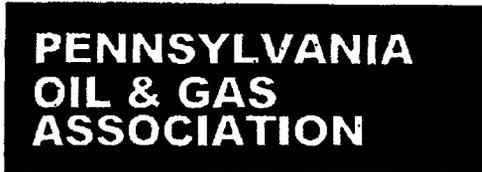


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Harrisburg, PA 17101
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INDEPENDENT REGULATORY
RE **Fax**

To: Chuck Tyrrell & John Jewett	From: Steve Rhoads
Fax: 717.783.2664	Pages: 11
Phone:	Date: May 31, 1997
Re: EPA Comments on Antidegradation	CCs:

Urgent For Review Please Comment Please Reply

• **Comments:**

Any questions, please call:
7717-233-0935 or 717-426-3010

PENNSYLVANIA OIL & GAS ASSOCIATION

JUN 02 1997 412 North Second Street, Harrisburg, PA 17101 • Tel : 7172330935 Fax: 7172330940

INDEPENDENT REGULATORY REVIEW COMMISSION
MEMORANDUM

May 30, 1997

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TO: Charles Tyrrell and John Jewett
Independent Regulatory Review Commission
333 Market Street
Harrisburg 2, 14th Floor
Harrisburg, PA 17101

FROM: Stephen Rhoads, President *SR*

Re: US EPA Region III Comments on the Proposed DEP Antidegradation Rulemaking

The following discussion provides some background and my observations on EPA Region III's letter dated May 19, 1997 which details the federal agency's comments on the proposed DEP rule amending the antidegradation elements in the water quality program.

EPA COVER LETTER

General focus of EPA's comments. In the cover letter, EPA notes that its comments address implementation methods contained in the proposed rule because "implementation is such an important part of the effectiveness of antidegradation as a tool to protect water quality."

This focus is unusual for EPA since it has previously stated that its primary concern is with ensuring that the DEP antidegradation program conforms to the letter of its regulation. The fact that EPA is so concerned with implementation issues reflects, in my opinion, its desire to ensure not only that the DEP program conforms with the strict letter of EPA rules, but also that DEP interprets the rules according to EPA Region III's underlying philosophy.

EPA's philosophy is reflected in the agency's comments on specific elements of the proposed rule, and in many ways, it mirrors the goals and objectives expressed by the environmentalist stakeholders in the report they filed in the wake of the reg-neg collapse last August.

In essence, EPA wants the department to implement its HQ and EV assessment standards in a manner that ensures the highest level of antidegradation protection for as many streams as possible. This posture will become evident below.

EPA reaction to the "800 letters from the citizens of the Commonwealth." EPA is clearly troubled by the overwhelming support expressed by the grassroots environmentalist community for jettisoning the DEP program in favor of the "clearer, simpler" language of the federal program.

The 800 letters were spawned by a letter writing campaign which touted the EPA December 1996 promulgation of an antidegradation rule for Pennsylvania as a better regulation than what DEP proposed. That attitude is based on a flawed understanding of EPA's promulgation. If DEP were to do what the environmentalists asked them to, Pennsylvania's program would be substantially weaker than it currently is. That is the "misconception" EPA is talking about.

I find it amusing that EPA attempts to blame the environmentalists' misunderstanding of the matter on DEP's efforts to openly communicate the details of its program to the public. In reality, the misunderstanding arose because the activist environmentalists responsible for the letter writing campaign tried to spin the proposed rulemaking as a DEP effort to undercut the Proffitt Foundation lawsuit victory. That victory forced EPA to promulgate the December 1996 rule.

EPA COMMENTS

General NPDES permits on HQ streams (§§92.81 and 92.83)

EPA states that the general permit provisions in the proposed rule "exempt...dischargers from antidegradation requirements for HQ waters" because the regulation does not spell out specific criteria and special conditions that would apply to the use of GPs in HQ streams.

**US EPA Region III Comments on the Proposed DEP Antidegradation Rulemaking
May 30, 1997**

My understanding is that the HQ antidegradation requirements would be satisfied when the department evaluates the class of dischargers being considered for a possible general permit and includes any special criteria or conditions applicable to the class in the general permit itself.

EPA wants DEP to promulgate those implementation procedures in regulation so that the department has as little flexibility on the issuance of GPs as possible. EPA appears to assume that the DEP will use GPs to subvert the HQ antidegradation requirements.

For your information, the environmentalists in the reg-neg at first agreed to GPs on HQ waters, then reneged.

Inappropriate standard. In order to approve DEP's proposal to allow GPs on HQ streams, EPA also demands that the department provide "a demonstration that *de minimis* dischargers will not have an impact on HQ waters." The "no impact" standard is a Tier 3 condition. HQ or Tier 2 allows an impact so long as all existing uses are protected and certain conditions are satisfied (e.g., Social and Economic Justification).

EPA appears to want GPs on HQ streams to be evaluated at a higher standard than the standard against which individual NPDES permits to HQ streams are assessed.

General NPDES permits on EV streams

EPA notes that the proposed rule retains the restriction against using GPs on EV streams. In the final rule, if DEP were to extend the use of GPs to EV streams, as some commentators have suggested, EPA would not be pleased. EPA would have no legal grounds upon which to object, however, because of the way it promulgated its Pennsylvania rule last December.

Background. In its December 1996 promulgation, EPA chose to supplement rather than supplant DEP's current EV program by adding a new Outstanding National Resource Waters (ONRW) classification to the Pennsylvania regulation.

EPA believed that the new category was needed to implement its interpretation that the Tier 3 classification carries with it a prohibition of no new or expanded discharges. DEP allows permitted discharges to EV streams if the discharge results in "no adverse measurable change" to the ambient quality of the EV waters.

In the preamble to the final rule, EPA argues that the DEP standard is not sufficiently protective of Tier 3 waters because "Pennsylvania's policy of 'no adverse measurable change' could allow potentially significant discharges and loading increases from point and nonpoint sources."

A more protective standard, EPA said, is needed for true Tier 3 streams. Therefore:

EPA proposed promulgating language [which] states that where waters are identified by the Commonwealth as ONRWs, their water quality shall be maintained and protected. It is EPA's recommendation that, while not required by EPA's regulation, "no new or increased discharges" to Tier 3 waters is the best and most reliable method to assure that water quality is fully maintained and protected in ONRWs. [Emphasis added.]

In the preamble, EPA also says that it promulgated the new ONRW Tier 3 category rather than a modification of the Pennsylvania EV category to avoid giving Pennsylvania the impression that it should redesignate current EV streams to a less protective category. EPA states:

EPA proposed a new tier, rather than a modification of Pennsylvania's Exceptional Value category because this seemed least disruptive to the state and most protective of the environment. The Exceptional Value category, which is not quite as protective as Tier 3, but still better than Tier 2, covers more waters than are likely to be designated ONRWs. Had EPA proposed to modify the Exceptional Value category, the State might have felt the need to reconsider the inclusion of some of the currently designated Exceptional Value waters.

Implications. Through its December 1996 promulgation, EPA formally stated that the EV program is not a Tier 3 program. EPA purposely added its ONRW category to the Pennsylvania

**US EPA Region III Comments on the Proposed DEP Antidegradation... Rulemaking
May 30, 1997**

program to preserve the very liberal EV designation while imposing its tougher Tier 3 standard on the narrower ONRW class of streams.

Because of EPA's determination that the Pennsylvania EV program is not a Tier 3 program, DEP is not required to continue regulating permits for discharges to EV waters as if the Tier 3 antidegradation requirements apply. DEP could allow GPs on all EV waters if it chooses to exercise that authority. EPA would object to GPs on ONRWs, however.

Definitions (§93.1)

ONRW on public lands. EPA makes its point that the ONRW designation is not exclusively restricted to public lands.

Surface waters. The issue of whether the antidegradation program applies to "waters" or "watersheds" was hotly debated in the reg-neg, and no satisfactory consensus was reached. EPA seems to be pushing the environmentalists' position on this matter, even though it openly acknowledges that "the Federal antidegradation policy likewise refers to 'waters'."

During the reg-neg, the regulated community argued that antidegradation designations apply to the waters in the watershed, not to the watershed as a whole. The watershed, we argued, consists of the land surface through which the waters flow. We acknowledged that the permitting aspects of the antidegradation program regulate activities in watersheds that could affect waters, but we argued that the permitting elements of the program have no relevance to whether a stream attains a certain level of antidegradation protection.

The environmentalists, on the other hand, wanted the watershed to be the entity designated for antidegradation purposes. If the watershed is designated, they could argue that the antidegradation designation applies point and nonpoint surface activities which could affect springs, seeps, ground water, puddles, whatever. (See DEP rules at §93.5(b)(1).)

Protected uses (§93.3)

The big issue here is DEP's endorsement of an interim consensus reached during the reg-neg that HQ and EV are not "uses" in the strict sense of the term's meaning in the antidegradation program. The interim reg-neg report recommended treating HQ and EV as antidegradation "management categories" for the reasons EPA outlines in the first paragraph of the section discussing the matter.

EPA has two concerns here. The first is that the "management category" scenario does not give EPA any say in whether a stream qualifies for Tier 2 or 3 designation.

The second related issue is more significant. EPA is contending that since all current EV and HQ designations are regulated as "uses", the federal agency would have to be consulted any time the DEP considers removing the use.

This concern relates to EPA's fear that DEP could arbitrarily lower the antidegradation protection available to a stream currently classified as EV or HQ once it begins regulating streams for antidegradation in the manner envisioned by the proposed rule.

EPA roadblock. EPA appears to be putting DEP on notice that it must solicit EPA's approval each time it removes the HQ or EV "use" designation in order to start regulating antidegradation "management categories."

I believe EPA intends to use its authority through this process to ensure that DEP will not lower the antidegradation protection available to current HQ and EV streams without a fight. EPA says it will require DEP to provide a use attainability analysis as required in its rules at 40 CFR §131.10(i)(2) whenever it proposes to remove HQ or EV as a designated use.

EPA's rules at §131.3(g) define a use attainability analysis as "a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g)." §131.10(g) stipulates the six conditions that a state may use to remove a designated use.

**US EPA Region III Comments on the Proposed DEP Antidegradation Rulemaking
May 30, 1997**

HQ default for unassessed waters. In the discussion of §93.3, EPA asks DEP how it will apply the "management category" approach to assure appropriate antidegradation protection for unassessed waters when a new discharge is proposed.

EPA answers the question for DEP in the discussion of §94.4d (pages 4-5) when it endorses one of the major environmentalist positions discussed in the reg-neg. EPA recommends that DEP adopt a presumption that all unassessed waters warrant HQ protection when a new discharge is proposed. To avoid the HQ classification, the permit applicant would have to prove that the stream is not an HQ stream.

Since only about one-third of the state's waters have been assessed, the presumption would have a dramatic impact on potential growth and development across the state. For that reason, the reg-neg came to an interim consensus that circumvented the presumption. The stakeholders agreed to recommend that DEP should commit to assess all of the unassessed streams as quickly as possible. They also agreed to use their influence in the General Assembly to get the necessary money appropriated for an expedited assessment.

Since then, DEP committed that it will undertake such an assessment effort in the context of an April 7 Memorandum of Agreement with EPA. (See the lead article in my April Reporter for details.)

Antidegradation policy (§§93.42, 93.4b and 93.4c)

EPA asks DEP to include a redundant antidegradation policy in its regulation – presumably the EPA language promulgated for Pennsylvania at 40 CFR §131.32. There is no need for such a change. The antidegradation policy is already clearly spelled out in the proposed rule.

Existing uses (§93.4a)

EPA wants DEP to modify its regulation to ensure that existing uses are always protected, even if we don't know they're there. It is concerned that an existing use may go unprotected if DEP first has to make sure the use actually exists.

EPA's suggestion raises the old philosopher's conundrum about whether a tree falling in the forest makes a sound if no one is there to hear it. Its recommendation creates confusion by making the regulation vague.

HQ and EV qualifying tests (§§93.4b(a) and 93.4c(a))

Chemistry test. EPA bluntly challenges the chemistry test DEP uses to screen streams for HQ and EV candidacy as "not statistically adequate to disqualify a water from special protection." Many in the regulated community, on the other hand, challenge the statistical adequacy of the DEP chemistry test as a screen to qualify a water for special protection.

While our reasons for challenging the chemistry test differ, the fact remains that we both agree that the chemistry test is scientifically flawed.

What is EPA's problem?

While EPA notes that the test is scientifically invalid, it does not seem to care. Instead, EPA appears to be more concerned that the department use the chemistry test to allow as many streams to qualify for HQ or EV as possible.

EPA's attitude is reflected in its observation that streams could be disqualified from an elevated antidegradation protection if they fail to meet public water supply use standards but meet aquatic life standards.

What's the problem from our perspective?

EPA's regulation establishes a clear "bright line" chemistry standard. Its regulations at §131.12(a)(2) specifically state that a stream can qualify for HQ only "where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water."

US EPA Region III Comments on the Proposed DEP Antidegradation Rulemaking
May 30, 1997

The chemistry test DEP uses does not evaluate the candidate stream against a precise standard. DEP's chemistry test only determines whether the water quality in a candidate stream is "generally better" than statewide aquatic life and human health water quality standards. DEP uses the chemistry test to ascertain whether most of the chemicals are better than standards. If some parameters do not qualify, the DEP will forgive the discrepancy if it can rationalize the poor showing as a natural condition of the stream.

Secondly, the procedure DEP uses to evaluate the stream is statistically flawed. EPA makes its evaluation of the stream chemistry on the basis of one composite grab sample taken at a number of points on the candidate stream reach at an arbitrary moment in time. One sample cannot provide enough data to determine a statistically valid reflection of the background condition of the stream.

In essence, DEP's procedures for evaluating the chemistry of HQ and EV candidates provide the department with a caricature of the stream condition more than a characterization, and it evaluates the simplistic data set it gathers against a general standard that DEP can adjust on a whim.

Biology test. EPA expresses strong support for DEP's efforts to use biological data as an indicator of long-term water quality when evaluating stream candidates for HQ and EV protection, and it applauds DEP for using "scientifically defensible methods to evaluate biological integrity." Nevertheless, EPA attacks DEP's desire to rely on an EPA-sponsored, peer-reviewed bioassessment protocol to evaluate a stream for antidegradation protection.

