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September 11, 2019

RE: Permit No WV0115924 General WV/NPDES Water Pollution Control Permit:  
Stormwater Associated with Construction Activities - Rural Agricultural Defenders  
Public Comment

Dear Director,

**RADs overall comment is that this revised General Permit is in conflict with EPA's Construction and Development (C&D) rule requirements, that it violates NPDES-delegated authority, and should not be considered an NPDES-compliant permit.**

**Specific comments are below.**

The Construction Stormwater General Permit WV/NPDES Permit No. WV0115924 is revised every five years. Work to revise the 2012 permit was carried on by WVDEP over the fall of 2018 and a Draft Permit and Fact Sheet was released for public review in mid-September 2018, with comments accepted through October 19, 2018. A public hearing was scheduled and took place from 6:00 pm to 8:00 pm on October 9, 2018, at the Coopers Rock Training Room, WV DEP Headquarters, 601 57th Street SE, Charleston, WV 25304. After the public review period, a Responsiveness Summary was prepared by WVDEP.

WVDEP received many comments and addressed them all in the Responsiveness Summary, issued along with the revised General Permit on January 9, 2019, effective February 9, 2019. An immediate appeal was made by the West Virginia Manufacturers Association, Jefferson Asphalt Products, and the Contractors Association of West Virginia. This permit appeal consisted of essentially all of the industry comments that had been submitted to WVDEP during the public comment period. WVDEP had addressed those comments in their Responsiveness Summary, justifying their approach to the revised permit and providing scientific and environmentally-sound reasons why they responded how they did. Nevertheless, the outcome of the appeal was to set aside the WVDEP approach and instead **to grant every single industry request** for removal of protections, roll-back of water quality standards, and accession to the demands of industry, the net result of which was to eviscerate the Construction Stormwater General Permit.

**This appeal was conducted with no voice or representation from the environmental community.** This led to the Order for Appeals numbers 19-03-EQB and 19-04-EQB issued by the Environmental Quality Board (EQB), directing the parties (WVDEP and the Industry appellants) to settle their differences. On May 31, 2019, a settlement agreement was signed by the EQB. Thus, the General Permit was revised and is the subject of the current public notice, whose period of comment runs through September 13, 2019.

**The current proposed General Permit has language which is non-negotiable.** Comments will not be considered if they include or suggest any revisions that would have the effect of changing the agreement or failing to carry out the agreement of May 31, 2019. That leaves precious little to comment on, as the entire Permit was recast in the most industry-favorable way one could imagine. Every comment made by an industry commentator on the version of the General Permit that went through the public review process in September and October, 2018, was in fact granted.

WVDEP's overall approach to permit revision, prior to this instance, was to align the WV General Permit as close as possible to EPA's 2017 Construction General Permit, which applies to those states and tribal governments that do not possess delegated authority to run their own NPDES permitting program. West Virginia is a delegated state, but must follow the general precepts for rulemaking and environmentally-sound protection as EPA. It can be more stringent, but not less. With this new industry-centric General Permit, West Virginia has ignored this precept, gone rogue, and dares EPA to challenge their delegated NPDES authority.

The most egregious change allowed by the EQB settlement is the removal of both the term and protections for "sensitive waters" and the substitution of the term "special waters." By the stroke of a pen, two serious degradations in the protection of stream water quality happens:

1) all the Tier I impaired streams (streams in the CWA section 303(d) list) lose protection under the Stormwater General Permit unless they are covered by a TMDL that is sediment-only;

2) all of the Tier II streams not only lose protection, but are subject to degradation to Tier I. The majority of streams in West Virginia are Tier 2, so that puts a huge portion of the water quality in WV at risk. That is strictly counter to EPA's antidegradation policy, and **grounds in itself for EPA to revoke WV's NPDES delegation authority.**

WVDEP took the approach—that was removed by the EQB settlement—that since WV has few approved TMDLs (WVDEP is behind schedule in putting forth TMDLs to EPA Region 3 for approval) and those that they have are quite old (1999-era) using older data and methods of allocating waste loads, that most of the Tier I and II streams in WV are to be considered “special waters” that need additional BMP protections in the General Permit scheme.

