

Regulatory Analysis Form		This space for use by IRRC RECEIVED 99 MAY 20 PM 3:19 INDUSTRIAL & ENVIRONMENTAL REVIEW COMMISSION Cocodrilli IRRC Number: # 1799
(1) Agency Department of Environmental Protection		
(2) I.D. Number (Governor's Office Use) 7-310		
(3) Short Title Water Quality Amendments – Antidegradation		
(4) PA Code Cite 25 PA Code, Chapters 93 and 95	(5) Agency Contacts & Telephone Numbers Primary Contact: Sharon Freeman 783-1303 Secondary Contact: Barbara A. Sexton 783-1303	
(6) Type of Rulemaking (Check One) <input type="checkbox"/> Proposed Rulemaking <input checked="" type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final Order, Proposed Rulemaking Omitted	(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and non-technical language. This rulemaking amends the Commonwealth's antidegradation water quality regulations in order to satisfy federal Clean Water Act (CWA) requirements and sets forth a regulation which carefully balances the needs of all citizens in assuring protection of the Commonwealth's waters. The regulation is more comprehensive than the federal antidegradation regulation in that it sets forth implementation provisions. The regulation modifies Chapter 93 by, <i>inter alia</i> : revising existing use requirements and the scope of High Quality Waters to be consistent with federal requirements; setting forth objective qualifying criteria for Exceptional Value (EV) and High Quality (HQ) waters; modifying provisions relating to social or economic justification (SEJ) in HQ waters; and expanding public participation opportunities in the assessment of waters for HQ and EV designation. Finally, portions of Section 95.1 are modified and moved to Chapter 93.		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. The Pennsylvania Clean Streams Law, Act of June 22, 1937 (P.L. 1987, No. 394) <u>as amended</u> , 35 P.S. § 691.1 <u>et seq.</u> Section 1920-A of The Administrative Code of 1929, <u>as amended</u> , 71 P.S. § 510-20.		

Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The U.S. EPA disapproved portions of Pennsylvania's antidegradation regulations on June 6, 1994. EPA then published final regulations in the Federal Register on December 9, 1996 (61 Fed Reg 64816) at 40 CFR §131.32 to replace a portion of Pennsylvania's antidegradation regulations for the Commonwealth. This final regulation addresses the issues raised in EPA's disapproval and promulgation of antidegradation regulations for Pennsylvania.

EPA has stated that they will withdraw the federally promulgated Pennsylvania antidegradation regulations if the Commonwealth submits a final approvable antidegradation regulation for EPA approval. This regulatory package represents Pennsylvania's attempt at developing such regulations in order to replace the imposition of EPA's "one size fits all" federal antidegradation regulations currently promulgated for the Commonwealth with regulations which carefully balance the needs of all citizens of the Commonwealth in assuring the protection of the Commonwealth's waters.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

These regulations address EPA's disapproval of portions of Pennsylvania's antidegradation regulations and will enable Pennsylvania to have an antidegradation program which carefully balances the needs of all Commonwealth citizens, including the regulated community, based on input from numerous stakeholders, committees, groups, advisory committees, and others. Moreover, the Pennsylvania regulations are more comprehensive than the federal antidegradation regulations and give the public and interested parties notice of how the Department will implement antidegradation requirements in the Commonwealth, unlike the federal regulations which contain no implementation provisions.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

These regulations protect the existing and designated uses of all Pennsylvania surface waters and establish the environmental protections necessary to maintain and protect Pennsylvania's High Quality and Exceptional Value waters.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The citizens of the Commonwealth will benefit from the regulations since they will provide an appropriate level of protection to Commonwealth waters. Moreover, the regulations carefully balance the needs of all Commonwealth citizens, including the regulated community, based on extensive public participation including input from numerous stakeholders, committees, groups, advisory committees, and others.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

The Commonwealth, political subdivisions, and the private sector planning new, additional or increased wastewater discharges or other activities requiring a Department permit or approval may be affected through the implementation of these regulations. The number of affected proposed activities cannot be determined because of the uncertainty in knowing who and where persons will apply for Department permits or approvals.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Persons proposing new, additional or increased wastewater discharges or other activities requiring a Department permit or approval may be affected through the implementation of these regulations. The number of affected proposed activities cannot be determined because of the uncertainty in knowing who and where persons will apply for Department permits or approvals.

(16) Describe the communications with and inputs from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

These regulatory modifications reflect input from public comments received from representatives of the regulated community, environmental groups, other state and federal resource management or regulatory agencies, and the general public. In addition to a regulatory negotiation stakeholder process, opportunities for public input into the proposed regulation included public meetings on January 11, 1995, a public hearing on April 20, 1995, and a public hearing and comment period ending on June 18, 1996 on draft proposed regulations. The proposal appeared in the Pennsylvania Bulletin on March 22, 1997 (27 Pa.B. 1459), with provisions for a 60-day public comment period and a public hearing which was held May 7, 1997 in Harrisburg. The public comment period concluded on May 21, 1997. Nearly 1700 comments were received on the proposal, mostly in opposition. In light of the adverse comment, the Department undertook an extensive effort to recraft the proposal in the form of an Advance Notice of Final Rulemaking (ANFR) proposal. In developing the ANFR, a conceptual description of the ANFR was discussed at several outreach meetings with various stakeholder groups. Next, the conceptual ANFR was discussed with several advisory groups including the Citizen's Advisory Council (CAC) and the Water Resources Advisory Committee (WRAC). The input from the stakeholders and the advisory committees was utilized in the development of a formal proposal. Notice of the availability of the ANFR appeared in the Pennsylvania Bulletin on January 23, 1999 (29 Pa.B. 455) with provisions for a public comment period open until February 22, 1999, and 3 public meetings/hearings in Harrisburg on February 8, 1999; in Conshohocken on February 10, 1999; and in Pittsburgh on February 18, 1999. The Department received 743 public comments on the ANFR. Many commentators were generally supportive of the ANFR. All comments which were received were considered in formulating this final regulation.

Regulatory Analysis Form

(17) Provide a specific estimate of the cost and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

This regulation will impose no direct costs on the regulated community. During implementation, it is possible that dischargers planning to add new or expanded discharges or propose activities requiring Department permits or approvals may experience higher costs. The increased costs may take the form of higher engineering, construction or operating costs. It is not possible to precisely predict the actual change in costs since these are site-specific and may depend upon the size of the discharge in relation to the size of the stream, and many other factors.

(18) Provide a specific estimate of the cost and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

See Question 17.

No costs will be imposed directly upon state or local governments by this regulation. During implementation of the regulation, it is possible that an entity proposing a new, expanded, or additional discharge (if they may own or operate a wastewater treatment plant) or other activity requiring a Department permit or approval may incur some additional costs necessary to ensure protection of the receiving water.

(19) Provide a specific estimate of the cost and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

See Questions 17 and 18.

It is not possible to precisely estimate the cost and/or savings to state government associated with the implementation of these regulations. These regulations will be implemented through existing Department programs.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Governments						
Total Savings	NOT APPLICABLE					
COSTS:						
Regulated Community						
Local Government						
State Governments						
Total Cost	NOT MEASURABLE					
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Governments						
Total Revenue Losses	NOT APPLICABLE					

(20a) Explain how the cost estimates listed above were derived.

Not Applicable. See responses to 17-19.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
Water Quality Management	\$14,504,928	\$14,684,546	\$13,343,278	\$12,461,727

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and cost.

The benefits (Question 13) of a regulation developed with substantial public input which carefully balances the needs of Commonwealth citizens, including the regulated community, and which assures that high quality waters in Pennsylvania receive the appropriate level of protection, outweigh any potential costs which may result from the implementation of these regulations (Questions 17, 18 and 19). Protecting the Commonwealth's waters is paramount in ensuring the availability of clean water for recreational, drinking water, tourism, and industrial purposes, and sustainable economic development in the Commonwealth is compatible with clean water.

(22) Describe the nonregulatory alternative considered and the cost associated with those alternatives. Provide the reasons for their dismissal.

There is no viable nonregulatory scheme to consider. Federal regulations at 40 CFR §131.12 require that States have an antidegradation program in place.

(23) Describe alternative regulatory schemes considered and the cost associated with those schemes. Provide the reasons for their dismissal.

The Department considered the alternative regulatory scheme of allowing the federally promulgated antidegradation regulation to remain in place in the Commonwealth. This approach was rejected because it leaves in place federal "one size fits all" regulations which are not appropriate for the needs of Commonwealth citizens, and fails to give the public notice, through regulation, of how the antidegradation regulations will be implemented in the Commonwealth. The costs associated with leaving the federal regulation in place are unknown. The final regulations are more appropriate than the federal regulation because they carefully balance the needs of citizens and the regulated community in assuring the protection of the Commonwealth's waters based on input from the public and the collective knowledge and experience drawn from numerous stakeholders, committees, groups, advisory committees, and others.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Yes. There are four such provisions in this regulatory package. First, the Pennsylvania definition of the term "Outstanding National, State, Regional, or Local Waters" is broader than the federal term "Outstanding National Resource Water" in 40 CFR §131.12(a)(3); Pennsylvania protects outstanding state, regional, and local resource waters in addition to outstanding national resource waters in the Commonwealth for several reasons. Whereas EPA's focus is only on outstanding national waters, the DEP believes that there are also outstanding state, regional, and local waters which merit EV protection. Next, the Commonwealth's antidegradation program has included outstanding state, regional, and local waters for many years in its existing regulations at §93.3 (Definition of "Exceptional Value Waters"), and the DEP continues to believe that such outstanding waters are worthy of EV status even though they may not be outstanding national resource waters. Pennsylvania has 83,000 miles of surface waters, more than any other state except Alaska, and to date approximately 1700 miles, or less than 2 percent of such waters, have been classified as EV waters. This percentage is not expected to change markedly under these regulations since these final regulations merely continue the existing inclusion of such waters as EV waters. The second more stringent provision is the inclusion of a requirement that proposed dischargers to High Quality and Exceptional Value Waters must evaluate alternatives to stream discharge, and where cost-effective, implement an alternative which is environmentally sound and has the least adverse impact on water quality. Although there is no equivalent federal provision, Pennsylvania has had a similar provision in Section 95.1 since 1980 which has proved workable and effective. Third, the Pennsylvania regulations contain extensive public participation provisions for the assessment of waters, and review of evaluations and petitions, for HQ and EV designation, including a provision for public meetings and fact finding hearings to obtain information regarding these proceedings. Fourth, the Department must hold a public hearing, when requested by an interested person, on a new or expanded discharge to waters classified as EV; this is a modification of an existing requirement in §95.1(c) wherein a public hearing is required for all new or expanded discharges to EV waters, even if such hearing is not requested. The DEP believes that public participation opportunities are vital in the antidegradation program in both surface water designations to HQ and EV, and in proposed discharges to EV waters.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Other states are required to maintain water quality standards that also include antidegradation requirements and additional protection for surface waters that are considered ecologically significant and/or outstanding resource waters.

No. These amendments will not put Pennsylvania at a competitive disadvantage with other states. These amendments provide the appropriate level of protection for surface waters of the Commonwealth.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

Regulatory Analysis Form

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

These regulatory modifications reflect input from public comments received from representatives of the regulated community, environmental groups, other state and federal resource management or regulatory agencies, and the general public. In addition to a regulatory negotiation stakeholder process, opportunities for public input into the proposed regulation included public meetings on January 11, 1995, a public hearing on April 20, 1995, and a public hearing and comment period ending on June 18, 1996 on draft proposed regulations. The proposal appeared in the Pennsylvania Bulletin on March 22, 1997 (27 Pa.B. 1459), with provisions for a 60-day public comment period and a public hearing which was held May 7, 1997 in Harrisburg. The public comment period concluded on May 21, 1997. Nearly 1700 comments were received on the proposal, mostly in opposition. In light of the adverse comment, the Department undertook an extensive effort to recraft the proposal in the form of an Advance Notice of Final Rulemaking (ANFR) proposal. In developing the ANFR, a conceptual description of the ANFR was discussed at several outreach meetings with various stakeholder groups. Next, the conceptual ANFR was discussed with several advisory groups including the Citizen's Advisory Council (CAC), the Water Resources Advisory Committee (WRAC), and the regulatory negotiation (RegNeg) group. The input from the stakeholders and the advisory committees was utilized in the development of a formal proposal. Notice of the availability of the ANFR appeared in the Pennsylvania Bulletin on January 23, 1999 (29 Pa.B. 455) with provisions for a public comment period open until February 22, 1999, and three public meetings/hearings in Harrisburg on February 8, 1999; in Conshohocken on February 10, 1999; and in Pittsburgh on February 18, 1999. The Department received 743 public comments on the ANFR. Many commentators were generally supportive of the ANFR. All comments which were received were considered in formulating this final regulation.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports that will be required as a result of implementation, if available.

No additional reporting, recordkeeping or other paperwork will be required by the regulation.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The regulations contain numerous provisions to address the particular needs of groups or persons who may be affected when the regulations are implemented. First, future dischargers to High Quality Waters are given an opportunity under the regulation to justify discharges which, based on social or economic justification (SEJ), will lower the quality of the stream to the level of the water quality criteria that protect the uses of the stream. Second, proponents of sewage facilities in HQ waters who demonstrate SEJ at the sewage facilities planning stage need not re-demonstrate SEJ at the discharge permitting stage. Third, extensive public participation opportunities are provided in the regulation in both the assessment and evaluation of waters for HQ or EV status, and for proposed new or expanded discharges to EV streams. Fourth, regulation of nonpoint sources in HQ and EV waters is limited to the level provided in the federal regulation by providing that the Department shall assure that cost-effective and reasonable best management practices for nonpoint source control shall be achieved; existing requirements in Chapters 102 and 105, the Nutrient Management Act and the Manure Management Program, among others, will continue to govern for nonpoint sources.

Regulatory Analysis Form

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

This final regulation will become effective following approval by the Environmental Quality Board and publication in the Pennsylvania Bulletin as a final rule. The regulations do not establish any date by which any required permits, approvals, or licenses must be obtained; these approvals must be obtained when a new or expanded activity requiring a Department permit or approval is proposed.

(31) Provide the schedule for continual review of the regulation.

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)

RECEIVED

99 MAY 20 PM 3:19

LEGISLATIVE REFERENCE BUREAU
REVIEW DIVISION

#1799

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to
form and legality. Attorney General

(DEPUTY ATTORNEY GENERAL)

DATE OF APPROVAL

Check if applicable
copy not approved. Objections
attached.

Copy below is hereby certified to be a true and correct copy
of a document issued, prescribed or promulgated by:

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-310

DATE OF ADOPTION: _____

BY: James M. Seif

TITLE: JAMES M. SEIF, CHAIRMAN
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

Copy below is hereby approved as to
form and legality. Executive or Independent
Agencies.

BY: [Signature]

20 May 99
DATE OF APPROVAL

(Deputy General Counsel)
(Chief Counsel, Independent Agency)
(Strike inapplicable title)

Check if applicable. No Attorney General
approval or objection within 30
days after submission.

ORDER ADOPTING REGULATIONS

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

WATER QUALITY AMENDMENTS - ANTIDegradation

25 Pa. Code Chapters 93 and 95

**NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
25 PA. Code, Chapters 93 and 95
Water Quality Standards – Antidegradation**

Preamble

The Environmental Quality Board (EQB) is amending 25 Pa. Code Chapters 93 and 95 (relating to water quality standards and wastewater treatment requirements) as set forth in Annex A. The final regulatory changes consolidate the antidegradation requirements in the water quality standards regulation at Chapter 93. This notice is given under Board order at its meeting of May 19, 1999.

A. Effective Date

These amendments will be effective upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Edward R. Brezina, Chief, Division of Assessment and Standards, Bureau of Watershed Conservation, 10th Floor, Rachel Carson State Office Building, P.O. Box 8555, 400 Market Street, Harrisburg, PA 17105-8555, (717) 787-9637 or William J. Gerlach, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users) and request that the call be relayed. This final regulation is available electronically through the DEP Web site (<http://www.dep.state.pa.us>).

C. Statutory Authority

These amendments are made under the authority of the following acts: Sections 5(b)(1) and 402 of The Clean Streams Law (35 P.S. §§691.5(b)(1) and 691.402) and Section 1920-A of The Administrative Code of 1929 (71 P.S. §510-20), which grant to the Environmental Quality Board the authority to develop and adopt rules and regulations to implement the provisions of the Clean Streams Law.

D. Background of the Amendments

Pennsylvania's Water Quality Standards, which are set forth in part at 25 Pa. Code, Chapter 93, implement the provisions of Sections 5 and 402 of the Clean Streams Law and Section 303 of the Federal Clean Water Act, 33 U.S.C. §1313. Water quality standards consist of the designated uses of the surface waters of the Commonwealth and the specific numeric and narrative criteria necessary to achieve and maintain those uses. In addition to protection of uses, portions of the regulations focus on preventing degradation to high quality waters.

The federal antidegradation requirements at 40 CFR §131.12 provide for three tiers of water quality protection. Under Tier 1, existing instream water uses and the level of water quality necessary to protect and maintain the existing uses must be maintained and protected. This level of protection is defined by meeting established water quality standards and is applicable to all surface waters. Tier 2, or High Quality Waters, are to be maintained and protected at existing quality unless lowering of water quality is necessary to accommodate important economic or social development in the area in which the surface water is located. Where surface waters of high quality constitute an Outstanding National Resource Water (ONRW), that water quality shall be maintained and protected (Tier 3). In the long-standing Pennsylvania program, Exceptional Value Waters are more broadly defined than the federal Tier 3 definition.

Pennsylvania has implemented an effective and protective antidegradation program since 1968, when a "Conservation Area" use designation was included in the water quality standards regulations. EPA approved Pennsylvania's antidegradation program in 1981. On June 6, 1994, EPA disapproved a portion of the Pennsylvania antidegradation program. In response to EPA's disapproval, the Department solicited comments on the Special Protection (Antidegradation) Waters program at a public meeting on January 11, 1995 and a public hearing on April 20, 1995. With the assistance of a professional facilitator, the Department convened a group of interested stakeholders representing conservationists, the regulated community and government in a regulatory negotiation (Reg Neg) process. DEP committed to use all consensus reached by the group in drafting new regulations. Meetings with the Reg Neg group began in June 1995 and continued monthly thereafter until August 1, 1996. In addition, smaller workgroup meetings to address specific issues were held between the main meetings. The group signed a Phase I Interim Report on April 1, 1996 and presented it to Secretary Seif on May 6, 1996. That report describes some issues on which conditional consensus had been reached and the issues remaining to be resolved. At its August 1, 1996 meeting, the Reg Neg group reached the conclusion that they were at an impasse on several outstanding issues. The Reg Neg group agreed to submit separate reports to the Department and the Reg Neg process was concluded. These reports were submitted to the Department during the week of August 19, 1996.

On April 16, 1996, the U.S. District Court for the Eastern District of Pennsylvania ordered EPA to promptly promulgate proposed federal regulations for Pennsylvania's antidegradation program. On May 13, 1996, at a status conference on the matter, EPA proposed, and Judge Louis C. Bechtle, Jr. accepted, a schedule requiring that proposed federal antidegradation regulations for the Commonwealth be completed and signed by the EPA administrator by August 26, 1996. Proposed federal regulations were published in the Federal Register on August 29, 1996 (61 Fed. Reg. 45379). EPA provided a public comment period and held a public hearing on the proposed regulation on October 16, 1996. Final federal regulations were published in the Federal Register on December 9, 1996 (61 Fed. Reg. 64816).

The Department initially prepared a draft proposed regulation based on the Reg Neg group's April 1, 1996 Phase I Interim Report. The Phase I Interim Report was an informed, thoughtful consideration by a representation of diverse public viewpoints on the antidegradation program and served as a good starting point for new regulations because it incorporated extensive public input. The draft regulation was made available for public comment. The public comment period

concluded with a public hearing on June 18, 1996 in Harrisburg. Ten persons provided oral testimony at the public hearing, and 107 persons sent written comments.

Most public comments were provided by members of the conservation community, and expressed a common viewpoint. Many comments urged no weakening of regulations to protect High Quality and Exceptional Value Waters, no degradation and/or no discharge to these waters, and use of waste minimization and pollution prevention techniques. The comments generally recommended adoption of the Federal Tier 1 language to protect existing uses; recommended a broader definition for High Quality Waters that provides for more waters receiving Tier 2 protection, including Class A Wild Trout Streams; expressed concerns with the biological test and use of assimilative capacity in High Quality Waters; and expressed support for a stringent Exceptional Value Waters program. Other comments supported adopting the federal definition for Tier 3 waters and a stronger public participation process. Following the public hearing, the Department considered the public comments and the reports submitted by the parties participating in the Reg Neg process in the preparation of recommendations to the EQB for the proposed regulations.

The Department considered the public input it received, as well as the input from the Reg Neg group, in preparing an antidegradation rulemaking proposal. That proposal was adopted by the EQB as proposed rulemaking at its January 21, 1997 meeting. The proposal appeared in the Pennsylvania Bulletin on March 22, 1997 (27 Pa.B. 1459), with provisions for a 60-day public comment period and a public hearing which was held May 7, 1997 in Harrisburg. The public comment period concluded on May 21, 1997.

Nearly 1700 comments were received on the proposal. Most commentators objected to the proposal as not being stringent enough. Other commentators believed that the proposal was too stringent. In considering all of the comments received on the proposal, it became obvious that the proposal did not have widespread public support. The Department undertook an extensive effort to revise the proposal in the form of an Advance Notice of Final Rulemaking (ANFR) proposal. Notice of the availability of the ANFR appeared in the Pennsylvania Bulletin on January 23, 1999 (29 Pa. B. 455) with provisions for a public comment period open until February 22, 1999, and 3 public meetings/hearings in Harrisburg on February 8, 1999; in Conshohocken on February 10, 1999; and in Pittsburgh on February 18, 1999. The Department received 743 public comments on the ANFR. Many commentators were generally supportive of the ANFR. A summary of these comments and responses is discussed in more detail below.

The EQB has considered all of the public comments received on both its March 22, 1997 rulemaking proposal, and the Department's January 23, 1999 ANFR, in preparing this final regulation. The final regulation was presented to the WRAC, and discussed and approved by that group on March 17, 1999. The valuable input from the public and the collective knowledge and experience drawn from numerous stakeholders, committees, groups, advisory committees, and others on these proposals has been utilized to craft a regulation which carefully balances the needs of citizens and the regulated community in assuring the protection of the Commonwealth's waters.

The Department will revise its existing implementation guidance for its antidegradation program.

The Department will provide opportunities for full public participation during the development of the revisions, including public information meetings and opportunities for public comments. The Department will work closely with the Department's Water Resources Advisory Committee (WRAC) to develop the revised implementation guidance to ensure that the Department receives public input on implementation issues such as reference stream selection criteria, procedures for implementing biological and chemical tests, procedures for stream classification determinations when chemistry and biology data are in conflict, and social and economic justification (SEJ). The Department will provide notice concerning the opportunities for public participation in the near future.

The details of the final regulation are set forth below.

E. Summary of Regulatory Revisions

Section Description of Amendment

§§92.81 & 92.83. *General NPDES Permits And Inclusion Of Individual Dischargers In General NPDES Permits:*

These existing regulatory provisions currently preclude the use of general NPDES permits in High Quality (HQ) and Exceptional Value (EV) waters. The March 22, 1997 proposal advocated removing the prohibition on the use of NPDES general permits in HQ waters, and proposed retaining the prohibition in EV waters. The same language advocated in the March 22, 1997 proposal was also set forth in a proposed regulation to amend Chapter 92 (Water Quality Amendments - Regulatory Basics Initiative (RBI)) which appeared in the August 29, 1998 *Pennsylvania Bulletin* (28 Pa. B. 4431). Because this issue must be addressed in the RBI rulemaking package, the final regulation contains no changes to §§92.81 and 92.83.

§93.1. *Definitions:*

The term "Class A Wild Trout Water" is new and is defined as a surface water classified by the Pennsylvania Fish and Boat Commission (PFBC) based on species-specific biomass standards which supports a population of naturally produced trout of sufficient size and abundance to produce a long-term and rewarding sport fishery. This definition is drawn from PFBC's Statement of Policy on the term at 58 Pa. Code §57.8a as well as from the "Management of Trout Fisheries in Pennsylvania Waters", 2nd ed., PFBC (5/87). These waters are listed by the PFBC's Fisheries Management Division.

A definition of "Coordinated Water Quality Protective Measures" (CWQPM) is added. This term is defined as legally binding, sound land use water quality protective measures coupled with an interest in real estate which expressly provide long-term protection of a watershed corridor. The term is used in the regulation in the definition of "Outstanding National, State, Local or Regional Resource Water" (discussed below). The term "sound land use" protective measures is drawn from the Governor's 21st Century Environment Commission initiative and supports the Governor's January 7, 1999 Executive Order on Land Use Planning (1999-1). The term includes, but is not limited to, measures which expressly provide extraordinary water quality

protection such as: surface or groundwater source protection zones, enhanced storm water management measures, wetland protection zones, and other measures which local or regional governments coordinate to adopt along a watershed corridor. To qualify, the local or regional governments must also obtain real estate interests in property such as conservation easements, or government owned (county or other local or regional) parks or natural areas, or other interests in real property which enhance water quality in a watershed corridor. The term CWQPM reflects the emphasis on, and importance of, the watershed approach to water quality management, as well as intergovernmental cooperation. Local or regional governments who cooperate on a watershed corridor area to take extraordinary sound land use water quality protective measures, and obtain the requisite interests in real property, can request the Department (as an existing use) or the EQB (as a designated use) to protect the corridor as an EV water.

The proposed definition of the term “Exceptional Value Waters” in the March 22, 1997 proposal has been modified in the final regulation to include surface waters of high quality which satisfy §93.4b(b). The qualifying criteria which appeared in the proposed definition are now set forth at §93.4b(b). In order to qualify as an EV water, a water must (except in the case of “surface waters of exceptional ecological significance”) first qualify as an HQ water by meeting either the long-term chemistry test set forth at §93.4b(a)(1), or the biology test set forth at §93.4b(a)(2). Next, the water must meet one or more of the factors specified in §93.4b(1)(i)-(vi). The other pathway to qualify as an EV water involves qualification as “surface waters of exceptional ecological significance”; this pathway does not require the surface water to meet the HQ water qualifying criteria because it includes waters such as thermal springs, or Exceptional Value Wetlands under 25 Pa. Code §105.17(1), which represent outstanding ecological resources but whose water quality is not indicative of its exceptional attributes when measured by traditional chemical or biological measurements applicable to other surface waters.

The proposed definition of “High Quality Waters” tracks the language in the federal regulation at 40 CFR §131.12(a)(2) by including surface waters having quality which exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. In addition, language is added in the final regulation which ties the definition to the qualifying criteria for HQ waters which is now set forth in §93.4b(a).

The proposed definition of “Natural Quality” is eliminated; the term is no longer needed because it is no longer used in the final regulation.

A definition of “Nonpoint Source” is added which provides that nonpoint sources are those pollution sources which are not “point source discharges”, as that term is defined in §93.1.

A definition of “Outstanding National, State, Regional, or Local Resource Water” has been added; the term was used in the proposal but was not defined. The term includes two elements: (1) waters for which national or state government agencies have adopted water quality protective measures in a resource management plan; and (2) waters for which regional or local governments have adopted “coordinated water quality protective measures” along a watershed corridor. The term “coordinated water quality protective measures” is defined in §93.1 and discussed in further detail above. The outstanding national and state waters which will qualify under this definition include those waters which do not otherwise qualify as national and state resources under

§93.4b(b)(1)(i), (ii), and (vi). The national and state elements of this definition are further fleshed out in a definition of “water quality protective measures in a resource management plan”; the local and regional element of this definition is fleshed out largely in the definition of “coordinated water quality protective measures”.

The Pennsylvania definition of the term is broader than the federal term “Outstanding National Resource Water” in 40 CFR §131.12(a)(3). Pennsylvania protects outstanding state, regional, and local resource waters in addition to outstanding national resource waters in the Commonwealth for several reasons. First, whereas EPA’s focus is only on outstanding national waters, the EQB believes that there are also outstanding state, regional, and local waters which merit EV protection. Second, the Commonwealth’s antidegradation program has included outstanding state, regional, and local waters for many years in its existing regulations at §93.3 (definition of “Exceptional Value Waters”), and the EQB continues to believe that such outstanding waters are worthy of EV status even though they may not be outstanding national resource waters. Pennsylvania has 83,000 miles of surface waters, more than any other state except Alaska, and to date approximately 1700 miles, or less than 2 percent of such waters, have been classified as EV waters. This percentage is not expected to change markedly under these regulations since these final regulations merely continue the existing inclusion of such waters as EV waters.

A definition of “Point Source Discharge” is added which refers to sources regulated under the Department’s NPDES regulations at 25 Pa. Code Chapter 92.

