MARTIN BERGER
141 CEDARBROOK ROAD
ARDMORE, PA. 19003-1636

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Edward Brezina
Pa. D.E.P.
P.O.Box 8555
Harrisburg,Pa. 17105

I am writing to inform you of my opposition the new proposed water quality standards and toxics strategy.

The new regulations proposed by the Dept. of Environmental Protection will allow for more toxic discharges.

This is no time for our state to reduce the quality of our life, the air we breathe and water we drink.

If the intention is to make our state more"business friendly" then it should not be at the expense of the health of the population.

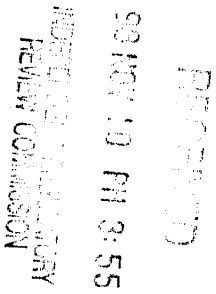
I stand for stronger regukation not less.

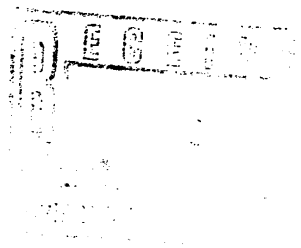
Let me hear from you as to why you are doing this and let me know when and where a hearing will be held on the regulations so I can appear with my neighbors.

Thank you,

Sincerely yours,

Martin Berger





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I EMPHATICALLY OPPOSE the NEW PROPOSED WATER QUALITY STANDARDS AND TOXICS STRATEGY. WE NEED TO STRENGTHEN the STANDARDS THAT PROTECT OUR WATER. WEAKENING them is RIDICULOUS. PLEASE USE SOME COMMON SENSE, NOT CAMPAIGN MONEY.

Mark J. Walsh

Widener University

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Environmental Law Clinic

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November 18, 1998

By Hand Delivery

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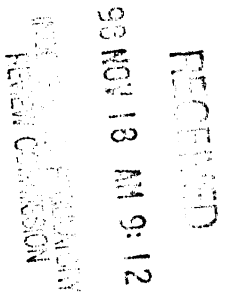
Mr. John Jewett
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101



Dear Mr. Jewett:

At the request of Barb Kooser of the Chesapeake Bay Foundation, I am enclosing a copy of the Environmental Hearing Board's Adjudication in William and Mary Belitskus, et al. v. Department of Environmental Protection and Willamette Industries, Inc., which the EHB issued on August 20, 1998. Please note that the name "Belitskus" appears in boldface throughout this copy only because it was used as a search term in retrieving the document.

Sincerely,

Kurt J. Weist
Director, Environmental Law Clinic

Enclosure

Citation Search Result Rank(R) 1 of 9 Database
--EHB-- PAENV-ADMIN
(Cite as: 1998 WL 525574 (Pa.Env.Hrg.Bd.))

Environmental Hearing Board
Commonwealth of Pennsylvania

*1 WILLIAM AND MARY **BELITSKUS**, RONALD AND ANITA HOUSLER, PROACT
v.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND WILLAMETTE INDUSTRIES, INC., PERMITTEE
EHB Docket No. 96-196-MR
August 20, 1998

ADJUDICATION

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By Robert D. Myers, Administrative Law Judge

Synopsis:

Two Appellants have standing as individuals to challenge the Department's approval of coverage under a general NPDES permit for storm water discharges from a Chip Plant into a stream. The two Appellants have shown that storm water runoff from the Chip Plant may adversely affect their use and enjoyment of the stream. The standing of a third Appellant was not addressed in Appellants' post-hearing brief; therefore, that issue was waived.

The Department's regulation at 25 Pa. Code s 92.83(b)(2) requires that the Department deny any application for coverage under a general NPDES permit when the discharger has a significant history of noncompliance with prior "permits" issued by the Department. This means that, before approving coverage under a general NPDES permit, the Department must consider the applicant's compliance history for any and all permits issued by the Department for any site in the state. The Department's attempt to limit this review is inconsistent with the plain language of the regulation and is clearly erroneous in light of section 609 of the Clean Streams Law, 35 P.S. s 691.609.

In failing to consider any and all permits issued by the Department before approving coverage under the general NPDES permit, the Department misapplied 25 Pa. Code s 92.83(b)(2). Because the Department misapplied the law, it also abused its discretion. Where the Board finds that the Department has abused its discretion, the Board may properly substitute its discretion for that of the Department based upon the record made before it.

An applicant has a "significant" history of noncompliance when past or continuing permit violations indicate that the applicant cannot be trusted with a permit. Therefore, evidence which shows that the applicant violated the terms and conditions of prior permits issued by the Department is relevant here. If such evidence demonstrates that the applicant lacks the ability or intention to comply with the law, then the Department cannot approve coverage under a general NPDES permit. However, if the Department is satisfied that the applicant's past or continuing unlawful conduct has been or is being corrected, the Department may approve coverage. 35 P.S. s 691.609. In this case, the evidence shows that the applicant does not lack the ability and intention to comply with the law, that the applicant's past or continuing violations are being corrected to the satisfaction of the Department, and that the applicant does not have a

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"significant" history of noncompliance with prior permits issued by the Department. Accordingly, the Board will not disturb the Department's decision to approve coverage under the general NPDES permit.

*2 Ordinarily, the Board will not revisit an issue on equitable grounds after granting summary judgment on that issue. Indeed, the Board lacks judicial power to act in equity. However, because the Board may substitute its discretion for that of the Department when the Board finds that the Department abused its discretion, the Board may decide to adjudicate the issue where the Appellants were not represented by legal counsel when the Board entered summary judgment, and where the parties presented sufficient scientific evidence at the hearing. Here, Appellants ask the Board to consider whether storm water runoff from the Chip Plant has adversely affected the stream used and enjoyed by Appellants. Having weighed the evidence presented at the hearing, the Board concludes that there is no adverse impact on the stream due to storm water runoff associated with Chip Plant activities authorized by the Storm Water Permit.

PROCEDURAL HISTORY

On September 30, 1996, William and Mary **Belitskus**, Ronald and Anita Housler, and PROACT, an unincorporated group of concerned citizens, filed a pro se [FN1] Notice of Appeal with the Board, challenging the Department of Environmental Protection's (Department) August 14, 1996 approval of coverage under General National Pollutant Discharge Elimination System (NPDES) Permit No. PAR228325 (Storm Water Permit) for storm water discharges from Willamette Industries, Inc.'s (Willamette) North Chip Plant (Chip Plant) into the West Branch of the Clarion River in Hamlin Township, McKean County. In the Notice of Appeal, Appellants set forth five objections to the Department's action.

On June 13, 1997, Willamette filed a Motion to Dismiss and/or for Summary Judgment (Motion) with the Board. In an Opinion and Order dated October 21, 1997, the Board entered summary judgment in favor of Willamette on most of the issues raised in the Notice of Appeal. However, the Board ruled that a hearing was necessary to decide: (1) whether the Houslers, Mr. **Belitskus**, and PROACT have standing to challenge the Department's action; and (2) whether the Department properly considered Willamette's compliance history in approving coverage under the Storm Water Permit. See **Belitskus** v. DEP, 1997 EHB 939. With respect to the latter issue, the Board stated that the Department was obligated under 25 Pa. Code s 92.83(b)(2) to consider Willamette's compliance with any and all permits issued by the Department to Willamette for any site in the state. Id.

On December 26, 1997, the Department filed a Motion in Limine to Preclude Testimony and Evidence at Hearing. The Department asserted therein that it interprets 25 Pa. Code s 92.83(b)(2) to require only a review of the applicant's history of compliance with prior NPDES permits. (Department's Motion in Limine at para. 13.) The Department asked the Board to give deference to its interpretation of the regulation and to limit testimony and evidence at the hearing to Willamette's history of compliance with prior NPDES permits. (Department's Motion in Limine at para. 14-15.) Appellants filed a Response on January 9, 1998. On the same date, the Department requested leave to amend its Motion in Limine, which the Board granted.

*3 On January 14, 1998, the Department filed its Amended Motion in Limine. The

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Department stated that:
[B]y serendipity, Department staff discovered last week a document entitled "DER Permit Guide to Stormwater Discharges from Nonconstruction Industrial Activities...." The Permit Guide was published sometime in 1994, and was given to prospective general NPDES permittees to describe the procedures for obtaining coverage under a general NPDES permit for stormwater discharges for industrial activities.
(Amended Motion in Limine at para. 8.) The Permit Guide states that storm water discharges are not eligible for coverage under a general permit if they are discharges "from persons with a significant history of noncompliance with prior coverage under the NPDES general stormwater permit issued by DER." (Amended Motion in Limine at para. 10.) (Emphasis added.) Based on this language, the Department then asserted that 25 Pa. Code s 92.83(b)(2) only requires the Department to review an applicant's history of compliance with prior general NPDES permits. (Amended Motion in Limine at para. 13.) Accordingly, the Department asked the Board to limit testimony and evidence at the hearing to Willamette's history of compliance with prior general NPDES permits. (Amended Motion in Limine at para. 16.) On January 14, 1998, the Board denied this request. However, the Board allowed the Department and Willamette to present evidence at the hearing related to the Department's interpretation of 25 Pa. Code s 92.83(b)(2).
On February 2, 1998, Willamette filed a Motion in Limine asking the Board to preclude compliance history evidence involving incidents that occurred after the Department's August 14, 1996 approval of coverage. On February 6, 1998, the Board granted this motion. On the same date, the parties filed a Joint Stipulation of facts. In the Joint Stipulation, the parties agreed that any compliance history evidence involving violations that occurred prior to May 1, 1990 should not be considered. (Joint Stipulation F.)
The Board held a hearing on February 10, 11, and 12, 1998. At the hearing, Appellants agreed to strike PROACT as a party to this appeal. (N.T. at 84.) Thus, it is no longer necessary for the Board to consider whether PROACT has standing in this matter.
On April 20, 1998, Appellants filed their post-hearing brief with the Board. Appellants' brief does not address Mrs. Housler's standing. Thus, the Board will not address Mrs. Housler's standing here. Lucky Strike Coal Co. v. Department of Environmental Resources, 547 A.2d 447 (Pa. Cmwlth. 1988) (holding that an issue not raised in a post-hearing brief is deemed waived). Willamette filed its post-hearing brief on June 19, 1998, and the Department filed its post-hearing brief on June 23, 1998.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. ss 691.1-691.1001; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), as amended, 35 P.S. ss 4001-4015; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. s 510-17; and the rules and regulations promulgated thereunder. (Joint Stipulation A.)
***4** 2. Willamette is a corporation organized and existing under the laws of

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Delaware. Its principal place of business is located at 500 First Interstate Tower, Portland, Oregon, 97210. (Joint Stipulation B.)

3. Keystone Chipping, Inc. (Keystone) is a corporation organized and existing under the laws of Pennsylvania. Its principal place of business is located at Pennsylvania State Route 6, Kane, McKean County, Pennsylvania. (Joint Stipulation C.)

4. Appellants William **Belitskus** and Ronald Housler are individuals who reside in Hamlin Township, McKean County, Pennsylvania. (Joint Stipulation D.)

5. Willamette owns a parcel of real property located approximately one-half mile south of Pennsylvania State Route 6 and approximately one and one-half miles west of Pennsylvania State Route 219 in Hamlin Township, McKean County. This property consists of approximately 110 acres, buildings, and various structures used to manufacture wood chips. Keystone operates this Chip Plant. The chips manufactured at the Chip Plant are transported to a Willamette pulp mill located in Johnsonburg, Pennsylvania (Johnsonburg Mill). The Johnsonburg Mill was previously owned and operated by Penntech Papers, Inc. (Penntech). Willamette acquired Penntech as a subsidiary on May 1, 1990. Penntech was merged into Willamette on December 31, 1992. (Joint Stipulation E.)

6. Willamette owns and operates a total of five plants in Pennsylvania. In addition to the Chip Plant and the Johnsonburg Mill, Williamette owns and operates: a second chip plant located in Woodland; a facility to convert rolls of paper into sheets of paper located in Dubois; and a second converting facility located in Langhorne. (Joint Stipulation G.)

7. The Department has issued no permits to either the Dubois or Langhorne converting facilities. (Joint Stipulation H.)

8. Between May 1990 and August 14, 1996, Willamette submitted applications and the Department approved the following permits:

a. Johnsonburg Mill - Air Quality Permit Nos. 24302008, 24302021A, 24309007, 24315001, 24315006, 24306003, 24315007, 24315008, 2435009, and individual NPDES Permit No. PA0002143 for discharge of industrial waste from industrial activities;

b. Chip Plant - general NPDES Permit No. PAR104100 for storm water discharges from construction activities and general NPDES Permit No. PAR28325 for storm water discharges from industrial activities (Storm Water Permit);

c. Woodland Chip Plant - general NPDES Permit No. PAR101708 for storm water discharges from construction activities.

(Joint Stipulation I.)

9. The Department has determined that Willamette has not violated the terms and conditions of NPDES Permit Nos. PAR104100, PAR28325, or PAR101708. (Joint Stipulation J.)

10. A small unnamed tributary of the West Branch of the Clarion River known as Lanigan Brook originates, in part, from springs situated on or around portions of the Chip Plant. (Joint Stipulation K.)

