



**INDEPENDENT REGULATORY REVIEW COMMISSION  
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June 20, 1997

Honorable James M. Seif, Chairman  
Environmental Quality Board  
400 Market Street, 16th Floor  
Harrisburg, PA 17101

Re: IRRC Regulation #7-310 (#1799)  
Water Quality Amendments - Antidegradation

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-310. These comments outline areas of concern raised by individual Commissioners and the Commission's staff. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Chuck Tyrrell at 772-3455 or John H. Jewett at 783-5475. They have been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce  
Executive Director

REN:wbg

cc: Barbara Sexton  
Sharon Freeman  
Office of General Counsel  
Office of Attorney General  
Pete Tartline

**COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION**

**ON**

**ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-310**

**WATER QUALITY AMENDMENTS - ANTIDegradation**

**June 20, 1997**

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5(d) and 5(e) of the Regulatory Review Act (71 P.S. §§ 745.5(d) and (e)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to economic and fiscal impact, the effect on natural resources, and the clarity and reasonableness of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

**1. Economic impact and clarity of the Exceptional Value designation.**

We are concerned with the definition and criteria for the Exceptional Value classification because it is more expansive than the federal counterpart, it may have an adverse economic impact, it contains undefined criteria, and may not resolve the United States Environmental Protection Agency's (EPA) concerns which prompted its June 6, 1994 disapproval of Pennsylvania's water quality program.

*(i) Creation of a new designation classification.*

The EQB indicates, in the regulatory analysis form, that the definition of EV waters is more expansive in scope than the federal definition of Tier III waters. However, the EQB does not explain the compelling Pennsylvania interest that demands the more expansive definition. Concurrent with the more expansive EV definition, the EQB states that neither the definition of EV waters nor any other part of the proposal resolves the EPA disapproval issue whereby the EPA policy interprets that protection of outstanding national resource waters (ONRW) must be accomplished by prohibiting all but certain temporary discharges to these waters.

We believe the concerns expressed about exceeding federal standards and the EPA's concerns can be resolved by creating a new classification. The EQB should consider adopting the structure established in the EPA's regulations, that is also similar to the recommendation included in the August 19, 1996 regulated community stakeholders report to the Department of Environmental Protection (DEP). Specifically, the EQB should establish ONRW designation which include waters meeting the water quality analysis requirements contained in Section 93.4(c) and are also located in national, state or county parks, wildlife refuges or state game lands. At the same time, the EQB should establish a Tier 2 1/2 classification which would be similar to the

current EV classification. The creation of this new classification system will achieve the following:

1. The establishment of the ONRW classification directly addresses EPA's disapproval based on its requirement that there be no long term discharges in Tier III waters.
2. The establishment of a Tier 2 1/2 classification allow the continuation of the current EV program and gives the DEP and the EQB the flexibility to allow certain discharges into these waters that could address the concerns expressed by the regulated industry.

We also believe the EQB should evaluate the concerns expressed by the regulated industry about the costs and barriers of an EV designation and develop new standards or guidance. For example, consideration should be given to allowing certain general NPDES permits or other discharges that do not impact the existing use of the stream and will not adversely impact the ecology of the stream.

If the EQB does not adopt this new classification system, it must explain the financial, economic and social impact of the EV definition on individuals, business and labor as required in the Regulatory Review Act. Also, the EQB must explain how the more expansive definition of EV waters is consistent with Executive Order No. 1, which provides that if federal regulations exist, regulations of the Commonwealth may not exceed federal standards unless justified by a compelling and articulable Pennsylvania interest. Finally, the EQB must explain how it will address EPA's disapproval issue concerning long term discharges into EV streams, especially since the EPA disapproval was the major reason for the rulemaking.

Additionally, if the EQB fails to adopt the new classification system we believe it should add two specific decision criteria for EV designations to ensure reasonable and fair implementation. First, we believe consideration must be given to the level of public access to the streams being assessed and the presence of public lands in the watersheds of these streams. We question the reasonableness and fairness of a EV designation where the public cannot access the stream because it is on private property. Furthermore, we also question the fairness of a EV designation when a private property owner along the stream objects to the EV designation.

The second additional criteria is that the EV designation should be consistent with the local zoning where the stream is designated. We do not believe it is reasonable to adopt an EV stream designation which conflicts with local zoning that have been properly considered by local government and its citizens. It has been our experience that some individuals have used the special protection designation process because they opposed a newly adopted zoning classification.

