



EPA Appeals Order Directing It to Act on WV Biological Impairments, June 2017

In April, EPA filed an appeal with the Fourth Circuit Court of Appeals, challenging the district court's ruling in *Ohio Valley Environmental Coalition v. McCarthy*. EPA also filed a motion to stay the district court's order with the Fourth Circuit pending appeal. The district court's order requires EPA to approve or disapprove of WVDEP's decision not to develop TMDLs for waters with biological impairments. If EPA approves DEP's decision, its approval likely will be subject to another lawsuit filed by environmental groups. On the other hand, disapproval will trigger a mandatory duty for EPA to develop the TMDLs itself. The deadline for approving or disapproving of DEP's decision has been extended to 14 days after the Fourth Circuit rules on EPA's motion to stay.

In its motion to stay, EPA contends it will suffer irreparable injury in the form of possible future litigation if it is required to comply with the district court's order. EPA also argues that it cannot properly create the missing TMDLs within the 30-day statutory deadline, due to the complex and time-consuming nature of the task and the potential number of TMDLs to be established.

As background, between 2006 and 2012, DEP listed a number of streams as impaired for failing to meet a state narrative water quality standard for the protection of aquatic life, and identified ionic toxicity (conductivity) as the source of the impairment for many of these streams. In 2012, the Legislature directed DEP to develop a new methodology for determining biological impairment, and, accordingly, DEP rescheduled its efforts to develop TMDLs for biologically impaired streams. In 2015, several environmental groups sued EPA. These groups argued that EPA had a nondiscretionary duty to develop and issue TMDLs for biologically impaired waters in West Virginia due to DEP's decision to delay TMDL development while promulgating a new methodology to determine biological impairment. In the plaintiffs' view, DEP's decision to delay TMDL development represented a decision that no TMDLs for biological impairment were necessary.

Agreeing with the plaintiffs, the U.S. District Court for the Southern District of West Virginia held that EPA should deem DEP's non-action to be "a constructive submission" of no biological impairment TMDLs because DEP had no "credible plan" in place to issue the TMDLs. EPA immediately asked the district court to stay its order pending appeal. Although the district court denied that request, it did suspend the deadline for approving or disapproving of the constructive submission.

As explained in previous Status Reports, we believe the district court's expansive view of EPA's duty to approve or disapprove of state decisions to reschedule or reprioritize TMDL development



is inconsistent with the appropriate state-federal balance in the CWA. We will continue to update the Membership with developments, and, depending on how the litigation proceeds, MWQA may consider submitting an amicus brief over this issue.