

LAW OFFICE OF:

ROBERT P. GING, JR., P.C.
COUNSELOR AND ATTORNEY AT LAW
R. D. #3 - BOX 220
Confluence, PA 15424-9610

ORIGINAL: #1799
COPIES: COCCODRILLI
TYRRELL
JEWETT
SANDUSKY
WYATTE
BERESCHAK

Robert P. Ging, Jr.

Robert A. Reiley

May 20, 1997

(814) 395-3661

Environmental Quality Board
P. O. Box 8477
Harrisburg, PA 17101-8477

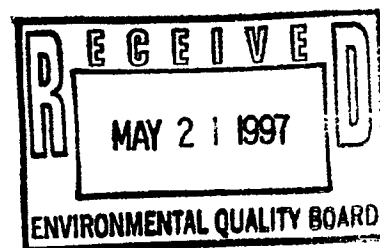
Dear Members of the EQB,

These comments from Robert P. Ging, Jr., P.C. are in response to the proposed rulemaking on anti-degradation relating to the Clean Streams Law published in the March 22, 1997 Pennsylvania Bulletin (Vol. 27, No. 12, March 22, 1997). Our firm is engaged in the practice of environmental law and represents a number of citizens' groups in the Commonwealth that are actively engaged in the preservation, enhancement, and restoration of cold water resources in Pennsylvania.

These comments are submitted mindful of the fact that the Pennsylvania Environmental Quality Board must enact regulations that are as stringent as the EPA promulgated regulations. In general, the proposed regulations do not now meet the Federal regulations and urge the Environmental Quality Board to reconsider any of the proposed regulations that will allow degradation of Pennsylvania's waters to occur more easily and more often than the Federal regulations.

SECTION 92.81 - GENERAL NPDES PERMITS

The current preclusion on the use of general NPDES permits for regulating discharges and "special protection" waters should remain. Since general permits allow for degradation individual permits should be required to maintain the needed level of protection, that Pennsylvania water deserve.



ENVIRONMENTAL QUALITY BOARD

May 20, 1997

Page Two

SECTION 93.3 - PROTECTED WATER USES

High quality and exceptional value waters should not be deleted as "protected uses". Once high quality and exceptional value are removed as uses DEP can raise the designation threshold for both high quality and exceptional value, reassess the existing high quality and exceptional value streams and downgrade them since they do not meet the new threshold requirements. Since the Department would continue to assess waters, evaluate technical data, and make recommendations to the Board under the existing regulatory process for formal designation as HQ or EV waters these protected water uses should not be deleted.

SECTION 93.4(a)

This regulation should state:

"Existing instream water uses and the level of water quality necessary to protect existing uses shall be maintained and protected."

This language is consistent with the Federal counterpart as set forth in the Clean Water Act and EPA regulations. To make water quality protection and maintenance contingent upon the Department's evaluation of technical data is unduly burdensome and provides less protection than that found under the Federal law and regulations.

SECTION 93.4(b) - HIGH QUALITY WATERS

The assessment of water quality to be contingent upon both a chemistry test and biology test is less stringent than existing Federal regulations. This section should read that:

"For a surface water to qualify as high quality waters, the Department must determine that the high quality meets one of the conditions set forth below:
(i) chemistry test or (ii) biology test."

ENVIRONMENTAL QUALITY BOARD

May 20, 1997

Page Three

The proposed regulation states that a discharge cannot maintain and protect water quality if it uses up to 25% of its assimilative capacity of the water, or qualifies for a general permit. One of the main reasons of high quality is to ensure that there is a satisfactory reason for degradation and that the public interest is served because of that degradation. This 25% degradation has no basis in the Federal regulations. All applicants wishing to degrade water quality must be required to justify that degradation as outlined in subsection (b).

SECTION 93.4(c) - EXCEPTIONAL VALUE WATERS

The definition of exceptional value waters does not provide consideration for public lands. The "special protection waters implementation handbook" did consider public lands and other things like endangered species. It is recommended that the language set forth in the handbook be retained in the proposed regulation.

SECTION 93.4(d) - GENERAL REQUIREMENTS FOR HQ AND EV WATERS

The proposed language should be changed to read as follows:

"A person planning or proposing a new, additional or increased discharge to high quality or exceptional value waters must evaluate all alternatives to the discharge and shall use an alternative that is environmentally sound and incorporates necessary pollution prevention methods."

The language contained in the Federal regulations regarding non-point sources should be adopted to read that a state must ensure that all required non-point source controls be in place before allowing any more degradation. In addition it is believed that the Department should also implement programs that will not only be cost effective and best management practices but also incorporate pollution prevention elements for non-point source control.

ENVIRONMENTAL QUALITY BOARD

May 20, 1997

Page Four

SECTION 93.4(e) - PUBLIC PARTICIPATION IN HQ AND EV VALUE WATERS

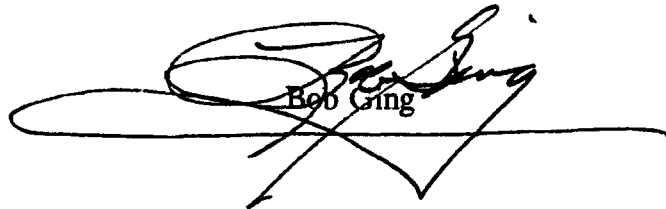
Local residents, local governments or local businesses should in no way have a "veto power" over exceptional value designations. This approach is contrary to Federal regulations and cannot be adopted.

OTHER ISSUES

The proposed regulations do not place enough emphasis upon pollution prevention as a means of preventing degradation of the Commonwealth's waters. These proposed regulations as all environmental regulations must seriously consider and incorporate pollution prevention requirements when appropriate.

SUMMARY

In summary, there are certain portions of these proposed regulations that are less stringent than the Federal counterpart. If these particular portions of the proposed regulations are not changed we can anticipate supporting litigation that will change these proposed regulations to be as stringent as the Federal counterpart or request that EPA retain primary responsibility over the Pennsylvania program.



Bob Ging

BG/rae

**Regulatory Negotiation
for the Antidegradation (Special Protection Waters) Program:**

Final Report of the Conservation Stakeholders

***Submitted to the PA Department of Environmental Protection
21 August 1996***

Stakeholders representing governmental agencies, conservation groups, public interest groups and the regulated community were identified and invited to participate in the process beginning in June 1995. This is the final report of the following stakeholders:

Berks County Conservancy	PA Environmental Defense Foundation
League of Women Voters	PA Fish and Boat Commission
Penns Valley Conservation Association	PA Trout, Inc.
	U.S. Fish and Wildlife Service

Two conservation stakeholder groups support the final report except for a few areas where certain differences exist which warrant Attachment 1. This attachment clarifies the position of the following stakeholders on various issues contained in this report:

Chesapeake Bay Foundation	PA Environmental Council
---------------------------	--------------------------

The reg-neg process encouraged representatives to actively communicate with non-participating groups with similar interests. We have done this throughout the process and communicated our recommendations to those groups. Letters of endorsement from the following groups for this report are included in Attachment 2, and we expect additional groups and individuals to support our recommendations during the public comment period:

Friends of Saucony Marsh	PA Chapter American Fisheries Society
I. B. Sinclair, Esquire	PA Game Commission
Laurel Hill Creek Watershed Association	PA Federation of Sportsmen's Clubs
Pine Creek Valley Watershed Association	PA Organization for Watersheds & Rivers
PA BASS Chapter Federation	SONS of Lake Erie
Greens Valleys Association	

A progress report was issued on April 1, 1996. The report was intended to apprise DEP on the progress made to that date, and did not represent consensus. Agreements made to that date were contingent on reaching consensus on other issues, and also were subject to further discussion if necessary. Following the federal Court's decision requiring EPA to promulgate an antidegradation regulation for Pennsylvania, DEP used the interim report as a basis for draft regulations. We consider DEP's action to be unfortunate, because of the contingent nature of the interim report.

On August 1, 1996, the stakeholders decided to end the process, and no consensus was ever reached. Because the preliminary agreements of the interim report were contingent on final consensus, the components of the interim report are null and void. We appreciate DEP's decision to withdraw the draft rulemaking based on the interim report, and to accept and consider comments from the stakeholders prior to the development of a new regulatory package to be submitted to the EQB.

I. Introduction

We believe that the Department's Special Protection program is, as EPA has called it, an excellent vehicle for protecting Pennsylvania's best waters. At most, the program has needed "fine-tuning" as opposed to a major "overhaul." As EPA said, "[o]ur disapproval is intended to result in the enhancement and broadening of Pennsylvania's program, and not to replace the program, regulations or antidegradation policy that Pennsylvania has already implemented." After nearly fourteen months of negotiations with the regulated community, we are cognizant of the implications of an antidegradation program that is not realistic. However, we believe that the current program is realistic, and that the following recommendations are needed in order to satisfy the EPA disapproval. We offer the following recommendations to DEP as a common-sense approach to protecting Pennsylvania's waters--which should be the primary goal of the Commonwealth's antidegradation policy.

II. Recommendations

Following are the respective elements as they apply to the three tiers: Tier 1 - Basic Water Quality Protection; Tier 2 - High Quality (HQ) Waters; and Tier 3 - Exceptional Value (EV) Waters. In addition to the recommended regulatory approaches, explanatory information is included in *italics*.

Tier 1

The following regulatory language is proposed for inclusion in Chapter 93:

Section 93.4. Statewide Water Uses

(c) Redesignation of waters. Waters considered for redesignation may not be redesignated to less restrictive uses than existing uses.

(d) Protection of streams or watersheds. Existing instream water uses and the levels 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 waterbody attains the criteria for an existing use which is more protective of the stream or watershed than the designated use, that stream or watershed shall be protected at its existing use.

This language is intended to insure that all surface waters will receive a minimum of Tier 1 protection and that existing uses will be protected regardless of the designated use. The promulgation of this language also changes the current responsibility for determining protected uses: the regulatory designation process of the Environmental Quality Board (EQB) will no longer be used to determine an existing use but would only be used to modify the designated use to be consistent with the existing use that is established by the Department.

The Department currently designates "watersheds" or "basins". This approach properly recognizes that water quality throughout a watershed contributes to overall water quality in the waterbody, and the "fishable/swimmable" goals that are a major factor in the antidegradation program. We support the current method, which has a basis in sound water quality management. We do not believe that requiring separate assessments on each segment of the Commonwealth's 54,000 miles of streams is workable or prudent, especially if done in response to unsubstantiated fears of an extension of the water quality regulatory program.

Tier 2

The following regulatory language is proposed:

Section 93.3 Protected water uses.

High Quality Waters - A stream or watershed where water quality exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water.

The reg-neg group discussed the removal of both HQ and EV as "protected water uses." We believe that including special protection categories as uses provides additional water quality protection to these waters. However, we could support removal of these designations as use categories provided that Chapter 93 includes assurances that waters cannot be arbitrarily downgraded. Language to assure this is included in the following sections. Without adequate regulatory safeguards, we cannot support removal of HQ and EV as protected water uses.

Section 93.X. General Requirements

(a) Determination of high quality waters.

(1) To qualify as High Quality Waters, a stream or watershed must have quality generally better than established water quality criteria contained in the Water Quality Standards in 25 PA Code Chapters 93 and 16, or its water quality must be in a natural state.

Specific methods to determine water quality which exceeds levels necessary to support fishable/swimmable uses should be in a Statement of Policy (see below).

(2) If a waterbody has met the requirements of high quality waters (as described in (1) above) at any time on or after November 28, 1975, then that waterbody shall be considered to be high quality waters. If, it can be demonstrated to the satisfaction of the Department and the Fish and Boat Commission, and after ample opportunity for public participation, that a waterbody currently protected as high quality waters does not currently, and has never met the requirements (as described in (1) above) since November 28, 1975, then that waterbody shall not be protected as high quality waters. Such a determination shall not preclude the waterbody from being protected as high quality waters at a later time if the waterbody shall later meet the requirements.

The following Subsection (x) should be added to address the issue of unassessed waters in the interim between the time of enactment of a new program and until such time as all waters of the Commonwealth are assessed.

(x) Any water that has not been assessed by the Department for the purposes of antidegradation protection shall be listed as a High Quality water until such time that assessment of that water shows that a change in antidegradation protection is warranted.