*(ii) Lack of clarity of EV definition.*

Regardless if the EQB retains the current classification or adopts our recommendations for new classifications, we believe it must clarify the EV definition. The EV definition provides the following examples of waters that may achieve this classification:

1. Waters located in National, State or county parks or forests.
2. Waters in wildlife refuges or state game lands.
3. Waters which have been designated by the Fish and Boat Commission as "Wilderness Trout Streams."
4. Other waters of exceptional recreational or ecological significance.

These examples should not appear in the definition and they are inconsistent with the conditions specified in Section 93.4(c). If there are specific requirements a stream must meet, beyond the chemistry test and biology test, they should be specifically included in Section 93.4(c). Additionally, we object to the EQB including subjective criteria such as "waters of exceptional recreational or ecological significance." It has been the Commission's experience that this criteria has never been clearly defined or consistently applied. Therefore, we recommend the EQB define EV waters in Section 93.1 as follows:

*Exceptional Value Waters* -- Surface waters of high quality which meet the conditions specified in § 93.4c (relating to Exceptional Value Waters).

All requirements and standards for obtaining EV classification should be clearly specified in Section 93.4(c).

*(iii) Reasonableness of downstream designations*

We question the impact on upstream users of a stream when a proposal is made for a higher stream designation downstream. For example, if the beginning portion of a stream is designated as a cold water fishery, and the lower portion of the stream is proposed to be EV, what standards and rules will apply to those along the upper portion. We recommend the EQB explain what rules or standards will apply to those who discharge into a stream where the lower portion of the stream has a higher designation classification.

**2. Clarity and reasonableness of chemistry tests and biology tests.**

We believe that Sections 93.4b and 93.4c lack the necessary clarity for a definitive and fair determination and evaluation of the chemistry test and the biology test.

*(i) Clarity of requirements for obtaining EV or HQ designation.*

As proposed, the regulation requires the surface water to pass both the chemistry test and the biology tests. Many of the conservationists groups oppose requiring a stream to pass both tests and believe meeting the standards for either of the tests to be sufficient. The EPA commented that the DEP explained to it that the chemistry test is considered only a screening tool and that the weight of the evidence is in the biology test. The EPA believes that the chemical test alone is not statistically valid to disqualify a water from special protection. Furthermore, the EPA indicates that it is not necessary for each parameter in the chemistry test to exceed the established water quality criteria to obtain special protection.

In our discussions with the DEP staff, it was also evident that in some instances it may not be necessary for a stream to pass the chemistry test. In some instances the DEP may determine that a stream may not meet the necessary chemistry standards, but because of the results of the biology tests, it will still be designated for special protection. Therefore, we believe the EQB needs to clearly indicate if the chemistry test will be used as supporting justification of the biology test or as a separate condition that must be satisfied for the designation of the stream. If the chemistry test will be used for justification, the EQB needs to amend the regulation to indicate the priority and weight the parameters will be given in making the designation. Furthermore, if the EQB agrees with the EPA's philosophy that it is not necessary for each parameter to exceed the established criteria, this must be clearly spelled out in the regulation.

*(ii) Reasonableness of one grab sample.*

The regulation provides that one or more grab samples will be used as part of the water quality analysis. Several commentators object to the use of only one grab sample because it will not provide a fair representation of the stream's chemistry. These commentators recommend a more statistically valid number of tests to be used for the chemistry test.

In discussions with the DEP, it acknowledged that one grab sample may not always yield a statistically valid indication of the stream's water quality. However, the DEP claims that the biology test will resolve or identify any statistically invalid results in a chemistry test that used only one grab sample.

We are also concerned about the use of only one grab sample for the chemistry test. The regulation provides that a stream needs to pass both the chemistry and biology test in order to obtain special protection. However, the DEP's position that the biology test may be used to either verify or override the one grab sample chemistry test contradicts the intent of passing both tests. As previously recommended, the DEP must clarify the role of the chemistry test in the assessment of streams. If the chemistry test will be used as a condition that must be met for a stream designation, the regulation needs to provide for a more statistically valid number of grab samples.

*(iii) Clarity of "generally better" in evaluation of chemistry test.*

The regulation provides that for the chemistry test, the water quality shall be generally better than the water quality criteria contained in Section 93.7, Table 3. The regulated community objects to the term "generally better" and believes that the water quality must exceed all of the listed parameters.

