

January 25, 2013

Lisa Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: 60-Day Notice of Intent to File Citizens Suit Under Clean Water Act Section 505(a) for Failure to Perform a Non-Discretionary Duty under Section 303(d) of the Act.**

Dear Ms. Jackson,

The Sierra Club, West Virginia Highlands Conservancy, and Ohio Valley Environmental Coalition (collectively “the Groups”) in accordance with Section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365 and 40 C.F.R. Part 135, hereby notify you that you have failed to perform acts and duties pursuant to Sections 303(c) and (d) of the Act that are not discretionary. If you do not remedy this failure within the next sixty days, the Groups intend to file suit.

**I. The EPA Administrator Has Violated Her Non-Discretionary Duty to Approve or Deny West Virginia’s 303(d) List Within the Requisite 30-day Period.**

Section 303(d) of the CWA requires that “[e]ach State shall identify those water within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) [of the Act] are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). Further, “[e]ach state shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 [of the Act] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.” 33 U.S.C. § 1313(d)(1)(B). Each state is then required to submit the list of identified waters (the “303(d) List”) under these provisions to the Administrator. The Administrator “shall approve or disapprove such identification . . . not later than thirty days after the date of submission.” 33 U.S.C. § 1313(d)(2).

The West Virginia Department of Environmental Protection (“WVDEP”) sent its most recent 303(d) list to EPA on Friday December 21, 2012. Accordingly, the Administrator was required to approve or disapprove the list no later than January 22, 2013 (the next business day after the expiration of the 30-day period). Unfortunately, you have not done so. Instead, the only action taken by EPA in response to WVDEP’s submission was to request a conference call with the state agency. Larry Miller, Letter to John Wirts Re: West Virginia 2012 Integrated Report (January 22, 2013). That response is not only legally deficient; it also reinforces the State’s recalcitrance. EPA’s passivity towards WVDEP’s refusal to enforce the Clean Water Act not only harms our environment, but weakens the rule of law in our region. If you have

not, therefore, approved or disapproved the list within 60 days we intend to file a citizen suit to compel you to perform this non-discretionary duty placed on you by Congress.

## **II. The EPA Administrator Has Violated Her Non-Discretionary Duty to Approve or Deny a Revision of West Virginia's Water Quality Standards Within the Requisite Time Periods**

As we explain in Part III.B. below, Senate Bill 562, enacted in March 2012, revised West Virginia's water quality standards to weaken the standards for protecting the biological integrity of streams. WVDEP has failed to submit that revision to EPA for approval, and has defiantly taken the indefensible position that it is not a revision. EPA cannot accept WVDEP's representation at face value. EPA has an independent federal duty to determine whether a revision has in fact occurred, and in this case it has. "Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards." *Miccossukee Tribe v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997).

If a state's new or revised standards meet the requirements of the Clean Water Act, the EPA must approve the standards within sixty days. 33 U.S.C. § 1313(c)(3). If, however, EPA identifies violations of the Clean Water Act, the EPA is required to take appropriate measures to ensure that these problems are fixed. It must notify the state within ninety days and specify the changes needed to comply with the Clean Water Act. 33 U.S.C. § 1313(c)(3). The EPA also must propose new regulations that satisfy the requirements of the Clean Water Act. *Id.* at § 1313(c)(4). And if the state does not adopt EPA's proposed changes within ninety days of publication, the EPA itself must promulgate those standards. *Id.* Any existing water quality standard "remains the applicable standard until [the] EPA approves a change, deletion, or addition to that water quality standard, or until [the] EPA promulgates a more stringent water quality standard." 40 C.F.R. § 131.21(e).

In this case, EPA has violated its non-discretionary duty either to approve West Virginia's revised standard within 60 days or to notify the State of its disapproval of that revised standard within 90 days.

## **III. EPA Must Disapprove West Virginia's 303(d) List as Submitted.**

The Groups believe that the Administrator cannot legally approve West Virginia's 303(d) list as submitted. It would set a clear precedent that West Virginia regulators and coal operators may continue to ignore the EPA and the provisions of the federal Clean Water Act without consequence.

### *A. West Virginia Refused to Identify All Waters that Are Not Complying with Narrative Water Quality Standards*

West Virginia has abdicated its responsibilities under Section 303(d) of the CWA by refusing to identify waters that do not comply with narrative water quality standards.