(b) High Quality streams or watersheds shall be maintained at existing quality, unless a person who proposes a new, additional or increased discharge of sewage, industrial waste or other pollutants which are applicable to the receiving waters meets the following conditions:

(1) The proposed new, additional or increased discharge of pollutants is essential to accommodate necessary economic or social development of significant public value in the area in which the stream or watershed is located.

DEP must reexamine the present review criteria for SEJ to ensure that the purpose of the test is achieved. Our belief is that the present review criteria do not reflect the current definition in Chapter 95, nor would it work for this new definition. Currently, environmental values are not considered in the review criteria, nor is the public's interest in maintaining existing water quality given adequate weight. DEP is obligated to implement a method of review that recognizes the public trust. Extensive public participation is required before this decision is reached. The review criteria should be placed in a Statement of Policy and referenced in Chapter 93. The program requires there to be a rebuttable presumption that water quality in High Quality watersheds will not be degraded and the burden of proving that it may be degraded rests with the proposed discharger. The balancing test (SEJ) should be designed to truly reflect the public's interest in either maintaining or degrading water quality.

(2) such proposed discharge shall utilize the best available combination of treatment and land disposal technologies and practices for such wastes, where land disposal would be economically feasible, environmentally sound, and consistent with all other provisions of this Title;

(3) if land disposal is not economically feasible, is not environmentally sound, or cannot be accomplished consistent with all other provisions of this Title, the proposed discharge shall utilize the best available technologies and practices for the reuse and discharge of such wastes;

We support conducting the SEJ and the alternatives analysis simultaneously, or having the SEJ follow the alternatives analysis. If DEP is going to compare alternatives using only the costs of treatment methods, then non-discharge alternatives should be given a cost advantage over discharge alternatives. DEP should strongly consider assessing alternatives against the viability of the development (as outlined in EPA guidance), where the required alternative is the one that results in the least degradation but does not hinder the development. DEP should acquire additional staff versed in the technical skills needed (i.e., economics) in order to competently conduct Tier 2 reviews, and reviews should be conducted in the Central Office for consistent results.

(4) The Department shall assure that there shall be achieved cost-effective and reasonable best management practices (BMPs) for non-point source control in the watershed before allowing any further degradation of water quality.

(c) Any proposed discharge to a High Quality stream or watershed, alone or in combination with other anticipated discharges, shall not preclude any use presently attained in the waters and downstream from the stream or watershed, and shall not result in a violation of any of the numerical water quality criteria which are applicable to the receiving stream or watershed to protect existing uses or water quality criteria.

The group believes that all dischargers should be subject to the full Tier 2 requirements, in order to meet the goals of antidegradation. Although the reg-neg group agreed that discharges that used less than 25% of the assimilative capacity would be exempt from the Tier 2 review, that agreement was predicated on reaching consensus on SEJ, which was not accomplished. In addition, new information came to light regarding the effectiveness of the current program, especially the alternatives analysis, which led us to conclude that it would be poor public policy to forego the alternatives analysis, possibly the best opportunity for preventing degradation. The 25% level, was in any case, not based in science, and was an arbitrary figure. We also see no need to allow general NPDES permits in HQ watersheds, as general permits, by their nature, allow for degradation. Instead, DEP should develop technical assistance programs for small-flow discharges to help the applicants conduct the alternatives analysis and meet antidegradation goals.

The following section on pollution prevention and waste minimization evaluation during the alternative analysis phase should be added:

(d) Any person who proposes a new, additional, or increased discharge of sewage, industrial waste, or other pollutants to High Quality waters shall evaluate and implement pollution prevention and waste minimization techniques.

Tier 2 Statement of Policy

The Statement of Policy will state that the Department will evaluate candidate streams or watersheds for an HQ (Tier 2) designation using the general chemistry test or any of the following biological methods. The purpose of the biology test is to serve as a substitute for long-term water chemistry data. It is not intended to create an additional hurdle to qualify for Tier 2 protection.

Proposed methods for determining HQ streams, as listed in a Statement of Policy:

Water Chemistry

In order to assess if water quality is generally better than established water quality criteria in PA Code Chapters 93 and 16, the Department presently uses and will continue to use the results of the following laboratory water quality analyses obtained from at least one grab sample collected at average stream flows along multiple defined reaches in the watershed.

pH (lab)	Cadmium *	Chromium, hexavalent *
Alkalinity	Ammonia - Nitrogen	Copper *
Acidity, total	Nitrate - Nitrogen	Iron, total
Total Dissolved Solids	Nitrite - Nitrogen	Lead *
Total Suspended Solids	Phosphorus, total	Manganese, total
Chlorides	Hardness	Nickel *
Sulfates	Calcium, total	Zinc *
Aluminum, total	Magnesium, total	Arsenic *
	Chromium, total	

* Total and dissolved metal analyses are to be consistent with the changes made to specific metals listed in 25 PA Code Chapter 16.

We recommend that the Department cease sampling for fecal coliforms for antidegradation purposes.

Biology

1. The US EPA Rapid Bioassessment Protocols (RBP) II or III (Plafkin, et. al., Rapid Bioassessment Protocols for Use in Streams and Rivers: Benthic Macroinvertebrates and Fish. EPA/444/4-89-001). A candidate stream or watershed satisfies this condition if its integrated benthic macroinvertebrate score is greater than or equal to **X** percent of the reference stream or watershed score. To assess whether a stream or watershed satisfies this condition, the Department will compare a candidate stream or watershed to a reference stream or watershed of the same stream or watershed order with similar characteristics or other similar stream or watershed within the same ecoregion;

As data become available, DEP should determine what number represents a level of biological integrity that represents long-term water chemistry that is better than standards.

2. The stream or watershed has been designated as a Wild Trout Stream by the PA Fish and Boat Commission pursuant to its annual Wild Trout Stream List; or

Wild trout are an excellent barometer of good water quality. Streams that support reproducing wild trout populations must have good water quality and adequate food and habitat for all life stages of the fish. Wild trout streams are recognized by other states as Tier 2 waters. Pennsylvania should follow suit.

3. Other peer-reviewed, biological assessment procedures adopted by the Department to determine comparable non-impairment of a candidate stream or watershed.

Tier 3 (Exceptional Value)

The group believes that the Tier 3 program is basically sound and requires only minor modifications. DEP should defend its EV program as equivalent of the federal Tier 3 requirements. We do not see any need for an additional Tier 2.5 or 3 category.

The definition should remain unchanged. Additional categories that go beyond the examples in the federal regulation, merely indicate the numerous examples of outstanding waters that are present in Pennsylvania, and do not significantly expand the Commonwealth's definition over the federal definition.

DEP should not use the median flow as the benchmark for determining "no measurable change." Water quality standards are applicable at flows greater than or equal to $Q_{7.10}$, and the "no degradation" requirement is a water quality standard for EV streams. Therefore, DEP should determine "no measurable change" at a design flow of $Q_{7.10}$. Similarly, federal guidance does not allow "mixing" or "compliance" zones in waters of ecological significance. EV waters, by their nature, should be free from mixing zones.

We believe that the selection criteria in the Special Protection Waters Implementation Handbook are sound. We offer the following suggestions:

Outstanding Local Resource Waters:

We support that where local municipalities have enacted protective mechanisms, those watersheds will be considered for an EV designation. We suggest that a threshold level of 50% of the watershed be used to determine whether or not this criterion is met.

Other Waters of Significant Ecological or Recreational Resources:

The requirement that DEP demonstrate that existing water quality is needed to protect endangered species should be dropped. Instead, EV protection should be extended to waters where endangered species are existing uses (present on or after November 28, 1975). DEP should work with other agencies to develop workable criteria for assessing the recreational value of waters, and adopt a criterion for EV protection based on recreational merit.

Other Issues Considered

Public Participation

Certainly one of the major causes of the controversial nature of this program is because it is poorly understood by Pennsylvanians. We believe a major outreach effort to educate the public on the antidegradation program is long overdue. We offer our assistance to DEP for this effort. This administration has rightfully placed a strong emphasis on public participation, and we believe that an informed public will support an antidegradation program that properly protects their resources.

We support the conclusions reached by the SEJ work group on public participation. One of the major purposes of Tier 2 antidegradation is to give the public a greater voice in decisions involving their water quality. Public participation requirements for HQ streams should be included in regulation.

DEP should make a major effort to inform the public about the EV program. An EV designation for a basin is neither the end of all economic activity as some claim, nor is it an adequate substitute for local land use controls. Public involvement should be solicited early in the assessment process, but an EV designation should not be conditioned on public approval.

Assessing Unassessed Waters

We believe that the existence of a significant portion of Pennsylvania's surface waters that have not been assessed for potential antidegradation protection is one of the root causes of the issues raised about the current antidegradation program. Consequently, we recommend that all unassessed waters "default" to a Tier 2 status, unless permit applicants provide data that show otherwise.

III. Other Issues Remaining

The group identified a number of issues that should be addressed when the Department revises the water quality regulations. These include:

- * Methods to improve the public participation process regarding the antidegradation program, with particular attention to expanding public involvement in the assessment of Tier 2 and Tier 3 candidates.
- * Methods to further streamline the designation process.
- * Coordination among bureaus to ensure consistency of antidegradation measures, especially the Bureau of Mining and Reclamation.
- * Development of a simple flow chart or example of the designation process.
- * Improvement of the petition process.
- * Integration of the wetlands protection program with the antidegradation program, in order to meet minimum federal requirements.

Attachments

ATTACHMENT 1

Chesapeake Bay Foundation and PA Environmental Council's Supplemental Comments

Conservation Stakeholder's Report

August 21, 1996

STATION 811329

TO: Dan Drawbaugh
Pennsylvania Department of Environmental Protection

FROM: Davitt Woodwell
Pennsylvania Environmental Council

Jolene Chinchilli
Chesapeake Bay Foundation

DATE: August 21, 1996

RE: Comments on Conservation Stakeholders Comments on Special Protection Waters

What follows are comments on the Final Report on the Special Protection Waters Regulatory Negotiation submitted by other conservation representatives to the reg-neg. While we generally support that final report, there are certain areas where we differ somewhat. Because of this, we are submitting these comments on that final report rather than preparing an entirely separate submission. Other than the differences set forth below, we support the Final Report of the other conservation stakeholders.

PREAMBLE

Paragraph IV

The sentence stating that "the components of the interim report are null and void" is overstated and should be removed. This is especially true as a number of those "components" are still included in this final report. In addition, the interim report was, as we constantly reminded the regulated community, contingent on a number of outcomes that did not pan out. Therefore, the interim report has gone its own way

INTRODUCTION

Paragraph I

We suggest removing the sentence "However, we believe that the current program is realistic, and that the following recommendations are needed in order to satisfy the EPA disapproval." Based on our understanding of the program, it is not realistic and does not adequately protect high quality waters in the Commonwealth.

RECOMMENDATIONS

TIER 2

Section 93.3 (Italicized comment)

The purpose of this paragraph, discussion of the removal of HQ and EV as uses, is muddled and indicates that specific language on this issue follows when, in fact, it does not. An edited version of this paragraph should read:

“The reg-neg group discussed the removal of both HQ and EV as ‘protected water uses.’ Many conservation stakeholders believe that including special protection designation as a ‘use’ provides additional water quality protection. However, we could support removal of these designations as ‘uses’ so long as Chapter 93 includes assurances that waters cannot be arbitrarily downgraded. Language to assure this is included in the following sections.”

Chapter 93.x

An additional subsection should be added to this section to address the issue of unassessed waters in the interim between enactment of a new program and such time as all waters of the Commonwealth are assessed. The section should read:

“(x) Any water that has not been assessed by the Department for purposes of anti-degradation protection shall be listed as a High Quality water until such time that assessment of that water shows that a change in antidegradation protection is warranted.”

Chapter 93(x)(b)(1) (Italicized Comment)

Remove the sentence “Currently, environmental values are not in the review criteria, nor is the public’s interest in maintaining existing water quality given adequate weight.”