We also object to the term "generally better" because it lacks the necessary definition to determine how the DEP will make a decision on the findings of the chemistry test. Therefore, we recommend the term "generally better" be deleted. As mentioned above, if the EQB agrees with the EPA that it is not necessary for each testing parameter to exceed the established water quality criteria, the EQB must amend the regulation to clearly indicate the weight and priority that will be placed on the parameters.

*(iv) Need for and methodology for determining what is "natural quality."*

The regulation allows a water surface to pass the chemistry test if the DEP determines the water is of natural quality. The regulation defines natural quality to be the water quality conditions that exist or that would reasonably be expected to exist in the absence of human related activity. First, we question the appropriateness of this provision and believe the EQB must explain how it is relevant to determine if a stream deserves special protection. If a stream does not meet minimum water quality standards, for reasons caused by humans or nature, it would be unreasonable to propose that it be a candidate for HQ or EV designation. Therefore, we recommend that Sections 93.4b(a)(1)(ii) and 93.4c(1)(ii) be deleted.

If the EQB can justify its use, we believe the definition fails to explain in sufficient detail how the DEP will determine what constitutes "natural quality". To do this, the EQB needs to amend the regulation to indicate what process and criteria the DEP will use to determine if the surface water is of natural quality.

*(v) Clarity of and standards for biology test.*

The biology test for high quality waters requires, in part, that "The water quality shall support nonimpaired *high quality* aquatic communities as determined by the Department using peer reviewed biological assessment procedures..." (emphasis added) In comparison, the biology test for EV requires, in part, that "The water quality shall support nonimpaired *outstanding* aquatic communities as determined by the Department using peer reviewed biological assessments procedures..." (emphasis added) The regulation does not clearly define or differentiate between nonimpaired *high quality* aquatic communities and nonimpaired *outstanding* aquatic communities. Because the difference could be the decision factor for determining if a stream should be HQ or EV, the regulation needs to clearly provide the distinction between the two phrases. Therefore, we recommend the EQB amend the regulation to specify the evaluation criteria for the biology test for HQ and EV streams.

*(vi) Additional information requirement.*

Beyond the chemistry test and biology test, the regulation provides that the DEP may consider additional chemical or biological information which characterizes or indicates the quality of a water in making its determination. The regulation provides no direction as to when the DEP would require this additional information or what types of additional information may be required. We are concerned that this open ended, subjective provision could potentially be inconsistently applied. It is important for the regulation to provide clear notice and procedures for all impacted by this provision. Therefore, we recommend the EQB delete Sections 93.4b(3) and 93.4c(3) from the regulation. If the EQB believes that additional biological or chemical information is necessary, it should specifically include the type of additional information that may be required.

### **3. Reasonableness for including binding norms in Chapter 15 Statement of Policy.**

Concurrent with this proposed regulation, the DEP has proposed a statement of policy on the implementation of antidegradation requirements. We believe that several provisions in the

statement of policy are more appropriately included in the rulemaking because they establish binding norms. Since a policy statement may not be used to create binding standards that apply to a general category or persons or situations, the provisions should be moved to the regulation.

Sections 15.1(b) and 15.2(b) of the statement of policy allow the DEP to consider additional parameters for the chemistry test which are not contained in the proposed rulemaking. We believe that these two sections should be included in the rulemaking if the DEP will use them in assessing a stream. In addition, the inclusion of these sections may help resolve our previously mentioned concerns about the lack of clarity for the chemistry test.

Section 15.1(d) of the statement of policy provides that a HQ candidate surface water meets the biology test if its integrated benthic macroinvertebrate score is greater than or equal to 83% of the reference stream or watershed. For an EV stream, Section 15.2(d) of the statement of policy requires a score of 92% or better. Since these tests scores will be definitive decision factors used in assessment of the stream, they should be in the regulation. Including the scores in the regulation will also help address the previous concerns with the lack of clarity for evaluating the biology test.

#### **4. Clarity in granting of NPDES permits in HQ streams.**

The regulation removes the prohibition against granting NPDES permits in HQ streams. In the preamble of the regulation, the EQB indicates that granting these permits will be on a limited basis. However, the regulation does not clearly indicate this intent; it simply allows the issuance of a NPDES permits in a HQ stream. As a result of this unclear language, numerous comments were received expressing concern with granting general NPDES permits in HQ streams, especially without any restrictions.