11. Lanigan Brook is classified as a cold water fishery pursuant to 25 Pa. Code s 93.9r. Lanigan Brook is not classified as "high quality" or "exceptional value" waters as defined in 25 Pa. Code s 93.3. (Joint Stipulation L.)

***5** 12. William **Belitskus** lives "probably three-quarters of a mile" from the Chip Plant. He moved to that location 13 or 14 years before the Chip Plant was built after spending a lot of time looking in several states for a place to live that was "clean and green," with "peace and quiet" and a "high quality life." On

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really hot days in the summertime, when the temperature reaches 90 degrees, **Belitskus** enjoys driving down to Lanigan Brook at Burning Well, where Lanigan Brook runs into Buck Run, about five miles downstream from the Chip Plant. There in the cool shade, he stands and watches the water go by; he observes the five and six-foot-high ferns, the moss-covered logs, and the insects; and, sometimes, he wades into the water. (N.T. at 44, 64-66, 69-70, 85, 102.)

13. Ronald Housler has lived on a farm near Lanigan Brook for his entire life. During those 44 years, Housler has used and enjoyed Lanigan Brook and its environs for hunting, camping, riding horses, and fishing. Housler goes fishing in Lanigan Brook every year. Over the years, he has caught brook trout, brown trout, suckers, catfish, and mudpuppies. Housler has taken his son and daughter fishing and would like them to be able to enjoy fishing in Lanigan Brook in the future. (N.T. at 17-19, 22-23, 46-49.)

14. Before Willamette began construction of the Chip Plant in 1993, Lanigan Brook and its tributaries ran clear. In 1995, Housler began to notice that there is no more clear water. The water is red, and a reddish-orange color hangs on every stick and rock. There are bark chips and wood particles in the water; there is mud and sedimentation. When Housler goes fishing: "You don't get as many bites. You don't get as many ... little ones." As a result, Housler does not enjoy fishing at Lanigan Brook as much as in the past. (N.T. at 21, 28, 40, 61.)

15. Since Willamette constructed the Chip Plant, there is a layer of loose sediment on the streambed and rocks in Lanigan Brook at Burning Well, and some of the rocks are discolored. There is mud, foam, white scum, red slime, and black rocks in Lanigan Brook downstream of the Willamette property line. (N.T. at 66, 68-69.)

16. Appellant **Belitskus** asked Peter John Hutchinson, Ph.D., to investigate the changes to Lanigan Brook since construction of the Chip Plant. Hutchinson is an expert in hydrogeology with a related specialty in biology and aquatic systems. (N.T. at 152, 155; Exhibit A-3.)

17. Hutchinson visited Lanigan Brook on January 14, 1998 and took some field measurements at several locations. Hutchinson did not take any water samples; however, water samples were taken on January 20, 1998 by Charlene Ann Sheppard, a science teacher, under the supervision of **Belitskus.** (N.T. at 164, 167; Exhibit A-3 at 1.)

18. Hutchinson concluded that "two discharge areas considered to be downgradient of the [Chip Plant] site showed some impact from site operations" with "elevated levels of conductivity, pH, turbidity and organic acids and depressed levels of dissolved oxygen." Hutchinson testified that there is "something" in the water of Lanigan Brook, and he attributed it to storm water runoff from the Chip Plant site. However, Hutchinson acknowledged that, because of winter conditions, his field measurements could be spurious and his conclusions false. (N.T. at 166, 174-75, 182-83, 200; Exhibit A-3 at 4-5.)

***6** 19. David C. Hails, an expert in aquatic surveys, concluded that there is no impact whatsoever to Lanigan Brook. Hails noted that Hutchinson failed to consider relevant biological and physical factors in reaching his conclusion. Hails explained that the pH, conductivity, turbidity, organic acid and dissolved oxygen levels in the water samples taken from Lanigan Brook could be attributable to certain biological or physical factors. (N.T. at 315, 330-45.)

20. Steven Kepler, a fish biologist for the Pennsylvania Fish and Boat

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Commission, conducted electrofishing at two sites on Lanigan Brook on September 23, 1997. Electrofishing is a process whereby a small generator with a voltage regulator and two electrodes stuns the fish with an electric current. Trained individuals then collect, examine, identify and count the fish. Through this process, Kepler found wild brook trout and brown trout of varying sizes in Lanigan Brook. Kepler noted that the numerous size classes indicate "a fairly good system" and concluded that Lanigan Brook had a viable trout population. (Joint Exhibit G; N.T. at 291, 295-96, 301-02, 309-10.)

21. In 1994, the Department published the DER Permit Guide to Stormwater Discharges From Nonconstruction Industrial Activities. This Permit Guide was given to at least some prospective general NPDES permittees to describe the procedures for obtaining coverage under the general NPDES permit for storm water discharges from industrial activities. (Joint Stipulation N.)

22. The Permit Guide provides on page 5, paragraph 5, that: "Storm Water discharges associated with industrial activities that are not eligible for coverage under the general permit [include] ... [d]ischarges from persons with a significant history of noncompliance with prior coverage under the NPDES general stormwater permit issued by DER." (Joint Stipulation O.)

23. The parties have stipulated that Appellants' Exhibits 4-22 describe or pertain to permit violations at the Johnsonburg Mill. (N.T. at 385.)

24. Appellants' Exhibit 23 is a Notice of Violation which begins: "I conducted an inspection on December 3, 1992 .... The inspection revealed the facility to be in violation of your NPDES Permit No. PA0002143." The notice goes on to say that a boiler precipitator discharged wash water into a storm sewer and into the East Branch of the Clarion River, and that "[t]his discharge is not authorized by your Permit or any permit issued by the Department."

25. Appellants' Exhibits 24 and 25 are Consent Assessments of Civil Penalties involving industrial discharges into the East Branch of the Clarion River. The captions of these exhibits refer to the Johnsonburg Mill NPDES Permit.

26. Appellants' Exhibits 26, 27, and 28 are letters from Willamette to the Department reporting unauthorized discharges from an evaporator, a pipe, and a drain valve into the East Branch of the Clarion River.

27. Appellants' Exhibit 29 is a Notice of Violation advising Willamette that it violated 25 Pa. Code s 123.2 on October 18, 1994 when fugitive particulate emissions, i.e., wood dust, from an air contamination source at the Johnsonburg Mill were visible at the point the emissions passed outside Willamette's property.

*7 28. Appellants' Exhibit 30 is a Notice of Violation which states in pertinent part that: "Operation of the sources, as specified above, without incineration constitutes a violation of permit and plan approval conditions as set forth in Department permit # 24-315-008."

29. Appellants' Exhibits 31-49 are Continuous Emissions Monitoring (CEM) reports and related documents for the following air contamination sources: a recovery furnace, a lime kiln, and two boilers. The boilers operate under Air Quality Permit # 24-302-021A. See Appellants' Exhibit 32. The lime kiln is covered by Air Quality Permit # 24-315-007. See Appellants' Exhibit 6. The recovery furnace operates under Air Quality Permit # 24-306-003. See Appellants' Exhibit 22.

30. When Willamette acquired the Johnsonburg Mill in 1990, some of the equipment had been in operation since 1928, and waste water was being pumped

into a 243-acre lake known as the Dill Hill Lagoon. In order to ensure compliance with future permits issued by the Department, Willamette immediately began to install a waste water treatment plant and embarked on a program to replace all of the major processing equipment associated with making pulp or recovering chemicals. Willamette has spent $550 million on these projects, including roughly $110 million on environmental control technology and permit compliance. (N.T. at 372-77.)

31. Willamette completed construction of the waste water treatment facility in April 1992. The violations enumerated in Exhibit 4 did not continue after the new treatment plant was constructed. (N.T. at 374, 395.)

32. Half of the exhibits presented to show violations of the Johnsonburg Mill NPDES Permit pertain to exceedences for "total suspended solids." See Appellants' Exhibits 7-10, 15-21. Willamette has taken short-term and long-term measures to address those violations, and, for the most part, the measures have been successful in reducing the violations. (N.T. at 399-401.)

33. The exhibits indicate that some of Willamette's Johnsonburg Mill NPDES Permit violations were due to: the failure of a pipe; a broken drain valve; a loose pipe flange; a power outage; and an incorrect setting on a new piece of equipment. Appellants' Exhibits 11, 24-28.

34. On September 26 and 27, 1995, Willamette exceeded allowable NPDES Permit effluent limits during its annual shutdown of the Johnsonburg Mill. When Willamette discovered the problem, it held up the scheduled shutdown in spite of possible economic hardship to Willamette. (N.T. at 402-03; Appellants' Exhibit 12).

35. On November 12, 1995, Willamette violated the provisions of Air Quality Permit No. 24-306-003 when black liquor concentrate was released from a pressure relief valve on a new piece of equipment. Because of a design flaw in the equipment, Willamette could not accurately monitor the build-up of pressure. Approximately 65 homes and numerous vehicles were impacted by the release. The release also resulted in the discharge of contaminated water into the Clarion River. Willamette immediately began to wash the streets and vehicles; arranged to have an outside firm wash the homes and vehicles; and circulated handouts on the streets to explain the release and the arrangements for cleanup. Willamette also corrected the design flaw in the equipment and ensured that any future release would not escape into the atmosphere. (N.T. at 417-19; Appellants' Exhibits 13-14, 18, 22.)

***8** 36. With respect to Willamette's CEM exceedences, the record shows that they compare quite favorably with similar facilities in some areas and are on a par with similar facilities in other areas. (N.T. at 477; Appellants' Exhibits 31-49.)

37. Patrick G. Williams, Permits Chief in the Department's Bureau of Water Management, who made the decision to approve coverage under the Storm Water Permit, testified that Willamette's permit violations do not represent a significant history of noncompliance for purposes of approving coverage under a general NPDES permit. (N.T. at 503-06.)

38. William McCarthy, Regional Monitoring and Compliance Manager, testified that Willamette's compliance history between 1992 and August 1996 for the Johnsonburg NPDES Permit has been good, and that he would recommend that the Department grant coverage to Willamette under the Storm Water Permit. (N.T. at 447-48.)

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39. William Snyder, an Air Quality Specialist for the Department, who has performed inspections at the Johnsonburg Mill since 1993 and has been responsible for determining permit compliance there, testified based on his inspections that Willamette's compliance history at the Johnsonburg Mill is "very favorable." Snyder agreed that Willamette worked diligently to address any permit violations he identified at the Johnsonburg Mill and has been very cooperative. (N.T. at 456-58, 465-66.)

40. Ronald Gray, an Air Quality District Supervisor for the Department, who has had oversight of the CEM reports from the Johnsonburg Mill for the past five years, testified that none of the Johnsonburg Mill exceedences have been significant, that he is satisfied with steps that Willamette took to address various problems, that he considers the air permit compliance history at the Johnsonburg Mill to be good, and that the site is now thoroughly modernized. (N.T. at 472-73, 475, 477-81.)

DISCUSSION

I. Standing

The first issue is whether **Belitskus** and Housler have standing to challenge the Department's approval of coverage under the Storm Water Permit.

In order to have standing to challenge a Department action, an appellant must be "aggrieved" by that action. This means that the appellant must have a direct, immediate and substantial interest in the litigation challenging the action. A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. For an interest to be "direct," it must have been adversely affected by the action. An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975); Barshinger v. DEP, 1996 EHB 849.

Both the Pennsylvania Supreme Court and the United States Supreme Court have recognized that aesthetic and environmental well-being are important ingredients of the quality of life in our society. Therefore, a member of society may challenge a government action which threatens to harm that person's use and enjoyment of natural resources. See Wm. Penn Parking Garage, Inc., 346 A.2d at 281, n. 20 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686-87 (1973)); see also Sierra Club v. Morton, 405 U.S. 727 (1972). The Board, too, has held that an individual may challenge a Department action which may adversely affect the person's recreational and aesthetic use and enjoyment of an area. See Barshinger, 1996 EHB 849, 855-56; Heasley v. DER, 1991 EHB 1758, 1763. Indeed, the Board has conferred standing where a Department action was alleged to have an adverse effect on the recreational use of a stream for trout fishing. Pohoqualine Fish Association v. DER, 1992 EHB 502, 504-505.

***9 Belitskus** lives "probably three-quarters of a mile" from the Chip Plant. (N.T. at 65.) He moved to that location 13 or 14 years before the Chip Plant was built after spending a lot of time looking in several states for a place to live that was "clean and green," with "peace and quiet" and a "high quality life." (N.T. at 64, 102.) On really hot days in the summertime, when the temperature

reaches 90 degrees, **Belitskus** enjoys driving down to Lanigan Brook at Burning Well, where Lanigan Brook runs into Buck Run, about five miles downstream from the Chip Plant. [FN2] (N.T. at 44, 65-66, 69.) There in the cool shade, he stands and watches the water go by; he observes the five and six-foot-high ferns, the moss-covered logs, and the insects; and, sometimes, he wades into the water. (N.T. at 65-66, 69-70, 85.)

