State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

November 1, 2017

Mr. Austin Caperton
Cabinet Secretary
West Virginia Department of
Environmental Protection
601 57th Street, Southeast
Charleston, WV 25304

Dear Secretary Caperton:

You have asked for an Opinion of the Attorney General regarding whether amendments to West Virginia Code § 22-11-7b contained in House Bill 2506 and Senate Bill 687 can be harmonized or whether effect must be given to Senate Bill 687 as the later-enacted statute. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the director of the division of environmental protection." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General's Office.

In your letter, you explain that in the 2017 Regular Session of the Legislature, the Legislature enacted two bills purporting to amend the provisions of West Virginia Code § 22-11-7b. According to your letter, prior to both enactments, West Virginia Code § 22-11-7b(c) directed the Secretary of the West Virginia Department of Environmental Protection ("DEP") to establish standards of water quality for all surface and ground waters in the State and implement a regulatory program to protect waters of the State from activities that may degrade water quality. That provision did not mandate that DEP use a particular formula or to assess the quality of drinking water. A different subsection of the same provision—West Virginia Code § 22-11-7b(f)—directed the Secretary to propose a legislative rule implementing a method for determining the health of a stream based on the presence and health of aquatic life in the stream.

Your letter further explains that, during the 2017 session, House Bill 2506 added a provision to subsection (c) requiring DEP to use harmonic mean flow in calculating permit limits when implementing human health criteria to protect drinking water sources and to allow mixing zones to overlap, subject to certain conditions. The House bill passed the Legislature on March 28, 2017, was signed into law by the Governor on April 8, 2017, and had an effective date of June 26, 2017. Eleven days after the House bill passed the Legislature, on April 8, 2017, the Legislature

enacted Senate Bill 687, which removed a provision from subsection (f) requiring the Secretary to develop a method to determine the health of a stream based on whether the stream "supports a balanced aquatic community . . . diverse in species composition." The Senate bill did not incorporate the amendment to subsection (c) made by the House bill that required the use of harmonic mean flow to assess the quality of drinking water. Senate Bill 687 took effect on April 8 and was signed into law by the Governor on April 26, 2017.

Finally, your letter notes that DEP is aware of the West Virginia Supreme Court of Appeals' opinion in *Wiley v. Toppings*, 210 W. Va. 173, 556 S.E.2d 818 (2001), which provides that "effect should always be given to the latest . . . expression of the legislative will."

Your letter raises the following specific legal question:

> *Whether the amendments to West Virginia Code § 22-11-7b contained in Senate Bill 687 supersede the amendments to that provision in House Bill 2506?*

We conclude that a court is likely to hold that the currently operative provisions of West Virginia Code § 22-11-7b include (1) subsection (c) of House Bill 2506, requiring DEP, among other things, to use harmonic mean flow in assessing drinking water quality, and (2) the remainder of Senate Bill 687, including subsection (f), which removes the balanced aquatic community assessment requirement.

We reach this conclusion through a combination of statutory and constitutional analysis. We conclude first that the Legislature intended that Senate Bill 687 expressly repeal and replace House Bill 2506 in its entirety. In the alternative, the amendments contained in Senate Bill 687 irreconcilably conflict with those in House Bill 2506, and therefore, because the Senate Bill was enacted more recently, it would control in its entirety absent some constitutional defect in the bill. Second, we conclude that the Senate bill *does* suffer in part from a constitutional defect, namely, that the title of the bill nowhere reflects the purported removal of the House amendment to subsection (c). Accordingly, we conclude that a court would most likely deem the Senate Bill's purported elimination of the House amendment to this subsection to be unconstitutional under Article VI, Section 30 of the West Virginia Constitution. Finally, we conclude that a court would proceed to sever the unconstitutional amendment contained in the Senate Bill and permit the remainder of the bill to take full effect. The net result would be that Senate Bill 687, including its amendment to the aquatic life provisions in subsection (f), would take full effect, with the exception of subsection (c), which would continue to reflect the amendment made by House Bill 2506 requiring DEP to use harmonic mean flow.