Specifically West Virginia has not identified waters that fail to meet two narrative standards that prohibit conditions in state waters that are injurious or adverse to aquatic life:

47 C.S.R. § 2-3.2e – prohibiting “[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal, or aquatic life;

47 C.S.R. § 2-3.2i – stating that “no adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.”

WVDEP’s refusal violates state obligations under 33 U.S.C. § 1313(d)(1)(A) and (B).

WVDEP was brazen in its refusal to comply with the Clean Water Act. In the report accompanying its 303(d) list the agency states: “In response to the legislation [SB 562], DEP is not adding new biological impairments to the 2012 Section 303(d) list. Previously listed impairments are being retained. When new rules become effective, delisting without TMDL development may occur if the application of the assessment methodology demonstrates a non-impaired condition.” WVDEP, *Integrated 2012 303(d) List and Report (2012)* at 15. In essence, WVDEP told EPA that it would no longer comply with the Act; it would not list waters on the 303(d) list for biological impairment in the face of an earlier directive by EPA to do so. In response to that provocation, EPA asked WVDEP to participate in a conference call at an unspecified future date. Such a weak response is not permitted by the Clean Water Act. EPA’s must assert its authority in the face of WVDEP’s intransigence; further appeasement will only encourage more defiance by WVDEP.

*B. By Refusing to Identify Biologically Impaired Waters, West Virginia Has Illegally Changed Its Water Quality Standards.*

As justification for its decision not to identify waters that fail to meet narrative water quality standards, the WVDEP cites SB 562, enacted by the West Virginia Legislature in 2012. SB 562 amended W. Va. Code § 22-11-7b to include the following provision:

The secretary shall propose rules [to provide that] measuring compliance with the biologic component of West Virginia’s narrative water quality standard requires evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) Supports a balanced aquatic community that is diverse in species composition; (ii) contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (iii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present. The secretary shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code that implement the provisions of this subsection. Rules promulgated pursuant to this subsection may not establish measurements for biologic components of West Virginia’s narrative water quality standards that would establish standards less protective than requirements that exist at the time

of enactment of the amendments to this subsection by the Legislature during the 2012 regular session.

W. Va. Code § 22-11-7b(f).

In the report attached to its 303(d) list, as well as in a letter sent to Regional Administrator Shawn Garvin on December 20, 2012, the WVDEP unsuccessfully tried to explain that SB 562 does not constitute a change in WQS by relying on *Florida Clean Water Network Inc. v. United States Environmental Protection Agency*, 2012 U.S. Dist Lexis 44539 (N.D. Fla. March 20, 2012) (“*Florida Clean Water Network*”). Citing that case, DEP argued that SB 562 “merely describes the sufficiency of reliability of information necessary to make an attainment decision” and “merely outlines methodologies as contemplated by Section 303(d) of the federal Clean Water Act.” DEP then falsely asserts that SB 562 does not “affect an attainment decision.”

The DEP’s description of SB 562 is inaccurate. An “attainment decision,” as defined by EPA in the *Florida Clean Water Network* litigation, is “one where a State decides what it means to attain or not to attain any ‘water quality standard applicable to such waters’ for purposes of establishing total maximum daily loads (TMDLs) under section 303(d)(1)(A) of the Act.” *Florida Clean Water Network* at \*3 n. 10. The very reason a discussion of SB 562 is included in the 303(d) report is because the WVDEP interprets that bill as binding upon certain attainment decisions for purposes of establishing TMDLs under section 303(d)(1)(A). Specifically, the agency said that it is binding on its decision whether a state water meets the conditions of the narrative water quality standard within 47 C.S.R. § 2-3.2.i. The 303(d) list is required under 303(d)(1)(A) for purposes of establishing TMDLs. Senate Bill 562, as interpreted by WVDEP, therefore affects an “attainment decision.”