The result of this sentence is to require a separate “balancing” of the environmental and SEJ factors when determining whether a discharge will be permitted in HQ waters. Currently, and the way that we feel it must remain, there is a rebuttable presumption that water quality in a high quality water will not be degraded. Degradation can only occur if the applicant demonstrates that the social and economic justification outweighs the public interest in high water quality and, if SEJ and alternatives are tightened, that the discharge is necessary for the public interest. This is a much better approach than trying to quantify the environmental and other factors that are being protected.

Chapter 93(c)

The interim report included language allowing for degradation of the first twenty-five percent of the assimilative capacity of High Quality waters. The proposed final report of the conservation stakeholders removes any possibility for differential treatment of discharges in HQ waters.

While we agree that the 25% number was predicated on reaching consensus on SEJ, we also

believe that it is necessary to recognize that "insignificant" discharges be treated somewhat differently in the regs. To that end, we feel that this section must include language and an equation similar to that of the interim report that allows dischargers to forego SEJ analysis for "insignificant" discharges into HQ waters. However, we believe that "insignificant" must be defined as no more than 20% of assimilative capacity for conventional pollutants (i.e. BOD and solids), 10% for toxics, and 0% for persistent (bioaccumulative) toxics. In addition, this avoidance of SEJ analysis must be accompanied by a streamlined alternatives analysis developed by the Department and performed by the applicant.

The comment to this subsection also includes discussion of General Permits in HQ waters and a position against all such permits. General Permits are, by definition, issued only for activities that are insignificant both individually and cumulatively. We believe that the issuance of general permits for activities in HQ waters is appropriate in certain circumstances and dependant upon adequate review of the permit at the time that it is proposed as well as annual reviews by the Department and the public of all activities carried out under the permit. Such language needs to be in the report.

Chapter 93(d)

We believe that an additional subsection needs to be added to address the issue of pollution prevention in the alternatives analysis phase. This subsection should read;

"Any person who proposes a new, additional, or increased discharge of sewage, industrial waste, or other pollutants to High Quality waters shall evaluate and implement pollution prevention and waste minimization techniques."

TIER 2 STATEMENT OF POLICY

The language on fecal coliforms should be printed in bold letters to highlight the importance of this point.

TIER 3 (EXCEPTIONAL VALUE)

Paragraph I

The paragraph is somewhat confusing. A suggested modification is that the paragraph reads.

"The group believes that the Tier 3 program is basically sound and requires only minor modifications. DEP should defend its EV program as equivalent of the Federal Tier 3 requirements. We do not see any need for an additional Tier 2 ½ or 3 category."

Outstanding Local Resource Waters

We believe that this entire section should be removed. The Special Protection Handbook currently addresses important local resources and we should have an opportunity to work for their continued inclusion outside of the EQB and TRRC processes.

STH 1126 011 3 97

Public Information
Division

ATTACHMENT 2

Additional Conservation Group Endorsement Letters

Conservation Stakeholder's Report

August 21, 1996

August 19, 1996

STANDARD MAIL

POSTAGE WILL BE PAID BY ADDRESSEE



P.O. Box 37
Kutztown, PA 19530

Mr. John Arway
Pennsylvania Fish and Boat Commission
Division of Environmental Resources
450 Robinson Lane
Bellefonte, PA 16823
FAX 814-359-5175

Dear Mr. Arway:

The Friends of the Saucony Marsh endorse the final report of the conservation stakeholders in the regulatory negotiation for the anti-degradation (special protection waters) program. As a local organization committed to the protection of the Saucony Creek watershed in Berks County, we find that these recommendations would benefit the waters with which we are concerned. In our judgement the recommendations fulfill the anti-degradation provisions of the Clean Water Act. With regard to Tier 2 protection we also judge that these recommendations allow for discharges in true cases of need.

We commend the conservation stakeholders for their outstanding effort in analyzing Pennsylvania's special protection waters program and offering the needed fine-tuning.

Sincerely,

Phila Back
Chairwoman

RECEIVED

AUG 19 1996

LAW OFFICES
I.B. SINCLAIR
ATTORNEY AND COUNSELLOR AT LAW
COURT HOUSE SQUARE EAST
30 W. THIRD STREET
MEDIA, DELAWARE COUNTY, PA 19063-2824

PA Fish & Boat Commission
Division of Environmental Services
AREA CODE 610
666-2500
FAX 565-2508
891-1649
HAROLD B. RAMSEY
1982-1986

Practice Limited To Family and Matrimonial Law

Fellow, American Academy of Matrimonial Lawyers

5/16/96

I wish to endorse the Final Report
of Community Stakeholders.

The stronger the action against
pollution of all kinds, the better.

The faster regulations are enforced,
the better.

There must be no compromise
with evil (to paraphrase Henry
Cabot Lodge.)

I. B. Sinclair

571.410.1100

Laurel Hill Creek Watershed Association

R.D. # 3, Box 138
Rockwood, PA 15557

RECEIVED

AUG 16 1996

John Arway
Pa. Fish and Boat Commission
Division of Environmental Resources
450 Robinson Lane
Bellefonte, PA 16823

PA Fish & Boat Commission
Division of Environmental Services

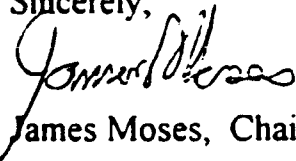
August 14, 1996

Dear John:

We the members of the LHCWA do whole heartedly endorse the Final Report of Conservation Stakeholders submitted by the Berks Co. Conservancy, League of Women Voters, Penns Valley Conservation Assoc., PA Environmental Defense Foundation, PA Trout Inc. U.S. Fish and Wildlife Service and your PA Fish and Boat Commission.

We will try to enlist support from our Somerset Co. Sportsmen's League and the Somerset County Conservancy to endorse this Final Report but won't be able to make the time deadline for your report.

Sincerely,



James Moses, Chairman

**THE PINE CREEK VALLEY
WATERSHED ASSOCIATION, INC.**

P.O. Box 239
Oley, PA 19547

August 17, 1996

Mr. Daniel Drawbaugh
Department of Environmental Protection
Bureau of Water Quality
P.O. Box 8465
Harrisburg, PA 17105-8465

Re: Reg-Neg Special Protection Waters Program

Dear Mr. Drawbaugh:

Please be advised that the Pine Creek Watershed Association endorses the final report of the Conservation Stakeholders for the Regulatory Negotiation Antidegradation (Special Protection Waters) Program.

Sincerely,



Ingrid E. Morning,
President and
General Counsel

cc: Mr. John Arway (via fax)



Pennsylvania B.A.S.S. Chapter Federation, Inc.

97 MAY 20 1996
RECEIVED
FEDERAL BUREAU OF INVESTIGATION

August 17, 1996

The Pennsylvania B.A.S.S. Federation does concur with the recommendations and conclusions of the report issued by The Conservation Stakeholders for protection and conservation of Pennsylvania water resources.

John Bayer
Pa. B.A.S.S. Federation Conservation Director
District V
560 Pittsburgh Road
West Brownsville, Pennsylvania 15417
412-785-3922



Green Valleys Association

John D. Funk, President • Matthew Cremers, Vice President
Anne L. Hearn, Secretary • Donald W. Hans, Jr., Treasurer • Ralph D. Heister, Jr., Executive Director

RECEIVED

August 16, 1996

AUG 21 1996

John Arway
PFBC
Division of Environmental Resources
450 Robinson Lane
Bellefonte, PA 16832

PA Fish & Boat Commission
Division of Environmental Services

Dear Mr. Arway,

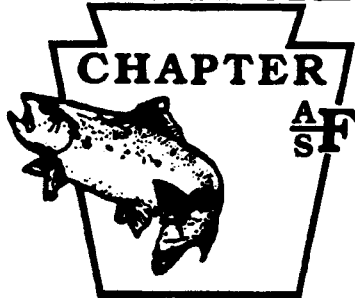
The Green Valley Association is a watershed association of about 900 members in southeastern Pennsylvania. We are one of the leading supporters and sponsors for Exceptional Value designation of French Creek in Chester County. This has been before the EQB for two years.

We are very supportive of the Final Report of Conservation stakeholders submitted to the DEP as a final position for the Regulatory Negotiation for the Antidegradation (Special Protection Waters) Program. We are especially supportive of the EV portion of the report.

Sincerely,

Dr. Ralph D. Heister, Jr.
Executive Director

PENNSYLVANIA



American Fisheries Society

450 Robinson Lane
Bellefonte, PA 16823

August 16, 1996

TO: The Conservation Stakeholders

RE: Regulatory Negotiation for the Anti-degradation Program

The Pennsylvania Chapter of the American Fisheries Society represents the interests of fisheries and aquatic resource professionals throughout the Commonwealth. The Pennsylvania Chapter is a member of the National Society with a roll of 7310 students and professionals. Included in the objectives of the American Fisheries Society are to: promote the conservation, development, and wise use of the fisheries; gather and disseminate to Society members and the general public scientific, technical, and other information about fisheries science and practice through publications, meetings, and other forms of communication.

Inherent to the conservation, development, and wise use of fisheries is the need for clean water and more importantly, the protection of aquatic resources. Pennsylvania's aquatic resources include 53,962 miles of rivers and streams and 161,445 acres of lakes, reservoirs, and ponds as reported in the 1996 Water Quality Assessment 305(b) Report. This report further identifies acid mine drainage as the #1 contributor to water quality degradation. However, other negative impacts to water quality include improper agricultural practices, wastewater systems, industry, etc. It is imperative that Pennsylvania implement an anti-degradation program that properly protects water quality required by the extremely diverse fishery resources of the Commonwealth.

The Pennsylvania Chapter of the American Fisheries Society concurs with the findings of the Conservation Stakeholders report. The implementation of this report would insure that the aquatic resources of Pennsylvania would receive the necessary water quality protection.

Sincerely,

Tom Shervinskie, Chairman
Environmental Concerns Committee

c: R. Weber, President



COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA GAME COMMISSION

2001 ELMERTON AVENUE
HARRISBURG, PA 17110-0707

ADMINISTRATIVE BUREAUS:	
ADMINISTRATION	717-787-5870
AUTOMOTIVE AND	
RECREATION DIVISION	717-787-6594
LICENSE DIVISION	717-787-7494
PERSONNEL DIVISION	717-787-7836
WILDLIFE MANAGEMENT	717-787-5579
INFORMATION & EDUCATION	717-787-6266
LAW ENFORCEMENT	717-787-5760
LAND MANAGEMENT	717-787-6819
REAL ESTATE DIVISION	717-787-8968
MANAGEMENT INFORMATION	
SYSTEMS	717-787-4076

August 19, 1996

Conservation Stakeholders
 Bureau of Fisheries & Engineering
 PA Fish Commission
 450 Robinson Lane
 Bellefonte, PA 16823-9620

In Re: Final Report of Conservation Stakeholders
 Special Protected Waters Program

Dear Conservation Stakeholders:

Thank you for the opportunity to review the report submitted by the Conservation Stakeholders regarding the Pennsylvania Special Protected Waters Anti-degradation Reg-Neg process.

We are in support of the recommendations as outlined in the report, and recognize the validity of its findings and conclusions.

Very truly yours,

Denver A. McDowell, Jr., Chief
 Division of Environmental Planning
 and Habitat Protection
 Bureau of Land Management

PENNSYLVANIA FEDERATION OF SPORTSMEN'S CLUBS, INC.