Belitskus' use and enjoyment of Lanigan Brook in this manner may be properly characterized as either recreational or aesthetic in nature. Whatever the case, his use and enjoyment of Lanigan Brook on really hot days in the summertime is sufficient to give **Belitskus** a substantial, direct and immediate interest in the outcome of this litigation. It is one facet of the "high quality life" he sought years ago. Lanigan Brook is a place for him to go on hot summer days that is "clean and green" with "peace and quiet." Lanigan Brook gives **Belitskus** what the Pennsylvania and United States Supreme Courts called a sense of aesthetic and environmental well-being. If nothing else, **Belitskus'** particular use and enjoyment of Lanigan Brook gives him an interest in this litigation that surpasses the common interest of all citizens in procuring obedience to the law.

Housler has lived on a farm near Lanigan Brook for his entire life. During those 44 years, Housler has used and enjoyed Lanigan Brook and its environs for hunting, camping, riding horses, and fishing. (N.T. at 17-18, 22-23.) Indeed, Housler goes fishing in Lanigan Brook every year. (N.T. at 18, 46-49.) Over the years, Housler has caught brook trout, brown trout, suckers, catfish, and mudpuppies. (N.T. at 19.) Housler has also taken his son and daughter fishing and would like them to be able to enjoy fishing in Lanigan Brook in the future. (N.T. at 19.) Housler's fishing of Lanigan Brook gives him a substantial, direct and immediate interest in the outcome of this litigation. Pohoqualine Fish Association.

To support their individual testimony, **Belitskus** and Housler asked Dr. Peter John Hutchinson to investigate the matter. (Exhibit A-3.) He is an expert in hydrogeology with a related specialty in biology and aquatic systems. (N.T. at 152, 155.) Hutchinson concluded that there is "something" in the water of Lanigan Brook downstream of the Chip Plant which he attributed to storm water runoff from the Chip Plant site. (N.T. at 166, 174-75, 182-83; Exhibit A-3 at 4.)

This testimony was unnecessary. In our October 21, 1997 Opinion and Order, we granted summary judgment to Willamette on Appellants' contention that the issuance of the Storm Water Permit will adversely affect the water quality of Lanigan Brook. **Belitskus**, 1997 EHB at 955. This was done because Appellants had not shown that they could make out a prima facie case on that issue. Pa. R.C.P. No. 1035.2(2). As a result, that issue is no longer before us.

***10** We also held that, in order to prove standing on the only remaining substantive issue, Willamette's compliance history, **Belitskus** and Housler did not have to show a specific impact upon Lanigan Brook's recreational uses. "The Storm Water Permit's conditions may be entirely appropriate to protect the brook and still [the Department's] approval of coverage would be unlawful and an abuse of discretion if Willamette's compliance history shows that it cannot be trusted with a discharge permit." **Belitskus**, 1997 EHB at 955-56. **Belitskus** and Housler have demonstrated sufficient interest to confer standing to raise this issue.

II. Significant History of Noncompliance

--EHB--
(Cite as: 1998 WL 525574, *10 (Pa.Env.Hrg.Bd.))

The second issue is whether the Department properly considered Willamette's compliance history in approving coverage under the Storm Water Permit.

The Department's regulation at 25 Pa. Code s 92.83(b)(2) mandates that the Department deny "any application for coverage under a general permit when ... [t]he discharger ... has a significant history of noncompliance with a prior permit issued by the Department." In our October 21, 1997 Opinion and Order, we explained: "Since the disqualification is based upon noncompliance with a prior DEP permit, it is relevant to consider any and all permits issued by DEP to Willamette for any site in the state." **Belitskus** v. DEP, 1997 EHB 939, 956-57 (emphasis in original). However, in our January 14, 1998 Order, we allowed Willamette and the Department to present evidence on the Department's interpretation of 25 Pa. Code s 92.83(b)(2). The Department claims that the word "permit" in the regulation means "general NPDES permit," and the Department urges the Board to give deference to this interpretation. This we cannot do.

A. "Permit" in 25 Pa. Code s 92.83(b)(2)

When reviewing the validity of the Department's interpretation of its own regulation, the Department's interpretation is to be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. Department of Environmental Protection v. City of Philadelphia, 692 A.2d 598 (Pa. Cmwlth. 1997). In this case, the Department's interpretation is plainly erroneous and inconsistent with the regulation.

First, it is inconsistent with the regulation. The plain language of the regulation refers to "a significant history of noncompliance with a prior permit issued by the Department." 25 Pa. Code s 92.83(b)(2) (emphasis added). There is nothing ambiguous about this language. As we stated in our earlier Opinion and Order, it means any and all permits previously issued by the Department.

There is absolutely no reason to change the single word "permit" into the phrase "general NPDES permit." In the regulations which specifically govern general NPDES permits, the word "permit" appears by itself only at 25 Pa. Code s 92.83(b)(2). In every other instance, the phrase "general permit" or "general NPDES permit," "individual permit" or "individual NPDES permit" is used. See 25 Pa. Code ss 92.81-92.83. Certainly, if the Environmental Quality Board (EQB) intended the word "permit" to mean "general permit" or "general NPDES permit," it would have used those phrases as it did everywhere else.

***11** Second, the Department's interpretation of 25 Pa. Code s 92.83(b)(2) is plainly erroneous because it conflicts with the compliance history review requirements of section 609 of the Clean Streams Law. [FN3] Section 609 provides in pertinent part as follows:

> The department shall not issue any permit required by this act ... if it finds, after investigation and an opportunity for informal hearing that:
>
> ....
>
> (2) the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. Any person ... which has engaged in unlawful conduct as defined in section 611 ... shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department.

Section 611 of the Clean Streams Law defines "unlawful conduct" as follows: "It shall be unlawful ... to fail to comply with any ... permit ... of the

department, to violate ... any ... permit ... of the department, [or] to cause air or water pollution ...." 35 P.S. s 691.611 (emphasis added). In other words, by statute, the Department must investigate violations of any and all permits before approving coverage under a general NPDES permit.

The Department argues that the thorough investigation required by section 609 of the Clean Streams Law does not apply to the general NPDES permit program because the general permit process was intended to reduce paperwork, procedures, and delays. We agree that general permit applications are not intended to receive the level of scrutiny accorded to individual permit applications, but we find no language in the Clean Streams Law or the regulations that authorizes a condensed review of compliance history for these types of permits.

We have considered the other arguments made by the Department and Willamette, including the language of the 1994 Permit Guide, and are not persuaded by them. The Board reaffirms its previous holding that, under 25 Pa. Code s 92.83(b)(2), the Department must review an applicant's history of compliance with any and all prior permits issued by the Department. Because the Department misinterpreted the compliance history review requirements of 25 Pa. Code s 92.83(b)(2), the Department's approval of coverage was improper. [FN4] Moreover, because the Department failed to act in accordance with applicable law, the Department's approval of coverage constitutes an abuse of discretion. Concerned Residents of the Yough, Inc. v. DER, 1995 EHB 41, 77.

Because the Department abused its discretion, Appellants ask the Board to vacate the Department's approval of coverage under the Storm Water Permit and remand this case to the Department for a proper review of Willamette's compliance history. However, in this case, it is not necessary for the Board to vacate and remand. When the Board finds, based on the evidence presented at a hearing, that the Department has abused its discretion, the Board may properly substitute its discretion based upon the record made before it. Pequea Township v. Herr, ____ A.2d ____ (No. 1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998); Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Therefore, we shall next examine the evidence presented by Appellants at the hearing to determine what is relevant here.

B. Compliance History Evidence

***12** Appellants have presented Exhibits 4 to 49 as evidence that Willamette had a significant history of noncompliance with prior permits issued by the Department when the Department approved coverage under the Storm Water Permit on August 14, 1996. All of these exhibits pertain to operations at Willamette's Johnsonburg Mill. (See Joint Stipulations G, H, and J.) The Department has issued an individual NPDES permit and various air quality permits to Willamette for the Johnsonburg Mill. (Joint Stipulation I.)

The parties agree that Exhibits 4 to 22 are relevant here. (N.T. at 385.) However, Willamette and the Department contend that Exhibits 23-49 are unrelated to any prior permit issued by the Department and, therefore, are not relevant here. [FN5] We disagree.

Exhibit 23 is a Notice of Violation which begins: "I conducted an inspection on December 3, 1992 .... The inspection revealed the facility to be in violation of your NPDES Permit No. PA0002143." Appellants' Exhibit 23 (emphasis added). On its face, then, Exhibit 23 is notice of a permit violation. The notice goes on to say that a boiler precipitator discharged wash water into a storm sewer and

into the East Branch of the Clarion River, and that "[t]his discharge is not authorized by your Permit or any permit issued by the Department." Appellants' Exhibit 23 (emphasis added). In other words, to the Department, an unauthorized discharge violates the Johnsonburg Mill NPDES Permit. We do not have the NPDES permit before us; therefore, we have no reason to conclude otherwise.

Exhibits 24 and 25 are Consent Assessments of Civil Penalties involving industrial discharges into the East Branch of the Clarion River. The exhibits, in their captions, refer to the Johnsonburg Mill NPDES Permit. Thus, as with Exhibit 23, the unauthorized discharges are violations of the Johnsonburg Mill NPDES Permit.

Exhibits 26, 27, and 28 are letters from Willamette to the Department reporting unauthorized discharges from an evaporator, a pipe, and a drain valve into the East Branch of the Clarion River. Because unauthorized discharges violate the Johnsonburg Mill NPDES Permit, Exhibits 26, 27, and 28 are relevant here.

Exhibit 29 is a Notice of Violation advising Willamette that it violated 25 Pa. Code s 123.2 on October 18, 1994 when fugitive particulate emissions, i.e., wood dust, from an air contamination source at the Johnsonburg Mill were visible at the point the emissions passed outside Willamette's property. See Appellants' Exhibit 29. Under 25 Pa. Code s 127.441, every air quality permit incorporates by reference the emission standards of the regulations. Therefore, a fugitive particulate emissions violation is a permit violation, and Exhibit 29 is relevant here.

Exhibit 30 is another Notice of Violation. It states: "Operation of the sources, as specified above, without incineration constitutes a violation of permit and plan approval conditions as set forth in Department permit # 24-315-008." Therefore, Exhibit 30 involves a permit violation and is relevant here.

***13** Exhibits 31-49 are CEM reports and other CEM documents. It is apparent that these are related to specific air contamination sources at the Johnsonburg Mill: a recovery furnace, a lime kiln, and two boilers. It is equally apparent that the Department has issued air quality permits for these sources. Exhibit 32 indicates that the boilers operate under Air Quality Permit # 24-302-021A. Exhibit 6 indicates that the lime kiln operates under Air Quality Permit # 24-315-007. Exhibit 22 indicates that the "recovery boiler and related equipment" is covered by Air Quality Permit # 24-306-00003 [sic]. [FN6] Therefore, all of these exhibits are relevant here.

C. Willamette's Compliance History

We now must decide whether this evidence shows that Willamette had a significant history of noncompliance with prior permits issued by the Department when the Department approved coverage under the Storm Water Permit on August 14, 1996.

In our October 21, 1997 Opinion and Order, we stated that the Department's approval of coverage under the Storm Water Permit would be unlawful under 25 Pa. Code s 92.83(b)(2) if Willamette's compliance history shows that it cannot be trusted with a discharge permit. **Belitskus**, 1997 EHB at 956. Indeed, we read 25 Pa. Code s 92.83(b)(2) in conjunction with section 609 of the Clean Streams Law, which states that the Department shall not issue a permit if the applicant has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. 35 P.S. s 691.609(2); see Western Pennsylvania Water

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Company v. DER, 1991 EHB 287, 335-36 (finding that permittee had no intention to comply with permit conditions). Where there are past or continuing violations, section 609 allows the Department to issue a permit if the applicant's unlawful conduct is being corrected to the satisfaction of the Department. 35 P.S. s 691.609(2). [FN7]

First, the record does not show that Willamette lacks the intent to comply with the law. In 1990, when Willamette acquired the Johnsonburg Mill, some of the equipment was antiquated, and waste water from the mill was being pumped into a lake. (N.T. at 372-74.) In order to ensure future permit compliance, Willamette spent more than $500 million to install a waste water treatment plant and to replace all of the major processing equipment associated with making pulp or recovering chemicals. (N.T. at 373-76.) In 1995, when the mill's annual shutdown caused an environmental problem, Willamette held up the process despite possible adverse economic consequences to Willamette. (N.T. at 402-03; Appellants' Exhibit 12). Indeed, according to the Department, Willamette has worked diligently to address permit violations and has been very cooperative with the Department. (N.T. at 465-66.)

Second, the evidence does not establish that Willamette lacks the ability to comply with the law. We note, for example, that Willamette has not violated in any way the permits issued by the Department for the two chip plants. Moreover, at the Johnsonburg Mill, the new waste water treatment plant has prevented the continuation of certain NPDES permit violations there. (N.T. at 395.) Other measures have been successful, for the most part, in reducing exceedences for "total suspended solids." (N.T. at 399-401.) With respect to CEM exceedences, Willamette thoroughly modernized the mill and has been able to maintain a record that is at least as good as at similar facilities. (N.T. at 477, 481; Appellants' Exhibits 31-49.)