Moreover, SB 562 does not “merely outline methodologies” or describe the “sufficiency or reliability of information.” Again, in *Florida Clean Water Network*, EPA described this category of provisions as including “minimum sample size requirements, age of data requirements, and the requirement that [state regulator] know the pollutant causing a water quality impairment before that water may be included on the 303(d) list.” *Florida Clean Water Network* at \*4. SB 562 does none of these things. Rather the statute describes the conditions that the assessed water body must meet in order to be included on the 303(d) list required under 33 U.S.C. 1313(d)(1)(A) – one of the defining features of a water quality standard. *Id.*

Finally, WVDEP ignores the fact that the court in *Florida Clean Water Network* applied an “effects test” in its analysis. This test, as described by the 11<sup>th</sup> Circuit, is simple: If “waterbodies that under pre-existing testing methodologies would have been included on the list were left off the list because of [the new law] then in effect the [law] would have created new or revised water quality standards. . . .” *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1090 (11<sup>th</sup> Cir. 2004) (emphasis added). Records obtained under the West Virginia Freedom of Information Act from WVDEP show that, based solely on the passage of SB 562, WVDEP has refused to list at least 173 streams as biologically impaired which would have been listed under previous listing protocols (WVSCI). Thus, SB 562 unquestionably has

the effect of creating a new or revised water quality standard and cannot be implemented by WVDEP until approved by EPA.

Despite WVDEP's statements to the contrary, SB 562 as interpreted by WVDEP is a change to West Virginia's Water Quality Standards. The December 20, 2012 letter from Secretary Huffman to EPA made plain that the state has no intention of submitting that change to EPA for approval and no intention of following other necessary procedures (most notably notice and comment requirements). EPA's approval of the 303(d) list as submitted would constitute an acceptance of this illegal change to West Virginia Water Quality Standards. The 303(d) list must, therefore, be disapproved.

*C. WVDEP Ignored EPA's Instruction to Use a Genus-Level Assessment Protocol for Evaluating Biological Impairment*

In its February 8, 2011 approval of the West Virginia 2010 303(d) list, EPA instructed WVDEP to move "to a genus-level analysis for its 2012 section 303(d) List." The letter explained that WVDEP's prior assessment tool (WVSCI) was outdated and that EPA expected West Virginia to adopt an available and approved genus-level assessment protocol (GLIMPSS). EPA's comments on the 2012 draft protocol reiterated this direction:

As part of its approval document for the 2010 Section 303(d) list, EPA noted that WVDEP is a regional leader in water quality monitoring. EPA set forth its expectation that West Virginia would equal its high quality monitoring program by utilizing a genus-level assessment methodology (Genus Level Index of Most Probable Stream Status (GLIMPSS) for the 2012 303(d) list. EPA noted that the final version of GLIMPSS had not been made available in time for the Section 2010 list and WVDEP had expressed concerns that GLIMPSS had not been peer reviewed. GLIMPSS has since undergone external peer review and recently (May 2012) was published online in the journal *Environmental Monitoring & Assessment* and will appear in the hard copy version of that journal. It is not clear to EPA why DEP has declined to use GLIMPSS for its 2012 Section 303(d) list or how the draft 2012 Section 303(d) list addresses the concerns raised by EPA. . . . it does not appear that the language of SB562 precludes the use of available methodologies [prior to the development of new methodologies].

EPA Comments to WVDEP Draft 303(d) List (2012). WVDEP's failure to use GLIMPSS and its pointed disregard for EPA directions are grounds for disapproving the 2012 303(d) list. Instead of adopting this EPA-approved and peer-reviewed method, WVDEP flatly refused to comply with EPA's requirement to use a genus level assessment protocol for listing biologically-impaired streams.

The failure of WVDEP to adopt GLIMPSS has a significant practical effect on West Virginia waterways. Although WVDEP has rejected the use of GLIMPSS, the state's Division of Water and Waste Management has been collecting genus-level macro-invertebrate data for several years. EPA calculated GLIMPSS scores using this data. Based on EPA's calculations, Appalachian Mountain Advocates submitted during the State comment period a list of 546

previously unlisted streams that would have appeared on the draft 2012 303(d) list, had the GLIMPSS protocol been applied. These 546 streams do not appear on the final 303(d) list as submitted by WVDEP. They will not, therefore, receive protections afforded by placement on that list, and will not be scheduled for development of TMDLs to bring them into compliance with West Virginia Water Quality Standards. WVDEP's failure to adopt and apply GLIMPSS is therefore another reason to disapprove WVDEP's draft 303(d) list.