This new provision merely deletes the current prohibition against granting NPDES permits for HQ streams. All of the general NPDES permits will need to be amended after final adoption of this regulation prior to allowing a discharge into a HQ stream. We believe the EQB and DEP need to explain the process that will be used to amend a general NPDES permit to allow a discharge in a HQ stream. In doing so, the EQB may be able to address the concerns expressed about this new provision.

#### **5. Clarity and reasonableness of social or economic justification provisions.**

Several commentators including both conservationists and representatives of affected businesses and industries noted the lack of clarity and reasonableness of the provisions in Section 93.4b(b) of the proposed regulation. This section establishes the "social or economic justification" (SEJ) process for new or additional discharges in HQ waters. Commentators cited the need for clarity and consistency in application of the SEJ process and in the review of SEJ proposals. We share these concerns.

The first and simplest problem is that Section 93.4b(b) contains a typographical error which inadvertently divides the section into two sentences when it is actually one long sentence. This problem can be easily resolved by deleting the period after the phrase "after public

notification and participation as described in § 93.4e(d) (relating to public participation in High Quality and Exceptional Value Waters)” and changing the “t” in the next word from upper case to lower case.

Besides the typographical error, there are several substantive problems with Section 93.4b(b). As proposed, it would allow a new discharge into HQ waters if the person can demonstrate two things:

- 1) The proposed discharge is necessary to accommodate important economic or social development in the area; and
- 2) The proposed discharge will result in economic or social benefits to the public which *outweigh* any water quality degradation which the proposed discharge is expected to cause.

The first problem is that this section and the regulation provide no guidance concerning the criteria or factors to be used in identifying the social or economic benefits of a proposed discharge or its level of degradation or impact on the stream. There is no description of the type of social or economic developments that the DEP will consider to be “important” or “necessary.” There is no guidance on how to measure the value of any benefits of a proposed discharge, such as new jobs or new services, and how they are to be included in an analysis of the benefits. Similarly, the regulation provides no criteria, process or method for comparing a discharge’s benefits to any degradation that it might cause.

Second, the proposed language goes beyond what is required by federal regulations. The first demonstration, which requires a finding that the discharge is necessary for important economic or social development, is very similar to the language in 40 CFR § 131.12(a)(2). This subsection of the federal regulation for “antidegradation policy” states the following:

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 full satisfaction of the intergovernmental coordination and public participation provisions of the State’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.* (Emphasis added)

However, Section 93.4b(b) of the proposed regulation requires an additional demonstration or finding. It reads as follows:

***Level of protection/social or economic justification (SEJ).*** The quality of High Quality Waters shall be maintained and protected unless a person proposing a new, additional or increased discharge of sewage, industrial waste or other pollutants demonstrates, and the Department finds, after public notification and participation as described in § 93.4e(d) (relating to public participation in high

quality and Exceptional Value Waters). [sic] The proposed discharge is *necessary* to accommodate important economic or social development in the areas 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)

Federal regulations do not require that the economic and social benefits of the discharge *outweigh* any water quality degradation. There is no mention of the need for an analysis that balances benefits against costs. A SEJ project can lower water quality if the state finds that it is “necessary to accommodate important economic or social development” and the state assures that the water quality remains adequate to protect existing uses.

The EQB and DEP need to explain the need for the “balancing test” for projects with benefits that outweigh any water quality degradation, and its relationship to the federal rule concerning projects that are necessary and important. We recommend that the proposed regulation include the criteria for social or economic developments that are “important” and “necessary,” and standards that identify the economic, environmental and social factors to be considered in reviewing SEJ proposals. For example, the Commonwealth’s *Special Protection Waters Implementation Handbook* states the following in its discussion of “Social or Economic Justification Analysis”:

Normally, if the proposed activity/project is intended to mitigate an existing public health or water pollution hazard or serve an identified community need like housing, transportation or public safety, the discharge is considered to be socially justified.

We understand that the final decision by DEP on an SEJ application will involve a “judgment call” by DEP staff, but the public deserves an opportunity to review and understand the criteria, factors or standards upon which the “judgment call” is based. Hence, these items need to be included in this regulation.