2426 N. Second Street • Harrisburg, PA 17110 • (717) 232-3480 • FAX (717) 231-3524

(Affiliate of the National Wildlife Federation)



President
EARLE (BUDD) FLOYD
R. D. 1 - BOX 226
TEMPLETON, PA 16259
(412) 868-3723

First Vice President
MAURICE UNBENHAUER
8 EARL AVENUE
SCHUYLKILL HAVEN, PA 17972
(717) 738-4184

Second Vice President
RAY M. MARTIN
610 SOUTH CUSTER AVENUE
NEW HOLLAND, PA 17557-8373
(717) 354-0508

Secretary
TED ONUFRAK
105 OAK STREET
PLEASANT GAP, PA 16823
(814) 358-3434

Treasurer
JOHN J. ARLEY
11 KNOB ROAD - BOX 171
MT. POCONO, PA 18344-1437
(717) 838-7183

Delegate to NWF
RONALD R. FRIED
421 GRAMMS WOODS ROAD
CARLISLE, PA 17013
(717) 243-8061

At Large Delegate to NWF
MARK HENRY
104 BUTTERNUT STREET
PINE GROVE MILLS, PA 16828
(814) 234-7192

Immediate Past President
DWAYNE S. WEAVER
101 CLEMONT STREET
JOHNSTOWN, PA 15804-2131
(814) 266-7356

Member-At-Large (Field Caravan)
ELLEN PENETRACK-OCILKA
224 DISHONO ROAD
JOHNSTOWN, PA 15808
(814) 835-2278

Executive Director
SONITA C. HOKE
2426 NORTH SECOND STREET
HARRISBURG, PA 17110
(717) 232-3480

DATE: 2011-03-08

RECEIVED

August 20, 1996

Mr. John Arway
Pennsylvania Fish
and Boat Commission
Division of Environmental Resources
450 Robinson Lane
Bellefonte, Pennsylvania 16823

Dear John:

In behalf of the members of the Pennsylvania Federation of Sportsmen's Clubs, Incorporated, I am writing to formalize our support of the Final Report of Conservation Stakeholders in the regulatory negotiation for the antidegradation (Special Waters) program.

The issue of clean streams was the driving force behind the establishment of the federation in 1932, and we remain committed to that issue more than ever before. Through the years our members have fought to put into place safeguards that would provide more swimmable, drinkable water quality standards and we will not allow those protection measures to be weakened or eliminated.

It is with regret that we learn that after fourteen months stakeholder groups around the table were unable to reach a consensus that would further fine-tune our state's water quality standards because in the end, dirty water hurts everyone.

Sincerely,

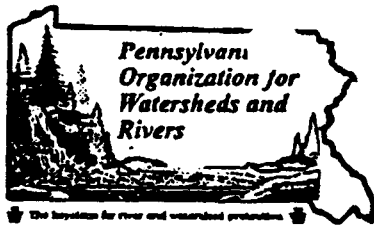
Earle Floyd
President

CONSERVATION PLEDGE:

I GIVE MY PLEDGE AS AN AMERICAN TO SAVE AND FAITHFULLY TO DEFEND FROM WASTE THE NATURAL RESOURCES OF MY COUNTRY — ITS SOIL, AIR, MINERALS, FORESTS, WATERS AND WILDLIFE IN ALL ASSEMBLIES OF AMERICANS — LET THIS PLEDGE RING OUT!



Printed on Recycled Paper



Pennsylvania Organization for Watersheds & Rivers

P.O. Box 765

Harrisburg, PA 17108-0765

Dedicated to the protection, sound management, and enhancement of the Commonwealth's rivers and watersheds and to the empowerment of local organizations with the same commitment.

RECEIVED

AUG 21 1996

PA Fish & Boat Commission
Division of Environmental Services

To: The Conservation Stakeholders

From: ~~Janie French~~, President

Janie French

Date: August 16, 1996

Re: Regulatory Negotiation for the Antidegradation Program Report

The Pennsylvania Organization for Watersheds and Rivers is a coalition of associations and individuals concerned about our Commonwealth's water resources. POWR is dedicated to the protection, sound management and enhancement of the state's rivers and watersheds and to the empowerment of local organizations with the same commitment.

After reviewing the final report of the Conservation Stakeholders, POWR concurs and supports the conclusions and recommendations detailed in your report. We urge DEP to carefully weigh these considerations and not drastically reduce our current standards for protecting the quality of our rivers and streams. Allowing EPA to promulgate our antidegradation regulations undermines our basic right to guarantee standards for protecting the existing quality of the Commonwealth's water resources.

Existing instream water uses and the water quality levels necessary to protect these uses must be maintained. The removal of High Quality and Exceptional Value as protected water uses without safeguards to protect against downgrades is just not good common sense. The recommendation that all unassessed waters "default" to a Tier 2 status, unless permit applicants provide data to support an otherwise designation should be implemented. We also urge DEP to reexamine its present review criteria for SEJ and implement a method that considers environmental values and public concern for maintaining the existing water quality. We will support DEP in developing technical assistance programs for small flow discharges to help the applicant meet antidegradation goals by not allowing general NPDES permits in HQ watersheds.

We support the Conservation Stakeholders recommendations for outstanding water resources and other waters of significant ecological or recreational value. As a statewide coalition, we would welcome the opportunity to assist the Department with an outreach and education effort to inform the public on the antidegradation program.

Conservation Stakeholders
page2

We could also assist with public participation requirements for HQ and EV designations. It's apparent that through the whole reg-neg process DEP failed to realize or appreciate the impact public participation provides.

POWR urges the Department to consider the antidegradation policy as a vehicle to maintain Pennsylvania's second leading industry, tourism. We also urge the Department to view the policy as an enhancement to the 54,000 miles of streams and rivers that benefit every citizen in the State of Pennsylvania.



P.O. BOX 3605 ERIE, PA 16508

THRU: John Arway, Environmental Services, PFBC
 TO: The Conservation Stakeholders
 SUBJECT: Regulatory Negotiation for the Antidegradation
 (Special Protection Waters) Program

The S.O.N.S. (Save Our Native Species) of Lake Erie Fishing Club with over 1600 members support the efforts of the Stakeholders to help keep and maintain the waters of the Commonwealth of Pennsylvania as clean as possible.

Our club is currently monitoring Cascade Creek in the City of Erie for pollution and even with the current regulations, the system of enforcement is of a concern.

Our water provides to much of a resource in our every day life style not to have the best quality water possible. Since our club is directly involved with the hatching and stocking of walleye and yellow perch into Presque Isle Bay, we know first hand the importance of good water quality.

We strongly support and encourage the Stakeholders to continue to make Pennsylvania waters the best in the U.S.

cc: Rep. Cappabianca
 Rep. Jones
 Rep. Scrimenti
 Rep. Merry
 Rep. Boyes
 Sen. Buzz Andrezeski

Sincerely,

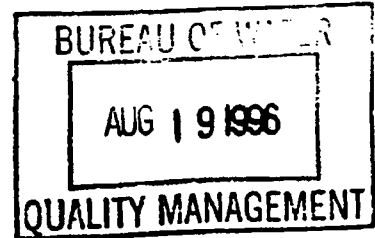
Jerry Skrypzak
 President, S.O.N.S.

Recycled Paper 

ORIGINAL: #1799
COPIES: TYRRELL
JEWETT
(PER JHJ)

August 19, 1996

The Honorable James M. Seif
Secretary
Pennsylvania Department of Environmental Protection
16th Floor
Rachel Carson State Office Building
P. O. Box 2063
Harrisburg, PA 17105-2063



Re: Comments on the Water Quality Antidegradation Program

Dear Secretary Seif:


Please accept our comments and recommendations for improvements to the Special Protection Waters Program. The attached document represents the combined thinking of all of the stakeholders representing the regulated community in the recently terminated Antidegradation Program Regulatory Negotiation.

We thank you for the opportunity to participate in this unique innovation in public participation. We share your hopes for the regulatory negotiation process, and while our group was unable to meet your challenge and come forth with a set of consensus recommendations for improving the water quality program, we firmly believe that regulatory negotiations have an important role to play in future Departmental efforts to craft reasonable, responsive environmental policies and regulations for Pennsylvania. We urge you to continue to promote and rely on this process and stakeholder discussions in general as you continue your efforts to transform the Department into a problem-solving service agency that is responsive to the needs and interests of every constituency it affects.

We look forward to your response to our proposals.


Sincerely yours,


for the PA Builders Association


for the PA Chamber of Business and Industry


for the PA Coal Association


for the PA Farm Bureau


for the Hardwood Lumber Manufacturers Association of PA


for the PA Oil and Gas Association


for the PA Water Environment Association


for the Water Utility Council

cc: David Hess
Dr. Hugh Archer
Dan Drawbaugh

**PENNSYLVANIA'S
ANTIDegradation (SPECIAL PROTECTION WATERS) PROGRAM**

**FINAL RECOMMENDATIONS
SUBMITTED
BY
THE REGULATED COMMUNITY STAKEHOLDERS
August 19, 1996**

Pennsylvania's Special Protection Waters Program outlines the Commonwealth's requirements for providing extended protection for High Quality (HQ) and Exceptional Value (EV) waters. The program has experienced an increased level of attention in recent years, in part due to:

- ◆ US Environmental Protection Agency (EPA) disapproval of portions of the program,
- ◆ concerns for inadequate protection for waters other than those determined as EV,
- ◆ concerns over the definition of HQ and EV waters,
- ◆ a large number of unassessed waters,
- ◆ increased interest in private property development, and
- ◆ the evaluation process used for social and economic justification.

Under the federal Clean Water Act, states are required to review their water quality standards every three years and submit the results of the review to the federal Environmental Protection Agency. In June 1994 as part of its review of Pennsylvania's standards, the EPA disapproved portions of Pennsylvania's antidegradation program, and in early 1995, the Raymond Proffitt Foundation sued the EPA over alleged failure to propose and promulgate an antidegradation policy for Pennsylvania consistent with the federal regulations.

The Pennsylvania Department of Environmental Protection (DEP or the Department) is re-examining its antidegradation program. A public meeting was held in January 1995 in an effort to identify the issues. In April 1995, a public hearing was held to solicit formal comments on ways to improve the current program. This information has served as the framework for a regulatory negotiation (reg-neg) process, designed to generate program modifications that will be incorporated into rulemaking.

Stakeholders representing governmental agencies, conservation groups, public interest groups and the regulated community were identified and invited to participate in the process beginning in June 1995.

An interim report was issued on April 1, 1996. The report stated areas of consensus and agreements in principle reached at that stage in the negotiation, outstanding unresolved issues, and conditions for final consensus. Following a federal court order requiring the EPA to promulgate an antidegradation regulation for Pennsylvania, the Department published proposed modifications of its antidegradation regulations which relied on the contents of the interim report to solicit public comment.

On August 1, 1996 the full stakeholder group met to attempt to craft a final report. Due to many reasons, the group's effort was unsuccessful. The stakeholders representing the regulated community however continue to support the use of the regulatory negotiation process. While we were unable to fulfill our charge, we believe the group generated some solid recommendations through negotiation and compromise. We stand together as stakeholders and present the following recommendations on the special protection waters program for the DEP's consideration and incorporation into the final regulatory package.

Many of our recommendations reflect the compromises contained in the group's interim report. While we understand that the environmental stakeholders no longer support some of the key elements in that document, we believe that the recommendations reflect an agreement that was achieved in the true spirit of the negotiation. For that reason, we continue to stand behind them.

I. Recommendations

Following are the respective elements as they apply to the three tiers: Tier 1 - Basic Water Quality Protection; Tier 2 - High Quality (HQ) Waters; and Tier 3 - Exceptional Value (EV) Waters. In addition to the recommended regulatory approaches, are supporting information, discussion and issues for further consideration.

A. TIER 1

The following regulatory language is proposed for inclusion in Chapter 93:

Section 93.4. Statewide Water Uses

(c) **Redesignation of waters.** Waters considered for redesignation may not be redesignated to less restrictive uses than existing uses.

(d) **Protection of stream or waterbody.** Existing in stream water uses and the levels 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 waterbody attains the criteria for an existing use which is more protective of the stream or waterbody than the designated use, that stream or waterbody shall be protected at its existing use.

The foregoing language is intended to assure that all surface waters will receive a minimum of Tier 1 protection and that existing uses will be protected regardless of the designated use. The promulgation of this language also changes current responsibility for determining protected uses: The Department establishes existing uses; the regulatory designation process of the Environmental Quality Board (EQB) will only be used to modify the designated use.

"Watershed" or "Waterbody" During negotiations an issue arose regarding the terminology of watershed vs. waterbody. While we appreciate the environmental community's assertion that sound water quality management must be done on a watershed basis, we believe that the term "watershed" is inaccurate, confusing, and inappropriate in the context of the regulation. The water quality program is designed to regulate and permit discharges to waterbodies which happen to be located in watersheds. Use of the term "watershed" implies that land uses are a legitimate subject of regulation under the water quality program. We believe that the Department should use the term "waterbody" in its regulations to properly reflect the scope of activities regulated by the water quality program and the surface water resource it is designed to protect.

