West Virginia Coal Association

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May 8, 2013

Bill Richardson
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U.S. Environmental Protection Agency Region 3
1650 Arch Street
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Re: Comments on EPA's Partial Approval and Partial Disapproval of West Virginia's 2012 Section 303(d) List of Impaired Waters

Dear Mr. Richardson:

Enclosed with this letter, please find the comments of the West Virginia Coal Association regarding the U.S. Environmental Protection Agency's decision to partially approve and partially disapprove the West Virginia Department of Environmental Protection's Clean Water Act Section 303(d) list of impaired waters for 2012.

Respectfully submitted,

Jason D. Bostic
Vice President

Encl.
cc: Randy Huffman
Secretary, WV DEP

COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION

REGARDING EPA'S PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S 2012 SECTION 303(d) LIST OF IMPAIRED WATERS

INTRODUCTION

The West Virginia Coal Association (WVCA) offers the following comments and observations regarding the federal Environmental Protection Agency's (EPA) decision to partially disapprove the Clean Water Act Section (CWA) 303(d) list of impaired waters submitted to EPA by the West Virginia Department of Environmental Protection (WV DEP) on December 21, 2012 and to forcibly add streams to this list of impaired waters through direct federal action. EPA announced its decision on March 25, 2013 and subsequently published notice of its decision and a request for public input in the Federal Register.[1]

WVCA is a trade association representing the interests of companies engaged in the mining of coal within the State of West Virginia. WVCA's producing membership accounts for more than 90 percent of West Virginia's underground and surface coal production. WVCA also represents approximately 250 associate members that supply an array of services to the mining industry, including permitting, environmental, and engineering consulting firms; mining equipment manufacturers; coal transportation companies; coal consumers and land and mineral holding companies. WVCA's primary

[1] 78 Fed. Reg. 20912 (Apr. 8, 2013).

goal is to enhance the viability of West Virginia coal as a source of domestic energy by facilitating environmentally responsible coal mining through reasonable, equitable, and achievable state and federal policy and regulation.

WVCA considers this federal 303(d) listing action as just the latest in a series of efforts by EPA to interfere with West Virginia's administration of its water quality standards and CWA Section 402 NPDES permitting programs by "hijacking" the interpretation and implementation of the state's approved narrative water quality criteria. As we explain in our detailed comments, WVCA believes that EPA has selectively interpreted the federal CWA in order to undertake this listing decision that would transform a mere *methodology* into a regulatory standard beyond the purpose for which it was intended. In doing so, EPA will eviscerate federal and state rulemaking procedures. EPA's listing action is also counter to the will and intent of the West Virginia Legislature, the body ultimately charged with promulgating water quality standards for the State of West Virginia. If WV DEP's own use of this *methodology* implies it was a *standard* that should be afforded deference in 303(d) listing actions, then EPA is required to reject its use entirely and require WV DEP to pursue the formal CWA rulemaking process for revising water quality standards. In this particular instance, EPA's arrogance goes even further as it reinterpreted that method differently than the state.

In essence, EPA, in defiance of the CWA and the courts, is attempting to bypass the legal rulemaking process related to water quality standards and substitute its own judgment for that of the West Virginia Legislature and WV DEP to implement a political agenda related to coal mining activities that occur in Appalachia and West Virginia.

EPA's Myopic Interpretation of the CWA Provisions Related to 303(d) Listing Decisions

In its letter to WV DEP informing the state of its decision to undertake a federal 303(d) listing action, EPA relies exclusively on the regulatory mandate at 40 CFR 130.7(b)(5): "Each State shall assemble and evaluate all existing and readily-available water quality related data and information to develop the list..." In its March 25, 2013 letter to WV DEP, EPA states "recognizing WV DEP's position that it is unable to carry out the requirements set forth in 40 CFR 130.7(b)(5), EPA has an obligation to take action to ensure that the federal requirements are satisfied."[2]

Nothing is further from the truth and the federal agency's interpretation of WV DEP's position represents a contrived reading of the state submission and a convenient application of 40 CFR 130.7 as a means to provide a basis for the federal listing action.