EPA is primarily concerned with the DEP's judgment to set a bright line percentage score on the bioassessment protocol as the threshold for earning a HQ (83 percent) or EV (92 percent) designation. EPA raises the issue to support the reg-neg environmentalists who challenged the standards as being set too high. EPA and the environmentalists want the number lowered so that more streams can qualify for higher antidegradation protection.

The concern is also reflected in EPA's questioning of provisions in the proposed rule which allow additional chemical or biological information which characterize the stream to be used in the evaluation of antidegradation candidacy. The fewer benchmarks, the better, EPA implies.

Natural quality as a special protection threshold. EPA also challenges DEP's reliance on the biology test's "nonimpaired" standard as the direct equivalent of HQ. The 83 percent score in the bioassessment protocol equates to a "nonimpaired" aquatic macroinvertebrate community.

This attack is most interesting because it challenges a fundamental assumption in the entire DEP antidegradation program: That special protection is warranted for any stream in its natural condition.

I am certain that EPA only challenges the standard as another line of attack on the DEP's use of the 83 percent HQ and 92 percent EV threshold scores in an effort to force DEP to adopt antidegradation standards that are as liberal as possible.

Flawed application of the bioassessment protocol. Even though the DEP's preferred biology test is peer-reviewed, DEP's use of the test undermines its validity.

First, DEP modified the protocol without going through the extensive scientific peer review procedures to determine whether its adaptations are scientifically valid.

Second, DEP gathers its bio-samples in the same way it gathers its chemistry samples. It uses one data set gathered on one day to evaluate the stream's biological health.

Third, it measures the data from the one sample against a "reference stream" that is supposedly reflective of natural unimpaired stream quality in the ecoregion. In some instances, a candidate stream will qualify for EV antidegradation protection when it is measured against a HQ reference stream. Such a procedure is statistically flawed and artificially lowers the EV and HQ thresholds against which the bio-data of the candidate stream is measured.

**US EPA Region III Comments on the Proposed DEP Antidegradati... Rulemaking
May 30, 1997**

For a fuller discussion of the flaws in DEP's use of the biology test, see the attached letter on Brown's Run.

Social and economic justification (§93.4b(b))

The department proposes two separate SEJ standards and openly acknowledged to the Air and Water Quality Technical Advisory Committee that the new "balancing test" is additive and more stringent than the federal standard.

EPA is not concerned that the standards are more stringent. It merely wants DEP to ensure that the new standard can be applied by placing a burden on the permit applicant to provide data quantifying a value for the anticipated water quality degradation.

The problem with EPA's request – in fact, the problem with the balancing test in general – is that no one, including DEP and EPA, really understands what such data would look like, how it would be gathered, or how it would be "weighed" against social and economic data. That problem is why we ask the balancing test to be eliminated.

Assimilative capacity equation (§93.4b(c))

The equation for allowing *de minimis* discharges to automatically pass the SEJ test for discharges to HQ streams is a proposal that the reg-neg group reached interim consensus on. Again, when the reg-neg broke down, the environmentalists walked away from their initial agreement.

The proposed section is modeled after a procedure and an equation that EPA Region III already approved in another state's antidegradation program. That's why we brought it up for consideration in the reg-neg.

EPA does not challenge the use of the procedure. Rather it wants to limit its availability. EPA wants DEP to assume that when the natural quality of a stream is greater than criteria, no assimilative capacity is available, i.e., when the water quality is worse than standards, all of the available assimilative capacity has been used up, then some. Such an interpretation could have the effect of proscribing any permitted discharges to the stream.

DEP's current rule already addresses this matter in §93.5(c). The section, which DEP does not propose to change, states:

"Where adopted water quality criteria...are more stringent than ambient stream concentrations of specific water quality indicators, the ambient stream concentrations shall be deemed to be the applicable criteria used to establish specific effluent limits."

The foregoing provisions will mean that the assimilative capacity equation will be driven by the natural quality of the stream, as DEP clearly states. In practice, natural quality that violates a standard simply becomes the standard. Such a position is consistent with DEP's philosophy that unimpaired natural quality equates to the HQ standard.

EPA is certainly aware of this provision and cannot have missed the fact that DEP proposes to retain it.

EV level of protection (§93.4c(b))

Here, EPA simply wants to know whether DEP is going to adopt their policy that no new or expanded discharges will be permitted on EV streams. EPA apparently wants its ONRW proposal applied to all EV streams.

Interim protection for unassessed waters (§94.4d)

Here, EPA explicitly endorses the application of a default Tier 2 HQ standard for any unassessed stream which has a pending NPDES permit application as requested by the environmentalist reg-neg participants. (See the discussion above on HQ default for unassessed waters.)

**US EPA Region III Comments on the Proposed DEP Antidegradation Rulemaking
May 30, 1997**

Public participation (§93.4e(d)(3))

Here, EPA simply wants the SEJ analysis for proposed discharges to HQ waters to be part of the record available for public scrutiny.

Please note the inherent problems with the balancing test discussed above and the implications that its arbitrariness has for creating a great deal of controversy over a permit application.

attachment

NO. 717 426 3010

PA ENVIRONMENTAL REPORTER

1000 MARKET STREET

PHILADELPHIA, PA 19106

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FAX: 717 426 3010

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**Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477**

Dear Gentlemen:

Please accept the following comments in regard to your proposed changes to water quality standards of Browns Run Basin from CWF to EV:

1. The legal notice only specified Browns Run as the stream for a change in the water quality standards when in fact the proposed law refers to the following streams:

Browns Run
Dutchman Run
Morrison Run
Fluent Run
Hook Run
Possum Run

These are separate streams and the legal notice should be republished to reflect all streams affected.

2. The proposed new law specifically states that the Department is utilizing guidance from the "Special Protection Waters Implementation Handbook". The department has accepted a recommendation from the Pennsylvania Fish and Boat Commission (PFBC) of changing only Browns Run stream from CWF to HQ.

The Department then unilaterally proposes changes to additional streams not in the PFBC recommendation to a category that was not proposed by the PFBC. Upon review of the Special Protection Waters Implementation Handbook, I find no provisions that would allow the Department to change a recommendation and/or add streams to a recommendation. I have asked Mr. Brezina's staff for clarification on this and to date have had no response. Please explain from where the authority to do this is derived.

3. The Special Protection Evaluation Report designates Cathers Run as the reference stream for comparison. Cathers Run is an HQ stream, not EV. How can you compare a stream to HQ, then, when it scores higher in one category than the reference stream, recommend it for EV designation?
4. The report is unauthored. There is no way to check the accuracy of information and data with the person(s) who prepared the report. All reports based on good science should be authored.

May 5, 1997

Page 2

5. The Habitat Assessment Summary attempts to categorize stream conditions based on 17 specific locations. The Habitat assessment should be based on the average condition of the entire stream. If this were done the authors would have reported dredging, dams, rip rap, severe channelization, erosion and sedimentation which would disqualify these streams from an EV designation.

These areas were conveniently overlooked during the Habitat assessment.

6. The report recommends redesignation based on outstanding ecological attributes by earning scores of greater than 92% of the reference station which is HQ.

These scores that were assessed by the unnamed author(s) used a modification of the EPA's Rapid Bioassessment Protocol for use in Streams and Rivers. This modification is not defined anywhere in the report. What is the definition and how does one arrive at the Modified EPT Index, Modified Hilsenhoff Biotic Index and Modified Mayfly %?

7. Repeatability in data acquisition is a very important criteria in scientific interpretation. I would think the Department would attempt more than one insect count before a recommendation is made. Other factors could account for the significant variation in insect count that was observed including localized weather conditions during a possible hatch. The report did not list local weather conditions during the insect count and did not attempt to repeat it at different times.
8. The water quality showed alkalinity below the accepted 20 mg/l criteria at 14 of the 17 stations. The report states without corresponding support data that the low alkalinity are from "natural geologic conditions". What are these natural geologic conditions? If this is true, all the local streams should have low alkalinity. This would disqualify the streams for an EV designation unless it were due to natural geologic conditions. The report only assumes this without the necessary qualifying supporting data.

In closing, the Board is to decide the fate of the entire Southeast Quadrant of the City of Warren based on an Evaluation report that is required by law. The report is unauthored, takes liberal use of field observations and is biased toward making these streams the most restrictive for development in an industrialized corridor. The stream basins contain two (2) major U.S. highways (Routes 6 and 59), a railroad and a number of utility right of ways, pipelines and electric right of ways and a number of large oil and gas fields.

May 5, 1997
Page 3

The board should demand better science than this one report before making such a decision.

Sincerely,



Darryl E. Pierce, P.E.

cc: Atty. Henry Ingram
Representative Jim Lynch
Senator Bill Slocum

DEP/jpk

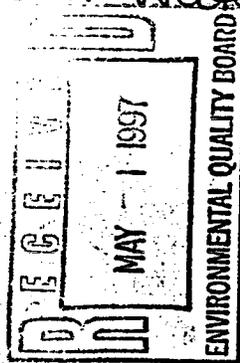
5-28-97

Dear Sir/Madam:

I am writing to encourage you to reject the DEP's current proposal to compromise the quality of our rivers and streams.

The "anti-degradation proposal" will ultimately result in many of our valuable surface waters being exposed to increasing levels of toxic discharge.

Please continue to protect our waterways as required by the federal Clean Water Act.



Please respond,

Jim Hahn (E)

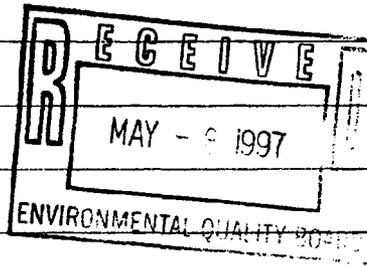
Jim Hahn
2812 Frederick St.
Pittsburgh, PA 15222

STATION 27 101 91 92

PAID BY
RECEIVED

Please reject The Deps current
anti degraaton proposal.

Please Riply TO 105 Cypress St
Quakertown PA
18951



105 Cypress St
Quakertown
PA 18951

Dear Sir,

As a concerned citizen and member of Trout Unlimited, I would like to comment on PA's proposed antidegradation and water quality standards which have been proposed. My primary concern is that PA's proposed regulations will allow more degradation of PA's waters than those of the EPA. The current regulations are much more desirable than the proposed regulations.

I believe that under definitions, the words "surface water" should be replaced with "watersheds". I also do not support deleting HQ and EV from the list of protected water uses. This would remove EPA oversight.

I also believe that requiring a stream to pass both a chemistry and a biology test to qualify as high quality is less restrictive and does not meet federal requirements. Under level of protection, I believe the word "discharges" should be replaced with the word activities.

I also oppose the minimal impact discharge provision. A discharge cannot maintain and protect water quality if it uses up to 25% of the assimilative capacity of the water.

Also there should be no mechanism for local residents or local governments to have a veto power over EV decisions. The water in question is always the water of the Commonwealth and not the sole domain of local residents and governing bodies.

I believe that there are many weaknesses in the current DEP proposal. We need consider only what is best for the Commonwealth's residents and its resources. I believe these proposed regulations need a complete overhaul. I will be watching.

Thank you



6 Balsam Court
Newtown, Pa 18940

May 16, 1997

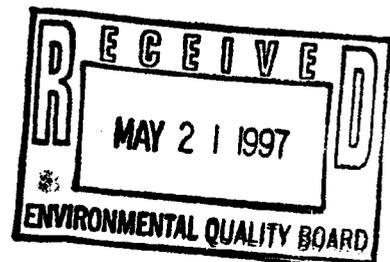
Environmental Quality Board
DPE
P O Box 8465
Harrisburg, pa 17105

Dear Sirs,

I'm writing to ask that you reject the DPE's current anti-degradation proposal. As a parent, I'm concern bout Pennsylvania water ways and the standards that protect them. I trust that the environmental Quality Board will adopt the simpler, better standers of the EPA. Thank you.



Margaret Chleboski



PENNSYLVANIA OIL & GAS ASSOCIATION

412 North Second Street, Harrisburg, PA 17101 • Tel: 717-233-0935 Fax: 717-233-0940

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Comments of the Pennsylvania Oil & Gas Association on proposed amendments to the Department of Environmental Protection's Water Quality (Antidegradation) Regulations

The Pennsylvania Oil and Gas Association (POGAM) is a trade organization representing independent oil and gas producers who live and work throughout the Commonwealth and the allied industries that serve them. Because of the nature of the oil and gas exploration and production business and because of the significant effect that Departmental decisions made on the basis of statutory authority to regulate the waters of the Commonwealth have on real property owned by our members, POGAM has a substantial interest in the structure and content of the Department of Environmental Protection's water quality program.

POGAM participated in the regulatory negotiation convened in 1995 by the Department to address outstanding concerns with the antidegradation components of the water quality program. While the negotiation ended without coming to an appropriate closure on many significant issues, we thank the Department for the opportunity to participate in the process. We also urge the Department to continue employing regulatory negotiations and similar techniques to ensure adequate public involvement in its decisions.

We submit the following comments on the proposed water quality rulemaking adopted by the Environmental Quality Board in January 1997 as published in the *Pennsylvania Bulletin* on March 22, 1997.

GENERAL COMMENTS

In general, POGAM endorses the final report submitted to the Department in the aftermath of the regulatory negotiation by the so-called "regulated community" stakeholders. We believe that their report presents a balanced approach to addressing many of the vexing regulatory issues that the Department and the Environmental Quality Board attempt to resolve through the proposed rulemaking being addressed in these comments.

We ask you to consider and respond to each of the issues raised in the regulated community stakeholders report in the context of this proposed rulemaking.

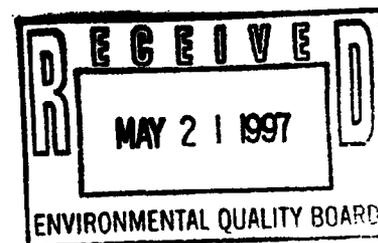
SPECIFIC ISSUES

We also wish to highlight some of the issues we consider most important through the following discussion.