The term “State Game Propagation and Protection Area” is new and is defined as an area established by the Pennsylvania Game Commission (PGC) for the propagation and protection of game and wildlife wherein game or wildlife shall not be hunted, pursued, disturbed, molested, killed, or taken at any time except as authorized by the PGC. The term derives from the use of the term at 34 Pa.C.S.A. §728(a).

A definition of “Surface Water of Exceptional Ecological Significance” is added. This term provides EV protection for a surface water which is important, unique, or sensitive ecologically, but whose water quality as measured by traditional parameters may not be particularly high, or whose character cannot be adequately described by these parameters. These waters include: (1) thermal springs and (2) Exceptional Value Wetlands defined under 25 Pa. Code §105.17(1). The need for the term derives from: (1) the preamble to EPA’s antidegradation regulation at 48 Fed. Reg. 51403 (November 8, 1983); (2) the EPA “Water Quality Standards Handbook” (2nd Ed. August, 1994), Chapter 4, Section 4.7; and (3) EPA’s latest pronouncement on the issue in its advanced notice of proposed rulemaking to amend the water quality standards program at 40 CFR Part 131, *See* 63 Fed. Reg. 36786 (July 7, 1998).

A definition of “Surface Water of Exceptional Recreational Significance” is added. This definition provides for EV protection for a surface water with HQ attributes or better which provides a water-based, water quality-dependent recreational opportunity because there are only a limited number of naturally occurring areas and waterbodies across Pennsylvania where the activity is available or feasible. Examples of such waters include waters with HQ attributes or better which provide recreational opportunities such as fishing for species with limited

distribution.

The definition of "Surface Waters" from the March, 1997 proposal is deleted from this rulemaking because it was finalized through other amendments to the Department's water quality standards regulations, *see* 27 Pa. B. 6799 (December 27, 1997), and is contained in §93.1.

A new definition of "Water Quality Protective Measures in a Resource Management Plan" is added which provides that for outstanding national and state waters to qualify as EV waters, the water must be the beneficiary of measures in a state or federally adopted resource management plan which expressly provide extraordinary long-term water quality protection of a watershed corridor. The definition incorporates the Department's existing procedures for national and state waters qualifying for EV status. Examples of such measures include surface or groundwater source protection zones, enhanced stormwater management measures, and wetland protection zones.

A definition of "Wilderness Trout Stream" is added. The term is defined as a surface water designated by the PFBC to protect and promote native trout fisheries and maintain and enhance wilderness aesthetics and ecological requirements necessary for the natural reproduction of trout. The definition is based upon PFBC's statement of policy codified at 58 Pa. Code §57.4 and the PFBC statement of policy on "Wilderness Trout Streams", 400-17-69 (Rev. 1/71).

§93.3. Protected Water Uses: The EQB has withdrawn its proposal to remove HQ and EV as protected uses. In light of this change, §93.3 is amended by leaving the HQ and EV categories as uses, but removing the definitions of the terms. The definitions of the terms are now contained in §93.1.

§93.4. Statewide Water Uses: Subsection (c) is finalized as proposed by deleting the words "under subsection (b)" to make clear that in no case may waters be redesignated to less restrictive uses than existing uses.

Subsection (d) is finalized as proposed by deleting provisions for the protection of existing uses and placing them elsewhere in a revised form in §§93.4a and 93.4c.

§93.4a. Antidegradation The title of this section is now "Antidegradation"; the section sets forth the scope of antidegradation protection as well as the levels of protection provided. Subsection (a) sets forth the scope of antidegradation as applicable to all surface waters of the Commonwealth. Subsection (b) provides that instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. This language is identical to the federal antidegradation language at 40 CFR §131.12(a)(1) for existing uses. Subsection (c) provides that the water quality of HQ waters shall be maintained and protected, except when SEJ is granted pursuant to §93.4c(b)(1)(iii). Again, this language is identical to the federal antidegradation standard of ensuring that Tier 2 waters (federal equivalent of HQ) shall be "maintained and protected." Subsection (d) provides that the water quality of EV waters shall be "maintained and protected." This standard of protection is exactly the same as that provided in the federal antidegradation regulation at 40 CFR §131.12(a)(3), though the Pennsylvania scope of waters protected as EV waters is broader than the federal Outstanding National

Resource Water (ONRW) classification since the Commonwealth also protects outstanding state, regional, and local waters in addition to outstanding national resource waters.

§93.4b. *Qualifying as High Quality or Exceptional Value Waters.* The proposed §93.4b is deleted in its entirety and replaced with language which specifies the criteria for qualifying as an HQ or EV water. Subsection (a) provides that a surface water qualifies as an HQ water if it meets one or more of the following: (1) a chemistry test or (2) a biology test.

The Chemistry Test (HQ): In order to qualify under the chemistry test, the water must have at least one year of water quality data which exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water by being better than the enumerated water quality criteria at least 99% of the time. The EQB has chosen a long-term chemistry test because it believes that such a test provides the appropriate picture of the water quality of a surface water. The chemical criteria utilized are: dissolved oxygen, temperature, aluminum, pH, iron, dissolved copper, dissolved arsenic, dissolved lead, dissolved nickel, dissolved cadmium, ammonia nitrogen, and dissolved zinc. These chemicals are naturally occurring aquatic life substances which have impacts and provide an excellent representation of water quality when used on a long-term basis. The list of chemicals, when reviewed on a long-term basis, tells the “story” of the quality of the stream. Chemicals which were proposed but were not included in this final regulation are: nitrate plus nitrogen, manganese, sulfate, and total dissolved solids. These chemicals were not included in the final regulation because they are designed to protect potable water supply (human health) uses, and therefore are not appropriate for the fish and aquatic life uses specified in the federal regulation at 40 CFR §131.12(a)(2) and in this Section. Additional language in subsection (a)(1) provides that the Department may consider additional chemical or toxicity information in making its determination. The “additional chemical” language does not supplant the long-term chemistry test, but can be considered, on a case-by-case basis, based upon the judgment of field biologists and others familiar with water quality and potential pollutional concerns in the area of the sampled site.

The Biology Test (HQ and EV): In order to qualify under the biology test, a water must meet one or more of: (1) a biological assessment which indicates HQ water conditions or (2) a Class A Wild Trout Stream designated by the PFBC after public notice and comment. The biological methodologies specified in the regulation are based on EPA’s Rapid Bioassessment Protocols (RBP) and have undergone extensive peer review and testing. The specific percentages used in surface water classifications have been added in response to comment to provide a more objective basis for such classifications; the benthic macroinvertebrate integrated metric score of 83 % of the reference stream or watershed has been in use since 1992. It has been thoroughly tested by DEP and it distinguishes between average streams and those deserving of Special Protection status. Moreover, the 92% score for EV was determined through best professional judgment, to reflect exceptional value waters from a biological perspective. Experience with this number since 1992 has proven that it has reflected outstanding waters of ecological significance. The EQB also believes the biological selection criteria for HQ and EV waters will assure that streams deserving Special Protection qualify. HQ waters must possess water quality better than that needed to support propagation of fish, shellfish, and wildlife and recreation in and on the water. EV waters must first meet the HQ requirements and then qualify under one of several criteria to merit an “outstanding” designation, worthy of the best streams in the Commonwealth,

except for waters of “exceptional ecological significance”, whose true ecological value is generally not measured by traditional water quality parameters.

The final regulation further allows the Department to use widely accepted and published peer-reviewed biological assessment procedures as science in this area advances. The Department, in cooperation with the Pennsylvania Fish and Boat Commission, is currently developing fish metrics and a fishery based Index of Biotic Integrity (IBI) for Pennsylvania waters. Fishery data is currently being collected by both agencies. It will take a few years to establish a database. Once the fish metrics and IBI are finalized, the Department intends to incorporate them as selection criteria, subject to public review and comment. Additional language provides that the Department may consider additional biological information in making its determination. This information will be considered, on a case-by-case basis, based upon the judgment of field biologists and others familiar with water quality and potential pollutional concerns in the area of the sampled site.

In order to qualify as a Class A Wild Trout Water, the water must first be classified by the PFBC as such. Next, the Department will look at the data underlying the PFBC decision, and then make a final determination.

Concerns were raised during the public comment period regarding the Board’s decision to rely on either the chemistry or biology test, but not both, for establishing the appropriate stream classification. Because of the importance of ensuring proper stream classifications, the Department recognizes that the implementation guidance must include the procedures that the Department will use to determine the proper classification of a stream when chemistry and biology data are in conflict. The Department also recognizes that selection of the appropriate reference stream is important to the valid use of the Rapid Bioassessment Protocol. These issues will be specifically addressed in the implementation guidance to be developed in consultation with the Water Resources Advisory Committee.

Qualifying as an EV Water: Section 93.4b(b) sets forth the requirements for qualifying as an EV Water. In order to qualify as an EV water, a water must (except in the case of “Surface Waters of Exceptional Ecological Significance”) first qualify as an HQ water by meeting either the long-term chemistry test set forth at §93.4b(a)(1), or the biology test set forth at §93.4b(a)(2). Next, the water must meet one or more of the factors specified in §93.4b(1)(i)-(vi) which include location in: a National Wildlife Refuge, a State Game Propagation and Protection Area, a State Park Natural Area or State Forest Natural Area, a National Natural Landmark, Federal or State Wild River, Federal Wilderness Area, or National Recreation Area; qualification as an Outstanding National, State, Regional, or Local Resource Water; qualification as a “surface water of exceptional recreational significance”; qualification under a 92% Rapid Bioassessment Protocol (RBP) biology measure; or designation as a Wilderness Trout Stream by the PFBC. The other pathway to qualify as an EV water involves qualification as “surface waters of exceptional ecological significance”; this pathway does not require HQ water quality since it includes waters such as thermal springs, or Exceptional Value Wetlands under 25 Pa. Code §105.17(1), which represent outstanding ecological resources but whose water quality is not indicative of its exceptional attributes when measured by traditional chemical or biological measurements.

§93.4c. Implementation of Antidegradation Requirements: The proposed §93.4c, which addressed issues related to EV waters, is replaced by new language which sets forth specific implementation requirements for the antidegradation program.

Existing Use Protection: Subsection (a) codifies the Department's existing policy and procedures for the protection of existing uses which have been undertaken in response to implementing the federal antidegradation regulation promulgated for the Commonwealth at 40 CFR §131.12(a)(1). Subparagraph (a)(1)(i) provides that existing use protection is provided when the Department's evaluation of information indicates that a surface water attains or has attained an existing use. This language codifies the Department's policy of protecting surface waters based on the best available information regarding a water. Subparagraph (a)(1)(ii) sets forth a requirement that the Department notify persons who apply for a Department permit or Department approval which may impact a surface water of the results of any evaluation of information undertaken pursuant to Subparagraph (a)(1)(i). Subparagraph (a)(1)(iii) allows interested persons, including the person applying for the Department permit or approval, to provide additional information during the permit or approval review process regarding the existing use of the surface water. Finally, Subparagraph (a)(1)(iv) provides that the Department will make a final determination of the existing use of a surface water at the time it takes an action on the request for a permit or other Department approval; persons aggrieved by the final permit or approval action of the Department can generally challenge the action, including the existing use determination of the surface water, by filing an appeal with the Environmental Hearing Board (EHB). Paragraph (a)(1) ensures the protection of surface waters of the Commonwealth based on the best available information, and ensures that interested persons can provide such information during the public comment period when any permits or approvals are sought. Paragraph (a)(2) provides existing use protection for endangered species. The language of this paragraph provides that the Department will ensure the protection of Pennsylvania or Federal threatened and endangered species and their critical habitat if it has confirmed the presence, critical habitat, or critical dependence of such species in or on a surface water.

Point Source Discharges Into HQ or EV Waters: Paragraph (b)(1) provides special provisions for point source discharges into HQ or EV waters. Clauses (b)(1)(i)(A) and (B) refine the existing requirement in §95.1(c) that a person proposing a new, additional, or increased discharge to an HQ or EV water must evaluate non-discharge alternatives to the discharge and utilize them if they are both environmentally sound and cost-effective. If a non-discharge alternative is not environmentally sound and cost-effective, the person proposing the new, additional, or increased discharge must use the best available combination of cost-effective treatment, land disposal, pollution prevention, and wastewater reuse technologies. Additionally, under clause (b)(1)(i)(B) a person who demonstrates that no cost-effective and environmentally sound alternative exists shall demonstrate that the discharge will maintain and protect existing quality of receiving surface waters, unless the discharger can obtain SEJ for a discharge to an HQ water pursuant to Subparagraph (b)(1)(iii) in which case no such demonstration is required.

Public Participation Requirements for Discharges To HQ or EV Waters: Subparagraph (b)(1)(ii)(A) provides that the Department will hold a public hearing on a proposed new, additional, or increased discharge to EV waters when requested by an interested person during

the public comment period on the proposed discharge. This language modifies the existing requirement at §95.1(c) which requires that a public hearing be held for every discharge to an EV water. This requirement has proved administratively burdensome because there have been many discharges proposed to EV waters where no person has expressed interest, yet a public hearing, with a court reporter, had to be held. The new language ensures that if there is no interest, no hearing need be held; where there is interest, a hearing will be held. This does not mean that every request will result in a hearing. For example, a neighboring property owner who requests a hearing is an interested party, whereas a lone comment from far outside the watershed expressing interest in the proposed discharge and requesting a hearing may not necessarily be that of an “interested” person. Subparagraph (b)(1)(ii)(B) adds a requirement that an applicant for a new or increased point source discharge in HQ or EV waters shall note the antidegradation classification of HQ or EV in its public notice of complete application required under §92.61(a).

Social or Economic Justification (SEJ) in HQ Waters: Subparagraph (b)(1)(iii) tracks the federal language at 40 CFR §131.12(a)(2) which allows discharges which degrade the quality of an HQ water if a proposed discharger demonstrates that the proposed discharge is necessary to accommodate important economic or social developments in the area in which the water is located. In addition, a sentence is added providing that even if a discharger obtains SEJ, it must still attain all applicable water uses (i.e., those other than HQ and EV) for its discharge. The EQB has removed language from the proposed SEJ test which had provided that the social or economic benefits must “outweigh any water quality degradation which the proposed discharge is expected to cause.” This language was intended to provide a “balancing” test, and was criticized as being beyond the scope of the federal SEJ. In addition, Federal guidance provides that the provision is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for “fishable/swimmable” waters, and the two cannot both be achieved (EPA’s *Questions and Answers on: Antidegradation*, question 17, page 7, August 1995). The EQB believes that the word “important,” which is not currently in the Department’s existing SEJ regulation at §95.1(b), adds a “balancing” element, and provides authority to enable the Department to perform a balancing test and address the decision in Big B Mining Co. v. DER, 1987 EHB 815 (1987) *aff’d Commonwealth of Pennsylvania, Department of Environmental Resources v. Big B Mining Co.*, 123 Pa. Commonwealth Ct. 591, 554 A.2d 1002 (1989) on the Department’s authority to balance. In that case, the Environmental Hearing Board (EHB) invited the EQB to change its regulations to include a balancing test when it stated that: “[I]f the EQB had intended a balancing test within §95.1(b)(1), it could have easily included the appropriate words.” *Id.* at 853. The EQB does so now.

The Department will work with the Water Resources Advisory Committee to develop appropriate implementation guidance for evaluating and approving the social and economic justification for discharges to high quality waters under these regulations.

Nonpoint Source Control: Subsection (b)(2) provides that the Department shall assure that cost-effective and reasonable best management practices (BMPs) for nonpoint source control shall be achieved. This language tracks the federal language at 40 CFR §131.12(a)(2), and is somewhat different than the nonpoint source language which was contained in the March 22, 1997 proposal at §93.4d(b). The language was changed to more closely match the federal language in response

to concerns raised by EPA, among others, that the language was not acceptable. Existing requirements in Chapters 102 and 105, the Nutrient Management Act and the Manure Management Program, among others, will continue to govern for nonpoint sources. There are no new or additional requirements in the ANFR regarding nonpoint sources in HQ or EV waters; such sources must continue to implement cost-effective and reasonable BMPs as set forth in existing state regulations.

Special Provisions for Sewage Discharges to HQ Waters: Paragraph (c)(1) is a streamlined version of the language in the proposal at §93.4b(e). This provision specifies that proponents of new, additional, or increased sewage discharges in HQ waters shall include an SEJ analysis as part of its proposed revision to the official municipal sewage facilities plan under 25 Pa. Code Chapter 71. The Department's determination of SEJ at the sewage facilities planning stage will constitute SEJ at the NPDES stage unless there is a material change in the project or law between sewage facilities planning and NPDES permitting, in which case sewage facilities planning shall be recommenced. This language eliminates the current duplicative nature of SEJ with regard to sewage dischargers; such dischargers had to complete an SEJ analysis at both the sewage facilities planning stage and the NPDES stage; this was burdensome, with no environmental benefit. The SEJ for sewage facilities is now consolidated.

Social or Economic Justification for Sewage Facilities in HQ Waters Correcting Existing Public Health or Pollution Hazards: Paragraph (c)(2) provides for a streamlined SEJ where a sewage facility which does not have an environmentally sound and cost-effective discharge alternative is designed for the purpose of correcting existing public health or pollution hazards documented by the Department and approved as part of an official sewage facilities plan revision under §71.32. An existing public health or pollution hazard is a situation where there is documented evidence that existing wastewater disposal and pollution control measures either do not currently exist or are no longer functioning in a satisfactory manner, thereby creating a public health or pollution threat. The most common type of hazard usually encountered by the Department in HQ watersheds is failing on-lot sewage disposal systems. The provisions of paragraph 93.4c(c)(2) are restricted to sewage facilities, because in these cases the only practicable method of resolving the public health and pollution hazard may be the construction of centralized sewage disposal plants. Moreover, sewage facilities planning is a public process with extensive local and public involvement.

Public Participation Requirements For Official Sewage Facilities Plans in HQ or EV Waters: Paragraph (c)(3) provides that proponents of sewage facilities in HQ or EV waters who are seeking an approval of an official sewage facilities plan or revision must comply with the public participation requirements of 25 Pa. Code §71.53(d)(6).

§93.4d. Processing of Petitions, Evaluations, and Assessments to Change a Designated Use: The proposed §93.4d was replaced by language which sets forth requirements for public participation and the processing of petitions, evaluations, and assessments to change a designated use. Designated use changes are made by the EQB through rulemaking; existing uses reflect the use based on the best available information and are evaluated by the Department in the context of a request for a Department permit or Department approval under §93.4c(a). The public participation and procedural requirements for changing a designated use are described below:

Public Notice of Receipt of Evaluation, or Assessment of Waters, for HQ or EV Waters Redesignation: Subsection (a) specifies that the Department will publish in the *Pennsylvania Bulletin* and in a local newspaper of general circulation notice of a receipt of either: (1) a complete surface water evaluation which has been accepted by the EQB and is recommending an HQ or EV redesignation; or (2) the Department's intent to assess a surface water for potential redesignation as an HQ or EV water. The "evaluation" is an analysis of the surface water in a locale which can be conducted by any person pursuant to Department assessment protocols, including quality assurance/quality control (QA/QC). Both types of notices will request submission of information concerning the water quality of waters subject to the evaluation, or to be assessed, to be used by the Department to supplement any studies which have been performed. Both types of notice will be sent by the Department to all municipalities containing waters subject to the evaluation or assessment.

Combined Public Meeting and Fact-Finding Hearing: Subsection (b) provides that the Department may hold a combined public meeting and fact finding hearing as part of its review of an evaluation or performance of an assessment, to discuss the evaluation or assessment. The meeting/hearing may involve discussion of the methodology for the evaluation or assessment, and may solicit information, including technical data, to be considered in the Department's evaluation or assessment.

Submission to EQB to Alter Designated Use: Subsection (c) provides that, upon the completion of its assessment, or review of an evaluation, and the satisfaction of other applicable requirements of this section, the Department shall submit the results of its assessment, or review of the submitted evaluation, to the EQB for proposed rulemaking. If a person is petitioning the EQB to change the designated use, the Department's submission to the EQB will occur only after the petitioner has had the opportunity to review and comment on the Department's assessment or review of submitted evaluation, in accordance with the EQB's petition policy which is codified at 25 Pa. Code Chapter 23.

§93.4e. *Public Participation in High Quality and Exceptional Value Waters.* The proposed §93.4e has been modified and integrated into other sections of the final rule.

§93.7. *Specific Water Quality Criteria:* Table 5 was proposed to be revised to delete High Quality and Exceptional Value Waters as protected uses, with the addition of a new Table 5a to contain the specific criteria for the antidegradation categories. These proposed changes have not been made at final rulemaking in light of the EQB's decision to retain HQ and EV waters as protected uses.

§93.9a-93.9z. *Drainage lists:* The drainage lists were proposed to be amended to delete "HQ" and "EV" from the Water Uses Protected Column and instead list the designated use (WWF, CWF, TSF, etc.). Exceptional Value Waters and High Quality Waters were proposed to be listed in a new column in the drainage lists. These proposed changes have not been made at final rulemaking in light of the EQB's decision to retain HQ and EV waters as protected uses.

§95.1. *General Requirements:* The proposed revisions to Subsection (a) are modified to refer to

the antidegradation requirements under §93.4a- §93.4d, to reflect the retooling of the proposal which had contained a proposed §93.4e. Subsections (b) through (d) are deleted as was proposed. It should be noted that §95.1 was also proposed to be amended in a regulatory proposal (Water Quality Amendments - RBI) which was published in the *Pennsylvania Bulletin* on August 29, 1998 (28 Pa. B. 4431).

F. Summary of Comments and Responses on the Proposed Rulemaking.

The Department received nearly 1700 comments on the March 22, 1997 proposal. The major areas of comment, and the Department's response, is summarized as follows. Many commentators objected to the proposal as not being sufficiently protective, noting, among other things, that it: (1) proposed the deletion of HQ and EV waters as protected uses; (2) required that both a chemistry and biology element be satisfied to qualify as an HQ or EV water; (3) regulated only discharges, not all activities in HQ and EV waters; (4) allowed for a de minimis "off ramp" to the Social or Economic Justification (SEJ) process for certain proposed discharges to HQ waters; (5) allowed for National Pollutant Discharge Elimination System (NPDES) General Permits in HQ waters; (6) did not provide sufficient protection for endangered species; (7) did not provide adequate protection for nonpoint source impacts; (8) failed to prohibit all impacts to EV waters; (9) lessened public hearing requirements for discharges to EV waters; (10) did not provide for adequate public participation with regard to proposed activities which may impact HQ or EV waters; and (11) failed to adequately provide a process for protecting existing uses. Other commentators believed that the proposal was too stringent in that it: (1) contained "balancing" language beyond the scope of the equivalent federal regulation which requires the balancing of social or economic considerations against the environmental degradation a proposed discharge to HQ waters would result in; (2) allowed for imprecise "general" considerations of grab sample chemistry in making HQ and EV determinations; (3) allowed for the classification of outstanding local or regional waters as EV waters, beyond the scope of the federal program; (4) contained subjective terminology such as "ecological or recreational significance" which did not contain objective criteria for decisionmaking in regard to classification of a water; (5) did not provide for notification of landowners riparian to EV and HQ waters; (6) did not provide for adequate public participation in the stream designation process; and (7) did not allow for the use of NPDES general permits in EV waters.

General Comments: Many commentators suggested that the Department should simply track the language of the federal antidegradation regulation at 40 CFR §131.12 because it is assertedly more protective than the proposal. In response, the Department has altered several areas of the proposal on final rulemaking to be consistent with the federal regulation. Moreover, because the antidegradation program in Pennsylvania is implemented by the Commonwealth, not EPA, the EQB believes that it is sound public policy to expand the minimum legal language of the federal antidegradation regulation and set forth specific implementation provisions. Over twenty years of experience implementing the antidegradation program in Pennsylvania, as well as the input of the public, stakeholders groups, advisory committees, and others have provided a more complete means to address the specific needs of Commonwealth citizens.

Another comment requested the term "surface waters" be replaced by the term "watersheds" to emphasize the Department's watershed approach. In response, the EQB believes that watersheds

are contained in the term “surface waters”. Stream classifications will continue to be made on a basin basis. Moreover, the Department has emphasized the “watershed” approach and the recommendations of the 21st Century Environment Commission in several ways in this regulation, most notably in the definition of “Coordinated Water Quality Protective Measures,” which provides for the protection of watershed corridors as EV waters where local or regional governments have adopted sound land use water quality protective measures in waters which have the water quality of High Quality Waters or higher.

HQ/EV Waters as Uses. Many commentators objected to the proposal to eliminate the HQ and EV use categories as protected uses, fearing that such waters would not be protected outside of a use classification scheme, and that waters already classified as HQ or EV would lose their protected status. In response, the EQB has decided to maintain HQ and EV waters as uses. This approach has been in place since 1978 and has proved workable since it integrates antidegradation management categories into the water quality standards program. The existing quality of HQ and EV waters must be protected regardless of whether the waters are protected uses or not. Moreover, it is less confusing for the public and easier for the Department from a programmatic and administrative viewpoint to include HQ and EV waters along with all other listed waters in the drainage lists in §§93.9a- 93.9z rather than to separate them. The retention of uses for HQ and EV waters was supported by a majority of persons commenting on the proposal.

Chemical/Biological Qualifying Methodology. Many comments were received on the chemical and biological tests for ascertaining whether a water qualifies for HQ or EV protection. The primary objection to the proposal was that the EQB was requiring that a water meet both a chemistry and biology test. Others objected that the use of the language “generally” in the chemical test was vague, and that the specific percentages used in the biological test should be provided. In response, the EQB has revised the chemical and biological qualifying criteria to provide that either a chemistry or biology test can qualify a water as HQ. In order to ensure that the chemistry test is sound, the EQB has adopted a “long-term” chemistry test which requires at least one year of data, as opposed to the grab sample test which was proposed. Moreover, the EQB has provided more certainty to the chemistry test by eliminating the term “generally” and specifically enumerating the chemical factors which will be considered in ascertaining whether a water is an HQ water. Finally, the specific percentages which qualify a water for HQ (83%) or EV (92%) under the biology test have been specifically enumerated in the final regulation. These methodologies are discussed in more detail above.

Scope of Protection. Several comments stated that the antidegradation regulations need to address not only discharges, but other activities which may impact surface waters. In response, the language requiring the protection of existing uses has been amended, consistent with federal regulations, to be implemented during the review of an application for a Department permit or Department approval. The Department requires that all existing uses be maintained and protected. This protection occurs during the evaluation of an application for a Department permit or approval which could impact a surface water. By linking the regulation of activities requiring Department permits or approvals to existing use protection, all categories of uses (including HQ and EV) receive such protection. This language is needed to address comments from EPA (and others).

De Minimis "Off Ramp" to SEJ. Several comments criticized the proposed 25% of assimilation capacity "off-ramp" to SEJ as not being sufficiently protective of water quality in HQ waters. In response to comments, the language allowing for a de minimis off-ramp to SEJ for certain small impact dischargers has been deleted from the final rulemaking.

NPDES General Permits in HQ/EV Waters. Several comments expressed the view that NPDES general permits should not be allowed in HQ waters; other comments believed that such general permits should be able to be utilized in EV waters as well as HQ waters. As part of its Regulatory Basics Initiative (RBI) proposed revisions to Chapter 92 (see 28 Pa. B. 4431), the EQB also proposed allowing the use of general NPDES permits in HQ watersheds. The EQB received a substantial number of comments on that proposal and must address those comments in that rulemaking package.

Endangered and Threatened Species Protection. Several commentators believed that the proposed language which provided for the Department to limit mixing areas of discharges to protect aquatic threatened and endangered species identified in the Pennsylvania Natural Diversity Index (PNDI) was insufficient because it fails to address all activities, it only addresses aquatic species, and the PNDI does not include all threatened and endangered species. In response, the EQB has reworked the language of §93.4c(a)(2) to provide that if the Department confirms the presence, critical habitat, or critical dependence of endangered or threatened species in a surface water, it will ensure protection of such species and critical habitat. The language relating to "discharges" has been deleted; existing use protection applies to activities requiring Department permits or approvals. Moreover, the qualifier "aquatic" was removed, as were references to the PNDI.

Nonpoint Sources. Several comments asserted that the nonpoint source protection language in the proposal was not as stringent as the federal language. In response, the final regulation requires the Department to assure that cost-effective and reasonable best management practices for non-point source control be achieved. This requirement tracks language in the federal regulation at 40 CFR §131.32(a)(2). Existing requirements in Chapters 102 and 105, the Nutrient Management Act and the Manure Management Program will continue to govern. There are no new or additional requirements regarding nonpoint sources.