WV DEP did not ignore "existing and readily-available information". Instead, WV DEP considered the information available and made the decision, *consistent with the statutory instructions provided by the West Virginia Legislature*, that insect scores alone were not sufficient to classify streams as "biologically impaired". Further, WV DEP is not

[2] Letter dated March 25, 2013 from Shawn Garvin, Regional Administrator of EPA Region III to WV DEP Cabinet Secretary Randy Huffman.

"unable to carry out the requirements set forth in 40 CFR 130.7(b)(5)" as EPA maintains. The state agency did indeed consider all "available information", which in this case includes more than insect scores collected under a simple, unofficial assessment document. WV DEP 's consideration of information in compiling the draft 303(d) list included the controlling, statutory instruction provided by the West Virginia Legislature in the passage of Senate Bill (SB) 562 (see subsequent paragraphs).

Since it is clear that WV DEP did consider the information available to it, the only reasonable conclusion that can be reached is that EPA disagrees with the decision WV DEP chose to make with that information. EPA cannot, however, substitute its own policy judgment for that of the State of West Virginia. EPA's tenuous reliance on the provisions of 40 CFR 130.7(b)(7) is evidence that this proposed 303(d) listing action is yet another example of its arrogant denial of the rightful state prerogatives under the CWA.

In its reliance on the provisions of 40 CFR 130.7, EPA has conveniently ignored other, more substantive provisions of the CWA that govern its actions relative to 303(d) listing actions such as CWA Section 303(d)(1)(a):

> Each State shall identify those waters within its boundaries for which the *effluent limitations* required by section 301(b)(1)(a) and section 303(b)(1)(B) are not stringent enough to implement *any water quality standard* applicable to such waters. The state shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters *(emphasis added)*.

In the case of the current proposal from EPA to "overwrite" the state's proposed 303(d) list, if the cause of the alleged impairment cannot be linked to "effluent limitations" developed to protect a "water quality standard" as required by CWA Section 303(d)(1)(a), then listing a stream is not appropriate. Simply classifying a stream as "biologically impaired" is far from enough to satisfy the requirements of the CWA, since the biological conditions of the stream can be influenced by other factors, independent of any effluent limitation or water quality standard, such as habitat and seasonal variation. Further, as we explain in more detail in subsequent paragraphs, the foundation for EPA's listing decision rests on a *methodology*, the West Virginia Stream Condition Index (WV SCI) not a *water quality standard*. EPA cannot rely on an unsanctioned practice to satisfy the requirements of CWA Section 303(d)(1)(a).

West Virginia's actual, legally promulgated and EPA-approved state water quality standards contain the following narrative criteria:

> 3.2. No sewage, industrial wastes or other wastes present in any of the waters of the state shall cause therein or materially contribute to any of the following conditions thereof:
>
> 3.2.e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life;
>
> 3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.[3]

[3] 47 CSR 2.3.2.

Until recently, WV DEP has had a practice of basing its attainment decisions for these narrative criteria solely upon a score calculated using the WV SCI. This *methodology* was never promulgated pursuant to the rulemaking procedures required by West Virginia's Administrative Procedures Act (APA).[4] Because of this, WVCA has long objected to this use of the WV SCI method.

Should EPA proceed with this proposed listing action, it will confirm our belief that the agency intends to bypass the legal rulemaking process and seize authority reserved to the states for promulgating water quality standards. Since there is no legally promulgated water quality standard at issue, EPA's reliance on the WV SCI *method* to satisfy the requirements of CWA Section 303(d)(1)(a) is evidence of the federal agency's intent to *magically* transform an internal *methodology* into a *water quality standard* contrary to the CWA. If EPA were to consider all of its mandates under the CWA regarding 303(d) listing decisions instead of selectively reciting only the regulatory sections that support its efforts to bootstrap a water quality standard for West Virginia it would suspend its efforts to forcibly add streams to the 303(d) list.

