



West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • www.wvcoal.com

July 5, 2016

Mr. William Richardson
Water Protection Division (3WP30)
U.S. Environmental Protection Agency, Region 3
1650 Arch Street
Philadelphia, PA 19103-2029
Email: Richardson.william@epa.gov

Re: EPA's Proposed Rejection of West Virginia's CWA Section 303(d) List of Impaired Waters (81 Fed. Reg. 35350; June 2, 2016)

Dear Mr. Richardson:

Pursuant to the Federal Register Notice published on June 2, 2016, attached please find the comments of the West Virginia Coal Association (WVCA) regarding the Environmental Protection Agency's (EPA) proposed rejection of the West Virginia Department of Environmental Protection's Clean Water Act Section 303(d) List of Impaired Waters.

In addition to consideration of these comments relative to the proposed West Virginia over-listing action, please regard this submission as a formal request under the Freedom of Information Act (5 U.S.C. §552 *et. seq.*) for information regarding specific instances where EPA has forcibly over-listed other states using benthic assessment information or mandated the use of specific benthic methodologies in the development of impaired stream listings.

Please feel free to contact me at any time to discuss WVCA's comments or our request for information regarding EPA actions in other states.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', written over a horizontal line.

Jason D. Bostic

Vice-President

COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION
REGARDING EPA'S PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF THE
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S 2014 SECTION
303(d) LIST OF IMPAIRED WATERS

INTRODUCTION

The West Virginia Coal Association (WVCA) offers the following comments and observations regarding the federal Environmental Protection Agency's (EPA) decision to partially disapprove the Clean Water Act Section (CWA) 303(d) list of impaired waters submitted to EPA by the West Virginia Department of Environmental Protection (WV DEP) on April 13, 2015 and to forcibly and illegally add streams to this list of impaired waters through direct federal action. EPA announced its decision on May 11, 2016 and subsequently published notice of its decision and a request for public input in the Federal Register on June 2, 2016.¹

WVCA is a trade association representing the interests of companies engaged in the mining of coal within the State of West Virginia. WVCA's producing membership accounts for more than 95 percent of West Virginia's underground and surface coal production. WVCA also represents approximately 250 associate members that supply an array of services to the mining industry, including permitting, environmental, and engineering consulting firms; mining equipment manufacturers; coal transportation companies; coal consumers and land and mineral holding companies. WVCA's primary

¹ 81 Fed. Reg. 35350 (June 2, 2016).

goal is to enhance the viability of West Virginia coal as a source of domestic energy by facilitating environmentally responsible coal mining through reasonable, equitable, and achievable state and federal policy and regulation.

WVCA considers this federal 303(d) listing action as just the latest in a series of efforts by EPA to interfere with West Virginia's administration of its water quality standards and CWA Section 402 NPDES permitting programs by "hijacking" the interpretation and implementation of the state's approved narrative water quality criteria. As we commented in response to previous over-listing actions by EPA using the West Virginia Stream Condition Index Score (WV SCI), WVCA believes EPA has selectively interpreted the federal CWA in order to undertake this listing decision that would transform a mere *methodology* into a regulatory standard beyond the purpose for which anyone ever intended.

In this proposed action EPA has gone even further astray, basing its over-listing decisions on the Genus-Level Index of Most Probable Stream Status (GLIMPSS), an unsanctioned measurement *technique* that has never been used by West Virginia to effect CWA-related policy or permitting decisions. In doing so, EPA will eviscerate federal and state rulemaking procedures to further extend its own distorted interpretations of West Virginia's approved narrative water quality criteria to the state's CWA regulatory programs.

EPA's listing action is also counter to the will and intent of the West Virginia Legislature, the body ultimately charged with promulgating water quality standards for the State of West Virginia. *If WV DEP's own internal use of the GLIMPSS contrivance or any other measurement technique implies it was a standard that should be afforded deference in 303(d) listing actions, then EPA is required to reject its use entirely and require WV DEP to pursue the formal CWA rulemaking process for revising water quality standards.*

Moreover, EPA's position on use of GLIMPSS or another similar metric appears to be targeted solely at West Virginia. *We would challenge EPA to provide examples of other states where 303(d) listing decisions for the narrative criterion are required to be based on benthic macroinvertebrate data.* If this is indeed a necessary requirement for implementation of the federal CWA and a water quality standards program, then certainly EPA should have readily available ample information to provide regarding other state's procedures for stream listing determinations based on their narrative criterion. In the absence of such information, EPA's actions are clearly politically motivated and not technical in nature.