*D. WVDEP Used a Statistically Invalid Method to List Streams Pursuant to WVSCI*

Because WVDEP refused to include any new streams on the 2012 303(d) list, the only streams that appear on the list are those that appeared on the 2010 303(d) list. As EPA previously noted, and explained again in comments to the 2012 303(d) list, the methodology used to list those streams was statistically invalid:

WVDEP should address concerns that EPA has raised regarding WVDEP's use of WVSCI. In its approval document for the 2010 Section 303(d) list, EPA identified concerns with the continued interpretation of WVSCI beyond the fact that it is an older and coarser assessment methodology than GLIMPSS. Particularly, EPA raised issues with WVDEP's use of a "gray zone" of 60.7 to 68. EPA has commented that the use of the gray zone is not statistically supported. Please address EPA's prior comments in this regard. EPA's analysis shows that there are approximately 270 waters currently identified in the gray zone.

EPA Comments to WVDEP Draft 303(d) List (2012). WVDEP did not address this issue in the final 303(d) list.

In addition to being statistically unsupportable, WVDEP's decision not to list streams within a "gray-zone" between WVSCI 60.7 and 68 results in the omission of streams that are significantly degraded. Commenters from Duke and Baylor Universities explained why the gray-zone is problematic from an ecological perspective:

[W]e found that the vast majority of the taxa had declined by at least 50% at a WVSCI score of 80, and that most of the remaining taxa declined by 50% or more by a WVSCI of 68. Very few additional taxa declined below a WVSCI score of 68. In fact, it appeared as though very little additional information is contained in the index below an impairment threshold of 68, suggesting that most of the biological degradation that can be done to a stream has been achieved once a site is scored at or below 68.

Bernhard and King Comments to WVDEP Draft 303(d) List (2012). WVDEP's perpetuation of the flaws in WVSCI is yet another reason that EPA must disapprove the 2012 303(d) list.

#### **IV. The Exclusion of Streams from the Section 303(d) List Eliminates Protections for Streams**

EPA recognizes that “high levels of salts, measured as TDS or conductivity, are a primary cause of water quality impairments downstream from mine discharges.” EPA, July 21, 2011 Memorandum re: Improving Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, Appendix 1, p. ii. Despite that harm, WVDEP has refused to establish any water quality standards based on these parameters. As the EPA is well aware, the state of West Virginia has gone so far as suing EPA in federal court to avoid having to follow guidance that EPA has promulgated for these parameters. *See Nat’l Mining Ass’n. et al., v. Jackson*, 2012 WL 3090245 (D. D.C. July 31, 2012). The lack of guidance or numeric standards specific to one of the primary pollutants causing harm to Appalachian Streams means that narrative standards are the only protection available. Through its interpretation of SB 562 and its resulting refusal to list biologically impaired streams on the 2012 303(d) list, the WVDEP is attempting to undercut the last line of defense for these streams.

Specific examples of how SB 562 is affecting West Virginia streams can be seen in the current situation with Road Fork and Leatherwood Creek, tributaries of the Elk River in Clay County, WV. *See* Appendix A. These two streams have extremely low WVSCI scores. Road Fork was most recently scored at 30.81, Leatherwood Creek at 35.96. *Id.* Ions, such as sulfates, measured as conductivity are an obvious source of impairment. Conductivity readings have consistently been between 3000 and 5000  $\mu\text{S}/\text{cm}$  since 2010. *Id.* Despite these findings the development of a TMDL has been put off as a result of SB 562. *Id.*

The situations at Leatherwood Creek and Road Fork are not isolated. As explained previously, WVDEP recognizes that 173 streams that would have been listed as biologically impaired under WVSCI are not included on the 2012 303(d) list. The number of omitted streams rises to 546 when an appropriate stream assessment protocol is used. Under the State’s scheme, those omitted streams cannot even be scheduled for a TMDL until the next listing cycle occurs in 2014. Because of West Virginia’s five-year Management Framework cycle and the time WVDEP takes to develop new biological protocols, the omission of streams from the current list would mean that certain TMDLs could be delayed for many years.

