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June 30, 2017

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Austin Caperton
Cabinet Secretary
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

Re: Regulatory Reform

Dear Secretary Caperton:

On March 12, 2016 the West Virginia Legislature passed S.B. 619. That bill sets the stage for this assessment and comment concerning a subset of key elements of the West Virginia environmental statutory and regulatory program.¹ These comments and recommendations are filed on behalf of the West Virginia Chamber of Commerce (the "Chamber").

The Chamber is the largest, most influential general business organization, representing all business sectors in every region of the state. Members range from small business enterprises to mid-size manufacturers to tourism destinations to energy companies to Fortune 500 corporations. However, small businesses are the core of our membership -- making up 95 percent of the West Virginia Chamber's companies and firms. The West Virginia Chamber believes business must be a positive force for enhancing the quality of life in the Mountain State. The Chamber is a proactive leader in: the search for solutions to problems, a voice for free market competition and streamlined government, a catalyst for progressive thinking and problem solving, and a partner with government for progress in West Virginia.

S.B. 619 enacted W.Va. Code §29A-3-20 titled, "Executive review of agency rules, guidelines, policies and recommendations." This section of the W. Va. Code directs all executive agencies with rule-making authority to review and evaluate all state rules, guidelines, policies and recommendations to determine whether they are more stringent than their respective federal counterparts. The statute directs the agencies to provide for a comment period on that evaluation. Additionally, the agencies are required to submit a report to the Joint Committee on

¹ The statutory provisions, rules, guidelines, policies and recommendations highlighted in this letter are not an exhaustive assessment of all portions of the West Virginia environmental statutory and regulatory program. The issues addressed in this letter represent program elements that warrant review at this time.

Government and Finance and the Legislative Rule-Making Review Committee on or before November 1, 2017. That report is required to set forth a description of the state rules, guidelines, policies and recommendations that are more stringent than federal counterparts, and is to include comments received. With this statutory directive from the W.Va. Legislature in mind, the Chamber offers the following recommendations regarding the regulations, guidelines, policies and other statements that the WVDEP should consider addressing in its report to the Legislature.

WATER ISSUES

NPDES Permit Language Provisions. The Chamber proposes that WVDEP conduct a review and/or be receptive to a request for review of NPDES permit conditions as identified by a permittee or permit applicant. Such review would identify any proposed or existing permit provisions that are more stringent than federal counterparts. Any such provisions must be changed so as to not be more stringent than the federal counterpart prior to issuance, renewal or reissuance of a final permit. Existing NPDES permits should be eligible for review and modification as a matter of WVDEP policy and pursuant to the NPDES permit modification provisions. WVDEP should support any permit changes to conditions that will eliminate provisions in permits that are more stringent than required by federal law. WVDEP should also commit to provide supportive comment, justification and agency action, upon appropriate demonstration of inconsistency with federal law, rules, guidelines, policies and recommendations, for such modification requests.

NPDES Permit Terms Can Be Interpreted As Eliminating Federal CWA Provisions. The U.S. Court of Appeals for the Fourth Circuit ruled in a citizen suit case, Ohio Valley Environmental Coalition v. Fola Coal, that “a court must interpret an NPDES permit as it would a contract.” 845 F.3d 133, 138 (4th Cir. 2017). The Court read the text of the WV/NPDES permit at issue as an agreement between West Virginia and the NPDES permit holder to render void the “permit shield” concept of the Clean Water Act §402(k), 33 U.S.C. §1342(k) and W.Va. Code §22-11-6(2). *See, Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits (April 11, 1995).* Because the permit condition that was more stringent than the federal counterpart was not removed from the permit before it was finalized, (despite the request of the permittee, and statutory changes in state law), the permittee (who fully disclosed in its application the constituents in the waste water discharge at issue) was determined to be in violation of a vintage permit condition. The Chamber urges WVDEP to actively engage in permit modifications as justified by law.

Direct Enforcement of Water Quality Standards. W.Va. Code §§22-11-6(2) and 22-11-8(a) imply that water quality standards are the basis for the development of effluent limitations in water discharge permits. This West Virginia statutory law is consistent

with the CWA which lays out the process for setting water quality standards and implementing them in NPDES permits. 33 U.S.C. §§ 1313(c), 1311(c)(2)(B), 1342(b). It is federal law that water quality standards are not effluent limitations. 33 U.S.C. §1362(11); *Va. Elec. & Power Co., v. Costle*, 566 F.2d 446, n. 17 (4th Cir. 1977). In the Fola case, the issue involved assertion that Fola was required to comply with any sulfate and conductivity levels necessary to comply with the narrative criteria. The impact of a ruling that implements an NPDES permit in a manner more stringent than federal policy is uncertainty as to compliance obligations of a NPDES permittee. These uncertainties lend to a lack of confidence when determining investment options in West Virginia as opposed to other jurisdictions. The Chamber urges the WVDEP to strengthen its NPDES program by clarifying the implementation process for water quality standards through recommended statutory amendments, rulemaking, and policy.