EPA's Myopic Interpretation of the CWA Provisions Related to 303(d) Listing Decisions

In its letter to WV DEP informing the state of its decision to undertake a federal 303(d) listing action, EPA relies exclusively on the regulatory mandate at 40 CFR 130.7(b)(5): "Each State shall assemble and evaluate all existing and readily-available

water quality related data and information to develop the list...” In its May 11, 2016 letter to WV DEP, EPA writes “due to WV DEP’s decision not to evaluate existing and readily-available data regarding whether certain waters are achieving West Virginia’s narrative criteria...” that EPA has an obligation to take action to ensure that the federal requirements are satisfied.”²

Nothing is further from the truth and the federal agency’s interpretation of WV DEP’s position represents a contrived reading of the state submission and a convenient application of 40 CFR 130.7 as a means to provide a basis for the federal listing action.

WV DEP did not ignore “existing and readily-available information.” Instead, WV DEP considered the information available and made the decision, consistent with the statutory instructions provided by the West Virginia Legislature, that insect scores alone were not sufficient to classify streams as “biologically impaired”. Further, WV DEP is not “unable to carry out the requirements set forth in 40 CFR 130.7(b)(5)” as EPA maintains. The state agency did indeed consider “all available information”, which in this case includes more than insect scores collected under a simple, unofficial assessment document. WV DEP ‘s consideration of information in compiling the draft 303(d) list included the controlling, statutory instruction provided by the West Virginia Legislature in the passage of Senate Bill (SB) 562 (see subsequent paragraphs).

² Letter dated May 11, 2016 from Shawn Garvin, Regional Administrator of EPA Region III to WV DEP Cabinet Secretary Randy Huffman.
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Since it is clear that WV DEP **did** consider the information available to it, the only reasonable conclusion that can be reached is that EPA disagrees with the decision WV DEP chose to make with that information. EPA cannot, however, substitute its own policy judgment for that of the State of West Virginia. EPA's tenuous reliance on the provisions of 40 CFR 130.7(b)(7) is evidence that this proposed 303(d) listing action is yet another example of its arrogant denial of the rightful state prerogatives under the CWA.

In its reliance on the provisions of 40 CFR 130.7, EPA has conveniently ignored other, more substantive provisions of the CWA that govern its actions relative to 303(d) listing actions such as CWA Section 303(d)(1)(a):

Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(a) and section 303(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The state shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters (*emphasis added*).

In the case of the current proposal from EPA to “overwrite” the state’s proposed 303(d) list, if the cause of the alleged impairment cannot be linked to “effluent limitations” developed to protect a “water quality standard” as required by CWA Section 303(d)(1)(a), then listing a stream is not appropriate. Simply classifying a stream as “biologically impaired” is far from enough to satisfy the requirements of the CWA, since the biological conditions of the stream can be influenced by other factors, independent of any effluent limitation or water quality standard, such as habitat and seasonal

variation. Further, as we explain in more detail in subsequent paragraphs, the foundation for EPA's listing decision rests on a *methodology*, the GLIMPSS, not a *water quality standard*. EPA cannot rely on an unsanctioned practice to satisfy the requirements of CWA Section 303(d)(1)(a).

West Virginia's actual, legally promulgated and EPA-approved state water quality standards contain the following narrative criteria:

3.2. No sewage, industrial wastes or other wastes present in any of the waters of the state shall cause therein or materially contribute to any of the following conditions thereof:

3.2.e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life;

3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.³

Until the passage of SB 562, WV DEP had a practice of basing its attainment decisions for these narrative criteria solely upon a score calculated using the WV SCI. This *methodology* was never promulgated pursuant to the rulemaking procedures required by West Virginia's Administrative Procedures Act (APA).⁴ Because of this, WVCA has long objected to this use of the WV SCI method. The GLIMPSS suffers the same rulemaking infirmities as the WV SCI, with an added insult- it has NEVER been used

³ 47 CSR 2.3.2.

