

EPA Agrees to Impose Novel Water Quality Requirements for West Virginia Streams



April 19, 2024

Charleston, WV

Environmental Alert

(by **Kip Power** and **Robert Stonestreet**)

The federal Environmental Protection Agency (EPA) has agreed to impose novel water quality requirements for West Virginia streams to resolve a lawsuit filed by multiple environmental advocacy organizations. On March 18, 2024, the Sierra Club, the West Virginia Highlands Conservancy, and the West Virginia Rivers Coalition (Plaintiffs) filed a lawsuit against EPA in the U.S. District Court for the Southern District of West Virginia (at Huntington). The suit alleges that EPA has improperly failed to take action under the federal Clean Water Act with respect to certain “biologically impaired” streams located in the Lower Guyandotte River Watershed in West Virginia. Specifically, Plaintiffs assert that because the West Virginia Department of Environmental Protection (WVDEP) has failed to do so, EPA must step in and develop pollution reduction plans (known as “total maximum daily loads” or “TMDLs”) for those streams.

However, rather than seek to reduce levels of conventional pollutants (e.g., iron, aluminum, etc.), the lawsuit addresses the concentration of dissolved minerals in the water (often referred to as “total dissolved solids” or conductivity). According to the Plaintiffs, certain levels of conductivity lead to an adverse impact (known as “ionic toxicity”) on specific species of aquatic life. Neither West Virginia nor EPA has developed a specific water quality standard for total dissolved solids or conductivity. A wide range of activities can affect conductivity levels of a stream, including wastewater treatment and earth disturbances associated with construction activities or mining. Naturally occurring conductivity levels can also vary widely among different streams.

About 10 days after the suit was filed, Plaintiffs and EPA announced a settlement, in the form of a proposed Consent Decree (CD). 89 *Federal Register* 22140 (March 29, 2024). According to the *Federal Register* notice, the parties have been discussing the settlement for approximately one year (since Plaintiffs sent EPA notice of their intent to file suit, on March 21, 2023). Unless extended, written comments on the proposed CD will only be accepted by EPA until April 29, 2024.

The CD is available at <https://www.regulations.gov> (Docket No. EPA-HQ-OGC-2024-0145), along with public comments and other documents in the public docket. Under the proposed CD, EPA must publish draft TMDLs for the subject streams for public comment by October 31, 2024 and finalize those TMDLs by January 15, 2025 unless WVDEP does so first (which EPA must approve). Plaintiffs agree not to pursue further litigation against EPA alleging the need for TMDLs to address “ionic toxicity” in other West Virginia watersheds until after January 15, 2025.

The proposed CD could well have implications for areas far beyond those streams specifically identified in it. By imposing limits on conductivity or total dissolved solids in order to limit ionic toxicity, the TMDL process completed under the CD will effectively create a new water quality standard that may come to be applied throughout the state in order to purportedly protect against violations of West Virginia’s “narrative” water quality standards (i.e., descriptions of certain prohibited conditions, such as distinctly visible foam, sludge deposits, foul odors, discoloration, or “materials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life”). Typically, such water quality standard-setting takes place through federal and state legislative and rulemaking processes, and there are valid concerns that establishing regulatory standards through lawsuits is a poor substitute for those processes. That concern is heightened when addressing a measure such as conductivity, which may be affected by a wide range of activities and may have effects that vary greatly from one location to another. Treatment methods to reduce conductivity levels can be expensive and difficult to implement.

For questions about the proposed Consent Decree or other Clean Water Act issues, please contact Christopher B. (Kip) Power at (681) 265-1362 or cpower@babstcalland.com, or Robert M. Stonestreet at (681) 265-1364 or rstonestreet@babstcalland.com.



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