Intake Water Credit. The WVDEP water quality standards regulations unnecessarily limit the application of credit for pollutants that exist in water taken into a facility and ultimately returned to the same surface water. 47 CSR 10, Section 7.7.a narrowly provides that “upon request of the permittee, *technology-based effluent limitations or standards* shall be adjusted to reflect credit for pollutants in the permittee’s intake water if certain conditions are met.” U.S. EPA has approved implementation of intake credit (or “netting” of intake pollutants) to water quality based effluent limits in addition to technology based limits, in the following states: Delaware, Kentucky, Illinois, Indiana, Ohio, Pennsylvania and Virginia.² The West Virginia regulation, W.Va. C.S.R. §47-10-7.7a. is not federally mandated. The Chamber urges WVDEP to review the authorizations EPA has granted to other states and to promulgate an administrative rule to allow for intake credit related to water quality based effluent limits.

Protection For “Future” Uses of Surface Waters. W.Va. Code 22-11-7b(c) provides, “. . .the secretary shall promulgate legislative rules setting standards of water quality. . .Standards of quality with respect to surface waters shall protect the public health and welfare, wildlife, fish and aquatic life and the present and prospective future uses of the water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.” WVDEP has opined that this language on “future use” could be interpreted to mean the agency is required to expand its obligation to protect surface waters to all potential uses the future may hold. This would amount to WVDEP “setting aside” waterbody assimilative capacity for pollutants in order to accommodate “future uses” where such uses are merely theoretical and

²Ohio – OAC 3745-2-06(c); Pennsylvania - 25 Pa. Code §92a.45; Indiana – 327 IAC 5-2-11(f); and 327 IAC 5-18-6; Kentucky – 401 KAR10:029(2); Illinois - 35 Ill. Adm. Code 301.373, 304.103, 304.105; Delaware 7-7000-7201, Del. Admin Code 6.16.6 and 7 and Virginia - 9 VAC 25-31-230(G).

undefined. This assertion is in direct conflict with the CWA §§101(a)(2) and 303(c); and USEPA regulation, 40 CFR Part 131, policy and guidance on use designation and policy implementation. *See also, U.S. EPA Water Quality Standards Handbook.* The Chamber urges the WVDEP to carefully assess interpretation of this language and propose a statutory modification for consideration by the legislature if it concludes the statutory language is inconsistent with federal law, rules, guidelines, policies and recommendations.

Water Quality Certification. The WVDEP administrative regulation, 47 CSR 5A sets forth the “Regulations for State Certification of Activities Requiring Federal Licenses and Permits.” This rule became effective on May 14, 2014. Although the West Virginia Code of State Rules provides a mechanism for the administrative review of State 401 Water Quality Certifications in 47 CSR 5A-7, that part of the rule is not applicable for pipelines regulated by the Federal Energy Regulatory Commission (“FERC”) pursuant to the Natural Gas Act (“NGA”), and the regulation should state that. 15 U.S.C. §§ 717-717z. *See Del. Riverkeeper Network v. Sec’y Pa. Dept. of Env’tl. Prot.*, 833 F.3d 360, 367 (3rd Cir. 2016). While the NGA is the controlling authority for interstate pipelines, the NGA requires states to participate in the environmental regulation of pipeline projects, including the Clean Water Act’s requirement that such projects obtain a State 401 WQC or a waiver. 15 U.S.C. § 717b(d). In determining jurisdiction for the review of the issuance of a State 401 WQC, the NGA contains the following provision:

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence or approval (hereinafter collectively referred to as “permit”) required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

See 15 U.S.C. § 717r(d)(1) (2005) (emphasis added). Numerous Federal Circuit Courts have interpreted the above-cited provision as providing original and exclusive jurisdiction to the United States Court of Appeals for the circuit in which the facility is subject to the NGA with regard to the judicial review of a State administrative agency’s issuance of a 401 WQC. See AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 726-27 (4th Cir. 2009) (holding that it has original jurisdiction over the review of the issuance or denial of a 401 WQC in accordance with 15 U.S.C. § 717r(d)(1)); Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot., 833 F.3d.360, 371-72 (3rd Cir. 2016); Islander E. Pipeline Co. v. Conn. Dep’t of Env’tl. Prot., 482 F.3d 79 (2nd Cir. 2006); Islander E. Pipeline Co. v. McCarthy, 525 F.3d 141 (2nd Cir. 2008).

