West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ www.wvcoal.com

March 26, 2010

West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
Via electronic submission: DEP.comments@wv.gov;

Re: Public Input Period- Interpretation and Implementation of State Narrative Water Quality Standards

West Virginia's narrative water quality standards, codified at 47 CSR 2, have been included as part of West Virginia's water quality standards rule for many years. The rule, including the narrative criteria, has been reviewed and approved by the United States Environmental Protection Agency (EPA). As such, the West Virginia Department of Environmental Protection (WVDEP) is charged with the interpretation and implementation of the rule, including its narrative criteria.

On March 3, 2010, the WVDEP published a news release stating its intent to develop a protocol for the interpretation and implementation of the long-standing narrative criteria, and inviting public input.

The West Virginia Coal Association (WVCA) has a significant interest in the issue of narrative criteria, not just as a result of WVDEP's news release, but as a result of what it believes to be an ongoing effort by the EPA to impose a number of its own new interpretations of long-existing federal law to existing state laws as well – clearly an exercise in over-reaching by a federal agency. Indeed, the EPA's efforts, through

comment letters sent to both the WVDEP and the U.S. Army Corps of Engineers (Corps), has become such a significant issue that West Virginia Governor Manchin has encouraged the WVDEP and others to evaluate and address the issues created by the EPA's actions.

On behalf of the coal industry in West Virginia, WVCA has devoted substantial time and resources to fully analyze the question of interpreting and implementing narrative criteria relative to coal mining activities. As a result of its extensive analysis and effort, WVCA offers the following specific and general comments for the WVDEP's consideration.

First, we have attached as a specific comment, for your review and consideration a detailed, protective, and legally and scientifically sound document (attachment "A") that we strongly urge the WVDEP to adopt as its interpretation and implementation policy for narrative water quality criteria for coal mining activities. WVCA offers this document because of the critical importance of this issue. Most mining-related Clean Water Act (CWA) Section 404 permits and CWA Section 402 (NPDES) permits are being held up by the EPA for intolerable periods of time – and have been for over a year – due in large measure to the uncertainties that EPA has created through its attempt to superimpose its own interpretation of state laws over the intent of the Legislature and WVDEP. By doing so, the federal agency seeks to compel the imposition of permit limitations and conditions without legal basis. In WVCA's view, EPA is pressing West Virginia to impose

limitations that we believe it would have no legal basis to impose itself.[1] And EPA presses forward, impeding all coal permitting in the State, to the detriment of each and every WVCA member, their employees, and to the economy of the State. It is with this critical concern that we offer a proposed policy for coal mining activities in West Virginia.[2] The attached policy represents a substantial effort- hundreds of hours of research and review of federal and state statutes, regulations, guidance. The attached policy was developed by outside consultants (two former state regulators) in conjunction with WVCA's Environmental-Technical Committee. We believe it to be environmentally protective, responsive to the Governor's call for the WVDEP and others to evaluate this issue and to be consistent with federal and state law, applicable guidance, and legislative intent. We urge its adoption.

Second, and as context for the attached document, WVCA offers the following general comments:

1. It is WVDEP's Role to Interpret and Apply its Rules

WVCA believes that EPA, as expressed in its many letters to the WVDEP and the Corps related to permitting matters for coal mining, has incorrectly and inappropriately used its own interpretation of West Virginia's narrative standards. In many letters to the Corps, for example, EPA used an unapproved benthic macroinvertebrate review method – not used in West Virginia – as well as an *ad hoc*

[1] Indeed – a quick review of permits issued by the EPA (in jurisdictions where the EPA is the permitting authority instead of a state water regulatory authority) reflect direct inconsistencies with what EPA is insisting be adopted by WVDEP to implement narrative criteria.

[2] These comments, including the proposed policy document, are submitted for application to coal mining activities. The document was not developed to address or apply to other industry sectors.

conductivity level of 500 uS/cm or less as a basis to conclude that water quality standards were not being met. The letters represent not only a new interpretation by the EPA, but a wrong application of state law by the EPA. As you know, the EPA cannot simply impose its own preferred biological threshold to interpret a State's narrative standard. As EPA has conceded in connection with the standards and listing litigation in Florida, doing so would be a *de facto* change in standards subject to the full-blown CWA 303(c) process. As the WVDEP knows, this process governs the review and revision of water quality standards by individual states and, where necessary, EPA. Neither West Virginia nor EPA has established numeric criteria for conductivity or biological translator procedures for the existing narrative standard. If EPA believes that such criteria or procedures are necessary to meet the requirements of the federal CWA, then the agency's only recourse is to prepare and publish proposed regulations under CWA 303((c)(4). **Unless and until such steps are taken, it remains the duty of the WVDEP to interpret and apply its own statutes and rules.**

Instead of following this statutory mandate, EPA has spent the better part of 2009 relying on its own staff study and has simply demanded that the Corps and WVDEP make regulatory findings and decisions – including the use of its macroinvertebrate and conductivity conclusions – without use or consideration of other available data and information that would surely be considered in any of the required regulatory processes.