⁴ See generally W.Va. Code 29A-3-1 through 29A-3-18.

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by the state for permitting or policy decisions under its CWA regulatory programs. Few outside the state agency and EPA are even familiar with the method, certainly not the broader regulated community that could be subject to the application of a de facto water quality standard by its adoption, the West Virginia Legislature or the general public.

Should EPA proceed with this proposed listing action, it will confirm our belief the agency intends to bypass the legal rulemaking process and seize authority reserved to the states for promulgating water quality standards. Since there is no legally promulgated water quality standard at issue, EPA's reliance on the GLIMPSS *contrivance* to satisfy the requirements of CWA Section 303(d)(1)(a) is evidence of the federal agency's intent to *magically* transform an internal *methodology* into a *water quality standard* contrary to the CWA. If EPA were to consider all of its mandates under the CWA regarding 303(d) listing decisions instead of selectively reciting only the regulatory sections that support its efforts to bootstrap a water quality standard for West Virginia it would suspend its efforts to forcibly add streams to the 303(d) list.

The Genus-Level Index of Most Probable Stream Status

EPA's proposed listing action relies exclusively on GLIMPSS data for several West Virginia streams. At its core, the GLIMPSS is a narrowly focused measurement of benthics that, as WV DEP has recently recognized (consistent with findings and

instructions from the West Virginia Legislature), cannot serve as sole factor in measuring compliance with West Virginia's narrative water quality standards.

Because of its narrow focus, the GLIMPSS may have some *restricted* utility as an individual assessment *methodology* that is part of holistic evaluation, but it is far too limited to measure compliance with West Virginia's *water quality standards*.

Standing alone, the GLIMPSS is not a scientifically defensible basis for accurately measuring the aquatic ecosystem within a particular stream reach. As EPA's own 1991 guidance points out, a proper evaluation of the overall biologic integrity of an aquatic ecosystem does not rely exclusively on benthic macro invertebrate composition, but requires a far more comprehensive assessment of all components of that ecosystem, including habitat and fish populations.⁵ The GLIMPSS and its focus on certain aquatic insects falls far short of EPA's recommendation that state standards "should contain biological criteria that consider the various components (e.g., algae, invertebrates, fish) and attributes (measures of structure and/or function) of the larger aquatic community."⁶

Any interpretation of West Virginia's narrative criteria and decisions related to designated use attainment must be consistent with the public policy goals of the West Virginia Legislature. In 2010, the Legislature unanimously adopted House Concurrent

⁵ See generally "Policy on the Use of Biological Assessments and Criteria in the Water Quality Program." U.S. EPA, May 1991.

⁶ *Id.*

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Resolution No. 111 regarding the intent of the state's narrative criteria. The Legislature determined that the requirements of the state's narrative criteria are satisfied when a stream segment:

- (a) supports a balanced aquatic community that is diverse in species composition; and (b) contains appropriate trophic levels of fish (in streams with sufficient flows to support fish populations); and (c) the aquatic community is not composed only of pollution tolerant species or 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).⁷

The Legislature also reminded WV DEP that any interpretation and/or implementation of the narrative criteria must remain faithful to the guiding principles of the WV WPCA:

...the agency's interpretation of West Virginia's narrative water quality standards must faithfully balance the protection of the environment with the need to maintain and expand opportunities for employment, agriculture and industry as set forth in the Legislature's statement of public policy as contained in the West Virginia Water Pollution Control Act.⁸

Recently, WV DEP has also recognized the limited scope and regulatory applicability of narrowly-focused measurements like the GLIMPSS and the WV SCI:

⁷ House Concurrent Resolution No. 111, adopted unanimously by the West Virginia Legislature during the 2010 Regular Session.