The Exceptional Value Waters program should only apply to outstanding waters on public lands.

It is important to note that the proposed rule retains the current Exceptional Value waters program essentially intact. This is contrary to Governor Ridge's Executive Order No. 1996-1 which requires the Department to rein in all regulations that are more stringent than federal rules unless there is a state law specifically mandating a tougher standard or the department can articulate an overriding Pennsylvania need that justifies it. There are no state laws that expressly require the Department's Exceptional Value Waters program to be more stringent than federal requirements, and no overriding state need for a higher standard has ever been established.

EPA's Tier 3 antidegradation program protects the highest quality waters in the nation. Waters that qualify for Tier 3 status are protected against any activities that could change their ambient quality. In effect, a Tier 3 designation means that activities which use the surface water to satisfy a human need are prohibited.



**Comments of the Pennsylvania Oil and Gas Association
on proposed amendments to the Department of Environmental Protection
Water Quality (Antidegradation) Regulations**

May 21, 1997

Almost half of the streams now classified by DEP as Exceptional Value waters are on private lands. DEP should not be permitted to designate waters that flow through private lands for Exceptional Value protection because of the extreme restrictions the designation imposes on individuals and communities who reside in the affected watersheds.

The Exceptional Value designation should be reserved for streams that are truly unique or exhibit statewide or national significance. Many of the Pennsylvania streams currently classified as Exceptional Value cannot meet that standard, and the proposed regulation lets DEP continue to designate Exceptional Value streams that could never meet such a standard.

By continuing to extend its Exceptional Value Waters program beyond streams in public parks and forests, the Department's proposed regulation will continue to impose unnecessary roadblocks on activities that could enhance the quality of life for individuals and communities who happen to live and work in watersheds through which Exceptional Value streams flow.

The Environmental Quality Board should amend the final rulemaking to restrict the Exceptional Value waters designation to outstanding national and state waters that flow through publicly owned watersheds.

Public participation in the Exceptional Value designation decision.

In the preamble to the proposed water quality amendments, the Environmental Quality Board solicits comments on ways to enhance public participation in the designation of Exceptional Value waters.

If the final regulation allows the Exceptional Value designation to be placed on private watershed lands, you should provide for more public participation in the decision to designate Exceptional Value waters. The proposed rulemaking asks for more public input on technical issues, but it brushes aside any serious consideration of the substantial economic and social impacts that the Exceptional Value designation can have for the people who live and work in the affected watershed.

The Environmental Quality Board should amend the final regulation to require DEP to get the people affected by an Exceptional Value upgrade to buy into it. Specifically:

- DEP should be required to inform the owners of private property interests in the watershed lands that would be affected by a new Exceptional Value designation how it will limit what they can do on their property.
- The regulations should allow the affected property owners to decide whether they want the Exceptional Value designation.
- DEP should be required to get a formal commitment from the owners of property interests in the affected watershed lands to preserve the resource at the strict Exceptional Value standard before recommending the designation to the EQB through a proposed rulemaking.

By turning to the property owners in the watershed – the people most directly affected by the implications of the Exceptional Value designation – the Department can ensure that the resource to be protected is truly “outstanding” in the sense envisioned by the federal Tier 3 program because it will guarantee that those who rely on the watershed to sustain their economy and community recognize the resource as such and are committed to preserving it.

The Environmental Quality Board should not blindly extend the federal Tier 3 dictate to streams running through private holdings on the basis of technical measures of the stream's intrinsic characteristics or the presence of aquatic species. When human communities are part of the watershed through which an Exceptional Value candidate flows, their interests and needs must also be taken into account.

Pennsylvania's Exceptional Value regulations can be improved substantially if they are modified to require the department to take the time to ensure that the people directly affected by a potential decision to regulate a water body under strict Exceptional Value standards understand and endorse that level of governmental control.

**Comments of the Pennsylvania Oil and Gas Association
on proposed amendments to the Department of Environmental Protection
Water Quality (Antidegradation) Regulations**

May 21, 1997

The expansion of public participation in the Exceptional Value waters decision-making process as described above is also a logical extension of the department's new policies. The Department's World Wide Web site on the Internet make the point very clearly.

At http://www.dep.state.pap.us/dep/subject/involved/yes_comment.htm, the Department states:

Yes, We Do Want Your Comments!

One fundamental rule has changed at the new DEP – we want your comments!

When the new DEP puts out a proposed rule or policy, we want your comments and alternatives. We also want to encourage your constructive discussion based on facts and science. We don't want you to simply make a point with your comments, we want you to make a difference.

One of the critical "facts" that is discounted by the proposed amendments to the Exceptional Value waters program is the effect the designation has when it is imposed on private watershed lands. If the Department wants "comments and alternatives" to a regulation that would designate a privately owned watershed as an Exceptional Value resource, it should consider the effects of the designation on the citizens of the candidate watershed on an equal footing with the proposed technical criteria. The department can obtain such comments and alternatives by giving the owners of the private watershed lands affected by a potential Exceptional Value waters designation the opportunity to share their concerns and participate in the decision.

One of the first policies developed and adopted by the new Department attempted to put teeth into its commitment to expand public involvement in the rulemaking activities. The document, entitled "Public Participation in the Development of Regulations and Technical Guidance" (Document No. 012-1920-001), states:

The Department will ensure that all guidance documents and regulations are developed with effective participation by the public during all steps in the process.

It explains that "one of the primary objectives of this Administration is to improve public access to information and decision-making in the Department," and it states unequivocally that "the Department must reach out to broaden public participation to understand what the public thinks, to better inform the Department, and to ensure that the public understands what the Department is doing and why it is doing it."

The public participation policy also list specific principles that the Department commits to following to ensure effective public participation. They include the following:

1. Public involvement in the process must occur early and often. Public participation takes more time and effort up front, but will result in a better decision which is less controversial and requires less outreach, education and defense.
2. Public trust is earned through openness, outreach, consistency and results. Public involvement is integral to sound decision-making....
3. Public dialog will increase understanding among all interests affected by environmental decisions. Public dialog can aid both the regulated community and the public in understanding their individual expectations, resulting in more workable and widely-acceptable solutions.
4. Public input should be solicited from all sectors of society. Equal opportunity for comment and equal consideration of comments from the private and public sectors should be provided. All members of the public should have equitable opportunities to participate. The Department will encourage broad participation in its decision-making from all members of the public....

Comments of the Pennsylvania Oil and Gas Association
on proposed amendments to the Department of Environmental Protection
Water Quality (Antidegradation) Regulations

May 21, 1997

5. The public deserves substantive responses to all comments they submit. The Department should carefully consider all public comments, regardless of their origin, and provide a response through a comment and response document, not just an acknowledgment.
6. Freedom to Participate. The Department will encourage broad participation in its decision-making and discourage actions which prevent effective participation. DEP will encourage participation by targeting specific audiences who may have a particular interest in a proposal, widely distributing information on proposals, and proactively asking for comments on specific issues of concern. Disruptive actions by interest groups which hinder others from participating in discussions and meetings with the Department will be discouraged.

If the Department truly believes that "effective participation also means two-way communication and the willingness of the public to take advantage of the various opportunities to participate," it should open the door to such communication so that individuals and communities directly affected by its decisions have a meaningful opportunity to participate. Such an opportunity is especially critical in the context of the Exceptional value waters designation.

To perfect the Department's public participation policy, the Environmental Quality Board should amend the final antidegradation rulemaking to provide for meaningful public involvement in the decision to impose an Exceptional Value waters designation on private watershed lands.

Make general permits available on all Special Protection waters.

The proposed regulation allows general permits for minor discharges on High Quality streams. This is a positive step, but the final regulation should go further.

Many private individuals own the minerals under Exceptional Value watershed lands. If their discharge qualifies for a general permit, they should be able to use that permit on both High Quality and Exceptional Value streams. Otherwise they may not be able to extract the minerals economically.

Keep the "de minimis" permit threshold to ease the permitting burden.

POGAM supports the proposal to ease the permitting burden for minor discharges to High Quality streams. EPA has approved such an approach in other states in Region III. We believe that the streamlined approach to regulating minor discharges to High Quality streams strikes a reasonable balance between the goals of the antidegradation program and continuing economic growth in the Commonwealth.

Change the High Quality Waters program to match federal standards.

DEP's proposal allows streams to qualify for High Quality status if they have water quality that is "generally better" than water quality standards. The EPA regulation, on the other hand, requires a stream to "exceed" water quality standards before it can be elevated to High Quality status. A stream should never qualify for Special Protection if even one of its water quality parameters violates the required standard.

The final regulation should be modified to require the water quality of streams to actually "exceed" water quality standards for all relevant criteria before qualifying for a High Quality waters designation.

The same condition should also apply to candidates for an Exceptional Value designation.

Use sound science to evaluate streams for Special Protection.

DEP should also be required to conduct a valid scientific investigation of water quality to determine if a stream qualifies for Special Protection. It is bad science to rely on one grab sample to assess a stream. While it may be a bureaucratic convenience, such limited sampling does not generate enough information to accurately determine whether a stream's background condition exceeds water quality standards.

PENNSYLVANIA OIL & GAS ASSOCIATION

412 North Second Street, Harrisburg, PA 17101 • Tel : 717-233-0935 Fax: 717-233-0940

COMMENTS ON THE PROPOSED WATER QUALITY ANTIDegradation REGULATION

The Exceptional Value Waters program should only apply to outstanding waters on public lands.

The EV designation should be reserved for streams that are truly unique or exhibit statewide or national significance. Many of the Pennsylvania streams currently classified as EV cannot meet that standard, and the proposed regulation lets DEP continue to designate EV streams that could never meet such a standard.

Almost half of the streams now classified by DEP as EV waters are on private lands. DEP should not be permitted to designate waters that flow through private lands for EV protection because of the extreme restrictions the designation imposes on individuals and communities who wish to use the waters responsibly to improve their quality of life.

Expand public participation in the EV designation decision.

If the final regulation allows the EV designation to be placed on private watershed lands, you should provide for more public participation in the decision to designate EV waters. The proposed rulemaking asks for more public input on technical issues, but it brushes aside any consideration of the serious economic and social impacts that the EV designation can have for the people who live and work in the affected watershed.

The regulation should be changed to require DEP to get the people affected by an EV upgrade to buy into it. Specifically:

- DEP should be required to inform the owners of private watershed lands that would be affected by a new EV designation how it will limit what they can do on their property.
- The regulations should allow the affected property owners to decide whether they want the EV designation.
- DEP should be required to get a formal commitment from the owners of the affected watershed lands to preserve the resource at the strict EV standard before recommending the designation to the EQB.

Make general permits available on all Special Protection waters.

The proposed regulation makes a positive step by allowing general permits for minor discharges on HQ streams. This is a positive step, but it should go further. Many private individuals own the minerals under EV watershed lands. If their discharge qualifies for a general permit, the general permit should be available on both HQ and EV streams. Otherwise they may not be able to extract the minerals economically.

Keep the “de minimis” permit threshold to ease the permitting burden.

POGAM supports the proposal to ease the permitting burden for minor discharges to HQ streams.

Change the High Quality Waters program to match federal standards.

DEP's proposal allows streams to qualify for HQ status if they have water quality that is “generally better” than water quality standards. The EPA regulation, on the other hand, requires a stream to “exceed” water quality standards before it can be elevated to HQ status. The regulation should be changed to ensure that a stream can qualify for Special Protection only when all of its water quality parameters meet the required standard.

Use sound science to evaluate streams for Special Protection.

DEP should also be required to conduct a valid scientific investigation of water quality to determine if a stream qualifies for Special Protection. It is bad science to rely on one grab sample to assess a stream. While it may be a bureaucratic convenience, this limited sampling does not generate enough information to accurately determine whether a stream's background condition exceeds water quality standards.

The Social and Economic Justification should match federal regulations.

The Department's proposal imposes the basic federal SEJ standard and adds a second “balancing test” that has no federal counterpart. The second SEJ balancing test should be removed from the final rule because it exceeds federal requirements.

Two public comment periods for permits on Special Protection streams is excessive.

The proposed regulation requires NPDES permit applicants to solicit public comment on proposed discharges to HQ and EV streams before applying for the permit. This is an unnecessary burden on the permit applicant that is not required by the federal regulations. It also serves no purpose because the department will also ask for public comments after the application is submitted. The requirement that permit applicants must ask for public comments is costly, time-consuming and redundant, and it should be eliminated.

**Comments of the Pennsylvania Oil and Gas Association
on proposed amendments to the Department of Environmental Protection
Water Quality (Antidegradation) Regulations**

May 21, 1997

Change the Social and Economic Justification (SEJ) requirements for High Quality Waters to match federal regulations.

The Department's proposal imposes the basic federal SEJ standard and adds a second "balancing test" that has no federal counterpart. The balancing test should be removed from the final rule to maintain consistency with the federal regulation.

Eliminate the requirement for two public comment periods for permits on Special Protection streams.

The proposed regulation requires NPDES permit applicants to solicit public comment on proposed discharges to High Quality and Exceptional Value streams before applying for the permit. This is an unnecessary burden on the permit applicant that is not required by the federal regulations. It also serves no purpose because the department will also ask for public comments after the application is submitted.

The Environmental Quality Board should eliminate the requirement that permit applicants must ask for public comments from the final regulation because it is costly, time-consuming and redundant.

Thank you for considering these comments.

Sincerely,



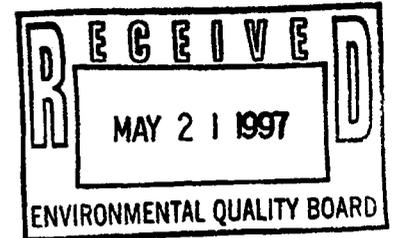
Stephen W. Rhoads
President

Chief Counsel



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA FISH & BOAT COMMISSION

P.O. Box 67000
Harrisburg, PA 17106-7000
(717) 657-4525



May 20, 1997

The Honorable James Seif
Chairman
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

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BERESCHAK

Re: Water Quality Amendments/Antidegradation
Regulation Number #7-310
27 Pa. B. 1459 et seq. (Mar. 22, 1997)

Dear Secretary Seif:

The Pennsylvania Fish and Boat Commission is submitting the following comments on the subject proposed amendments to 25 PA Code Chapters 92, 93 and 95. I have also attached a one-page summary of these comments for the Board's use.

