January 23, 2017

By e-mail to DEPG80A@wv.gov

Mr. Jerry Williams, P.E.
Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

Re: Comments on Draft Class II General Permit G35-D

Mr. Williams:

The West Virginia Oil and Natural Gas Association ("WVONGA") appreciates the opportunity to provide the following comments on the West Virginia Department of Environmental Protection Division of Air Quality's ("WVDAQ") proposed Class II General Permit G35-D for the Prevention and Control of Air Pollution in regard to the Construction, Modification, Administrative Update and Operation of Natural Gas Compressor and/or Dehydration Facilities (the "Draft General Permit"). Chartered in 1915, WVONGA is one of the oldest trade organizations in the State, and is the only association that serves the entire oil and gas industry. The activities of our members include construction, environmental services, drilling, completion, production, gathering, transporting, distribution and processing. WVONGA members operate in almost every county in West Virginia and employ thousands of people across the State, with payrolls totaling hundreds of millions of dollars annually. Our members have cumulative investment of nearly ten billion dollars in West Virginia, account for 80% of the production and 90% of the permits, operate more than 20,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses. As such, WVONGA's members have a keen interest in all aspects of environmental regulation associated with oil and gas activities, including the Draft General Permit.

A. Specific Comments on Draft General Permit

a. Facility-Wide Requirements (Section 3.0)

Section 3.2.8. The West Virginia Division of Air Quality ("DAQ") has no authority to regulate noise and light, and it cannot impose limitations in the Draft General Permit that purport to regulate noise and light. Even if it could, the prohibition of a "nuisance" and "unreasonable light and noise" is too vague to enforce, as it gives the permittee no guidance as to what constitutes permitted behavior. This section should be eliminated from the General Permit.

The West Virginia Air Pollution Control Act ("WVAPCA") only gives the DAQ the authority to regulate air pollutants, and air pollutants are defined as "solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution." W. Va. Code § 22-5-2(1). Statutory air pollution is "limited to the discharge into the air by the act of a man of substances (liquid, solid, gaseous, organic or inorganic) . . ." W. Va. Code § 22-5-2(6). Neither noise nor light is liquid, solid, or gas and, thus—under the explicit language of the WVAPCA—neither noise nor light can be regulated by the DAQ. The statutory language explicitly includes solid, liquids, and gases and does not contain any language that allows the DAQ to regulate anything other than physical substances.

When interpreting a possibly ambiguous statute "where general words follow an enumeration of persons or things, such general words are not to be construed in their widest extent but are to be held as applying only to persons or things of the same kind, class or nature as those specifically mentioned." *West Virginia Dept. of Highways v. Farmer*, 159 W. Va. 823, 826-27 (1976) (citations omitted) (holding that when a statute specifically enumerated oil and gas, the term "other minerals" only included minerals that are of the same kind, class, or nature as oil and gas and, thus, limited the application of the statute to other petroleum products). This doctrine of statutory interpretation is known as "ejusdem generis" or "of the same kind, class, or nature." *See id.*

Under this doctrine, the noise and light restrictions in the Draft General Permit must be eliminated because the language in the WVAPCA has limited, even in its broadest possible interpretation, the DAQ's authority to regulate air pollutants in the form of *substances* discharged into the air by the act of man. While the WVCAPCA does not define "substance," the generally recognized definition of substance is "matter of particular or definite chemical constitution." *Substance*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/substance (last visited January 16, 2017). Thus—even if the DAQ chooses to interpret the definition of statutory air pollutant to include other

discharged, man-made substances—noise and light still do not fall into the realm of DAQ control because noise[1] and light[2] are not substances.

Furthermore, the DAQ has never developed a rule that would identify harmful levels or under what conditions noise and light can be lawfully generated. If the DAQ believed it had authority to regulate noise and light, it would have drafted such a rule before imposing noise and light restrictions in the Draft General Permit. Permits are not intended as a substitute for rule making.

Even if the DAQ had the authority to regulate light and noise, Section 3.2.8 in the General Draft Permit is impermissibly vague because it provides no standard to apply. Neither oil and natural gas companies, nor members of the Air Quality Board, nor the inspectors for the DAQ, are provided the specificity necessary to determine what constitutes a violation. There is no guidance, structure, or clarification regarding what levels of light or noise constitute a "nuisance" or even what process will be used to measure noise and light levels. Such undefined limits on noise and light are unlawfully vague and unenforceable.[3]

Importantly, eliminating Section 3.2.8 does not leave the public without protection against excessive noise and light, regardless of the source. There is already a definition of nuisance under common law, and a place (the court system) for applying that definition.[4] In part, because there is an avenue to pursue issues of excess noise and light in the court system, the vague restrictions imposed by Section 3.2.8 are not reasonable. Rather, not only do noise and light restrictions fall outside the authority of the DAQ but they are also unreasonable and impermissibly vague. Thus, Section 3.2.8 should be eliminated from the General Draft Permit.

[1] Noise is generally defined as a sound, and a sound is not a substance since it is not matter and does not have a definite chemical constitution. *Noise*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/substance (last visited January 16, 2017).

[2] Light is also not a substance because light is defined as "something that makes vision possible…[,] the sensation aroused by stimulation of visual receptors…[, or] electromagnetic radiation of any wavelength that travels in a vacuum with a speed of 299,792,458 meters (about 186,000 miles) per second." *Light*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/substance (last visited January 16, 2017). Thus, like noise, light also does not meet the definition of a substance.

[3] 45 CSR 13-5.11 requires that all emission limits in permits be "quantifiable, permanent and practically enforceable." Section 3.2.8 is not quantifiable, permanent, or practically enforceable.

[4] Although it is not clear whether Section 3.2.8 is an attempt to prohibit a public or private nuisance, it is assumed that the DAQ is concerned with public nuisance since, like municipality, the DAQ's interest in preventing a nuisance is in the context of harm to the general public or public interest.

B. Conclusion

WVONGA appreciates the opportunity to provide these comments on the Draft General Permit, and would be happy to discuss any of the issues raised above with the agency. Again, WVONGA commends WVDAQ on its efforts to ensure that the Draft General Permit promotes operational flexibility for the regulated community while minimizing the administrative burden for both industry and the agency. WVONGA believes that the Draft General Permit represents a significant step forward in this regard. Please do not hesitate to contact me at (304) 343-1609 should you have any questions.

Respectfully submitted,

Anne C. Blankenship, Executive Director