Most importantly, industry knows well that in the more recent TMDLs (2005-2015 timeframe), iron has been used as a surrogate for sediment TMDL, so there is in fact NO WV TMDL that is a sediment only TMDL—they are iron-impaired water TMDLs that also capture the degradation effects of sediment.

Industry inserted the phrase "Special Waters" meaning (i) Tier 3 waters, as those waters are defined and set forth in 47 C.S.R., Series 2; (ii) trout waters specifically identified in 47 C.S.R., Series 2 (excluding warm water streams, warm water fisheries stocked with trout or those without sufficient age classes of trout to demonstrate a population of trout through natural reproduction); and (iii) **streams for which a sediment TMDL (but not those streams for which a TMDL for iron, aluminum or other parameters are developed, unless sediment is also addressed) has been completed,** fully aware that category iii does not exist in WV.

As category i (Tier 3 waters) is the same as category ii (natural trout waters), and as those streams exist only in remote, already well-protected areas (not generally subject to construction and development pressures associated with the Construction Stormwater General Permit), then the entire construct of “Special Waters” is a sham. It protects very little while at the same time jeopardizing the majority of streams in the state.

***Specific Comments Permit No WV0115924 General WV/NPDES Water  
Pollution Control Permit: Stormwater Associated with Construction Activities***

- 1) **p.3, first paragraph.** Clarify whether the status map must show the original Limits of Disturbance (LOD), as they appear in the original registration, or the LOD which remains at the point of certification, after consideration of the areas that have been permanently stabilized.
- 2) **p. 3, Continuation of this general permit, third bullet:** “Your submittal of notification of termination that the facility has ceased operations;” — Clarify what is meant by “ceased operations.” Does this refer to a completed construction project which received an official WVDEP Notice of Termination? Or does this refer to a facility, such as a manufacturing plant, that will not be continuing to operate?
- 3) **PART I - I.B. COMPLIANCE REQUIREMENT:** “Compliance with this General Permit, the approved Stormwater Pollution Prevention Plan and the Groundwater Protection Plan is required upon the beginning of the construction project.” — Clarify what is meant by “the beginning of the construction project?” Is it the date of application on the ESS? The date of first earth disturbing activities? Section IIG states that, “Construction activities may begin after the Qualified Person inspects and finds that all erosion and sediment control BMPs are installed properly in the areas where earth disturbing activities are planned to commence.” That could also be considered the “beginning of the construction project.”

Does the compliance requirement apply to an “approved” Groundwater Protection Plan or merely a submitted one? As the modifier “approved” does not appear before the term “Groundwater Protection Plan;” “submitted” could be the interpretation of your intent. In revised Section II. I. GPPs are allowed to be submitted, using a template provided by the DEP, to include only that information available at the time of application. Are you saying that earth disturbing activities can begin even in the absence of an approved plan?

- 4) **I.C. WATER QUALITY - Second paragraph:** “Compliance with the terms of this Permit, including the use of appropriate BMPs (regular or enhanced) at construction sites, satisfies the antidegradation requirements of 47 C.S.R. 2 and 60 C.S.R. 5.” — Does the opposite also hold true? Noncompliance with the terms of the permit...would NOT satisfy (and therefore violate) antidegradation requirements?

If permittees are noncompliant in their maintenance and monitoring of erosion and sediment controls, might not degradation occur? This would mean that every Notice of Violation that is not addressed in a timely fashion—or in the case of habitual violators—there could be degradation of stream use. How does the Director intend to

decide which violations and violators are significant enough to lead to a finding of degradation? The previous 2012 permit has a very succinct statement on Water Quality, it states:

*“Subject to 47 WV CSR 10.3.4.a, the effluent or effluents covered by this permit are to be of such quality so as not to cause a violation of applicable water quality standards.”*

RAD strongly suggests that this revised permit keep the permit condition on Water Quality exactly as it appears in the 2012 permit.