Prohibition of Activities/Discharges to EV Waters. Several commentators believe that the EQB should prohibit all new activities, including new discharges, into EV waters. In response, the Department mirrors the federal regulation at 40 CFR §131.12(a)(3) by providing that the existing quality of EV waters be "maintained and protected." The EQB believes that an outright prohibition on regulated activities (including new discharges) in EV waters would be unduly restrictive of economic development; careful economic development is compatible with excellent water quality so long as such development can ensure no degradation of water quality. Many activities (including point source discharges from construction activities, and new discharges from quarries) have been authorized in EV waters which have demonstrated that economic development and clean water are not mutually exclusive.

Public Participation for Discharges Which Could Impact HQ or EV Waters. Several comments questioned the need for an additional pre-permit 30-day public comment period prior to the

submission by an applicant of an application to discharge wastes into Commonwealth waters; others questioned whether the public participation provided for such activities was adequate. In response, the EQB has eliminated the pre-permit 30-day comment period; this additional public comment period was seen as redundant, and would result in additional paperwork and expense in the permit process. Additional public information and input possibilities are provided in the form of a public hearing requirement for discharges to EV waters, when requested, as well as a requirement that public notices for discharge permits contain language noting the antidegradation classification of the receiving water.

Existing Use Protection. Several comments questioned the proposed process for existing use protection, stating that the requirement that existing uses not be protected until the Department evaluates technical data is inappropriate to protect existing uses. In response, language is added at §93.4a(b) which is identical to the federal language for existing use protection at 40 CFR §131.12(a)(1). Moreover, the amended language of the final regulation at §93.4c(a) provides a procedure for existing use protection; existing use protection is provided by the Department based upon the best available information for a waterbody. The final existing use determination is made in the context of a Department permit or approval action. That action includes the opportunity for the public and the person seeking to conduct the activity requiring the permit or approval to provide water quality information.

SEJ "Balancing" Language. Several comments questioned the need for SEJ language in the proposal which provided that dischargers must demonstrate that the social or economic justification for their proposed discharge into HQ waters must outweigh the proposed environmental degradation from the discharge. The EQB has removed the phrase "which outweigh any water quality degradation which the proposed discharge is expected to cause" because it is beyond that contained in the relevant federal language at 40 CFR §131.12(a)(2) and is not necessary. The term "important" in "important economic or social development" provides sufficient authority to conduct a balancing test which balances the social or economic benefits of a proposed discharge against any water quality degradation the discharge is expected to cause.

Outstanding "State, Regional or Local" Resource Waters. Several comments expressed that the scope of EV waters should be "Outstanding National Resource Waters", which is the scope of the federal regulation at 40 CFR §131.12(a)(3). The EQB's EV waters definition is broader than EPA's Tier 3 definition. Pennsylvania also protects outstanding state, regional, and local resource waters. First, whereas EPA's focus is only on outstanding national waters, the EQB believes that there are also outstanding state, regional, and local waters which merit EV protection. Second, the Commonwealth's antidegradation program has included outstanding state, regional, and local waters for many years in its existing regulations at §93.3 (definition of "Exceptional Value Waters"), and the EQB continues to believe that such outstanding waters are worthy of EV status even though they may not be outstanding national resource waters. Pennsylvania has 83,000 miles of surface waters, more than any other state except Alaska, and to date approximately 1700 miles, or less than 2 percent of such waters, have been classified as EV waters. This percentage is not expected to change markedly under these regulations since these final regulations merely continue the existing inclusion of such waters as EV waters.

Terminology/Subjectivity in the Classification of HQ/EV Waters. Several commentators believed

that the criteria utilized for defining an EV water in the proposal, particularly the phrase “other waters of exceptional recreational or ecological significance”, was unduly subjective. In response to the comments, the EQB has added more objectivity to the regulations by specifically laying out the biological qualifying criteria in more detail (i.e., 83% of macroinvertebrate populations of excellent reference waters to qualify as an HQ water under the biology test), adding several new definitions of terms such as “coordinated water quality protective measures”, “outstanding national, state, regional, or local resource water”, “surface water of exceptional ecological significance”, and “surface water of exceptional recreational significance”, and specifically enumerating categories of national and state waters which, when accompanied by water quality which qualifies a water as HQ, qualify the water for EV protection. All these changes were designed to provide more objective criteria. Other measures which have been taken, such as deleting the word “generally” from the chemistry qualifying criteria for HQ, and the more precise laying out of criteria for HQ and EV, as well as specific procedures for existing use protection, also provide more objectivity in the final regulation.

Landowner Notification of Assessments for HQ/EV Status. Several comments suggested that either the Department, or the proponent of a petition to upgrade a water to HQ or EV status, should be required to notify all landowners in the watershed. In response, although the Department believes that public notification is appropriate, having petitioners or the Department try to search and send individual certified letters to each landowner in a watershed is onerous and burdensome and still may not reach everyone. The Department believes more workable and effective notification options include placing notices in local newspapers within the watershed, public service announcements on local radio or television, and working with municipalities to assist in the notification of the potentially affected local citizens, including landowners.

Adequate Public Participation in the Stream Designation Process. Several comments noted that there were not adequate opportunities for public input in the EQB’s redesignation of surface waters to HQ or EV status. In response, the EQB has modified the proposal to expand public participation requirements. Section 93.4d(a) requires the Department to publish notices of intent to assess a water for potential HQ or EV designation in both the Pennsylvania Bulletin and local newspapers. In addition, a notice is also required when a completed evaluation is accepted by the EQB. The Department will also notify all municipalities in the affected watershed. These notices will request submittal of additional information for use by the Department. Section 93.4d(b) further provides for combined public meeting and fact-finding hearings to discuss the assessment or evaluation and solicit additional data.

G. Advance Notice of Final Rulemaking

After considering all of the comments received on the proposal, the Department undertook an extensive effort to recraft the proposal in the form of an Advance Notice of Final Rulemaking (ANFR) proposal, in order to seek additional public input. The Department developed the ANFR in a multistage process. First, a conceptual description of the ANFR was discussed at several outreach meetings with various stakeholder groups. Next, the conceptual ANFR was discussed with several advisory groups including the Citizen’s Advisory Council (CAC), the Water Resources Advisory Committee (WRAC), and the regulatory negotiation (Reg Neg) group. The input from the stakeholders and the advisory committees was utilized in the

development of a formal proposal. Notice of the availability of the ANFR appeared in the Pennsylvania Bulletin on January 23, 1999 (29 Pa. B. 455) with provisions for a public comment period which remained open until February 22, 1999. In addition, three public meetings/hearings were held at the following sites and dates: Harrisburg on February 8, 1999; Conshohocken on February 10, 1999; and Pittsburgh on February 18, 1999. The formal proposal was also discussed with the Agricultural Advisory Board (AAB).

The Department received 743 public comments on the ANFR. Many commentators were generally supportive of the ANFR. Several comments addressed issues such as: (1) landowner notification of stream upgrades; (2) SEJ issues such as whether the regulation should contain language "balancing" social or economic justification against environmental degradation; how extensive should the regulation be with regard to spelling out the factors for analyzing SEJ requests; expanding terms such as "existing public health or pollution hazard" and "cost effective and environmentally sound"; and whether the "automatic" SEJ process for sewage facilities with existing public health or pollution hazards should be applied to industrial activities as well; (3) the appropriate chemical and biological methodology for ascertaining HQ and EV stream classifications; (4) whether the regulation should be limited to discharges or apply to more activities; (5) the appropriate language for protecting threatened and endangered species; (6) whether EV and HQ should be protected as uses; (7) the appropriate public hearing requirements for discharges in EV waters; (8) the use of NPDES general permits in HQ and EV waters; (9) the appropriate factors and methodology for EV waters classifications, including where social and economic factors and information should be considered; and (10) the impact of these regulations on agricultural activities and other land uses. These comments are addressed in more detail below, except to the extent they are already addressed in Sections E or F.

SEJ Issues. Several comments addressed various issues with SEJ terminology and implementation. In response, the EQB has adopted the federal SEJ language at 40 CFR §131.12(a)(2) as Pennsylvania's SEJ language. As such, the Department will look to federal SEJ guidance on the terminology and its implementation; the guidance will be considered and appropriately tailored to meet the needs of Pennsylvanians.

Public Hearing Requirements for Discharges to EV Waters. Several comments expressed concern with the ANFR proposal to remove mandatory public hearing requirements for proposed discharges to EV waters. The EQB has added language, in response to the comments, which provides that a public hearing will be held on a proposed discharge to EV waters when requested by an interested person. This language replaces §95.1(c) which requires mandatory public hearings for all discharges to EV waters, regardless of public interest. Numerous hearings have been scheduled and held with the expense of Department staff time and court reporters, and no testimony given. The new language assures that hearings are held when requested, while eliminating the necessity for holding a hearing when there is no public interest.

Social and Economic Impacts in Stream Classifications. Several comments requested that the Department consider the social and economic impacts of a stream classification during the stream assessment process. In response, the federal Clean Water Act (CWA) precludes States from considering economic or social factors in developing water quality standards (including water uses and water quality criteria).

Impact of Stream Classifications on Land Uses. Several comments suggested that the antidegradation regulations will impact the ability of farmers to continue farming, and developers and builders to develop their property in areas near HQ/EV streams, and that such regulations may constitute a “taking” of their property rights. In response, Department regulations, including these regulations, are drafted mindful of the takings provisions of the United States and Pennsylvania Constitutions. These regulations represent a reasonable exercise of the Commonwealth’s police powers and do not in any way prohibit all economically viable uses of a property owner based on the property owner’s reasonable investment-backed expectations. The regulations do not affect the right to dispose of private property, and instead provide protection to the Commonwealth’s best waters. Experience has shown that numerous discharge permits have been granted for discharges to High Quality and Exceptional Value waters. Moreover, there are no new or additional requirements in the final regulation regarding farms in HQ or EV waters; the final regulation requires the Department to assure that cost-effective and reasonable best management practices for non-point source control be achieved. This requirement tracks language in the federal regulation at 40 CFR §131.32(a)(2). Existing requirements in Chapters 102 and 105, the Nutrient Management Act and the Manure Management Program will continue to govern.

Additional comments which were raised in the ANFR have been addressed in the response to comments on the proposed regulations in Section F, or as part of the description of the final regulations in Section E.

H. Benefits, Costs, and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the regulation.

Benefits - Overall, the citizens of the Commonwealth will benefit from these changes because they will provide appropriate protection of surface waters in the Commonwealth, including existing uses and High Quality and Exceptional Value waters. The antidegradation program set forth in the final regulation addresses EPA's disapproval of certain antidegradation provisions and provides an antidegradation program which reflects the input of the public, interested stakeholders, and others, and addresses concerns specific to Pennsylvania.

Compliance Costs - New, additional or increased discharges to HQ or EV waters, or those proposing other activities requiring a Department permit or approval in such waters, may require alternate disposal methods, installation of higher technology, or more stringent effluent limitations than discharges to Tier 1 waters, and compliance costs may be higher.

The changes may have some fiscal impact on or create additional compliance costs for the Commonwealth, political subdivisions, and the private sector planning new, additional or increased wastewater discharges or other activities requiring a Department permit or approval which may affect High Quality or Exceptional Value Waters. The number of affected discharges or other activities requiring a Department permit or approval cannot be determined because of the uncertainty in which waters will be evaluated as High Quality and Exceptional Value Waters, and because future discharges cannot be known.

Compliance Assistance Plan - The Department plans to educate and assist the public with understanding the newly revised requirements and how to comply with them. The Special Protection Waters Implementation Handbook was developed as a multi-purpose document in November 1992 to provide information and guidance about the development of acceptable point and nonpoint source control measures and as a general source for antidegradation implementation policies and procedures. An updated version of the Handbook will be prepared to reflect changes in the regulation and requirements for antidegradation waters and will be made widely available to the public, with opportunities for public input and comment.

Paperwork Requirements - The regulatory revisions will have limited paperwork impacts on the Commonwealth, its political subdivisions, and the private sector.

I. Pollution Prevention - The antidegradation program is a major pollution prevention tool because its objective is to prevent degradation by maintaining and protecting existing water quality. Although wastewater discharges are not prohibited by the antidegradation program, non-discharge alternatives are encouraged and required, when appropriate. Non-discharge alternatives remove impacts to the surface water and reduce the overall level of pollution to the environment by remediation of the effluent through the soil. Dischargers to HQ and EV waters must evaluate alternatives to stream discharge. If no cost-effective and environmentally sound alternative is available, the discharger must use the best available combination of cost-effective treatment, land disposal, pollution prevention, and wastewater reuse technologies.

J. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

K. Regulatory Review

Under Section 5(a) of the Regulatory Review Act, the Act of June 30, 1989 (P.L. 73, No. 19), (71 P.S. §745.5(a)), the Department submitted a copy of the proposed rulemaking, published at 27 Pa. B. 1459 (March 22, 1997) on March 10, 1997 to the Independent Regulatory Review Commission and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided the Commission and Committees with a copy of all comments received on the proposed regulation, as well as other documentation.

In preparing this final-form regulation, the Department has considered all comments received from the Commission and the public. The committees did not provide comments on the proposed rulemaking.

This final-form regulation was (deemed) approved by the House Environmental Resources and Energy Committee on _____ and was (deemed) approved by the Senate Environmental Resources and Energy Committee on _____. The Commission met on _____ and (deemed) approved the regulation in accordance with Section 5(c) of the Act.

L. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under Sections 201 and 202 of the Act of July 31, 1968, P.L. 769, No. 240) (45 P.S. §§1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§7.1 and 7.2.
- (2) A public comment period was provided, as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 27 Pa. B. 1459 (March 22, 1997).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

M. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (1) The regulations of the Department of Environmental protection, 25 Pa. Code Chapters 93 and 95, are amended by amending §§93.1, 93.3, 93.4, and 95.1, and adding §§93.4a, 93.4b, 93.4c, and 93.4d, to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (2) The Chairman of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval and review as to legality and form, as required by law.
- (3) The Chairman shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (4) The Chairman of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (5) This order shall take effect immediately.

BY:

JAMES M. SEIF
Chairman
Environmental Quality Board

ANNEX A

(NOTE: "Strikethroughs" over text represents Deletions; added data are underlined and CAPITALIZED. Changes from proposed rulemaking are **BOLDED, UNDERLINED & CAPITALIZED** for additions; and ~~Bolded-Strikethroughs~~ for deletions.)

CHAPTER 92. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

* * * * *

§92.81. General NPDES permits.

(a) *Coverage and purpose.* The Director may issue a general NPDES permit, in lieu of issuing individual NPDES permits, for a clearly and specifically described category of point source discharges, if the point sources meet all of the following paragraphs:

* * * * *

(8) Do not discharge to waters classified as "special protection" EXCEPTIONAL VALUE WATERS under Chapter 93 (relating to water quality standards).

* * * * *

§92.83. Inclusion of individual dischargers in general NPDES permits.

* * * * *

(b) *Denial of coverage.* The Director shall deny any application for coverage under a general permit when one or more of the following conditions exist:

* * * * *

(8) The discharge would be to waters classified as "special protection" EXCEPTIONAL VALUE WATERS under Chapter 93 (relating to water quality standards).

(Editor's Note: Sections 92.81 and 92.83(b)(8) are proposed to be amended in proposed amendments set forth in the regulatory package at 28 Pa.B. 4431 (August 29, 1998).

CHAPTER 93. WATER QUALITY STANDARDS

§93.1. Definitions.

* * * * *

CLASS A WILD TROUT WATER - A SURFACE WATER CLASSIFIED BY THE FISH AND BOAT COMMISSION, BASED ON SPECIES -SPECIFIC BIOMASS STANDARDS, WHICH SUPPORTS A POPULATION OF NATURALLY PRODUCED TROUT OF SUFFICIENT SIZE AND ABUNDANCE TO SUPPORT A LONG-TERM AND REWARDING SPORT FISHERY.

* * * * *

COORDINATED WATER QUALITY PROTECTIVE MEASURES - LEGALLY BINDING SOUND LAND USE WATER QUALITY PROTECTIVE MEASURES COUPLED WITH AN INTEREST IN REAL ESTATE WHICH EXPRESSLY PROVIDE LONG-TERM WATER QUALITY PROTECTION OF A WATERSHED CORRIDOR. SOUND LAND USE WATER QUALITY PROTECTIVE MEASURES INCLUDE: SURFACE OR GROUNDWATER SOURCE PROTECTION ZONES, ENHANCED STORMWATER MANAGEMENT MEASURES, WETLAND PROTECTION ZONES, OR OTHER MEASURES WHICH PROVIDE EXTRAORDINARY WATER QUALITY PROTECTION. REAL ESTATE INTERESTS INCLUDE: FEE INTERESTS, CONSERVATION EASEMENTS, GOVERNMENT OWNED RIPARIAN PARKS OR NATURAL AREAS, AND OTHER SUCH INTERESTS IN LAND WHICH ENHANCE WATER QUALITY IN A WATERSHED CORRIDOR AREA.

* * * * *

EXCEPTIONAL VALUE WATERS - SURFACE WATERS OF HIGH QUALITY WHICH CONSTITUTE AN OUTSTANDING NATIONAL, STATE, REGIONAL OR LOCAL RESOURCE SATISFY SUBSECTION 93.4b(b) (RELATING TO QUALIFYING AS EXCEPTIONAL VALUE WATERS). EXAMPLES WHICH QUALIFY FOR EXCEPTIONAL

VALUE WATERS DESIGNATION IF THEY MEET THE CONDITIONS SPECIFIED IN §93.4c (RELATING TO EXCEPTIONAL VALUE WATERS) ARE AS FOLLOWS:

(i) WATERS LOCATED IN NATIONAL, STATE, OR COUNTY PARKS OR FORESTS.

(ii) WATERS IN WILDLIFE REFUGES OR STATE GAME LANDS.

(iii) WATERS WHICH HAVE BEEN DESIGNATED BY THE FISH AND BOAT COMMISSION AS "WILDERNESS TROUT STREAMS".

(iv) OTHER WATERS OF EXCEPTIONAL RECREATIONAL OR ECOLOGICAL SIGNIFICANCE.

* * * * *

HIGH QUALITY WATERS - SURFACE WATERS HAVING QUALITY WHICH EXCEEDS LEVELS NECESSARY TO SUPPORT PROPAGATION OF FISH, SHELLFISH, AND WILDLIFE AND RECREATION IN AND ON THE WATER BY SATISFYING SUBSECTION 93.4b(a) (RELATING TO QUALIFYING AS HIGH QUALITY WATERS).

* * * * *

NATURAL QUALITY - THE WATER QUALITY CONDITIONS THAT EXIST OR THAT WOULD REASONABLY BE EXPECTED TO EXIST IN THE ABSENCE OF HUMAN RELATED ACTIVITY.

* * * * *

NONPOINT SOURCE - A POLLUTION SOURCE WHICH IS NOT A POINT SOURCE DISCHARGE.

* * * * *

OUTSTANDING NATIONAL, STATE, REGIONAL, OR LOCAL RESOURCE WATER - A SURFACE WATER FOR WHICH A NATIONAL OR STATE GOVERNMENT AGENCY HAS ADOPTED WATER QUALITY PROTECTIVE MEASURES IN A RESOURCE MANAGEMENT PLAN, OR REGIONAL OR LOCAL GOVERNMENTS HAVE ADOPTED COORDINATED WATER QUALITY PROTECTIVE MEASURES ALONG A WATERSHED CORRIDOR.

* * * * *

POINT SOURCE DISCHARGE - A POLLUTANT SOURCE REGULATED UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) AS DEFINED IN §92.1 (RELATING TO DEFINITIONS).

* * * * *

STATE GAME PROPAGATION AND PROTECTION AREA - AN AREA ESTABLISHED BY THE GAME COMMISSION FOR THE PROPAGATION AND PROTECTION OF GAME OR WILDLIFE WHEREIN GAME OR WILDLIFE SHALL NOT BE HUNTED, PURSUED, DISTURBED, MOLESTED, KILLED, OR TAKEN AT ANY TIME EXCEPT AS AUTHORIZED BY THE COMMISSION.

* * * * *

SURFACE WATER OF EXCEPTIONAL ECOLOGICAL SIGNIFICANCE - A SURFACE WATER WHICH IS IMPORTANT, UNIQUE, OR SENSITIVE ECOLOGICALLY, BUT WHOSE WATER QUALITY AS MEASURED BY TRADITIONAL PARAMETERS (E.G. CHEMICAL, PHYSICAL, BIOLOGICAL) MAY NOT BE PARTICULARLY HIGH, OR WHOSE CHARACTER CANNOT BE ADEQUATELY DESCRIBED BY THESE PARAMETERS. THESE WATERS INCLUDE: (1) THERMAL SPRINGS AND (2) WETLANDS WHICH ARE EXCEPTIONAL VALUE WETLANDS PURSUANT TO 25 PA. CODE §105.17(1) (RELATING TO WETLANDS).

SURFACE WATER OF EXCEPTIONAL RECREATIONAL SIGNIFICANCE - A SURFACE WATER WHICH PROVIDES A WATER-BASED, WATER QUALITY-DEPENDENT RECREATIONAL OPPORTUNITY (SUCH AS FISHING FOR SPECIES WITH LIMITED DISTRIBUTION) BECAUSE THERE ARE ONLY A LIMITED NUMBER OF NATURALLY OCCURRING AREAS AND WATERBODIES ACROSS THE STATE WHERE THE ACTIVITY IS AVAILABLE OR FEASIBLE.

~~SURFACE WATERS - PERENNIAL AND INTERMITTENT STREAMS, RIVERS, LAKES, RESERVOIRS, PONDS, WETLANDS, SPRINGS, NATURAL SEEPS AND ESTUARIES, EXCLUDING WATER AT FACILITIES APPROVED FOR WASTEWATER TREATMENT SUCH AS WASTEWATER TREATMENT IMPOUNDMENTS, COOLING WATER PONDS, AND CONSTRUCTED WETLANDS USED AS PART OF A WASTEWATER TREATMENT PROCESS.~~

* * * * *

WATER QUALITY PROTECTIVE MEASURES IN A RESOURCE MANAGEMENT PLAN - MEASURES IN A RESOURCE MANAGEMENT PLAN WHICH EXPRESSLY PROVIDE EXTRAORDINARY LONG-TERM WATER QUALITY PROTECTION OF A WATERSHED CORRIDOR. SUCH MEASURES INCLUDE SURFACE OR GROUNDWATER SOURCE PROTECTION ZONES, ENHANCED STORMWATER MANAGEMENT MEASURES, OR WETLAND PROTECTION ZONES.

* * * * *

WILDERNESS TROUT STREAM - A SURFACE WATER DESIGNATED BY THE FISH AND BOAT COMMISSION TO PROTECT AND PROMOTE NATIVE TROUT FISHERIES AND MAINTAIN AND ENHANCE WILDERNESS AESTHETICS AND ECOLOGICAL REQUIREMENTS NECESSARY FOR THE NATURAL REPRODUCTION OF TROUT.

(Editor's Note: The proposed change to the definition of "Surface Waters" in §93.1 was finalized in amendments published at 27 Pa.B. 6799 (December 27, 1997) and is thus not part of these amendments.)

§93.3. Protected water uses.

Water uses which shall be protected, and upon which the development of water quality criteria shall be based, are set forth, accompanied by their identifying symbols, in the following Table 1:

Table 1

Symbol	Protected Use
* * * * *	
	Special Protection
HQ	High Quality Waters [A stream or watershed which has excellent quality waters and environmental or other features that require special water quality protection]
EV	Exceptional Value Waters [A stream or watershed which constitutes an outstanding national, State, regional or local resource, such as waters of national, State or county parks or forests, or waters which are used as a source of unfiltered potable water supply, or waters of wildlife refuges or State game lands, or waters which have been characterized by the Fish Commission as "Wilderness Trout Streams," and other waters of substantial recreational or ecological significance.]

§93.4. Statewide water uses.

* * * * *

(c) Redesignation of waters. Waters considered for redesignation [under subsection (b)] may not be redesignated to less restrictive uses than the existing uses.

~~[(d) Protection of water bodies.~~

~~(1) When the Department's evaluation of technical data establishes that a waterbody attains the criteria for an existing use which is more protective of the waterbody than the designated use, that waterbody shall be protected at its existing use until the conclusion of rulemaking action as a result of the evaluation. At the conclusion of the rulemaking procedure, the waterbody shall be protected at its designated use.~~

~~(2) When the Department's evaluation under paragraph (1) establishes that a waterbody attains the criteria for "High Quality Waters", as defined in §93.3 (relating to protected water uses), that waterbody shall be protected at its existing use. Proposed new and expanded discharges to the waterbody shall maintain and protect the existing quality of the waterbody unless the person proposing the new or expanded discharge demonstrates the criteria in §95.1(b)(1) and (2) (relating to general requirements).]~~

ANTIDEGRADATION REQUIREMENTS

§93.4a. EXISTING USES ANTIDEGRADATION.

EXISTING INSTREAM WATER USES AND THE LEVEL OF WATER QUALITY NECESSARY TO PROTECT THE EXISTING USES SHALL BE MAINTAINED AND PROTECTED WHEN THE DEPARTMENT'S EVALUATION OF TECHNICAL DATA ESTABLISHES THAT A SURFACE WATER ATTAINS OR HAS ATTAINED AN EXISTING USE. IF THE DEPARTMENT HAS CONFIRMED THE PRESENCE OR CRITICAL HABITAT OF ENDANGERED OR THREATENED, FEDERAL OR PENNSYLVANIA AQUATIC SPECIES LISTED IN THE PENNSYLVANIA NATURAL DIVERSITY INVENTORY (PNDI), DISCHARGES TO SUCH WATERS SHALL BE LIMITED TO ENSURE PROTECTION OF SUCH SPECIES AND CRITICAL HABITAT.

(a) SCOPE. THE REQUIREMENTS OF THIS SECTION ARE APPLICABLE TO SURFACE WATERS OF THE COMMONWEALTH.

(b) EXISTING USE PROTECTION FOR SURFACE WATERS - EXISTING INSTREAM WATER USES AND THE LEVEL OF WATER QUALITY NECESSARY TO PROTECT THE EXISTING USES SHALL BE MAINTAINED AND PROTECTED.

(c) PROTECTION FOR HIGH QUALITY WATERS - THE WATER QUALITY OF HIGH QUALITY WATERS SHALL BE MAINTAINED AND PROTECTED, EXCEPT AS PROVIDED IN SUBPARAGRAPH §93.4c(b)(1)(iii).

(d) PROTECTION FOR EXCEPTIONAL VALUE WATERS - THE WATER QUALITY OF EXCEPTIONAL VALUE WATERS SHALL BE MAINTAINED AND PROTECTED.

§93.4b. QUALIFYING AS HIGH QUALITY OR EXCEPTIONAL VALUE WATERS

(a) QUALIFYING AS A HIGH QUALITY WATER - A SURFACE WATER THAT MEETS ONE OR MORE OF THE FOLLOWING CONDITIONS IS A HIGH QUALITY WATER.

(1) CHEMISTRY - THE WATER HAS LONG-TERM WATER QUALITY, BASED ON AT LEAST ONE YEAR OF DATA WHICH EXCEEDS LEVELS NECESSARY TO SUPPORT THE PROPAGATION OF FISH, SHELLFISH, AND WILDLIFE AND RECREATION IN AND ON THE WATER BY BEING BETTER THAN THE WATER QUALITY CRITERIA IN §93.7, TABLE 3 (RELATING TO SPECIFIC WATER QUALITY CRITERIA) OR OTHERWISE AUTHORIZED BY §93.8a(b), AT LEAST NINETY-NINE (99) PERCENT OF THE TIME FOR THE FOLLOWING PARAMETERS:

<u>dissolved oxygen</u>	<u>temperature</u>	<u>aluminum</u>	<u>pH</u>
<u>iron</u>	<u>dissolved arsenic</u>	<u>dissolved nickel</u>	<u>ammonia nitrogen</u>
<u>dissolved copper</u>	<u>dissolved lead</u>	<u>dissolved cadmium</u>	<u>dissolved zinc</u>

THE DEPARTMENT MAY CONSIDER ADDITIONAL CHEMICAL AND TOXICITY INFORMATION, WHICH CHARACTERIZES OR INDICATES THE QUALITY OF A WATER, IN MAKING ITS DETERMINATION.

(2) BIOLOGY - ONE OR MORE OF THE FOLLOWING SHALL EXIST:

(i) BIOLOGICAL ASSESSMENT QUALIFIER

(A) THE SURFACE WATER SUPPORTS A HIGH QUALITY AQUATIC COMMUNITY BASED UPON INFORMATION GATHERED USING PEER-REVIEWED BIOLOGICAL ASSESSMENT PROCEDURES THAT CONSIDER PHYSICAL HABITAT, BENTHIC MACROINVERTEBRATES, OR FISHES BASED ON RAPID BIOASSESSMENT PROTOCOLS FOR USE IN STREAMS AND RIVERS: BENTHIC MACROINVERTEBRATES AND FISH, PLAFKIN, ET AL., (EPA/444/4-89-001), AS UPDATED AND AMENDED. THE SURFACE WATER IS COMPARED TO A REFERENCE STREAM OR WATERSHED, AND IT MUST ATTAIN AN INTEGRATED BENTHIC MACROINVERTEBRATE SCORE OF AT LEAST 83 PERCENT OF THE REFERENCED STREAM OR WATERSHED.