B. TIER 2 (HIGH QUALITY WATERS)

The following language for Tier 2 presumes that “special protection” categories are considered separate from “use” categories. The Department will determine whether a stream or waterbody qualifies for Tier 2 antidegradation protection. Once established, the Tier 2 protection will automatically take effect; no regulatory determination by the EQB is needed. The Department will notify the public of an application of the Tier 2 standard to appropriate waters through a notice in the Pennsylvania Bulletin and through a formal revision to the appropriate drainage lists in a Statement of Policy.

The precise mechanism for implementing the separation from “use” categories was not discussed.

The following regulatory language is proposed:

Section 93.1. Definitions

High Quality Waters - Water quality within a stream or waterbody which exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.

Section 93.X. General Requirements

(a) To qualify as High Quality Waters, a stream or waterbody must satisfy the following conditions:

The water quality in a stream or waterbody must support non-impaired, high quality aquatic communities. To determine whether or not this condition is met, the Department will assess the biological conditions using peer-reviewed biological assessment procedures set forth in a Department Statement of Policy. Also, the stream or waterbody must have quality better than established water quality criteria contained in the Water Quality Standards in 25 PA Code Chapters 93 and 16.

During the regulatory negotiation, the regulated community agreed, as a compromise position, to allow the term “generally better than” remain in the regulation establishing the standard for qualifying a waterbody for Tier 2 status. We agreed to the compromise even though the general chemistry standard is more liberal than the Federal Tier 2 requirement and is subject to abuse because of its vague nature. We also agreed to allow the Department to continue to assessing the Tier 2 water quality standard using one grab sample for each stream segment, even though such a methodology does not provide an accurate characterization of the nature of a Tier 2 candidate's water chemistry. The Department's staff reinforced our concerns with the one grab sample methodology at our

June 1996 meeting.

These compromises were contingent on achieving consensus on Tier 3 issues. Unfortunately, neither a consensus on the issues nor an agreement to disagree was accomplished on specific issues. Therefore, the regulated community stakeholders are recommending that the DEP to remove the term "generally" from the regulation so that the Tier 2 water chemistry threshold is at least as high as the minimum federal standard. Such a standard is clearly more appropriate in our opinion, especially if the Department continues to rely on one grab sample to characterize the stream's chemistry for a High Quality designation.

We also ask that the Department begin analyzing a Tier 2 candidate's water using assessment protocols that provide a true picture of the waterbody's chemistry. While one grab sample may be expedient for each stream segment, it certainly does not provide an accurate or reliable characterization of the stream.

In order to assess if water quality is better than established water quality criteria in PA Code Chapters 93 and 16, the Department should use the results of the following laboratory water quality analyses obtained from a sufficient number of grab samples to ensure an accurate characterization of the Tier 2 candidate's water chemistry. The grab samples should be collected at average stream flows along multiple defined reaches of the stream or waterbody:

pH (lab)	Cadmium*	Chromium, hexavalent*
Alkalinity	Ammonia - Nitrogen	Copper*
Acidity, total	Nitrate - Nitrogen	Iron, total
Total Dissolved Solids	Nitrite - Nitrogen	Lead*
Total Suspended Solids	Phosphorus, total	Manganese, total
Chlorides	Hardness	Nickel*
Sulfates	Calcium, total	Zinc*
Aluminum, total	Magnesium, total	Fecal Coliform
Arsenic*	Chromium, total	

* Total and dissolved metal analyses are to be consistent with the changes made to specific metals listed in 25 PA Code Chapter 16.

The **Statement of Policy** will state that the Department will evaluate candidate streams or waterbodies for a HQ (Tier 2) designation using the chemistry test in conjunction with any of the following methods:

1. The US EPA Rapid Bioassessment Protocols (RBP) II or III (Plafkin, et. al., Rapid Bioassessment Protocols for Use in Streams and Rivers: Benthic Macroinvertebrates and Fish. EPA/444/4-89-001). A candidate stream or waterbody satisfies this condition if its integrated benthic macroinvertebrate score is greater than or equal to 79 percent of the reference stream or waterbody score. To assess whether a stream or waterbody satisfies this condition, the Department will compare a candidate stream or waterbody to a reference stream or waterbody of the same stream or waterbody order with similar characteristics or other similar stream or waterbody within the same ecoregion;
2. The stream or waterbody has been designated as a Class A Wild Trout Stream by the PA Fish and Boat Commission pursuant to its Class A Wild Trout Stream protocol following formal public notice, public comment and formal rulemaking; or
3. Other peer-reviewed, biological assessment procedures adopted by the Department to determine comparable non-impairment of a candidate stream or waterbody.

The PA Fish and Boat Commission (PFBC) presently provides DEP with factual information about the Class A Wild Trout Stream program which is used by DEP to make decisions on Tier 2 designations. The PFBC was willing to accept the additional responsibilities of seeking public input and considering it in future policy designations of Class A Wild Trout Streams, but not incorporating those designations by formal rulemaking.

For a stream to be considered as a candidate for a HQ designation, the PFBC Class A Wild Trout Stream must be subject to rulemaking. If these additional formal rulemaking procedures, including public participation, are not incorporated, we feel the Wild Trout Stream designations will not yield consistent results with the other biological tests and therefore should be removed from consideration as a measurable criteria. Keep in mind that protecting trout is actually a Tier 1 criteria since the statewide water quality criteria are based on protecting fish and other aquatic life.

(b) High Quality streams or waterbodies shall be maintained at existing quality, unless a person who proposes a new, additional or increased discharge of sewage, industrial waste or other pollutants which are applicable to the receiving waters meets the following conditions:

(1) The proposed new, additional or increased discharge of pollutants is necessary to accommodate important economic or social development in the area in which the stream or waterbody is located.

(2) such proposed discharge shall utilize the best available combination of treatment and land disposal technologies and practices for such wastes, where land disposal would be economically feasible, environmentally sound, and consistent with all other provisions of this Title;

(3) if land disposal is not economically feasible, is not environmentally sound, or cannot be accomplished consistent with all other provisions of this Title, the proposed discharge shall utilize the best available technologies and practices for the reuse and discharge of such wastes;

(4) The Department shall implement programs that will promote cost-effective and reasonable best management practices (BMPs) for non-point source control.

Implementation Where BMPs Are Not Required By Law: The Department shall, to the extent feasible, provide and support measures such as education, technical assistance, and financial assistance, and shall encourage voluntary participation.

Implementation Where BMPs Are Required By Law: The Department shall, to the extent authorized by law, implement measures to secure compliance. The Department shall, to the extent feasible, make the best efforts to encourage voluntary compliance prior to implementing measures to secure compliance.

(c) A person who proposes a new, additional or increased discharge of sewage, industrial waste or other pollutants to a High Quality stream or waterbody shall not be subject to the requirements of (b)(1), (2), (3) if the proposed discharge meets one of the following conditions:

(1) The proposed new, additional or increased discharge of a pollutant-utilizes less than 25 percent of the stream or waterbody assimilative capacity alone or in conjunction with any permitted discharges into the stream or waterbody. To comply with this condition, the proposed discharge shall satisfy an effluent limit established by the Department through mathematical modeling based on an anti-degradation criterion for the regulated pollutant as calculated by the following formula:

$$c_a = (c_{wq} - c_{rs}) \times 0.25 + c_{rs}$$

where c_a = antidegradation criterion

c_{wq} = water quality criterion for the pollutant

c_{rs} = ambient concentration of pollutant in the receiving stream or waterbody or ambient concentration of the pollutant in a reference stream or waterbody when data on the receiving stream or waterbody is not available.

For dissolved oxygen and alkalinity:

$$c_a = c_{rs} - 0.25 (c_{rs} - c_{wq})$$

(2) the proposed new, additional or increased discharge of pollutants qualifies for a general permit administered pursuant to this Title.

(d) Any proposed discharge to a High Quality stream or waterbody, alone or in combination with other anticipated discharges, shall not preclude any use presently attained in the waters and downstream from the stream or waterbody, and shall not result in a violation of any of the numerical water quality criteria which are applicable to the receiving stream or waterbody to protect existing uses or water quality criteria.

C. SOCIAL AND ECONOMIC JUSTIFICATION (SEJ)

The stakeholders representing the regulated community can endorse several recommendations resulting from the SEJ Workgroup contingent on other revisions elsewhere in the special protection waters program.

1. Recommendations For Public Participation During The SEJ Process

Act 537 Planning

537 Plan Development

Where a discharge to a High Quality stream is to be evaluated during the development of alternatives for wastewater management, a municipality shall provide public notice highlighting the high quality issue and solicit public participation and comment in the planning process.

Prior to DEP Approval of the Plan

DEP has 60 days to act on a plan submitted by a municipality. There is currently no formal public participation at this point in the process. Public comment should be solicited and considered by DEP during this review.

After DEP Approval of the Plan

Currently 537 plan approval by DEP is appealable to the Environmental Hearing Board. We recommend DEP retains this provision.

All Other Permits

At Permit Application

Public participation should be included at this stage and should include the following elements:

- a) 4 newspaper notices (1 per week for 4 weeks) provided by the applicant highlighting the fact that the permit application proposes a discharge to a high quality stream. The notice should solicit comments and provide for the opportunity to request a public hearing.
- b) The application should be made available to the public at an accessible public place in the area of the project.
- c) DEP publishes notice of the application in the *Pennsylvania Bulletin*.

d) DEP notifies by letter the following: the municipality, water suppliers, planning agencies and other governmental agencies as appropriate.

At the Draft Permit Stage

Public participation should be included at this stage and include the following elements:

- a) DEP's *Pennsylvania Bulletin* notice should indicate that the discharge is to a high quality stream and solicit input regarding antidegradation issues (SEJ and alternatives).
- b) Add a requirement that the applicant provide 2 newspaper notices on consecutive weeks stating the draft permit is available at a locally accessible site.
- c) DEP sends a copy of the notice to all commentors of the permit application.

2. Recommendations For SEJ Review Criteria

The "Social and Economic Benefits Analysis Checklist for Proposed Discharges to HQ Waters" contained in DEP's current *Special Protection Waters Handbook* (page A-7-2) is a good framework. It should be expanded, however to ensure the questions are not merely answered in a yes or no format. We recommend that the applicant provide narrative responses and documentation, when appropriate, when completing the checklist. This checklist should remain in policy, not included in regulation, as over time factors to be evaluated may change. The DEP should also provide the public with an explanation and record of its SEJ determination. A revised checklist is attached to this report as Appendix A.

3. DEP Conditional Concurrence With SEJ And Alternatives Analysis During Act 537 Planning

DEP should have the authority to grant a conditional SEJ approval when an Act 537 plan is approved that includes a proposed discharge to a high quality stream. Municipalities should consider SEJ in the Act 537 planning process. Upon review of the permit for the discharge DEP must review the SEJ determination for consistency with applicable laws, regulations and SEJ considerations (advances in technology, alternatives) in effect at the time of the permit decision. Thus, if the permit application is consistent with the conditional SEJ approval, SEJ will be granted.

4. Alternatives Analysis And SEJ

The regulated community strongly feels that SEJ should be conducted prior to alternatives analysis. Performing alternative analysis before SEJ presumes no discharge alternative (i.e. Tier 3). The federal regulations provide the applicant with the opportunity to provide social and economic justification for a discharge to a high quality water. If alternative analysis is conducted first, it eliminates the opportunity for the applicant to justify a discharge to a high quality stream.

In order to reach a compromise with the environmental community, a merging of the two processes was suggested during negotiations. The proposal allows the permit applicant, when performing the alternatives analysis, to include as one of the alternatives a stream discharge alternative based on BAT. The high quality of the stream is recognized by the permit applicant by using BAT instead of using limits set at Tier 3 levels.

D. TIER 3 (EXCEPTIONAL VALUE WATERS)

While the group agreed that a consensus on the Tier 3 definition, selection criteria and implementation issues are central to final consensus, consensus was not reached on the Tier 3 issues. There was a fundamental disagreement among the stakeholders over the scope of the EV definition, which subgroups of waters should be regulated under the EV program and to what extent, and whether additional tests are appropriate for those waters that do not fall under the federal program.

