



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
333 MARKET STREET
14TH FLOOR
HARRISBURG, PA 17101**

**(717) 783-5417
Fax (717) 783-2664**

October 30, 1997

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

Re: IRRC Regulation #7-324 (#1874)
Stream Redesignations; Hay Creek et al.

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-324. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of the 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 James M. Smith at 783-5439. He has been assigned to review this regulation.

Sincerely,

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

Robert E. Nyce
Executive Director

REN/lzd

Enclosure

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

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-324

STREAM REDESIGNATIONS; HAY CREEK, *et al.*

OCTOBER 30, 1997

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act 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 statutory authority; and the clarity, feasibility, and reasonableness of the requirements. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. EPA's Preemption of a Portion of Pennsylvania's Special Protection Program under Chapter 93 of 25 Pa. Code and EQB's Proposed Rulemaking #7-310 - Clarification of Authority for Designations

In June 1994, the Philadelphia Regional Office of the Environmental Protection Agency (EPA) disapproved portions of the Commonwealth's antidegradation program under Chapter 93 as not being consistent with Section 303(c)(4) of the federal Clean Water Act. The EPA published a final rule, effective January 8, 1997, which officially preempted Pennsylvania's provisions and established federal water quality standards (i.e., antidegradation standards) for Pennsylvania. The EPA disapproved portions of Pennsylvania's Special Protection Waters Program, relating to protection of existing uses, criteria used to define High Quality (HQ) Waters and protection afforded to Exceptional Value (EV) Waters as equivalent to the federal Tier 3 or Outstanding Natural Resource Waters (under 40 CFR §131.12(a)(3)).

This important development is not discussed in this rulemaking package. The regulated public is left in the dark as to whether the proposed stream redesignations are consistent with federal requirements (33 U.S.C. §1313) and whether existing permits and other actions and activities based on water quality standards, developed by whatever agency under federal and/or Pennsylvania law, are jeopardized.

The EQB should fully explain in the final-form regulation which law (i.e., statutory and regulatory) is the basis for this rulemaking and cite the authority for each of the designations of the streams in this rulemaking package.

The Regulatory Review Act also requires us to consider the reasonableness of requirements, implementation procedures and timetables of a rulemaking for the public and private sectors. The EQB has initiated a separate major rulemaking ("Water Quality Amendments

- Antidegradation" (Rulemaking #7-310)) to modify the basic stream redesignation criteria to address the concerns of the EPA. If these proposed stream redesignations are consistent with the current in-force-federal provisions, then it is appropriate for the EQB to proceed to final-form rulemaking. If they are not, we recommend that the EQB defer further action on these redesignations until it has adopted its new antidegradation regulations and the EPA has withdrawn its override regulations. This will allow the EQB to ensure that the proposed redesignations are consistent with the appropriate redesignation criteria.

2. Criteria used to determine designations - Clarity, feasibility, and reasonableness

We have concerns with the method used to support redesignations. First, to determine whether waterbodies are to be subject to the Special Protection Waters Program, and meet the definition of HQ or EV in 25 PA Code Section 93.3, the DEP developed the "Special Protection Waters Selection Criteria" found in its "Special Protection Waters Implementation Handbook" (Handbook). Whereas the DEP relies on the additional information in the Handbook to arrive at stream reclassifications, we note that the Handbook is only a guidance document. The only law is found in the statutes and in the regulations in Chapter 93. The criteria of the Handbook are routinely cited in the information accompanying the rulemaking as justification for upgrades. For example, references are made to EV criterion IV-1 and IV-2, and HQ Criterion 3. However, these references lack clarity because these criteria are not in regulation and the references in the Handbook are not clearly linked to the criteria in the regulation. The proposed redesignations should more appropriately cite statutes and regulations.

Second, portions of Hay Creek proposed to be redesignated to EV were evaluated based upon reference stations on French Creek. However, the reference stations on French Creek are not currently designated EV; the French Creek stations are currently designated HQ-CWF. Similarly, several portions of Pine Creek are proposed to be redesignated to EV based upon reference stations on Spring Creek that has a designation of HQ-CWF. The data supporting a redesignation needs to be compared to more uniform EV benchmarks. Otherwise, we question the value of percentage comparisons between creeks because a succession of percentage comparisons could lead to degenerative criteria. For example, if Creek B meets 92% of Creek A criteria, Creek C could qualify by meeting 92% of Creek B criteria, even though Creek C only meets 85% of Creek A criteria. The data used to support an EV redesignation needs to be compared to more uniform benchmarks. The EQB needs to explain why it is appropriate and reasonable to use HQ-CWF data to support a redesignation to EV.