The West Virginia Stream Condition Index

EPA's proposed listing action relies exclusively on WV SCI data for several West Virginia streams. At its core, the WV SCI is a narrowly focused measurement of benthics that, as WV DEP has recently recognized (consistent with findings and instructions from

[4] *See generally* W.Va. Code 29A-3-1 through 29A-3-18.

the West Virginia Legislature), cannot serve as sole factor in measuring compliance with West Virginia's narrative water quality standards.

The WV SCI was developed by Tetra Tech, Inc. using WV DEP and EPA data collected from riffle habitats in wadeable streams.[5] The WV SCI is comprised of six benthic macro invertebrate community metrics.[6] A "metric" is "a characteristic of the biota that changes in some predictable way with increased human influence."[7] A score is calculated for each of the six metrics, and then those scores are converted using a standardized scale from 0 to 100. The six standardized scores are averaged to produce a single WV SCI score between 0 and 100. A score of 100 is *supposed* to represent the condition of the benthic macro invertebrate community found in "reference streams" in West Virginia, which are streams that have experienced minimal human disturbance.[8]

Because of its narrow focus, the WV SCI may have some restricted utility as an individual assessment *methodology* but it is far too limited to measure compliance with West Virginia's *water quality standards*. Standing alone, the WV SCI is not a scientifically defensible basis for accurately measuring the aquatic ecosystem within a particular stream reach. As EPA's own 1991 guidance points out, a proper evaluation of the overall biologic integrity of an aquatic ecosystem does not rely exclusively on benthic macro invertebrate composition, but requires a far more comprehensive

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[5] *See generally* "A Stream Condition Index for West Virginia Wadeable Streams" (March 28, 2000).

[6] The six metrics are: (1) total taxa, (2) EPT taxa, (3) percent EPT, (4) percent Chironomidae, (5) HBI (family level), and (6) percent two dominant taxa.

[7] "A Stream Condition Index for West Virginia Wadeable Streams", pg. 13, March 28, 2000.

[8] *Id.* at 21, A-2.

assessment of all components of that ecosystem, including habitat and fish populations.[9] The WV SCI and its focus on certain aquatic insects falls far short of EPA's recommendation that state standards "should contain biological criteria that consider the various components (e.g., algae, invertebrates, fish) and attributes (measures of structure and/or function) of the larger aquatic community."[10]

Any interpretation of West Virginia's narrative criteria and decisions related to designated use attainment must be consistent with the public policy goals of the West Virginia Legislature. In 2010, the Legislature unanimously adopted House Concurrent Resolution No. 111 regarding the intent of the state's narrative criteria. The Legislature determined that the requirements of the state's narrative criteria are satisfied when a stream segment

> (a) supports a balanced aquatic community that is diverse in species composition; and (b) contains appropriate trophic levels of fish (in streams with sufficient flows to support fish populations); and (c) the aquatic community is not composed only of pollution tolerant species or 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).[11]

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[9] *See generally* "Policy on the Use of Biological Assessments and Criteria in the Water Quality Program." U.S. EPA, May 1991.
[10] *Id.*
[11] House Concurrent Resolution No. 111, adopted unanimously by the West Virginia Legislature during the 2010 Regular Session.

The Legislature also reminded WV DEP that any interpretation and/or implementation of the narrative criteria must remain faithful to the guiding principles of the WV WPCA:

> ...the agency's interpretation of West Virginia's narrative water quality standards must faithfully balance the protection of the environment with the need to maintain and expand opportunities for employment, agriculture and industry as set forth in the Legislature's statement of public policy as contained in the West Virginia Water Pollution Control Act.[12]

Recently, WV DEP has also recognized the limited scope and regulatory applicability of the WV SCI. With respect to assessment methodologies or "tools" like the WV SCI:

> These tools are just that, tools. ***They are not stand-alone determinants of compliance with the narrative criterion***. Any application of these assessment tools in determining compliance with the narrative criterion must faithfully apply the language of the standard itself, which prohibits significant adverse impacts on the biologic component of the aquatic ecosystem (emphasis added).[13]

WV DEP also addressed the narrow scope of the WV SCI and its limited use for any determination concerning the state's narrative standard in a letter to the U.S. Army Corps of Engineers: "Where the only impacts to this component of the ecosystem are diminished numbers of certain genera of mayflies, without evidence that this has had

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[12] House Concurrent Resolution No. 111, adopted unanimously by the West Virginia Legislature during the 2010 Regular Session.