The "Last in Time" Rule

The first step in our analysis requires us to determine what provisions of West Virginia Code § 22-11-7b would be operative absent some constitutional infirmity—that is, what has the Legislature in fact enacted as the current version of the law? Under this first step of the analysis, we conclude that the Legislature, either expressly or impliedly, repealed House Bill 2506 in its entirety when it enacted Senate Bill 687. Accordingly, if Senate Bill 687 were free from constitutional defect, it would control in full.

As your letter points out, the West Virginia Supreme Court of Appeals has developed a canon of construction that requires a court, when two provisions of law are in actual conflict, to give effect to the provision that was enacted later in time. A court may not need to resort to this "last-in-time" rule, however, to determine what the Legislature has deemed to be the current provisions of West Virginia Code § 22-11-7b. Courts typically apply this canon to determine whether the Legislature has effected a repeal *by implication*—that is to say, in cases where the Legislature has enacted a new statute that irreconcilably conflicts with a second, earlier-enacted statute but does not directly refer to or address the second law. *See, e.g.*, *State ex re. Pinson v. Varney*, 142 W. Va. 105, 109, 96 S.E.2d 72, 74 (1956).

In such cases, the West Virginia Supreme Court of Appeals has long recognized that "[r]epeal of a statute by implication is not favored in law." Syl. pt. 1, *State ex rel. City of Wheeling v. Renick*, 145 W. Va. 640, 116 S.E.2d 763 (1960). "To repeal a statute by implication there must be such positive repugnancy between the provisions of the new statute and the old statute that they can not stand together or be consistently reconciled." *Id.* at syl. pt. 2; *see also Pinson,* 142 W. Va.at 109, 96 S.E.2d at 74 ("[W]here two distinct statutes stand in pari materia, and sections thereof are in irreconcilable conflict, that section must prevail which can properly be considered as the last expression of the law making power. . . ."). But where legislative enactments cannot be reconciled, effect must "be given to the latest . . . expression of the legislative will." *Wiley v. Toppings*, 210 W. Va. 173, 175, 556 S.E.2d 818, 820 (2001) (quoting *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S.E. 534 (1904)).

This case, however, does not appear to involve repeal by implication. By contrast, the Legislature *expressly* repealed and replaced the entirety of House Bill 2506 with Senate Bill 687. *See* Senate Bill 687 (2017 W. Va. Legislative Session) ("AN ACT to amend and reenact . . . § 2211-7b"). Typically, if the Legislature expressly amends an existing provision of law with different language to replace the same provision, its intent to repeal is clear, and there is no reason to consider whether or not the two provisions stand in irreconcilable conflict. In such cases, the amendment is clearly law, and the repealed act no longer has effect. Because the Legislature appears to have expressly replaced one version of West Virginia Code § 22-11-7b with another, a court may not need to have recourse to the "last-in-time" canon to conclude that Senate Bill 687 reflects the text of the current statute. *See State ex rel. Thompson v. Morton*, 140 W. Va. 207, 211–12, 84 S.E.2d 791, 795 (1954) (distinguishing between a statute that expressly repeals a provision by referencing "its name, title, or caption" and an implied repeal where the "last-in-time" canon applies); *McConiha v. Guthrie*, 21 W. Va. 134, 148 (1882) (distinguishing between express and implied repeals).

To be sure, the Supreme Court of Appeals has also applied the "last-in-time" rule in instances where there is some confusion about what language the Legislature actually intended to enact into law—for example, where the Legislature enacted two conflicting definitions of the same provision on the same day. *See Wiley*, 210 W. Va at 175, 556 S.E.2d at 820. But here, there is arguably no such confusion—the Legislature took up and enacted two separate bills to amend the same statute eleven days apart from each other. It seems clear in such a case that the provisions in Senate Bill 687 would govern, regardless of their putative conflict with the text of House Bill 2506.

Even if it were appropriate to apply a "last-in-time" analysis to resolve the tension between House Bill 2506 and Senate Bill 687, however, we would reach the same conclusion.