The Fish and Boat Commission's mission is to provide fishing and boating opportunities through the protection and management of the Commonwealth's aquatic resources. The protection of water quality is perhaps the most important tool that the Commonwealth has to ensure the future protection of aquatic resources. The linkage between water quality, aquatic resources and recreational fishing and boating is obvious. This relationship is much like the food chain pyramid that explains the way of life in aquatic systems. If you degrade water quality then you affect the animals that depend upon it to survive and ultimately affect the anglers and boaters that use the resource for recreation or subsistence. This is the reason that the PFBC participated in the regulatory negotiations that preceded this rulemaking. Clean water is essential to achieving our mission and, a strong, scientifically-based antidegradation regulation is vital to protecting our Commonwealth's water resources into the future.

Over the years the PFBC has worked closely with the DEP and its predecessor agencies, the Environmental Quality Board and the Pennsylvania General Assembly on various statutory, regulatory and policy matters that involve clean water. The PFBC is somewhat disappointed that the approach to crafting changes in this program apparently was based on the notion that Pennsylvania should not be any more stringent than the guiding federal Clean Water Act program.

Pennsylvania has been long regarded as a leader, and not a follower, in efforts to provide clean water. Our Clean Streams Law was used as a blueprint by the federal government when it created the

federal Water Pollution Control Act (Clean Water Act), and our Surface Mining Conservation and Reclamation Act was used as a model for the federal Surface Mining Control and Reclamation Act.

The PFBC staff are offering the following specific comments concerning this proposed rulemaking:

Background of the Amendment

It is noted that the US EPA "generally lauded the Commonwealth's antidegradation program as an excellent vehicle to protect valuable resources...." The PFBC would like to echo these observations and comment that we generally are satisfied with the Commonwealth's existing antidegradation program. While we also believe that there are areas that could be strengthened to fully meet the requirements of the Clean Water Act, these changes are minor and do not require a complete overhaul of the entire program.

In many of the proposed changes, the DEP staff have attempted to strike a balance between the industry and conservation comments that were contained in reports that resulted from the regulatory negotiation efforts. However, we believe that many of these issues require the Board to take a position on one side of the issue or the other. In these cases, we believe that when there is potential to do harm to our water resources then we should not take the risk of changing our program without a scientific basis.

The PFBC is in general support of the findings and recommendations contained in the Conservation Stakeholder's Report of August 21, 1996. We are supplementing this report with the following comments:

Section 92.81. General Permits. and Section 92.83. Inclusion of individual dischargers in general NPDES permits.

The changes to these sections provide for the use of general permits in High Quality watersheds where they are now prohibited. We continue to strongly support this prohibition in EV watersheds. We still have some questions about the general exception for HQ watersheds. During the negotiated rulemaking discussions, there was consensus agreement that some general permits (i.e. aerial transmission line stream crossings) might be applicable in HQ watersheds if they pose no potential threat to water quality. The wording of the proposed rulemaking sets no clear boundaries on which permits may or may not be used. The Board should require DEP to do an analysis on which permits may or may not qualify for use in HQ watersheds prior to making this change.

Section 93.1 Definitions.

The changes in definition to EV Waters were extensively discussed at the reg-neg meetings. We believe that the word "watershed" should be included in the new definition in much the same

way it is used in the existing definition. The special protection designations are presently watershed (basin) designations and not stream-specific designations except for some special exceptions (certain mainstem segments of larger streams and rivers). We are very concerned that this change would greatly weaken the existing EV protection program and could eventually lead to a far less protective program for our best natural resources.

Section 93.3. Protected Water Uses.

The PFBC staff believe that it is inappropriate to remove EV and HQ waters as protected water uses unless there is some assurance that to prevent DEP from independently (without EQB or EPA approvals) downgrading waters from these special protection classifications. The Conservation Stakeholders report contains language to provide these safeguards while removing EV and HQ waters as protected uses. The PFBC staff recommend use of this wording.

Section 93.4. Statewide Water Uses.

The PFBC staff concur with the proposed change, which will insure that the designated uses will reflect the existing uses at all times.

Section 93.4a. Existing Uses.

We suggest that the first sentence be amended to read:

Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. ~~when the Department's evaluation of technical data establishes that a surface water attains or has attained an existing use.~~

We recommend that the last portion of this sentence be eliminated since it conditions the protection of the existing use on a DEP evaluation which is not supported by federal regulation or policy. The federal program requirements are simple: The Commonwealth has a duty to protect and maintain all existing water uses.

The reference to the Pennsylvania Natural Diversity Inventory (PNDI) should be changed since this is one of several databases that is used to house information about the location of state and federally listed threatened and endangered (T&E) species. Agencies (Fish & Boat Commission, Game Commission, Department of Conservation and Natural Resources, and US Fish and Wildlife Service) with the direct responsibility for state and federally listed plants and animals should be the ultimate contact for confirmation of their presence or absence in particular watersheds. Although the agencies contribute information to PNDI, it should not be the sole source of information. Excluding it from the discussion doesn't limit the Department to one source for the information.

The proposed language states that "discharges to these waters shall be limited to ensure protection of these species and critical habitat" and the *Summary of Proposed Revisions* explains that this will be done by "specifically limiting mixing areas, in permitting discharges that may impact these species." The following language would be more acceptable. It would allow the Department to be more comprehensive in fully protecting state and federally-listed T&E species:

Where necessary, the Department will restrict activities, including limiting discharges, to ensure protection of federal or Pennsylvania endangered or threatened species or their critical habitat.

Section 93.4b. High Quality Waters.

(a) Qualifying as High Quality Waters

The PFBC staff do not believe that a water should have to pass both a biological and water quality test in order to qualify for protection as an HQ water. One or the other should be sufficient based on EPA guidance. To require both is too restrictive for Tier 2 protection.

The EPA Rapid Bioassessment Protocols (RBP) that are referenced in the regulations are scientifically-based procedures that are widely supported in the literature and are designed to evaluate whether or not a particular water may or may not be impaired. DEP has taken this process an extra step and developed a procedure to conduct comparisons of Ecoregion reference sites and sites which are being considered for HQ or EV (Special Protection). To the PFBC staff's knowledge, this particular modification has not been subject to peer review. However, we agree that this approach is more credible conceptually than the manner by which waters were designated in the past. There is much more objectivity involved with these decisions and, as a result, the decisions are far more defensible. On the other hand, although the procedures seem to be fixed, they are periodically adjusted to produce a result that may be more politically or socially acceptable. It is difficult or impossible to devise a flawless procedure, but the process should be well explained in policy so that the Board understands the ground rules that DEP is using to make these decisions.

Reference streams (waters of substantial ecological significance) are presently being used to make the comparisons. Once identified as an Ecoregion Reference, these streams need to be protected as EV to insure that they are not degraded, which would prevent them from being used as reference streams in the future. More importantly there have been some recent interpretations that a water cannot merit EV if it is not judged by comparing it to an EV

reference. This makes it even more urgent to reclassify all of our reference streams EV. Since the HQ comparisons require only an 83% score for the candidate site/reference site comparison, it is reasonable to require EV for all reference streams.

The PFBC staff suggest that HQ designations should not be limited to just Class A Wild Trout Streams but should include Class A, B, C and D Wild Trout Streams since these streams support good, clean water as indicated by the presence of wild trout.

(b) Level of Protection/social or economic justification (SEJ)

We recommend that this section explicitly reference both point-sources and non-point sources of pollution. Although "discharges" may be interpreted to include both, they are sometimes thought to only include point sources.

It is very important that the ultimate measure of whether or not a stream passes the test is measured by creating social or economic benefits to the public which outweigh the degradation expected to be caused by the discharge. How DEP will perform this balancing should be subsequently defined in a policy document so that the Board is aware of how DEP staff is conducting these tests.

(f) Special provisions for minimal impact discharges.

The offer of an "off ramp" for certain *de minimus* discharges was a discussion point in the negotiations during the reg-neg. The PFBC staff objects to a procedure that would suspend an SEJ analysis for the first 25% assimilative capacity of a receiving stream since it will exempt a discharger from SEJ and the public participation requirements that go along with it. If general permits are allowed in HQ watersheds, they should also pass the SEJ test.

Section 93.4 c. Exceptional Value Waters.

(a) Qualifying as Exceptional Value Waters

The PFBC staff concur with the two-test approach for EV since it is appropriate for a water to pass more stringent tests to receive a greater level of protection. However, the same comments are noted for the biology test as were explained in the review of 93.4b (a) for High Quality Waters. Reference Streams should be immediately designated EV because of their ecological significance.

The PFBC designation of waters as Wilderness Trout Streams should not be listed as a biology test. The PFBC staff concur that Wilderness Trout Streams should be EV but this designation should not be used as an example of a biology test. Streams enter the PFBC's Wilderness Trout Stream program because they are in a remote location and support naturally reproducing trout populations to offer sport fishing opportunity for the recreation of anglers in a wilderness setting away from roads or vehicular use (58 Pa. Code § 57.4). The

Wilderness Trout Stream designation would more appropriately qualify as a recreational test rather than a biological test.

Section 93.4d. General requirements for High Quality and Exceptional Value Waters.

(a) The PFBC staff applaud the requirement that all permit applicants in HQ and EV watersheds must evaluate non-discharge alternatives. We recommend including the pollution prevention language from the Conservation Stakeholders report in this section.

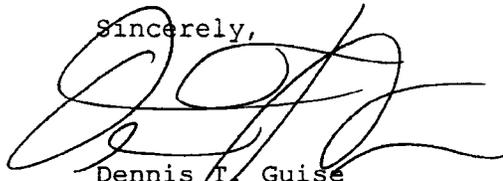
(b) We are unclear about how DEP will promote non-point pollution programs. We recommend that the existing regulation be retained since it assures that there shall be achieved Best Management Practices (BMPs).

Section 93.7. Specific Water Quality Criteria.

The PFBC staff strongly support the higher dissolved oxygen criteria for HQ waters and encourage DEP to evaluate the existing DO criteria for CWF and WWF and update these in accordance with the most recent US EPA Water Quality Criteria guidance.

Thank you for the opportunity to provide these comments. The PFBC staff contact for these comments is John Arway, Chief, Environmental Services Division, 450 Robinson Lane, Bellefonte, PA 16823, 814/359-5140, email: jxa18@psu.edu.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis T. Guise", written over a horizontal line.

Dennis T. Guise
Deputy Executive Director
Chief Counsel



May 20, 1997

One-Page Summary of PFBC Comments on Water Quality Amendments/Antidegradation Regulations; Regulation Number #7-310; 27 Pa. B. 1459 et seq. (Mar. 22, 1997)

The Fish and Boat Commission's (PFBC) mission is to provide fishing and boating opportunities through the protection and management of the Commonwealth's aquatic resources. The protection of water quality is perhaps the most important tool that the Commonwealth has to insure the future protection of aquatic resources. Clean water is essential to achieving the PFBC's mission and, a strong, scientifically-based antidegradation regulation is vital to protecting the Commonwealth's water resources into the future.

The EPA has "generally lauded the Commonwealth's antidegradation program as an excellent vehicle to protect valuable resources..." The PFBC is satisfied with the Commonwealth's existing antidegradation program, and we do not believe that a complete overhaul of the program is required at this time. When proposed revisions to the antidegradation program require the Board to take a position on one or the other of an issue, we believe that the board should not take the risk of changing our program without a scientific basis when there is a potential to do harm to water resources.

Section 92.81 and Section 92.83. The changes to these sections provide for the use of general permits in High Quality watersheds where they are now prohibited. The PFBC staff believe that some general permits (*i.e.* aerial transmission line stream crossings) might be applicable in HQ watersheds if they pose no potential threat to water quality. The Board should require DEP to do an analysis on which permits may or may not qualify for use in HQ watersheds prior to making this change.

Definitions. The PFBC suggests that the word "watershed" be included in the new definition in much the same way it is used in the existing definition.

Existing Uses. The PFBC staff concur with the proposed change, which will insure that the designated uses will reflect the existing uses at all times. Agencies with the direct responsibility for state and federally listed threatened and endangered plants and animals should be the ultimate contact for confirmation of their presence or absence in particular watersheds.

High Quality Waters. The PFBC staff do not believe that a water should have to pass both a biological and water quality test in order to qualify for protection as an HQ water. Reference streams (waters of substantial ecological significance) are presently being used to make comparisons for evaluation purposes. Once identified as an Ecoregion Reference, these streams need to be protected as EV to insure that they are not degraded. The PFBC staff suggest that HQ designations should not be limited to just Class A Wild Trout Streams but should include Class A, B, C and D Wild Trout Streams since these streams support good, clean water as indicated by the presence of wild trout.

Exceptional Value Waters. The PFBC staff concur with the two-test approach for EV since it is appropriate for a water to pass more stringent tests to receive a greater level of protection. The PFBC's Wilderness Trout Stream designation would more appropriately qualify as a recreational test rather than a biological test.

General requirements for both High Quality and Exceptional Value Waters. The PFBC staff applaud the requirement that all permit applicants in HQ and EV watersheds must evaluate non-discharge alternatives.

Specific Water Quality Criteria. The PFBC staff strongly support the higher dissolved oxygen criteria for HQ waters and encourage DEP to evaluate the existing DO criteria for cold water fisheries (CWF) and warmwater fisheries (WWF).

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(PER JHJ)

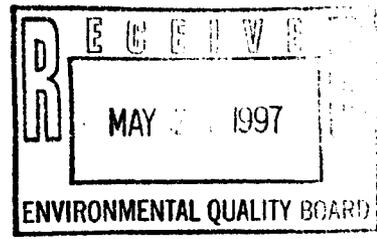
Dear EQB staff —

We need to protect our waterways and keep our water pure.

Please reject the DEP's current anti-degradation proposal.