(B) THE SURFACE WATER SUPPORTS A HIGH QUALITY AQUATIC COMMUNITY BASED UPON INFORMATION GATHERED USING OTHER WIDELY ACCEPTED AND PUBLISHED PEER-REVIEWED BIOLOGICAL ASSESSMENT PROCEDURES THAT THE DEPARTMENT MAY APPROVE TO DETERMINE THE CONDITION OF THE AQUATIC COMMUNITY OF A SURFACE WATER.

(C) THE DEPARTMENT MAY CONSIDER ADDITIONAL BIOLOGICAL INFORMATION WHICH CHARACTERIZES OR INDICATES THE QUALITY OF A WATER IN MAKING ITS DETERMINATION.

(ii) CLASS A WILD TROUT STREAM QUALIFIER - THE SURFACE WATER HAS BEEN DESIGNATED A CLASS A WILD TROUT STREAM BY THE FISH AND BOAT COMMISSION FOLLOWING PUBLIC NOTICE AND COMMENT.

(b) QUALIFYING AS AN EXCEPTIONAL VALUE WATER - A SURFACE WATER THAT MEETS ONE OR MORE OF THE FOLLOWING CONDITIONS IS AN EXCEPTIONAL VALUE WATER:

(1) THE WATER MEETS THE REQUIREMENTS OF SUBSECTION 93.4b(a) (RELATING TO QUALIFYING AS HIGH QUALITY WATERS) AND ONE OR MORE OF THE FOLLOWING:

(i) THE WATER IS LOCATED IN A NATIONAL WILDLIFE REFUGE OR A STATE GAME PROPAGATION AND PROTECTION AREA.

(ii) THE WATER IS LOCATED IN A DESIGNATED STATE PARK NATURAL AREA OR STATE FOREST NATURAL AREA, NATIONAL NATURAL LANDMARK, FEDERAL OR STATE WILD RIVER, FEDERAL WILDERNESS AREA, OR NATIONAL RECREATIONAL AREA.

(iii) THE WATER IS AN OUTSTANDING NATIONAL, STATE, REGIONAL, OR LOCAL RESOURCE WATER.

(iv) THE WATER IS A SURFACE WATER OF EXCEPTIONAL RECREATIONAL SIGNIFICANCE.

(v) THE WATER ACHIEVES A SCORE OF AT LEAST 92 PERCENT (OR ITS EQUIVALENT) USING THE METHODS AND PROCEDURES DESCRIBED IN §93.4b(a)(2)(i)(A) OR (B).

(vi) THE WATER IS DESIGNATED AS A "WILDERNESS TROUT STREAM" BY THE FISH AND BOAT COMMISSION FOLLOWING PUBLIC NOTICE AND COMMENT.

(2) THE WATER IS A SURFACE WATER OF EXCEPTIONAL ECOLOGICAL SIGNIFICANCE.

§93.4c. IMPLEMENTATION OF ANTIDegradation REQUIREMENTS

(a) EXISTING USE PROTECTION

(1) PROCEDURES

(i) EXISTING USE PROTECTION SHALL BE PROVIDED WHEN THE DEPARTMENT'S EVALUATION OF INFORMATION (INCLUDING DATA GATHERED AT THE DEPARTMENT'S OWN INITIATIVE, DATA CONTAINED IN A PETITION TO CHANGE A DESIGNATED USE SUBMITTED TO THE ENVIRONMENTAL QUALITY BOARD PURSUANT TO §93.4d(a), OR DATA CONSIDERED IN THE CONTEXT OF A DEPARTMENT PERMIT OR APPROVAL ACTION) INDICATES THAT A SURFACE WATER ATTAINS OR HAS ATTAINED AN EXISTING USE.

(ii) THE DEPARTMENT SHALL INFORM PERSONS WHO APPLY FOR A DEPARTMENT PERMIT OR APPROVAL WHICH COULD IMPACT A SURFACE WATER, DURING THE PERMIT OR APPROVAL APPLICATION OR REVIEW PROCESS, OF THE RESULTS OF THE EVALUATION OF INFORMATION UNDERTAKEN PURSUANT TO PARAGRAPH (1)(i).

(iii) INTERESTED PERSONS MAY PROVIDE THE DEPARTMENT WITH ADDITIONAL INFORMATION DURING THE PERMIT OR APPROVAL APPLICATION OR REVIEW PROCESS REGARDING EXISTING USE PROTECTION FOR THE SURFACE WATER.

(iv) THE DEPARTMENT WILL MAKE A FINAL DETERMINATION OF EXISTING USE PROTECTION FOR THE SURFACE WATER AS PART OF THE FINAL PERMIT OR APPROVAL ACTION.

(2) ENDANGERED OR THREATENED SPECIES - IF THE DEPARTMENT HAS CONFIRMED THE PRESENCE, CRITICAL HABITAT, OR CRITICAL DEPENDENCE OF ENDANGERED OR THREATENED FEDERAL OR PENNSYLVANIA SPECIES IN OR ON A SURFACE WATER, THE DEPARTMENT SHALL ENSURE PROTECTION OF SUCH SPECIES AND CRITICAL HABITAT.

(b) PROTECTION OF HIGH QUALITY AND EXCEPTIONAL VALUE WATERS

(1) POINT SOURCE DISCHARGES - THE FOLLOWING APPLIES TO POINT SOURCE DISCHARGES TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS.

(i) NON-DISCHARGE ALTERNATIVES/ USE OF BEST TECHNOLOGIES.

(A) A PERSON PROPOSING A NEW, ADDITIONAL, OR INCREASED DISCHARGE TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS MUST EVALUATE NON-DISCHARGE ALTERNATIVES TO THE PROPOSED DISCHARGE AND USE AN ALTERNATIVE THAT IS ENVIRONMENTALLY SOUND AND COST-EFFECTIVE WHEN COMPARED WITH THE COST OF THE PROPOSED DISCHARGE. IF A NON-DISCHARGE ALTERNATIVE IS NOT ENVIRONMENTALLY SOUND AND COST-EFFECTIVE, A NEW, ADDITIONAL, OR INCREASED DISCHARGE SHALL USE THE BEST AVAILABLE COMBINATION OF COST-EFFECTIVE TREATMENT, LAND DISPOSAL, POLLUTION PREVENTION, AND WASTEWATER REUSE TECHNOLOGIES.

(B) A PERSON PROPOSING A NEW, ADDITIONAL, OR INCREASED DISCHARGE TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS, WHO HAS DEMONSTRATED THAT NO ENVIRONMENTALLY SOUND AND COST-EFFECTIVE NON-DISCHARGE ALTERNATIVE EXISTS UNDER CLAUSE (b)(1)(i)(A), SHALL DEMONSTRATE THAT THE DISCHARGE WILL MAINTAIN AND PROTECT THE EXISTING QUALITY OF RECEIVING SURFACE WATERS, EXCEPT AS PROVIDED IN SUBPARAGRAPH (b)(1)(iii).

(ii) PUBLIC PARTICIPATION REQUIREMENTS FOR DISCHARGES TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS - THE FOLLOWING REQUIREMENTS APPLY TO DISCHARGES TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS, AS APPLICABLE:

(A) THE DEPARTMENT WILL HOLD A PUBLIC HEARING ON A PROPOSED NEW, ADDITIONAL, OR INCREASED DISCHARGE TO EXCEPTIONAL VALUE WATERS WHEN REQUESTED BY AN INTERESTED PERSON ON OR BEFORE THE TERMINATION OF THE PUBLIC COMMENT PERIOD ON THE DISCHARGE.

(B) FOR NEW OR INCREASED POINT SOURCE DISCHARGES, IN ADDITION TO THE PUBLIC PARTICIPATION REQUIREMENTS IN SECTIONS 92.61, 92.63, AND 92.65 (RELATING TO PUBLIC NOTICE OF PERMIT APPLICATION AND PUBLIC HEARING; PUBLIC ACCESS TO INFORMATION; AND NOTICE TO OTHER GOVERNMENT AGENCIES), THE APPLICANT SHALL IDENTIFY THE ANTIDegradation CLASSIFICATION OF THE RECEIVING WATER IN THE NOTICE OF COMPLETE APPLICATION SET FORTH IN SUBSECTION 92.61(a).

(iii) SOCIAL OR ECONOMIC JUSTIFICATION (SEJ) IN HIGH QUALITY WATERS - THE DEPARTMENT MAY ALLOW A REDUCTION OF WATER QUALITY IN A HIGH QUALITY WATER IF IT FINDS, AFTER FULL SATISFACTION OF

THE INTER-GOVERNMENTAL COORDINATION AND PUBLIC PARTICIPATION PROVISIONS OF THE COMMONWEALTH'S CONTINUING PLANNING PROCESS, THAT ALLOWING LOWER WATER QUALITY IS NECESSARY TO ACCOMMODATE IMPORTANT ECONOMIC OR SOCIAL DEVELOPMENT IN THE AREA IN WHICH THE WATERS ARE LOCATED. NO REDUCTION IN WATER QUALITY SHALL BE ALLOWED UNDER THIS SUBPARAGRAPH UNLESS THE DISCHARGER DEMONSTRATES THAT THE HIGH QUALITY WATER WILL SUPPORT APPLICABLE EXISTING AND DESIGNATED WATER USES (OTHER THAN THE HIGH QUALITY AND EXCEPTIONAL VALUE USES) SET FORTH IN §93.3, TABLE 1 (RELATING TO PROTECTED WATER USES).

(2) *NONPOINT SOURCE CONTROL* - THE DEPARTMENT SHALL ASSURE THAT COST-EFFECTIVE AND REASONABLE BEST MANAGEMENT PRACTICES FOR NONPOINT SOURCE CONTROL SHALL BE ACHIEVED.

(c) *SPECIAL PROVISIONS FOR SEWAGE FACILITIES IN HIGH QUALITY OR EXCEPTIONAL VALUE WATERS.*

(1) *SOCIAL OR ECONOMIC JUSTIFICATION (SEJ) APPROVAL IN SEWAGE FACILITIES PLANNING AND APPROVAL IN HIGH QUALITY WATERS.* A PROPONENT OF A NEW, ADDITIONAL, OR INCREASED SEWAGE DISCHARGE IN HIGH QUALITY WATERS SHALL INCLUDE A SOCIAL OR ECONOMIC JUSTIFICATION IMPACT ANALYSIS AS PART OF THE PROPOSED REVISION OR UPDATE TO THE OFFICIAL MUNICIPAL SEWAGE FACILITIES PLAN PURSUANT TO CHAPTER 71 (RELATING TO ADMINISTRATION OF SEWAGE FACILITIES PLANNING PROGRAM). THE DEPARTMENT WILL MAKE A DETERMINATION REGARDING THE CONSISTENCY OF THE SOCIAL OR ECONOMIC JUSTIFICATION IMPACT ANALYSIS WITH SUBPARAGRAPH (b)(1)(iii). SUCH DETERMINATION SHALL CONSTITUTE THE SUBPARAGRAPH (b)(1)(iii) ANALYSIS AT THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT REVIEW STAGE UNDER CHAPTER 92 (RELATING TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM), UNLESS THERE IS A MATERIAL CHANGE IN THE PROJECT OR LAW BETWEEN SEWAGE FACILITIES PLANNING AND NPDES PERMITTING, IN WHICH CASE THE PROPONENT SHALL RECOMMENCE SEWAGE FACILITIES PLANNING AND PERFORM A NEW SOCIAL OR ECONOMIC JUSTIFICATION IMPACT ANALYSIS.

(2) *SOCIAL OR ECONOMIC JUSTIFICATION (SEJ) FOR SEWAGE FACILITIES IN HIGH QUALITY WATERS CORRECTING EXISTING PUBLIC HEALTH OR POLLUTION HAZARDS-* A SEWAGE FACILITY, FOR WHICH NO ENVIRONMENTALLY SOUND AND COST-EFFECTIVE NON-DISCHARGE ALTERNATIVE IS AVAILABLE UNDER §93.4c(b)(1)(i)(A), PROPOSED TO DISCHARGE INTO HIGH QUALITY WATERS, WHICH IS DESIGNED FOR THE PURPOSE OF CORRECTING EXISTING PUBLIC HEALTH OR POLLUTION HAZARDS DOCUMENTED BY THE DEPARTMENT, AND APPROVED AS PART OF AN OFFICIAL PLAN OR OFFICIAL PLAN REVISION UNDER 25 PA. CODE §71.32 (RELATING TO

DEPARTMENT RESPONSIBILITY TO REVIEW AND ACT UPON OFFICIAL PLANS), SATISFIES THE SOCIAL AND ECONOMIC JUSTIFICATION REQUIREMENTS IN SUBPARAGRAPH (b)(1)(iii).

(3) PUBLIC PARTICIPATION REQUIREMENTS FOR OFFICIAL SEWAGE FACILITIES PLANS OR REVISIONS TO OFFICIAL PLANS IN HIGH QUALITY OR EXCEPTIONAL VALUE WATERS. A PROPONENT OF A SEWAGE FACILITY IN HIGH QUALITY OR EXCEPTIONAL VALUE WATERS SEEKING APPROVAL OF AN OFFICIAL PLAN OR REVISION MUST COMPLY WITH THE PUBLIC PARTICIPATION REQUIREMENTS IN SUBPARAGRAPH 71.53(d)(6)(RELATING TO MUNICIPAL ADMINISTRATION OF NEW LAND DEVELOPMENT PLANNING REQUIREMENTS FOR REVISIONS).

§93.4d. PROCESSING OF PETITIONS, EVALUATIONS, AND ASSESSMENTS TO CHANGE A DESIGNATED USE.

(a) PUBLIC NOTICE OF RECEIPT OF EVALUATION, OR ASSESSMENT OF WATERS, FOR HIGH QUALITY OR EXCEPTIONAL VALUE WATERS REDESIGNATION. THE DEPARTMENT WILL PUBLISH IN THE PENNSYLVANIA BULLETIN AND IN A LOCAL NEWSPAPER OF GENERAL CIRCULATION NOTICE OF RECEIPT OF A COMPLETE EVALUATION WHICH HAS BEEN ACCEPTED BY THE ENVIRONMENTAL QUALITY BOARD RECOMMENDING A HIGH QUALITY OR EXCEPTIONAL VALUE WATERS REDESIGNATION, OR NOTICE OF THE DEPARTMENT'S INTENT TO ASSESS SURFACE WATERS FOR POTENTIAL REDESIGNATION AS HIGH QUALITY OR EXCEPTIONAL VALUE WATERS. SUCH ASSESSMENTS MAY BE UNDERTAKEN IN RESPONSE TO A PETITION OR ON THE DEPARTMENT'S OWN INITIATIVE. THE NOTICE WILL REQUEST SUBMISSION OF INFORMATION CONCERNING THE WATER QUALITY OF THE WATERS SUBJECT TO THE EVALUATION, OR TO BE ASSESSED, FOR USE BY THE DEPARTMENT TO SUPPLEMENT ANY STUDIES WHICH HAVE BEEN PERFORMED. THE DEPARTMENT WILL SEND A COPY OF THE NOTICE TO ALL MUNICIPALITIES CONTAINING WATERS SUBJECT TO THE EVALUATION OR ASSESSMENT.

(b) COMBINED PUBLIC MEETING AND FACT-FINDING HEARING. AS PART OF ITS REVIEW OF AN EVALUATION OR PERFORMANCE OF AN ASSESSMENT, THE DEPARTMENT MAY HOLD A COMBINED PUBLIC MEETING AND FACT FINDING HEARING TO DISCUSS THE EVALUATION OR ASSESSMENT, INCLUDING THE METHODOLOGY FOR THE EVALUATION OR ASSESSMENT, AND MAY SOLICIT INFORMATION, INCLUDING TECHNICAL DATA, TO BE CONSIDERED IN THE DEPARTMENT'S EVALUATION OR ASSESSMENT.

(c) SUBMISSION TO ENVIRONMENTAL QUALITY BOARD TO ALTER DESIGNATED USE. UPON THE COMPLETION OF ITS ASSESSMENT OR REVIEW OF

A COMPLETE EVALUATION, AND THE SATISFACTION OF THE OTHER APPLICABLE REQUIREMENTS OF THIS SECTION, THE DEPARTMENT SHALL SUBMIT THE RESULTS OF ITS ASSESSMENT OR REVIEW TO THE ENVIRONMENTAL QUALITY BOARD FOR PROPOSED RULEMAKING FOLLOWING REVIEW AND COMMENT BY THE PETITIONER, IF APPLICABLE, IN ACCORDANCE WITH CHAPTER 23.

§93.4b — HIGH QUALITY WATERS

(a) QUALIFYING AS HIGH QUALITY WATERS. FOR A SURFACE WATER TO QUALIFY AS HIGH QUALITY WATERS, THE DEPARTMENT MUST DETERMINE THAT THE WATER QUALITY MEETS THE CONDITIONS SET FORTH IN PARAGRAPHS (1) — (3).

(1) CHEMISTRY TEST. ONE OF THE FOLLOWING SHALL EXIST:

(i) WATER QUALITY MUST BE GENERALLY BETTER THAN THE WATER QUALITY CRITERIA IN §93.7, TABLE 3 (RELATING TO SPECIFIC WATER QUALITY CRITERIA) AND IN CHAPTER 16, APPENDIX A, TABLE 1 (RELATING TO WATER QUALITY CRITERIA FOR TOXIC SUBSTANCES) BASED ON WATER QUALITY ANALYSIS OBTAINED FROM ONE OR MORE GRAB SAMPLES COLLECTED AT REPRESENTATIVE STREAM FLOW CONDITIONS FOR THE FOLLOWING PARAMETERS:

<u>pH</u>	<u>alkalinity</u>	<u>dissolved oxygen</u>
<u>total dissolved solids</u>	<u>ammonia nitrogen</u>	<u>nitrite nitrogen</u>
<u>nitrate nitrogen</u>	<u>hardness</u>	<u>chloride</u>
<u>sulfate</u>	<u>iron</u>	<u>manganese</u>
<u>aluminum</u>	<u>arsenic*</u>	<u>cadmium*</u>
<u>chromium VI*</u>	<u>copper*</u>	<u>lead*</u>
<u>nickel*</u>	<u>zinc*</u>	

(where "*" means dissolved analyses are to be performed).

(ii) THE WATER IS DETERMINED BY THE DEPARTMENT TO BE OF NATURAL QUALITY.

(2) BIOLOGY TEST. ONE OR MORE OF THE FOLLOWING SHALL EXIST:

(i) THE WATER QUALITY MUST SUPPORT NONIMPAIRED, HIGH QUALITY AQUATIC COMMUNITIES AS DETERMINED BY THE DEPARTMENT USING PEER-REVIEWED BIOLOGICAL ASSESSMENT PROCEDURES THAT CONSIDER PHYSICAL HABITAT AND ONE OR BOTH OF BENTHIC

MACROINVERTEBRATES AND FISHES. SUCH PROCEDURES SHALL BE BASED ON RAPID BIOASSESSMENT PROTOCOLS FOR USE IN STREAMS AND RIVERS: BENTHIC MACROINVERTEBRATES AND FISH, PLAFKIN, ET AL., (EPA/444/4-89-001).

(ii) THE WATER QUALITY SATISFIES OTHER PEER-REVIEWED BIOLOGICAL ASSESSMENT PROCEDURES THAT THE DEPARTMENT MAY APPROVE TO DETERMINE THE CONDITION OF THE AQUATIC COMMUNITY OF A SURFACE WATER.

(iii) THE SURFACE WATER HAS BEEN DESIGNATED A CLASS A WILD TROUT STREAM BY THE FISH AND BOAT COMMISSION FOLLOWING PUBLIC NOTICE AND COMMENT.

(3) ADDITIONAL INFORMATION: THE DEPARTMENT MAY CONSIDER ADDITIONAL CHEMICAL OR BIOLOGICAL INFORMATION WHICH CHARACTERIZES OR INDICATES THE QUALITY OF A WATER IN MAKING ITS DETERMINATION.

(b) LEVEL OF PROTECTION/ SOCIAL OR ECONOMIC JUSTIFICATION (SEJ). THE QUALITY OF HIGH QUALITY WATERS SHALL BE MAINTAINED AND PROTECTED UNLESS A PERSON PROPOSING A NEW, ADDITIONAL OR INCREASED DISCHARGE OF SEWAGE, INDUSTRIAL WASTE OR OTHER POLLUTANTS DEMONSTRATES, AND THE DEPARTMENT FINDS, AFTER PUBLIC NOTIFICATION AND PARTICIPATION AS DESCRIBED IN PARAGRAPH (c)(4), THE PROPOSED DISCHARGE IS NECESSARY TO ACCOMMODATE IMPORTANT ECONOMIC OR SOCIAL DEVELOPMENT IN THE AREA IN WHICH THE SURFACE WATER IS LOCATED AND WILL RESULT IN ECONOMIC OR SOCIAL BENEFITS TO THE PUBLIC WHICH OUTWEIGH ANY WATER QUALITY DEGRADATION WHICH THE PROPOSED DISCHARGE IS EXPECTED TO CAUSE.

(c) COMPLIANCE WITH WATER QUALITY STANDARDS. A PROPOSED DISCHARGE TO HIGH QUALITY WATERS, ALONE OR IN COMBINATION WITH OTHER EXISTING AND ANTICIPATED DISCHARGES, SHALL NOT PRECLUDE ANY USE IN THE WATERS AND DOWNSTREAM FROM THE WATERS, NOR RESULT IN A VIOLATION OF ANY OF THE WATER QUALITY CRITERIA WHICH ARE APPLICABLE TO THE RECEIVING WATERS.

(d) SPECIAL PROVISIONS FOR SEWAGE FACILITIES CORRECTING PUBLIC HEALTH OR POLLUTION HAZARDS. A PROPOSED SEWAGE FACILITY THAT THE DEPARTMENT DETERMINES IS DESIGNED FOR THE PURPOSE OF CORRECTING PUBLIC HEALTH OR POLLUTION HAZARDS SHALL BE DEEMED TO SATISFY SUBSECTION (b).

(e) SOCIAL OR ECONOMIC JUSTIFICATION APPROVAL IN SEWAGE FACILITIES PLANNING AND APPROVAL. FOR A PROPONENT OF A NEW SEWAGE

FACILITY IN HIGH QUALITY WATERS WHO SEEKS TO DEMONSTRATE SOCIAL OR ECONOMIC JUSTIFICATION FOR LOWERING WATER QUALITY AS PART OF THE APPLICATION FOR AN OFFICIAL SEWAGE FACILITIES PLAN OR AN OFFICIAL PLAN REVISION PURSUANT TO CHAPTER 71 (RELATING TO ADMINISTRATION OF SEWAGE FACILITIES PLANNING PROGRAM), ALL OF THE FOLLOWING CONDITIONS SHALL APPLY:

(1) THE PROPONENT SHALL EVALUATE DISCHARGE ALTERNATIVES IN ACCORDANCE WITH §93.4d(a) (RELATING TO GENERAL REQUIREMENTS FOR HIGH QUALITY AND EXCEPTIONAL VALUE).

(2) THE PROPONENT SHALL COMPLETE AND SUBMIT AN SEJ IMPACT ANALYSIS AS PART OF THE SEWAGE FACILITIES PLANNING SUBMITTAL.

(3) THE DEPARTMENT WILL MAKE A DETERMINATION REGARDING THE SEJ IMPACT ANALYSIS FOR CONSISTENCY WITH PARAGRAPH (2) DURING ITS REVIEW OF THE OFFICIAL PLAN OR PLAN REVISION.

(4) UPON THE SUBMISSION OF A WASTEWATER DISCHARGE PERMIT APPLICATION, THE APPLICANT SHALL DOCUMENT THAT NONE OF THE FOLLOWING HAS OCCURRED:

(i) THERE HAS BEEN A MATERIAL CHANGE IN THE SCOPE OR CHARACTERISTICS OF THE PROJECT.

(ii) THERE HAS BEEN A CHANGE IN THE LAWS OR REGULATIONS AFFECTING THE SEWAGE FACILITIES PLANNING, WASTEWATER DISCHARGE, OR OTHER RELATED ASPECTS OF THE PROPOSED PROJECT.

(iii) THERE HAS BEEN A CHANGE IN TECHNOLOGY WHICH MAKES A NON-DISCHARGE ALTERNATIVE OR COMBINATION OF DISCHARGE AND NON-DISCHARGE ALTERNATIVES, ENVIRONMENTALLY SOUND AND ECONOMICALLY FEASIBLE.

(5) IF ANY OF THE CHANGES IN PARAGRAPH (4) HAS OCCURRED, THE APPLICANT SHALL SUBMIT A REVISED SEJ IMPACT ANALYSIS TO THE DEPARTMENT FOR REVIEW AND APPROVAL AS PART OF THE WASTEWATER DISCHARGE PERMIT APPLICATION.

(f) SPECIAL PROVISIONS FOR MINIMAL IMPACT DISCHARGES: IF A PROPOSED DISCHARGE TO HIGH QUALITY WATERS MEETS ONE OR MORE OF THE FOLLOWING CONDITIONS, THAT DISCHARGE MAINTAINS AND PROTECTS WATER QUALITY AND IS NOT SUBJECT TO SUBSECTION (b):

(1) THE DISCHARGE OF ANY POLLUTANT, ALONE OR IN COMBINATION WITH OTHER DISCHARGES INTO THOSE WATERS, UTILIZES 25 PERCENT OR LESS OF THE SURFACE WATER'S ASSIMILATIVE CAPACITY. TO COMPLY WITH THIS CONDITION, THE PROPOSED DISCHARGE SHALL MAINTAIN AND PROTECT WATER QUALITY BY SATISFYING AN EFFLUENT LIMIT ESTABLISHED BY THE DEPARTMENT THROUGH MATHEMATICAL MODELING BASED ON AN ANTIDegradation ALLOWANCE FOR THE REGULATED PARAMETER AS CALCULATED BY THE FOLLOWING FORMULA:

$$C_A = 0.25(C_{wo} - C_{rs}) + C_{rs}$$

WHERE C_A - ANTIDegradation ALLOWANCE FOR THE PARAMETER,

C_{wo} - WATER QUALITY CRITERION FOR THE PARAMETER, AND

C_{rs} - NATURAL QUALITY OF THE PARAMETER IN THE RECEIVING STREAM OR IN THE REFERENCE STREAM IF RECEIVING STREAM DATA IS NOT AVAILABLE

(2) THE DISCHARGE OF POLLUTANTS QUALIFIES FOR A GENERAL PERMIT UNDER §§92.81 AND 92.83 (RELATING TO GENERAL NPDES PERMITS AND INCLUSION OF INDIVIDUAL DISCHARGERS IN GENERAL NPDES PERMITS) AND THE TERMS AND CONDITIONS OF THE PERMIT.

§93.4c. EXCEPTIONAL VALUE WATERS.

(a) QUALIFYING AS EXCEPTIONAL VALUE WATERS. FOR A SURFACE WATER TO QUALIFY AS EXCEPTIONAL VALUE WATERS, THE DEPARTMENT MUST DETERMINE THAT THE WATER QUALITY MEETS CONDITIONS SET FORTH IN THIS SUBSECTION.