As identified in your letter, *Wiley* describes a two-step process for analyzing whether two seemingly inconsistent versions of a particular Code section can be reconciled, and if not, which statute governs. 210 W. Va. at 175, 556 S.E.2d at 820. The first question is whether the provisions conflict or can be reconciled. *Id.* at 175, 556 S.E.2d at 820. If they conflict, the court next must determine which enactment is "the latest . . . expression of the legislative will." *Id.* at 175, 556 S.E.2d at 820. The latest expression of the legislative will is determined based on the time when the respective bills passed the Legislature. *Id.* at 175, 556 S.E.2d at 820.

In *Wiley*, the court considered whether two definitions of "timbering operations" enacted on the same day could be reconciled. *Id.* at 174–75, 556 S.E.2d at 819–20. The earlier-enacted definition exempted harvesting of timber from the definition of timbering operations while the later-enacted version omitted the exemption and applied the requirements of the statute to the harvesting of timber. *Id.* at 174–75, 556 S.E.2d at 819–20. The Court concluded that because the earlier-enacted definition excluded some commercial logging operations that the later-enacted version did not, the provisions conflicted. *Id.* at 175 n.2, 556 S.E.2d at 820 n.2.

The Court reached the opposite conclusion in *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013) where a legislative rule and a statutory provision both allowed for the exercise of discretion and did not impose binding obligations on anyone. *Smithers* involved a potential conflict between the State Freedom of Information Act ("FOIA") and a legislative rule enacted under West Virginia Code § 15–2–21 (1977), which required the West Virginia Division of Public Safety to promulgate investigation procedures. 232 W. Va. at 457, & n.4, 752 S.E.2d at 611 & n.4. The rule provided "that a court *can* order '[d]ocuments, evidence, and other items related to complaints, internal inquiries and/or contained in case files' to be 'released, disseminated, or disclosed.'" *Id.* at 468 n.30, 752 S.E.2d at 622 n.30 (emphasis added). The FOIA statute provided that "[i]nformation of a personal nature such as that kept in a personal, medical or similar file" is exempt from disclosure "if the public disclosure thereof would constitute an unreasonable invasion of privacy." *Id.* at 461, 752 S.E.2d at 615. Under *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986), a court has discretion in determining whether disclosure constitutes an invasion of privacy under FOIA. *Id.* at 463–64, 752 S.E.2d at 617–18 (citing *Child Prot. Grp. v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986)). Because both the rule and FOIA allow a court discretion to order disclosure, the Supreme Court of Appeals concluded there was no conflict between the two.

Applying the first step in the *Wiley* analysis to the question presented in your letter, we conclude that this case appears to present an irreconcilable conflict between conflicting commands, as in *Wiley*, rather than two reconcilable grants of discretion, as in *Smithers*. As in *Wiley*, the bills purport to adopt different versions of the same provision—one of which (House Bill 2506) imposes an obligation that the other (Senate Bill 687) does not. *See* 210 W. Va. at 174–75, 556 S.E.2d at 819–520. The conflict is apparent by attempting to reconcile the two provisions. The House bill's subsection (c) requires DEP to use harmonic mean flow in setting permit limits while the Senate bill does not. Specifically, House Bill 2506 provides that "the Secretary *shall* calculate permit limits using the harmonic mean flow . . ." House Bill 2506

(emphasis added).[1] If full effect were given to the House bill, requiring harmonic mean flow, it would be impossible to give full effect to Senate Bill 687, which grants DEP discretion in determining how to calculate permit limits. Equally, it would be impossible to give full effect to the House bill's subsection (f), which requires DEP to assess compliance with narrative water quality standards based on a balanced aquatic community, and to the Senate bill's removal of that requirement.

