



March 26, 2010

VIA ELECTRONIC MAIL AND U.S. MAIL

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

Re: **Narrative Water Quality Standards Protocol**

Dear Secretary Huffman:

On behalf of the Independent Oil and Gas Association of West Virginia, Inc. ("IOGA"), I am submitting comments in response to your solicitation of comments regarding WVDEP's intention to establish a protocol for the interpretation of the narrative water quality standards contained in Title 47, Series 2, of the Code of State Rules (hereinafter "47 CSR 2"). IOGA is a statewide non-profit trade association representing companies engaged in the exploration, production and development of natural gas and oil resources in West Virginia, and the companies and individuals who support these activities. We appreciate the opportunity to offer these comments.

1. IOGA supports WVDEP's efforts to develop a protocol for implementing the narrative water quality standards.

IOGA is pleased that WVDEP has proactively sought input on how to best implement a protocol to interpret the narrative criteria in West Virginia's water quality standards. It is our understanding that the United States Environmental Protection Agency ("USEPA") has seized on the perceived lack of metrics to measure when these narrative criteria are being protected to justify a series of comments seeking to impose outrageous standards for coal mining WV/NPDES permits. In essence, USEPA has attempted to substitute its interpretation of West Virginia's water quality standards for that of the WVDEP – the agency specifically tasked with protecting West Virginia's waters by the Legislature.

In addition to the fact that implementation of the water quality standards has been legally delegated to WVDEP, IOGA firmly believes that, as the expert agency with the best understanding of West Virginia's environment, WVDEP is in the best position to interpret and enforce the rules that are approved by the Legislature, including 47 CSR 2. We must not let a few federal bureaucrats usurp this important state role.

INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC.

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In developing a protocol on how to apply the narrative standards, IOGA urges WVDEP to consider the differences in receiving streams (and aquatic life in those streams) and develop a flexible approach within a guiding framework to interpret these narrative standards. For example, interpreting the narrative standards for discharges from coal mines in headwater streams may require a different set of benchmarks to measure the impact on aquatic life than a discharge from an industrial facility on the Kanawha River. Accordingly, the WVDEP should avoid a "one-size-fits-all" approach for this protocol.

2. The protocol established by WVDEP must be guidance based on existing statutory and regulatory authority and cannot expand or change the 47 CSR 2 without going through the rule-making process.

Although IOGA supports WVDEP's efforts to develop a protocol for interpreting the narrative water quality standards in 47 CSR 2, we caution that the protocol must not change or expand the narrative water quality standards without going through rule-making as prescribed in the West Virginia Administrative Procedure Act, W.Va. Code § 29A-1-1*et seq.* WVDEP should not simply choose an arbitrary number based on a biological assessment metric or an arbitrary standard of a parameter for which there is no water quality standard (such as conductivity) as a stand-in for biological impairment. We are aware of assessment tools, especially the West Virginia Stream Condition Index ("WVSCI"), that have been developed by WVDEP, without ever being subjected to public review and comment, to give the agency a metric to assess an environmental condition that have subsequently been used as a part of permitting decisions or for determining whether a stream should be included on the list of impaired streams.

The protocol development process should not be viewed as an opportunity to create a new numeric standard based on a WVSCI score or a conductivity level while avoiding legislative rule-making. To the extent that new or expanded authority or numeric standards are necessary to implement the narrative standards, these should go through the rule-making process so that the public, including the regulated community, will have the opportunity to fully participate in the development of new regulations. As such, IOGA urges WVDEP to review each part of any protocol to ensure that the protocol merely interprets existing authority and does not require rule-making.

IOGA appreciates the opportunity to provide these comments and looks forward to the DEP's response.

Very truly yours,

A handwritten signature in blue ink that reads "Charlie Burd" followed by a stylized flourish or initials.

Charlie Burd
Executive Director