***14** It is true that, between May 1990 and August 1996, Willamette violated its Johnsonburg Mill permits when a pipe failed, a drain valve broke, a pipe flange became loose, and the power went out. Willamette also had trouble when a new piece of equipment had a design flaw and when new equipment was not properly installed. (N.T. at 417-19; Appellants' Exhibits 11, 13-14, 18, 22, 24-28). In each instance, however, Willamette acted responsibly to control the situation and to repair the problem. Moreover, only one of these occurrences had a severe environmental impact, i.e., the release of black liquor condensate into the atmosphere on November 12, 1995 because of the design flaw. One serious occurrence over six years for permits at several sites does not constitute a significant history of noncompliance.

Finally, we note that Department officials have expressed their satisfaction with Willamette's ability and intent to comply with the law. The Permits Chief in the Department's Bureau of Water Management does not consider Willamette's permit violations to be "significant." (N.T. at 503-06.) The Regional Monitoring and Compliance Manager considers Willamette's compliance history between 1992 and August 1996 for the Johnsonburg Mill NPDES Permit to be good; he would recommend that the Department grant coverage to Willamette under the Storm Water Permit. (N.T. at 447-48.)

The Air Quality Specialist who has performed inspections at the Johnsonburg Mill since 1993 and who has been responsible for determining permit compliance there testified that Willamette's compliance history at the Johnsonburg Mill is "very favorable." (N.T. at 456-58, 465.) The Air Quality District Supervisor,

who has had oversight of the CEM reports from the Johnsonburg Mill for the past five years, testified that none of the Johnsonburg Mill exceedences have been significant, that he is satisfied with steps that Willamette took to address various problems, and that he considers the air permit compliance history at the Johnsonburg Mill to be good. (N.T. at 472-75, 477-81.)

Appellants characterize the testimony of Department officials as "post hoc assertions" made years after issuance of the Storm Water Permit that should be viewed skeptically. This may be appropriate with respect to laudatory adjectives like "good," "very favorable," and others, but the factual evidence in the record stands on its own merits.

Because the record establishes that, when the Department approved coverage under the Storm Water Permit on August 14, 1996, Willamette did not lack the ability or intent to comply with the law and any problems were being corrected to the satisfaction of the Department, we conclude that Willamette did not have a significant history of noncompliance with prior permits issued by the Department at that time. Therefore, Willamette's compliance history was no bar to its receipt of the Storm Water Permit.

D. Equitable Relief

Finally, Appellants ask the Board to order the Department to deny approval of coverage under the Storm Water Permit because of evidence that storm water runoff from the Chip Plant is causing harm to Lanigan Brook. In the alternative, Appellants ask the Board to vacate the Department's approval of coverage and remand the case to the Department for consideration of the impact of storm water runoff on Lanigan Brook.

***15** As noted earlier, we granted summary judgment to Willamette on this issue in our October 21, 1997 Opinion and Order. But in that same decision, we reserved our power to bestow equitable relief on Appellants if we were persuaded that the appeal required such treatment. **Belitskus**, 1997 EHB at 951- 52. The Herr case we cited for this proposition has since been reviewed by Commonwealth Court, Pequea Township v. Herr, ____ A.2d ____ (No. 1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998), which instructed us that we do not have judicial powers to act in equity but do have the power to substitute our discretion for that of the Department when we find that it has been abused. This includes the "power to modify the department's action and to direct the department in what is the proper action to be taken." Pequea Township, slip op. at 15.

Here we have determined that the Department abused its discretion with regard to its review of Willamette's compliance history and have exercised our own discretion on that issue. That abuse of discretion does not involve any impact on the water quality of Lanigan Brook, and we have no justifiable basis for revisiting that issue after having granted summary judgment to Willamette. Nevertheless, at the risk of being criticized for rendering an advisory opinion, we are induced by the circumstances of this appeal to consider the issue on the basis of the current record.

Appellants were not represented by legal counsel at the time we entered summary judgment for Willamette and were clearly prejudiced by that fact. While litigants assume the high risk of failure whenever they choose to proceed pro se, we believe these particular individuals may not have fully appreciated the extent of the risk until after our October 21, 1997 Opinion and Order was

issued. They retained legal counsel promptly thereafter and were represented throughout the remainder of the proceedings.

It is clear that Appellants' chief concern is what they perceive to be a threat to the brook that is the focus of their recreational and environmental interests which, as we have held, gives them standing in this appeal. The other persuasive factor is the body of scientific evidence that was presented at the hearing. Appellants presented it for the purpose of proving standing although, as noted earlier, it was unnecessary for that purpose. Willamette responded with its own scientific evidence. As a result, the record is sufficient for us to adjudicate the issue.

Both **Belitskus** and Housler testified to changes in Lanigan Brook after the Chip Plant was built in 1993. By 1995 the water appeared orange-red and contained bark chips, wood particles, sedimentation, foam and white scum. (N.T. at 21, 28, 66, 68-69.) Housler experienced fewer bites when fishing and his enjoyment of the sport in Lanigan Brook diminished. (N.T. at 40, 61.)

Dr. Hutchinson got into the case very late, visiting the site less than a month before the hearing commenced. (Exhibit A-3 at 1.) While he personally took some field measurements at several locations, he did not take any water samples. These were taken on January 20, 1998 by Charlene Ann Sheppard, a science teacher, under the supervision of **Belitskus.** (N.T. at 164, 167.) The manner of taking the samples, the details of their preservation, and their chain of custody cannot be substantiated by Hutchinson or any other highly- trained expert.

***16** Based on his own field measurements and the results of the water sampling, Hutchinson concluded that "two discharge areas considered to be downgradient of the site showed some impact from site operations" with "elevated levels of conductivity, pH, turbidity and organic acids and depressed levels of dissolved oxygen." (Exhibit A-3 at 5.) In his words, there was "something" in the water which he attributed to runoff from the Chip Plant site. (N.T. at 166, 174-75.)

While Hutchinson's investigation suggests the presence of constituents in Lanigan Brook that could adversely affect its water quality, there is no scientific data to show the background quality of the stream before the Chip Plant was built. Moreover, Hutchinson acknowledged in his report and at the hearing that, because of winter conditions, his field measurements could be spurious and his conclusions false. (N.T. at 200.) The claim that the waters are degraded, thus, hangs by a very slender scientific thread.

Contrary testimony from David C. Hails, an expert in aquatic surveys, maintains that the constituent levels found in the water samples do not show any impact on Lanigan Brook. (N.T. at 334.) This seems to be confirmed by the testimony of Steven Kepler, a fish biologist with the Pennsylvania Fish and Boat Commission, who conducted electrofishing [FN8] at two locations on Lanigan Brook on September 23, 1997. Wild brook trout and brown trout of varying sizes were found indicating a viable reproducing trout population. (Joint Exhibit G.) As Kepler explained, the numerous size classes indicate "a fairly good system." (N.T. at 310.) It is hard to believe that this fairly good system for trout that was present in September 1997 was degraded by January 1998.

Weighing all of the evidence, we are convinced that Appellants have not shown any adverse impact on the water quality of Lanigan Brook. The argument that the degradation may be taking place so slowly as to be as yet scientifically undetectable is too speculative to give serious consideration.

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(Cite as: 1998 WL 525574, *16 (Pa.Env.Hrg.Bd.))

Housler's and **Belitskus'** observations, while sincere, cannot be given much weight without scientific data to support them, especially since the conditions observed can be explained by factors unrelated to runoff from the Chip Plant. (N.T. at 330, 334-345.) In addition, their observations relate to changes that began in 1993 and were very apparent by 1995, long before the Storm Water Permit was issued in August 1996. The cause, obviously, was something other than the activities authorized by the Storm Water Permit.

Since the scientific evidence before us fails to show any adverse impact to Lanigan Brook and since Housler's and **Belitskus'** observations relate to conditions existing prior to the issuance of the Storm Water Permit, we find no basis for remanding the matter to the Department for reconsideration.

CONCLUSIONS OF LAW

1. Mr. **Belitskus** and Mr. Housler have standing to challenge the Department's approval of coverage under the Storm Water Permit because storm water runoff from the Chip Plant may adversely affect their use and enjoyment of Lanigan Brook. Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975); Barshinger v. DEP, 1996 EHB 849; Pohoqualine Fish Association v. DER, 1992 EHB 502; and Heasley v. DER, 1991 EHB 1758.

***17** 2. Because Appellants' Post-hearing Brief fails to address Mrs. Housler's standing, Appellants have waived that issue. Lucky Strike Coal Co. v. Department of Environmental Resources, 547 A.2d 447 (Pa. Cmwlth. 1988).

3. The Department's regulation at 25 Pa. Code s 92.83(b)(2) requires that the Department deny any application for coverage under a general permit when the discharger has a significant history of noncompliance with a prior "permit" issued by the Department. This means that, in this case, the Department had to consider any and all permits issued by the Department to Willamette for any site in the state. **Belitskus** v. DEP, 1997 EHB 939.

4. The Department's contrary interpretation of 25 Pa. Code s 92.83(b)(2) is clearly erroneous because it conflicts with section 609 of the Clean Streams Law; therefore, it is not to be given controlling weight in this case. Department of Environmental Protection v. City of Philadelphia, 692 A.2d 598 (Pa. Cmwlth. 1997).

5. The Department's contrary interpretation of 25 Pa. Code s 92.83(b)(2) is inconsistent with the plain language of the regulation; therefore, it is not to be given controlling weight in this case. Id.

6. The Department misapplied 25 Pa. Code s 92.83(b)(2) because it did not consider any and all permits issued by the Department to Willamette for any site in the state before approving coverage under the Storm Water Permit.

7. The Department abused its discretion in approving coverage under the Storm Water Permit because it misapplied 25 Pa. Code s 92.83(b)(2).

8. Where the Board finds that the Department has abused its discretion, the Board may properly substitute its discretion for that of the Department based upon the record made before it. Pequea Township v. Herr, ____ A.2d ____ (No. 1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998); Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources, 341 A.2d 556 (Pa. Cmwlth. 1975.)

9. The violations of law set forth in Appellants' Exhibits 23-49 are related to specific permits issued by the Department; therefore, the exhibits are relevant here.

--EHB--
(Cite as: 1998 WL 525574, *17 (Pa.Env.Hrg.Bd.))

10. The Department shall not issue a permit under the Clean Streams Law if the applicant has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. Where the Department is satisfied that the applicant's past or continuing unlawful conduct has been or is being corrected, the Department may issue the permit. 35 P.S. s 691.609.
11. Because the record establishes that, when the Department approved coverage under the Storm Water Permit on August 14, 1996, Willamette did not lack the ability or intent to comply with the law and any problems were being corrected to the satisfaction of the Department, we conclude that Willamette did not have a significant history of noncompliance with prior permits issued by the Department.
12. Because Willamette's past and continuing violations do not indicate that Willamette cannot be trusted with a permit and do not constitute a significant history of noncompliance with prior permits issued by the Department, the Board will not disturb the Department's decision to approve coverage under the Storm Water Permit.
***18** 13. Ordinarily, the Board will not revisit an issue on equitable grounds after granting summary judgment on that issue; indeed, the Board lacks judicial power to act in equity. However, because the Board may substitute its discretion for that of the Department when the Board finds that the Department abused its discretion, because Appellants were not represented by legal counsel when the Board entered summary judgment, and because the parties presented sufficient scientific evidence on the issue, the Board concludes that it is proper to consider whether storm water runoff from the Chip Plant has harmed Lanigan Brook.
14. Weighing the evidence presented at the hearing, the Board concludes that there is no adverse impact on Lanigan Brook from storm water runoff associated with activities at the Chip Plant authorized by the Storm Water Permit.

ORDER

AND NOW, this 20th day of August, 1998, it is ordered that the above-captioned appeal is dismissed.

George J. Miller
Administrative Law Judge
Chairman

Robert D. Myers
Administrative Law Judge
Member

Thomas W. Renwand
Administrative Law Judge
Member

Michelle A. Coleman
Administrative Law Judge
Member

--EHB--
(Cite as: 1998 WL 525574, *18 (Pa.Env.Hrg.Bd.))

FN1. Appellants retained legal counsel who entered an appearance with the Board on October 27, 1997.

FN2. Buck Run eventually runs into the West Branch of the Clarion River. (N.T. at 43.)

FN3. Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. ss 691.609.

FN4. Appellants contend that the record contains evidence that the Department conducted no compliance history review at all. See Appellant's Post-hearing Brief at 44-47. We need not determine whether the Department did or did not conduct a compliance history review. In either case, the Department failed to comply with 25 Pa. Code s 92.83(b)(2).

FN5. In our October 21, 1997 Opinion and Order, we stated that, in order to prove that Willamette had a significant history of noncompliance with prior permits issued by the Department, Appellants have to: (1) relate any alleged violation of law to a specific permit issued by the Department; and (2) establish the severity of the violations. **Belitskus**, 1997 EHB at 957.

FN6. It seems self-evident that the "recovery furnace" is related to the "recovery boiler."

