



November 14, 2023

Via Email

Karen Melvin, EPA Region III
Director, Enforcement and Compliance Assurance Division
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Catherine Libertz, EPA Region III
Director, Water Division
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Re: WVDEP Failure to Provide Public Notice of Draft Permits

Ms. Melvin and Ms. Libertz:

I am writing on behalf of Stewards of the Potomac Highlands (“Stewards”), a 501(c)(4) dedicated to protecting land and community in West Virginia’s northeastern counties. This letter comes in response to perceived errors the West Virginia Department of Environmental Protection (“WVDEP”) is making in issuing NPDES permits. To wit, WVDEP has failed to provide public notice of draft NPDES permits, either on their website, through local newspapers, or both. As Stewards is sure the EPA recognizes, public participation, through public notice and comments, is essential to the Clean Water Act. As the federal agency responsible for ensuring states granted the authority to administer the NPDES permitting process dutifully follow the provisions of the Clean Water Act, EPA needs to be aware of these failures and needs to take action to ensure WVDEP follows even the most basic principles of the Clean Water Act. If WVDEP cannot satisfy these requirements, they are not fit to facilitate the NPDES permitting process under the Clean Water Act. Stewards requests that EPA respond to this letter, in writing, stating how these failures will be addressed.

Background and Legal Framework

Public participation is essential to implementation of the Clean Water Act. This is especially true in the NPDES permitting process, as shown by the language of the Clean Water Act. “Public participation in the development, revision, enforcement of any ... effluent limitation... established by the Administrator or any State under this Chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” Clean Water Act, 33 U.S.C. § 1251(e). Public participation can and should occur in multiple ways. Public notice and an opportunity to comment is fundamental to public participation. After a permit application is received, permitting agencies, such as WVDEP, must publicly post a draft permit or draft denial and accept public comments on the draft for at least 30 days. 40 C.F.R. § 124.6(e) (EPA regulations applicable to State agencies under 40 C.F.R. § 123.25); *see also* W.V. Code § 22-11-8(a). This is also the time when the public can request a public hearing on the draft permit. 40 C.F.R. § 124.12. Without this already-narrow 30-day window, the public is deprived of their opportunity to participate in the NPDES permitting process.

Stewards, by virtue of their interest in the Corridor H highway project, became aware of NPDES permits that were issued for core boring activities along proposed routes of the highway. Upon learning of this permit, Stewards searched for the required public notice. WVDEP regularly publishes public notices for draft NPDES permits in local newspapers and on their website, as they are required to do. However, Stewards has been unable to find any such notice.

Sample Permits

Permit ID WVR112243:

This permit was applied for by West Virginia Division of Highways, with Enviroprobe Integrated Solutions, Inc. as the permittee, on or around July 18, 2023. The permit was then issued on or around July 20, 2023. Obviously, the two days between application and issuance do not allow for the required public comment period. Further, a search of the permit number, and a review of all notices in Hardy County, WV, on the WVDEP's website yields no results for public notice of this permit. No notice is found in the Moorefield Examiner or other local papers, either. This permit was issued for core borings to determine geologic properties for design of the Corridor H roadway of approximately 9.45 acres of land. An application for a modification of the permit was applied for on August 23, 2023, and no public notice of a draft permit was provided in this instance either. Because the permit (and then the modification) was issued without the proper public notice of the draft permit and the opportunity to request a public hearing, the permit should be revoked, and the public should be allowed the opportunity to participate in the process as required by the law outlined above.

Permit ID WVR112141:

This permit was applied for on April 10, 2023, by Greenman-Pedersen, Inc., who, upon information and belief, is contracted to perform the core drilling activities for the Parsons-Davis section of Corridor H. The permit was then issued on May 12, 2023. A search of the permit number, and a review of all notices in Tucker County, WV on the WVDEP's website yields no results for public notice of this permit. No notice is found in the Parsons Advocate or other local papers, either. Almost inexplicably, public notice of the application for a modification of this permit was provided on August 30, 2023, both online and in The Parsons Advocate. The permit was requested for exploratory core borings of over 38 acres of land. This permit, which was issued without the required public notice, should also be revoked so that the public can participate as the law requires.

Conclusion

Both of these permits were subject to the public notice provisions of the Clean Water Act and no notice was provided. This basic, yet essential, process ensures that the public can participate in permitting decisions. The EPA should undertake a thorough and comprehensive audit of the applications from the last several years to see whether and how often public participation was undertaken for NPDES permits issued by WVDEP. WVDEP and the EPA are required to ensure that this happens. Please let Stewards of the Potomac Highlands know, in writing, how

WVDEP's failure will be addressed as soon as possible. Stewards anticipates there will be further permitting related to the Corridor H project and needs to be able to participate in that process. If you need further information, do not hesitate to reach out.

Sincerely,

/s/ Andrew C. Earley

Andrew Earley

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Cc:

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