



WVMWQA Comments on DEP Rules and Policies That Are More Stringent Than Their Federal Counterparts, October 2017

On October 5, the WVMWQA submitted comments on DEP's Stringency Report. W. Va. Code §29A-3-20(a) requires all state executive agencies to produce a Stringency Report and to "[p]rovide for a comment period for all ... state rules, guidelines, policies and recommendations [that] are more stringent than federal counterparts." Additionally, W. Va. Code §22-1-3a requires DEP to provide specific reasons that demonstrate that such provisions are necessary, taking into consideration scientific evidence and specific environmental characteristics and providing the specific technical basis upon which the director has relied. DEP has failed to do this for 47 CSR 2, *Requirements Governing Water Quality Standards*, for requirements in WV/NPDES Water Pollution Control permits, and also for requirements in WV/NPDES MS4 permits.

Our comments explain that DEP failed to identify several areas where its programs are more stringent than their federal counterpart. Where DEP did identify areas where its rules and policies are more stringent, DEP has not provided any justification for that additional stringency. They simply ignored this statutory requirement. A summary of our comments is provided below.

Related to 47 CSR 2, the only documentation DEP provided for public review was a table comprised of one sentence descriptions like "West Virginia has human health criteria [for lead], while EPA does not." The Department has not provided specific written reasons demonstrating why these more stringent provisions are necessary. The table is devoid of any analysis or technical basis for the Department's decision to be more stringent.

We also noted DEP's failure to identify the standard conditions below in NPDES Water Pollution Control Permits as being more stringent than federal requirements. We particularly requested DEP to provide justification for the additional stringency related to the following:

- Ammonia-Nitrogen Limits. DEP has included Ammonia-Nitrogen limits in many major POTW permits where there is no reasonable potential for the permittee to exceed ammonia water quality standards. The Department needs to provide a specific legal justification for this practice to satisfy the statutory requirement.
- Bacteria. DEP has imposed bacteria daily maximum permit limitations for POTWs. This is in stark contrast to almost every other state and is far more stringent than federal requirements, as evidenced by neighboring states' programs. DEP should either revise its permitting approach to monthly or monthly/weekly or it must provide a justification for



why WV POTWs have to meet daily maximum limits when communities in most other states and every surrounding state do not.

- CSO Effluent Limitations. DEP is imposing end-of-pipe effluent limits for bacteria (and in some cases, residual chlorine) for combined sewer outfalls when other states and EPA regions do not. DEP must explain why imposing such limits is necessary, especially given the extraordinary cost such an approach imposes statewide on 50-60 communities with combined sewers.

Regarding MS4 permits, DEP failed to address the following provisions that are more stringent than federal requirements and/or recommendations.

- Generic Water Quality Compliance Language. As with NPDES Water Pollution Control Permits, there are multiple references to generic water quality standard compliance. This is also contrary to the legal standard applicable to MS4s, which is to reduce the discharge of pollutants to the *maximum extent practicable*.
- One-Inch Capture Requirement. Imposing a numeric effluent limitation on MS4s goes beyond the federal standard, which requires MS4s to implement best management practices to the maximum extent practicable. There is no applicable federal retention requirement. DEP must explain why such additional stringency is necessary for West Virginia MS4 communities.
- Groundwater Recharge. Neither the federal or state NPDES programs regulate groundwater – only surface water. Accordingly, DEP is without authority to include permit provisions requiring WV MS4 systems to recharge groundwater. DEP must provide an explanation sufficient to justify this unique MS4 permit requirement.
- Restoration of Ecologically Sensitive Areas. Section II.C.7.e.7.b of the Small MS4 General Permit requires that a permittee’s post-construction program include water protection elements with an approach to “[p]reserve, protect, create, and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions.” There is no basis in federal law for this requirement and it goes far beyond DEP’s NPDES program authority under state law to regulate discharges to surface waters. If DEP believes otherwise, it must provide a legal/technical justification to support the retention of this permit requirement.
- Above-Ground Storage Tanks and Other Materials. Section II.C.7.c.18 of the Small MS4 General Permit requires permittees to inventory and report on all above-ground storage



tanks in business/industrial areas that are not covered by an NPDES permit. This is not a federal requirement and West Virginia law requires DEP and storage tank owners/operators to do this. Accordingly, DEP has no authority under state law to impose this requirement.