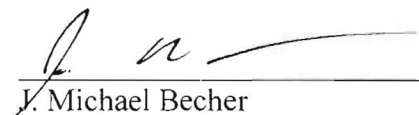
The groups represented by this notice are working hard to protect West Virginia streams from harmful effects of conductivity, sulfates, and dissolved solids. The groups on this letter have become, by default, the enforcers of the Clean Water Act for coal mining discharges. The WVDEP has not only abdicated its responsibility to enforce the Clean Water Act, but has colluded with polluters to protect them from the requirements of the Clean Water Act and save them hundreds of millions of dollars in clean-up costs. The Groups submitted numerous comments to WVDEP. They are actively engaged in the enforcement of permit conditions mandating compliance with West Virginia Water Quality Standards against some of the State’s most egregious violators. They have been forced by WVDEP’s failure to enforce and implement the Clean Water Act to appeal scores of WVDEP issued Clean Water Act permits. They have filed federal citizen suits to enforce narrative standard violations against coal operators. Efforts

such as these are undermined by EPA's failure to carry out its duties to assure that WVDEP complies with the Clean Water Act.

**V. Conclusion**

As described above the Administrator has violated non-discretionary duties under Sections 303(c) and (d) of the Act by failing to respond to WVDEP's submission of an inadequate 303(d) list and by failing to respond to the state of West Virginia's change of its water quality standards. If EPA does not remedy those failures within the next sixty days we intend to file suit. If EPA believes that anything in this letter is inaccurate please let us know. Additionally, we would be happy to meet with EPA or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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*On behalf of Sierra Club, the Ohio Valley  
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Virginia Highlands Conservancy*

cc:

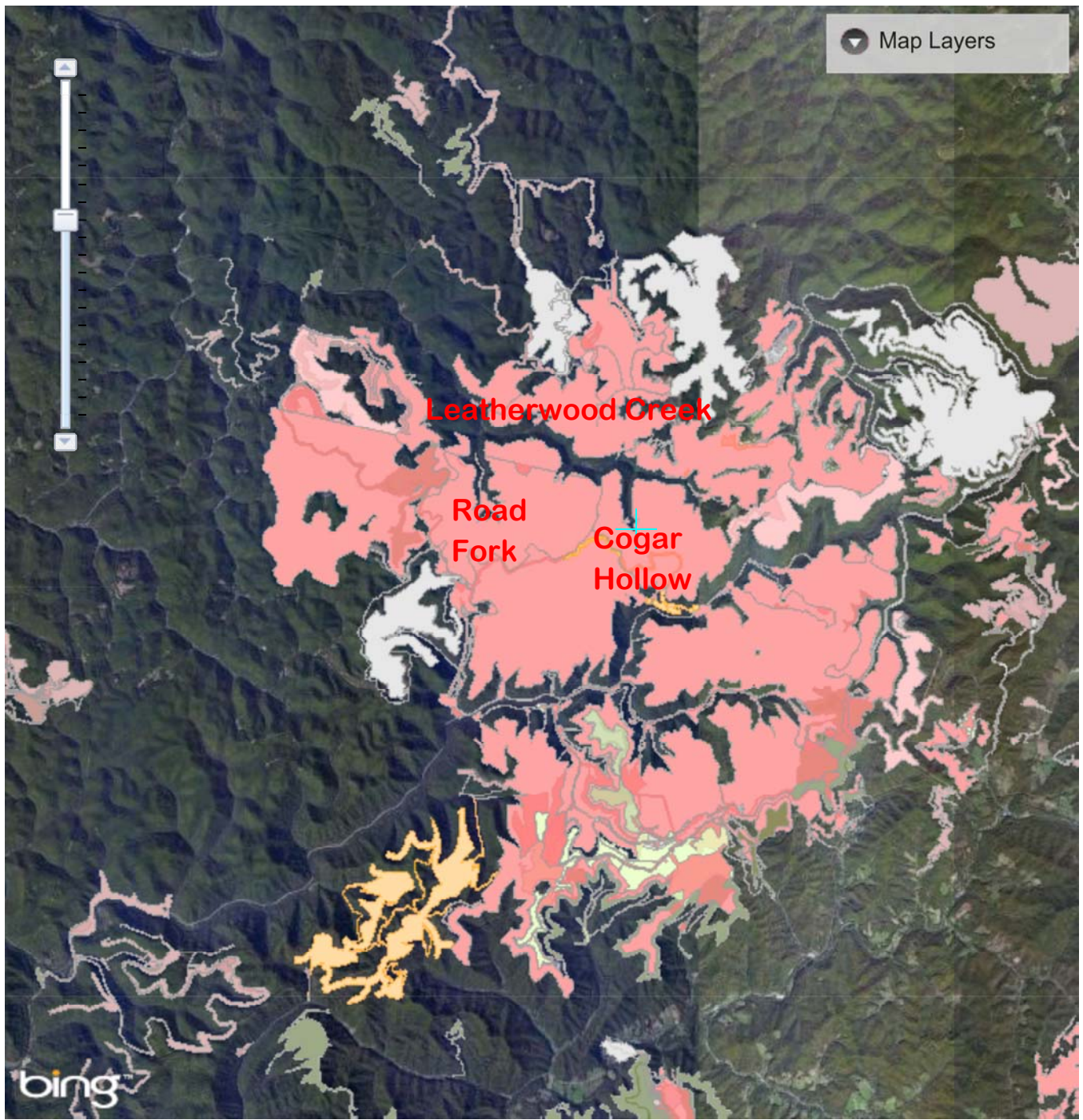
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Charleston, WV 25304