And please do whatever possible & necessary to protect our water supply.
Thank you.

Wayne: Joan Beaver
10 E. Fifth St, #1
Media, PA 19063





Environmental Quality Board

p.o. box 8477 • harrisburg, pa. 17105-8477 • (717) 787-4526

June 3, 1997

97 JUN -6 PM 9:00

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Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

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

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Mr. David Densmore, U.S. Fish and Wildlife Service
2. Mr. Ron Lutz
3. Mr. David Yates
4. Keen Cornell, The Tobyhanna Creek/Tunkhannock Creek Watershed Assn. (Monroe County)

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

Sharon K. Freeman
Regulatory Coordinator

Enclosure

DATE: 27 JUN 88

ATTENTION

STATE OF CALIFORNIA
DEPARTMENT OF WATER RESOURCES

Environmental Quality Board
Would you please REJECT
The DEPS CURRENT anti
degradation Proposal

NAME: GARY MAF
P.O. Box or Street Address: 238 FRAY
CITY: Quakertown State

May 16, 1997

Mr. James Seif
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Dear Mr. Seif,

We are asking you to reject the proposed rule changes for Antidegradation by DEP to the EQB. Please do your part to protect the existing uses of our waters, including all wetlands. Make the Pennsylvania regulations the same as the Federal regulations and the Clean Water Act.

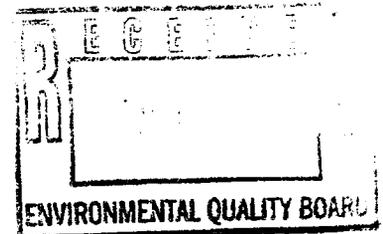
We are concerned that DEP is leaning more toward the positions of lobbyists for businesses and industry and away from the desires of ordinary citizens who want strong regulations for clean water.

Sincerely,

Nancy J. Lezark
Nancy J. Lezark

Alexander P. Lezark
Alexander P. Lezark

R.D. 1 Box 10
Clarksburg, PA 15725



FAX

RECEIVED

MAY 30 1997

**PA Fish and Boat Commission
Environmental Services Division
450 Robinson Lane
Belleville, PA 16823**

**INDEPENDENT REGULATORY
REVIEW COMMISSION**

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BERESCHAK

Date 29 May, 1997

Number of pages including cover sheet _____

To:

John Jewett

IRRC

From:

John Arway

Environmental Services

Phone

Fax Phone

717/783-5476 - 2664

CC:

Phone

Fax Phone

814/359-5147

814/359-5175

REMARKS

- Urgent
- For your review
- Reply ASAP
- Please comment

Attached is the information as promised. The "Conservation Stakeholder" contacts are as follows:

Berks County Conservancy-- Harlan Snyder

Chesapeake Bay Foundation-- Jolene Chinchilli 717/234-5550

League of Women Voters-- Edie Stevens 717/839-8130

Penns Valley Conservation Association-- Helen Fahy 814/422-8210

PA Environmental Council-- Davitt Woodwell 412/471-1661

*PA Environmental Defense Foundation-- John Childs 717/566-5626

*US Fish & Wildlife Service-- Mark Herch 814/234-4000

*PA Trout (Council of Trout Unlimited-- Inky Moore 717/776-7005 or *Bill Kodrich 814/275-2531

* Denotes best contacts

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PA FISH COMMISSION

PAGE 08

MAY 30 1997

INDEPENDENT REGULATORY
REVIEW COMMISSION



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May 20, 1997

One-Page Summary of PFBC Comments on Water Quality Amendments/Antidegradation Regulations; Regulation Number #7-310; 27 Pa. B. 1459 et seq. (Mar. 22, 1997)

The Fish and Boat Commission's (PFBC) mission is to provide fishing and boating opportunities through the protection and management of the Commonwealth's aquatic resources. The protection of water quality is perhaps the most important tool that the Commonwealth has to insure the future protection of aquatic resources. Clean water is essential to achieving the PFBC's mission and, a strong, scientifically-based antidegradation regulation is vital to protecting the Commonwealth's water resources into the future.

The EPA has "generally lauded the Commonwealth's antidegradation program as an excellent vehicle to protect valuable resources...." The PFBC is satisfied with the Commonwealth's existing antidegradation program, and we do not believe that a complete overhaul of the program is required at this time. When proposed revisions to the antidegradation program require the Board to take a position on one or the other of an issue, we believe that the board should not take the risk of changing our program without a scientific basis when there is a potential to do harm to water resources.

Section 92.81 and Section 92.83. The changes to these sections provide for the use of general permits in High Quality watersheds where they are now prohibited. The PFBC staff believe that some general permits (i.e. aerial transmission line stream crossings) might be applicable in HQ watersheds if they pose no potential threat to water quality. The Board should require DEP to do an analysis on which permits may or may not qualify for use in HQ watersheds prior to making this change.

Definitions. The PFBC suggests that the word "watershed" be included in the new definition in much the same way it is used in the existing definition.

Existing Uses. The PFBC staff concur with the proposed change, which will insure that the designated uses will reflect the existing uses at all times. Agencies with the direct responsibility for state and federally listed threatened and endangered plants and animals should be the ultimate contact for confirmation of their presence or absence in particular watersheds.

High Quality Waters. The PFBC staff do not believe that a water should have to pass both a biological and water quality test in order to qualify for protection as an HQ water. Reference streams (waters of substantial ecological significance) are presently being used to make comparisons for evaluation purposes. Once identified as an Ecoregion Reference, these streams need to be protected as EV to insure that they are not degraded. The PFBC staff suggest that HQ designations should not be limited to just Class A Wild Trout Streams but should include Class A, B, C and D Wild Trout Streams since these streams support good, clean water as indicated by the presence of wild trout.

Exceptional Value Waters. The PFBC staff concur with the two-test approach for EV since it is appropriate for a water to pass more stringent tests to receive a greater level of protection. The PFBC's Wilderness Trout Stream designation would more appropriately qualify as a recreational test rather than a biological test.

General requirements for both High Quality and Exceptional Value Waters. The PFBC staff applaud the requirement that all permit applicants in HQ and EV watersheds must evaluate non-discharge alternatives.

Specific Water Quality Criteria. The PFBC staff strongly support the higher dissolved oxygen criteria for HQ waters and encourage DEP to evaluate the existing DO criteria for cold water fisheries (CWF) and warmwater fisheries (WWF).

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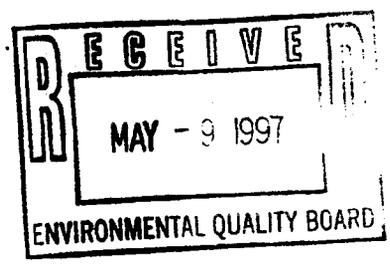
To:

Pa. Environmental Board.

We do need standards to protect our water from further degradation.

We have to reject DEP's proposal.

We have enough low standards in our country, does our water have to be another



MRS. PATRICIA BECK
209 S. PCH. ST.
ZELLENOPLE, PA. 16063

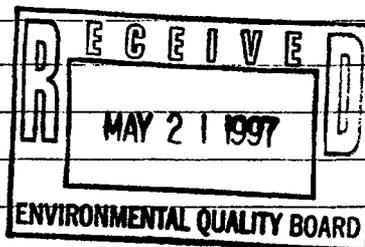
7/1/97 14:13
R...

Dear Sirs,

Please reject the current
DEP degradation Proposal.

Regards
Paul Patsy

Paul Baniewicz
1 Green ridge Cr
Newtown PA 18940



Chairman
Environmental Quality Board
P. O. Box 8477
Harrisburg, PA 17105-8477

Dear Sir:

This letter is in reference to the antidegradation regulation proposal in the March 22, 1997, *Pennsylvania Bulletin*.

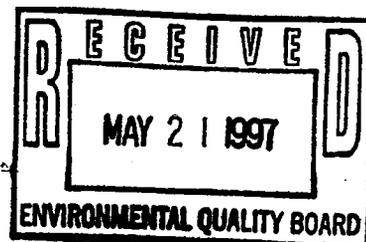
I am opposed to the allowance of general NPDES permits in our High Quality streams. Oil and gas discharges have already done plenty of damage in the northwest part of the state, and now you want to allow their discharges in HQ streams. General permits are not tracked by DEP, so they would have no way of knowing how much degradation is taking place in any one watershed--until it was too late. The proposed rules will significantly weaken existing protection for both High Quality and Exceptional Value streams.

I am also very disappointed that DEP did not mention wetlands in their antidegradation proposal. The current regulation, put into place by EPA, gives this protection to wetlands. How can wetlands be given HQ or EV protection if the criteria to make a "surface water" HQ or EV are based on streams?

The proposed regulation has little good to recommend them and much bad. The proposed regulation should be rejected by the Board.

Sincerely yours,

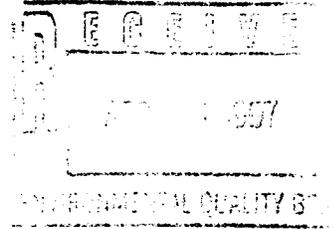
Robert L. Strano



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(PER CAT)

S

April 8, 1997



Environmental Quality Board
DEP
PO Box 8465
Harrisburg, PA 17105

To Whom It May Concern:

This letter is in regards to the present condition of the waterways in the state of Pennsylvania. I strongly disagree with the current movement towards easier and more pollution in our waterways. I want my voice to be heard with the message - reject the DEP's current anti-degradation proposal.

I feel it is your responsibility to adopt better standard of the EPA.

I would appreciate a reply as to what will be done as to regards to this issue.

Sincerely,

Regina M. Bortz

Mrs. Regina M. Bortz
2843 Edgemont Drive
Allentown, PA 18103



600 N. Twelfth St. • Lemoyne, Pennsylvania 17043
717-730-4380 or Toll Free (in PA) 800-692-7339 • 717-730-4396 (Fax)

President Edward S. Nikles, Sr. Pike County BA	Vice President Charles L. Kasko BIA of Northeast PA	Associate Vice President Mary C. Pucciarella Blair County BA	Treasurer Dennis L. Brislin BIA of Northeastern PA	Secretary Michael J. Schultz Washington County BA	Executive Vice President David F. Sheppard, Jr., CAE
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PENNSYLVANIA
BUILDERS
ASSOCIATION

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harrisstown 2
333 Market Street
Harrisburg, PA 17101

June 19, 1997

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Dear Bob:

Thank you for meeting with me and Megan Milford to discuss the Pennsylvania Builders Associations' (PBA) concerns with the proposed Department of Environmental Protection (DEP) antidegradation regulations (#7-310). How this proposal is finalized and ultimately implemented is of great concern to our membership.

We would appreciate it if the Commission in its initial comments on this proposal raise the following issues:

1. This proposal should be evaluated pursuant to the Governor's Executive Order 1996-1. There are several provisions contained in this proposal that are considerably more stringent than existing federal standards.
2. The DEP must use sound scientific methods in evaluating a stream's quality. "Generally better than" water quality standards determinations and obtaining one grab sample is clearly inadequate in determining a stream's actual quality.
3. The exceptional value stream designation program cannot be a tool to halt growth, as is now the case. Exceptional value designations, if warranted, should primarily be designated on public lands. If private property is involved, all landowners must be notified and involved prior to the stream assessment, understand the impacts of the designation and ultimately agree to any proposed designation.

Page 2

As you are well aware, over the past ten years the Department has lost its focus on this water quality program. Now is the time to correct the provisions of the regulation that have continued to allow abuse of this program to occur.

Additionally, because of this on-going problem with stream designations, we request that the Commission institute a policy to disapprove any DEP regulatory packages that include an upgrade to a stream's designation until Pennsylvania's antidegradation regulation is published as a final rule.

Thank you for your attention to this matter. If you would like to discuss this further, please give me a call.

Best regards,

A handwritten signature in black ink, appearing to read "Louis J. Biacchi". The signature is fluid and cursive, with a prominent initial "L" and "B".

Louis J. Biacchi
Director of Governmental Affairs

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL-5659-9]
RIN 2040-AC78

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Water Quality Standards for Pennsylvania

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes water quality standards applicable to waters of the United States in the Commonwealth of Pennsylvania. EPA is promulgating this rule pursuant to Section 303(c)(4) of the Clean Water Act (CWA). This rule establishes an antidegradation policy for Pennsylvania, making available additional water quality protection than currently provided by the Commonwealth's antidegradation policy including the "Special Protection Waters Program," which EPA disapproved in part in 1994.

EFFECTIVE DATE: January 8, 1997.

ADDRESSES: This action's administrative record is available for review and copying at Water Protection Division, EPA, Region 3, 841 Chestnut Building, Philadelphia, PA 19107. For access to the docket materials, call Denise Hakowski at 215-566-5726 for an appointment. A reasonable fee will be charged for copies.

FOR FURTHER INFORMATION CONTACT: Evelyn S. MacKnight, Chief, PA/DE Branch, 3WP11, Office of Watersheds, Water Protection Division, EPA, Region 3, 841 Chestnut Building, Philadelphia, PA, telephone: 215-566-5717.

SUPPLEMENTARY INFORMATION:

A. Potentially Affected Entities

This action will establish a Federal antidegradation policy applicable to waters of the United States in the Commonwealth of Pennsylvania. Entities potentially affected by this action are those dischargers (e.g., industries or municipalities) that may request authorization for a new or increased discharge of pollutants to waters of the United States in Pennsylvania. This list is not intended to be exhaustive, but rather a guide for readers regarding entities potentially affected by this action. Other types of entities not listed could also potentially be affected. If you have questions regarding the applicability of this action to a particular entity, consult the person

B. Background

Under section 303 (33 U.S.C. 1313) of the Clean Water Act (CWA), States are required to develop water quality standards for waters of the United States within the State. States are required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards. 33 U.S.C. 1313(c). States are required to submit the results of their triennial review of their water quality standards to EPA. EPA reviews the submittal and makes a determination whether to approve or disapprove any new or revised standards.