⁸ *Id.*

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These tools are just that, tools. ***They are not stand-alone determinants of compliance with the narrative criterion.*** Any application of these assessment tools in determining compliance with the narrative criterion must faithfully apply the language of the standard itself, which prohibits significant adverse impacts on the biologic component of the aquatic ecosystem (emphasis added).⁹

With respect to the GLIMPSS specifically, WV DEP stated: "...West Virginia does not use the draft GLIMPSS in its assessment of the biologic health of West Virginia streams."¹⁰

WV DEP also addressed the narrow scope of the WV SCI and similar tools like the GLIMPSS and their limited use for any determination concerning the state's narrative standard in a letter to the U.S. Army Corps of Engineers: "Where the only impacts to this component of the ecosystem are diminished numbers of certain genera of mayflies, without evidence that this has had any adverse impact of any significance on the rest of the ecosystem, the State cannot say there has been a violation of its narrative standard."¹¹

In 2010, WV DEP developed an additional internal document to guide the state agency's actions with respect to the narrative criteria. In that policy, WV DEP, consistent with the instructions of the Legislature, acknowledged the limited applicability of the insect-only assessment methods:

⁹ Statement by Randy Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection, to U.S. Senate Committee on Environment and Public Works, Subcommittee on Water and Wildlife, June 25, 2010.

¹⁰ *Id.*

¹¹ Letter dated July 10, 2009 from WV DEP Cabinet Secretary Randy Huffman to Dana Hurst, District Engineer, Huntington District, U.S. Army Corps of Engineers.

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Through adoption of H.C.R. 111, the West Virginia Legislature has given [WV] DEP direction as to how it should implement its narrative water quality standards. [WV] DEP has determined that “significant adverse impact” is more than a change in the numbers or makeup of the benthic macro invertebrate community in a segment of a water body downstream from a point source discharge. **It is, instead, a material decline in the overall health of an aquatic ecosystem.** A goal of the CWA and WV WPCA is to protect the aquatic ecosystem as a whole; it is a holistic standard that requires a holistic approach to ecosystem assessment. In contrast to numeric water quality criteria, which can be applied by analysis of samples of water taken at any discharge or monitoring point in a stream, compliance with a standard that protects the aquatic ecosystem must be assessed in the broader area comprising the ecosystem. **An ecosystem does not exist at a single point and, accordingly, its health cannot be assessed at a single point.**

Thus, [WV] DEP’s Guidance follows long-standing EPA guidance, which indicates that bio surveys cannot fully characterize an entire aquatic community and its many attributes, and accordingly suggests, “State standards should contain biological criteria that consider various components (e.g., algae, invertebrates, fish) and attributes that (measures of structure and/or function) of the larger aquatic community (emphasis added).”¹²

Further, in a recent letter to WV DEP regarding the passage of legislation related to the state’s narrative standard, EPA acknowledges that a broader assessment than the GLIMPSS is necessary to make regulatory determinations regarding the narrative criteria: “the best way to achieve the goals [of the legislation] is by protection of all

¹² West Virginia Department of Environmental Protection, “Narrative Water Quality Standard Interpretive Policy Justification Document”, August 12, 2010.
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components of the aquatic ecosystem, including plants, macro invertebrates, mussels, amphibians, water dependent birds and fish.”¹³

Despite the clear evidence regarding the appropriate role of the insect-dependent measures in the context of the state’s narrative standard and other regulatory situations, EPA has inappropriately chosen to ignore the potential use of the GLIMPSS or WV SCI’s as a “individual instruments in the larger toolbox” and has undertaken this federal action to place streams on the 303(d) list using these insect scores alone. As noted earlier, EPA’s actions with respect to this proposed 303(d) listing action effectively converts an unendorsed *methodology*, the GLIMPSS, into a *water quality standard*. By doing so, EPA has elevated the role of the GLIMPSS in the water quality standards program to a level never contemplated nor sanctioned by the West Virginia Legislature. Hence EPA’s proposed listing action is clearly contrary to rulemaking requirements of both the CWA and the WV WPCA and will have the result of creating an illegitimate water quality standard for the State of West Virginia.