- 5) **Last paragraph:** “Individual stream crossings must be completed in accordance with the 401 certification. Whatever crossing method is chosen by the permittee, the crossing should be completed as soon as practicable.” — This paragraph does not appear to be in the proper section. An explanation of the relevance of this paragraph and of the 401 certification is needed for clarification.
- 6) **I.F. ALLOWABLE DISCHARGES:** RAD strongly suggests that WVDEP amend the list of allowable discharges to specify that water used for dust control be applied using appropriate quantities and methods and that **no chemicals, soaps, detergents, etc., shall be used**. Dust wetting additives consisting of surfactants to increase the ability of water to wet and suppress road dust are often used in haul roads and increasingly in construction access roads as well. These additives are often proprietary and can contain salts, petroleum products, and toxic chemicals. The majority of state/NPDES stormwater construction permitting programs ban the use of additives and require water-only dust suppression. Silence on this issue opens the door for permittees to use and potentially misuse dust suppression chemicals.
- 7) **II.A.1.f. Offsite Waste and Borrow Areas - First paragraph, third sentence:** “Offsite waste or borrow sites less than one acre in size that are not contiguous to the construction site...” TYPO. Change to: “once acre in size.”
- 8) **II.B. POSTING SIGN OR NOTICE** - The original 2019 permit suggested that the content of the posted sign should include information that directs the public to the WVDEP Electronic Submission System (ESS) to view applications. This system was created to provide the public with an easy-to-access method of acquiring of permit information. It seems to have been removed from the revised 2019 permit but **was not part of the challenges to the permit reflected in the Order of Appeals 19-03-EQB and 19-04-EQB, nor in the settlement agreement.**

In the 2019 permit responsiveness survey, it seems that WVDOH (Comment #94) specifically objected to having small print with a website address on it, and stated that:

“There is too much information for the passing motorist to comprehend...the WVDOH cannot allow a sign of this type to be placed in the viewshed of the travelling public.”

Here are three examples of actual signs, taken in July 2019, Jefferson County. All are active construction projects:



RAD respectfully suggests that DEP consider signs of these types be placed in the viewshed of the travelling public, because they are every bit as unreadable by a passing motorist. Moreover, the last photo, which is of an actual DOH-funded state road extension project, is unreadable because the permit number has been hand written-in with a marker that is fading. This situation speaks to our next comment—regarding new Clause:

- 9) **II.B.4. “Within 7 business days of assignment of the permit registration number, the applicant shall affix such number to the sign or to the posted notice.”** RAD requests that DEP clarify how the number shall be affixed, and that all writing must be done in permanent marker (Sharpie style).

10) **II.G. QUALIFIED PERSON TO INSPECT EROSION AND SEDIMENT**

**CONTROLS:** The revised permit defines a "Qualified Person" as “a person who is knowledgeable in the principles and practices of sediment and erosion controls, pollution prevention, and possesses the education and abilities to assess conditions at the proposed site that could impact stormwater quality and to assess the effectiveness of proposed stormwater controls to meet the requirements of this permit.”

Considering DEP’s new approach to using BMPs as Technology-Based Effluent Limits to ensure compliance with water quality standards and to preserve anti-degradation effects, the role of a Qualified Person increases immensely. The fact that DEP provides few specifics on what constitute qualifications, RAD strongly suggests criteria such as the following be adopted:

A Qualified Person, knowledgeable in the principles and practices of erosion and sediment control, shall include:

A person with one of the following credentials: a Licensed Professional Engineer, Certified Professional in Erosion and Sediment Control (CPESC), or a Registered Landscape Architect; or

A person working under the direct supervision of, and at the same company as, the Licensed Professional Engineer or Registered Landscape Architect, provided that person has training in the principles and practices of erosion and sediment control.

11) **II.H.5. Record Keeping:** “All SWPPPs required under this permit are considered reports that shall be available for review to the public under Section 308(b) of the CWA and WV Code 29B-1-1. The permittee may claim any portion of a SWPPP as confidential to the extent permissible by 47 C.S.R. 10-12.7. (NPDES Program)... All GPPs are considered reports and shall be made available as required by WV Code 29B1-1.”

These two paragraphs need to be clearly placed under their own section titled: Public Review, not buried under the section on record keeping. Be clear so the public knows and understands that they have the right to request to see the SWPPP and/or the GPP and that the permittee must make it available to them.

This paragraph about the GPP should be placed under **Section II.H.** for clarity.