



CSB Files Additional Claims Against EPA Over Unprecedented Disapproval of Copper WER, January 2017

The Charleston Sanitary Board (CSB) filed a Supplemental Complaint against EPA on November 17, adding three additional claims against EPA regarding its unprecedented disapproval of the water effect ratio (WER) for copper promulgated in March 2015. As previously reported, CSB's multi-year effort to obtain an appropriate site-specific water quality criterion for copper took an unexpected turn in July 2015 when EPA formally disapproved the standard. CSB began the process of developing a copper WER in 2012. At that time, CSB was given a three-year compliance schedule to develop the WER. CSB worked diligently with DEP to complete a WER (5.67 times EPA's national default copper standard) and obtain state approval of site-specific copper criteria well in advance of the December 31, 2015 expiration of the compliance schedule. EPA was fully on board with the process, stating in a formal June 2014 comment letter that, "The US EPA is supportive of ... the copper Water Effects Ratio (WER) for the Sanitary Board of the City of Charleston." EPA further made no objection when the West Virginia legislature then adopted the legislative rules.

However, EPA announced in October 2015 that it was not prepared to approve or disapprove the standard – even though the Agency was already past the deadline set by the CWA § 303(c) to issue its decision. The apparent obstacle was a request by the US Fish and Wildlife Service (FWS) to delay approval of the WER until a survey could be conducted for the presence of endangered mussels downstream from CSB's outfall. Facing the prospect of enforcement action or unnecessary plant upgrades to comply with an unnecessary and overly stringent copper limit, CSB was compelled to file a protective complaint against EPA in a Charleston federal district court on March 31, 2016. The complaint sought a ruling from the court ordering EPA to issue its long-overdue decision, as well as an order directing EPA to approve the WER.

On July 19, 2016, EPA Region 3 issued a letter formally disapproving the site-specific standard on the grounds that the WER value of 5.67 was too high to be protective of aquatic life – notwithstanding that the Region has routinely approved copper WERs at the same or higher values. Instead, EPA stated its preference that WER values above 5 be confirmed using EPA's newer (and unpromulgated in West Virginia) biotic ligand model (BLM) – notwithstanding that no discharger in EPA Region 3 has used the BLM in the nearly 10 years it has been available. Rather than assert the desire to confer with USFWS as the basis for the denial – EPA had been focused solely on the potential presence of endangered mussels up until that point – its letter limited EPA's objection to concerns about the validity of WERs greater than "5."



In response to the disapproval decision, CSB filed a supplemental complaint adding three new claims to the lawsuit. The first new claim argues that the disapproval was arbitrary and capricious because it went against longstanding EPA precedent of approving WERs with values of 5 and failed to provide a reasonable justification for not doing so. The second claim argues EPA had no authority to disapprove the WER because the Agency had acknowledged that the standard was based on a “scientifically defensible method” – more specifically, EPA’s own WER guidance – and therefore the standard met the CWA § 303(c) criteria for approval. The third claim challenges EPA’s unlawful action to extend the 60-day review period prescribed by CWA § 303(c) so that it could gather additional information upon which to base its disapproval decision. EPA’s decision should have been based on the information available at the time the CWA required the decision to be made.

This case underscores the need to revise WVDEP’s regulations to allow site-specific limits for copper and other metals to be developed through the normal permitting process, rather than as site-specific changes to the state’s WQS. EPA and FWS have approved this streamlined approach in a number of other states. CSB’s experience demonstrates why DEP should make these necessary revisions to its WQS regulations. DEP had included a provision in the now-withdrawn triennial review of WQS to allow WERs to be implemented as site-specific permit limits rather than WQS changes pursuant to EPA approval.