#### **6. The reasonableness of the “25% or less of assimilative capacity” rule.**

Several commentators questioned the basis for the use of 25 percent in Section 93.4c(f)(1). It provides an exemption that would allow minimal impact discharges if the pollutant, alone or in combination with other discharges, utilizes 25 percent or less of the surface water’s assimilative capacity. Conservationists object to this “off ramp” provision which allows certain discharges to avoid SEJ review and the HQ public participation process. Conservationists suggested that if there is to be an exemption for minimal impact discharges, it should be staggered in the following manner: “no more than 20% of assimilative capacity for conventional pollutants (i.e. BOD and solids), 10% for toxics and 0% for persistent (bioaccumulative) toxics.” Since not all pollutants are equal, there is merit to a staggered approach. We recommend that the DEP and EQB review their conservationists’ concerns on this issue. If they opt to retain the universal “25-percent” rule, they need to explain and justify its use.

## **7. Reasonableness and fiscal impact of public participation procedures.**

Several commentators suggested that the public participation procedures for HQ and EV waters in Section 93.4e be amended to require that property owners in the watershed be notified when DEP is assessing waters for HQ or EV classification. Upgrading a stream to HQ or EV may have unforeseen impacts on property owners and municipalities in the affected watershed. In addition, watershed residents and municipalities may have experiences or knowledge that would be useful to DEP in its assessment of the stream. This concern touches upon both the regulatory review criteria of "fiscal impact," "reasonableness" and "effect on the Commonwealth's natural resources." Likewise, a new discharge in HQ or EV waters may have an impact on owners of property or municipalities adjacent to or near the stream.

We agree that there is a need for greater public involvement in the redesignation process. However, many stream designations involve miles of stream beds. The costs of contacting every landowner with property on the banks of a stream in these situations could be excessive.

As a result of our review of Sections 93.4e, we see a need for greater parity in the public participation processes for both redesignations and permit applications for new discharges. In addition, we believe that specific portions of the process can be streamlined to be more efficient and reduce costs for the private sector and DEP.

First, we note that the public participation requirements for proposed discharges in Section 93.4e(d) include the opportunity for a public hearing. By contrast, Section 93.4e(e) requires that DEP hold a public hearing on proposed discharges into EV waters. For consistency and parity, we believe that the public participation rules for assessment of waters for HQ or EV designations in Section 93.4e(b) ought to parallel the requirements for proposed discharges into HQ and EV streams.

We recommend that Section 93.4e(b) be amended to require a public comment period after DEP has completed its technical report for the assessment of a stream for reclassification as HQ or EV. DEP would be directed to publish a notice in local newspapers and the *Pennsylvania Bulletin*, and send copies of the notice to all municipalities in the watersheds of the assessed streams. It would announce that DEP had completed its technical report with recommendations for upgrades to EV or HQ. The notice would explain how and where interested parties could obtain copies of the technical reports and recommendations, and invite persons to submit comments. It would also state that DEP would hold a public hearing if requested. We also suggest that the same notice sent to the municipalities be sent to each person with a current permit or pending permit application for a discharge into a stream which was assessed.

We support the requirement that the permit applicant publish notice in a local newspaper of his intent to apply for a discharge permit into HQ or EV waters and provides an address where interested parties can review information about the proposed discharge. However, we believe that the provisions requiring an applicant to invite comments and submit copies of the comments received and a comment and response document to DEP are overly burdensome, unnecessary and redundant. DEP is already required to hold a public comment period for these types of pending permit applications by Section 92.61(d) (relating to public notice of permit application and public

hearing). We fail to see the need for two public comment periods. For the sake of parity and in order to streamline the process, we recommend that the requirements concerning a public comment period in Subsection 93.4e(d)(1) be deleted from the final-form regulation. In addition, we recommend that the reference to a comment and response document in Subsection 93.4e(d)(2) be deleted. Even in the absence of a formal comment period, the applicant may receive written comments in response to the public notice requirements. We do not object to retaining the requirement in Subsection 93.4e(d)(2) that the applicant forward copies of these comments to DEP.

In addition, we recommend that Subsection 93.4e(e) be deleted in its entirety. There is no need to hold a public hearing on a proposed discharge into an EV stream if no one wants to testify. Sections 92.61(d) and (e) require that DEP hold a public hearing on a pending application if it is requested.

These recommendations will bring the public participation process for EV and HQ reclassifications into greater parity with the requirements for proposed discharges in EV or HQ streams. Both will require a public comment period before decisions are finalized by DEP and will provide interested parties with the opportunity for a public hearing if they request it. Simultaneously, they will eliminate needless and costly redundancy in the requirements for proposed discharges.

IRRC Regulation #7-310 (#1799)  
Environmental Quality Board  
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Honorable James M. Seif, Chairman

Maule M Jones  
Date: 6-19-97