Minimum elements which must be included in each State's water quality standards regulations include: use designations for all waterbodies in the State, water quality criteria sufficient to protect those designated uses, and an antidegradation policy consistent with EPA's water quality standards regulations (40 CFR 131.6). States may also include in their standards policies generally affecting the standards' application and implementation (40 CFR 131.13). These policies are subject to EPA review and approval (40 CFR 131.6(f), 40 CFR 131.13).

This rule involves antidegradation. 40 CFR 131.12 requires States to adopt antidegradation policies that provide three levels of protection of water quality, and to identify implementation methods. Under 40 CFR 131.12(a)(1), referred to as Tier 1, existing instream water uses and the level of water quality necessary to protect the existing uses are to be maintained and protected. Existing uses are those uses that existed on or since November 28, 1975. Tier 1 represents the "floor" of water quality protection afforded to all waters of the United States. Under 40 CFR 131.12(a)(2), referred to as Tier 2 or High Quality Waters, where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after public participation and intergovernmental review, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources.

Finally, under 40 CFR 131.12(a)(3), known as Tier 3 or Outstanding National Resource Waters (ONRWS), where a State determines that high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

Section 303(c)(4) (33 U.S.C. 1313(c)(4)) of the CWA authorizes EPA to promulgate water quality standards for a State when EPA disapproves the State's new or revised water quality standards, or in any case where the Administrator determines that a new or revised water quality standard is needed in a State to meet the CWA's requirements.

In June 1994, EPA Region 3 disapproved portions of Pennsylvania's standards pursuant to Section 303(c)(4) of the CWA and 40 CFR 131.21, including portions of the antidegradation policy, known in Pennsylvania as the Special Protection Waters Program, relating to protection of existing uses, criteria used to define High Quality Waters and protection afforded to Exceptional Value Waters as

discussions between the Pennsylvania Department of Environmental Protection (''Pennsylvania'' or ''the Department'') resulting from EPA's disapproval, see

[[Page 64817]]

the August 29, 1996, Federal Register proposal of this rule. (61 FR 45379).

As a result of EPA's disapproval, Pennsylvania initiated a regulatory negotiation, or ''reg-neg,'' to reassess its antidegradation policy, or Special Protection Waters Program, while involving stakeholders in the process. EPA participated in the reg-neg process in an advisory capacity and informed the reg-neg group of this rulemaking action.

Based on the reg-neg process and an interim report produced by the group, the Department announced in the Pennsylvania Bulletin, May 4, 1996, the availability of proposed changes to the antidegradation provisions of the Commonwealth's water quality standards. The reg-neg group's final meeting was on August 1, 1996, where the stakeholders declared that a group consensus could not be reached, disbanded and issued two separate reports, representing the opinions of the conservation stakeholders and the regulated community stakeholders respectively. The Department is currently developing a new regulatory proposal using these reports and input it received in response to its May 4, 1996 Pennsylvania Bulletin notice.

On April 18, 1996, concerned with the time that had elapsed since EPA's disapproval, the United States District Court for the Eastern District of Pennsylvania ordered EPA to prepare and publish proposed regulations setting forth revised or new water quality standards for the Commonwealth's antidegradation provisions disapproved in June 1994. *Raymond Proffitt Foundation v. Browner*, Civil Docket No. 95-0861 (E.D.Pa). The court stated that EPA was not to delay its rulemaking any more to accommodate the Commonwealth's schedule.

Consistent with the Court's order, on August 29, 1996, EPA published a Federal Register notice proposing standards related to Pennsylvania's antidegradation policy (61 FR 45379). Since the Commonwealth has not adopted revised water quality standards which EPA determined are in accordance with the CWA, an action that would have made EPA's rulemaking unnecessary, EPA is promulgating this rule in accordance with Section 303(c)(3) and (4) of the CWA.

EPA's long-standing practice in the water quality standards program has been to withdraw the Federal rule if, and when, a State subsequently adopts rules that are then approved by EPA. Thus, notwithstanding today's action, EPA strongly encourages the Commonwealth to pursue its on-going effort to adopt appropriate standards which will make this Federally promulgated rule unnecessary.

C. Summary of Final Rule and Response to Major Comments

A description of EPA's final action, and a summary of major comments regarding the proposal and EPA's response, are set forth below. Additional comments and responses to comments are in the administrative record.

1. Ensuring That Existing Uses Will Be Maintained and Protected as Required Under 40 CFR 131.12(a)(1)

Pennsylvania's regulation at 25 PA Code Sec. 93.4 explicitly protects existing uses only through Pennsylvania's designated use process. That process requires that when an evaluation of technical

data establishes that a waterbody attains the criteria for an existing use that is more protective of the waterbody than the current designated use, that waterbody will be protected at its existing use until the conclusion of a rulemaking action. After the rulemaking action the waterbody will be protected only at its designated use and in some cases the designated use will not adequately protect the existing use. For a more detailed discussion of EPA's disapproval of this provision and Pennsylvania's resulting actions, see the preamble discussion in the August 29, 1996, proposal, 61 FR 45379.

In order to ensure that the standards governing Tier 1 antidegradation protection in Pennsylvania are consistent with the CWA, EPA proposed to promulgate for Pennsylvania language that ensures existing uses shall be maintained and protected in accordance with 40 CFR 131.12(a)(1). The comments EPA received regarding Federal Tier 1 protection were generally supportive of EPA's proposed action and raised no significant issues. See the Response to Comments document in the Administrative Record to this rule for responses to specific comments.

This final rule is promulgating our proposal without changes. This regulation will be the applicable Federal antidegradation Tier 1 policy in Pennsylvania for purposes of the CWA and, to the extent it is more stringent, supersedes Pennsylvania Regulations at 25 PA Code 93.4(d)(1): EPA is taking this action to protect all existing uses, including providing protection for existing uses that may be more specific, or require more protection, than Pennsylvania's designated uses.

Pennsylvania has recently proposed changes to its antidegradation policy that would protect existing uses without the limitations imposed by its use designation process. See 25 Pennsylvania Bulletin 2131-32 (May 4, 1996). If Pennsylvania promulgates this proposal as a final rule and it is approved by EPA, EPA would expect to withdraw the part of the Federal rule relating to Tier 1.

2. Ensuring That Pennsylvania's High Quality Designation Adequately Protects All Waters That Qualify for Protection Under the Federal Tier 2 Set Forth in 40 CFR 131.12(a)(2)

In order to afford equivalent protection to that afforded by Tier 2 of the Federal policy set forth in 40 CFR 131.12(a)(2), Pennsylvania has developed a Special Protection Waters Program which utilizes the designational approach, i.e., designates specific waters as High Quality. The High Quality Waters Policy is set forth in 25 PA Code Secs. 93.3, 93.7, 93.9 & 95.1, and the Department's Special Protection Waters Handbook (November 1992). High Quality Waters are defined in Pennsylvania's water quality standards as "[a] stream or watershed which has excellent quality waters and environmental or other features that require special water quality protection". 25 Pa Code Sec. 93.3. Once designated as High Quality, those waters are afforded a level of protection consistent with EPA's Tier 2.

EPA disapproved a portion of Pennsylvania's High Quality Waters Policy because the policy requires that a stream must possess "excellent quality waters and environmental or other features that require special water quality protection" [emphasis added]. That definition may exclude waters that would be protected under the Federal Tier 2 policy which provides Tier 2 protection to all waters with water quality exceeding levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water regardless of any other feature. Additional details concerning EPA's disapproval and Pennsylvania's response to the disapproval are available in the preamble to the August 29, 1996, proposal. 61 FR 45379.

EPA proposed language based on 40 CFR 131.12(a)(2) to make

available Federal Tier 2 protection for Pennsylvania waters on the basis of water quality alone. That language would have the effect of making Tier 2 protection available to all waters whose quality "exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water."

[[Page 64818]]

Discussion of major comments relating to Tier 2

Comment: Two commenters stated that the EPA proposed language concerning social and economic justification for lowering water quality will weaken the present Pennsylvania program. Pennsylvania's program requires that a proposed project that will add a new or increased discharge into a Special Protection waters must be "necessary" and "of significant benefit to the public," whereas the Federal language requires that lowering of water quality be "necessary" and "to support important social and economic benefit in the area in which the waters are located."

Response: Under the wording of 40 CFR Sec. 131.32(a)(2), the Commonwealth will be responsible for determining whether a particular lowering of water quality is "necessary to support important social and economic benefit in the area in which the waters are located." In making that determination the Commonwealth may equate "important social and economic benefit" with "of significant benefit to the public" if that phrase as used by Pennsylvania is interpreted to be at least as stringent as EPA's wording. We note that the word "important" was selected by EPA in 1983 because it was believed to be more protective than "significant." Accordingly, EPA does not believe that the language of the Federal regulation will weaken the level of protection of Tier 2 waters.

Comment: One commenter stated that the Federal Tier 2 designation should be strictly interpreted in Pennsylvania as disallowing the Commonwealth from designating a stream as high quality or Tier 2 if even one of the stream's water quality standards is violated.

Response: EPA does not interpret 40 CFR 131.32(a)(2) as excluding a water from Tier 2 protection merely because one parameter exceeds water quality standards.

For additional comments and responses, see the Response to Comments document in the Administrative Record to this rule.

In the August 29, 1996, proposal, EPA also discussed another option of simply promulgating the definition of High Quality Water from 25 Pa. Code Sec. 93.3 but without the phrase "and environmental or other features which require special criteria." EPA sought comments on both of these options through the August 29, 1996, Federal Register proposal. Under either option, the current State process for establishing designations and reviewing proposals to lower water quality would remain in effect. The only comment supporting the second option was based on the concern that using the language of 131.12(a)(2) would weaken Pennsylvania's program. This concern is discussed above. Accordingly, the final rule retains the proposed approach.

Pennsylvania has not yet satisfied EPA's disapproval of its High Quality waters policy. Therefore, promulgation of the rule is still necessary. EPA has decided to retain the proposed language in this final rule since the rule is still necessary, and EPA received no comments on the proposed rule that would necessitate modification.

As discussed in the BACKGROUND section of this notice, Pennsylvania has considered enhancements to its High Quality Waters program through a regulatory negotiation process. As a result of this process, the Department indicated in the Pennsylvania Bulletin, May 4, 1996, that it may consider revising the High Quality Water definition to delete the requirements for additional "environmental or other features." If

Pennsylvania were to finalize this proposal and EPA approved it, EPA would expect to withdraw the portion of the Federal promulgation relating to Tier 2.

3. Ensuring That Pennsylvania's Highest Quality Waters May Be Provided a Level of Protection Fully Equivalent to Tier 3 of the Federal Policy

Pennsylvania considers its Exceptional Value Waters designation as part of the Special Protection Waters Program to be equivalent to Tier 3. The Exceptional Value Policy is set forth in 25 PA Code Secs. 93.3, 93.7, 93.9 & 95.1, and the Department's Special Protection Handbook, which contains implementation procedures for Exceptional Value protection. The Code and the Handbook must be read together to understand the effect of the Exceptional Value policy.

As described in the Handbook, Pennsylvania requires Exceptional Value Waters to be protected at their existing quality to the extent that no adverse measurable change in existing water quality would occur as a result of a point source permit. A change is considered measurable "if the long-term average in-stream concentration of the parameter of concern can be expected, after complete mix of stream and wastewater, to differ from the mean value established from historical data describing background conditions in the receiving stream" or at selected Pennsylvania reference sites.

EPA disapproved the Commonwealth's Exceptional Value designation because it is not convinced that this level of protection is sufficient to assure that water quality shall be maintained and protected as required by the Federal Tier 3 requirement at 40 CFR 131.12(a)(3). EPA believes that, in practice, Pennsylvania's policy of "no adverse measurable change" could allow potentially significant discharges and loading increases from point and nonpoint sources. See the August 29, 1996, Federal Register proposal of this rule (61 FR 45382).

EPA proposed promulgating language derived from 40 CFR 131.12(a)(3) (see 61 FR 45379). The language states that where waters are identified by the Commonwealth as ONRWs, their water quality shall be maintained and protected. It is EPA's recommendation that, while not required by EPA's regulation, "no new or increased discharges" to Tier 3 waters is the best and most reliable method to assure that water quality is fully maintained and protected in ONRWs. In the preamble to the proposed rule, and consistent with the recommended interpretation in its National guidance, EPA Water Quality Standards Handbook at 4-8 (2nd ed. 1994), EPA interpreted the proposed language at 40 CFR 131.32(a)(3) to prohibit, in waters identified by the Commonwealth as ONRWs, new or increased discharges, aside from limited activities which have only temporary or short-term effects on water quality.

Despite EPA's position that Pennsylvania's Exceptional Value designation is not as protective as EPA's Tier 3 regulation, EPA recognized that the Commonwealth's success in having so many waters designated Exceptional Value might not have occurred if new or increased discharges were strictly prohibited. In light of this situation, rather than modify the Exceptional Value policy, EPA proposed in the August 29, 1996 Federal Register notice to promulgate language to provide Pennsylvania the opportunity to designate appropriate Pennsylvania waters as ONRWs, to which no new or increased discharges would be allowed. The intent of this ONRW proposal was not to replace or supplant the Exceptional Value category and designations already in place in Pennsylvania, but rather to supplement them. It would give the citizens of the Commonwealth the opportunity to request the highest level of protection be afforded to particular waters where appropriate. Under the proposal, EPA will not designate waters as ONRWs; that will be the Commonwealth's prerogative.

Discussion of Major Comment relating to Tier 3

Comment: While some comments supported the creation of a new tier of protection, a number of comments requested that Pennsylvania's EV category be upgraded to be equivalent to Federal Tier 3 protection.

Response: EPA proposed a new tier, rather than a modification of Pennsylvania's Exceptional Value category because this seemed least disruptive to the state and most protective of the environment. The Exceptional Value category, which is not quite as protective as Tier 3, but still better than Tier 2, covers more waters than are likely to be designated ONRWS. Had EPA proposed to modify the Exceptional Value category, the State might have felt the need to reconsider the inclusion of some of the currently designated Exceptional Value waters.

Comment: Several commenters asserted that Section 131.12(a)(3) does not require a prohibition against new or increased discharges.

