Jefferson County Foundation, Inc.

July 21, 2020

Via email

Dave Ross, Assistant Administrator
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Mark Pollins, Director
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RE: Advisory That West Virginia Entities Are Being Allowed to Operate Construction Projects In Violation of the Clean Water Act and Request for Stop Work

Dear Mr. Ross and Mr. Pollins:

We write to inform you that the West Virginia Department of Environmental Protection (DEP) has engaged in irregularities in its administration of the National Pollution Discharge Elimination System (NPDES) program that are inconsistent with the approved permits, expectations, and instruction of the Environmental Protection Agency (EPA). Through this letter we ask the EPA to urgently take action to rectify this situation. These irregularities are leaving the water quality of ground and surface water resources of West Virginia at risk from construction projects.

There are two recent examples of the irregularities with respect to how the West Virginia DEP is handling NPDES Construction Stormwater General Permits ("CGPs").

1) DEP is using enforcement orders to allow regulated entities to operate without a permit or registration under the current general permit; and

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2) DEP is allowing regulated entities originally registered under a now-expired CGP to register under a new CGP by signature only without submission of any newly required items.

These irregularities are allowing the DEP to circumvent the normal permitting process and avoid complying with EPA regulatory requirements.

Background:

The newest version of the Construction Stormwater General Permit ("2019 CGP") was issued by DEP on January 10, 2019 and went into effect on February 9, 2019. On February 8, 2019, the 2019 CGP was appealed to the West Virginia Environmental Quality Board ("EQB") by several industry groups representing regulated entities.

Before the hearing scheduled to hear the appeal, the DEP and the parties representing regulated entities came to a settlement agreement. The settlement was incorporated into a final order from the EQB dated June 10, 2019, from which a revised draft 2019 CGP was written. This revised draft CGP went to public comment and to the EPA for review. On October 31, 2019, at the conclusion of the EPA's review of the revised draft 2019 CGP, the Region III EPA Water Division submitted an objection to the revised CGP to the DEP (see, Exhibit A EPA letter with comments on revised draft CGP). This objection specifically stated that the DEP was not to implement this draft until it first addressed the comments of the EPA. On January 7, 2020, the DEP formally withdrew the revised draft 2019 CGP from EPA review, leaving the February 9, 2019 permit in effect (See, Exhibit B DEP January 7, 2020 letter to EPA).

The previous Construction Stormwater General Permit ("2012 CGP") was approved in December 2012, took effect on January 3, 2013, and expired on January 3, 2018. The 2012 CGP was extended three times before the February 9, 2019 CGP replaced it. During the appeal of the February 9, 2019 CGP, a stay was issued by the EQB, allowing permittees to continue to operate under the conditions of the 2012 CGP (see, Exhibit C EQB Order Granting Stay).

The June 10, 2019 EQB final order (see, Exhibit D EQB Final Order) in this proceeding allowed for entities previously covered under the 2012 CGP to continue work under the conditions of the 2012 CGP for 18 months. This permission to operate under the 2012 CGP was written into the draft revised 2019 CGP, and in its review, the EPA specifically objected to DEP's providing such permission (See, Exhibit A EPA comments on revised draft CGP), stating:

> "Commented [A5]: This is not allowable. The 2012 permit expired and has been replaced by the 2019 permit. Therefore, the terms of the 2012 CGP are no longer valid. New permit coverage may not be issued under an expired

permit. Additionally, an expired permit may not be modified." (emphasis added)

"Commented [A6]: See above. Work may not continue under the 2012 permit for any amount of time since it has been replaced by the 2019 permit. Any permitees that maintained coverage under the 2012 permit wishing to continue coverage must apply under the 2019 permit."

"Commented [A7]: Per 40 CFR 122.46(b), the term of an NPDES permit shall not be extended by modification beyond the maximum duration of five years."

Irregular DEP Actions:

Irregularity 1: DEP Misuse of Enforcement Orders

When the DEP withdrew the revised draft 2019 CGP on January 7, 2020, there were many entities operating under the 2012 permit conditions. In March of 2020, the DEP issued unilateral enforcement orders to many of those entities. According to DEP's own website, it issued over 690 such orders, almost entirely on a single day! These entities are not covered under the 2019 CGP and are still operating under the 2012 permit conditions. These orders allow such entities to continue operating under the 2012 permit conditions for up to six months from the date the order was issued. Allowing such entities to operate under 2012 permit conditions for up to six months provides regulatory relief for more than a month longer than would have the draft revised Construction Stormwater General Permit that was rejected by the EPA.

The DEP is the architect of this situation. The DEP is well aware that these entities do not have permit coverage and yet are continuing to operate, illegally, under the 2012 permit conditions. On February 28, 2020, without any public notice, the DEP sent an email to Michael Clowser, representing the Contractors Association of West Virginia, stating:

> "The WVDEP recognizes that certain permittees previously covered under the 2012 Construction Stormwater NPDES general permit <u>are currently without permit coverage</u> due to concerns regarding the issuance of the 2019 version of the permit. Upon EPA's specific objection to the issuance of the modified version of the 2019 permit, the agency withdrew it, and initiated the authorization of permit coverage-for those applicants who filed applications under the February 2019 version of the permit. The agency intends to issue a 2020 version of the general permit. (emphasis added)
>
> To provide certainty to those entities currently without permit coverage until that permit is issued, the WVDEP will issue Unilateral Orders over the next several weeks that will..."