WVCA strongly disagrees with this approach being taken by the EPA to date. State rule interpretation is the singular role of the State and its appointed agency – and

NOT the EPA or any other federal agency. The WVDEP must "run its program," including interpretation and implementation of its EPA-approved narrative criteria.

2. Any Policy Developed by WVDEP Must be Consistent with Legislative Intent as Expressed in the Underlying Statute and Be Faithful to the Language of the Standard Itself.

The West Virginia Legislature, in passing the West Virginia Water Pollution Control Act (WVWPCA), recognized that environmental protection must be balanced with the need to promote and facilitate industrial development:

> It is declared to be the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the waters of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.[3]

From this statutory mandate and declaration of public policy, WVDEP has developed designated uses and established narrative and numeric standards to protect those designated uses consistent with the federal CWA and regulations promulgated by EPA:

> 47 CSR 2-3 Conditions Not Allowable in State Waters[4]
>
> No sewage, industrial wastes or other wastes present in any waters of the state shall cause or materially contribute to any of the following conditions thereof:
>
> ****
>
> 3.2.i. Any other condition…which adversely alters the integrity of waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of the aquatic ecosystem shall be allowed.

[3] W.Va. Code 22-11-1(a).
[4] The full section on narrative criteria is set forth at 47 CSR 2-3.

As noted by the agency in establishing this public input period, WVDEP does not currently have an implementation policy to implement the previously-cited narrative standards at 47 CSR 2. The Legislature's statement of public policy in the WVWPCA **must** serve as the basis for any interpretative/implementation policy for the narrative standards, as well as guidance from EPA and prior policy statements of WVDEP.

First, implementation and interpretation of the state's narrative standards must be faithful to the previously-cited intent of the Legislature as expressed through passage of the WVWPCA- that environmental protection be balanced against the need to promote "industrial development and the "expansion of employment opportunities" through "**reasonable standards of purity and quality**". The policy statement on its face clearly contemplates that industrial development and employment opportunities are desired and expected to occur, and that standards of quality and purity are to be balanced such that those activities can occur. Implicit is the notion that these human activities will result in some level of impact to the environment – thus the need for a proper balance.

Consistent with the State's express policy, WVCA believes that a reasonable interpretation of the narrative criteria must start with the premise that conditions within a stream (or other water) may change, either naturally or as a result of human impacts. Further, changes can and will occur from industrial and other human activities that do not necessarily represent water impairment or failure to attain a stream's designated use.

To give proper effect to State law and maintain consistency with the federal CWA, an interpretation of narrative criteria should start by defining what it means to protect

aquatic ecosystems. The definitions must balance quality with the preservation and expansion of agriculture, jobs, and industry in order to achieve a "reasonable standard of purity and quality." **A narrative standard of purity and quality that requires protection of aquatic life at the expense of jobs, industry and agriculture – absent a specific federal *law requiring it*[5] – fails to achieve this balance and would betray not only the Legislature's stated public policy goals in the WVWPCA but also the very intent and purpose of the federal CWA as passed by Congress.**

3. The WVDEP's Recent Statements of Policy Can be Incorporated into its Narrative Criteria Interpretation and Implementation.

The WVDEP has in the recent past expressed its interpretation of certain aspects of the state's narrative standards. In June 2009, for example, during a hearing before the U.S. Senate Committee on Environment and Public Works, Subcommittee on Water and Wildlife, WVDEP Secretary Randy Huffman testified that **"[w]ithout evidence of any significant impact on the rest of the ecosystem beyond the diminished numbers of certain genus of mayflies, the State cannot say that there has been a violation of its narrative standard."** [6] In July 2009, WVDEP stated as follows:

---

[5] Here, we recognize that the EPA – as well as numerous environmental groups – have made many pronouncements, demands, suggestions, and comments regarding conductivity and "benthic macroinvertebrates," or bugs. Such pronouncements, comments, and "bluster," though, are not federal laws – and will not be found in either the CWA or promulgated regulations. Further, no state or federal criteria for conductivity exists, and efforts to develop an "advisory criteria" appear to have absolutely no legal basis.

[6] See Testimony of Randy C. Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection, to The U.S. Senate Committee on Environment and Public Works, Subcommittee on Water and Wildlife Copy provided as attachment "B".