One could argue that the bills do not actually conflict because the Legislature only *intended* for Senate Bill 687 to amend subsection (f) while it only *intended* House Bill 2506 to amend subsection (c). But that argument ignores the actual content of the two bills. Senate Bill 687 unquestionably makes a change to the House bill version of subsection (c) by amending and reenacting the entirety of § 22-11-7b, which contains the language in subsection (c) in effect prior to enactment of the House bill. The text of the bill provides no indication that the Legislature intended to limit Senate Bill 687 to the amendments to subsection (f). To give full effect to House Bill 2506 would be to ignore that amendment and give effect to the presumed, subjective intent of the Legislature over clear statutory text, which courts generally do not do. *See, e.g.*, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 115–16, 219 S.E.2d 361, 365 (1975).

Having found a conflict, we turn to the second step of the *Wiley* analysis, which requires a court to give "effect . . . to the latest . . . expression of the legislative will . . . ." 210 W. Va. at 175, 556 S.E.2d at 820 (quoting *Joseph Speidel*, 56 W. Va. at 608, 49 S.E. at 536). Under applicable precedent, the latest expression is measured from the date or time that the Legislature passed the bill (as opposed to the effective date or the date of the Governor's signature). *See id.* at 174–75, 556 S.E.2d at 819–20; *City of Benwood v. Bd. of Educ.*, 212 W. Va. 436, 440, 573 S.E.2d 347, 351 (2002) (concluding that a bill "effective from passage" became effective when it was "passed by both houses of the Legislature"). House Bill 2506 was passed by both houses on March 28, 2017, while Senate Bill 687 was passed on April 8, 2017, making Senate Bill 687 the latest expression of legislative will under *Wiley*.

In short, whether analyzed as an express or implied repeal, the text of Senate Bill 687 would control over the text of House Bill 2506, absent some other constitutional defect.

---

[1] The full text of the House Bill 2506 amendment to subsection (c) reads:

> "For implementing human health criteria for the protection of drinking water, the Secretary shall calculate permit limits using the harmonic mean flow and may determine the point of compliance for a permittee's discharge pursuant to the mixing zone provisions of the Legislative rule entitled Requirements Governing Water Quality Standards, 47 C.S.R. 2: Provided, That the Secretary may allow mixing zones to overlap, but not to go beyond a point one-half mile upstream of a public water supply. At locations where mixing zones are allowed to overlap, the Secretary shall require permittees to indicate on their required signage an indication that mixing zones overlap in a particular vicinity."

The Title Rule

After concluding that Senate Bill 687 would prevail under an express or implied repeal analysis, we next assess whether the Supreme Court of Appeals would find the Senate bill constitutional. We conclude that the Court would likely find that the Senate bill amendment to subsection (c) is unconstitutional because the Legislature did not provide notice of that change in the title to the bill.

The West Virginia Constitution requires that the object of an act "shall be expressed in the title." W. Va. Const. art. VI, § 30. The Supreme Court of Appeals has explained that "[t]he test to be applied is whether the title imparts enough information to one interested in the subject matter to provoke a reading of the act." *State ex rel. Walton v. Casey*, 179 W. Va. 485, 488, 370 S.E.2d 141, 144 (1988). The requirement also serves to "enhance the rationality of the deliberative process," because "[t]he very act of amending the title to a bill so that the title comports with the substance of the bill may call legislators' attention to the subject of the title amendment." *C.C. Spike Copley Garage, Inc. v. Pub. Serv. Comm'n*, 171 W. Va. 489, 493, 300 S.E.2d 485, 489 (1983). Relatedly, the title rule provides the Governor, who must decide whether to sign or veto the legislation, fair notice of the bill's provisions. *Id.* at 493, 300 S.E.2d at 489. Therefore, while it would be inappropriate to presume the subjective intent of legislators when interpreting statutory text, the West Virginia Constitution's title requirement provides an independent check on the Legislature and the Governor enacting mistaken or ill-considered amendments.