FN7. Appellants ask the Board to hold, as a matter of law, that a long series of permit violations and large civil penalties attributable to negligence or to behavior that is not even "blameworthy" is sufficient to establish that Willamette is unable to comply with the law and, therefore, cannot be trusted with a discharge permit. (Appellants' Post-hearing Brief at 35-36, 43.) However, this formulation of the law fails to take into account the severity of the permit violations, Willamette's efforts to correct its unlawful conduct, and the Department's satisfaction with those efforts.

FN8. This is a procedure whereby fish are stunned by electric current, then examined, identified and counted by trained individuals.
1998 WL 525574 (Pa.Env.Hrg.Bd.)
1998 WL 525574 (Pa.Env.Hrg.Bd.)
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106TH CASE of L...l 1 printed in FULL format.

ALASKA CLEAN WATER ALLIANCE, ALASKA CENTER FOR THE ENVIRONMENT, and TRUSTEES FOR ALASKA, Plaintiffs, v. CHARLES C. CLARKE, Administrator, U.S. Environmental Protection Agency, Region X, the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION X, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.

NO. C96-1762R

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE DIVISION

1997 U.S. Dist. LEXIS 11144; 45 ERC (BNA) 1664; 27 ELR 21330

ORIGINAL: 1975
MIZNER
COPIES: Wilmarth
Jewett
Sandusky
Legal

July 8, 1997, Decided
July 8, 1997, FILED; July 8, 1997, ENTERED

DISPOSITION: [*1] Plaintiffs' motion for summary judgment DENIED as to Claim I and GRANTED as to Claim II. Defendants' cross-motion for summary judgment GRANTED as to Claim I and DENIED as to Claim II.

COUNSEL: For ALASKA CLEAN WATER ALLIANCE, ALASKA CENTER FOR THE ENVIRONMENT, TRUSTEES FOR ALASKA, plaintiffs: Todd D. True, SIERRA CLUB LEGAL DEFENSE FUND, SEATTLE, WA. Stephen Koteff, TRUSTEES FOR ALASKA, ANCHORAGE, AK. Eric Paul Jorgensen, SIERRA CLUB LEGAL DEFENSE FUND, JUNEAU, AK.

For CHARLES C CLARKE, Administrator, United States Environmental Protection Agency, Region X, ENVIRONMENTAL PROTECTION AGENCY - REGION X, ENVIRONMENTAL PROTECTION AGENCY, defendants: Brian C Kipnis, U. S. ATTORNEY'S OFFICE, SEATTLE, WA. Michael James Sevenbergen, US DEPARTMENT OF JUSTICE c/o NOAA/GCNW, SEATTLE, WA.

JUDGES: BARBARA JACOBS ROTHSTEIN, UNITED STATES DISTRICT JUDGE

OPINIONBY: BARBARA JACOBS ROTHSTEIN

OPINION: ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on cross-motions for summary judgment. Having reviewed the motions together with all documents filed in support and in opposition, having heard oral argument, and being fully advised, the court finds and rules [*2] as follows:

I. FACTUAL BACKGROUND

Plaintiffs Alaska Clean Water Alliance and Alaska Center for the Environment are nonprofit environmental organizations whose mission is to protect Alaska's water quality. Plaintiff Trustees for Alaska litigates cases on behalf of groups interested in environmental issues. Defendants are the United States Environmental Protection Agency (EPA), the EPA's administrator and its Region X office (collectively "EPA").

The underlying facts are undisputed. The Clean Water Act (CWA), 33 U.S.C. @@ 1251-1387, is a comprehensive statute intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. Section 101(a), 33 U.S.C. @ 1251(a). Pursuant to the CWA, each state must complete a triennial review of water quality standards and then submit any new or revised standards to EPA for its review. Section 303(c)(1) and (2), 33 U.S.C. @ 1313(c)(1) and (2).

In July of 1993, Alaska announced an intent to revise certain standards. Numerous organizations, including plaintiffs in this case, filed opposition to the proposed revisions. [*3] On December 5, 1993, the proposed standards were certified and filed as state regulations. On January 26, 1995, the Alaska Department of Environmental Conservation formally submitted the regulations to EPA for review as required under section 303(c)(2) of the CWA. 33 U.S.C. @ 1313(c)(2). n1

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n1 On September 26, 1996, Alaska submitted to EPA some additional water quality standards which had been adopted on February 14, 1996. These additional revisions were in response to comment and criticism received from environmental organizations about the original proposals.

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Section 303(c)(3), 33 U.S.C. @ 1313(c)(3), provides that, after a state has submitted officially adopted revisions of water quality standards for EPA review, EPA must either notify the state within sixty days that the revisions have been approved or indicate within ninety days that they have been disapproved. When EPA had still not acted to approve or disapprove Alaska's new regulations by November of 1996, plaintiffs filed suit against EPA to force [*4] a decision.

On January 30, 1997, the court issued a minute order declining to schedule a trial in this case and directing the parties to file summary judgment motions by April 17, 1997. On April 7, 1997, ten days before the summary judgment motion filing deadline, EPA issued a letter approving all of Alaska's revised water quality standards with one exception not relevant to this litigation. The parties thereafter filed cross-motions for summary judgment which are now pending before the court.

II. LEGAL DISCUSSION

A. Claim I

Plaintiff's first claim is that EPA failed to carry out its mandatory duty to review and approve or disapprove the proposed revisions in a timely fashion. EPA acknowledges the duty, but argues that the claim has been mooted by the April 7, 1997 letter approving the standards.

Plaintiffs respond that the claim is not moot because EPA still has to complete consultation with the United States Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act (ESA). Final approval is conditional on successful conclusion of ESA consultation. EPA

1997 U.S. Dist. I S 11144, *; 45 ERC (BNA) 1664

standards from those in effect under the CWA. While recognizing that section 510 prohibits this result, EPA argues that the lowered standards can still become effective immediately because states typically rescind their existing standards before adopting new ones. Thus, according to EPA's interpretation, the lower standards are acceptable under section 510 since no standards are in effect at the time under the CWA. Given that the stated purpose of the CWA is to eliminate discharge of pollutants from all waters, the court finds it extremely dubious that Congress could have intended such a result.

Finally, EPA raises the spectre of practical difficulties which would ensue if the court were to accept plaintiffs' interpretation of section 303(c)(3). While EPA's concerns may have some merit, they are more appropriately addressed to Congress. This court's role is to construe the language which Congress saw fit to enact in the CWA, not to weigh in on the question of how best to achieve the goals of the CWA.

III. CONCLUSION

Plaintiffs' motion [*13] for summary judgment is DENIED as to Claim I and GRANTED as to Claim II. Defendants' cross-motion for summary judgment is GRANTED as to Claim I and DENIED as to Claim II.

DATED at Seattle, Washington this 8th day of July, 1997.

BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT JUDGE

PA Dept. of Environmental Protection 15th Fl, RCSOB 400 Market St. PO Box 2063, Harrisburg PA 17105-2063

Pennsylvania Department of Environmental Protection

FAX

Date/Time: 11/18 - 10:45

Number of pages including cover sheet: 8

To: John Jewett

Phone:

Fax phone:

CC:

From: Sharon Freeman

Phone: 717-

Fax phone: 717-783-8470

REMARKS: ☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

FACSIMILE COVER PAGE

To :	**John Jewett Fiona Wilmarth**	**From :**	**Krista Jones**
Sent :	**12/1/98 at 11:28:32 AM**	**Pages :**	**5 (including Cover)**
Subject :	**Water Quality comments**		

I was wondering if you ever received a copy of our comments, which we submitted to the EQB regarding Water Quality Amendments, Ch. 92, (et al), particularly the sections that address NPDES Stormwater Permits for Construction Activities as required for oil and gas extraction activities. I'm pleased with your comments on this matter, but notice you reference POGA comments. Perhaps we did not take the proper channels in getting our ideas to you.

I would appreciate your suggestions for future contacts. Please contact me at 232-0137.

Thanks for your help and keep up the consistently fine work that you folks generate.

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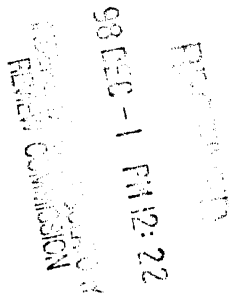

Louis D. D'Amico
Independent Oil and Gas Association of PA
234 State Street
Harrisburg, PA 17101

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Legal

October 28, 1998

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

Re: Comments on Proposed Rulemaking for Water Quality Amendments
(25 PA Code, Chapters 92, 93, 95, 96, and 97)

Dear Board Members:

The Independent Oil and Gas Association of Pennsylvania (IOGA) supports the Department of Environmental Protection's efforts to streamline and update regulatory requirements for NPDES permitting, water quality standards development and water quality standards implementation. IOGA is a non-profit trade association that represents the natural gas and oil producing industry in Pennsylvania. Its member companies drill wells, produce and market natural gas, and service the industry to provide a valuable, clean-burning source of energy.

Many of the proposed revisions to Pennsylvania's water quality program represent improvements in clarity and organization. Streamlining the administrative aspect of environmental regulatory compliance is an important step towards fostering truly responsible management of our natural resources.

We support the Department's effort to limit extended NPDES permit reporting and public notification requirements. Repetitive permitting tasks and unwarranted delays do nothing to protect the environment; on the contrary, they waste time, energy and money. Pennsylvania's economy relies on the ability of its business and industry to function efficiently, responsibly and competitively. Consolidation and elimination of overlapping reporting requirements in the permitting process make good economic and ecological sense.

However, this regulatory package (specifically, Chapter 92, National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance) contains a glaring omission, which, if left uncorrected, could have serious detrimental effects on our industry in the very near future. Activities associated with natural gas and oil producing operations are currently subject to NPDES stormwater permit requirements, although the identical activities are exempt from permitting for the silviculture industry. Sections 92.4(a)(1) and 92.4(a)(2) provide exclusions from NPDES permit requirements for pollutants from non-point source agricultural activities and silvicultural activities. Natural gas and oil producing activities that are identical to those defined as non-point silvicultural activities in Section 92.1 – i.e., construction of temporary access roads and other earth moving

activities from which there is (the potential for) runoff -- should be added to the exclusions from NPDES permit requirements. Currently, the regulations represent unjustified favoritism and special treatment for the logging industry. If the current exclusions are environmentally valid, they should be extended to include identical activities of the natural gas and oil producing industry.

Although current NPDES stormwater permitting for construction activities applies to earth disturbances larger than five acres, EPA has proposed expanding the NPDES permitting program to include operations that disturb one acre or more. If adopted, this rule would cause serious problems for Pennsylvania's natural gas producing industry. Without the specific exclusions that are now afforded to the silviculture industry, EPA's proposed stormwater permit rules could apply to virtually every new well site. The resulting delays in operations would severely cripple Pennsylvania's production of natural gas.

In proposing the rule change, EPA cited a growing concern over pollution from urban stormwater runoff; its rationale was not based on evidence of excessive pollution from rural stormwater runoff related to oil and gas construction activities. Without some corrective action by the state to prevent this unfortunate oversight, Pennsylvania could be hurt economically and hampered in its efforts to meet new federal air quality mandates. From a more holistic perspective, it seems counter-productive to stymie an industry that plays such an important role in providing Pennsylvania with a valuable, clean-burning energy source.

In addition to highlighting these concerns, IOGA wishes to submit the following comments on other aspects of the proposed rulemaking contained in Chapters 92, 93, 95, 96 and 97 of the Pennsylvania Code.

92.41 Monitoring:

IOGA agrees with the statement by the Water Resources Advisory Committee (WRAC) that DEP should not require additional monitoring beyond that required by the NPDES permit unless the additional monitoring has been made a condition of that permit. The purpose of Section C (Required and Optional Chemical Analysts) of the NPDES permit application is to initially identify any problem pollutants. At that point, DEP should regulate the pollutants by establishing limits and monitoring requirements or by adding a special permit condition for additional monitoring. Since any change in the permitted facility, such as production increases or process modifications, requires dischargers to notify DEP, as stated in 92.7, no additional pollutant analyses should be required of dischargers who make no changes to their operations. In the event that new regulations would take effect, 92.8(a) already requires permitted facilities to take steps to comply with the new water quality standards or treatment requirements.

92.61 Public Notice of Permit Applications and Public Hearings

We agree with the Department's decision not to add an additional public notification and comment period before an NPDES permit is submitted for review.

Publication of the intent to apply for an NPDES permit under Section 307 of the Pennsylvania Clean Streams Law and notification of Municipal and County officials under Act 14 already give the public adequate time to comment. Since the Department requires a notarized copy of the newspaper notice and statement of publication dates be sent with the permit application, the public is guaranteed a 30-day notification period to express any interest or concerns with the permit application.

92.8(c) Changes in Treatment Requirements:

If the proposed regulation is adopted and NPDES dischargers are required to meet more stringent effluent limitations when a potable water supply is identified, then the discharger must be notified as early as possible in order to make timely changes to achieve compliance. We suggest that the NPDES permittee be notified immediately whenever an application for a Water Allocation Permit is submitted to the Department or when the State Water Plans are updated and new potable water supplies are identified.