[13] Statement by Randy Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection, to U.S. Senate Committee on Environment and Public Works, Subcommittee on Water and Wildlife, June 25, 2010.

any adverse impact of any significance on the rest of the ecosystem, the State cannot say there has been a violation of its narrative standard."[14]

In 2010, WV DEP developed an additional internal document to guide the state agency's actions with respect to the narrative criteria. In that policy, WV DEP, consistent with the instructions of the Legislature, acknowledged the limited applicability of the WV SCI:

> Through adoption of H.C.R. 111, the West Virginia Legislature has given [WV] DEP direction as to how it should implement its narrative water quality standards. [WV] DEP has determined that "significant adverse impact" is more than a change in the numbers or makeup of the benthic macro invertebrate community in a segment of a water body downstream from a point source discharge. It is, instead, a material decline in the overall health of an aquatic ecosystem. A goal of the CWA and WV WPCA is to protect the aquatic ecosystem as a whole; it is a holistic standard that requires a holistic approach to ecosystem assessment. In contrast to numeric water quality criteria, which can be applied by analysis of samples of water taken at any discharge or monitoring point in a stream, compliance with a standard that protects the aquatic ecosystem must be assessed in the broader area comprising the ecosystem. An ecosystem does not exist at a single point and, accordingly, its health cannot be assessed at a single point.
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> Thus, [WV] DEP's Guidance follows long-standing EPA guidance, which indicates that bio surveys cannot fully characterize an entire aquatic community and its many attributes, and accordingly suggests, "State standards should contain biological criteria that consider various components (e.g., algae, invertebrates, fish) and attributes that (measures of structure and/or function) of the larger aquatic community.[15]

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[14] Letter dated July 10, 2009 from WV DEP Cabinet Secretary Randy Huffman to Dana Hurst, District Engineer, Huntington District, U.S. Army Corps of Engineers.

[15] West Virginia Department of Environmental Protection, "Narrative Water Quality Standard Interpretive Policy Justification Document", August 12, 2010.

Further, in a recent letter to WV DEP regarding the passage of legislation related to the state's narrative standard, EPA acknowledges that a broader assessment than the WV SCI is necessary to make regulatory determinations regarding the narrative criteria: "the best way to achieve the goals [of the legislation] is by protection of all components of the aquatic ecosystem, including plants, macro invertebrates, mussels, amphibians, water dependent birds and fish."[16]

Despite the clear evidence regarding the appropriate role of the WV SCI in the context of the state's narrative standard and other regulatory situations, EPA has inappropriately chosen to ignore the WV SCI's use as a "tool" and has undertaken this federal action to place streams on the 303(d) list using these insect scores alone. As noted earlier, EPA's actions with respect to this proposed 303(d) listing action effectively converts a *methodology*, the WV SCI, into a *water quality standard*. By doing so, EPA has elevated the WV SCI's role in the water quality standards program to a level never contemplated nor sanctioned by the West Virginia Legislature. Hence EPA's proposed listing action is clearly contrary to rulemaking requirements of both the CWA and the WV WPCA and will have the result of creating an illegitimate water quality standard for the State of West Virginia.

[16] Letter dated November 6, 2012 from Shawn Garvin, Regional Administrator of EPA Region III to WV DEP Cabinet Secretary Randy Huffman.

