



July 19, 2021

Water Quality Standards, DWWM
WV Department of Environmental Protection
601 57th St. S.E.
Charleston, WV 25304

Submitted via email to WQSComments@wv.gov

Attn: Christopher Smith

Re: Proposed changes to Legislative Rule 47 C.S.R. 2, "Requirements Governing Water Quality Standards."

The West Virginia Rivers Coalition (WV Rivers), on behalf of our members and the ten undersigned organizations, submit the following comments on proposed changes to the water quality standards rule, 47 C.S.R. 2.

WVDEP should adopt all remaining EPA recommended updates that strengthen West Virginia's human health criteria, and establish recommended criteria where standards currently do not exist.

We support the adoption of another subset of updates to the human health criteria from EPA's 2015 updates, but only those that strengthen protections for human health. Adoption of these updates are long overdue, yet still do not go far enough. There are approximately 35 EPA-recommended criteria from the 2015 updates that WVDEP has yet to address and are missing from this rule. In the interest of protecting public health, we strongly urge the WVDEP to revise the rule to establish criteria for all chemicals included in EPA's 2015 updates that are not regulated under WV's standards.

Neighboring states have adopted all updates. It is not fair or just for West Virginians to be put at greater risk than residents of surrounding states when it comes to the set of chemicals regulated by water quality standards. For example, regulating certain chemicals on one side of the Ohio River, but not the other, does not ensure protection of human health for West Virginians, who will be at greater risk. There should be no

further delay in setting limits on toxins known to be harmful to human health – especially for those for which EPA has established updated recommended criteria.

WV Rivers opposes weakening of existing standards.

While the changes to the human health criteria follow EPA’s methodology and recommendations, several of EPA’s proposed criteria would actually weaken the state’s existing criteria. As a matter of policy, WV Rivers is opposed to weakening of existing criteria. Public health officials agree that any additional exposure to toxic chemicals increases the risk to public health. Industry is already meeting the current standards so there is no valid argument to weaken any standard. We request that WVDEP restore the following criteria:

- Benzo (k) Fluoranthene (Category A)
- DDT
- Chrysene
- Gamma BHC
- Methyl Bromide

The proposed addition of Paragraph 8.2.c. should be rescinded.

The next sections of our comments outline our basis for adamantly opposing the proposed language in 8.2.c. We strongly urge the WVDEP to remove = 8.2.c from the rule.

Paragraph 8.2.c is an unlawful change to water quality standards.

Paragraph 8.2.c may be interpreted to allow a change in water quality standards without going through the requisite procedures of the federal Clean Water Act (“CWA”). A change to water quality standards is an action that is separate and distinct from the permitting process and subject to public scrutiny, EPA oversight, and the safeguards of the state lawmaking process. Procedures for revising water quality standards already exist under both federal and state law. *See* 40 C.F.R. § 131 (federal procedures); 47 W.Va. CSR §2-8.4; 46 W.Va. CSR § 6. Language in 8.2.c allowing changes to human health criteria on a “case by case” basis, is at best useless and at worst illegal.

First, there should be no question that human health criteria are water quality standards. “Water quality standards are provisions of State or Federal law which

consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based on such uses.” 40 C.F.R. § 131.3(i); *see also, id.* at 131.3(b) (“Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.”). Any changes that have the effect of changing human health criteria, including variables such as bioaccumulation factors and relative source contributions, are changes to water quality standards. *See* Office of Water, EPA, EPA 820-B-14-008, Water Quality Standards Handbook, Chapter 1: Provisions n.2 (2014); *Fla. Pub. Int. Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1090 (11th Cir. 2004). As such they are subject to CWA § 303(c) as well as federal regulations governing changes to water quality standards.

Pursuant to 33 U.S.C. § 1313(c) all revisions to water quality standards must be submitted to EPA for approval. Several regulations detail the requirements for submission. Notably, 40 C.F.R. § 131.20 contains standards for state review and mandates that public participation, including “one or more public hearings” with the “proposed water quality standards revision and supporting analyses” made available before such hearing. 40 C.F.R. § 131.20(b). Before submission to EPA, water quality standards must be “duly adopted pursuant to State law”, which would include elements of both the state Administrative Procedures Act, as well as all relevant legislative procedures. 40 C.F.R. § 131.6.

Variances to generally applicable water quality standards are recognized and permissible under the CWA. Thus, “case by case” evaluations are already allowed under existing law. These variances, however, must comply with the detailed requirements of 40 C.F.R. § 131.14. Importantly, just like other water quality standards revisions they are subject to the public participation requirements of § 131.20(b), including a public hearing. Moreover, variances to generally applicable water quality standards must meet the following requirements (among others): 1) they be justified by one of the factors articulated in 40 C.F.R. § 131.10(g); 2) they must represent the “highest attainable condition of the water body or waterbody segment”; 3) they cannot result in the lowering of ambient water quality conditions; and 4) they must be time limited. 40 C.F.R § 131.14.

Each of the above outlined procedures is a requirement under federal law. To the extent that the language in 47 C.S.R. § 2-8.2.c would circumvent these procedures, it is

illegal. To the extent that the language in 47 C.S.R. §2-8.2.c requires compliance with those procedures it is redundant and unnecessary because the state already possess authority to revise water quality standards and to create variances to generally applicable water quality standards pursuant to 47 C.S.R. § 2-8.4 and 46 C.S.R. § 6-1 et seq.