93.4 Statewide Water Uses:

We agree with members of the WRAC and the RBI report that the Potable Water Supply (PWS) criteria should be applied only at the point of potable water withdrawal and that the statewide PWS use should be removed. Proposed paragraph 92.5(c) states that whenever a new potable water supply is identified, the discharger "shall meet more stringent effluent limitations needed to protect the point of withdrawal." Therefore, the rationale that maintaining the statewide PWS use is necessary to prevent degradation of water quality should the body of water be used for drinking water in the future is not applicable.

Chapter 96. Definitions:

A general explanation of the term "effluent trading" as it applies to implementation of Pennsylvania's water quality standards should be included in the definitions.

96.4(k) Total Maximum Daily Loads:

This proposed requirement may impose undue economic hardship on smaller dischargers if there are a number of pollution sources (point and non-point) contributing to a receiving stream segment which must be analyzed to develop TMDLs. Also, the phrase "to determine their (MDL) effectiveness" is highly subjective language, open to broad interpretation that could result in additional costs. If one of the goals of this regulatory reevaluation is to ensure "that pollution control costs are equitably distributed," then the Department, not the individual dischargers, should assume the costs of determining TMDLs. Development and documentation of the TMDLs should be the responsibility of the Department. As outlined in 96.4(1), anyone challenging a TMDL determination should by required to assume the burden of proof. The state should only require a discharger to determine the TMDL of a receiving stream if the discharger disagrees with the TMDL assigned by the State.

Thank you for the opportunity to comment on the proposed changes to these regulations.

Sincerely,
IOGA of Pennsylvania

Louis D. D'Amico
Executive Director

Cc: Independent Regulatory Review Commission
Chair, PA Senate Environmental Resources and Energy Committee
Chair, PA House Environmental Protection Committee

Randall G. Hurst, Esq.

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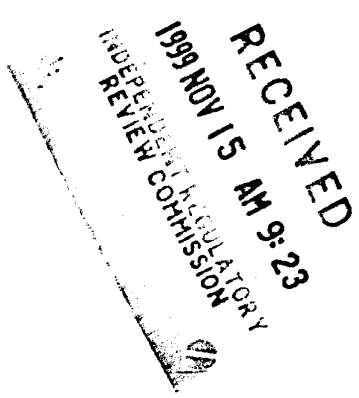
November 12, 1999



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Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, PA 17101

Gentlemen:

Re: DEP ANFR
Pa Code Title 25, Chapters 16, 92, 93, 95, 96 & 97

Enclosed are comments I have provided to the Department of Environmental Protection regarding the referenced rulemaking. I would like to call your attention especially to the comments manually indicated with an arrow, as these issues are those with which the IRRC is particularly concerned. The most important of these are two: the second comment (starting at the bottom of page 1) and the fifth (first full comment on page 4). The first-mentioned involves a significant change in regulations that affect over 400 municipal wastewater treatment plants. To abide by the new rule to reduce all pollutants "to the maximum extent practicable" would cost tens, if not hundreds of millions of dollars. DEP has not provided an economic analysis of this most onerous new rule. I hope that you will remind DEP of its duty to assess the economic impact of major new regulations.

The second most important comment regards DEP's attempt to deny due process mandated by the Clean Streams Law. The proposed rule at §92.93 is self-explanatory and requires correction to be in accord with the statute.

In the past, it has been my experience that DEP has not been very responsive to comments unless the IRRC took an interest. I hope that you will find these comments relevant to your role in regulatory oversight, and that you will include these important issues in your comments to DEP on this rulemaking.

If you wish to discuss any of the comments, I can be reached at the number above during normal working hours.

Very truly yours,

Randall G. Hurst

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COMMENTS ON ADVANCED NOTICE OF FINAL RULEMAKING
25 PA CODE CHAPTERS 16, 92, 93, 95, 96 & 97

Prepared by Randall G. Hurst, Esq.

INTRODUCTION

The 9/18/99 revised version of this proposed rulemaking is significantly improved over the initial 1998 draft. Many substantive concerns expressed in the comments have been addressed. However, the proposed final version still requires correction to be technically correct, practical and implementable, and to meet the goals of the Regulatory Basics Initiative. Given the emphasis placed on the RBI by Secretary Seif and other top officials, it is somewhat disheartening to see the actual rulemaking process continue to defy these admirable and worthwhile goals. In particular, the proposal to add extensive new requirements to the Secondary Treatment rules (proposed §92.2c(b)) is especially troublesome, especially when the potential effect of the proposal — significant additional cost to Pennsylvania municipalities — has received no consideration by DEP.

The comments below were prepared with the interests of the members of the Pennsylvania Water Environment Association in mind. Due to the very limited time allowed for review of these complex rules and development of comments, however, there was insufficient time to both prepare the comments and provide for the Association to review and approve them. Therefore, the comments are my own, and do not represent the position of the PWEA or its members.

COMMENTS

Comments on Proposed Chapter 92

→ **§ 92.2(a) Improper delegation of State Authority to a Federal Agency.** The proposed regulation will incorporate all federal regulations, "including all . . . future amendments . . . ." This language appeared in the initial draft and I provided a comment that the Department may not delegate its rulemaking authority to a federal administrative agency. Doing so is an apparent violation of Tenth Amendment state sovereignty. Surprisingly, DEP failed to acknowledge this comment or to respond to the issue in any way. Merely ignoring a problem, however, does not make the problem disappear. The concern remains that if EPA promulgates changes to the federal regulations, and DEP fails to take appropriate rulemaking actions to adopt these changes into the Pennsylvania rules, a serious issue will arise as to whether the new EPA rules are applicable and enforceable by DEP, and as to whether the failure to adopt the new rules in an enforceable fashion is a violation of the MOU between EPA and DEP. The clause cited increases the risk that DEP will fail to follow the appropriate rulemaking procedures under the mistaken impression that it need not do so, risking its enforcement authority and inviting litigation.

→ **§ 92.2c (b)(4) Unlimited expansion of Secondary Treatment Requirements.** Federal secondary treatment standards only establish discharge limitations for BOD (and C-BOD), TSS,

and pH. The current State secondary treatment standards at §95.2(b) exceed the federal requirements, adding requirements for disinfection, sludge disposal, and for reduction of the discharges of oils, greases, acids, alkalis, toxics, and taste and odor producing substances so as not to cause pollution. Although not addressed in DEP's sparse discussion documents, it was apparently the determination of DEP that easing the existing rule to make it consistent with the federal rule (a major goal of the Regulatory Basics Initiative) was not appropriate. However, DEP was not content to leave the rule alone: the proposed regulation represents a significant expansion of the rule, in a manner that is of great concern.

The proposed rule amends the current rule regarding the reduction of polluting substances to say "Reduction to **the maximum extent practicable** of the discharge of oils, greases, acids, alkalis and toxic, taste or odor-producing substances inimical to the public interest." In addition to the obvious conflicts with the goals of the RBI (primarily the goals to improve clarity and to make rules more compatible and not more onerous than the EPA rules), there is a significant practical problem with the proposed rule. The rule change is significant in that it replaces an acceptable, performance-based standard, with a vague mandate to implement the best technology available, regardless of necessity or environmental benefit, and possibly without regard to cost.

• The proposed rule establishes an impermissibly vague standard of performance unrelated to environmental protection

In this rule, DEP proposes to replace an acceptable environmental protection-based standard — "which will not pollute the receiving stream" — with a general guideline consisting of the mandate, "reduction to the maximum extent practicable." Obviously, this is unrelated to environmental protection, since discharges of small amounts of many substances, including the so-called toxics (many of which are, in fact, important micro-nutrients), has no environmental impact. DEP has provided no guidance on, nor even a general discussion of, what it intends this important new term to mean. Is it intended to be the POTW equivalent of BAT, or will it go beyond that standard? Will the determination of the "practicable" include the consideration of costs, efficacy, and availability of funds to construct additional treatment units? How is the "maximum extent" determined? What will DEP use in deciding if the performance of a particular POTW is deficient? Simply stating that one must do the "maximum" is not setting a standard, it is simply a vague hope, one that cannot meet the minimum requirements for a regulation, especially one that will be enforceable against hundreds of POTWs across the Commonwealth.

• The proposed standard is in fact a pollutant elimination requirement, not a secondary treatment standard, and cannot be met by most POTWs without extensive (and expensive) modifications. Since literally all substances in the known universe are defined as "toxic" under the DEP definition (e.g., air, pure water and sand are "toxic"), this new regulatory requirement will in effect add a "minimization of all substances" requirement to the secondary treatment standards. Even if the more rational Clean Water Act definition of toxics (limited to the 136 listed substances) was intended, the scope of this new rule remains extremely broad. Simply put, this is not a secondary treatment requirement, but a virtual pollutant elimination requirement. It goes far beyond the concept of secondary treatment envisioned in the Clean

Water Act, and attempts by subterfuge to reinstate the requirement that appeared in the first draft of the regulations in section 92.41(b), which was deleted from the proposed final rule in response to comments. It is not only unreasonable to add such a broad requirement to the definition of secondary treatment, it is in fact irrational to try to radically change the treatment capabilities of hundreds of existing POTW secondary treatment plants simply by changing a regulatory definition.

• **The rule could impose millions of dollars in additional treatment costs to Pennsylvania municipalities.** It is an unfortunate fact that regulatory agencies often believe that cost burdens to municipalities are not worthy of consideration in determining if technologies are "practicable," and only technological feasibility is meaningful. If this is so, then the broad-brush regulation proposed could impose tens of millions of dollars of unfunded treatment costs on the municipalities of the Commonwealth, ironically just at the time that the Secretary is campaigning to reduce the amount of state funding provided to these same municipalities under the Act 339 program. In spite of the potentially massive increase in costs, *DEP has provided no financial analysis of the potential impact of this extensive new regulatory requirement.*

→ **§ 92.7. Reporting of New Pollutants Requirement is Too Vague to Comply With.** Typically, when NPDES Permits are issued, the DEP permit engineer reviews all of the pollutants reported as being present in the effluent, and determines which, if any, of these pollutants require regulation or monitoring through the imposition of effluent limitations. The proposed rule would require obtaining a new or revised NPDES Permit when a "new pollutant not covered by the NPDES permit" is proposed to be discharged. It is impossible to determine what this requirement is supposed to mean. If a pollutant was reported as present in the most recent permit application, but is not regulated by a discharge limit, is it a "new pollutant?" Or is a "new pollutant" only one that was not previously reported as present? More importantly, what is meant by "covered by the NPDES permit?" If a pollutant was evaluated during the Permit development process and no effluent limitation is required, is it "covered?" If so, how does a permittee determine which pollutants were evaluated?

While the apparent intent of the new requirement — at least as I interpret it — is acceptable, the requirement must be stated in a sensible fashion that the regulated community and the Department's many regulators can understand to mean one thing. The rule as proposed is open to multiple interpretations, potentially leading to unnecessary confrontation and litigation to determine its meaning. One ostensible goal of the Regulatory Basics Initiative was to "clarify" regulations; this proposed rule would establish a rule subject to many different and equally reasonable interpretations, inviting confusion, not clarity.

§ 92.21a(f)(1) Information to be Submitted by CSO dischargers to Include All Stormwater Inlets. The proposed requirement would mandate that all CSO dischargers identify all of the points of **inflow** into combined systems. Since even in small cities, this may involve hundreds of

inflow points, this requirement is senseless. What use would hundreds of pages listing all of the stormwater inlets in the City of Philadelphia be to DEP? How would this mass of information enhance the permit development process? Perhaps the drafters intended to require the identification of the points of DISCHARGE (i.e., the CSOs) in the combined system?

→ **§ 92.93 Procedure for assessment of a civil penalty violates the specific provisions of the Clean Streams Law.** The Clean Streams Law specifies that the Department may assess a civil penalty "after hearing." 35 P.S. §691.605. The proposed regulation would allow DEP to assess a civil penalty **without a hearing** unless the person assessed "serves" DEP with a "request" to hold a hearing, using a particular method of notice, within 30 days. This is too obvious a statutory violation to require additional comment.

Comments on Proposed Chapter 93

§93.7, Bac1 and Bac2 standards establish extremely low limits for bacteria during the non-contact season. The Bac1 proposal purports to establish a maximum discharge standard during periods of no public exposure of 2000 per 100 ml as a geometric mean. While questionably low from an environmental protection standpoint, this limit does not present a practical difficulty for treatment plants. However, in fact, **the actual regulatory limit is less than 700,** an unnecessarily low limit. This is because the standard also provides that no more than ten percent of the samples may exceed 400. **Mathematically, if nine samples gave the maximum result of 400, and the tenth sample is 100,000 (the highest result typically encountered) the geometric mean is 695.** (The single maximum would have to be 3.98 billion to result in a geometric mean of 2000!) Thus, the rule does not establish a discharge standard of 2000, but effectively establishes a non-contact season fecal coliform limit of no more than 700 (as a geometric mean). Whether this irrational rule is an attempt to camouflage a proposal to establish a non-contact limit of 700, or simply the result of innumeracy on the part of the drafters is not apparent. In any event, the current rule setting the geometric mean at 2000 and restricting the maximum discharge to no more than ten percent of results above 10,000 is fully adequate to provide protection during the non-contact season. Since DEP provided no information supporting the new significantly more stringent limits, nor any analysis of the additional costs to achieve the increased disinfection limits for the several hundred affected POTWs, the new rule violates the spirit and letter of the RBI as well as concepts of rational rulemaking.