WV DEP's Historical Use of the West Virginia Stream Condition Index

As noted previously, there are no provisions contained within the state's water quality standards or the WV WPCA that indicate how WV DEP determines compliance with its narrative criteria found at 47 CSR 2.3.2. WV DEP has recently developed policies intended to guide the agency's implementation of that narrative standard and is currently developing a formal, inclusive assessment methodology per the instructions of the West Virginia Legislature. For EPA to base any federal listing decisions on the WV SCI, per the requirements of CWA Section 303(d)(1)(a), it must be a water quality standard. If the WV SCI is functioning as a water quality standard as EPA apparently contends, then it should have been legally promulgated as a water quality standard according to the requirements of the federal CWA, the state WV WPCA and the state APA. Since the WV SCI cannot be a water quality standard because it has not been promulgated as one and approved by the West Virginia Legislature and EPA, then it cannot be used by the federal agency to forcibly add streams on the 303(d) list. To the extent the state's use of the WV SCI in the past has "codified" it to the level where it is considered controlling in the context of this regulatory action, then it has been used as a water quality standard illegally in past 303(d) listing actions by WV DEP.

At some point after the WV SCI was developed, WV DEP made a decision to begin listing streams as "biologically impaired" on the Section 303(d) list based solely on WV SCI scores. Until the 2012 303(d) list, WV DEP considered a stream with a WV SCI score

greater than 68.0 to be unimpaired (attaining the narrative criteria), while a stream with a score below 60.6 was considered to be impaired (not attaining the narrative criteria). Scores between 60.6 and 68.0 fell within a "gray zone" in which WV DEP considered adverse impacts to the benthic macro invertebrate community to be uncertain. WV DEP began listing streams as impaired based solely on the existence of a WV SCI score below 60.6 beginning with the 2002 303(d) list. WV DEP continued to implement this policy during the development of the 303(d) lists for 2004, 2006, 2008, and 2010.

From 2002 to 2010, when WV DEP assessed a stream to determine whether the narrative criteria were being attained, the sole factor WV DEP relied upon was a WV SCI score obtained in that stream. If there was a single WV SCI score below 60.6 that had been calculated for a stream, WV DEP placed the stream on the 303(d) list of impaired waters, indicating that the stream was not attaining the narrative criteria. There were no other factors that WV DEP considered in making these attainment decisions. *Yet at no point was the WV DEP's WV SCI methodology ever lawfully promulgated as a water quality standard.*

States are required to submit new or revised water quality standards to EPA for review and approval.[17] EPA is required to disapprove a new or revised water quality standard if the State fails to follow its legal procedures for revising or adopting standards.[18] When WV DEP began implementing its WV SCI method, *EPA should have*

[17] 33 USC 1313(c)(2)(A).
[18] 40 CFR 131.5.

reviewed and disapproved the policy, since it constituted a new or revised water quality standard that was not legally or properly promulgated pursuant to West Virginia's rulemaking requirements.

To determine whether a particular provision or policy constitutes a new or revised water quality standard, EPA engages in a two-part analysis, considering:

> (1) whether the provision or policy relates to an "attainment decision"; and, if so,
>
> (2) whether the provision or policy defines, changes, or establishes the magnitude, duration, or frequency related to water quality criteria necessary to support a designated use.[19]

If the provision or policy does relate to an attainment decision and does define, change, or establish the level of protection to be applied in making that attainment decision, then the provision or policy constitutes a new or revised water quality standard.[20]

According to EPA, an "attainment decision" is "one where a State decides what it means to attain or to not attain any 'water quality standard applicable to such waters' for purposes of establishing total maximum daily loads (TMDLs) under section 303(d)(1)(A) of the [Clean Water] Act[.]"[21] Pursuant to this analysis, WV DEP's practice of listing a stream as biologically impaired based solely on a particular WV SCI score constitutes a new or revised water quality standard.

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[19] *Fla. Clean Water Network, Inc. v. U.S. Envtl. Prot. Agency*, 2012 WL 1072216, *3 (N.D. Fla. 2012).
[20] *Id.*
[21] *Id.* at *3 n. 10.

As described above, WV DEP's WV SCI methodology relates to an attainment decision—if a stream had a WV SCI score below 60.6, WV DEP placed the stream on the 303(d) list for non-attainment of the narrative criteria and indicated that a TMDL would be developed to address that impairment. WV DEP's WV SCI method also defined, changed, and/or established a magnitude component regarding the level of protection to be applied in making an attainment decision—the method established that the sole factor for determining whether the narrative criteria were being attained was a WV SCI score below 60.6. In that context, WV DEP's use of WV SCI constituted a new or revised water quality standard.