WVDEP is urged to modify regulation 45 CSR 5A to clarify that its review process for WQC does not apply to FERC regulated activities.

Stormwater Benchmarks. WVDEP implements stormwater discharge benchmark concentrations for water quality parameters as a threshold in their NPDES permitting of industrial stormwater discharges. WVDEP has chosen to use the benchmark values prepared by EPA. These benchmark values are largely derived from nationally- recommended water quality criteria for aquatic life protection. WVDEP's comparison of stormwater discharge values against these benchmarks as indicators of potential aquatic toxicity (i.e., bioavailability, exposure duration and frequency, and background concentrations) is scientifically and technically improper. Stormwater discharges, by their very nature, are of limited duration such that aquatic life are exposed to pollutants at a rate much different than used for EPA nationally-recommended criteria, WVDEP's stormwater benchmark protocol is more stringent than the federal and warrants revision. EPA guidance provides, "[a]n exceedance of a benchmark does not necessarily mean that your control measures are insufficient." *Industrial Stormwater Monitoring and Sampling Guide*, EPA 832-B-09-003. Final Draft. March 2009. The Chamber urges WVDEP to engage in a process of improving its existing stormwater benchmark approach to evaluate the potential impact on in-stream aquatic life from stormwater discharges. The West Virginia Manufacturers Association has led the effort to inform WVDEP of the problems relative to its implementation of benchmark values. The Chamber is working with the WVMA. We commend to WVDEP the research and efforts being led by the WVMA.

Arsenic Water Quality Standard. The WVDEP water quality standard for arsenic reflects a water contact recreation concentration of 10 ug/l. This human health derived standard had no federal equivalent. The Chamber urges WVDEP to promulgate a revision to the standard to remove the water contact recreation criteria. The water contact recreation use reflects exposure to pollutants during swimming, fishing, and boating; these activities do not apply to arsenic. Other states and regulatory bodies in the region do not have an arsenic standard for water contact recreation to include: Kentucky, Virginia, Maryland, Pennsylvania, Ohio and ORSANCO.

The Chamber also recommends that WVDEP establish a protocol that updates the water quality standards periodically to identify appropriate revisions consistent with federal recommendations.

Mercury Water Quality Standard. The WVDEP aquatic life mercury criterion for chronic exposure is a methylmercury standard of 0.012 ug/l. The aquatic life mercury criterion for chronic exposure promulgated by U.S. EPA in the Great Lakes Water Quality Guidance Rulemaking is 0.91 ug/l, which is the same value that has been adopted by ORSANCO and the states of Ohio and Pennsylvania. WVDEP's value is more stringent than necessary to achieve

EPA approval. The Chamber urges the WVDEP to initiate an administrative rulemaking to promulgate a revised standard.

The human health criterion for mercury is 0.5 mg/kg as a methylmercury fish tissue concentration. WVDEP has yet to develop guidance on how this criterion is implemented in NPDES permits. As such, permittees may be required to incur costly mercury removal treatment technologies when these measures are unnecessary where the fish tissue standard is not exceeded. The Chamber urges WVDEP to do as EPA has done, adopt the 2010 Implementation Guidance EPA has developed. Such adoption would assist in the efficient and effective implementation of the criterion.

Chloride Water Quality Standard. EPA does not have a recommended water quality standard for human health protection for chloride. The WVDEP human health chloride water quality standard of 250 mg/l is based on the secondary maximum contaminant level (SMCL) for chloride published by EPA under the Safe Drinking Water Act (SDWA). This SMCL is not enforceable under the SDWA, is not recommended for listing as a water quality standard, and should therefore be removed as a human health water quality standard in the WVDEP's water quality standards regulation.