The regulated community stakeholders believe that the Department's current EV program should be refined because it goes far beyond federal Tier 3 requirements. The federal Tier 3 program was designed to protect and strictly regulate only those waters on lands which are considered outstanding on a national scale. We hold that the existing EV selection criteria are unsound because they prevent future economic development and undermine the ability of communities in affected watersheds to maintain or enhance their quality of life. The dearth of permits issued for activities in EV waters is a reflection of these impacts.

We also note that the selection of "exceptional value" waters is inherently subjective and that environmental interests must be balanced with other equally significant social and economic values and private rights guaranteed by the Pennsylvania Constitution and required by the Clean Streams Law when an EV designation is made. The current selection criteria do not provide for such a balance.

We believe that waters other than those protected by the basic federal Tier 3 program should only become candidates for Exceptional Value protection if they satisfy two distinct criteria:

- (1) they contain specific, outstanding ecological or recreational attributes delineated by the Department in regulation; and
- (2) the residents of the affected watershed formally recognize the outstanding nature of the water's attributes; understand the ramifications of the EV designation on future community and economic development; and make a commitment to preserving the resource through a formal dedication of the affected watershed lands to public or non-profit ownership or through the creation of private controls permanently restricting land use.

The regulated community believes that a decision on an Exceptional Value Waters designation should only be made with the consent of informed and committed residents of the affected watershed who have a substantial stake in the designation.

In light of these concerns, we offer the following suggestions. The first discussion addresses the stakeholder's deliberations on the current Tier 3 program and contains our recommendations regarding the issues as they were presented and considered in that context. The second discussion addresses the possible creation of a new Tier 2½ category.

Exceptional Value Waters (Tier 3)

Exceptional Value Waters Definition. A proposed definition of Exceptional Value Waters was discussed by the work group and presented to the full group in December 1995. Three times the work group revisited the definition at the direction of the full group and always came back with the following recommendation:

" Exceptional Value Waters - A stream or waterbody which constitutes an outstanding national, state, or regional resource. Examples which may qualify are: waters of national, state, or county parks or forests or waters of wildlife refuges or state game lands, or waters which have been designated by the Fish and Boat Commission as "wilderness trout streams" and other waters of exceptional recreational or ecological significance."

Stakeholders representing the regulated community endorse the phrasing initially suggested by the EV Work Group because it reflects the intent of the federal Tier 3 program. We also offer the following comments and suggestions on the EV definition issues left unresolved by the full group.

1. Local EV Designations. The foregoing EV work group definition removed provisions in the Department's current Exceptional Value Waters program which allow waters to become candidates for a Tier 3 designation solely on the basis of local considerations.

We support the change. All streams are "local" to some interest group, and the Department's existing vague selection criteria and simplistic petition process allow local governments and opponents of economic development to abuse the designation. We suggest that a local government action by itself should not be sufficient to qualify a waterbody for EV candidacy and that local governments should only use protective mechanisms to ensure the protection of EV ecological or recreational attributes specifically delineated by the Department.

2. Mandatory Designation vs. EV Candidacy. Another disagreement concerned the phrasing in the work group's draft definition that listed examples of waterbodies that qualify as candidates for an EV designation.

We believe that the suggested phrasing acknowledges the inherently subjective nature of a program designed to strictly regulate "exceptional value" waters. We believe that the presence of an aquatic, recreational or ecological attribute by itself is insufficient to justify a mandatory EV designation.

3. Prohibition of New or Expanded Discharges. The regulated community stakeholders endorse the Department's approach to allow permits for discharges which ensure "no degradation" of the receiving EV stream.

4. Public Participation. Additional public involvement is necessary in the designation and permitting processes. In addition, we support the retention of the EQB in the role of making formal regulatory designations of EV waters.

The regulated community stakeholders strongly support increased public participation in the assessment of uses and antidegradation level for streams in Pennsylvania. DEP should be proactive in involving all interested parties prior to conducting an assessment.

The majority of the following actions were discussed by the Public Participation Work Group. The Work Group however, did not have the opportunity to present their recommendations to the full group for consideration. We believe the DEP should actively seek public input as follows:

- ◆ publish display adds in the local paper identifying the stream(s) to be assessed, the reason for the assessment, the impact of specific designations on watershed land use, the opportunity for the public to request a workshop concerning the assessment, and request for any pertinent information to be forwarded to DEP,

- ◆ notify local municipal and county governments of DEP's intention to conduct the assessment,
- ◆ notify pending permit applicants and permit holders of DEP's intent to conduct the assessment,
- ◆ DEP may hold a workshop to inform the local community about the assessment and the impacts any specific designation may have on that community, and
- ◆ prepare and release to local media a press release concerning the assessment and its impacts on the local community.

5. Selection Criteria. The EV work group could not achieve consensus on many of the categories of waters currently in use by the Department for selecting Exceptional Value Waters candidates and offered positions on each of the criteria to the full group for further deliberation. The full group did not discuss the specific issues because the environmental community refused to acknowledge the legitimacy of the public participation and balance of interest issues underlying most of the regulated community's concerns with the present selection criteria. Because deliberations halted, the group was unable to proceed to discussions of which categories of streams properly fall under the ONRW category.

The regulated community asserts that the federal language is meant to severely restrict activities only on "high quality waters which constitute an outstanding National resource, such as waters of National or State parks and wildlife refuges and waters of exceptional recreational or ecological significance." [40 CFR 131.12(a)(3); emphasis added] The decision to include additional categories of waters in the state program warrants careful scrutiny.

The regulated community stakeholders generally agree that the Department's current Outstanding National Resource Waters selection criteria should be retained. We also generally accept the Department's current Outstanding State Resource Waters selection criteria as they apply to waters flowing through public lands. We believe that the current ONRW and OSRW selection criteria should not be applied to privately owned watersheds without the informed consent of the affected citizens.

We are concerned over the lack of clarity on what an Outstanding Regional Resource Water is. If the Department continues to use this category of waterbody for EV candidates, it needs to provide clear direction on the matter to ensure the EV designation for such waters only occurs on publicly owned or controlled waters unless it is formally agreed to by informed and committed citizens in the local area with a stake in the designation .

With regard to a specific ORRW selection criteria, we offer the following:

- The regulated community stakeholders cannot offer recommendations regarding the relationship between the program and ground water protection because of the changing nature of the Department's ground water protection policies other than to note that the program is meant to protect surface waters and should be construed in that light when considering ground water concerns.
- As mentioned above, we also disagree with the use of local protective mechanisms as a sole justification for an EV designation.
- We endorse an EV Work Group suggestion to change the selection criteria relating to wellhead protection. The work group suggested that EV candidacy should be extended to waters that contribute recharge for Wellhead Protection Areas which are identified and protected by a Department approved wellhead protection program that has been developed and implemented pursuant to §109.713.

The stakeholders from the regulated community are concerned with the lack of clarity of the "outstanding ecological attributes" selection criteria. Specifically, we believe the current selection criterion relating to endangered or threatened aquatic or semi-aquatic species should be strictly interpreted. The Department should establish a procedure to clearly demonstrate that "maintenance of existing water quality is required" to qualify a waterbody for Tier 3 protection. Current DEP procedures merely require a listing of the species in the Pennsylvania Natural Diversity Inventory and a demonstration that the waterbody currently is or historically has been a habitat for the species.

The regulated community stakeholders also believe the Department should provide greater clarity as to how waters should qualify for EV protection as "substantial water-based, water quality dependent recreation." See the discussion below in the Tier 2½ section.

We also seek the incorporation of specific land use controls and land ownership considerations as additional qualifiers for the selection criteria listed as Waters of Exceptional Ecological or Recreational Significance" that otherwise do not qualify under the basic federal Tier 3 standards. The controls we envision are contained in the Tier 2½ provision below.

ONRW Designation(Tier 3) and OSRW Designation (Tier 2½).

At the outset, there was a general feeling that no separate Outstanding National Resource Waters (ONRW) designation need be created in regulation and that the EV classification encompassed the federal definition.

In light of pending court-ordered EPA regulations which will prohibit new or expanded discharges on EV streams, the regulated community now believes that it is appropriate to consider using the EPA's strict Tier 3 classification solely for ONRWs and to create a new "Outstanding State Resource Waters" category containing most of the Department's current EV candidates. The regulated community believes that the establishment of this new classification would create an appropriate context in the Department's program within which our concerns with the current EV selection and designation process can be addressed.

The following proposal for a Tier 3 and new "Outstanding State Resource Waters" (Tier 2½) classification system could be used instead of the work group's broad redefinition of EV waters.

Tier 3

The Department's Tier 3 program would track the Federal program to protect waters that are outstanding on a national scale. The Tier 3 category would continue to rely on the Department's approach to allowing permits for discharges on Tier 3 streams, provided that the discharge is temporary in nature or will not degrade the ambient quality of the receiving stream.

Candidate streams that meet the ecological or recreational selection criteria could be designated by the Environmental Quality Board (EQB) only after a very careful review of the immediate and long range economic impacts of the designation on the citizens in the watershed pursuant to the requirements of §5(a)(5) of the *Clean Streams Law*.

1. Outstanding National Resource Waters - High Quality Waters which constitute an outstanding national resource, such as waters of national or state parks and wildlife refuges and waters of exceptional recreational or ecological significance.

Selection Criteria:

Candidate waters may include:

- (1) Waters within designated National Natural Landmarks;
- (2) Waters in National Wildlife Propagation Areas;
- (3) Designated Federal Wild Rivers;
- (4) Waters in Federal Wilderness Areas;
- (5) Waters in National Recreational Areas, National Parks, or National Forests;

- (6) Waters of national recreational or national ecological significance.

2. Outstanding State Resource Waters (Tier 2½)

The new tier of protection would address "exceptional value" waters that are not candidates for designation as ONRW. Discharges of a temporary nature and discharges that would not alter ambient water quality would be permitted.

Outstanding State Resource Waters - High quality waters which support aquatic resources or recreational uses which are unique or uncommon in the State where the residents of the affected watershed lands formally recognize the outstanding nature of the resource and make a commitment to preserving it through the development of a voluntary watershed conservation plan.

Selection Criteria:

- (1) Waters in designated State Forest or State Park Natural Areas or State Forest Wild Areas.
- (2) Waters in State Game Propagation Areas
- (3) Designated PA Fish and Boat Commission Wilderness Trout Streams.
- (4) Designated State Wild Rivers.
- (5) Waters that flow within the boundaries of properties under the ownership or control of The PA Department of Conservation and Natural Resources, the PA Fish and Boat Commission, or the PA Game Commission which are designated in management plans for OSRW protection.
- (6) Waters where maintenance of existing water quality is required to protect any life cycle stage of an endangered or threatened aquatic or semi-aquatic species.
- (7) Waters that contribute recharge for wellhead protection areas which are identified and protected by a Department approved plan. The wellhead protection program is developed and implemented pursuant to §109.713.

- (8) Other waterbodies with outstanding ecological attributes. "Outstanding ecological attributes" are those characteristics of a stream or waterbody which:
- (A) support populations of aquatic or semi-aquatic species which are unique in the State; or
 - (B) support populations of aquatic or semi-aquatic species which are endemic to unique or unusual habitats.
- (9) Waterbodies which support substantial water-based, water quality dependant recreational uses. "Substantial water-based, water quality dependent recreational uses" are those activities which are supported and maintained by substantial public or private investment and infrastructure or which attract a level of public use that makes a significant contribution to the local economy.

Public Participation Requirements

After the Department identifies an OSRW candidate or receives a petition seeking a formal OSRW designation, the Department will actively engage all stakeholders living, owning property or conducting activities on the affected watershed lands to design a formal watershed conservation plan that provides for the desired resource protection while offering property owners and residents long-range certainty about the future development of their land.

Following formal adoption and implementation of the plan by all affected stakeholders, the Environmental Quality Board will designate by rulemaking the extent of the waterbody it protects as and OSRW.