Response: The literal Federal regulatory requirement is that the water quality of designated ONRWS "be maintained and protected." For the reasons explained in the preamble to the proposed rule (see 61 FR 45382), EPA believes that prohibition of new or increased discharges is a reasonable interpretation of its regulatory language and is the most dependable way of ensuring that ONRWS will be maintained and protected. There is no Federal requirement for states to adopt such a prohibition as a water quality standard regulation. EPA notes that there may be other formulations that States may adopt to meet the requirements of 40 CFR 131.12(a)(3) and provide a level of protection substantially equivalent for maintaining and protecting water quality in ONRWS. However, with respect to Pennsylvania, the Commonwealth's level of protection falls short of "maintaining and protecting" water quality in ONRWS and hence fails to meet Federal requirements. Because EPA is promulgating a Federal regulation for Pennsylvania, EPA wishes to make it clear how it will interpret today's regulation.

Comment: One commenter stated that EPA improperly considered Pennsylvania's implementation of its antidegradation procedures, as the Commonwealth is not required by the CWA to submit water quality standards implementation procedures to EPA for review and approval.

Response: This is incorrect. In reviewing those elements of water quality standards that have been submitted as required in 40 CFR 131.6, EPA may use any information available in determining what the State actually means by its water quality standards language. EPA's water quality standards regulation also requires in 40 CFR 131.12(a) that "the State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart." In this case, EPA disapproved Pennsylvania's antidegradation policy based on the Commonwealth's interpretation of its policy as reflected in the Special Protection Waters Handbook.

See the Response to Comments document, which is part of the Administrative Record to this rule, for additional comments and responses concerning Tier 3.

Today's final rule is identical to the rule as proposed on August 29, 1996. Federal promulgation is still necessary since the Commonwealth has not yet satisfied EPA's disapproval of its Exceptional Value designation. EPA received no comments that necessitated changes to the proposal and believes that promulgation of the language as proposed is the most effective way to provide to Pennsylvania the level of protection equivalent to the Federal Tier 3.

Pennsylvania's reg-neg group discussed this issue but did not reach an agreement to recommend that Pennsylvania create a new Tier 3 ONRW category of protection. If Pennsylvania adopts either EPA's recommended interpretation or an appropriate alternative formulation for maintaining and protecting water quality in ONRWS, and it is approved

by EPA as meeting the requirements of 40 CFR 131.12(a)(3), EPA would expect to propose to withdraw the portion of its rule relating to Tier 3.

D. Relationship of This Rulemaking to the Great Lakes Water Quality Guidance

On March 23, 1995, pursuant to section 118(c)(2) of the CWA, EPA published Final Water Quality Guidance for the Great Lakes System (60 FR 15366), which applies to the Great Lakes System, including a small portion of Pennsylvania waters. The Guidance includes water quality criteria, implementation procedures and antidegradation policies which are intended to provide the basis for consistent, enforceable protection for the Great Lakes System. In particular, the antidegradation requirements are more specific than those set out in 40 CFR 131.12. Pennsylvania and the other Great Lakes States and Tribes must adopt provisions into their water quality programs which are consistent with the Guidance, or EPA will promulgate the provisions for them.

This rulemaking, which is being undertaken pursuant to section 303 of the Act, is independent of, and does not supersede, the Guidance. Regardless of this rulemaking, Pennsylvania must still adopt an antidegradation policy for its waters in the Great Lakes Basin consistent with the Guidance, or EPA will promulgate such provisions for them. At that time, EPA will withdraw any portion of this rule which is inconsistent with such Great Lakes provisions and which applies to Pennsylvania waters within the Great Lakes basin.

E. Endangered Species Act

Pursuant to section 7 of the Endangered Species Act (16 U.S.C. Sec. 1536 et seq.), Federal agencies must assure that their actions are unlikely to jeopardize the continued existence of listed threatened or endangered species or adversely affect designated critical habitat of such species.

EPA initiated section 7 informal consultation under the Endangered Species Act with the U. S. Fish and Wildlife Service (FWS) regarding this rulemaking, and requested concurrence from the FWS that this action is unlikely to adversely affect threatened or endangered species. The FWS originally responded in a letter dated July 31, 1996, that they could not concur with a finding of no adverse affect to threatened or endangered species, but proposed five options that would facilitate a "not likely to adversely affect" determination. In EPA's August 29, 1996 proposal of this rule (61 FR 45379), EPA sought comment on these five options, which were available in the administrative record.

Since that proposal, EPA and FWS have continued to consult informally, and have reached agreement on an alternative approach. Under that approach, EPA will make every effort to ensure that, prior to the final Commonwealth rulemaking pertaining to antidegradation (but no later than June 30, 1997), the State will draft an antidegradation policy which accords full antidegradation protection, including Tier 1 requirements, for threatened and endangered species and that, by December 31, 1997, the State will identify implementation methods for this policy. The policy and implementation methods must fully protect threatened and endangered

[[Page 64820]]

species as existing uses of the waterbody. EPA will request that Pennsylvania submit both the policy and implementation methods to EPA

and the FWS by the dates listed above to allow for review and early coordination prior to the final State rulemaking. EPA will encourage the State to develop the draft regulatory language and implementation methods in close coordination with the Service and EPA. In any case, EPA will consult with FWS on any revisions to Pennsylvania's water quality standards which are submitted to EPA for review and approval and welcomes the State as a partner in this process.

Also, as part of EPA's role in overseeing Pennsylvania's implementation of the National Pollutant Discharge Elimination System (NPDES) program, where EPA finds (based on analysis conducted by EPA or FWS) that issuance of a PADEP NPDES permit, as drafted, is likely to have an adverse effect on Federally-listed species or critical habitat, EPA will require changes to a State-issued draft permit under Section 402(d)(4) of the CWA, or take other appropriate actions.

By letter to the FWS dated November 7, 1996, EPA offered to implement this alternative approach, explained our concerns with the other options, and again sought FWS's concurrence. Based upon EPA's commitment to fully implement the approach outlined above, the FWS provided concurrence with EPA's finding of no adverse affect to threatened or endangered species by letter dated November 7, 1996. Discussion of Major Comments Concerning the Endangered Species Act

Comment: EPA received comment that EPA lacks authority or obligation to consult with the FWS on the proposed antidegradation rule, since EPA has taken no action that would jeopardize listed species, as the rule would have a beneficial effect on listed species.

Response: EPA agrees that issuance of the antidegradation rule will improve water quality in Pennsylvania. Nonetheless, EPA had an obligation to consult FWS under the controlling regulations.

The commenters' view that issuance of the rule is not an "action" under the ESA ignores FWS's definition of agency action. That definition expressly includes "actions intended to conserve listed species or their habitat * * * the promulgation of regulations * * * or actions directly or indirectly causing modifications to the * * * water." 50 CFR Sec. 402.02. Issuance of the rule is agency "action" under this broad definition.

In addition, under the FWS' regulations, the fact that the effect of an action may be beneficial does not exempt EPA from the obligation to consult. EPA agrees that the antidegradation rule will have a positive effect, but that effect triggers consultation under FWS's regulatory interpretation of section 7(a)(2), 16 U.S.C. Sec. 1536(a)(2)--i.e., whether an agency's action "may affect" listed species. See 50 CFR Sec. 402.14(a). FWS interprets this standard to require consultation even when an action will have "beneficial" effects. 51 Fed. Reg. 19,949. Thus, although the rule will improve water quality in Pennsylvania, this beneficial effect is sufficient, under FWS's regulations, to trigger the consultation obligation. See also *TVA v. Hill*, 437 U.S. 153, 178 (1978) ("the heart of" the ESA is the "institutionalization of * * * caution").

Comment: EPA received several comments that EPA should not adopt any of the five options proposed by the FWS for resolving Sec. 7 consultation.

Response: To the extent that this objection is based on a general belief that the FWS lacked authority to require anything in connection with this rule, see the response to the previous comment. With respect to the specifics of the five options, EPA agrees that the particular options, as formulated by the FWS in its letter of July 31, 1996, were inappropriate and has not adopted them. As indicated above, as a result of further discussions with the FWS, EPA offered an alternative approach consisting of a modification of two of the options, and on that basis the FWS concurred that the rule is not likely to adversely affect listed species. See the Response to Comments document for this

rule for further discussion of comments received under the
Species Act.

F. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs of the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because the annualized cost of this final rule would be significantly less than \$100 million and the rule would meet none of the other criteria specified in the Executive Order, it has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866, and is therefore not subject to OMB review.

Comment: Comment was received that, in light of the options raised by the FWS in the context of the rulemaking, EPA was incorrect in its finding that the proposed rule is not a significant regulatory action under Executive Order 12866, particularly the FWS option that would extend Tier 3 protection to streams that contain listed species, and another that would federalize NPDES permits on waterbodies that contain federally listed species, and grant the FWS a role in each permit action on those waters.

Response: In making its determination under Executive Order 12866 that the proposed rule was not a significant regulatory action, EPA evaluated the rule as proposed. EPA did not adopt any of the Service's options, and therefore stands by its original assessment.

G. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a "major rule" as defined by section 804(2) of the APA as amended.

H. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) provides that, whenever an agency promulgates a final rule under 5 U.S.C. 553, after being required to publish a general notice of proposed rulemaking, an agency must prepare a final regulatory flexibility analysis unless the

head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604 & 605. The Administrator is today certifying, pursuant to section 605(b) of the RFA, that this rule will not have a significant impact on a substantial number of small entities. Therefore, the Agency did not prepare a regulatory flexibility analysis.

Under the Clean Water Act water quality standards program, States must adopt water quality standards for their waters that must be submitted to EPA for approval. If the Agency disapproves a state standard, EPA must promulgate standards consistent with the statutory requirements. These State standards (or EPA-promulgated standards) are implemented through the NPDES program that limits discharges to navigable waters except in compliance with an EPA permit or permit issued under an approved state program. The CWA requires that all NPDES permits must include any limits on discharges that are necessary to meet State water quality standards.

Thus, under the CWA, EPA's promulgation of water quality standards where state standards are inconsistent with statutory requirements establishes standards that the state implements through the NPDES permit process. The state has discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. While the state's implementation of federally-promulgated water quality standards may result in new or revised discharge limits being placed on small entities, the standards themselves do not apply to any discharger, including small entities.

Today's rule imposes obligations on the Commonwealth of Pennsylvania but, as explained above, does not itself establish any requirements that are applicable to small entities. As a result of EPA's action here, the Commonwealth of Pennsylvania will need to ensure that permits it issues comply with the antidegradation provisions in today's rule. In so doing, the Commonwealth will have a number of discretionary choices associated with permit writing. In addition, the Commonwealth has the threshold choice whether to designate particular waters as Outstanding National Resource Waters. While Pennsylvania's implementation of today's rule may ultimately result in some new or revised permit conditions for some dischargers, including small entities, EPA's action today does not impose any of these as yet unknown requirements on small entities.

The RFA requires analysis of the impacts of a rule on the small entities subject to the rules' requirements. See *United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Today's rule establishes no requirements applicable to small entities, and so is not susceptible to regulatory flexibility analysis as prescribed by the RFA. ("[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule." *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by United Distribution court).) The Agency is thus certifying that today's rule will not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

Although the statute does not require EPA to prepare an RFA when it promulgates water quality standards for Pennsylvania, EPA has undertaken a limited assessment, to the extent it could, of possible outcomes and the economic effect of these on small entities. Given the fact that any economic impact on small entities is dependent on a number of currently unknown factors, EPA's quantitative consideration

that evaluation is available in the administrative record for today's action.

Comment: One commenter stated that EPA's proposed regulation fails to comply with the RFA because it reaches the conclusion that this rule would not have a significant economic impact on a substantial number of small entities without providing a factual basis for this certification, and it is incorrect in its assumption that this rule would not impact small business in Pennsylvania.

Response: The commenter is incorrect in asserting that EPA has no basis for its Section 605(b) certification. Further, as explained above, though not required by the RFA, EPA prepared with contractor assistance an assessment which identified and evaluated, as best it could given the unknown, the potential costs to small entities that might follow state implementation of today's standards. The assessment is based on data developed by the contractor from a variety of sources including data from the U.S. Department of Commerce, EPA reports, and telephone surveys of industrial and municipal dischargers and each Commonwealth regional office. EPA referenced this assessment in the proposal (61 FR 45379, 45384), made it available in the administrative record, and specifically invited comment on it. No comments were received pointing out errors in this assessment, or the data on which it was based. With regard to the impact to small businesses, EPA stands by its assessment.

I. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

As noted above, this rule is limited to antidegradation designations within the Commonwealth of Pennsylvania. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. EPA has also determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

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Thus, today's rule is not subject to the requirements of section 202, 203, or 205 of the UMRA.

Comment: One commenter stated that EPA failed to comply with UMRA in that it did not provide the basis for conclusions that this rule will not significantly or uniquely affect small governments, that this rule will not result in expenditure of \$100 million or more for State, local and tribal governments, in the aggregate, or the private sector in any one year, or develop a small government agency plan.

Response: EPA disagrees. EPA has assessed the effects of this regulatory action on State and local governments and the private sector, and based its conclusions on the report entitled Economic Analysis of the Potential Impact of the Proposed Antidegradation Requirements for Pennsylvania.

J. Paperwork Reduction Act

This action requires no information collection activities subject to the Paperwork Reduction Act, and therefore no Information Collection Request (ICR) will be submitted to the Office of Management and Budget (OMB) for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 40 CFR Part 131

Environmental protection, Water pollution control, Water quality standards.

Dated: November 27, 1996.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, part 131 of title 40 of the Code of Federal Regulations is amended as follows:

PART 131--WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

Subpart D--[Amended]

2. Section 131.32 is added to read as follows:

Sec. 131.32 Pennsylvania.

(a) Antidegradation policy. This antidegradation policy shall be applicable to all waters of the United States within the Commonwealth of Pennsylvania, including wetlands.

(1) Existing in-stream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Commonwealth finds, after full satisfaction of the inter-

governmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Commonwealth shall assure water quality adequate to protect existing uses fully. Further, the Commonwealth shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources.

(3) Where high quality waters are identified as constituting an outstanding National resource, such as waters of National and State parks and wildlife refuges and water of exceptional recreational and ecological significance, that water quality shall be maintained and protected.