In applying that test, the Supreme Court of Appeals has held that where the title is general and fairly encompasses the particular amendment at issue, it satisfies the constitutional requirement. For example, the Court found sufficient a title reading "[an Act] to repeal article twelve-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended and enact in lieu thereof a new article twelve-a of said chapter, relating to an annual tax on incomes of certain carriers." *City of Huntington v. Chesapeake & Potomac Tel. Co.*, 154 W. Va. 634, 638, 177 S.E.2d 591, 595 (1970). The Court reasoned that the title "fairly or reasonably expresse[d], embrace[d], or indicate[d] the general subject or object" of the act. *Id.* at 642, 177 S.E.2d at 597 (citation omitted). In another case, the Court concluded that a title explaining that the act "relat[es] generally to the collection of solid waste and litter" was sufficient to include the regulation of the rates and fees of commercial solid waste facilities. *Nw. Disposal Co., Inc. v. W. Va. Pub. Serv. Comm'n*, 182 W. Va. 423, 425, 388 S.E.2d 297, 299 (1989). The Court reasoned that such a general title alerts the reader to the subject matter of the bill and prompts interested parties to read the bill. *Id.* at 427, 388 S.E.2d at 301.

On the other hand, the Court has also concluded that if the Legislature takes a more granular approach, specifically listing the matters contained in the bill, it must list all changes in order to avoid misleading the reader. *See C.C. Spike Copley*, 171 W. Va. at 493, 300 S.E.2d at 489; *see also Nw. Disposal Co.*, 182 W. Va. at 426–27, 388 S.E.2d at 300–01 (acknowledging *Copley* rule but distinguishing case on particular facts). In *C.C. Spike Copley*, the Court held insufficient a title including a general description of the subject matter—"relating to reorganization, composition, authority and operations of the public service commission," but then listing every change made by the act except for the deregulation of "towing, hauling or carrying wrecked cars." *Id.* at 490 & n.1,

491, 300 S.E.2d at 486 & n.1, 487. The Court found that deregulation provision was invalid because it had not been appropriately noticed in the title. *Id.* at 489–90, 300 S.E.2d at 486. The Court explained that the title at issue was misleading because it "was enormously specific" and "set forth a brief description of every major change that the act made except" for the change at issue in the litigation. *Id.* at 491, 300 S.E.2d at 487 (emphasis in original). The Court further reasoned that "[a] person reading a title to a bill drawn with [such] specificity . . . would reasonably conclude that the act did not touch that subject because all other concerns [were] set forth with specificity." *Id.* at 491, 300 S.E.2d at 487.

The Court's decision in *C.C. Spike Copley* is particularly relevant here because the title of Senate Bill 687 follows the same pattern as the title at issue in that case. It referred to the provisions the act was amending and reenacting, stated that its provisions related "generally to natural resources," and then specifically listed the changes made to the existing statutes.[2] As relevant to your question, the bill's title included as one of its purposes "removing certain criteria from evaluation for the narrative water quality standard." That purpose encompasses the change to

---

[2] The full title of Senate Bill 687 is:

> "AN ACT to amend and reenact §22-3-11, §22-3-13a and §22-3-23 of the Code of West Virginia, 1931, as amended; to amend and reenact §22-6-24 of said code; to amend and reenact §22-11-7b of said code; to amend and reenact §22A-1-2 and §22A-1-5 of said code; to amend and reenact §22A-2-59 of said code; to amend said code by adding thereto a new section, designated §22A-2A-1001; to amend and reenact §22A-6-3, §22A-6-4 and §22A-6-6 of said code; to amend and reenact §22A-7-2, §22A-7-3, §22A-7-5, §22A-7-5a and §22A-7-7 of said code; to amend and reenact §22A-9-1 of said code; to amend and reenact §22A-11-1, §22A-11-2, §22A-11-3 and §22A-11-4 of said code; and to amend said code by adding thereto a new section, designated §22A-11-5, all relating generally to natural resources; providing that moneys be paid from Special Reclamation Water Trust Fund to assure a reliable source of capital and operating expenses for the treatment of discharges from forfeited sites; modifying notification requirements for preblast surveys for surface mining operations and certain other blasting activities; removing minimum bond requirements related to certain reclamation work; providing for changes to the method of plugging abandoned gas wells where a coal operator intends to mine through the well; removing certain criteria from evaluation for the narrative water quality standard; authorizing the elimination of the Board of Miner Training, Education and Certification, the Mine Inspectors' Examining Board and the Mine Safety Technology Task Force, and the transfer of duties from those boards and task force to the Board of Coal Mine Health and Safety; providing guaranteed term limits for certain board and commission members; providing that an automated external defibrillator unit be required first-aid equipment located in certain areas of an underground coal mine; directing that the Office of Miners' Health, Safety and Training revise state rules related to diesel equipment operating in underground mines; and requiring rulemaking."