(1) CHEMISTRY TEST. ONE OR MORE OF THE FOLLOWING SHALL EXIST:

(i) WATER QUALITY MUST BE GENERALLY BETTER THAN THE WATER QUALITY CRITERIA IN §93.7, TABLE 3 (RELATING TO SPECIFIC WATER QUALITY CRITERIA) AND IN CHAPTER 16, APPENDIX A, TABLE 1 (RELATING TO WATER QUALITY CRITERIA FOR TOXIC SUBSTANCES) BASED ON WATER QUALITY ANALYSIS OBTAINED FROM ONE OR MORE GRAB SAMPLES COLLECTED AT REPRESENTATIVE STREAM FLOW CONDITIONS FOR THE FOLLOWING PARAMETERS:

<u>pH</u>	<u>alkalinity</u>	<u>dissolved oxygen</u>
<u>total dissolved solids</u>	<u>ammonia nitrogen</u>	<u>nitrite - nitrogen</u>
<u>nitrate - nitrogen</u>	<u>hardness</u>	<u>chloride</u>
<u>sulfate</u>	<u>iron</u>	<u>manganese</u>
<u>aluminum</u>	<u>arsenic*</u>	<u>cadmium*</u>
<u>chromium VI*</u>	<u>copper*</u>	<u>lead*</u>

~~nickel*~~ ~~zinc*~~
~~(where "x" means dissolved analyses are to be performed).~~

~~(ii) THE WATER IS DETERMINED BY THE DEPARTMENT TO BE OF NATURAL QUALITY.~~

~~(2) BIOLOGY TEST. ONE OF THE FOLLOWING SHALL EXIST:~~

~~(i) THE WATER QUALITY SHALL SUPPORT NON-IMPAIRED, OUTSTANDING AQUATIC COMMUNITIES AS DETERMINED BY THE DEPARTMENT USING PEER REVIEWED BIOLOGICAL ASSESSMENT PROCEDURES THAT CONSIDER PHYSICAL HABITAT, BENTHIC MACROINVERTEBRATES, OR FISHES BASED ON RAPID BIOASSESSMENT PROTOCOLS FOR USE IN STREAMS AND RIVERS: BENTHIC MACROINVERTEBRATES AND FISH, PLAFKIN, ET AL., (EPA/444/4-89-001).~~

~~(ii) THE WATER QUALITY SATISFIES OTHER PEER-REVIEWED BIOLOGICAL ASSESSMENT PROCEDURES THAT THE DEPARTMENT MAY APPROVE TO DETERMINE THE CONDITION OF THE AQUATIC COMMUNITY OF A SURFACE WATER.~~

~~(iii) THE SURFACE WATER HAS BEEN DESIGNATED A WILDERNESS TROUT STREAM BY THE FISH AND BOAT COMMISSION FOLLOWING PUBLIC NOTICE AND COMMENT.~~

~~(3) ADDITIONAL INFORMATION: THE DEPARTMENT MAY CONSIDER ADDITIONAL CHEMICAL OR BIOLOGICAL INFORMATION WHICH CHARACTERIZES OR INDICATES THE QUALITY OF A WATER IN MAKING ITS DETERMINATION.~~

~~(b) LEVEL OF PROTECTION FOR EXCEPTIONAL VALUE WATERS. THE QUALITY OF EXCEPTIONAL VALUE WATERS SHALL BE MAINTAINED AND PROTECTED.~~

~~§93.4d. GENERAL REQUIREMENTS FOR HIGH QUALITY AND EXCEPTIONAL VALUE WATERS.~~

~~(a) DISCHARGE ALTERNATIVES/USE OF BEST TECHNOLOGIES. A PERSON PLANNING OR PROPOSING A NEW, ADDITIONAL OR INCREASED DISCHARGE TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS MUST EVALUATE ALTERNATIVES TO THE DISCHARGE AND USE AN ALTERNATIVE THAT IS ENVIRONMENTALLY SOUND AND COST-EFFECTIVE WHEN COMPARED WITH THE COST OF THE PROPOSED STREAM DISCHARGE. A PROPOSED DISCHARGE SHALL USE THE BEST AVAILABLE COMBINATION OF COST-~~

EFFECTIVE TREATMENT, LAND DISPOSAL AND WASTEWATER REUSE TECHNOLOGIES.

(b) NONPOINT SOURCES. THE DEPARTMENT WILL IMPLEMENT PROGRAMS THAT WILL PROMOTE COST EFFECTIVE AND REASONABLE BEST MANAGEMENT PRACTICES FOR NONPOINT SOURCE CONTROL.

(c) DESIGNATION AND LISTING. HIGH QUALITY AND EXCEPTIONAL VALUE WATERS ARE LISTED IN §§93.9a-93.9z (RELATING TO DRAINAGE LISTS) FOLLOWING DESIGNATION THROUGH THE REGULATORY PROCESS.

(d) PROTECTION PENDING DESIGNATION. WHERE THE DEPARTMENT'S EVALUATION OF TECHNICAL DATA ESTABLISHES THAT A SURFACE WATER QUALIFIES AS HIGH QUALITY OR EXCEPTIONAL VALUE WATERS, THAT SURFACE WATER SHALL BE PROTECTED AS HIGH QUALITY OR EXCEPTIONAL VALUE WATERS, RESPECTIVELY, PENDING DESIGNATION.

§93.4c. PUBLIC PARTICIPATION IN HIGH QUALITY AND EXCEPTIONAL VALUE WATERS.

(a) SUBMISSION OF ANTIDEGRADATION EVALUATION REPORTS AND PETITIONS. A PERSON WHO PETITIONS THE BOARD FOR STREAM REDESIGNATION UNDER CHAPTER 23, APPENDIX A (RELATING TO SPECIAL PROCEDURES FOR PETITIONS FOR STREAM REDESIGNATIONS UNDER THE CLEAN STREAMS LAW AND CHAPTER 93—STATEMENT OF POLICY) MAY SUBMIT TO THE DEPARTMENT COMPLETE DOCUMENTATION OF AN ANTIDEGRADATION EVALUATION CONDUCTED BY A NON-DEPARTMENT ENTITY WITH A CONCLUSION CONCERNING ELIGIBILITY FOR ANTIDEGRADATION PROTECTION. THE DEPARTMENT WILL REVIEW THE ANTIDEGRADATION EVALUATION FOR COMPLETENESS AND WILL CONSIDER IF THE EVALUATION SUPPORTS THE PROPOSED REDESIGNATION WITHOUT ADDITIONAL INFORMATION.

(b) ASSESSMENT OF WATERS FOR HIGH QUALITY OR EXCEPTIONAL VALUE WATERS CLASSIFICATION. THE DEPARTMENT WILL PUBLISH IN THE PENNSYLVANIA BULLETIN AND IN A LOCAL NEWSPAPER OF GENERAL CIRCULATION NOTICE OF ITS INTENT TO ASSESS SURFACE WATERS FOR POTENTIAL CLASSIFICATION AS HIGH QUALITY OR EXCEPTIONAL VALUE WATERS. THE NOTICE WILL REQUEST SUBMITTAL OF TECHNICAL AND SCIENTIFIC INFORMATION CONCERNING THE WATER QUALITY OF THE WATERS TO BE ASSESSED FOR USE BY THE DEPARTMENT TO SUPPLEMENT ITS TECHNICAL EVALUATION. THE DEPARTMENT WILL SEND A COPY OF THE NOTICE TO ALL MUNICIPALITIES CONTAINING WATERS SUBJECT TO THE ASSESSMENT.

~~(c) PUBLIC PARTICIPATION REQUIREMENTS FOR OFFICIAL SEWAGE FACILITIES PLANS OR REVISIONS TO OFFICIAL PLANS IN HIGH QUALITY OR EXCEPTIONAL VALUE WATERS. A PROPONENT OF A SEWAGE FACILITY IN HIGH QUALITY OR EXCEPTIONAL VALUE WATERS SEEKING APPROVAL OF AN OFFICIAL PLAN OR REVISION MUST COMPLY WITH THE PUBLIC PARTICIPATION REQUIREMENTS IN CHAPTER 71, RELATING TO NOTICE OF ANTIDegradation CLASSIFICATION OF THE RECEIVING WATERS.~~

~~(d) PUBLIC PARTICIPATION REQUIREMENTS FOR PROPOSED DISCHARGES TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS. IN ADDITION TO THE PUBLIC PARTICIPATION REQUIREMENTS IN §§92.61, 92.63, AND 92.65, THE FOLLOWING REQUIREMENTS APPLY TO A PROPOSED DISCHARGE TO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS:~~

~~(1) PROOF OF PUBLICATION OF A NOTICE IN A LOCAL NEWSPAPER OF GENERAL CIRCULATION THAT THE APPLICANT INTENDS TO APPLY FOR A PERMIT TO DISCHARGE INTO HIGH QUALITY OR EXCEPTIONAL VALUE WATERS, AND SEEKS COMMENT FOR A 30 DAY PERIOD ON THE PROPOSAL. THE NOTICE MUST STATE THE NAME OF THE RECEIVING WATER AND ITS ANTIDegradation CLASSIFICATION, AND SHALL PROVIDE THE ADDRESS OF AN ACCESSIBLE PUBLIC LOCATION, SUCH AS A PUBLIC LIBRARY, WHERE INTERESTED PERSONS MAY REVIEW INFORMATION REGARDING THE DISCHARGE, INCLUDING ANY SOCIAL OR ECONOMIC JUSTIFICATION ANALYSES, AND ANY PUBLIC COMMENTS SUBMITTED TO THE APPLICANT REGARDING ITS PROPOSAL.~~

~~(2) THE APPLICANT SHALL PROVIDE THE DEPARTMENT WITH A COPY OF ALL PUBLIC COMMENTS RECEIVED AND A RESPONSE TO THE COMMENTS PRIOR TO THE DEPARTMENT'S REVIEW OF THE PROPOSAL.~~

~~(3) THE DEPARTMENT'S NOTICE OF COMPLETE APPLICATION SET FORTH IN SUBSECTION 92.61(a) SHALL NOTE THE ANTIDegradation CLASSIFICATION OF THE RECEIVING WATER.~~

~~(e) PUBLIC HEARINGS FOR DISCHARGES TO EXCEPTIONAL VALUE WATERS. THE DEPARTMENT WILL HOLD A PUBLIC HEARING ON ANY PROPOSED DISCHARGE INTO WATERS DESIGNATED AS EXCEPTIONAL VALUE WATERS.~~

§93.7 Specific water quality criteria.

* * * * *

(e) Table 5 contains groups of specific water quality criteria based upon water uses to be protected. When the symbols listed in Table 5 appear in the Water Uses Protected column in [§93-9] §§93.9a – 93.9z, they have the meaning listed in [the] Table 5. Exceptions to these standardized groupings will be indicated on a stream-by-stream or segment-by-segment basis by the words “Add” or “Delete” followed by the appropriate symbols described elsewhere in this chapter.

TABLE 5

Symbol	Water Uses Included	Specific Criteria
* * * * *		
[HQ-WWF	Statewide list plus High Quality Waters	Statewide list plus DO1 and Temp2
HQ-CWF	Statewide list plus High Quality Waters and Cold Water Fish	Statewide list plus DO6 and Temp1
HQ-TSF	Statewide list plus High Quality Waters and Trout Stocking	Statewide list plus DO1 and Temp3
EV	Statewide list plus Exceptional Value Waters}	Existing quality
* * * * *		

(g) TABLE 5A CONTAINS GROUPS OF SPECIFIC WATER QUALITY CRITERIA FOR HIGH QUALITY AND EXCEPTIONAL VALUE WATERS.

TABLE 5A

<u>SYMBOL</u>		<u>CATEGORY-SPECIFIC CRITERIA</u>

<u>SYMBOL</u>		<u>CATEGORY SPECIFIC CRITERIA</u>
<u>HQ-WWF</u>	<u>STATEWIDE LIST PLUS HIGH QUALITY WATERS</u>	<u>STATEWIDE LIST PLUS DO1 AND TEMP2</u>
<u>HQ-CWF</u>	<u>STATEWIDE LIST PLUS HIGH QUALITY WATERS AND COLD WATER FISH</u>	<u>STATEWIDE LIST PLUS DO6 AND TEMP1</u>
<u>HQ-TSF</u>	<u>STATEWIDE LIST PLUS HIGH QUALITY WATERS AND TROUT STOCKING</u>	<u>STATEWIDE LIST PLUS DO1 AND TEMP3</u>
<u>EV</u>	<u>STATEWIDE LIST PLUS EXCEPTIONAL VALUE WATERS</u>	<u>EXISTING QUALITY</u>

(Editor's Note: §93.7 is proposed to be amended in proposed amendments in a rulemaking package at 28 Pa.B. 4431 (August 29, 1998)).

NOTE: §93.9a-93.9z (relating to drainage lists) are proposed to be amended like the following example of an amended drainage list. "HQ" and "EV" would no longer be listed in the "Water Uses Protected" column, but in a new column titled "Antidegradation Classification". "EV" in the "Water Uses Protected" column would be replaced with the designated use of the water (in most cases, CWF - see editor's note below).

§93.9e. Drainage List C.

**Delaware River Basin in Pennsylvania
Delaware River**

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria	Antidegradation Classification

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria	Antidegradation Classification
1—Delaware River	Main Stem, Lackawaxen River to Tocks Island	Pike	WWF, MF	Delete Bae1, pH1 and TDS1. Add Bae5, pH4, Temp4, Temp9, TON, TDS3 Tur5 upstream of RM 254.75 and Tur6, downstream of RM 254.75, MBAS1 and Rad	
2—Unnamed Tributaries to Delaware River	Basins Lackawaxen River to Tocks Island	Pike	{HQ-CWF} CWF	None	HQ
2—Panther Creek	Basin	Pike	{HQ-CWF} CWF	None	HQ
2—Shohola Creek	Basin	Pike	{HQ-CWF} CWF	None	HQ
2—Twin Lakes Creek	Basin	Pike	{HQ-CWF} CWF	None	HQ
2—Pond Eddy Creek	Basin	Pike	{HQ-CWF} CWF	None	HQ
2—Bush Kill	Basin	Pike	{EV} CWF	None	EV
2—Rosetown Creek	Basin	Pike	{HQ-CWF} CWF, MF	None	HQ

Editor's Note: §§93.9a-93.9z are amended as follows:

In the "Water Uses Protected" column, "HQ" and "EV" are deleted and relocated in a new column and titled "Antidegradation Classification"; the designated uses (i.e., CWF, WWF, or TSF and MF, if listed) are retained in the column.

The entry for the "Water Uses Protected" column for EVs is "CWF" for all except the following streams:

Drainage List	Stream	Zone	County	Water Uses Protected
(§93.9f Pa. Code p. 93-53)	4 Peters Creek	Basin	Berks	WWF
(§93.9g Pa. Code p. 93-62)	5 Broad Run	Basin	Chester	TSF, MF
(§93.9o Pa. Code p. 93-129)	5 Elders Run	Basin	Lancaster	TSF
(§93.9o Pa. Code p. 93-134)	3 Black Run	Basin, Source to Unnamed Tributary at RM 2.50	Chester	TSF, MF
(§93.9o Pa. Code p. 93-134)	3 Unnamed Tributary to Octoraro Creek at RM 13.60	Basin	Chester	TSF, MF
(§93.9o Pa. Code p. 93-135)	4 Jordan Run	Basin	Chester	TSF, MF
(§93.9o Pa. Code p. 93-135)	4 Barren Brook	Basin	Chester	TSF, MF

(Editor's Note: Sections 93.9a-93.9z are proposed to be changed in proposed amendments at 28 Pa.B. 4431 (August 29, 1998)).

CHAPTER 95. WASTEWATER TREATMENT REQUIREMENTS

§95.1. General requirements.

~~[(a)]~~ Specific treatment requirements and effluent limitations for each waste discharge shall be established based on the more stringent of ~~[subsections (b) and (c)]~~ ANTIDEGRADATION REQUIREMENTS UNDER §§93.4a - 93.4[e]d (RELATING TO ANTIDEGRADATION REQUIREMENTS), the water quality criteria specified in Chapter 93 (relating to water quality standards), the applicable treatment requirements and effluent limitations to which a discharge is subject under 33 U.S.C.A. §1251 or the treatment requirements and effluent limitations of this title provided that specific treatment requirements and effluent limitations for waste discharges from overflows as defined in §94.1 (relating to definitions) shall be established based on applicable treatment requirements and effluent limitations to which ~~[such]~~ THE discharge is subject under 33 U.S.C.A. §1251 *et seq.*

~~[(b) Waters having a water use designated as "High Quality Waters" in §§93.6 and 93.9 (relating to general water quality criteria; and designated water uses and water quality criteria) shall be maintained and protected at their existing quality or enhanced, unless the following are affirmatively demonstrated by the proposed discharger of sewage, industrial wastes, or other pollutants:~~

~~(1) The proposed new, additional or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of significant public value.~~

~~(2) The proposed discharge or discharges, alone or in combination with other anticipated discharges of pollutants to the waters, will not preclude any use presently possible in the waters and downstream from the waters, and will not result in a violation of any of the numerical water quality criteria specified in §93.9 which are applicable to the receiving waters.~~

~~(c) Waters having a use designated as "Exceptional Value Waters" in §93.9 shall be maintained and protected at a minimum at their existing quality. The Department will hold a public hearing on any proposed discharge into waters having a water use designated as "Exceptional Value Waters" in §93.9.~~

~~(d) A project or development which would result in a new, additional or increased discharge or discharges of sewage, industrial wastes, or other pollutants into waters having a water use designated as "High Quality Waters" in §93.9 will be permitted only in compliance with the requirements of (b) and, furthermore, shall be required to:~~

~~(1) Utilize the best available combination of treatment and land disposal technologies and practices for the wastes, where the land disposal would be economically feasible, environmentally sound and consistent with other provisions of this title; or~~

~~(2) If the land disposal is not economically feasible, is not environmentally sound or cannot be accomplished consistent with other provisions of this title, utilize the best available technologies and practices for the reuse and discharge of the wastes.]~~

(Editor's Note: §95.1 is proposed to be amended in proposed regulations published at 28 Pa.B. 4431 (August 28, 1998)).



**REPORT TO THE ENVIRONMENTAL QUALITY BOARD
RESPONSE TO COMMENTS
CONCERNING PROPOSED AMENDMENTS
TO 25 PA. CODE CHAPTERS 92, 93 AND 95
PENNSYLVANIA WATER QUALITY STANDARDS
RELATING TO ANTIDegradation**

In January 1997, the Department recommended proposed changes to 25 Pa Code, §§ 92.81, 92.83, 93.1, 93.3, 93.4, 93.7, 93.9a-93.9z, and 95.1; and the addition of § 93.4a, relating to water quality standards antidegradation requirements, to the Environmental Quality Board. These proposed regulatory changes were developed to respond to EPA's disapproval of portions of Pennsylvania's antidegradation regulations. The proposed rulemaking was based, in part, on input from a regulatory negotiation stakeholders group, and considered public comments received during an earlier public comment period.

The Environmental Quality Board approved the proposed rulemaking on January 21, 1997. The proposal was published in the Pennsylvania Bulletin on March 22, 1997, (27 Pa B 1459). It included provisions for a 60-day public comment period and a public hearing to receive additional comments. The EQB public hearing was held on May 7, 1997 at the Rachel Carson State Office Building in Harrisburg. The proposed rulemaking public comment period concluded on May 21, 1997. The Department also held a public hearing on May 7, 1997 to receive additional information on the implementation of these amendments through a new Chapter 15, Statement of Policy.

Nearly 1700 comments were received on the proposal. This includes 6 witnesses at the May 7, 1997 public hearings. The comments are considered below:

Supportive Comments

Although several commentators acknowledged that some of the provisions of the proposal are acceptable, they still suggested that EQB withdraw DEP's entire proposal so it can be rewritten.

Neutral Comments

Two commentators (13, 573) submitted comments indicating they do not know enough to form a valid opinion on the proposal. They urge the Department and EQB to decide what is best and do what is right. Another commentator indicated that Pennsylvania's standards should reflect our best efforts to promote clean, healthy water. (1687)

Opposing Comments

The comments, except for the two neutral ones, and all the testimony received by the EQB or Department during the hearings, were opposed to the proposed regulatory revisions. The reasons the commentators oppose the proposal vary greatly. There are claims that it is more stringent than necessary, exceeds federal requirements, and will cause regulatory and/or economic hardship. But there are also claims that it is less protective than federal requirements, and is an environmental setback from

DEP's original antidegradation and Special Protection program. This dichotomy of reasons for opposing the regulatory recommendations generally followed a pattern of affiliation. Regulated parties (including industry, business, builders and/or developers) oppose it because they feel it is too stringent. Other regulatory agencies (including U.S. EPA), environmental and/or conservation groups oppose it because they feel it is not stringent enough.

Another group of commentators stated that the proposed regulatory amendments should be rejected by the EQB, but did not provide specific reasons or address particular issues.

The following is a summary of specific issues or comments raised by commentators during the proposed rulemaking public comment period, and the Department's response to each issue or comment:

Comment - Approximately 410 commentators asked the EQB to reject the proposal without explaining their objections, why it should be rejected, how it should be revised, or recommending alternative proposals. (2-5, 7-10, 12, 27, 29-32, 34, 36, 38-40, 42-44, 47, 48, 51, 53, 55, 59, 62, 63, 65, 68, 73, 75, 76, 81, 82-84, 86, 87, 93, 94, 96, 101-103, 106-109, 111, 115, 118, 125-132, 134-136, 141, 145, 146, 148, 151, 154-156, 159, 161, 164, 170-171, 175-178, 180, 186, 189, 190, 192, 193, 197, 198, 201, 204, 205, 208, 209, 212, 213, 217-218, 220, 222, 224, 226, 228, 231, 232, 239, 242, 247-250, 253, 254, 257-260, 265-268, 270, 272, 273, 275, 283, 286, 291, 295, 297, 303, 310-313, 323-327, 330-339, 341-343, 347, 348, 351, 354, 355, 357, 358, 360-362, 370-374, 379, 386, 388, 393, 400, 405, 410, 414, 419, 426, 428, 429, 431, 433, 435, 439-445, 448-450, 452, 454, 455, 457-461, 477-480, 482-484, 486-488, 490, 492-499, 501-513, 535, 548, 549, 556-559, 561, 571, 577, 602, 618, 625, 626, 635, 638, 642, 645, 651, 652, 658, 662, 665, 681, 691, 692, 694, 697, 699, 729, 741, 742, 776-778, 781, 784, 804, 829, 832, 834-836, 1177-1182, 1184-1186, 1190-1192, 1194, 1195, 1197, 1209, 1215-1217, 1227-1233, 1250, 1313, 1316, 1317, 1336, 1351, 1361, 1389, 1390, 1411, 1416, 1456, 1459, 1484, 1492, 1574, 1575, 1586-1591, 1603, 1623, 1624, 1626, 1627, 1629-1636, 1638, 1669, 1671-1673, 1680)

An additional 260 commentators also asked the EQB to reject the DEP's current antidegradation proposal, but added that the EQB should adopt what the commentators described as the simpler, better standards of the EPA. Some of these commentators also said that any change in regulations that would lower water quality standards is unacceptable, and emphasized that the issue of clean water is something that must not be compromised. (6, 14-16, 18-26, 28, 33, 35, 37, 41, 45, 46, 49, 50, 52, 54, 56-58, 60, 61, 64, 66, 67, 69-72, 74, 77, 80, 85, 88-92, 95, 98-100, 104, 105, 110, 112-114, 116, 120, 121-124, 133, 137-140, 142-144, 147, 149, 150, 158, 160, 163, 165-169, 172, 179, 181-185, 187, 188, 191, 194, 199, 202, 203, 206, 207, 210, 211, 214-216, 219, 221, 225, 227, 229, 230, 233, 234, 241, 243-246, 251, 252, 255, 256, 261-264, 269, 274, 278, 285, 287, 288, 290, 292, 293, 296, 300, 302, 306, 314, 315, 319, 320, 328, 329, 340, 344-346, 349, 350, 353, 356, 359, 366, 380, 381, 389, 390, 394, 395, 407, 409, 413, 418, 421-425, 427, 436, 437, 447, 451, 453, 456, 475, 481, 485, 489, 491, 500, 543, 545, 550-552, 560, 562, 572, 576, 582-584, 627-629, 633, 634, 636, 637, 641, 643, 644, 647, 649, 650, 656, 659, 664, 679, 693, 695, 700, 738-740, 779, 780, 783, 817, 828, 1183, 1187-1189, 1193, 1210, 1214, 1218, 1234, 1315, 1320, 1350, 1386, 1387, 1399, 1476, 1584, 1585, 1602, 1628, 1637, 1639, 1667)

Approximately 460 commentators recommended that the EQB reject the proposal, suggesting that if adopted, the proposed regulations would lower water quality in Pennsylvania. These commentators indicated that standards must protect our waterways from degradation. Most of these commentators also indicated that new regulations must provide for no new discharges into EV streams; return to the current standard for selecting HQ streams; and provide interim existing use protection while any proposal to reclassify a stream is being reviewed. (237, 322, 396, 397, 408, 463, 536, 575, 669, 841-1066, 1068-1176, 1337, 1494-1569, 1570, 1576, 1609)

Many commentators suggested that the EQB withdraw the proposal, and that it be rewritten and republished in the *Pennsylvania Bulletin* for public review and comment. Most commentators, regardless of their affiliation or their stated objections, recommended that the proposal be replaced by final regulations that are similar to those promulgated by the EPA in December 1996. Also, the Independent Regulatory Review Commission (IRRC) requested that DEP provide compelling reasons why Pennsylvania's antidegradation regulations need to be more stringent than the federal requirements. (1694)

EPA Region 3 commended PADEP for its efforts to adopt comprehensive language into regulation to address the important implementation issues. However, since there is such a large response from the public expressing a preference for the "simpler, clearer" Federal language, they strongly recommended that the Commonwealth clearly state its "...baseline antidegradation policy ...", perhaps in a separate policy statement inserted in the regulation, which clarifies what is intended as policy vs. implementation. (1490)

Response - Since there was an overwhelming response objecting to the proposed antidegradation regulation, the Department is recommending that the original proposal be reformatted and revised. This reformatting and the revisions to the proposal are believed to result in a simpler antidegradation regulation that is consistent with the provisions and requirements of the federal antidegradation policy.

Many of the commentators expressed that the Board should adopt EPA's allegedly simpler antidegradation water quality standards. EPA Region 3 (1490) acknowledged that this notion that EPA's regulation is simpler is a misconception that had likely been created by the Department's initiative to fully disclose how the antidegradation program will be implemented. EPA also said the December 1996 federal promulgation provides the Commonwealth with an antidegradation policy, but does not prescribe implementation methods.

An Advance Notice of Final Rulemaking was published in the Pennsylvania Bulletin on January 23, 1999 (29 Pa.B. 455) to announce the Department's recommendations prior to returning to the EQB for final rulemaking, allowing for additional public review and comments. The Department held three (3) combined public meetings/hearings on the ANFR.

There are four provisions in this proposed regulatory package that are more expansive than the federal regulations. First, the proposed definition of "Exceptional Value Waters" is more expansive in scope than the federal definition of Tier 3 waters. The proposed definition of Exceptional Value Waters (EV) includes outstanding National, State, regional and local waters. The scope of federal regulations includes only outstanding national waters. The EQB believes that there is a compelling interest in protecting outstanding regional and local waters, as well as outstanding national and state waters. Next is the inclusion of a requirement that proposed dischargers to High Quality and Exceptional Value Waters must evaluate alternatives to stream discharge, and where cost-effective, implement an alternative which is environmentally sound and has the least adverse impact on water quality. Although there is no equivalent federal provision, Pennsylvania has had a similar provision in Section 95.1 since 1980 which has proved workable and effective. Third, the Pennsylvania regulations contain extensive public participation provisions for the assessment of waters and review of evaluations and petitions for HQ and EV designation, including a provision for public meetings and fact finding hearings to obtain information regarding these proceedings. Fourth, the Department must hold a public hearing, when requested by an interested person, on a new or expanded discharge to waters classified as EV. This is a modification of an existing requirement in §95.1(c) wherein a public hearing is required for all new or expanded discharges to EV waters, even if such hearing is not requested. The EQB believes that public participation opportunities are vital in the antidegradation program in both surface water classifications of HQ and EV and in proposed discharges to EV waters.

Comment - The quality of PA's waters has improved due to stronger regulations. Continue to keep tight control on what is discharged from local industries into the waters. Do not lower the protection we currently have achieved. We need stronger protection and stronger antidegradation laws. (1, 11, 17, 78, 97, 119, 153, 157, 162, 174, 195, 196, 200, 223, 235, 236, 277, 284, 289, 294, 298, 307, 309, 317, 318, 376, 378, 383, 398, 399, 430, 432, 464-469, 516, 517, 523, 524, 530, 537-539, 544, 565, 567, 568, 570, 574, 578, 581, 586, 589, 595, 600, 601, 604-606, 611, 613, 614, 616, 621, 623, 624, 646, 648, 653, 660, 666, 668, 670, 674, 678, 680, 688, 696, 705, 725, 744, 746-775, 785, 837, 838, 1196, 1198, 1205, 1220, 1249, 1346, 1354, 1355, 1368, 1408, 1413, 1476, 1478, 1479, 1482, 1483, 1487, 1488, 1489, 1491, 1570-1573, 1576, 1582, 1592, 1609, 1625, 1640, 1668, 1679, 1681, 1682, 1685, 1689, 1690) We should be phasing out all permitted discharges and protecting all streams at least to current levels. Zero Discharge is mandated in the Clean Water Act. (515, 744)

Response - The Department agrees that the Clean Water Act contains provisions that encourage a goal of zero discharge to surface waters. The Department encourages, and where appropriate, requires waste minimization, discharge reduction and alternatives to stream discharge where technically and economically feasible. The Department places a strong emphasis on promoting pollution prevention. Specific language on pollution prevention was included in the final regulation at §93.4c(b)(1)(i)(A).