# **APPENDIX A**







Google earth





**WEST VIRGINIA**

**2012 Section 303(d) List**

**WEST VIRGINIA**

Stream Name	Stream Code	Criteria Affected	Source	Impaired Size (stream-miles) (lake-acres)	Reach Description	Projected TMDL Year (No Later Than)	2010 list?
Bacon Hollow	WVKE-46-A-5	Selenium	Unknown	1.0	Entire length	2025	No
UNT/Marsh Fork RM 4.13 (Upper Big Branch)	WVKE-46-A.7	Selenium	Unknown	1.1	RM 1.4 to HW	2025	No
Ellis Creek	WVKE-46-B	CNA-Biological	Mining	1.2	Mouth to RM 1.2	*TBD	Yes
Rock Creek	WVKE-46-I	CNA-Biological	Unknown	5.2	Entire length	2020	Yes
Spanker Branch	WVKE-46-M	CNA-Biological	Unknown	2.0	Entire length	2020	Yes
Rockhouse Creek	WVKE-47-A	Selenium	Unknown	3.3	Entire length	2020	Yes
UNT/Rockhouse Creek RM 0.99	WVKE-47-A-2	Selenium	Unknown	1.6	Entire length	2025	No
UNT/Rockhouse Creek RM 2.04	WVKE-47-A-5	Selenium	Unknown	1.3	Entire length	2025	No
Gardner Branch	WVKE-47-B	Selenium	Unknown	1.4	Entire length	2025	No
Laurel Branch	WVKE-47-D	Selenium	Unknown	1.3	Entire length	2025	No
Speed Branch	WVKE-47-E-1	Selenium	Unknown	1.1	Entire length	2025	No
White Oak Creek	WVKE-47-K	Selenium	Unknown	4.0	Entire length	2025	No
Horse Creek	WVKE-47-K.5	Selenium	Unknown	1.9	Entire length	2025	No
Toney Fork	WVKE-47-L	CNA-Biological	Mining	3.1	Entire length	*TBD	Yes
		Selenium	Unknown	2.6	Mouth to RM 2.6	2025	No
Buffalo Fork	WVKE-47-L-1	CNA-Biological	Mining	2.5	Entire length	*TBD	Yes
		Selenium	Unknown	2.5	Entire length	2025	No
Ewing Fork	WVKE-47-L-2	Selenium	Unknown	1.9	Entire length	2025	No

**ELK WATERSHED - HUC# 05050007**

*1 Lake 1500 acres 9 streams 62 miles*

Sutton Lake	WVKE-(L1)	Methylmercury	Unknown	1500.0	Entire Lake	2025	No
Leatherwood Creek	WVKE-46	CNA-Biological	Mining	11.3	Entire length	*TBD	Yes
Right Fork/Leatherwood Creek	WVKE-46-C	CNA-Biological	Mining	4.0	Entire length	*TBD	Yes
Bullpen Fork	WVKE-46-C-1	Selenium	Unknown	2.3	Entire length	2025	No

\* TBD - To be determined. TMDLs will be developed as soon as practicable after the effective date of rules enacted pursuant to Senate Bill 562.