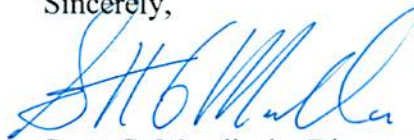
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proposed remedy. If EPA feels action is needed to list streams in West Virginia, it should be equally necessary and important to EPA to remove unimpaired streams from the List.

For these reasons, WVDEP respectfully disagrees with EPA's decisions to partially disapprove its 2012 section 303(d) list and to overlist 225 additional streams or stream segments and requests that EPA afford DEP and the West Virginia Legislature the deference to which they are entitled.

If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,



Scott G. Mandirola, Director
Division of Water and Waste Management