It is possible that the figure was intended to be 4000, not 400 (this would provide a mathematically possible scenario). If so, the error illustrates the validity of the comment I provided on the initial proposal, in which I noted that spelling out numbers, as proper English grammar dictates, results in fewer errors than using numerals.

Comments on Proposed Chapter 95

§95.2(1) Prohibits discharges of industrial wastes within normal and acceptable pH range; conflicts with succeeding rule. The proposed rule would prohibit the discharge of "wastes which are acid." A pH less than 7.0 is acid. The following paragraph would allow discharges in a range of 6 to 9, with certain exceptions. So a discharge with a pH of 6.2 would be prohibited under paragraph (1) and specifically allowed under paragraph (2). Since paragraph (2) provides specific standards, paragraph (1) serves no purpose other than to totally confuse the issue. Delete paragraph (1).

Comments on Proposed Chapter 96

§96.1 Definition of Dilution Ratio is mathematically incorrect. The dilution ratio is calculated as the sum of the stream and discharge flows, divided by the discharge flow. I understand that in its models DEP actually calculates dilution ratios by dividing the stream flow by the discharge flow, *and then adding one*. That method is mathematically identical to the formula cited above. However, whether the "sum of the flows" method, or the "adding one" method is used, the regulation should specify a mathematically correct definition. Establishing a mathematically incorrect term by law with an unspoken assumption that some different calculation technique will in fact be used is irresponsible.

→ **§96.1 Definitions of Load Allocation and TMDL are incompatible.** The definition of TMDL is the sum of Waste Load Allocations, Load Allocations, and Natural Quality (plus a safety factor). The definition of Load Allocation includes both nonpoint sources and Natural Quality. Thus, a TMDL would include Natural Quality twice, once in the LA calculation and again in the TMDL summation! The TMDL definition can be easily corrected by adding the word "and" where indicated:

> "the sum of individual waste load allocations for point sources, load allocations for nonpoint sources ***and*** natural quality, and a margin of safety, expressed in terms of . . . ."

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November 16, 1999

Ms. Carole Young
Division of Assessment and Standards
Bureau of Watershed Conservation
Rachel Carson State Office Building, 10th Floor
400 Market Street
Harrisburg, PA 17101

Dear Ms. Young:

The Pennsylvania Builders Association has reviewed the Advanced Notice of Final Rulemaking for 25 PA. Code, Chapters16, 92, 93, 95, 96, and 97 and offers the following comments.

§92.8a (a) and (b) – We believe that, since construction permits are temporary in nature, they should be exempt from the requirement to comply with higher water quality standards that the Department changes once a project is underway. Any additional water quality protection would not be balanced with the environmental risks and operational effort of reworking pollution prevention measures already in place for an ongoing project.

§92.21(c) – The allowance for the Department to demand any additional data is unduly burdensome to the applicant. Worse, the regulations do not establish specific conditions under which the Department can make such a demand. The public has a right to regulatory reliability. This reliability should ensure that when an applicant meets established requirements, the Department will make a timely decision. This directionless and open-ended process fails to provide this reliability and discourages a participatory and proactive approach to environmental stewardship on the part of the applicant. We recommend that specific guidance that limits the types of information that the Department can request and defines the conditions under which DEP can request them.

§92.21(d)(1) – The Department is transferring the burden of a responsibility that should be its own to the permit applicant. Application for a permit should not subject an individual to undertaking an extensive research effort in support of the Department's regulatory program. We recommend the Department delete this section from the final regulations.

§92.41(f) – The Department provides neither the list of potential monitoring requirements nor the parameters it will use in determining the appropriateness of those requirements. The proposed regulations again unduly compromise regulatory reliability for the permit applicant. We recommend the Department specify potential monitoring requirements and establish the parameters the Department will use in deciding to require them.

§92.81(a)(8) and §92.83(b)(9) – Negotiations held in support of the Department's promulgation of antidegradation standards led to an agreement between the Department and the public that General Permits could be appropriate in special protection waters. After so recently completing that process, the prohibition of general permit applicability in special protection waters, as proposed by this ANFR, seriously undermines the integrity of the Department's regulatory dialogue process. General Permits, by regulation, are no less protective of the environment. Further, the antidegradation regulations have not been in effect long enough for the Department to have categorically determined General Permits to be inappropriate. We recommend that the Department amend the ANFR to reflect the Department's decision, made earlier this year, to allow general permit applicability in special protection waters.

Thank you for your attention to these issues. If you have any questions or concerns regarding our comments, please contact me.

Sincerely,

Mark Maurer

Mark Maurer
Regulatory Specialist

cc: Senator Mary Jo White, Chair,
Senate Environmental Resources and Energy Committee
Representative Arthur D. Hershey, Chair,
House Environmental Resources and Energy Committee,
Senator Raphael J. Musto, Minority Chair,
Senate Environmental Resources and Energy Committee
Representative Camille George, Minority Chair,
House Environmental Resources and Energy Committee,
Mr. Robert E. Nyce, Executive Director,
Independent Regulatory Review Commission

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Pittsburgh, Pa. 15217

Edward Brezina
DEP
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Harrisburg, Pa. 17105

Dear Mr. Brezina,

I am writing in regard to proposals for lowering water quality and toxics management standards. They are designed to roll back standards to the minimum level required by the the federal government. They would allow quick general permits for discharges, eliminate protection of streams as potable water sources, and reduce or eliminate standards for many toxic chemicals. I requestthat you take appropriate action to maintain standards.

Sincerely,
William Wekselman

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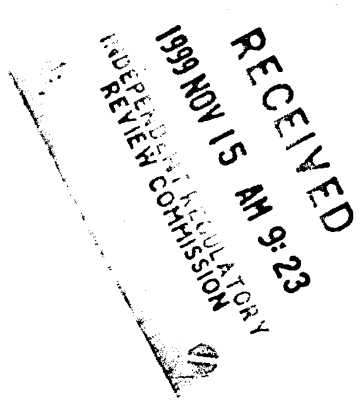
Sandusky
Legal

Randall G. Hurst, Esq.

37 South Linden Street
Manheim, PA 17545
(717) 231-5215

November 12, 1999



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Wyatte

Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, PA 17101

Gentlemen:

Re: DEP ANFR
Pa Code Title 25, Chapters 16, 92, 93, 95, 96 & 97

Enclosed are comments I have provided to the Department of Environmental Protection regarding the referenced rulemaking. I would like to call your attention especially to the comments manually indicated with an arrow, as these issues are those with which the IRRC is particularly concerned. The most important of these are two: the second comment (starting at the bottom of page 1) and the fifth (first full comment on page 4). The first-mentioned involves a significant change in regulations that affect over 400 municipal wastewater treatment plants. To abide by the new rule to reduce all pollutants "to the maximum extent practicable" would cost tens, if not hundreds of millions of dollars. DEP has not provided an economic analysis of this most onerous new rule. I hope that you will remind DEP of its duty to assess the economic impact of major new regulations.

The second most important comment regards DEP's attempt to deny due process mandated by the Clean Streams Law. The proposed rule at §92.93 is self-explanatory and requires correction to be in accord with the statute.

In the past, it has been my experience that DEP has not been very responsive to comments unless the IRRC took an interest. I hope that you will find these comments relevant to your role in regulatory oversight, and that you will include these important issues in your comments to DEP on this rulemaking.

If you wish to discuss any of the comments, I can be reached at the number above during normal working hours.

Very truly yours,

Randall G. Hurst

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COMMENTS ON ADVANCED NOTICE OF FINAL RULEMAKING 25 PA CODE CHAPTERS 16, 92, 93, 95, 96 & 97

Prepared by Randall G. Hurst, Esq.

INTRODUCTION

The 9/18/99 revised version of this proposed rulemaking is significantly improved over the initial 1998 draft. Many substantive concerns expressed in the comments have been addressed. However, the proposed final version still requires correction to be technically correct, practical and implementable, and to meet the goals of the Regulatory Basics Initiative. Given the emphasis placed on the RBI by Secretary Seif and other top officials, it is somewhat disheartening to see the actual rulemaking process continue to defy these admirable and worthwhile goals. In particular, the proposal to add extensive new requirements to the Secondary Treatment rules (proposed §92.2c(b)) is especially troublesome, especially when the potential effect of the proposal — significant additional cost to Pennsylvania municipalities — has received no consideration by DEP.

The comments below were prepared with the interests of the members of the Pennsylvania Water Environment Association in mind. Due to the very limited time allowed for review of these complex rules and development of comments, however, there was insufficient time to both prepare the comments and provide for the Association to review and approve them. Therefore, the comments are my own, and do not represent the position of the PWEA or its members.

COMMENTS

Comments on Proposed Chapter 92

→ **§ 92.2(a) Improper delegation of State Authority to a Federal Agency.** The proposed regulation will incorporate all federal regulations, "including all . . . future amendments . . . ." This language appeared in the initial draft and I provided a comment that the Department may not delegate its rulemaking authority to a federal administrative agency. Doing so is an apparent violation of Tenth Amendment state sovereignty. Surprisingly, DEP failed to acknowledge this comment or to respond to the issue in any way. Merely ignoring a problem, however, does not make the problem disappear. The concern remains that if EPA promulgates changes to the federal regulations, and DEP fails to take appropriate rulemaking actions to adopt these changes into the Pennsylvania rules, a serious issue will arise as to whether the new EPA rules are applicable and enforceable by DEP, and as to whether the failure to adopt the new rules in an enforceable fashion is a violation of the MOU between EPA and DEP. The clause cited increases the risk that DEP will fail to follow the appropriate rulemaking procedures under the mistaken impression that it need not do so, risking its enforcement authority and inviting litigation.

→ **§ 92.2c (b)(4) Unlimited expansion of Secondary Treatment Requirements.** Federal secondary treatment standards only establish discharge limitations for BOD (and C-BOD), TSS,

and pH. The current State secondary treatment standards at §95.2(b) exceed the federal requirements, adding requirements for disinfection, sludge disposal, and for reduction of the discharges of oils, greases, acids, alkalis, toxics, and taste and odor producing substances so as not to cause pollution. Although not addressed in DEP's sparse discussion documents, it was apparently the determination of DEP that easing the existing rule to make it consistent with the federal rule (a major goal of the Regulatory Basics Initiative) was not appropriate. However, DEP was not content to leave the rule alone: the proposed regulation represents a significant expansion of the rule, in a manner that is of great concern.

The proposed rule amends the current rule regarding the reduction of polluting substances to say "Reduction to **the maximum extent practicable** of the discharge of oils, greases, acids, alkalis and toxic, taste or odor-producing substances inimical to the public interest." In addition to the obvious conflicts with the goals of the RBI (primarily the goals to improve clarity and to make rules more compatible and not more onerous than the EPA rules), there is a significant practical problem with the proposed rule. The rule change is significant in that it replaces an acceptable, performance-based standard, with a vague mandate to implement the best technology available, regardless of necessity or environmental benefit, and possibly without regard to cost.

• The proposed rule establishes an impermissibly vague standard of performance unrelated to environmental protection

In this rule, DEP proposes to replace an acceptable environmental protection-based standard — "which will not pollute the receiving stream" — with a general guideline consisting of the mandate, "reduction to the maximum extent practicable." Obviously, this is unrelated to environmental protection, since discharges of small amounts of many substances, including the so-called toxics (many of which are, in fact, important micro-nutrients), has no environmental impact. DEP has provided no guidance on, nor even a general discussion of, what it intends this important new term to mean. Is it intended to be the POTW equivalent of BAT, or will it go beyond that standard? Will the determination of the "practicable" include the consideration of costs, efficacy, and availability of funds to construct additional treatment units? How is the "maximum extent" determined? What will DEP use in deciding if the performance of a particular POTW is deficient? Simply stating that one must do the "maximum" is not setting a standard, it is simply a vague hope, one that cannot meet the minimum requirements for a regulation, especially one that will be enforceable against hundreds of POTWs across the Commonwealth.

• The proposed standard is in fact a pollutant elimination requirement, not a secondary treatment standard, and cannot be met by most POTWs without extensive (and expensive) modifications. Since literally all substances in the known universe are defined as "toxic" under the DEP definition (e.g., air, pure water and sand are "toxic"), this new regulatory requirement will in effect add a "minimization of all substances" requirement to the secondary treatment standards. Even if the more rational Clean Water Act definition of toxics (limited to the 136 listed substances) was intended, the scope of this new rule remains extremely broad. Simply put, this is not a secondary treatment requirement, but a virtual pollutant elimination requirement. It goes far beyond the concept of secondary treatment envisioned in the Clean

Water Act, and attempts by subterfuge to reinstate the requirement that appeared in the first draft of the regulations in section 92.41(b), which was deleted from the proposed final rule in response to comments. It is not only unreasonable to add such a broad requirement to the definition of secondary treatment, it is in fact irrational to try to radically change the treatment capabilities of hundreds of existing POTW secondary treatment plants simply by changing a regulatory definition.