Comment - The language in the "existing uses" section is insufficient. (472, 520, 683, 801, 1419) The Department should return to the current standard for selecting HQ streams, and provide

interim existing use protection while reclassification is reviewed, without delays, without loopholes, and without degradation. (398, 399, 515, 547, 597, 830, 831, 1201, 1219, 1246) Unfortunately, DEP's proposal says that existing uses will be protected only after DEP evaluates the technical data. Until then, DEP is under no obligation to protect the existing uses. The Clean Water Act requires that 'existing in-stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.' (1, 11, 79, 173, 401, 415, 417, 474, 531, 538, 701, 746-775, 1337, 1454, 1458, 1480, 1483, 1485, 1489, 1490, 1570-1573, 1578, 1610, 1679, 1682, 1684, 1685, 1691) The proposed amendments should also elaborate on how the quality of EV Waters is to be "maintained and protected". (734, 1490)

Response - The final regulations at § 93.4a(b) protect existing uses as required by federal regulations by tracking the federal protection standard at 40 CFR § 131.12(a)(1). Section 93.4c(a)(1)(i) specifies that existing use protection shall be provided when the Department's evaluation of information indicates that a surface water attains or has attained an existing use. As such, existing use protection is provided based on the best available information that has been provided to the Department. The final determination on existing use protection is made in the context of a final Department permit or approval action. There is no way for such protection to be provided without a Department evaluation, just as a Department permit or approval cannot be issued by an entity other than the Department. Such evaluations are conducted based on the best available information during a permit or approval proceeding. Both the public and the person(s) seeking the permit or approval have the opportunity in the permit or approval proceeding to submit supplemental information regarding the existing use of the water.

The maintenance and protection of HQ and EV waters occurs through the implementation of antidegradation requirements. For example, when wastewater discharges are proposed, nondischarge alternatives must be utilized where they are cost-effective and environmentally sound. If no such alternative exists, the discharger must demonstrate that its' discharge will not adversely measurably change the long-term average water quality of the receiving waters. Other activities which require a Department permit or approval which may adversely affect an HQ or EV water will not be authorized until a demonstration has been made showing how the activity will not adversely affect existing quality and will maintain and protect such quality. With regard to nonpoint sources, the final regulation tracks the federal regulations by specifying that the Department will assure that cost-effective and reasonable best management practices for nonpoint source control.

Comment - The Department should not remove HQ or EV from the list of protected water uses in § 93.3, removing EPA oversight and approval for any proposed changes in stream designation. (195, 238, 271, 276, 279-282, 299, 301, 304, 308, 316, 321, 363-365, 367-369, 375, 377, 384, 382, 385, 387, 391, 392, 403, 404, 406, 412, 434, 438, 446, 462, 515, 538, 541, 546, 547, 553-555, 579, 580, 597, 632, 639, 640, 654, 655, 663, 698, 701, 734, 743, 782, 818-820, 833, 839, 1199, 1202-1204, 1206-1208, 1211-1213, 1235, 1314, 1337, 1388, 1412, 1570-1572, 1576, 1601, 401, 415, 417, 474, 531, 540, 791, 1364, 1419, 1421-1423, 1454, 1480, 1485, 1489, 1577-1579, 1581, 1609, 1619, 1644, 1668, 1676, 1679, 1685) If these

categories are to be removed as protected water uses there should be some assurance to prevent DEP from independently (without EQB or EPA approvals) downgrading waters from these special protection classifications. Suggests using specific language found in the Conservation Stakeholders' report to provide this safeguard. (117, 519, 1485, 1570, 1675)

Response - In response to numerous comments, DEP has abandoned its proposal to eliminate EV and HQ as uses and has maintained High Quality and Exceptional Value Waters as protected water uses. This approach has been in place since 1978 and has proved workable since it integrates antidegradation management categories into the water quality standards program. EPA questioned the 3/22/97 proposal which would have removed HQ and EV waters as protected uses. The existing quality of HQ and EV waters must be protected regardless of whether the waters are protected uses or not. Moreover, retention of uses for HQ and EV waters was supported by a majority of persons commenting on the issue.

Comment - Approximately 220 commentators were opposed to allowing general NPDES permits in HQ streams. General NPDES permits are not tracked by DEP, so they would have no way of knowing how much degradation is taking place in any watershed until it was too late. (195, 238, 412, 476, 515, 521, 532, 538, 563, 590, 597, 609, 612, 615, 631, 701, 724, 734, 790, 839, 1067, 1221-1226, 1236-1246, 1251-1312, 1318, 1319, 1321-1335, 1337, 1338-1340, 1353, 1356-1358, 1360, 1362, 1363, 1369-1385, 1394-1398, 1400-1404, 1406, 1414, 1415, 1419, 1424-1427, 1457, 1458, 1460-1471, 1474, 1476, 1480, 1485, 1486, 1489, 1570-1572, 1576, 1578, 1643, 1645-1662, 1668, 1692) If general permits are allowed, then additional review should be made to ensure that water quality is not being degraded. This review should be stricter than for the use of GP's in Tier 1 waters. It should include periodic review of the use of GP's in watersheds to ensure that the cumulative use of the GP's is not degrading the waters. There was a consensus during the regulatory negotiations that preceded this proposed rulemaking that some activities covered by general permits might be applicable to HQ watersheds if they pose no potential threat to water quality. DEP should describe which permits might or might not qualify for use in HQ watersheds. (401, 415, 417, 474, 531, 585, 610, 672, 708, 726, 802, 1342, 1343, 1352, 1417, 1454, 1616, 1620, 1675, 1676, 1684)

EPA Region 3 (1490) commented that they will require a demonstration that *de minimis* dischargers will not have an impact on HQ waters, either through criteria which must be met before a discharger can be eligible for a general permit in an HQ watershed or through special conditions placed in the general permit that would apply in HQ waters. As a result, EPA has determined that this regulatory action will require an amendment to current general permits issued by the Commonwealth, and that these types of modifications to the Commonwealth's NPDES regulation will require EPA approval under 40 CFR § 123.62(b)(4). EPA also explains that such a regulatory revision will be effective upon EPA approval and not immediately upon adoption by the Commonwealth, as is the case for water quality standards regulations.

Response - The final regulation does not address the requirement for an individual permit in HQ watersheds. As part of its Regulatory Basics Initiative (RBI) proposing revisions to Chapter

92, the Department proposed allowing the use of general NPDES permits in HQ watersheds. The Department received a substantial number of comments on that proposal and will address them in that rulemaking package. The *de minimis* provisions for certain minimal impact discharges to HQ Waters without SEJ have been eliminated in response to comments. The 25% *de minimis* test has been removed because it has proved to be of questionable utility.

Comment - DEP originally could designate “watersheds” as HQ or EV. The proposed regulations, however, provide only for the designation of “surface waters” as HQ or EV. (238, 403, 538, 791, 1364, 1421-1423, 1458, 1485, 1489, 1570, 1582, 1619, 1640, 1644, 1675)
Disappointed that DEP’s proposal does not mention protection for wetlands; EPA’s regulations gives protection to wetlands. This proposal does not provide protection for seeps, springs and wetlands, but should not be ignored to provide overall “watershed” protection not just “surface water” protection. How can wetlands be given HQ or EV protection if the biological criteria to make a “surface water” HQ or EV are based on streams? (195, 238, 271, 276, 279-282, 299, 301, 304, 305, 308, 316, 321, 363-365, 367-369, 375, 377, 382, 385, 387, 391, 392, 401, 402, 411, 412, 415-417, 434, 438, 446, 462, 470, 474, 476, 518, 521, 527, 531, 532, 541, 546, 547, 553-555, 563, 579, 580, 588, 590, 597, 609, 612, 615, 639, 640, 654, 655, 663, 698, 701, 724, 734, 743, 746-775, 782, 790, 801, 818-820, 833, 839, 1067, 1199, 1202-1204, 1206-1208, 1211-1213, 1221-1226, 1235-1245, 1246, 1251-1312, 1314, 1318, 1319, 1321-1335, 1337, 1338-1340, 1344, 1353, 1356-1358, 1360, 1362, 1363, 1369-1385, 1388, 1394-1398, 1400-1404, 1406, 1412, 1414, 1415, 1419, 1424-1427, 1454, 1457, 1460-1471, 1474, 1479, 1480, 1485, 1489, 1571-1573, 1577, 1579, 1581, 1601, 1609, 1610, 1643, 1645-1662, 1664, 1676, 1679, 1691)

EPA Region 3 also requested that the scope of the proposed definition be clarified since the definition of *Surface waters* does not include the term “watershed”, and describe how it relates to the term “waters of the Commonwealth” found in § 93.2. (1490)

Response - The definition of “surface waters” is equivalent to the federal scope of waters protected in the water quality standards program (“Waters of the U.S.”) at 40 CFR § 122.2. Wetlands are included in this definition. Stream classifications will continue to be made on a basin basis. Moreover, the Department has emphasized the “watershed” approach and the recommendations of the 21st Century Environment Commission in several ways in this regulation, most notably in the definition of “Coordinated Water Quality Protective Measures” which provides for the protection of watershed corridors as EV waters where local or regional governments have adopted sound land use water quality protective measures in waters which have the water quality of High Quality Waters or higher. The definition of “Water Quality Protective Measures” also emphasizes watersheds and must be met for certain outstanding state and national resource waters to become EV.

Comment - There is insufficient protection for endangered species. The Department should not remove “*the presence of endangered species*” as an EV selection criterion. The requirement concerning the presence of either endangered or threatened species or their habitat is ambiguous. It should simply state that if Federal or Pennsylvania threatened or endangered species or habitat are present, no activity will be permitted that could adversely affect either

the species or the habitat. There should be no added requirement that it be listed in the PNDI. PNDI is one of several databases that are used to house information about the location of state and federally listed threatened and endangered species. It should not be considered as the sole source of such information. (1, 11, 79, 153, 162, 173, 174, 195, 238, 401, 406, 415, 417, 472, 474, 515, 520, 531, 538, 597, 683, 701, 734, 1419, 1454, 1458, 1480, 1485, 1571, 1572, 1675, 1679, 1684)

Another commentator agrees that this language should not contain the phrase "listed in the Pennsylvania Natural Diversity Inventory' PNDI". But they are more concerned that this reference to PNDI could cause some confusion implying that special protection is to be afforded to every single species listed on the PNDI. Therefore, they suggest that this language should be amended to remove the PNDI reference, and that the implementation or definitions for "limited", "confirmed", and "aquatic species" are further clarified. They contend that modern society cannot continue to operate on the basis that all species must be preserved at any cost. They believe the human need for food, fiber, shelter and energy should have priority over the protection of endangered species. (1596)

Response - The Department and EPA Region 3 believe that the protection of endangered species and their habitat are a fundamental requirement of Tier 1 protection of existing uses. Pennsylvania's water quality criteria protect threatened and endangered species in all waters of the Commonwealth. In response to comments, DEP has modified the language in § 93.4c(a)(2); DEP agrees that the PNDI database is not "all inclusive". Other organizations, such as natural resource agencies, museums, and universities may have information about threatened and endangered species that have not yet been provided to PNDI. By referencing PNDI in § 93.4c(a)(2), DEP did not intend to imply that valid information from other agencies would not be considered. Therefore, the phrase "... listed in the Pennsylvania Natural Diversity Inventory (PNDI)..." has been removed from § 93.4c(a)(2).

Comment - Existing uses and the antidegradation policy should apply to more than just point source discharges. The reference to *Discharge* under the level of protection should be replaced with *Activities*. It should apply to all activities that could affect water quality. Strong non-point source pollution control language is also essential. (195, 238, 401, 403, 412, 415, 417, 472, 474, 520, 531, 538, 597, 683, 701, 734, 745, 791, 839, 1246, 1337, 1364, 1419, 1421-1423, 1454, 1458, 1476, 1480, 1485, 1489, 1570-1572, 1577, 1581, 1582, 1619, 1644, 1663, 1666, 1668, 1679, 1684, 1691)

The Federal antidegradation policy also refers to "waters", although actions considered to potentially lower water quality include those in the watershed as a whole and not merely in the "water". (1490)

No activities that would degrade water quality in HQ and EV streams should be allowed. (515, 542, 1572, 1682, 1684, 1691, 1692)

Response - The scope of activities subject to review is consistent with EPA's regulations. All existing uses must be maintained and protected. This protection occurs during the evaluation of an application for a Department permit or approval which could impact a surface water.

To clarify the applicability to non-point sources, the Department has inserted language at §93.4c(b)(2) of its final regulations that tracks the federal language, which provides that cost-effective and reasonable best management practices for non-point source pollutant control shall be achieved.

Comment - DEP's proposed requirement to pass both a biological and a chemical test used to qualify HQ streams is exceedingly stringent, leaving many outstanding streams unprotected. A stream should not be required to pass both a chemistry and a biological test to qualify as HQ waters. EPA considers only a water chemistry (quality) test. If water quality is better than standards the stream should be given HQ protection. The commentators indicate that EPA stated in its final rule that a violation of one parameter should not disqualify a stream from HQ protection. (1, 11, 79, 153, 162, 173, 174, 195, 387, 398, 399, 401, 403, 412, 415, 417, 474, 476, 515, 531, 538, 597, 701, 734, 791, 830, 839, 1200, 1246, 1337, 1364, 1412, 1419, 1421-1423, 1454, 1458, 1485, 1489, 1570, 1571-1573, 1576-1578, 1581, 1619, 1644, 1668, 1675, 1676, 1679, 1684, 1685, 1694) In the absence of biological data, which is a better long-term indicator of water quality, the commentators recommend that the chemistry test be based on water quality analysis obtained from more than one grab sample and include volatile organic compounds (VOC's). (1485)

It was suggested that, based on recent studies of the DEP's proposed scores for HQ and EV waters classifications, many current and potential HQ and EV streams would be eliminated from the Special Protection Program. (701)

IRRC recommends that the EQB amend the regulation to specify the evaluation criteria for the biology test for HQ and EV streams to clearly define or differentiate between nonimpaired high quality and nonimpaired outstanding aquatic communities since this could be the deciding factor between a stream being HQ or EV. (1694)

EPA Region 3 requested confirmation that it is PADEP's intent to consider the chemistry test as only a screening tool, and that the weight of evidence is in the biology test. They believe that the chemistry test alone is not statistically adequate to disqualify a water from special protection. Certain chemistry test parameters are based on criteria levels that are intended to support the public water supply use and are more stringent than are required for aquatic life use protection. Compliance with these water supply use criteria should not be expected to limit high quality protection of streams for the purposes of aquatic life uses. (1490)

Response - The Department has clarified that a watershed can qualify for HQ designation based on passing either the water quality chemistry or biological test; the chemistry test has been modified to be a "long-term" test as opposed to a grab sample test.

DEP agrees the chemical parameters should be consistent with the HQ/EV definitions. The chemical parameters are specific to levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. DEP agrees that nitrite plus nitrate nitrogen, manganese, sulfate and total dissolved solids are water quality criteria designed to protect a potable water supply use and are therefore not necessary to determine whether a surface water meets the HQ/EV definition. They have been deleted from the final regulation. Total recoverable aluminum, dissolved arsenic, cadmium, copper, lead, nickel, zinc, and temperature have been added because these are naturally occurring aquatic life related compounds. The list of chemicals, when reviewed on a long-term basis, tells the "story" of the quality of the stream.

Those streams currently meeting HQ or EV standards will continue to be protected as such by the Department.

In response to the comment, and to eliminate confusion, the term "nonimpaired" has been eliminated from the final regulation.

Comment - The PFBC suggests that Ecoregion Reference streams used in the RBP evaluation of Special Protection candidate streams should be immediately designated as EV Waters because of their ecological significance. (1675)

Response - The EQB will continue to designate EV Waters based on whether they meet the criteria for inclusion as EV waters; these qualifying criteria are set forth at § 93.4b(b).

Comment - Under DEP's proposal polluters could damage streams and then claim that they don't meet the standards and ask for a roll back to a lower designation. (401, 415, 417, 474, 531, 1454, 1573, 1579, 1582)

Response - Dischargers will not be able to damage streams and then claim that they don't meet the standards. This is contrary to state and federal requirements and protection of existing uses which provides that if a water attains an existing use on or after November 28, 1975, that existing use must be maintained and protected. Stream uses cannot be designated to uses that do not protect existing uses.

Comment - DEP proposes a system where it could go back and redesignate streams to lower categories than current uses, all without EPA being able to object. DEP would give itself the power to undo all the hard work done to upgrade the stream uses in the state, and therefore undo all the protection that all of us have fought so hard to achieve. (701, 1573) Existing HQ and EV designations should be "grandfathered" allowing for ongoing protection, not affected by the proposed regulatory changes. (1570)

If it is the Commonwealth's intent to remove the current HQ or EV designations from any of the current Special Protection Waters, the Commonwealth would have to provide justification, which would be reviewable by EPA and the public, in accordance with §131.10(j)(2). Although EPA would not have authority to review and approve waters that will be listed in the future based on the proposed management categories scenario,

antidegradation is still a water quality standard and would need to be treated as such for purposes of Section 401 certification and other situations requiring compliance with water quality standards. (1490)

Response - In the final regulation, DEP has abandoned its proposal to delete HQ and EV waters as protected uses and has thus addressed the commentator's concerns. HQ and EV waters will continue to be protected as such.

Comment - Opposes the use of the minimal impact discharge provision (using up to 25% of the stream's assimilative capacity). This has no basis in federal regulations. Dischargers should be required to demonstrate that environmentally sound alternatives are cost-prohibitive, not simply that they are not cost-effective as proposed in § 93.4d(a). (195, 238, 384, 401, 403, 412, 415, 417, 474, 476, 531, 538, 597, 631, 701, 734, 745-775, 791, 839, 1246, 1364, 1337, 1366, 1421-1423, 1454, 1458, 1485, 1486, 1489, 1571-1573, 1576-1579, 1619, 1644, 1668, 1691, 1692) IRRC recommends that the DEP and EQB consider the conservationists' concerns, and if they opt to retain use of this provision, that DEP and EQB must explain and further justify its use. (1694)

HQ streams should not be allowed to have a discharge into them that exceeds 10% of the stream's ability to assimilate those discharges. The proposed 25% is much too high. It is proposed that dischargers who use 25% or less of the assimilative capacity of a stream will not be required to demonstrate social or economic justification. (476, 1676, 1684)

Public hearings should be held on any proposed discharge to HQ waters. (195, 538, 1337, 1458, 1571) IRRC, on the other hand, suggested that there is no need to hold a public hearing on a proposed discharge into an EV stream if no one is interested in testifying. Therefore, §§ 92.61(d) and (e) should require that DEP hold a public hearing on a pending application if it is requested. (1694)

Response - In response to comments, the final regulations remove the minimal impact discharge 25% SEJ provision. The final regulations retain the provisions that all dischargers to HQ or EV waters are required to evaluate environmentally sound non-discharge alternatives.

The Department will continue to require that applicants of proposed activities within EV waters demonstrate that the proposed activity will not have an adverse effect on the existing water quality. Social or economic justification to lower existing water quality is not permitted in EV waters.

A public hearing is available for a proposed discharge into HQ waters under §92.61 if there is sufficient public interest in a hearing for that discharge.

Comment - "Unassessed" waters are proposed to receive only basic level of protection until the stream is assessed and shown to qualify for a higher level of protection. These unassessed streams should be protected at least at Tier 2 (HQ) level unless a permit applicant can demonstrate

otherwise. The public resources should get the benefit of the doubt. This does not support our state Constitution's guarantee that the citizens have a right to clean water. (271, 276, 279-282, 299, 301, 304, 308, 316, 352, 363-365, 367-369, 375, 377, 382, 385, 387, 391, 392, 401, 412, 415, 417, 420, 434, 438, 446, 462, 474, 515, 531, 538, 540, 541, 546, 547, 553-555, 579, 580, 597, 639, 640, 654, 655, 663, 698, 743, 745, 782, 818-820, 833, 839, 1199, 1202-1204, 1206-1208, 1211-1213, 1235, 1246, 1314, 1337, 1388, 1412, 1454, 1458, 1476, 1477, 1486, 1489, 1579, 1581, 1601, 1609, 1663, 1666, 1668, 1676, 1679, 1684, 1691)

EPA Region 3 (1490) requests that PADEP explain how adequate antidegradation protection will be ensured when new or expanded discharges are contemplated to unassessed waters. They would also like to know what interim protection applies for waters that have not yet been assessed. EPA recommends the presumption that waters are HQ when a new discharge is proposed unless proven otherwise by the applicant.

Response - The final regulations specify that all existing uses of surface waters are protected based on the best available information evaluated by the Department. If a water has been assessed by the Department, or if a non-Departmental entity submits an antidegradation evaluation which satisfies Department protocols for data quality assurance, the Department will consider such information in providing existing use protection for the water. Also, any applicant for a DEP permit or approval, or any interested member of the public, may present information in the permitting or approval review stage regarding the appropriate existing use for a water that may be impacted by an activity.

The Department has also committed to an extensive water quality assessment project that is aimed at evaluating all of the Commonwealth's "unassessed waters". This will, however, take considerable time to complete, and until these "unassessed waters" assessments are completed those streams that are proposed for permitted discharge activities may be given priority as is needed.

Comment - Urges that all streams designated as Class A Wild Trout Streams (by the PFBC) should automatically receive, at the very least, an HQ designation, but should not be precluded from consideration as EV waters. Wild trout constitute a unique biological, genetic, and recreational resource, and meet the Federal definition of Tier 2. Therefore, wild trout streams that are not Class A should also be given consideration for HQ designation. Wilderness Trout Streams should be considered a recreational rather than a biological component. (476, 1458, 1675, 1684, 1691) "Heritage Trout Angling" streams should also be considered as an example of EV Waters. (1691) The PFBC and other commentators suggest that HQ designations should not be limited to just Class A Wild Trout waters, but should also include Class A, B, C, and D streams since they are all indicative of high quality waters supporting wild trout. (538, 1458, 1572, 1675)

Response - The Department agrees that all Class A Wild Trout Streams designated by PFBC, following public notice and comment, should be protected at HQ level. These streams will not be precluded from consideration as EV Waters, and may be so evaluated if requested or

petitioned, or where the Department determines that such an evaluation is warranted. Streams other than Class A Wild Trout Streams are also assessed for possible inclusion as HQ Waters upon request or petition.

Comment - Fecal coliform counts should not be used as a measure of water quality. High fecal coliform levels often indicate the need for increased enforcement of sewage disposal regulations. Failure to enforce existing regulations should never justify a reduction of protection. (538, 1458)

Response - The Department agrees that high fecal coliform levels, in and of themselves, should not be used to preclude a stream from additional protection, or conversely, be used to justify a reduction in protection.

Comment - The proposal contains a loophole that allows discharges and degradation in EV Waters. (1, 79, 173, 271, 276, 279-282, 299, 301, 304, 305, 308, 316, 321, 352, 363-365, 367-369, 375, 377, 382, 385, 391, 392, 412, 434, 438, 446, 462, 515, 540, 541, 546, 553-555, 579, 580, 597, 639, 640, 654, 655, 663, 698, 743, 746-775, 782, 818-820, 830, 831, 833, 839, 1199, 1200, 1202-1204, 1206-1208, 1211-1213, 1235, 1246, 1314, 1337, 1388, 1412, 1480, 1489, 1570, 1581, 1601) Applicants proposing to discharge into HQ streams should be required to use waste minimization and pollution prevention techniques to decrease their impact on the stream as a condition of any permit to discharge to HQ streams. No new or expanded discharges should be permitted on EV streams, and general permits for discharge should not be permitted at all. (476, 538, 1337, 1458, 1570-1572, 1668, 1676, 1679, 1692)

Response - Language in the regulation requires that dischargers to HQ or EV waters must evaluate environmentally sound discharge alternatives, including waste minimization and pollution prevention techniques. An alternative must be utilized in lieu of a discharge where the alternative is environmentally sound and cost-effective. Applicants proposing to discharge to these streams will also be required to give public notification of their intent to discharge to these streams. Public hearings for proposed discharges to EV waters will be required where an interested person requests a hearing on the proposal.

The Department believes that prohibiting all discharges into EV waters would be a draconian measure; economic development can be compatible with outstanding water quality. Nondischarge alternatives are required where they are environmentally sound and cost-effective. Any discharges which are permitted in EV waters must demonstrate that their discharge does not degrade the quality of the water before a permit is approved. Moreover, the Department's antidegradation regulations specifically mirror the federal Tier 3 protection requirement that the existing quality of Tier 3 (EV) waters be "maintained and protected". Finally, no general NPDES permits are allowed to be utilized in EV waters under §§92.81-92.83.

Comment - Contrary to Federal regulations, no weight is given to public lands in the selection process. (1, 11, 173, 271, 276, 279-282, 299, 301, 304, 307, 308, 316, 352, 363-365, 367-369, 375, 377, 382, 384, 385, 387, 391, 392, 412, 420, 434, 438, 446, 462, 538, 541, 542, 546, 547,

553-555, 579, 580, 597, 639, 640, 654, 655, 663, 698, 734, 743, 746-775, 782, 818-820, 833, 839, 1199, 1202-1204, 1206-1208, 1211-1213, 1235, 1246, 1314, 1337, 1388, 1412, 1489, 1572, 1573, 1581, 1601, 1668, 1679) The selection criteria in the proposed Chapter 15 do not consider public lands in any way. The EPA regulations consider many streams on public lands to be "Outstanding National Resource Waters" (ONRW's). DEP's "old" Special Protection Waters Implementation Handbook considers State Parks, Forests, Game Lands and other public lands as examples of streams which qualify as Exceptional Value waters. (401, 415, 417, 474, 531, 538, 1454, 1458, 1572, 1684)

Response - The Department agrees that many watersheds containing public lands may be examples of waterbodies warranting Special Protection and has amended its EV selection criteria at §93.4b(b) to specifically enumerate categories of certain waters on public lands which may qualify for EV status. These waters are protected as EV existing uses where the best available information at the time of Department action on a request for permit or approval indicates that the water satisfies the HQ biological or chemical qualifying criteria, and one or more EV qualifiers in §93.4b(b)(1). Waters which meet the HQ qualifying criteria and which are outstanding national or state resource waters subject to a resource management plan adopted by a national or state government agency which provides water quality protective measures which ensure long-term protection for a watershed corridor merit EV status under the regulation.

Comment - When considering "environmentally sound discharge alternatives", what does this phrase mean? Who determines which alternatives are environmentally sound and which are not? Also, the alternatives must be "cost-effective when compared with the cost of the proposed stream discharge." Is this the environmental cost the public pays when its waters are further degraded; or the anticipated cost incurred to construct the proposed treatment system that will discharge to the waters; or a combination of both? How is environmental cost to be quantified, and who makes this determination? How is "cost-effectiveness" determined? (538)

Response - The Department explains the above concepts and phrases in more detail in its Special Protection Waters Implementation Handbook. This Handbook will be revised, with full opportunity for public input and participation, once these regulatory changes are finalized.

Comment - EPA and other commentators recommend that §93.4e(d)(3), (*Public participation requirements for proposed discharges to High Quality or Exceptional Value Waters*), include a requirement that the public notice of complete application and fact sheet for proposed dischargers to HQ waters include the basis and results of the SEJ review. This should allow that the public has adequate information to comments on the proposed discharge. They also suggest the process should provide for intergovernmental coordination consistent with the Federal regulation. (1458, 1490, 1572, 1676, 1682, 1693)

Response - DEP agrees that the public notices for proposed discharges should include information on the basis and results of the SEJ review, or where this information can be obtained if desired for public review. This provision has been moved to §93.4c(b)(1)(ii)(B). The language in

§93.4c(b)(1)(iii) tracks the federal regulation by specifically providing for intergovernmental coordination.

Comment - Local governments, residents and polluters should never have a veto power regarding the designation of EV waters. It must be remembered that all the citizens of our state jointly hold all waters, and will always be the water of the Commonwealth. They are not the sole domains of local residents or governing bodies. (401, 403, 412, 415, 417, 474, 515, 531, 579, 597, 791, 839, 1246, 1337, 1364, 1419, 1421-1423, 1454, 1480, 1485, 1489, 1571, 1579, 1581, 1619, 1644, 1668, 1679) Pennsylvania's numerous world class trout waters attract thousands of visiting anglers every year. The Commonwealth and many local communities draw millions of dollars from tourism, outdoor opportunities and recreation. Protection and enhancement of these watersheds is the greater good for the citizens of the Commonwealth. (465, 473, 527, 725, 785, 1354, 1412, 1413, 1485, 1663, 1666, 1670, 1691)

Response - Local governments, residents, and polluters have no veto power over the status of an EV water which merits classification as EV under one of the enumerated categories in §93.4b(b). DEP agrees that the waters of the Commonwealth are to be protected for the benefit of all the citizens of the Commonwealth, including future generations. The goals of the Clean Streams Law of Pennsylvania and the Water Quality Standards are to provide overall protection of the Commonwealth's water resources. The Department also recognizes that the most effective means of providing this protection is to encourage local governments and residents to be involved in this mutual goal of resource protection and management.