Senate Bill 562

SB 562 was passed by the West Virginia Legislature during its Regular Session in 2012. Signed by the Governor into law, the legislation amended the WV WPCA by adding the following language:

> (f) The secretary shall propose rules measuring compliance with the biologic component of West Virginia's narrative water quality standard requires [sic] evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) Supports a balanced aquatic community that is diverse in species composition; (ii) contains 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. The secretary shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code that implement the provisions of this subsection.

In passing SB 562, the Legislature endorsed an assessment method that considers the broader components of the ecosystem as suggested in EPA's own 1991 guidance document and *specifically rejected* a practice of making attainment decisions based solely on a benthic macro invertebrate metric. The Legislature directed WV DEP to develop a holistic methodology that considers fish populations and instructed WV DEP to promulgate rules establishing this methodology. WV DEP is currently in the process of developing the new methodology.

Considering "all available information", which now included the statutory instruction contained in SB 562, WV DEP decided not to add any new streams to the 2012 303(d) using WV SCI. However, WV DEP did retain streams that previously had been listed based solely on WV SCI scores below 60.6. For the reasons described in the previous section, WV DEP's practice of using the WV SCI as the sole determinant for making attainment decisions for the narrative criteria was already unlawful prior to the passage of SB 562. The passage of SB 562 makes it clear that the West Virginia Legislature disapproves of this practice and believes that a new, more holistic methodology should be developed and lawfully promulgated as a rule pursuant to the State APA.

EPA'S PARTIAL APPROVAL OF WV DEP'S 303(d) LIST INCLUDING STREAMS PREVIOUSLY LISTED BASED SOLELY ON WEST VIRGINIA STREAM CONDITION INDEX SCORES

EPA is proposing to partially approve WV DEP's 2012 303(d) list to the extent that it identifies 1,176 water quality limited segments (WQLSs) requiring a TMDL. This decision is unlawful because 472 of those 1,176 WQLSs were placed on the list for not attaining a water quality standard that was never lawfully promulgated. These streams were included on one or more previous 303(d) lists based solely on the existence of a WV SCI score below 60.6. As noted previously, a 303(d) list is required to contain streams that are not meeting "applicable" water quality standards.[22] *The WV SCI is not an applicable water quality standard.*

Although WV DEP decided not to list new streams using WV SCI alone, it included streams that had previously been listed as biologically impaired. WV DEP's explanation for retaining these streams on the 2012 303(d) list is that the streams were listed using a methodology "that was valid at the time those impairments were determined." As previously discussed, that methodology *was not valid* because it constituted a water quality standard that was never lawfully promulgated.

In EPA's explanation for its partial approval of WV DEP's 2012 303(d) list, EPA stated that "[i]t is not EPA's purpose to re-visit evaluations that form part of past approved Section 303(d) lists or to re-visit EPA's approval of those past lists." EPA's decision not to review a particular portion of WV DEP's 2012 303(d) list does not comply

[22] 33 USC 1313(d)(1)(A).

with EPA's duties under Section 303(d)(2) of the CWA or 40 CFR 130.7. The CWA requires states to identify streams that are not attaining water quality standards and submit "the waters identified" to EPA for its review.[23] The CWA requires EPA to "either approve or disapprove such identification."[24] This process of states identifying streams and EPA either approving or disapproving "such identification" is required to take place every two years.[25] There is absolutely nothing in Section 303(d) or 40 CFR 130.7 that indicates EPA is allowed to constrain its review to only a portion of the waters that have been identified by a state. Neither Section 303(d) nor 40 CFR 130.7 provide that EPA is required to review and either approve or disapprove only the new streams identified by a state.