Examples of conservation plan provisions which guarantee the protection of aquatic resources and recreational uses in OSRWs:

- (1) All property interests in the OSRW candidate stream watershed are under the ownership or control of a government agency or a non-profit entity whose purpose is the preservation of the waters; or
- (2) There is a conservation easement or other legal mechanism in place to regulate the use of privately owned watershed lands to ensure that the waters are protected from all activities that could adversely affect them; or
- (3) The municipality with jurisdiction over the waters uses its power of eminent domain to acquire affected watershed lands and supplements the acquisition with a zoning or land development ordinance designating the land for a restricted public purpose.

E. OTHER RELATED MATTERS

1. General Permits

Current requirements in 25 PA Code Chapter 92 prohibit the Department from allowing coverage under any NPDES General Permit for any project in a Special Protection (EV and HQ) stream or waterbody. The stakeholders representing the regulated community believe this requirement is unnecessarily restrictive. As discussed above in the High Quality Waters section, the group endorsed the use of general permits for discharges to Tier 2 waters in its interim report to the Department. The regulated community endorses the recommendation. Further, we recommend that the use of general permits on Exceptional Value waters should not be precluded.

2. Assessing Unassessed Waters

Stakeholders representing the regulated community acknowledge the concern raised by the environmental community over the significant portion of Pennsylvania's surface waters that have not been assessed for potential antidegradation protection. We stand by our recommendation in the interim report that DEP increase its efforts to have all state surface waters assessed for antidegradation protection within the next three years. Further, we recognize the Department's resource limitations, and we remain committed to working with the Department to obtain the necessary appropriation from the PA General Assembly to establish a dedicated source of funds specifically earmarked for a one-time surface waters assessment project for the program.

In order to move forward on this commitment, we ask the Department to revise its estimates of the costs of such a project in light of our recommendations for relying on more than one grab sample to evaluate whether unassessed waters exceed Tier 2 water quality standards.

We also encourage DEP:

- to make use of data from other reputable sources, when available;
- to develop a protocol to do the assessments;
- to ensure that the waters with pending permit applications receive first priority;
- to ensure that existing permits are not subjected to the results of the new assessment; and
- to give second priority to assessing the appropriateness of current HQ and EV designations for streams and waterbodies that were never scientifically analyzed for their water quality.

II. OTHER ISSUES REMAINING

Other issues should be addressed when the Department revises the water quality regulations. These include:

- ◆ Coordination among bureaus to ensure consistency of antidegradation measures.
- ◆ Elimination of the interim protection process.
- ◆ The development of a simple flow chart or example of the designation process and its ramifications for affected individuals and communities.

If the Department retains the petition process, it should be revised to require submittal of actual stream data to improve the scope and detail of information required of petitioners and procedures to ensure that affected parties are notified in a timely manner of the petition and its ramifications.

III. CONCLUSION

The stakeholders representing the regulated community strongly urge the DEP to keep an open dialogue and consult with all the stakeholders during the rulemaking process and development of implementation guidelines for the antidegradation program.

APPENDIX A

**Social or Economic Benefits Analysis Checklist
For
Proposed Discharges To High Quality Waters**

I. Description of the Activity

- a. Describe the nature and extent of the proposed activity that will result in this proposed discharge.
- b. Describe the volume and characteristics of the point source wastewaters (sewage or industrial wastes) that the activity described above will generate.
- c. Describe the expected impacts on surface or ground water quantity.
- d. Describe the expected magnitude of nonpoint source discharge(s), (stormwater runoff) including hydrologic modification that will result from the activity described above.

II. Economic Factors

Employment	Yes	No	N/A
a. Will the activity create or maintain full and/or part-time employment opportunities?	___	___	___

If yes, describe: 1) the nature and number of full and/or part-time jobs created or maintained, 2) the expected longevity of the jobs, 3) what percentage are from the local area, 4) what percentage are minorities, veterans, mentally or physically disabled or females, 5) community and regional employment levels noting employment and unemployment trends and 6) any major changes in the types of employment available in the region.

- b. Employment: What is the net effect of the activity on area employment? Will jobs be lost as well as gained as a result of the activity?**

Fiscal/Tax Impact

- | | | | | |
|-----------|--|------------|-----------|------------|
| c. | Will the activity result in increased state, county, or local tax revenues (applies to new rather than relocated commercial or industrial development and new residential development)? | Yes | No | N/A |
| | | — | — | — |

If yes, describe: 1) the estimated amount per annum in state taxes: 2) the estimated amount per annum in county taxes and 3) the estimated amount per annum in local taxes.

- | | | | | |
|-----------|--|------------|-----------|------------|
| d. | Will the activity result in increased property or real estate taxes over those being derived from the present land use? | Yes | No | N/A |
| | | — | — | — |

If yes, describe: 1) present land use and/or amount of property or real estate taxes collected per annum, 2) proposed land use and estimated amount of property or real estate taxes collected per annum.

- | | | | | |
|-----------|--|------------|-----------|------------|
| e. | Will the activity help or hinder the traditional economic base? | Yes | No | N/A |
| | | — | — | — |

- f. What is the quality of the jobs gained (high pay v. low pay; long term v. short term)?**

- | | | | | |
|-----------|---|------------|-----------|------------|
| g. | Will the activity result in increased public costs or user charges to maintain, improve or create state, county or municipal services and/or facilities? | Yes | No | N/A |
| | | — | — | — |

If yes, describe incremental public cost increases for: 1) roads and other community transportation systems, 2) storm drainage and public utilities, 3) hospitals and emergency

services, 4) public schools, 5) police and fire protection, 6) solid waste disposal and 7) any other municipal service or facility needed to support the activity.

h.	Will the activity result in a net economic benefit to state, county or local government?	Yes —	No —	N/A —
----	--	----------	---------	----------

If yes, document the net benefit using the information provided in the answers to a through d above and any other relevant data.

III. Social Factors

a.	Will the activity fulfill an immediate public need for specific types of residential, business or other commercial services?	Yes —	No —	N/A —
----	--	----------	---------	----------

If yes, describe: 1) what specific housing type is proposed and why from a public standpoint, it is desirable and necessary, and 2) what specific business or other commercial services are proposed and why these are of significant public benefit.

b.	Will the activity meet a need for community facilities, e.g. a hospital?	Yes —	No —	N/A —
----	--	----------	---------	----------

c.	Will the activity resolve or aid in the resolution of a public health, safety or nuisance condition?	Yes —	No —	N/A —
----	--	----------	---------	----------

If yes, describe: 1) the existing condition and 2) indicate how this activity will resolve or help to resolve this condition.

d. Will the activity be consistent with county and/or local governmental land use or zoning plans now and in the foreseeable future? In the case of sewage facilities, does the proposed activity and selected sewage disposal method satisfy the consistency requirements of 25 Pa. Code Section 71.21?

Yes No N/A

If yes, describe: 1) the current county and local land use plans, 2) the current local zoning plans and/or ordinances, 3) any available future county and/or local land use plans within a 10 year and 20 year planning horizon, and 5) how this activity will be consistent with 1), 2) and 3) above.

e. Will the activity be compatible with maintaining community cohesion and character ~~the surrounding area~~ in terms of style of architecture, land use density and scale, ~~mass, texture and architectural design~~?

Yes No N/A

Is it in an area of transition in terms of density or types of land use?

Yes No N/A

f. Will the activity have an impact on present and reasonably anticipated local and regional recreational uses of the stream or waterbody or existing parks or other recreational areas? Does the activity meet or enhance a recreational need?

~~f. Will the existing national, state, county or local recreational, or other open space facilities in the surrounding area be adequate to meet the needs the proposed activity might create?~~

~~Yes No N/A~~

~~_____~~

~~If yes, describe why. If no, describe how this activity is likely to impact on these public amenities and to what degree.~~

IV. Description of Alternatives

- a. Describe the alternatives to the proposed activity that have been considered to prevent or reduce water quality degradation or impacts on water quantity. Alternatives which should be considered include but are not limited to, relocation of the proposed activity or discharge to a non-special protection watershed, wastewater reuse/recycling and seasonal land disposal.
- b. Provide a rationale for eliminating any alternative as infeasible. Include technical and financial data to support your position.?

5/6/96 "Bared Version"

April 1, 1996

97105-2063

The Honorable James M. Seif
Secretary
Department of Environmental Protection
16th Floor
Rachel Carson Office Building
P. O. Box 2063
Harrisburg, PA 17105-2063

ORIGINAL: #1799
COPIES: TYRRELL
JEWETT
(PER JHJ)

Re: Antidegradation (Special Protection Waters) Program
Regulatory Negotiation - Phase I Report

Dear Mr. Seif:

We, the representatives of the stakeholders in the Antidegradation (Special Protection Waters) Program, submit to you the enclosed Phase I Report. The Department, the U.S. Environmental Protection Agency and the Delaware River Basin Commission provide support and service to the group in their ex officio capacity.

This Report provides status information on our deliberations to date, including possible regulatory language, explanations and items still requiring some attention. It is important to emphasize that the consensus as reported is conditional pending final agreement on all outstanding issues.

As recommended by the group, the Department has initiated drafting of the regulations for the group's review, even as discussions continue. We are prepared to meet with you or your staff to offer any further comments or clarifications.

Sincerely yours,



for the Berks County Conservancy


for the PA Builders Association


for the PA Chamber of Business and Industry


for the Chesapeake Bay Foundation


for the PA Coal Association


for the PA Department of Conservation and Natural Resources

**Regulatory Negotiation for the
Antidegradation (Special Protection Waters) Program**

Phase I Report

Pennsylvania's Special Protection Waters Program outlines the Commonwealth's requirements for providing extended protection for High Quality (HQ) and Exceptional Value (EV) waters.

The program has experienced an increased level of attention in recent years, in part due to:

- U.S. Environmental Protection Agency (EPA) disapproval of portions of the program,
- concerns for inadequate protection for waters other than those determined as EV,
- concerns over the definition of HQ and EV waters,
- a large number of unassessed waters,
- increased interest in private property development, and
- the evaluation process used for social and economic justification.

Under the federal Clean Water Act, states are required to review their water quality standards every three years and submit the results of the review to the federal Environmental Protection Agency. In June 1994 as part of its review of Pennsylvania's standards, the EPA disapproved portions of Pennsylvania's antidegradation program, and in early 1995, the Raymond Proffitt Foundation sued the EPA over alleged failure to propose and promulgate an antidegradation policy for Pennsylvania consistent with the federal regulations.

The Pennsylvania Department of Environmental Protection (DEP or the Department) is re-examining its antidegradation program. A public meeting was held in January 1995 in an effort to identify the issues. In April 1995, a public hearing was held to solicit formal comments on ways to improve the current program. This information has served as the framework for a regulatory negotiation (reg-neg) process, designed to generate program modifications that will be incorporated into rulemaking.

Stakeholders representing governmental agencies, conservation groups, public interest groups and the regulated community were identified and invited to participate in the process beginning in June 1995.

The following is a report summarizing the discussion from June 1995 through March 1996.

I. Introduction/Background

The following information material is provided and attached to establish the basis under which the reg-neg process was undertaken for antidegradation.

- DEP Reg-Neg Notice
- Stakeholder selection process
- Stakeholders and alternates - January 1996
- DEP's summary of law suit issues
- Operating Principles of the Reg-Neg Committee
- Meeting agendas and summaries (available from DEP on request)

II. Objectives

As originally intended, the group generally tried to:

- Develop regulatory language where possible, or at least the basis for language to be developed by DEP, with DEP agreeing to use consensus recommendations as the basis for proposed regulatory language and policy/guidance revisions and to provide public participation during the formal regulatory review process;
- Prioritize issues related to the EPA disapproval and the Proffitt suit in the 12/31/95 timeframe (Phase I); remaining issues (primarily process issues) are to be addressed in the 3/31/96 time frame (Phase II).
- Identify ways to make the designation process more understandable to the general public;
- Streamline the special protection waters designation process;
- Provide a balance of specific and flexible guidance; and
- Identify data needs.

III. Initial Results and Recommendations

Following are the respective elements as they apply to the three tiers: Tier 1 - Basic Water Quality Protection; Tier 2 - High Quality (HQ) Waters; and Tier 3 - Exceptional Value (EV) Waters. In addition to the recommended regulatory approaches, included in the shaded portions are supporting information, discussion and issues for further consideration. The timeframes associated with the originally intended Phase I and Phase II concept are no longer applicable. This is called a Phase I Report in that it is the first formal report of the group; it is expected that a final report will be issued after remaining items - specifically socioeconomic justification, Tier 3, comments on reg-neg process and public participation - have been addressed. The following discussion is contingent upon resolution of the remaining issues.