subsection (f), eliminating consideration of whether the stream "[s]upports a balanced aquatic community that is diverse in species composition" from the analysis of "the biologic component of West Virginia's narrative water quality standard." But under *C.C. Spike Copley*, the amendment to subsection (c) would also need to be specifically noticed in the title because the Legislature specifically listed other subjects. That amendment is not specifically noted, and therefore, would likely be deemed unconstitutional.

One could argue that the title's reference to "narrative water quality standard[s]" could also encompass the change to subsection (c), but that argument would be unlikely to prevail. Subsection (c) refers to DEP's method for calculating permit limits that implement water quality standards for protection of human health with respect to drinking water. The development of permit limits is different from the establishment of narrative water quality standards that govern permissible levels of pollution in public waterways. Also, the Senate bill did not "remov[e] certain criteria from evaluation" that DEP would use in exercising its discretion, but eliminated one specific and required calculation method—harmonic mean flow. DEP would not be alerted to the elimination of a binding obligation by a title referencing "remov[al of] certain criteria from evaluation" because these two actions mean significantly different things from the standpoint of DEP's flexibility to set certain water quality standards.

In the event that the Supreme Court of Appeals determined that the Senate bill's amendment of subsection (c) lacked adequate support in the title, the Court would most likely deem that specific amendment unconstitutional and leave the remainder of the Senate bill intact. The Court will uphold the balance of a statute even if one provision has been declared unconstitutional, so long as "the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid." Syl. pt. 6 in part, *State v. Heston*, 137 W.Va. 375, 71 S.E.2d 481 (1952). Only "[w]here the valid and the invalid provisions of a statute are so connected and interdependent in subject matter, meaning, or purpose as to preclude the belief, presumption or conclusion that the Legislature would have passed the one without the other [will] the whole statute will be declared invalid." *Louk v. Cormier*, 218 W. Va. 81, 97, 622 S.E.2d 788, 804 (2005) (quoting syl. pt. 9, *Robertson v. Hatcher*, 148 W.Va. 239, 135 S.E.2d 675 (1964)) (alterations in original).

Here, there is no reason to believe that the Legislature deemed subsections (c) and (f) of § 22-11-7b to be inexplicably intertwined, or that DEP could not comply simultaneously with subsection (c) of the House bill and subsection (f) of the Senate bill. Accordingly, the likely outcome if the Legislature decides that the title of the Senate bill does not appropriately reflect the amendments to subsection (c) would be to sever that provision from the remainder of the bill, leaving intact the version of subsection (c) enacted through the House bill.

* * *

In sum, we conclude that the Supreme Court of Appeals would be likely to hold, based on the constitutional and statutory analysis set forth above, that the currently operative provisions of West Virginia Code § 22-11-7b would consist of (1) the House bill amendment to subsection (c), including the harmonic mean flow requirement, and (2) the remainder of the Senate bill apart from subsection (c), including the removal of the aquatic life provision in subsection (f).

This letter takes no position on whether harmonic mean flow is the appropriate method for calculating permit limits or whether a balanced aquatic community should be considered in determining compliance with biologic narrative water quality standards. If the Legislature desires to remove the harmonic mean flow requirement or reinstate the balanced aquatic community requirement, it may of course amend the West Virginia Code to achieve those results.

Sincerely,

Patrick Morrisey

Patrick Morrisey
Attorney General

Erica N. Peterson
Assistant Attorney General