WV DEP’s Historical Use of Insect Assessments

As noted previously, there are no provisions contained within the state’s water quality standards or the WV WPCA that indicate how WV DEP determines compliance with its narrative criteria found at 47 CSR 2.3.2. WV DEP has recently developed policies intended to guide the agency’s implementation of that narrative standard and is

¹³ Letter dated November 6, 2012 from Shawn Garvin, Regional Administrator of EPA Region III to WV DEP Cabinet Secretary Randy Huffman.

currently developing a formal, inclusive assessment methodology per the instructions of the West Virginia Legislature. For EPA to base any federal listing decisions on the GLIMPSS, per the requirements of CWA Section 303(d)(1)(a), it must be a water quality standard. If the GLIMPSS, or its equally infirm predecessor, the WV SCI, is functioning as a water quality standard as EPA apparently contends with this proposed over-listing action, then it should have been legally promulgated as a water quality standard according to the requirements of the federal CWA, the state WV WPCA and the state APA. Since the GLIMPSS cannot be a water quality standard because it has not been promulgated as one and approved by the West Virginia Legislature, then it cannot be used by EPA to impose the federal agency's delusional vision of environmental policy on West Virginia by adding streams to the 303(d) list. To the extent the state's use of the GLIMPSS or even the WV SCI in the past has "codified" it to the level where it is considered controlling in the context of this regulatory action, then it has been used as a water quality standard illegally in past 303(d) listing actions by WV DEP.

At some point after the WV SCI was developed, WV DEP made a decision to begin listing streams as "biologically impaired" on the Section 303(d) list based solely on WV SCI scores. There were no other factors that WV DEP considered in making these attainment decisions. Yet at no point was the WV DEP's WV SCI methodology ever lawfully promulgated as a water quality standard. The same conclusion is even more accurate with respect to the GLIMPSS, since it has NEVER been used by WV DEP, and its

limited use has been expressly disavowed by the state: "...West Virginia does not use the draft GLIMPSS in its assessment of the biologic health of West Virginia streams."¹⁴

States are required to submit new or revised water quality standards to EPA for review and approval.¹⁵ EPA is required to disapprove a new or revised water quality standard if the State fails to follow its legal procedures for revising or adopting standards.¹⁶ With this proposed over-listing action, EPA is violating its own controlling statute by "elevating" an illegitimate insect examination developed by bureaucrats within WV DEP and EPA to the level of a water quality standard. For the GLIMPSS to serve the policy role as envisioned by EPA with this over-listing action, it must be subject to the level of public scrutiny and legislative policy debate as a water quality standard.

To determine whether a particular provision or policy constitutes a new or revised water quality standard, EPA engages in a two-part analysis, considering:

- (1) whether the provision or policy relates to an "attainment decision"; and, if so,
- (2) whether the provision or policy defines, changes, or establishes the magnitude, duration, or frequency related to water quality criteria necessary to support a designated use.¹⁷

¹⁴ Statement by Randy Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection, to U.S. Senate Committee on Environment and Public Works, Subcommittee on Water and Wildlife, June 25, 2010.

¹⁵ 33 USC 1313(c)(2)(A).

¹⁶ 40 CFR 131.5.

¹⁷ *Fla. Clean Water Network, Inc. v. U.S. Evtl. Prot. Agency*, 2012 WL 1072216, *3 (N.D. Fla. 2012).

If the provision or policy does relate to an attainment decision and does define, change, or establish the level of protection to be applied in making that attainment decision, then the provision or policy constitutes a new or revised water quality standard.¹⁸

According to EPA, an “attainment decision” is “one where a State decides what it means to attain or to not 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 [Clean Water] Act[.]”¹⁹ Pursuant to this analysis, listing a stream as biologically impaired based solely on a GLIMPSS score constitutes a new or revised water quality standard.

For the proposed over-listing action to have any appearance of credibility it must be based on a formally enacted and approved state water quality standard. If EPA believes that GLIMPSS is indeed a water quality criterion that must be implemented in West Virginia, then EPA must promulgate it as such by federal regulation as set forth in 40 CFR § 131.22:

¹⁸ *Fla. Clean Water Network, Inc. v. U.S. Evtl. Prot. Agency*, 2012 WL 1072216, *3 (N.D. Fla. 2012).

¹⁹ *Id.* at *3 n. 10.