Tier 1

The following regulatory language is proposed for inclusion in Chapter 93.

This language is intended to assure that all surface waters will receive a minimum of Tier 1 protection and that existing uses will be protected regardless of the designated use. The promulgation of this language also changes current responsibility for determining protected uses: the regulatory designation process of the Environmental Quality Board (EQB) will no longer be used to determine an existing use but would only be used to modify the designated use to be consistent with the existing use that is established by the Department.

Section 93.4. Statewide Water Uses

(c) Redesignation of waters. Waters considered for redesignation may not be redesignated to less restrictive uses than existing uses.

(d) Protection of stream or [waterbody/watershed]. Existing instream water uses and the levels 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 waterbody attains the criteria for an existing use which is more protective of the stream or [waterbody/watershed] than the designated use, that stream or [waterbody/watershed] shall be protected at its existing use.

The group does not agree on the word "waterbody" or "watershed," but regardless of the word, a complete definition is needed. The Berks County Conservancy feels that the specific use of the term "watershed," even if qualified and defined, is key to the antidegradation program.

The following language for Tier 2 and 3 presumes that "special protection" categories are considered separate from "use" categories. The Department will determine whether a stream or [waterbody/watershed] qualifies for Tier 2 or 3 antidegradation protection. Once established, the Tier 2 protection will automatically take effect; no regulatory determination by the EQB is needed. The Department will notify the public of an application of the Tier 2 standard to appropriate waters through a notice in the Pennsylvania Bulletin and through a formal revision to the appropriate drainage lists in a Statement of Policy. Discussion is still necessary regarding any role for the EQB in Tier 3 designations. The precise mechanism for implementing the separation from "use" categories will be discussed.

Tier 2 (High Quality Waters)

The following regulatory language is proposed:

Section 93.1. Definitions

The following option has been suggested:

High Quality Waters - Water quality within a stream or [waterbody/watershed] which exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.

Section 93.X. General Requirements

(a) To qualify as High Quality Waters, a stream or [waterbody/watershed] must satisfy the following conditions:

The water quality in a stream or [waterbody/watershed] must support non-impaired, high quality aquatic communities. To determine whether or not this condition is met, the Department will assess the biological conditions using peer-reviewed biological assessment procedures set forth in a Department Statement of Policy. Also, the stream or [waterbody/watershed] must have quality generally better than established water quality criteria contained in the Water Quality Standards in 25 PA Code Chapters 93 and 16, or its water quality must be in a natural state.

In order to assess if water quality is generally better than established water quality criteria in PA Code Chapters 93 and 16, the Department presently uses and will continue to use the results of the following laboratory water quality analyses obtained from at least one grab sample collected at average stream flows along multiple defined reaches of the stream or [waterbody/watershed]:

pH (lab)	Cadmium *	Chromium, hexavalent *
Alkalinity	Ammonia - Nitrogen	Copper *
Acidity, total	Nitrate - Nitrogen	Iron, total
Total Dissolved Solids	Nitrite - Nitrogen	Lead *
Total Suspended Solids	Phosphorus, total	Manganese, total
Chlorides	Hardness	Nickel *
Sulfates	Calcium, total	Zinc *
Aluminum, total	Magnesium, total	
Arsenic *	Chromium, total	

* Total and dissolved metal analyses are to be consistent with the changes made to specific metals listed in 25 PA Code Chapter 16.

It should be noted that the group recommends that the Department should no longer sample fecal coliform.

[The Statement of Policy will state that the Department will evaluate candidate streams or [waterbodies/watersheds] for a HQ (Tier 2)

designation using the general chemistry test in conjunction with any of the following methods:

1. The US EPA Rapid Bioassessment Protocols (RBP) II or III (Plafkin, et. al., Rapid Bioassessment Protocols for Use in Streams and Rivers: Benthic Macroinvertebrates and Fish. EPA/444/4-89-001). A candidate stream or [waterbody/watershed] satisfies this condition if its integrated benthic macroinvertebrate score is greater than or equal to 79 percent of the reference stream or [waterbody/watershed] score. To assess whether a stream or [waterbody/watershed] satisfies this condition, the Department will compare a candidate stream or [waterbody/watershed] to a reference stream or waterbody/watershed] of the same stream or [waterbody/watershed] order with similar characteristics or other similar stream or waterbody/watershed] within the same ecoregion;
2. The stream or [waterbody/watershed] has been designated as a Class A Wild Trout Stream by the PA Fish and Boat Commission pursuant to its Class A Wild Trout Stream protocol following public notice and comment; or

The PA Fish and Boat Commission (PFBC) presently provides DEP with factual information about the Class A Wild Trout Stream program which is used by DEP to make decisions on Tier 2 designations. The PFBC is willing to accept the additional responsibilities of seeking public input and considering it in future policy designations of Class A Wild Trout Streams.

The PA Coal Association (PCA) believes that the Department should not defer or delegate its responsibilities to determine whether a stream qualifies as a HQ stream to the PFBC. PCA also believes that protecting trout is a Tier 1 standard because the statewide water quality criteria are based on protecting trout and other aquatic life.

While this represents PCA's initial position, PCA also tentatively agreed that PFBC's designations could satisfy the biological portions of the HQ test, if the designations were done by rulemaking. The PFBC, however, is not prepared to adopt designations by rulemaking.

3. Other peer-reviewed, biological assessment procedures adopted by the Department to determine comparable non-impairment of a candidate stream or [waterbody/watershed].

The following section (b) has been generally agreed to in principle. The group agrees that a consensus on socio-economic justification (SEJ) issues is central to a final consensus on Tier 2. The group agrees to reopen discussion on Tier 2 elements, if necessary, subsequent to discussion of SEJ. The SEJ work group will address the regulation and implementation language of this section with the understanding that it is closely related to other Tier 2 issues.

(b) High Quality streams or [waterbodies/watersheds] shall be maintained at existing quality, unless a person who proposes a new, additional or increased discharge of sewage, industrial waste or other pollutants which are applicable to the receiving waters meets the following conditions:

- (1) The proposed new, additional or increased discharge of pollutants is necessary to accommodate important economic or social development in the area in which the stream or [waterbody/watershed] is located.
- (2) such proposed discharge shall utilize the best available combination of treatment and land disposal technologies and practices for such wastes, where land disposal would be economically feasible, environmentally sound, and consistent with all other provisions of this Title;
- (3) if land disposal is not economically feasible, is not environmentally sound, or cannot be accomplished consistent with all other provisions of this Title, the proposed discharge shall utilize the best available technologies and practices for the reuse and discharge of such wastes;
- (4) The Department shall implement programs that will promote cost-effective and reasonable best management practices (BMPs) for non-point source control.

Implementation Where BMPs Are Not Required By Law: The Department shall, to the extent feasible, provide and support measures such as education, technical assistance, and financial assistance, and shall encourage voluntary participation.

Implementation Where BMPs Are Required By Law: The Department shall, to the extent authorized by law, implement measures to secure compliance. The Department shall, to the extent feasible, make the best efforts to encourage voluntary compliance prior to implementing measures to secure compliance.

(c) A person who proposes a new, additional or increased discharge of sewage, industrial waste or other pollutants to a High Quality stream or [waterbody/watershed] shall not be subject to the requirements of (b)(1), (2), (3) if the proposed discharge meets one of the following conditions:

(1) The proposed new, additional or increased discharge of a pollutant utilizes less than 25 percent of the stream or [waterbody/watershed] assimilative capacity alone or in conjunction with any permitted discharges into the stream or [waterbody/watershed]. To comply with this condition, the proposed discharge shall satisfy an effluent limit established by the Department through mathematical modeling based on an anti-degradation criterion for the regulated pollutant as calculated by the following formula:

$$C_a = (C_{wq} - C_{rs}) \times 0.25 + C_{rs}$$

where C_a = antidegradation criterion
 C_{wq} = water quality criterion for the pollutant
 C_{rs} = ambient concentration of pollutant in the receiving stream or [waterbody/watershed] or ambient concentration of the pollutant in a reference stream or [waterbody/watershed] when data on the receiving stream or [waterbody/watershed] is not available.

For dissolved oxygen and alkalinity:

$$C_a = C_{rs} - 0.25 (C_{rs} - C_{wq})$$

The assimilative capacity of the stream or [waterbody/watershed] shall be determined at the time of the first proposed new, additional or expanded discharge.

(2) the proposed new, additional or increased discharge of pollutants qualifies for a general permit administered pursuant to this Title.

(d) Any proposed discharge to a High Quality stream or [waterbody/watershed], alone or in combination with other anticipated discharges, shall not preclude any use presently attained in the waters and downstream from the stream or [waterbody/watershed], and shall not result in a violation of any of the numerical water quality criteria which are applicable to the receiving stream or [waterbody/watershed] to protect existing uses or water quality criteria.

Tier 3 (Exceptional Value)

The group agrees that a consensus on the Tier 3 definition and implementation issues are central to final consensus.

Other Related Matters

General Permits

Current requirements in 25 PA Code Chapter 92 prohibit the Department from allowing coverage under any NPDES General Permit for any project in a Special Protection (EV and HQ) stream or [waterbody/watershed]. The group believes this requirement is unnecessarily restrictive and will work on a revision to the current regulatory provisions.

Assessing Unassessed Waters

The group agreed that the existence of a significant portion of Pennsylvania's surface waters that have not been assessed for potential antidegradation protection is one of the root causes of the issues raised about the current antidegradation program. Consequently, the group recommends that DEP increase its efforts to have all state surface waters assessed for antidegradation protection within the next three years. Recognizing the resource limitations which will prevent the accomplishment of such an effort, the parties participating in the regulatory negotiation commit to asking the PA General Assembly to establish a dedicated source of new funds for the Department that will be specifically earmarked for a one-time surface waters assessment project for this program, and the participating organizations ask the Administration to support them in requesting such funds from the General Assembly. The group also encourages DEP to make use of data from other reputable sources, when available. DEP is to develop a protocol to do the assessments, with waters with pending permit applications receiving first priority. Existing permits would not be subjected to the results of a new assessment. This expedient assessment process also makes the default issue, which had been a concern to the group, less critical, but one that still needs to be discussed. Relief to DEP staff from the "money back guarantee" is needed.

Further discussion in the implementation phase is required to address streams or [waterbodies/watersheds] which have been designated as HQ without an assessment. There will be no assessment of those streams or [waterbodies/watersheds] which have been previously scientifically analyzed for their in-stream water quality and respective HQ or EV designation made.

The full assessment protocol will be developed.

IV. Other Issues Remaining

In addition to SEJ and Tier 3, other remaining issues to be addressed by this group are:

- What suggestions and comments do we have for the Department regarding the Reg-Neg process, particularly this case?

- What recommendations do we have to improve the public participation process regarding the anti-degradation program?

Implementation issues, including any separation of "special protection" and "use" categories and the assessment protocol, will be addressed by the Department with continuing consultation with interested parties for presentation to the reg-neg group at the June 1996 meeting. Other issues that may be part of these discussions include:

- Can the designation process be streamlined further?
- Should there be coordination among bureaus to ensure consistency of antidegradation measures?
- What changes, if any, should be made to the interim protection process?
- Is a simple flow chart or example possible?
- What should local government's role be? Should land use decisions be factored into the process?
- Should the petition process be retained? If yes, what information should be required as part of the petition? Can the process be shortened? How should affected parties be notified?

V. Conclusion

- DEP should use this report to the greatest extent possible to develop the proposed regulations, policies and protocols to be presented to the reg-neg group at the June 1996 meeting.
- Work groups have been established to work on the remaining issues:
 1. Report preparation
 2. Tier 3, including any applicability of general permits
 3. Reg-Neg process comments and suggestions
 4. Socioeconomic justification
 5. Public participation
- Implementation issues will be addressed by the Department with continuing consultation with interested parties. Interested parties may also discuss unresolved issues for the purpose of offering a proposal to the reg-neg group prior to May 31, 1996 for presentation at the June 1996 meeting.

Attachments