



EPA Proposes to Usurp State’s Judgment and Standards for Stream Impairment Classification

The federal Environmental Protection Agency (EPA) has taken rare action in proposing to not only supersede the role of the West Virginia Department of Environmental Protection (WVDEP) in addressing water quality conditions in the state, but also seeking to impose a new standard for determining how to classify the biological health of West Virginia waters. Under Section 303(d) of the federal Clean Water Act, state governments are required to identify, every three years, waters within their borders that do not meet designated water quality standards. Such waters are deemed “impaired” for the water quality standards exceeded and are placed on what is known as a “303(d) List.” That list must include waters that fail to meet numeric water quality standards – i.e., specific concentrations of iron, aluminum, and other substances. Waters can also be “impaired” for failure to comply with “narrative” water quality standards – i.e., narrative descriptions of certain prohibited conditions, such as distinctly visible foam, sludge deposits, foul odors, or discoloration. West Virginia’s narrative standards also provide that waters can be considered “biologically impaired” if they contain “materials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life.”

When a stream is placed on the 303(d) List, it is put in line for the development of a pollution reduction plan (known as a “total maximum daily load” or “TMDL”). Among other things, a TMDL results in more restrictive permit limits for discharges associated with the parameters deemed to be contributing to the impairment.

For more than 20 years, the WVDEP has used the West Virginia Stream Condition Index (WVSCI) as the primary methodology for evaluating whether a stream is “biologically impaired.” Under WVSCI, a stream is considered impaired if it does not support a certain volume and diversity of insects and other aquatic life even if the stream meets all numeric water quality standards. In recent years, however, EPA has advocated for the use of a different methodology, known as the “Genus Level Index of Most Probable Stream Status” (GLIMPSS) to determine biological impairment for purposes of the 303(d) List. EPA has not, however, disapproved of the WVSCI methodology.

WVDEP submitted its most recent 303(d) List to EPA on May 5, 2023. Less than three months later, on July 19, 2023, EPA published a proposal to second-guess WVDEP’s judgment by adding 348 additional streams to WVDEP’s 303(d) List of “biologically impaired” waters. 88 *Federal Register* 46156. EPA determined these streams should be classified as impaired when evaluated using the GLIMPSS model, even though the WVDEP’s methodology (including consideration of a stream’s WVSCI score and other relevant factors) did not indicate biological impairment. EPA has never before used GLIMPSS to add a West Virginia stream to the 303(d) List.

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EPA's action is particularly noteworthy because the interpretation and enforcement of water quality standards is supposed to primarily fall to the states. In recent years, the West Virginia Legislature has even adopted legislation specifically addressing how the state's narrative water quality standards should be interpreted, which does not include the use of EPA's GLIMPSS methodology.

Assuming EPA follows through with its proposal, the result will be nearly 350 additional streams added to West Virginia's 303(d) List even though WVDEP does not consider those streams impaired using the methodology previously approved by EPA. Consequently, WVDEP will have to expend resources to ascertain the reason for the "impairment" and develop TMDLs to improve the biological health of the stream to meet whatever criteria EPA may designate as a proxy for its GLIMPSS score. This also threatens to establish a precedent for EPA's imposition of its view of other parts of the West Virginia narrative standards, all while bypassing the normal legislative rulemaking process that applies to changes to water quality standards.

More information regarding EPA's proposal may be found here: <https://www.epa.gov/tmdl/wv-303d-list-public-notice>. The public comment period ends on August 18, 2023.

For questions about this proposal, the federal Clean Water Act and its implementation in West Virginia, 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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