AIR ISSUES

Opacity Limits Fuel Burning Units. WVDEP legislative regulation 45 CSR 2 titled, "To Prevent and Control Particulate Air Pollution from Combustion of Fuel in Indirect Heat Exchangers," sets forth an opacity limit of 10%. This West Virginia originating limit developed many years ago before EPA's sector emissions programs were fully developed, applies to industrial boilers and electricity generating units. Opacity is a visual metric for assessing particulate emissions. Under both state and federal air emissions regulatory programs, visual opacity limits are paired with more precise particulate monitors to manage such emissions. EPA's regulatory program for monitoring opacity sets the standard at 20% for both industrial boilers and electricity generating units. 40 CFR §§60.42(a)(2), 60.42Da, and 60.43b(f). The Chamber urges the WVDEP to review this difference and consider promulgation of a revised opacity standard that is consistent with federal regulations.

Air Emissions Monitor Performance. WVDEP procedural/legislative regulation 45 CSR 02A, titled "Testing, Monitoring, Recordkeeping and Reporting Requirements under 45 CSR 2," sets forth guidance on the agency's testing, monitoring, recordkeeping and reporting requirements for owners/operators of fuel burning indirect heat exchangers subject to 45 CSR 2. Section 7.2 addresses exception reporting for the operation of continuous opacity monitors ("COMS"). Owners and operators are required to submit to the Director a COMS summary report and/or excursion and COMS monitoring system performance report. Section 7.2.b.1

provides the guidance on such submittal as follows: if the total duration of excursions for the reporting period is less than one percent (1%) of the total operating time for the reporting period and monitoring system downtime for the period is less than five percent (5%) of the total operating time for the reporting period, the COMS Summary Report shall be submitted. The 5% downtime threshold is inconsistent with the federal program requirements. The Chamber urges the WVDEP to review the disparity between the federal and the state requirement for monitor performance and consider promulgation of a revised standard that is consistent with the federal regulations.

Non-Substantive Default Regulatory Language. WVDEP legislative regulation 45 CSR 16 titled, “Standards of Performance for New Stationary Sources,” includes the statement,

§45-16-7. Inconsistency Between Rules.

7.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method or rule.

This regulatory provision creates a non-substantive default to a provision, term, condition method or rule, regardless of its origin or intent. Application of this provision could lead to a West Virginia regulatory decision that would be more stringent than a federal counterpart. The Chamber urges the agency to review this language and propose elimination of it as unnecessary.

Review and Reassessment of Vintage Legislative Air Regulations. The following items highlight the need for WVDEP to reassess the state only regulatory requirements of the WVDEP air program in light of expanded and revised federal air program strategies. The Chamber urges the WVDEP to review and propose for update these and similar regulations consistent with current federal air programs.

- 45 CSR 7, titled “To Prevent and Control Particulate Matter Air Pollution From Manufacturing Processes and Associated Operations” was last reviewed and updated in 1999-2000. This regulation includes a prohibition concerning the release of mineral acids at specific allowable stack gas concentrations as provided in Table 45-7B. The regulated mineral acids are Sulfuric Acid Mist, Nitric Acid Mist and/or Vapor, Hydrochloric Acid Mist and/or Vapor and Phosphoric Acid Mist and/or Vapor. These “mineral acids” are more comprehensively regulated pursuant to the federal CAA 112 program to regulate hazardous air pollutants (those known to cause cancer and other serious health impacts). Regulated sources for these and other toxic air pollutants listed by EPA are required to meet control technology requirements. EPA’s programs that address hazardous air pollutants include: National Emission

Standards for Hazardous Air Pollutants, Area Source Rules, Residual Risk/Technology rules, Area Source Generation Information and Implementations Rules, New Source Performance Rules, and certain Solid Waste rules [for waste combustors and incinerators]. This rule warrants WVDEP review and update as requested.