> **The WVDEP understands that [EPA] found a shift in the benthic macroinvertebrate community downstream from mining activity but did not otherwise correlate this finding with any significant or adverse impairment of the ecosystem. Where the only impacts to this component of the ecosystem are diminished numbers of certain genera of mayflies, without evidence that this has had any adverse impact of any significance on the rest of the ecosystem, the State cannot say there has been a violation of its narrative standards.** [7]

WVCA would anticipate that any interpretative or implementation policy developed by the agency would be consistent with these statements and seek to protect the aquatic ecosystem as a whole, incorporating all of its components. Such an approach would be consistent with both state and federal requirements for protection of designated uses.[8]

4. Limitations of the WVSCI

WVDEP has used biological assessment methods, specifically the West Virginia Stream Condition Index (WVSCI), in making determinations of water quality "impairment" under Section 303(d) of the federal CWA. EPA and others have, or likely will point to the existence of this assessment tool and determinations of impairment as an appropriate method for interpretation and implementation of the state's narrative standards. We disagree.

The WVSCI has been the source of complaints and concerns for as many years as it has been in use by the WVDEP, and it is of particular concern that the WVDEP seems to have slowly expanded its uses of and reliance on the WVSCI. WVCA does not

---

[7] See letter dated July 10, 2009 from Randy C. Huffman, West Virginia Department of Environmental Protection to Colonel Dana R. Hurst, U.S. Army Corps of Engineers, Huntington District. Copy provided as attachment "C".

[8] The federal CWA mandates that water quality be protected to "provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water." 33 USC 1251(a)(2). WVDEP has designated all waters of the state, at a minimum, for the Propagation and Maintenance of Fish and Other Aquatic Life (Category B) and for Water Contact Recreation (Category C), unless specifically noted otherwise. 47 CSR 2-6.1.

believe that the WVSCI is an appropriate basis for measuring the protection of aquatic life or of aquatic ecosystems. Evaluation of an aquatic ecosystem must include evaluation of various components – not simply a single look at benthic macroinvertebrates. While the WVSCI may be useful as an assessment tool, it is NOT a "biological criteria" and has never been adopted by the West Virginia Legislature as such. Any reliance on this assessment tool as if promulgated as a State water quality standard is in error. This indisputable fact has been acknowledged by WV DEP in official communications to EPA regarding the narrative standards of West Virginia. Addressing the use of WVSCI, which the agency refers to as a "tool", WVDEP has stated:

> **...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.**[9]

Thus, the WVSCI cannot serve as a "stand alone determinant of compliance with the narrative criterion." The WVDEP, consistent with Legislative intent, must instead consider impacts to the aquatic ecosystem as a whole. For this, the WVSCI is inadequate. Among other limitations, the WVSCI does not consider habitat, is not suitable for use in very high-gradient streams and is not designed for use in non-flowing streams. While the WVSCI may be a useful "tool" to WV DEP in limited

[9] See Attachments "B" and "C".

circumstances[10], it does not and cannot be the sole consideration of compliance with the narrative standard.

5. Conclusion

WVCA appreciates the opportunity for input on this important issue, and asks for WVDEP's prompt consideration of these comments and the attached documents. As noted previously by the Governor, the Legislature and by the agency itself, continued confusion surrounding the appropriate interpretation and implementation of the state's narrative criteria will serve to only worsen the "stalemate" that has been inappropriately created by EPA in terms of coal mine permitting at all levels state and federal. Additionally, the lack of an interpretative and implementation policy from WVDEP that ensures environmental protection and is faithful to the goals and objectives of the WVWPCA and federal CWA only invites further efforts from EPA to substitute its judgment for those of the Governor, the Legislature and WVDEP.

Respectfully Submitted,

Jason D. Bostic
Vice-President

CC: Honorable Joe Manchin III
Governor
State of West Virginia

[10] Improper use and application of the WV SCI, particularly with respect to stream listing decisions undertaken by WV DEP pursuant to Section 303(d) of the CWA, has generated significant concerns regarding the assessment tool. These concerns have resulted in a Notice of Intent to Sue WV DEP by the West Virginia Coal Association regarding the agency's continued sole reliance on the WV SCI.

Mr. Jonathan Deem
General Counsel
West Virginia Governor's Office

Mr. Randy Huffman
Secretary
West Virginia Department of Environmental Protection

Ms. Ginger Mullins
Chief, Regulatory Branch
Huntington District
U.S. Army Corps of Engineers

Mr. Scott Mandirola
Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection

Mr. Thomas Clarke
Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Mr. Lewis Halstead
Deputy Director
Division of Mining and Reclamation
West Virginia Department of Environment Protection