If a state unlawfully places a stream on a 303(d) list and EPA illegally approves of that listing, those legal errors cannot be perpetuated based on an argument that EPA will not "revisit" past listings that it has already approved. EPA must review the entire 303(d) list each time it is submitted by a state. Therefore, for the reasons previously stated, EPA is required to disapprove of WV DEP's 2012 303(d) list to the extent that it contains streams that were listed based solely on the existence of a WV SCI score below 60.6.

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[23] 33 USC 1313(d)(1)(A) and (2).
[24] 33 USC 1313(d)(2).
[25] 40 CFR 130.7(d)(1).

EPA'S PARTIAL DISAPPROVAL OF WV DEP'S 303(d) LIST AND ADDITION OF STREAMS BASED SOLELY ON WEST VIRGINIA STREAM CONDITION INDEX SCORES

EPA proposes to partially disapprove WV DEP's 303(d) list to the extent that WV DEP failed to list new streams based solely on WV SCI scores. In its rationale, EPA states that WV DEP must continue its practice of listing streams based solely on WV SCI scores until such time as a new methodology is adopted pursuant to the legislative directive in SB 562. However, as discussed previously, basing an attainment decision on a particular WV SCI score constitutes the implementation of a new or revised water quality standard without following required rulemaking procedures and contradicts the express will of the West Virginia Legislature as stated in SB 562.

EPA's explanation for partially disapproving WV DEP's 2012 303(d) list is that WV DEP did not comply with the requirements in 40 CFR 130.7(b)(5) to "assemble and evaluate all existing and readily available water quality-related data and information" when developing a 303(d) list. To "correct" this alleged error, EPA reviewed WV SCI scores and determined that 255 additional water quality limited segments should be added to WV DEP's 2012 303(d) list. *Not only did EPA continue WV DEP's unlawful practices with the WV SCI,* ***but also implemented its own version of this unlawful water quality standard.***

EPA explained that it believes WV DEP's practice of considering WV SCI scores between 60.6 and 68 to fall within a "gray zone" in which adverse impacts to the

benthic macro invertebrate community are uncertain to be "statistically unsupported."[26] Therefore, EPA made a determination that any stream with a WV SCI score below 68 is not attaining the narrative criteria. This is unlawful, because EPA cannot make an attainment decision based on an internal *methodology* that was never lawfully promulgated as a *water quality standard*. In addition, it is unlawful because it is WV DEP's responsibility to establish water quality standards for waters in West Virginia, not EPA's. EPA has authority, in certain circumstances, to promulgate water quality standards for a state. A 303(d) listing action is not one those circumstances as EPA cannot unilaterally adopt a new water quality standard for a state through its review of a state's 303(d) list.

CONCLUSION

For the reasons described by WVCA in these comments, a plain reading of the provisions of the CWA makes it crystal clear that EPA cannot rely on a mere assessment methodology to satisfy the requirements of the statute with respect to stream listing decisions. EPA's attempts to do so by relying on the WV SCI will transform that internal *methodology* into a *water quality stand*ard and create an illegitimate *federal* water quality criterion for the State of West Virginia, contrary to the CWA, the WV WPCA and the state APA. Further, EPA is openly defying the West Virginia Legislature, the body

[26] According to an expert witness hired by the Ohio Valley Environmental Coalition, the "gray zone" exists because of the high degree of variability in the WVSCI scoring methods. Even when two WVSCI samples are collected for the same site at the same time they vary, on average, plus or minus 7.4 points—meaning that scores of the samples taken at the same time and place are expected to differ by almost 15 points (2 x 7.4). *OVEC v. U.S. Army Corps of Engineers*, C.A. No. 3:11-00149, Tr. p. 296 (testimony of Dr. R. King) (May 9, 2012).

ultimately responsible for promulgating water quality standards for West Virginia and violating the separation of powers between state and federal entities as envisioned in the CWA.

Instead of expanding the 303(d) list, under the CWA EPA is required to disapprove WV DEP's 303(d) list to the extent that any streams are listed for failure to attain the narrative criteria based solely upon a WV SCI score. EPA is prohibited by the CWA and the WV WPCA from using the WV SCI to add new streams to WV DEP's 303(d) list.