- 45 CSR 13, titled “Permits for Construction, Modification, Relocation and Operation of Stationary Sources of Air Pollutants, Notification Requirements, Administrative Updates, Temporary Permits, General Permits, Permission to Commence Construction and Procedures for Evaluation” is another regulation warranting review and assessment. This is a state air permit program that does not have a federal equivalent and therefore is not required by federal law. There are air emissions thresholds in the rule that trigger this state permit. These trigger emissions thresholds warrant updating consistent with sound science and technical assessment. This rule warrants WVDEP review and update as requested.
- 45 CSR 25, titled “Control of Air Pollution from Hazardous Waste Treatment, Storage, and Disposal Facilities.” This rule generally incorporates by reference the federal program at 40 CFR Parts 260, 261, 262, 264, 265, 266, 270 and 279. However, this rule also supplements the incorporation with state derived requirements. As such there are redundancies and inefficiencies in this rule that warrant review as requested.
- 45 CSR 27, titled “To Prevent and Control the Emissions of Toxic Air Pollutants.” This rule was promulgated on May 1, 1990. The goal of the rule is to require best available (control) technology (BAT) for emissions of state defined Toxic Air Pollutants (TAPs). The rule defines the following chemicals as TAPs: Acrylonitrile, Allyl Chloride, Benzene, 1,3 Butadiene, Carbon Tetrachloride, Chloroform, Ethylene Dichloride (also known as 1,2 Dichloroethane), Ethylene Oxide, Formaldehyde, Methylene Chloride (also known as Dichloromethane), Propylene Oxide, Trichloroethylene, Vinyl Chloride and Vinylidene Chloride (also known as 1,1-Dichloroethylene). All of these compounds are defined by the U.S. EPA as hazardous air pollutants (HAP). Under Title III of the Clean Air Act Amendments, by November 15, 1991 the USEPA Administrator was required to publish the initial list source categories. This list is required to be updated a minimum of every 8 years. For these source categories and future categories, the USEPA was required to develop emission standards. These are referred to National Emission Standards for Hazardous Air Pollutants (NESHAPs). These standards determine the Maximum

Achievable Control Technology for HAPs associated with the source category. WVDEP CSR 34 “Emission Standards for Hazardous Air Pollutants” incorporates the federal NESHAP requirements by reference, but also incorporates state derived regulations. These rules warrant WVDEP review and update as requested to assure content is no more stringent than federal requirements.

West Virginia Voluntary Remediation and Redevelopment

The West Virginia Voluntary Remediation and Redevelopment Program is authorized pursuant to W.Va. Code §22-22-1 et seq. and 60 CSR 3. There are programmatic statutory and regulatory issues with the WVDEP Voluntary Remediation and Redevelopment Program that render it unable to meet the statement of purpose set forth at W.Va. Code §22-22-1. Specifically, the WVDEP program fails to meet the purpose of the Voluntary Remediation and Redevelopment Act “to (1) establish an administrative program to facilitate voluntary remediation activities and brownfield revitalization.” W. Va. Code §22-22-1(d)(1). The Chamber strongly urges the WVDEP to engage in a thorough review of this program as there are significant delays and increased administrative implementation requests that cause candidate properties to not participate, withdraw from the program, or to expend significant resources for marginal results that provide questionable benefit to the State of West Virginia. Several administrative provisions incorporated into §60-3 have eliminated participation in the Voluntary Remediation & Redevelopment program. Agency implementation documents/forms have been incorporated as rules or policy that eliminate flexibility in writing efficient land use covenants and require DEP involvement in many non-environmental issues that add unnecessary cost and liability in managing these properties that enter this program. A thorough review of this program is recommended. It is the Chamber’s intent to assure that this program facilitates remediation and redevelopment in a more productive and effective manner consistent with the existing enabling statute or as may be amended by the West Virginia Legislature.

S.B. 619 established a protocol for submission of legislative rules to the Legislative Rulemaking Review Committee pursuant to W.Va. Code §29A-3-11. This section of the W.Va. Code sets forth the minimum criteria against which the Committee must review a rule to include as follows. The Chamber highlights those criteria listed below, which the current WVDEP Voluntary Remediation and Redevelopment program cannot meet.

- (1) Whether the agency has specific statutory authority to propose the rule and has not exceeded the scope of its statutory authority in approving the proposed legislative rule;
- (2) Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret or make specific;

- (3) Whether the proposed legislative rule overlaps, duplicates or conflicts with any other provision of this code, any other rule adopted by the same or a different agency, with federal statutes and rules, or with local laws and rules;
- (4) Whether federal funding will be impacted by its expiration and explanation as to such;
- (5) Whether the proposed legislative rule is necessary to fully accomplish the objectives of the statute under which the rule was proposed for promulgation;
- (6) Whether the proposed legislative rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it;
- (7) Whether the proposed legislative rule could be made less complex or more readily understandable by the general public; and
- (8) Whether the proposed legislative rule was proposed for promulgation in compliance with the requirements of this article and with any requirements imposed by any other provision of this code.

The Chamber appreciates this opportunity to provide comment and recommendations and is prepared to participate and assist as the Legislature and WVDEP engage in implementing S.B. 619.

Very truly yours,



Kathy G. Beckett
Chair, Environmental Committee
West Virginia Chamber of Commerce

KGB/ssc

cc: Stephen G. Roberts, President
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