Finally, we question the consistency of the comparisons used to establish ecological or recreational significance with the actual regulations. The EQB uses comparisons of benthic macroinvertebrates between creeks to establish ecological or recreational significance. However, the definition of EV in Section 93.3 of the regulations appears to be narrower in scope than just comparisons. The definition requires the stream to be an "outstanding" resource, and goes on to describe several examples including waters of "substantial recreational or ecological significance." While the comparisons may establish a certain level of macroinvertebrates, the comparisons do not appear to directly relate to the criterion of establishing the stream as an outstanding resource as required by the regulation.

3. Hay Creek - Recognition of restrictions imposed upon existing and proposed land uses - Economic impact

Haines and Kibblehouse, Inc. (H&K) submitted comments on the redesignation of Hay Creek. H&K purchased land which is in the Hay creek drainage basin and straddles Robeson and Union Townships. These Townships reached agreements with H&K to rezone the property. The final agreements were subsequently reviewed and entered as an Order of Court by the Court of Common Pleas of Berks County. H&K has also filed an application with the Pennsylvania Department of Environmental Protection to develop and operate a noncoal surface mine on the property. H&K states that no mention is made of their efforts to develop their property in connection with the proposed redesignation of Hay Creek. H&K also takes issue with the proposed upgrade in relation to the facts and criteria the EQB used to arrive at the proposed upgrades. New Morgan Borough (represented by Lamb, Windle, and McErlane) of Berks County and Morgantown Properties (represented by Buckley, Nagle, Gentry, Brion, McGuire, and Morris) both expressed concerns with adverse economic impacts and inconsistent land use planning in the area.

The Regulatory Review Act criteria require consideration of the economic impacts of a regulation. We have reviewed the proposed redesignation of Hay Creek and its supporting documentation. It mentions a yet to be constructed sewage treatment facility to serve High Point Baptist Chapel and a proposed motor sports complex in New Morgan Borough. However, it does not discuss any other potential development. For this reason, we agree that the concerns of H&K, New Morgan Borough, and Morgantown Properties have not been fully addressed in the rulemaking package. We believe this omission brings into question DEP's statement that it believes the benefits of the regulation outweigh the costs. We recommend, that prior to filing a final-form regulation, the EQB undertake a thorough analysis of the economic impact of the regulation and then provide justification for its conclusion that the benefits of the regulation outweigh the costs.

4. Qualification under Handbook criteria - Reasonableness

Commentators in opposition to the redesignation of Hay Creek cited portions of the redesignation which, by DEP's data, do not meet the Handbook criteria for redesignation to EV waters. Specifically, stations 1HC and 2BR fell below the criteria for EV designation, but would be upgraded to EV waters. Similarly, Stations 12WB and 13WB of the Pine Creek proposal do not meet the Handbook criteria for EV designation. In addition to our concerns with the criteria used, we request that the EQB provide an explanation of why the Handbook criteria were not followed in redesignating portions of Hay Creek and Pine Creek.

5. Logic of EV designation when tributaries have HQ designations - Reasonableness

Portions of the proposed redesignations would have HQ tributaries flowing into EV waters. In the Hay Creek proposal, Beaver Run and UNT 63882 are proposed to be HQ waters, but they flow into EV waters. In the Pine Creek proposal, the Pine Creek basin (source to Caldwell Creek), and the Caldwell Creek basin (source to West Branch Caldwell Creek) are proposed to be HQ waters, but they flow into EV waters. Since the criteria for EV designation

are more strict than HQ, it does not appear logical to designate headwaters as HQ when they flow into EV waters. The EQB needs to explain the reasonableness of designating downstream waters as EV when headwaters are designated as HQ.

RECEIVED

97 OCT 30 PM 1: 57

**INDEPENDENT REGULATORY
REVIEW COMMISSION**ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE

To: Shirley Hartman
or Patty Johnson
or Denise Henke
or Jocelyn Darrow

Agency: Department of Environmental Protection
Phone 7-2814
Fax: 3-8926

From: Kristine M. Shomper, Executive Assistant
Company: Independent Regulatory Review
Commission
Phone: (717) 783-6419 or (717) 783-5417
Fax: (717) 783-2664

Date: October 30, 1997
of Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-324 (#1874). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:



Date:

10/30/97