(b) (Reserved)

[FR Doc. 96-31007 Filed 12-6-96; 8:45 am]
BILLING CODE 6560-50-P

EPA's Comments on Pennsylvania's Proposed Rulemaking to amend the Commonwealth's Antidegradation Requirements (Pennsylvania Bulletin, March 22, 1997)

§§92.81 and 92.83 -- General NPDES permits/Inclusion of individual dischargers in general NPDES permits

The Commonwealth's current regulation currently prohibits the use of general NPDES permits in "special protection" waters. We are pleased to note that this proposed rulemaking would retain this restriction in Exceptional Value (EV) waters. The proposal, does, however, allow the use of general permits in High Quality (HQ) waters. We understand from the *Summary of Regulatory Revisions* and from our discussions with PADEP that the use of general permits would be limited, but the regulation does not specify the criteria or special conditions that would apply to use of general permits in HQ waters. This would appear to exempt those dischargers from antidegradation requirements for HQ waters, without providing the necessary justification that the discharges allowed by general permits truly do have a *de minimis* impact on water quality. This is especially important given the potential impact on small HQ headwaters. In order to approve this section, EPA will require a demonstration that *de minimis* dischargers will not have an impact on HQ waters, either through criteria which must be met before a discharger can be eligible for a general permit in an HQ watershed or through special conditions placed in the general permits which would apply in HQ waters.

EPA has determined that this regulatory action will require an amendment to current general permits issued by the Commonwealth. As a modification of the Commonwealth's NPDES regulation, it will require EPA action under 40 CFR §123.62(b)(4), and will be effective upon the approval of EPA and not immediately upon adoption, as would be the case for a water quality standards regulation..

§93.1 -- Definitions

EPA wishes to correct any misconception that the Outstanding National Resource Water (ONRW) category within *Exceptional Value Waters* could be interpreted to apply only to surface waters located on publicly-owned lands. ONRW status can be granted to any waterbody, including wetlands, of significant ecological or recreational significance. We have been assured by PADEP representatives that this limitation was not intended, but request confirmation on the interpretation of this definition in the response to our comments.

In the current regulation, HQ and EV waters are defined as "(a) stream or watershed..." In the proposed regulation, the definition of *Surface waters* does not include the term "watershed". EPA requests clarification on the scope of this definition without the inclusion of "watershed" and how it relates to the term "waters of the Commonwealth" found in §93.2. The Federal antidegradation policy, likewise refers to "waters", although actions considered to potentially lower water quality include those in the watershed as a whole and not merely in the "water."

93.3 -- Protected water uses

The Federal regulation does not require that States use a designational approach to antidegradation and, in fact, EPA has expressed a parameter-by-parameter approach in which all changes to lower quality receive antidegradation protection. Pennsylvania's program of designating Special Protection waters has been successful, although limited by resources available to evaluate petitions and also somewhat encumbered by the regulatory process. Removal of Special Protection categories as designated uses was contemplated during the reg-neg process as a means to shorten the time required to insure protection by eliminating aspects of the approval process involving the Environmental Quality Board and also to allow PADEP to quickly require antidegradation protection based on its technical evaluation whenever new discharges were proposed for previously unassessed waters. The current proposal appears to have only the practical effect of removing EPA from the review and approval process.

For waters that are already listed as HQ or EV, if it is the Commonwealth's intent to remove the HQ or EV designation for any of these waters, the Commonwealth would have to provide justification, reviewable by EPA and the public, in accordance with §131.10(j)(2). The justification is necessary since these management categories include special criteria and removing the special protection would allow for less stringent criteria. For waters that will be listed in the future under the management categories scenario, EPA would not have authority to review and approve, although antidegradation would still be a "water quality standard" and subject to treatment as such for the purposes of Section 401 certification and other situations when "compliance with water quality standards" is required.

Given that the antidegradation management categories appear to apply only to waters which have been assessed in accordance, we request that PADEP explain how adequate antidegradation protection will be insured when new or expanded discharges are contemplated to unassessed waters.

§§93.4a, 93.4b and 93.4c -- ANTIDEGRADATION REQUIREMENTS

EPA commends Pennsylvania for its efforts to adopt comprehensive language into regulation to address important aspects of the implementation methods which must be identified to support the policy. However, the large response from the public expressing a preference for the "simpler, clearer" Federal language indicates that revisions are necessary to insure that this important public policy is clear to its intended readers. EPA strongly recommends that the Commonwealth clearly state its baseline antidegradation policy, perhaps as a separate policy statement inserted between "Definitions" and "Antidegradation Requirements" or by clarifying the policy vs. implementation bases within each category.

§93.4a -- Existing uses

EPA believes that the regulation should be revised to remove any misconception that existing use protection is only provided when the Department has conducted a technical evaluation. We recognize, however, that the technical evaluation is an important part of the process to identify and protect existing uses. This could be accomplished by the modifying the provision to read: "Existing uses shall be maintained and protected. The Department shall ..." EPA applauds the Commonwealth's recent commitment to assess all unassessed waters and encourages PADEP to highlight these plans when it responds to public comments.

§§93.4b(a) and 93.4c(a) Qualifying as High Quality Waters and Exceptional Value Waters

The proposed regulation requires that certain chemistry and biology tests must be met before a surface water can qualify for HQ or EV protection. EPA strongly supports PADEP's efforts to use biological data as an indicator of long-term water quality. We have been advised by PADEP representatives that the chemistry test is considered only as a screening tool, and that the weight of evidence is in the biology test. EPA requests confirmation that this is the case. EPA believes that the chemistry test alone, as described, is not statistically adequate to disqualify a water from special protection. We also note that the chemistry test requires that certain parameters be screened whose criteria level supports the public water supply use only (i.e., nitrite/nitrate-nitrogen, sulfate, manganese). Compliance with these criteria should not be expected to limit high quality protection of streams for the purposes of aquatic life use.

Regarding the biology test, EPA applauds PADEP's commitment to use scientifically defensible methods to evaluate biological integrity. This is a developing field and EPA cannot at this time confirm or deny the validity of the integrated benthic macroinvertebrate threshold scores set in the policy proposed on March 22, 1997, for Chapter 15 of Title 25 of the Pennsylvania Code as measures of HQ or EV equivalent. EPA's rapid bioassessment protocol was not developed specifically as an antidegradation tool and EPA does not have data available to support that "nonimpaired" is the direct equivalent of "high quality." We are, however, seeking advice from national experts and will provide comments in a separate letter to Mr. Edward R. Brezina, Chief of the Water Quality Assessment and Standards Division at PADEP. We also request that PADEP provide a rationale which supports these scores as indicators of waters which meet the intent of the Federal definition of high quality waters in Pennsylvania.

These qualification factors also allows that PADEP may consider additional chemical or biological information which characterizes or indicates the quality of a water in making its determination if a surface water is eligible for special protection. EPA requests clarification on how this additional information could support or override eligibility of a water for special protection.

§93.4b(b) -- Level of protection/social or economic justification (SEJ)

This section appears to have a typographical error separating two sentences where it appears there should only be one (...as described in §93.4e(d)...*that* the proposed discharge...). Also in this section, a proposed discharge into an HQ water is required to show that it is necessary to accommodate important economic or social development in the area in which the surface water is located and will result in economic or social benefits to the public which outweigh any water quality degradation which the proposed discharge is expected to cause [emphasis added]. However, in §93.4b(e)(1) through (5), it appears that the discharger is only expected to provide data regarding social and economic benefit. EPA recommends that §93.4b(e) include the specific requirement that the proposed discharger be required to provide data which demonstrates that the economic/social benefits may be adequately weighed against anticipated water quality degradation.

§93.4b(c) -- Compliance with water quality standards

This proposed regulation indicates that a proposed discharge to HQ waters, alone or in combination with other existing and anticipated discharges, may not violate water quality standards which are applicable to the receiving waters. This is the case for all discharges, whether or not they are to HQ waters.

§93.4b(f)(1) -- Assimilative Capacity Equation

EPA would like clarification as to the use of the term “natural quality” as it is used in this equation as it relates to the definition found in §93.1. In other words, is the level of a parameter set at the existing quality in the receiving stream, or at the condition that exists or that would reasonably be expected to exist in the absence of human-related activity? Also, when natural quality is greater than criteria, it appears that no assimilative capacity should exist. Is EPA interpreting the equation correctly? Please also clarify whether the assimilative capacity equation sets a cap at 25 percent for all existing and future dischargers.

§93.4c(b) -- Level of protection for Exceptional Value Waters

EPA notes that this section indicates that EV waters will be maintained and protected. Please clarify whether the interpretation of “maintain and protect” is based on the current edition of the Special Protection Waters Handbook.

§94.4d -- General requirements for High Quality and Exceptional Value Waters

The proposed regulation indicates that prior to designation a surface water is protected as HQ or EV following a positive evaluation of the technical data by the Department. EPA would like a clarification of what interim protection applies for waters that have not yet been assessed. EPA

recommends the presumption that waters are HQ when a new discharge is proposed unless proven otherwise by the applicant.

§93.4e(d)(3) -- Public participation requirements for proposed discharges to High Quality or Exceptional Value Waters

EPA recommends that this section include a requirement that the public notice of complete application and fact sheet for dischargers to HQ waters include the basis and results of the SEJ review, including the analysis of benefits, impacts and the criteria used to insure that the public has adequate information to comment on whether lowering of water quality should be allowed. The process should also provide for intergovernmental coordination consistent with the Federal regulation.

TO WHOM IT MAY CONCERN:

PLEASE REJECT THE D.E.P.'S CURRENT ANTI-DEGRADATION PROPOSAL. MY UNDERSTANDING OF THIS INDICATES THAT THE OPPORTUNITY FOR FURTHER DESTRUCTION OR REDUCTION OF OUR WATER QUALITY IS BEING INCREASED, NOT DECREASED.

PLEASE ADOPT THE CURRENT EPA STANDARDS AND TAKE AN ETHICAL STAND FOR PENNSYLVANIA

SINCERELY,

ERIK N. SHUMAN
109 MANOR RD.
PAOLI PA. 19301

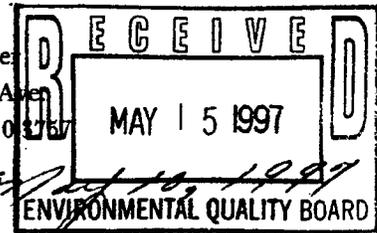
THE FAVOR OF A REPLY IS REQUESTED.

Erik N. Shuman

MAILED
MAY 12 1977
U.S. MAIL

RECEIVED
APR 27 1977
ENVIRONMENTAL

James A. Weaver
324 East Meyers Ave.
Pittsburgh, PA 15210



Environmental Protection Agency,
P.O. Box # 5465
Harrisburg, Pa. 1705

Dear Members,

at this time I am asking you
not to vote for the Clean
State Act bill when it comes
time for you to do so this
year. The Clean State Act bill
has even a worse bill than the
one before it that was passed
and is presently being used all
time in that it allows all
of these big industrial companies
to dump their waste into
our (3) three rivers here in
Pa. along with any one
else that use our (3) three
rivers here in Pa. to
dump waste into our rivers.
The residents of the City of
Pittsburgh, Pennsylvania deserve
(over)

to have clean water for drinking
and bathing and whatever else
we use water for just as
much as any one else who
lives in the state of Pennsylvania
including yourselves. If people
like yourself and all the others in
the different parts of the state
of Pennsylvania want to drink
and bath and do what ever else
it is your use water for if
you want to do all of that
polluted water then be our guests.
Because we the residents of Pa.
Pa. does not because we in them
are fed up with it. If all the
members of your department can't
see fit to turn this bill down
when it comes up for passage
some time this year then
it is time all of you resigned
your jobs and that your
have away with entirely. We
had enough that we have to get
up with all the pollution given
to us by "mother nature" which we
can't do anything about without
all the other people making it
even though it really is a
James A. ~~James~~
P.S. Kindly answer this letter.

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

**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 ads 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*.

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.

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 rom 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.



**THE IACOBUCCI
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45 Years Of Building Experience

May 13, 1997

Mr. James Seif
Chairman
Environmental Quality Board
Post Office Box 8477
Harrisburg, Pennsylvania 17105-8477



Dear Secretary Seif:

Thank you for the opportunity to provide comments on the Department of Environmental Protection's (DEP) proposed *Water Quality Antidegradation Regulations*. This is a very important proposal, and my comments are as follows:

This proposal should be subject to the Governor's Executive Order 1996-1, which requires the Department to revise all of its Regulations to bring balance to Pennsylvania's Environmental Regulations. In several instances, Pennsylvania's program exceeds federal standards. The DEP should adopt the federal language that states water quality must "*exceed*" standards, rather than what is contained in the proposal as "*generally better than*" standards. This proposal of "*generally better than*" standards allows for judgment calls by the Department. If data indicates the stream does not meet even one water quality standard, the stream should not qualify for a high quality, or exceptional, value designation.

Pennsylvania's exceptional value program should apply only to outstanding resource waters as contained in the federal regulation. Currently, DEP's program is much broader in scope, and includes streams that would never qualify under the Federal Program.

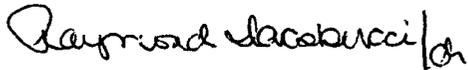
The DEP must expand its public participation in regard to its assessment of high quality and exceptional value waters. Notice by first class mail must be sent to any applicant with a pending permit, any existing discharge permittees, the appropriate municipalities, planning commissions and all applicants that have received planning or subdivision and land development approval within the last five years.

Mr. James Seif
Environmental Quality Board
May 13, 1997
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We support the Department's efforts to reduce the permitting burden for applicants included in this proposal. The provisions regarding dischargers with minimal impact are welcomed. We also endorse the use of general permits on high quality streams, and support the expansion of this practice to exceptional value streams.

Thank you for considering these comments.

Sincerely,

A handwritten signature in cursive script that reads "Raymond Iacobucci". The signature is written in dark ink and is positioned above the printed name and title.

Raymond Iacobucci
President

RI/dah/020