131.22 EPA promulgation of water quality standards.

(a) If the State does not adopt the changes specified by the Regional Administrator within 90 days after notification of the Regional Administrator's disapproval, the Administrator shall promptly propose and promulgate such standard.

(b) The Administrator may also propose and promulgate a regulation, applicable to one or more States, setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the Act.

(c) In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirements established for States in these regulations (emphasis added).

EPA has indeed promulgated water quality standards for other States (Arizona, Idaho, and Kansas, to name a few) to address particular circumstances. Considering the explicit statement by the West Virginia Legislature that a benthic macroinvertebrate index is not a measure of compliance with the West Virginia narrative criterion, EPA has no authority to implement GLIMPSS or any other macroinvertebrate ruse for determination of biological impairment. EPA has placed its cart before the horse. Unless EPA first promulgates a federal regulation incorporating GLIMPSS into the West Virginia water quality standards, EPA cannot make a 303(d) listing determination based on its use as an effective substitute for the narrative criterion. *If EPA feels so strongly about insect assessments as the only appropriate way to measure compliance with narrative standards under the CWA, then WVCA eagerly anticipates EPA's response to our request for information where similar insect assessments have been imposed by the federal agency in non-coal mining states outside of the Appalachian region.*

As described above, EPA over-listing action using the GLIMPSS methodology relates to an attainment decision. EPA's proposed use of the GLIMPSS assessment, developed incestuously by the federal agency and non-policymaker employees of WV DEP, would also define, change, and/or establish a magnitude component regarding the level of protection to be applied in making an attainment decision. In this context, EPA's use of the GLIMPSS constitutes federal imposition of a water quality standard for the State of West Virginia. As such, it requires its own, independent rulemaking action as mandated by the federal CWA and its implementing regulations.

Senate Bill 562

SB 562 was passed by the West Virginia Legislature during its Regular Session in 2012. Signed by the Governor into law, the legislation amended the WV WPCA by adding the following language:

(f) The secretary shall propose rules measuring compliance with the biologic component of West Virginia's narrative water quality standard requires [sic] 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.

In passing SB 562, the Legislature endorsed an assessment method that considers the broader components of the ecosystem as suggested in EPA's own 1991 guidance document and *specifically rejected* a practice of making attainment decisions based solely on any benthic macro invertebrate metric. The Legislature directed WV DEP to develop a holistic methodology that considers fish populations and instructed WV DEP to promulgate rules establishing this methodology. WV DEP is currently in the process of developing the new methodology.

Considering "all available information," which now included the statutory instruction contained in SB 562, WV DEP decided not to add any new streams to the 2012 303(d) using insect-only measurements like the GLIMPSS. The passage of SB 562 makes it clear that the West Virginia Legislature disapproves of this practice and believes that a new, more holistic methodology should be developed and lawfully promulgated as a rule pursuant to the State APA.

CONCLUSION

For the reasons described by WVCA in these comments, a plain reading of the provisions of the CWA makes it crystal clear that EPA cannot rely on a mere assessment methodology to satisfy the requirements of the statute with respect to stream listing decisions. EPA's attempts to do so by relying on the GLIMPSS will transform that a

renounced internal insect *scheme* into a *water quality standard* and create an illegitimate *federal* water quality criterion for the State of West Virginia, contrary to the CWA, the WV WPCA and the state APA. Further, EPA is openly defying the West Virginia Legislature, the body ultimately responsible for promulgating water quality standards for West Virginia and violating the separation of powers between state and federal entities as envisioned in the CWA.

In essence, EPA, in defiance of the CWA and the courts, is attempting to bypass the legal rulemaking process related to water quality standards and substitute its own judgment for that of the West Virginia Legislature and WV DEP to implement a political agenda related to coal mining activities that occur in Appalachia and West Virginia.

EPA's conceit in this proposed over-listing action is nothing short of appalling. Mandating the use of a specific measurement *method* over the professional judgement of WV DEP and the will of the West Virginia Legislature is as offensive as instructing a carpenter to use a specific instrument in his toolbox to the exclusion of all others such as using a screwdriver when a hammer is needed.