Paragraph 8.2.c is vague about being site specific or applicable to whole state.

Paragraph 8.2.c. does not specify whether modifications to water quality criteria following the procedures set forth in this paragraph will apply statewide or only to the receiving stream for the NPDES permit. And if a modification only applies to the receiving stream, the proposed language does not provide any guidance on what portion of the stream to which it would apply.

The paragraph contemplates two methods for weakening criteria: (1) on a case-by-case basis as part of the NPDES permitting process, or (2) by petition to the Secretary. Presumably, a water quality criterion that is changed on a case-by-case basis as part of the NPDES permitting process would only apply to the receiving stream or a portion of the receiving stream. If this is the case, how would WVDEP keep track of these amended criteria? Surely the changes would need to be reflected in manner that is fully open to the public such as an amendment to 47 CSR 2.

The second method of weakening criteria – by petition to the Secretary – is even more vague. Must this petition be presented for a specific receiving water (or portion of a receiving water) associated with an NPDES permit, or may a petition be presented for a statewide change to a criterion? Again, how would WVDEP keep track of these amended criteria?

This paragraph is sloppy and contradictory in another way. According to the proposed language, first a human health criterion will be changed, and then “permit limits based on revisions to the human health criteria made in accordance with this paragraph” will be changed. The paragraph goes on to specify public notice and comment requirements related to the permit limit changes. It specifies that the permit limit revisions are not subject to review by the Legislative Rule-Making Review Committee, even though permit limit revisions are not currently subject to that committee’s review.

If the intention of the proposed language is to circumvent the legislative process for changes to water quality criteria, it fails to do this for two reasons. First, as mentioned

above, it exempts changes in permit limits – and not changes to criteria – from review by the Legislative Rule-Making Review Committee. Second, even if the paragraph did exempt changes to criteria from the Legislative Rule-Making Review Committee, the changes would still be required to go through the rest of the legislative process and be approved by the House and Senate.

Paragraph 8.2.c. reduces the opportunity for public scrutiny and participation.

The existing process for revising water quality standards through the triennial review process affords a fairer and more balanced participation from all stakeholders than the process proposed within 8.2.c. Unlike a triennial review process that often spans a full year of public meetings and various forums for public input and open dialogue with agency officials, 8.2.c only offers a 45-day public comment period. This is not a reasonable timeframe for the public to have a meaningful opportunity to understand the science behind the proposed change and respond accordingly. Additionally, 8.2.c cuts out involvement and oversight of the Legislature which would provide another layer of public scrutiny and involvement. The addition of 8.2.c undermines agency efforts and responsibilities to increase public transparency and participation in decisions that have impacts on the lives of West Virginia residents.

Paragraph 8.2.c perpetuates and exacerbates inequities faced by disadvantaged communities.

The process offered in 8.2.c inherently and unevenly benefits large corporations that can afford conducting studies that disadvantaged communities and small businesses typically cannot afford. It is common that facilities discharging toxins governed by human health criteria are located in industrialized regions of the state which are often poorer communities already struggling with problems related to social, economic, and environmental justice. 8.2.c. stands to not only reduce public participation, but intensify issues of environmental injustice in areas already disproportionately burdened with pollution and associated health risks.

Footnote “i” allows weakening of all human health criteria through Paragraph 8.2.c.

The proposed footnote “i” has been applied to all human health criteria, and not just the updated criteria. This includes the 24 criteria that were updated in the 2021 Legislative Session. We are opposed to the footnote “i” because it would open up all of these criteria to changes that would be likely to increase public exposure to toxic chemicals.

8.29.2 We request clarification and technical support documents for proposed changes the temperature standard for trout waters.

We question the rationale for changing the temperature standards in the East River, Greenbrier River, Summersville Lake and its tailwaters above Collison Creek.

Additionally, we would like clarification on the specific reaches of these waterbodies impacted by these changes. The introduction asserts that these streams "exhibit higher natural temperatures than typically expected..." but no technical support document is offered as a reference for that claim.

The revisions would allow temperatures of 81 degrees Fahrenheit, but brook trout exhibit physiological stress at 68 degrees Fahrenheit and mortality at approximately 70 degrees Fahrenheit. Additionally, Candy Darters are a federally listed endangered species in the Greenbrier River and prefer the same temperature range as brook trout. Changing the temperature standard for these trout waters may also impact the Candy Darter and should require consultation with the US Fish and Wildlife Service.

Many of the streams listed as trout waters are currently too warm for trout. What is the rationale for singling out these specific water bodies? If the temperatures in these waters are exceeding the standard for trout populations, then the solution is to implement practices to protect the species from extreme temperatures such as installing large woody debris, preserving and restoring riparian buffers, and planting trees. Changing the temperature standard does not alleviate the issue of the temperature stress on sensitive fish species.

Conclusion

To conclude, for the reasons stated above, we strongly urge WVDEP to strike paragraph 8.2.c from the rule (and the corresponding footnote "i"), restore the values for the weakened criteria, adopt all EPA's recommended criteria for which WV standards currently do not exist, and explain the rationale behind changing the temperature standard for trout waters for the specific waterbodies.

Thank you for your careful consideration of these comments.

Signed,

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