Comment - DEP should follow the EPA's suggestion to create a new "Tier 3 ONRW" category of protection, then hold public hearings and evaluate data on which EV streams would fit in it and ban all discharges in the category. (631, 1485, 1694) The EQB should retain the current EV designation by establishing a Tier 2 ½ classification that would be similar to the current EV classification. The Tier 2 ½ classification would allow for the continuation of the current EV program, and would give DEP and EQB the flexibility to allow certain discharges into these waters. This would address the concerns expressed by the regulated community. (1694) If a no-discharge policy on EV streams is not feasible, then there should be a public hearing held on any proposed discharge into EV waters. (631, 1485)

Response - DEP disagrees with the recommendation to establish an additional "no discharge" Tier 3.5 category as part of the Commonwealth's antidegradation program since the Department already satisfies the federal Tier 3 regulations set forth at 40 CFR §131.12(a)(3). In addition, the Department believes that economic development can be compatible with outstanding water quality; nondischarge alternatives are required where they are environmentally sound and cost-effective. Any discharges which are permitted in EV waters must demonstrate that their discharge does not degrade the quality of the water before a permit is approved. Moreover, the Department's antidegradation regulations specifically mirror the federal Tier 3 protection requirement that the existing quality of Tier 3 (EV) waters be "maintained and protected". §93.4c(b)(1)(A) provides for public hearings on proposed discharges to EV waters when requested by an interested person.

Comment - All streams currently meeting HQ or EV standards should be protected to maintain their existing water quality. (476, 1480, 1485, 1571, 1577, 1579) How will these proposed regulations affect the special regulations now in effect in the watershed of the Upper Delaware and other EV waters presently protected, including those within Delaware Water Gap National Recreation Area (Toms Creek, Adams Creek and Saw Kill Creek)? (1409)

Response - Those streams currently meeting HQ or EV standards will continue to be protected as such by the Department. The proposed revisions to the Department's antidegradation program do not affect the watershed of the Upper Delaware or other presently protected EV waters. Furthermore, revisions to the Department's antidegradation program do not revise existing DRBC designations and regulations which are separate and distinct from the Department's antidegradation policy, regulations, and Special Protection Waters designations.

Comment - Determination of Social or Economic Justification (SEJ) for projects associated with High Quality waters is currently reviewed and coordinated by the Assistant Director of the appropriate DEP Regional Office. An environmental planner for the Montgomery County Planning Commission commented that to improve the review process, the EQB should consider the creation of an independent review board, or utilize an existing board if possible, which is comprised of individuals with background in social and economic analysis, as well as DEP and independent environmental specialists. An independent statewide board would be able to provide a systematic review of all projects, ensuring the uniform protection of High Quality waters, regardless of their location within the state. (1392)

Recommends that §93.4b(e) include the specific requirement that the proposed discharger be required to provide data which demonstrates that the economic/social benefits to the public outweigh any water quality degradation that the proposed discharge is expected to cause. (538, 1490, 1572, 1682, 1684, 1692)

The SEJ should consider only long-term impacts and benefits. There should be a requirement to submit the SEJ to the local governing body for review and approval during the Act 537 planning process. This would make a much-needed connection between the (Special Protection) Program and the local government, and would ensure a review of the SEJ at least at the local level. (1458, 1577, 1676, 1693)

Once the SEJ requirement has been met to allow degradation of HQ Waters, which includes consideration of alternatives to stream discharges that are environmentally sound and cost effective, some form of final mitigation should be required to offset that degradation. This mitigation could involve on- or off-site watershed improvements of non-point source pollution through implementation of BMP's and/or the elimination or improvement of existing point source discharges. The Board should consider adopting a mitigation strategy that requires minimization of any degradation, or a policy of "no net degradation". (1392)

Response – SEJ reviews will continue to be performed by DEP; it is likely that statutory amendments would be needed to enact an independent SEJ review board process which was binding on dischargers. The final regulation provides that SEJ is tied to the Act 537 planning process for

projects involving sewage disposal, and thus involves local government. This should eliminate the current requirement which sewage facility proponents face of two SEJ demonstrations – one at the sewage facilities planning stage and one at the wastewater discharge permit stage. With regard to the balancing of economic or social benefits against any environmental degradation the discharge would cause, the language explicitly requiring such balancing which was proposed is not contained in the final regulation; the Department believes that the addition of the word “important” in the SEJ test allows for such balancing. The word “important” is derived from the federal SEJ regulation at 40 CFR §131.12(a)(2). By including the federal language and the balancing test, the DEP is specifically addressing the decision in Big B Mining Co. v. DER, 1987 EHB 815 (1987) *aff’d* Commonwealth of Pennsylvania, Department of Environmental Resources v. Big B Mining Co., 123 Pa. Commonwealth Ct. 591, 554 A.2d 1002 (1989). Further refinements to the SEJ process will be addressed in revisions to the Department’s Special Protection Waters Implementation Handbook. With regard to the mitigation comment, the Department believes that mitigation is not explicitly necessary in the regulation because the balancing of economic or social benefits against environmental degradation which would result from the discharge will, in essence, offset the social or economic importance of the project with the amount of degradation allowed; in other words, mitigation is accomplished in a societal importance context rather than a purely water quality context.

Comment - Section 93.4d(d) of this proposal, (Protection Pending Designation), essentially circumvents the Designation Process. This is clearly inappropriate and would invite enormous complications if a redesignation effort subsequently were rejected by the EQB. The Department should expedite the process to the degree possible when data is obtained that indicates a designation may be appropriate. This section should be eliminated from the proposed amendments. (152, 1583)

Response – The process criticized by the commentator is an existing use protection process. Existing use protection is already required in Pennsylvania by federal regulations promulgated for the Commonwealth at 40 CFR § 131.32(a)(1). Existing uses are determined by the Department based on the best available information during a permit or approval review process; designated uses are made by the EQB in rulemaking. Any DEP antidegradation regulation must meet the federal antidegradation policy, including existing use protection (See 40 CFR § 131.6(d)). The final regulation at §93.4c(a)(1) sets forth procedures for existing use protection, including opportunities for input from the public and persons seeking a Department permit or approval during the permit or approval review process.

Comment - This proposal should be subject to the Governor’s Executive Order 1996-1, which requires the Department to revise all of its regulations to bring balance to Pennsylvania’s environmental regulations. In several instances, Pennsylvania’s program exceeds federal standards. The Department should adopt the federal language that states water quality must “exceed” standards, rather than what is contained in the DEP proposal that it is “generally better than standards.” If data indicates the stream does not meet even one water quality standard, the stream should not qualify for HQ or EV Waters designation. The current proposal allows for judgement calls by the Department. (471, 514, 522, 525, 526, 528, 529,

533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 603, 607, 608, 617, 619, 620, 622, 630, 657, 661, 667, 671, 673, 675-677, 682, 684-687, 689, 690, 702-704, 706, 707, 709-723, 727, 728, 730-733, 735-737, 786-789, 792-800, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1345, 1347-1349, 1359, 1365, 1367, 1391, 1393, 1405, 1407, 1410, 1418, 1420, 1428-1453, 1455, 1472, 1473, 1481, 1493, 1593-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1665, 1674, 1677, 1683, 1694) If the EQB agrees with EPA's philosophy that it is not necessary to pass both the chemistry and biology tests, and that it is not necessary for each parameter to be better than criteria, the EQB must clarify this in the final regulation. (1694)

The EV Waters program should apply only to outstanding resource waters as contained in the federal regulations. DEP's program is much broader in scope and includes streams that probably never qualify under the federal program. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 603, 607, 608, 617, 619, 620, 622, 630, 657, 661, 667, 671, 673, 675-677, 682, 684-687, 689, 690, 702-704, 706, 707, 709-723, 727, 728, 730-733, 735-737, 786-789, 792-800, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1345, 1347-1349, 1359, 1365, 1367, 1391, 1393, 1405, 1407, 1410, 1418, 1420, 1428-1453, 1455, 1472, 1473, 1481, 1493, 1593-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1642, 1665, 1674, 1677, 1678, 1683)

IRRC commented that the examples of types of waters that may qualify that are currently listed in the EV definition at § 93.1 should not be listed in the definition. If there are specific requirements that a stream must meet, beyond the chemistry and biology tests, they should be included in § 93.4(c) in the final form regulation. They also object to the subjective criteria such as "waters of exceptional recreational or ecological significance." They recommend the EQB define EV Waters in § 93.1 as: "*Surface waters of high quality which meet the conditions specified in § 93.4(c) (relating to Exceptional Value Waters).*" (1694)

Commentators suggest that EPA's program only applies to ONRW's on public lands, but that DEP's proposal goes further. DEP should not be permitted to designate waters that flow through private lands for EV protection because of the extreme restrictions the designation imposes on individuals and communities who wish to use the waters responsibly to improve their quality of life. If EV designations are allowed to be placed on private watershed lands then the final regulations should be revised to require that DEP get the affected parties to concur on the redesignation decision. The DEP should be required to inform the owners of private watershed lands that would be affected by a new EV designation how it will limit what they can do on their property. The regulations should allow the affected property owners to decide whether they want the EV designation. And DEP should be required to get a formal commitment from the owners of the affected watershed lands to preserve the resource at the strict EV standard before recommending the designation to the EQB. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 607, 608, 617, 619, 620, 622, 630, 667, 676, 684-686, 709-723, 730, 735, 736, 796-800, 1345, 1348, 1349, 1365, 1405, 1407, 1429-1434, 1493, 1597, 1674, 1677, 1678, 1683, 1694) The EV designation should be consistent with local zoning where the stream is designated. The

commentator also questions the fairness of an EV designation when a private property owner along the stream objects to the EV designation.

IRRC questioned DEP's rationale, which allows a stream to be designated as HQ or EV downstream from a stream segment with a lower designation. What are the impacts on those who discharge into the upper portion of a stream when the lower portion has a higher designation? IRRC also indicated that the regulation contains broad, discretionary language. Sections 93.4b(a)(1) and 93.4b(a)(2)(C) allow DEP to consider additional chemical or biological information in the designation of HQ streams. The regulation should require DEP to specifying the additional chemical or biological information needed, and explain why the information is necessary. (1694)

Response – The Executive Order was followed in drafting the regulation. The regulation attempts to track the federal regulations as closely as possible. Additional language is needed to flesh out the barebones federal requirements since Pennsylvania must implement the antidegradation program in the Commonwealth. Requirements which are more stringent than the federal regulations are adopted only where there is a compelling justification for such requirements.

The final regulation eliminates the commentator's concern regarding the term "generally" better than to provide more certainty. Also, language has been added at §93.4b(a)(1) which tracks the federal language suggested by the commentator. The federal requirement establishes that *"where the quality of the waters exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water; that quality shall be maintained and protected,"* (40 CFR §131.32(a)(2)).

The Department believes that it should not limit the scope of EV protection to outstanding national resource waters; there are many outstanding state, regional, and local resource waters in the Commonwealth which also merit EV protection.

The Department has adopted IRRC's suggestion and has removed the examples from the definition and into the text.

DEP believes that the waters of the Commonwealth are to be protected for the benefit of all the citizens of the Commonwealth, including future generations. The goals of the Clean Streams Law of Pennsylvania and the Water Quality Standards are to provide overall protection of the Commonwealth's water resources. The Department also recognizes that the most effective means of providing this protection is to encourage local governments and residents to be involved in this mutual goal of resource protection and management. However, such designations cannot lawfully, under the CWA and federal antidegradation regulations at 40 CFR § 131.12, be limited only to waters that flow through public lands or to those waters on private lands for which the landowners have agreed to such protection.

Only stream segments classified as HQ or EV receive the protection of these classifications. If there is a discharge upstream from a HQ or EV water, the effluent limitations for that discharge must be established to maintain that downstream HQ or EV waters classification.

The Department uses proven scientific methodologies to perform chemical and biological assessments. The Department believes that waters should be able to qualify as HQ waters through an analysis of long-term chemical data, or by meeting biological criteria. Both methods measure long-term water quality conditions, and provide an excellent picture of the stream's ability to support propagation of fish, shellfish and wildlife and recreation in and on the water. The Department utilizes additional chemical or biological information on a case by case basis in the exercise of its best professional judgment depending on site characteristics and field observations. Moreover, alternate biological assessment tests which are widely accepted and published peer reviewed may be utilized to ensure that the latest and best sound science is utilized in surface water assessments.

Comment - Supports the Department's efforts to reduce the permitting burden with the provisions regarding minimal-impact dischargers and the use of general permits on HQ streams, and support the expansion of this practice to EV streams. (152, 471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 603, 607, 608, 617, 619, 620, 622, 630, 657, 661, 667, 671, 673, 675-677, 682, 684-687, 689, 690, 702-704, 706, 707, 709-723, 727, 728, 730-733, 735-737, 786-789, 792-800, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1345, 1347-1349, 1359, 1365, 1391, 1393, 1405, 1407, 1410, 1418, 1420, 1428-1453, 1455, 1472, 1473, 1493, 1594, 1595-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1665, 1674, 1677, 1678)

IRRC further requests that EQB and DEP explain the process that will be used to amend a general NPDES permit to allow a discharge in a HQ stream.

Some of these commentators also specifically mention that they support a "de minimis" permit threshold where a social and economic justification is not required. They also commented that, despite EPA's insistence that the DEP prohibit new or expanded discharges to EV Waters streams, they believe the current EPA and DEP rules allow for the consideration of such discharges. Discharges resulting in no adverse measurable change to long term water quality should be allowed. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 607, 608, 617, 619, 620, 622, 630, 667, 675, 676, 684-686, 709-723, 730, 735, 736, 796-800, 805-816, 821-827, 1345, 1348, 1349, 1365, 1367, 1405, 1407, 1429-1451, 1493, 1593, 1594, 1596-1599, 1611-1613, 1617, 1674, 1677, 1678, 1683)

Response - The issue regarding whether NPDES general permits should be available in Special Protection Waters has been deferred to the Water Quality Regulatory Basics Initiative (RBI) rulemaking package. When the EQB determines in that package whether NPDES general permits are available in HQ or EV waters, the Department will explain the process used to amend a general permit in special protection waters at that time. Also, the final regulations remove the provision of allowing minimal impact discharges to use up to 25% of the stream's assimilative capacity from the final rulemaking in response to comment. Moreover, the Department will continue to require applicants of proposed activities within EV waters to demonstrate that the proposed activity will not have an adverse effect on the existing water

quality. Social or economic justification to lower existing water quality is not permitted in EV waters.

Comment - The proposed regulation requires NPDES permit applicants to solicit public comment on proposed discharges to HQ and EV Waters before applying for the permit. This is an unnecessary burden on the permit applicant that is not required by the federal regulations. It serves no purpose because the DEP will also ask for public comments after the application is submitted. Requiring the permit applicants to ask for public comments is costly, time-consuming and redundant. This requirement should be eliminated. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 607, 608, 617, 619, 620, 622, 630, 667, 676, 684-686, 709-723, 730, 735, 736, 796-800, 1345, 1348, 1349, 1365, 1405, 1407, 1429-1434, 1493, 1596 1597, 1674, 1678, 1684, 1694)

Response - The Department agrees with the commentator. The pre-application public comment process has been eliminated in the final regulation because it is duplicative and burdensome.

Comment - Because of the many implications an anti-degradation designation will have on a community, the DEP must base its designation on more than just one grab sample. The DEP must have enough actual sound scientific background water quality data before an accurate evaluation can occur and a stream designation can be made. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 607, 608, 617, 619, 620, 622, 630, 667, 675, 676, 684-686, 709-723, 730, 735, 736, 796-800, 805-816, 821-827, 1345, 1348, 1349, 1365, 1367, 1405, 1407, 1429-1451, 1493, 1593, 1594, 1596-1599, 1611-1613, 1617, 1674, 1677, 1683, 1694)

The Department should clarify what is meant by the phrases that “water quality must be generally better than the water quality criteria”, or that the water is of “natural quality”. The EQB must explain how it is relevant for a stream that does not meet minimum water quality standards, for reasons caused by humans or nature, deserves special protection. Therefore, the commentator recommends that §§ 93.4b(a)(1)(ii) and 93.4c(1)(ii) be deleted. (1694) Another commentator also suggests that “natural quality” should be replaced by the term “background water quality” as is used in the Groundwater Protection Strategy and Act 2 legislation. (152)

Response - The final regulations clarify both the chemical and biological qualifying tests in several ways. First, the final regulation provides that either chemistry or biological information can qualify a water for HQ. Second, the term “generally better than” has been abandoned in order to provide more certainty with the chemical test. Third, the list of chemicals has been modified to more closely reflect the EPA qualifying criteria in 40 CFR §131.12(a)(2). Fourth, the final regulation eliminates grab sample chemical testing in favor of long-term chemical testing of one year or more. The term “natural quality” is not used in the final regulation. It is replaced by the term “Surface waters of exceptional ecological significance”, which is defined as including exceptional value wetlands and thermal springs.

Comment - The Department should be required to consider the social and economic impacts associated with any of its HQ and EV Waters designations during the assessment process. This information should be made available to the public. The SEJ balancing test that requires that the economic or social benefits to the public must outweigh any water quality degradation which the proposed discharge is expected to cause should be eliminated from the final anti-degradation regulation. Pennsylvania should not be placed at an economic disadvantage in comparison to other states' water quality programs. (599, 675, 805-816, 821-827, 1367, 1435-1451, 1493, 1593, 1594, 1596, 1598, 1599, 1611-1613, 1617, 1618, 1674, 1677, 1678, 1683, 1693, 1694) The cost of additional regulations must be justified and be proven beneficial enough to the environment to justify the additional cost to the user. (1580)

IRRC cited that several commentators including both conservationists and representatives of the regulated community were concerned about the lack of clarity and reasonableness of the SEJ provisions. There is no description of the type of social or economic developments that DEP will consider to be "important" or "necessary". Similarly, the proposal does not provide criteria, process or method for comparing a discharge's benefits to any degradation that it might cause. The current language goes beyond what is required by the federal regulations. The federal regulations do not require that the economic and social benefits of the discharge outweigh any water quality degradation that is expected to occur. They understand that the final decision by DEP on an SEJ application will involve a "judgement call" by DEP staff, but they emphasize that the public deserves an opportunity to review and understand the criteria, factors or standards forming the basis of the "judgement call".

Response - Under the federal CWA, water quality standards determinations must be made based on water quality rather than on economics or social factors. With regard to SEJ, the final regulations at §93.4c(b)(1)(iii) tracks the federal SEJ regulation at 40 CFR §131.12(a)(2); SEJ language. Proposed language which went beyond the federal regulation by providing that the social or economic benefit to the public of the discharge must "outweigh any water quality degradation which the proposed discharge is expected to cause" has been eliminated on final rulemaking. The Commonwealth is not placed at an economic disadvantage to other states because of its SEJ process because its language tracks the federal language.

The final regulation fleshes out the barebones federal SEJ language in several respects by providing special SEJ provisions for sewage facilities in HQ waters which are proposed to correct existing public health or pollution hazards, and by providing that proponents of sewage facilities need not do an SEJ analysis at both the sewage facilities planning and discharge permit stages if there are no material changes in the project between such stages. The regulation does not specify every implementation detail for SEJ. The Department implements SEJ pursuant to factors and checklists contained in its Special Protection Waters Implementation Handbook; these portions of the Handbook are being revised, subject to public input and comment, to reflect the regulatory changes, as well as recent federal guidance on SEJ implementation in such documents as EPA's "Water Quality Standards Handbook," "Questions and Answers on Antidegradation," and "Interim Economic Guidance for Water Quality Standards".

Comment - The Department should expand its public participation in regard to its assessment of HQ and EV Waters. Public participation must start during the assessment of the stream. The DEP publishes a notice of acceptance of a petition in the Pennsylvania Bulletin, however not everyone affected by a stream upgrade subscribes to the Bulletin. Many parties that may be adversely affected by a stream upgrade are never made aware of the petition until a proposed regulatory package is already in front of the EQB for consideration. The DEP must notify potentially affected parties in the preliminary stages of the stream evaluation. Notice, by first class mail, must be sent to any applicant with a pending permit, any existing discharge permittees, the appropriate municipalities, planning commissions and all applicants that have received planning or subdivision and land development approval within the last five years. (599, 603, 657, 661, 671, 673, 675, 677, 682, 687, 689, 690, 702-704, 706, 707, 727, 728, 731-733, 737, 786-789, 792-795, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1347, 1359, 1367, 1391, 1393, 1410, 1418, 1420, 1428, 1435-1453, 1455, 1472, 1473, 1593-1595, 1598-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1665, 1674, 1677, 1678, 1683, 1685, 1693)

While IRRC agrees that there is a need for greater public participation in the redesignation process, they believe the costs of contacting every landowner within a watershed could be excessive. The public participation rules for assessment of waters for HQ or EV designations ought to parallel the requirements for proposed discharges into HQ and EV waters. They recommend that § 93.4e(b) be amended to require a public comment period after DEP has completed its technical report for the assessment of a stream for reclassification as HQ or EV. DEP should be directed to publish a notice in local newspapers and the Pennsylvania Bulletin; send copies of the notice to all municipalities in the watersheds. The notice would announce that DEP completed its technical report with recommendations for upgrades to EV or HQ. The notice would explain how and where interested parties could obtain copies of the technical reports and recommendations, invite persons to submit comments, and that DEP would hold public hearings if requested. They do agree that notices should be sent to each person with a current permit or pending permit application for a discharge into the candidate stream. (1694)

Response - Even though there are no explicit public participation requirements in the federal antidegradation regulations (except that public participation provisions of the Commonwealth's continuing planning process must be followed in granting a discharger SEJ when proposing a discharge to an HQ stream) the Department believes that additional public participation is in the public interest. The final regulations contain several public participation enhancements to the existing program. Section 93.4d(a) requires the Department to publish notices of intent to assess a water for potential HQ or EV designation in both the Pennsylvania Bulletin and local newspapers. In addition, a notice is also required when a completed evaluation is accepted by the EQB. The Department will also notify all municipalities in the affected watershed. These notices will request submittal of additional information for use by the Department. Section 93.4d(b) further provides for combined public meeting and fact-finding hearings to discuss the assessment or evaluation and solicit additional data. The Department has concluded that having either a petitioner or the Department personally notify each landowner in the watershed is overly burdensome. The

Department will pursue additional avenues of public outreach and notification, as described above, as well as exploring radio, web, and television notification where appropriate. The Department agrees that the most effective means of providing this protection is to encourage local governments and residents to be involved in this mutual goal of resource protection and management, as early as possible in the stream evaluation process.

Conclusion - The Department has revised the proposed Antidegradation policy and regulations to more closely mirror federal antidegradation regulations. The revisions are based on the comments received during the public comment periods for Proposed Rulemaking and an Advance Notice of Final Rulemaking, and other information available to the Department during its development of the recommendations for final rulemaking.

LIST OF COMMENTATORS

WATER QUALITY STANDARDS AMENDMENTS Antidegradation Rulemaking Package

(Public Comment Period: March 22 thru May 21, 1997)

Public Hearings: May 7, 1997 at the RCSOB
400 Market Street
Harrisburg, PA

10:00 am: by the Department of Environmental Protection
2nd Floor, Auditorium (for Proposed Chapter 15 only)
and

1:00 pm: by the Environmental Quality Board
1st Floor, Room 105

**COMPARISON OF EPA AND DEP
ANTIDEGRADATION REQUIREMENTS**

EPA	DEP
TIER 1	EXISTING USES
Existing uses maintained and protected	Existing uses maintained and protected
TIER 2	HIGH QUALITY WATERS
Water quality exceeds level necessary to support uses	Water quality exceeds level necessary to support uses
Maintain and protect existing quality	Maintain and protect existing quality
Allow degradation with SEJ (cannot violate baseline standards)	Allow degradation with SEJ (cannot violate baseline standards)
	SEJ granted for municipal sewage project to correct existing public health problem
	Nondischarge alternatives evaluation required
TIER 3	EXCEPTIONAL VALUE WATERS
High or natural quality waters are an outstanding national resource	High or natural quality waters are an outstanding national, state, regional or local resource
Maintain and protect existing quality	Maintain and protect existing quality
	Nondischarge alternatives evaluation required
NONPOINT SOURCE PROTECTION	NONPOINT SOURCE PROTECTION
Cost effective and reasonable BMPs for nonpoint source protection (Tier 2)	Cost effective and reasonable BMPs for nonpoint source protection (HQ and EV)

March 5, 1999

**SUMMARY OF COMMENTS and RESPONSES FOR
DEP's ADVANCE NOTICE OF FINAL RULEMAKING OF
PROPOSED AMENDMENTS TO 25 PA. CODE CHAPTERS 92, 93 AND 95
PENNSYLVANIA WATER QUALITY PROTECTION and
MANAGEMENT STANDARDS
RELATING TO ANTIDegradation**

The Department received numerous comments and written testimony from nearly 800 commentators during the ANFR public comment period. The public comment period included three (3) public hearings/meetings, which were held in the Harrisburg, Conshohocken, and Pittsburgh Regional Offices. Many of the commentators agree that the current draft final regulations are a vast improvement over the March 22, 1997, rulemaking proposal. Generally, the commentators commended the Department on its effort. Some believe there are still deficiencies in the current proposal. The Department has attempted to address these concerns in preparing the final rule. The comments and the Department's responses are summarized below.

GENERAL COMMENTS:

Some commentators suggested that the rush to finalize the antidegradation regulation is not warranted, since U.S. EPA is currently in the process of revising the federal program.

Other commentators said there are a number of aspects of the proposed program that they are uncomfortable with, but are willing to support the Department's proposal at this time. They requested that during the next Triennial Review the Department provide a report for public review and comment providing specific case examples of how the final program is implemented.

Response: EPA is not at a stage in revising its Federal Water Quality Standards regulations which merits Pennsylvania delaying its efforts to improve its antidegradation program. EPA published an Advance Notice of Proposed Rulemaking in the Federal Register on July 7, 1998, seeking public comments on whether the Federal Water Quality Standards regulations should be revised. The public comment period closed January 4, 1999. The Agency has said that no final decision has been made or is forthcoming. Assuming EPA decides to move forward with proposed rulemaking, it may take several years to complete the regulatory process. Consequently, the Department does not believe it would be appropriate to wait until EPA finalizes its rulemaking.

The Department is not opposed to providing case specific examples of how the program is working, if appropriate, in the next Technical Review.

LANDOWNER NOTIFICATION & PUBLIC PARTICIPATION:

Commentators associated with real estate, construction, development and/or the building trades said DEP should be required to notify, by mail, all landowners, permit holders and applicants whenever a High Quality (HQ) or Exceptional Value (EV) stream assessment is initiated. They

March 5, 1999

indicated this notification must include an explanation of the impacts a HQ or EV stream designation will have on the use of their property or permit. Additionally, other commentators associated with farming and/or the agricultural trades requested that every landowner in a watershed be contacted when a HQ or EV stream petition is submitted. They also requested combined public hearings/meetings on petitions and stream redesignations, claiming that landowners should be given a chance (the right) to respond to the petitions and redesignations. The commentators indicated that property owners should be informed of the proposed changes that could affect their property rights. It is claimed that the Department's current practice of notifying local municipal officials does not ensure that all affected parties will be adequately informed.

However, other commentators suggested that petitioners for stream upgrades should not be required to notify all watershed landowners, or be requested to provide a list of all possibly affected landowners. Instead, they suggested that the provision in the ANFR requiring notices in the Pa. Bulletin and/or local newspapers is adequate. One commentator suggested that a requirement to list landowners asserts a presumption that landowners own the water resources, and have a private property right to degrade that resource if they wish, and oppose any antidegradation effort. Another commentator argued that if EQB requires citizens (petitioners) to notify landowners then applicants for NPDES permits and those planning activities that could result in increased (point) and non-point source pollution should be required to undertake similar notification procedures, so that citizens could make timely comment on activities that will degrade public resources.

The Citizens Advisory Council to the Department (CAC) emphasized that public notification is critical, and they continue to support notification of all municipalities. They commented that the Independent Regulatory Review Commission (IRRC) had commented during the proposed rulemaking comment period that landowner notification would be too burdensome for the agency (DEP). Therefore, CAC concluded that it would be unreasonable to expect petitioners, who are often individuals or small groups or non-profit organizations, to meet such a requirement, because the petitioners will have far fewer staff and a much smaller budget to meet the demands.

CAC and several other commentators also questioned how land-ownership would be defined. Many areas may have a confusing mosaic of ownership patterns when one considers the simple surface rights in combination with other mineral and/or timber rights. They also are concerned that the list may change during the petition and rulemaking period.

CAC has offered to work with DEP to identify more workable and effective notification options. They suggest possibilities such as radio and public service announcements, and local cable ad channels, in addition to the current Pa. Bulletin and local newspaper approach being used by the EQB and DEP.

Many commentators support stronger public participation. In particular, they support a combined public meeting and fact-finding hearing approach as a means to educate concerned citizens and allow for an exchange of concerns and ideas related to stream evaluations and designations, while still providing a formal setting to accept formal comments and pertinent information.