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(See, Exhibit E February 28, 2020 email from Kathryn Emory, Acting Director of the Water and Waste Management Division of the DEP).

It is obvious that the DEP has been a willing participant in this strategy, so far successful, to allow hundreds of entities to operate without a valid NPDES permit. This is not a technical foul, but has real consequences that increase risks to the water resources of West Virginia, and beyond.

An example of this DEP tactic and its detrimental impact on environmental protection is DEP Order 9080 (Exhibit F), which the DEP issued on March 2, 2020 to the City of Charles Town for its large construction project building the Route 9 Sewer, to Rockwool. Order 9080, like the other unilateral enforcement orders, allows the City of Charles Town to continue to operate under the Stormwater Pollution Prevention Plan (SWPPP) previously approved as part of this project's application for registration under the 2012 CGP. Notably, because Order 9080 allows the City to operate under the 2012 Permit conditions, the City (and its construction company vendor) are not required to have and follow a site-specific Groundwater Protection Plan (GPP) or Karst Mitigation Plan that otherwise would be required under the 2019 CGP in that location.

This approximately five-mile project is entirely in well-developed karst as are other projects affected by these orders. Allowing these entities to continue to operate under the 2012 permit conditions allows entities to avoid appropriately evaluating, planning for, and mitigating karst features present within the projects limit of disturbance. This endangers both groundwater and the surface waters this groundwater convey to. The Potomac River is the destination of the groundwater for this and many other examples.

Irregularity 2: Issuance of General Permit registration without valid application or required materials.

The second irregular DEP action we have observed is that for those entities that were granted a CGP after the February 9, 2019 CGP took effect, their permit registration was under the conditions of the 2012 CGP and not under the 2019 CGP. Instead of requiring these entities to reapply under the February 9, 2019 CGP conditions, the DEP is allowing these entities to sign a letter promising to follow the 2019 permit conditions. However, without a new SWPPP and other newly required elements, the registration materials of these entities do not meet the standards required by the 2019 permit. This effectively allows these entities to continue operating under the expired 2012 permit conditions while claiming to be registered under the current 2019 CGP.

Furthermore, it is clear that the DEP is aware that these entities are continuing to operate under the 2012 permit conditions, because when the DEP has performed inspections even well beyond the January 7, 2020 letter, the DEP has evaluated the entities performance against the 2012 permit conditions and written up the

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inspection and notice of violations citing the 2012 permit conditions.

This is demonstrated by the following example:

The Northport Avenue Extension is a large construction project in and operated by the City of Ranson, West Virginia. It was originally permitted under the 2012 CGP. In June of 2019, a reissuance of the registration under the 2019 CGP was applied for and granted on September 11, 2019.

The registration application was incomplete, with only 7 out of 20 sections submitted, and provided for no substantive changes to the actual stormwater handling from the application under the 2012 permitting conditions. The only two changes were to the signature page, which now referred to the 2019 CGP, and the timeline was lengthened to over one year. Most notably, the application was missing a site-specific Groundwater Protection Plan and a karst mitigation plan, both required for this location in the 2019 CGP.

The City of Ranson is now operating this project under this reissuance and has incurred multiple violations. Both the Inspection Reports and the Notices of Violations refer to the 2012 permit conditions, not the 2019 permit conditions (see, Exhibit G the inspection reports and notice of violations for comparison with the cited 2012 CGP and 2019 CGP permit conditions. Note they match the 2012 not the 2019). This is a clear indication that the DEP not only understands that this entity is operating under expired permit conditions but, in fact, intends for them to do so.

EPA must act to protect water resources:

These irregularities represent egregious disregard for the clear directive that the EPA gave the DEP in the October 2019 communications in which the EPA directed that no entity be allowed to continue under the conditions of the 2012 permit. This represents backsliding, and in these and many other examples, poses real risk to the ground and surface water quality.

The DEP has intimated that they intend to develop and seek approval for a new version of the Construction Stormwater General Permit ("2020 permit"). The reason for this is unknown; the current permit is not due to expire until 2024. It is our concern that these irregularities described above are in an effort to allow entities to continue to operate under the 2012 permit conditions until such a new permit can be implemented. This would allow these entities to avoid compliance with the more stringent and protective 2019 CGP.

We ask that you direct the DEP to immediately require all entities, not validly covered under the 2019 CGP, to stop work until the entity has a complete application and valid registration under the 2019 CGP or an individual NPDES permit covering the entities construction activities. If the DEP will not take this

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immediate action, we ask that you rescind the NPDES administration privileges of the DEP.

Best regards,

Christine L Wimer

Christine L. Wimer, President
Jefferson County Foundation, Inc.
As joined by:

Aileen Curfman, Co-Chair
Jim Kotcon, Conservation Chair and
West Virginia Chapter of Sierra Club

Linda Frame, President
West Virginia Environmental Council

Vivian Stockman, Executive Director
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Rosa P. Hance, Chair
Maryland Chapter Sierra Club

Paul Walker, Group Chair
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Upper Potomac Riverkeeper

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