March 5, 1999

Some commentators said that a public comment period during DEP's review of a permit application is already required, so a requirement that an applicant also request public comments before submitting its discharge permit application is excessive, redundant, costly, and time consuming without any real benefit.

Some commentators recommended that the proposed requirement included in the March 1997 proposal for a public hearing on any proposed discharge (activity) to an EV water be restored.

Response: The Department requested comments as to whether persons petitioning the Environmental Quality Board (EQB) to change the designated use of a water to HQ or EV should be required to provide a list of landowners and addresses for the purpose of notifying such landowners. DEP also inquired whether there were other methods of notification that would be acceptable. Although the Department believes that public notification is critical, having petitioners or the Department try to search and send individual certified letters to each landowner in a watershed is onerous and burdensome and still may not reach everyone. The Department believes more workable and effective notification options include placing notices in local newspapers within the watershed, public service announcements on local radio or television, and working with municipalities to assist in the notification of the potentially affected local citizens, including landowners.

The Department has greatly expanded the public participation requirements in the ANFR. §93.4d(a) requires the Department to publish notices of intent to assess a water for potential HQ or EV designation in both the Pennsylvania Bulletin and local newspapers. In addition, a notice is also required when a completed evaluation is accepted by the EQB. The Department will also notify all municipalities in the affected watershed. These notices will request submittal of additional technical information for use by the Department. Section 93.4d(b) further provides for combined public meeting and fact-finding hearings to discuss the assessment or evaluation and solicit additional data.

The Department has reconsidered language in the Advance Notice of Final Rulemaking that requires an applicant applying for a new, additional, or increased discharge to HQ or EV waters to provide proof of publication of a notice in a local newspaper and seek comment for 30 days on the proposal. The Department agrees that these requirements are not necessary since a public comment period is already required as part of the NPDES permit application. These requirements are deleted in the Final Rule.

The Department has added language, in response to the comment, which provides that a public hearing will be held on a proposed discharge to EV waters, when requested by an interested person. This language replaces §95.1(c) which requires mandatory public hearings for all discharges to EV waters, regardless of public interest; numerous hearings have been scheduled and held with the expense of Department staff time and court reporters, and no testimony given.

The Department intends to hold public hearings/meetings when the Department and/or EQB determines there is sufficient interest for a hearing/meeting to address concerns or gather

March 5, 1999

additional factual information pertaining to proposed Special Protection designations. The final regulation has been revised to allow for such public hearings/meetings.

SOCIAL OR ECONOMIC JUSTIFICATION:

IRRC commented that social or economic justification (SEJ) for discharges into HQ streams is problematic because the regulation does not contain guidance on: 1) the criteria or factors that will be used to identify and quantify social or economic benefits; or 2) the method that will be used to determine if benefits outweigh the decrease in water quality.

Some commentators questioned the “existing public health or pollution hazards” provision in §93.4(c)(2). What constitutes a hazard? Should it only apply to sewage, or should it apply to other documented hazards from other types of activities? Also, it is not clear whether the satisfaction of the SEJ requirements only applies to the capacity required to address the hazard, or if it includes what might be considered excess capacity. It was suggested that only the portion of a facility designed to correct a hazard should be considered justified. Any portion of a facility or improvements that goes beyond addressing the hazard should be required to submit to an independent SEJ demonstration.

Some comments said the “balancing test” is not required by and is, therefore, more stringent than federal regulations. The SEJ language should be similar to the federal requirements for public participation and intergovernmental review. While some commentators would like the SEJ evaluation to determine the economic or social benefits to the local public, others questioned how this determination would indicate who would be affected by the diminished water quality. Other comments said the SEJ test for HQ streams should not be limited to just discharges to HQ streams. They suggested that SEJ should be required for any activity where a DEP permit or approval that would affect HQ waters is required.

Some commentators suggested the “concept of economic or social benefits to the public” needs to be clarified, and that the public should be defined as the majority of or the legal representatives of a municipality, school district, water district or population in a local geographic area.

Other commentators said the regulation contains vague and subjective language in §93.4(c)(b)(i)(a) concerning non-discharge alternatives into HQ or EV waters. There needs to be guidance for determining what is “cost effective and environmentally sound”. There should be an indication who will make this determination, and how.

One commentator stated that the SEJ provisions for *de minimis* discharges should be reinstated.

Response: The factors that are considered in determining social and economic impacts are normally case or activity specific. They can include, but are not limited to: the impact on employment or commercial or industrial activity, tax revenues, user charges for public facilities, public health and safety, consistency with local land use plans and zoning ordinances, and compatibility with surrounding land uses. The method for balancing these impacts against potential water quality degradation is also case specific. In general, projects and activities that

March 5, 1999

will significantly impact water quality must have greater social or economic benefit than do projects and activities that will have minimal water quality impact. Because of the project and activity specific nature of the application of SEJ, DEP does not believe that the details of the procedure are more appropriately addressed in implementation guidance.

An existing public health or pollution hazard is a situation where there is documented evidence that existing wastewater disposal and pollution control measures either don't currently exist or are no longer functioning in a satisfactory manner, thereby creating a public health or pollution threat. The most common type of hazard usually encountered by the Department in HQ watersheds is failing on-lot sewage disposal systems.

The Department believes that the provisions of Section 93.4c(c)(2) should be restricted to sewage facilities, because in these cases the only practicable method of resolving the public health and pollution hazard may be the construction of a centralized sewage disposal plant. Moreover, sewage facilities planning is a public process with extensive local and public involvement. There is no such process for the siting of industrial discharges.

In response to comment, the Department has removed the proposed language specifying that economic or social development "outweigh any reduction in water quality which the new, additional or increased discharge is expected to cause." The Department now uses the language from EPA's antidegradation regulation.

DEP believes that the public includes any interested or affected party or person, and therefore does not believe that the definition of public should be limited in the manner suggested above. This will be clarified in implementation guidance.

The 25% de minimis test has been removed because it has proved to be very confusing and of questionable utility.

CHEMICAL AND BIOLOGICAL METHODOLOGY:

The commentators said DEP should be required to conduct valid and thorough scientific testing and analysis to classify streams, and that chemistry and biology should be considered together. Many claimed that the draft regulations make it far too easy for a stream to acquire an HQ or EV stream designation, and that limited biological sampling will not accurately reflect the stream's quality. Most commentators accept that there is merit in the concept of objective scoring criteria. However, some believe an ill-conceived methodology will have unintended consequences. Therefore, some commentators suggested that before a methodology is adopted, there needs to be a thorough peer review of the method. Other commentators agree the biology of a stream reflects long term conditions, but that in some cases, chemical testing might provide an earlier indication of water quality problems that are not yet expressed by the biota. Therefore, the Department should not abandon chemical evaluations. Other commentators endorsed the approach of allowing a stream designation to be determined based on either chemical or biological assessment.

March 5, 1999

It was suggested that the list of chemical parameters that qualify a water for HQ protection be expanded to include temperature and all metals for which criteria exist. At the same time, since nitrite plus nitrate nitrogen and manganese are not listed in Chapter 93 to support recreation or aquatic life uses, these parameters should be deleted. Also, "long term" should be defined to include data over a period of at least one year, to which the 99% test would be applied. Other commentators recognized the resource needs and associated cost to collect and analyze a large number of chemical parameters over a long term, and supported minimizing the number of parameters to be collected and analyzed. They agreed that the need for adequate information must be balanced against the cost of obtaining such information. They supported retaining the flexibility to consider additional chemical and toxicity information that characterizes water quality on a case-by-case basis. IRRC and other commentators questioned the basis for decreasing the number of parameters for the chemistry test, and how the selected parameters provide an accurate representation of a stream's water quality.

IRRC indicated that the draft final regulation still contains broad, discretionary language. Sections 93.4b(a)(1) and 93.4b(a)(2)(C) allow DEP to consider additional chemical or biological information in the designation of HQ streams. The regulation should require DEP to provide written notice specifying the additional chemical or biological information needed, and explain why the information is necessary.

Some commentators said the Rapid Bioassessment Protocol referenced in §93.4b(a)(2)(i)(A) is out of date. Other commentators indicated that DEP is not applying all facets of the RBP, which should include fish and periphyton metrics, along with macroinvertebrates. They also suggested that DEP should be more explicit in describing other possible evaluation methods, and not be solely dependent on the RBP method.

Some commentators indicated they do not have sufficient data to assess whether the 83% threshold for HQ or 92% for EV is an appropriate number. Some suggested that if a water is not impaired that it should qualify for an HQ designation. Many suggested that these threshold values should be removed from the regulation and placed in the guidance in the revised Special Protection Waters Implementation Handbook. They asserted that the biological qualifying tests should be quantified in policy or guidance, rather than in the regulations. Since the suggested 83% figure is untested, DEP should try it for three years. Then DEP should issue a report, and if successful, then propose changes for the next available Triennial Review.

Some commentators feel the biological test in §93.4b(a)(2)(i)(A) is limited to a comparison to "a reference stream or watershed". It was suggested that the ideal comparison should be to a reference dataset that contains data from a variety of reference streams. Other commentators said the proposed scoring for water purity and biological quality is open to biased and arbitrary selection criteria. One commentator provided an example using a recent evaluation where the geological structures in the candidate and reference streams were significantly different. Reference streams should closely match candidate streams in terms of geology and other ecological parameters. Some commentators said the final regulation should specify the Department's selection criteria for choosing a reference stream.

March 5, 1999

Some commentators said classification of the Pennsylvania Fish and Boat Commission's Class A wild trout streams, as HQ should not be automatic. They asserted that DEP should not defer its regulatory authority and/or responsibilities to the PFBC, who are not held to the same regulatory procedures or requirements. However, others supported Class A wild trout streams as HQ waters. Some commentators suggested that since most wild trout streams have water chemistry that is generally better than water quality criteria, all wild trout streams should be considered HQ. Others commented that the PFBC "Class" designation for trout streams is a reflection of trout biomass, and that it may be dependent on factors other than water quality.

Response: The Department uses proven scientific methodologies to perform chemical and biological assessments. The Department believes that waters should be able to qualify as HQ waters through an analysis of long-term chemical data, or by meeting biological criteria. Both methods measure long-term water quality conditions, and provide an excellent picture of the stream's ability to support propagation of fish, shellfish and wildlife and recreation in and on the water.

The Department has recommended a stand alone, long-term chemistry test as one means of qualifying for HQ protection. In the past, the Department has relied on a grab chemical sample coupled with a biological test. The grab chemical sample only provided an instantaneous snapshot of water quality whereas the biological test reflected long-term conditions. Because of this, the Department believes that another stand-alone option which petitioners can use is necessary.

The Department disagrees that scientific data needed to classify streams as HQ or EV has been reduced. The High Quality Waters definition is now consistent with the EPA definition and requires that waters possess quality that exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. The previous definition, which EPA disapproved, contained the phrase "...and environmental or other features that require special water quality protection." This reduced the number of waters that could qualify. As a result, more waters may qualify for HQ protection under this regulation. On the other hand, in order to qualify as an EV water, the candidate must first qualify for HQ, except where the surface waters are of exceptional ecological significance. The current program does not generally require HQ be met before a water is upgraded to EV.

DEP agrees the chemical parameters should be consistent with the HQ/EV definitions. The chemical parameters are specific to levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. The Department agrees that nitrite plus nitrate nitrogen, manganese, sulfate and Total dissolved solids are water quality criteria designed to protect a potable water supply use and are therefore not necessary to determine whether a surface water meets the HQ/EV definition. They have been deleted from the final regulation. Total recoverable aluminum, dissolved arsenic, cadmium, copper, lead, nickel, zinc, and temperature have been added because these are naturally occurring aquatic life related compounds. The list of chemicals, when reviewed on a long-term basis, tells the "story" of the quality of the stream.

March 5, 1999

The phrase "long-term" is defined by adding language to the final regulation providing that long-term water quality will be based on at least one year of data developed under quality assurance and quality control protocols.

The biological methodologies specified in the regulation are based on EPA's Rapid Bioassessment Protocols (RBP). They have undergone extensive peer review and testing. The Department employs a modification of EPA's Rapid Bioassessment Protocol (RBP) III for benthic macroinvertebrates based on Rapid Bioassessment Protocols for Use in Streams and Rivers: Benthic Macroinvertebrates and Fish, Plafkin, et al., (EPA/444/4-89-001). RBP III is a sophisticated sampling procedure using benthic macroinvertebrates, and provides an excellent picture of a stream's overall water quality. The final regulation further allows the Department to use widely accepted and published peer-reviewed biological assessment procedures as science in this area advances. Whenever the Department uses additional chemical and/or other biological assessment procedures than the minimum required by the regulation, a detailed description of the differences will be provided in the Department's Special Protection Evaluation Report for the candidate waterbody. A summary will also be included in the preamble to the proposed rulemaking for the surface water reclassification, which will be open for public review and comments.

The Department believes it is more defensible to house HQ and EV waters selection criteria in regulations rather than in a policy or guidance document since these criteria form the basis for redesignating waters for Special Protection. The benthic macroinvertebrate integrated metric score of 83 % of the reference stream or watershed has been in use since 1992. It has been thoroughly tested by DEP and it distinguishes between average streams and those deserving of Special Protection status. Moreover, the 92% score for EV was determined through best professional judgment, to reflect exceptional value waters from a biological perspective. Experience with this number since 1992 has proven that it has reflected outstanding waters of ecological significance.

The Department believes the biological selection criteria for HQ and EV waters will assure that streams deserving Special Protection qualify. For example, the Department has determined that the integrated benthic macroinvertebrate score of at least 83 % of the reference stream or watershed used in the HQ biological selection criteria separates those waters with average water quality from those with quality deserving of Special Protection. HQ waters must possess water quality better than that needed to support propagation of fish, shellfish, and wildlife and recreation in and on the water. EV waters must first meet the HQ requirements and then qualify under one of several criteria to merit an "outstanding" designation, worthy of the best streams in the Commonwealth, except for waters of "exceptional ecological significance", whose true ecological value is generally not measured by traditional water quality parameters.

The Department, in cooperation with the Pennsylvania Fish and Boat Commission, is currently developing fish metrics and a fishery based Index of Biotic Integrity (IBI) for Pennsylvania waters. Fishery data is currently being collected by both agencies. It will take a few years to establish a database. Once the fish metrics and IBI are finalized, the Department intends to incorporate them as selection criteria, subject to public review and comment.

March 5, 1999

The Department currently selects reference streams to evaluate petitioned streams. The reference and candidate streams are, whenever possible, in the same subcoregion and have the same fishery type (cold water, warmwater). Reference streams closely match candidate streams from a physical, chemical and biological standpoint.

The Department believes that Class A Wild Trout Waters should continue to serve as a biological selection criteria for HQ waters as long as they are public noticed with an opportunity for comment by the PFBC. A stream or stream segment so classified and public noticed by the PFBC will be protected as a HQ water under the existing use provisions of the regulation.

ACTIVITIES VS DISCHARGES:

Some commentators said no Department permit or approval action should be completed until the Department has completed its Special Protection evaluation.

Other commentators, including US EPA, commented that antidegradation must cover all activities, not just discharges. A commentator also recommended that DEP either require no new or increased discharges or activities to EV streams or require bonding to cover the cost of failing systems.

IRRC questioned the DEP's rationale, which allows a stream to be designated as HQ or EV downstream from a stream segment with a lower designation. What are the impacts on those who discharge into the upper portion of a stream when the lower portion has a higher designation?

Some commentators stressed the Department should encourage a long-term goal of zero-discharge, consistent with the objective of the Clean Water Act.

Response: The scope of activities subject to review is consistent with EPA's regulations. The Department requires that all existing uses be maintained and protected. This protection occurs during the evaluation of an application for a Department permit or approval which could impact a surface water.

The Department does not believe it is either necessary or appropriate to require bonding beyond that provided for in express provisions of the Clean Streams Law related to mining.

The Department supports the Clean Water Act goal of "zero discharge" of pollutants. The final regulation requires that a person proposing a new, additional or increased discharge to HQ or EV waters evaluate non-discharge alternatives that are environmentally sound and cost-effective when compared to a stream discharge. If a non-discharge alternative is not cost-effective and environmentally sound, the discharge must utilize the best available combination of cost-effective treatment, land disposal, pollution prevention, and wastewater reuse technologies.

March 5, 1999

Only stream segments classified as HQ or EV receive the protection of these classifications. If there is a discharge upstream from an HQ or EV water, effluent limitations must be established to maintain that classification.

THREATENED AND ENDANGERED SPECIES AND USE OF PNDI:

Some commentators suggested Endangered Species should only be considered in EV stream designations. Additionally, some emphasized that the species must be aquatic and dependent on water quality.

Other commentators, including the U.S. Fish and Wildlife Service, suggested that all endangered species that depend on water quality should be included in the definition of Surface Waters of Exceptional Ecological Significance. USFWS claims that insufficient attention has been given to threatened and endangered species throughout the draft proposal. U.S. EPA Region III said it will not approve the regulation unless all endangered species are protected.

Some commentators said limiting data searches to only species on the PA Natural Diversity Index (PNDI) ignores the fact that the PNDI is neither all-inclusive nor always up to date. It was suggested that one way to help resolve this is to require applicants for Departmental permits to consult with the U.S. Fish and Wildlife Service for information on listed species within the proposed project area early in the permit process.

Response: Pennsylvania's water quality criteria protect threatened and endangered species in all waters of the Commonwealth.

In response to comments, the Department has modified the language in §93.4c(a)(2).

The Department agrees that the PNDI database is not "all inclusive". Other organizations, such as natural resource agencies, museums, and universities may have information about threatened and endangered species that have not yet been provided to PNDI. By referencing PNDI in §93.4c(a)(2), the Department did not intend to imply that valid information from other agencies would not be considered. Therefore, the phrase "...LISTED IN THE PENNSYLVANIA NATURAL DIVERSITY INVENTORY (PNDI)..." has been removed from §93.4c(a)(2).

HQ AND EV AS WATER USES:

Some commentators supported withdrawing the Exceptional Value and High Quality water use designations. Other commentators commended the Department on its decision to include HQ and EV as protected uses in the ANFR.

Several commentators mentioned that the waters being redesignated as HQ or EV waters are not being upgraded; rather it is only recognition of what already exists.

Response: The Department has maintained High Quality and Exceptional Value Waters as protected water uses. This approach has been in place since 1978 and has proved workable since

March 5, 1999

it integrates antidegradation management categories into the water quality standards program. EPA questioned the 3/22/97 proposal which would have removed HQ and EV waters; the existing quality of HQ and EV waters must be protected regardless of whether the waters are protected uses or not. Moreover, retention of uses for HQ and EV waters was supported by a majority of persons commenting on the issue.

The Department agrees that HQ and EV designations are a recognition of an existing condition.

USE OF GENERAL PERMITS IN SPECIAL PROTECTION WATERS:

A group of commentators having farming interests submitted approximately 600 comments, indicating that they oppose individual NPDES permits for CAOs in High Quality watersheds, and that if a permit is required, it should be a general permit. They do not believe the general permit issue should be delayed and addressed as part of the RBI final rulemaking.

Other commentators, however, supported the proposal to withdraw the use of general permits in HQ streams. Some commentators have recommended the Department expand this to also prohibit discharges under a general permit to any water that has not been assessed by DEP.

Response: The final regulation does not address the requirement for an individual permit in HQ watersheds. As part of its Regulatory Basics Initiative (RBI) proposing revisions to Chapter 92, the Department proposed allowing the use of general NPDES permits in HQ watersheds. The Department received a substantial number of comments on that proposal and will address them in that rulemaking package. However, the Department is addressing the current requirement to hold public hearings for every discharge to an EV water by deleting that section (§ 95.1 (c)) and including language that provides that a public hearing is required for point source discharge to EV waters only when requested by an interested party during the public comment period in the NPDES permit.

The Department's proposed Concentrated Animal Feeding Operation (CAFO) strategy requires an individual NPDES permit in Special Protection Watersheds because the existing regulations (Title 25, Chapter 92 –National Pollutant Discharge Elimination System) do not allow the use of a General Permit in Special Protection watersheds. This requirement will ultimately be dependent on the requirements established in the final RBI rulemaking for 25 Pa. Code Chapter 92.

EV CLASSIFICATION:

Many commentators said that DEP/EQB should consider the social and economic impacts an EV classification carries with it during the stream assessment process.

Comments submitted on behalf of the Pennsylvania Association of Realtors (PAR), Armco Inc., and others suggested that current antidegradation requirements are more stringent than federal requirements, and that exceeding the federal requirements is unnecessary and overly burdensome. IRRC stated in their comments on the ANFR that the DEP's definition of an EV stream should

March 5, 1999

not be broader than the federal requirements. IRRC and additional commentators indicated that the Department's proposal should be consistent with the Governor's Regulatory Basics Initiative of Executive Order 1996-1. Otherwise, the DEP must provide justification or compelling reasons for continuing an EV designation process that is more expansive than the federal standards.

PAR said the issue of "takings" should be considered by governmental agencies when regulatory language is drafted or considered. They indicated that individuals should have the right to dispose of their private property in a reasonable fashion unhindered by government regulations that negatively impact the value of property.

A number of commentators were disappointed that DEP retained the phrase "surface waters" instead of replacing it with "watershed", especially in view of DEP's new emphasis on watershed management, and the recommendations of the 21st Century Environment Commission.

Commentators expressed concern that there is no mention of National (and State) Parks as part of the criteria in §93.4(b)(1) to be used in considering high quality waters. Presence of National Parks is part of the federal criteria. A commentator uses the example of the EV status of Valley Creek that flows through Valley Forge National Historical Park. It is possible that since National Parks are not part of the criteria the EV classification for Valley Creek could be removed.

Response: The federal CWA precludes the Department from considering economic or social factors in developing water quality standards. See 33 USC § 1313 (c) (2) (A).

The Department's EV definition is broader than EPA's Tier 3 definition; EPA's definition protects only outstanding national waters. The Department believes that outstanding state, regional, and local waters in the Commonwealth also merit protection and recognition as EV waters; this is a compelling justification for having a definition of EV broader than the federal Tier 3.

Department regulations, including these regulations, are drafted mindful of the takings provisions of the United States and Pennsylvania Constitutions. These regulations represent a reasonable exercise of the Commonwealth's police powers and do not in any way prohibit all economically viable uses of a property owner based on the property owner's reasonable investment-backed expectations. The regulations do not affect the right to dispose of private property, and instead provide protection to the Commonwealth's best waters. Experience has shown that numerous permits have been granted for discharges to High Quality and Exceptional Value waters.

The Department believes that watersheds are contained in the term "surface waters". Stream designations will continue to be made on a basin basis. Moreover, the Department has emphasized the "watershed" approach and the recommendations of the 21st Century Environment Commission in several ways in this regulation, most notably in the definition of "Coordinated Water Quality Protective Measures," which provides for the protection of watershed corridors as EV waters where local or regional governments have adopted sound land use water quality protective measures in waters which have the water quality of High Quality Waters or higher.

March 5, 1999

The Department has added language to the final regulations which includes National Forests and Parks and State Forest and Park Natural Areas as Exceptional Value waters selection criteria. As a legal matter, no change is needed to the definition of "Surface Water of Exceptional Ecological Significance". The word "include" has the same legal meaning as "including, but not limited to".

IMPLEMENTATION GUIDANCE / SP HANDBOOK:

The Citizens Advisory Council (CAC) is concerned that SEJ and other important implementation details are to be addressed in the Special Protection Implementation Handbook, and that revisions to the Handbook are being delayed. They believe that the issues that are to be addressed in the Handbook are critical to the program and deserve (require) public review concurrent with the review of the regulations. The CAC suggested that a draft of the revised Handbook be made available for comment before the rulemaking goes back to the EQB for consideration. Another commentator requested that the Department issue a revised Handbook within the next 6 months, and to hold a formal comment period of at least 60 days on the implementation document.

Response: The Department will begin the task of preparing necessary implementation guidance to support the final regulation once the content of the regulation is certain. Substantial changes to the existing Special Protection Waters Implementation Handbook will be made, as necessary, and will undergo public notice with an appropriate comment period. The establishment of a date when this guidance will be available cannot be determined at this time.

IMPACT ON AGRICULTURE AND OTHER LAND USES:

Many commentators associated with farming and/or the agricultural trades, real estate, construction, development and/or the building trades said the draft final regulations will hurt agriculture and/or the farmers' ability to continue farming, and the builders and/or developers' ability to develop their property in those areas near HQ or EV streams. Many commentators claimed that the increased burden and regulatory controls will increase the costs to the farmers, builders and developers who develop property near a High Quality or Exceptional Value stream. They said the regulations are stricter than federal standards, and/or that the current federal promulgation has provided regulations with adequate protection since 1996.

Other commentators claimed that the regulations will continue to give certain groups the means to use HQ and EV stream designations as a method to restrict agricultural and landowners' activities, and to use the Special Protection Program as a tool to halt economic growth and development. Some commentators suggested that farmers are stewards of the land that provide income, and they do not purposely hurt the land that feeds them.

Response: The ANFR requires the Department to assure that cost-effective and reasonable best management practices for non-point source control be achieved. This requirement tracks language in the federal regulation at 40 CFR § 131.32(a)(2). Existing requirements in Chapters 102 and 105, the Nutrient Management Act and the Manure Management Program will continue

March 5, 1999

to govern. There are no new or additional requirements in the ANFR regarding farms in HQ or EV waters. In March, 1999, the Department finalized its CAFO strategy which describes requirements applicable to farming operations that are required by the Clean Water Act (CWA) to obtain a NPDES permit.



Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building

P.O. Box 2063

Harrisburg, PA 17105-2063

May 20, 1999

The Secretary

717-787-2814

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown II
Harrisburg, PA 17101

RE: Final Rulemaking – Water Quality Amendments (Antidegradation) (#7-310)

Dear Bob:

Pursuant to Section 5.1(a) of the Regulatory Review Act, enclosed is a copy of a final-form regulation for review by the Commission. This rulemaking was approved by the Environmental Quality Board (EQB) for final rulemaking on May 19, 1999.

This final rulemaking amends Pennsylvania's antidegradation regulations in Chapters 93 and 95 to satisfy federal Clean Water Act requirements by addressing EPA's disapproval of portions of Pennsylvania's antidegradation program. Based on input from the public, numerous stakeholders, committees, groups, and others, the final proposal has been reorganized and reformatted to be more objective and comprehensive and to carefully balance the needs of Pennsylvania's citizens, including the environmental and regulated communities, to assure the protection of the Commonwealth's waters. The final rulemaking more closely mirrors the federal antidegradation regulations. A one-page comparison of the DEP and federal requirements is also enclosed.

The EQB adopted the proposed rulemaking on January 21, 1997, after receiving input from individual members of the Regulatory Negotiation (Reg Neg) Group. This was a group of interested stakeholders convened by DEP in 1995 to address antidegradation issues as a result of the federal disapproval. A 60-day public comment period and one public hearing were held on the proposed rulemaking, resulting in comments from nearly 1,700 individuals and organizations. Most of the comments were in opposition to the proposal either because it was too stringent or not adequately protective. Based on the general and specific comments received, DEP developed the reorganized draft final rulemaking and published it for comment as an Advance Notice of Final Rulemaking (ANFR) on January 23, 1999. During that 30-day period 743 commentators responded. A separate summary of the comments and responses relative to the ANFR is attached to the final rulemaking.

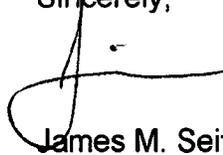


The final rulemaking incorporates recommendations received at both the proposed rulemaking and the ANFR stages. The Water Resources Advisory Committee (WRAC), the Citizens Advisory Council (CAC), the Agricultural Advisory Board and the Reg Neg Group members were consulted throughout this process.

The Department will provide the Commission with any assistance required to facilitate a thorough review of this final-form regulation. Section 5.1(e) of the Act provides that the Commission shall, within ten days after the expiration of the committee review period, approve or disapprove the final-form regulation.

For additional information, please contact Sharon Freeman, Regulatory Coordinator, at 783-1303.

Sincerely,

A handwritten signature in black ink, appearing to read "James M. Seif", with a long horizontal flourish extending to the right.

James M. Seif
Secretary

Enclosure

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

RECEIVED

I.D. NUMBER: 7-310

99 MAY 20 PM 3:19

SUBJECT: Water Quality Amendments - Antidegradation

INDEPENDENT REGULATORY
REVIEW COMMISSION

AGENCY: Department of Environmental Protection/Environmental Quality Board

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. _____ With Revisions

b. _____ Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
<i>initials</i> 5/20/99		HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
<i>initials</i> 5-20-99	<i>Tracy Donson</i>	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
5/20/99	<i>Kim C. Garner</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL
_____	_____	LEGISLATIVE REFERENCE BUREAU

May 20, 1999