• **The rule could impose millions of dollars in additional treatment costs to Pennsylvania municipalities.** It is an unfortunate fact that regulatory agencies often believe that cost burdens to municipalities are not worthy of consideration in determining if technologies are "practicable," and only technological feasibility is meaningful. If this is so, then the broad-brush regulation proposed could impose tens of millions of dollars of unfunded treatment costs on the municipalities of the Commonwealth, ironically just at the time that the Secretary is campaigning to reduce the amount of state funding provided to these same municipalities under the Act 339 program. In spite of the potentially massive increase in costs, *DEP has provided no financial analysis of the potential impact of this extensive new regulatory requirement.*

→ **§ 92.7. Reporting of New Pollutants Requirement is Too Vague to Comply With.** Typically, when NPDES Permits are issued, the DEP permit engineer reviews all of the pollutants reported as being present in the effluent, and determines which, if any, of these pollutants require regulation or monitoring through the imposition of effluent limitations. The proposed rule would require obtaining a new or revised NPDES Permit when a "new pollutant not covered by the NPDES permit" is proposed to be discharged. It is impossible to determine what this requirement is supposed to mean. If a pollutant was reported as present in the most recent permit application, but is not regulated by a discharge limit, is it a "new pollutant?" Or is a "new pollutant" only one that was not previously reported as present? More importantly, what is meant by "covered by the NPDES permit?" If a pollutant was evaluated during the Permit development process and no effluent limitation is required, is it "covered?" If so, how does a permittee determine which pollutants were evaluated?

While the apparent intent of the new requirement — at least as I interpret it — is acceptable, the requirement must be stated in a sensible fashion that the regulated community and the Department's many regulators can understand to mean one thing. The rule as proposed is open to multiple interpretations, potentially leading to unnecessary confrontation and litigation to determine its meaning. One ostensible goal of the Regulatory Basics Initiative was to "clarify" regulations; this proposed rule would establish a rule subject to many different and equally reasonable interpretations, inviting confusion, not clarity.

§ 92.21a(f)(1) Information to be Submitted by CSO dischargers to Include All Stormwater Inlets. The proposed requirement would mandate that all CSO dischargers identify all of the points of **inflow** into combined systems. Since even in small cities, this may involve hundreds of

inflow points, this requirement is senseless. What use would hundreds of pages listing all of the stormwater inlets in the City of Philadelphia be to DEP? How would this mass of information enhance the permit development process? Perhaps the drafters intended to require the identification of the points of DISCHARGE (i.e., the CSOs) in the combined system?

→ **§ 92.93 Procedure for assessment of a civil penalty violates the specific provisions of the Clean Streams Law.** The Clean Streams Law specifies that the Department may assess a civil penalty "after hearing." 35 P.S. §691.605. The proposed regulation would allow DEP to assess a civil penalty **without a hearing** unless the person assessed "serves" DEP with a "request" to hold a hearing, using a particular method of notice, within 30 days. This is too obvious a statutory violation to require additional comment.

Comments on Proposed Chapter 93

§93.7, Bac1 and Bac2 standards establish extremely low limits for bacteria during the non-contact season. The Bac1 proposal purports to establish a maximum discharge standard during periods of no public exposure of 2000 per 100 ml as a geometric mean. While questionably low from an environmental protection standpoint, this limit does not present a practical difficulty for treatment plants. However, in fact, **the actual regulatory limit is less than 700**, an unnecessarily low limit. This is because the standard also provides that no more than ten percent of the samples may exceed 400. **Mathematically, if nine samples gave the maximum result of 400, and the tenth sample is 100,000 (the highest result typically encountered) the geometric mean is 695.** (The single maximum would have to be 3.98 billion to result in a geometric mean of 2000!) Thus, the rule does not establish a discharge standard of 2000, but effectively establishes a non-contact season fecal coliform limit of no more than 700 (as a geometric mean). Whether this irrational rule is an attempt to camouflage a proposal to establish a non-contact limit of 700, or simply the result of innumeracy on the part of the drafters is not apparent. In any event, the current rule setting the geometric mean at 2000 and restricting the maximum discharge to no more than ten percent of results above 10,000 is fully adequate to provide protection during the non-contact season. Since DEP provided no information supporting the new significantly more stringent limits, nor any analysis of the additional costs to achieve the increased disinfection limits for the several hundred affected POTWs, the new rule violates the spirit and letter of the RBI as well as concepts of rational rulemaking.

It is possible that the figure was intended to be 4000, not 400 (this would provide a mathematically possible scenario). If so, the error illustrates the validity of the comment I provided on the initial proposal, in which I noted that spelling out numbers, as proper English grammar dictates, results in fewer errors than using numerals.

Comments on Proposed Chapter 95

§95.2(1) Prohibits discharges of industrial wastes within normal and acceptable pH range; conflicts with succeeding rule. The proposed rule would prohibit the discharge of "wastes which are acid." A pH less than 7.0 is acid. The following paragraph would allow discharges in a range of 6 to 9, with certain exceptions. So a discharge with a pH of 6.2 would be prohibited under paragraph (1) and specifically allowed under paragraph (2). Since paragraph (2) provides specific standards, paragraph (1) serves no purpose other than to totally confuse the issue. Delete paragraph (1).

Comments on Proposed Chapter 96

§96.1 Definition of Dilution Ratio is mathematically incorrect. The dilution ratio is calculated as the sum of the stream and discharge flows, divided by the discharge flow. I understand that in its models DEP actually calculates dilution ratios by dividing the stream flow by the discharge flow, *and then adding one*. That method is mathematically identical to the formula cited above. However, whether the "sum of the flows" method, or the "adding one" method is used, the regulation should specify a mathematically correct definition. Establishing a mathematically incorrect term by law with an unspoken assumption that some different calculation technique will in fact be used is irresponsible.

→ **§96.1 Definitions of Load Allocation and TMDL are incompatible.** The definition of TMDL is the sum of Waste Load Allocations, Load Allocations, and Natural Quality (plus a safety factor). The definition of Load Allocation includes both nonpoint sources and Natural Quality. Thus, a TMDL would include Natural Quality twice, once in the LA calculation and again in the TMDL summation! The TMDL definition can be easily corrected by adding the word "and" where indicated:

> "the sum of individual waste load allocations for point sources, load allocations for nonpoint sources ***and*** natural quality, and a margin of safety, expressed in terms of . . . ."

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(717) 231-5215
rghurst@mette.com

lushed out of state's water pollution proposal

visions to Pennsylva-
on rules, which envi-
would expose more
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sal to drop 20 chemi-
those that must be re-
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Environmentalists' fears led to removal of recommendations

mental groups, which maintained the revisions would cause an increase in toxic chemicals being dumped into rivers and streams.

The Department of Environmental Protection acknowledged yesterday that there was reason to doubt the integrity of the two recommendations.

"Frankly, we are better off with original language," said David Hess, executive deputy secretary for policy and communications for DEP.

"We were very encouraged to hear that," said Jolene Chinchili, executive director of the Pennsylvania office of the Chesapeake Bay Foundation.

The Bay Foundation was among a handful of environmental groups across the state that testified against the proposed recommendations last week before the state Environmental Quality Board.

The organizations warned that the changes would weaken the state's water quality protection regulations.

"Toxic substances are so tremendously harmful to public health that to regulate them in a general basis" would be wrong, Chinchili said.

DEP officials denied that, but agreed there was enough confusion over some of the proposals to warrant withdrawing them, Hess said. Pennsylvania ranks No. 2 behind Louisiana for the amount of toxic chemicals released into its rivers and streams, 22 million pounds, according to EPA data.

"I guess the potential could be there for toxics to increase," Hess said.

It was doubtful, however, because the oversight built into the program and because industry would have no incentive to cut back on its water treatment processes.

Other proposed changes that environmentalists say would weaken pollution

See **RULES** / Page B2

"We were very encouraged to hear that."

— JOLENE CHINCHILI, EXECUTIVE DIRECTOR OF THE PENNSYLVANIA OFFICE OF THE CHESAPEAKE BAY FOUNDATION

#1975

THE PATRIOT-NEWS OCTOBER 30, 1998

Revisions flushed out of state's water pollution

"Frankly, we are better off with original language."

— DAVID HESS, EXECUTIVE DEPUTY SECRETARY FOR POLICY AND COMMUNICATIONS FOR DEP

BY GARRY LENTON
OF THE PATRIOT-NEWS

Environmentalists' fears led to removal of recommendations

Two proposed revisions to Pennsylvania's water protection rules, which environmentalists said would expose more people to toxic chemicals, will be withdrawn, Ridge administration officials said yesterday.

Gone are a proposal to drop 20 chemicals from the list of those that must be reported by industries, and a recommendation that would have allowed businesses to obtain a single permit for all of their toxic releases, instead of individual permits.

Both drew complaints from environmental groups, which maintained the revisions would cause an increase in toxic chemicals being dumped into rivers and streams.

The Department of Environmental Protection acknowledged yesterday that there was reason to doubt the integrity of the two recommendations.

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Other proposed changes th mentalists say would weake

See **RULES** / Page B

Freeman, Sharon

From: Marilyn Skolnick(SMTP:marilyn@concentric.net)
Sent: Thursday, October 29, 1998 11:40 AM
To: REGCOMMENTS
Subject: WaterRegs

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TO: The Environmental Quality Board
and
Edward Brezina,DEP

FROM: Marilyn Skolnick for the Sierra Club, Allegheny Group
109 South Ridge DR.
Monroeville, PA. 15146
TEL.& FAX 412-373-7714

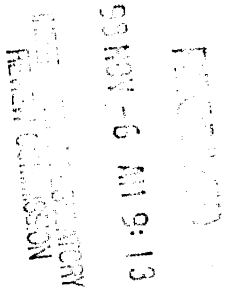
THE SIERRA CLUB Allegheny Group is opposed to the proposed changes, that would in effect weaken , the quality of our water standards and the Toxic Management Strategy.

At a time when the record shows that Pennsylvania is second in the United States for toxic discharges to our water, (about 23 million pounds of toxics) it is absolutely inappropriate to call for a weakening of our standards. If we are already polluting our water ways, why is it necessary to make it even easier to pollute.

Because the Federal Government is not doing enough to protect the public water ways is no reason for Pennsylvania to lower its standards. Instead, we should be working to improve the federal standards Remember the name of the agency is the Department of Pollution PREVENTION !

Industry already has not been regulated enough as regards human health.Let us not make it even easier for industry with these proposals.For once , please worry about the public, and not industry.

Thank you for your attention.



Freeman, Sharon

From: LCHIP(SMTP:LCHIP@aol.com)
Sent: Wednesday, October 28, 1998 9:04 AM
To: REGCOMMENTS
Subject: Revisions to Water Quality Standards

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10/26/98
Chairman James M. Seif
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477
Email: RegComments@A1.dep.state.pa.us

Layfield Family
58 Oakford Rd.
Wayne, PA 19087
Phone/Fax: 610-293-1367
Email: lchip@aol.com

Dear Mr. Seif:

As concerned citizens, regular voters, and watershed advocates, our family is commenting on the proposed changes to the water quality regulations as described in the August 29, 1998, Pennsylvania Bulletin.

Chapter 92: NPDES Permitting, Monitoring, and Compliance.

92.2d(3) The technology-based limit (0.5 mg/l) for total residual chlorine is proposed to be retained.
We support keeping the cap, since chlorine, although needed for disinfection purposes, is so toxic to aquatic life. Its discharge should be limited even if plenty of dilution exists.

92.51(6) We recommend this "narrative criterion" standard condition needs to be strengthened, stating simply that dischargers should not be permitted to violate water quality standards by their discharges.

92.61 We suggest an additional public comment period is needed when an applicant intends to submit an NPDES (discharge permit) application, as recommended by the Water Resources Advisory Committee. We believe it is important to know about specific public water quality concerns before all the calculations have been done and a draft permit published.

92.81 We feel this is a VERY BAD SECTION. "General" permits (permits with little or no oversight) would be allowed in High Quality streams, waters that are already "impaired," and would allow the discharge of toxic materials while loosening the documentation requirements.

We feel very strongly that DEP needs to retain the documentation provision to ensure water quality standards will not be violated by the use of general permits and the proposed changes should be dropped!

Chapter 93: Water Quality Standards.

93.4 DEP presently protects all our waters as potential "potable water" sources. However, DEP proposes deleting warm water fishes as a statewide water use. DEP states that aquatic life will be protected for each stream listed in the stream list, but this leaves no basement protection for any stream that for one reason or another doesn't get on the list. It just makes sense that a basement level of protection should be afforded, and warm water fishes should be retained as a statewide water use.
Because it gives our waters additional protection, we recommend the provision should be retained.

93.5(e) The current wording of this section spells out that there will be no mixing zones - "Criteria necessary to protect other designated uses shall be met at the point of wastewater discharge." This section was moved to Chapter 96, but this mixing zone statement was deleted. DEP currently allows mixing zones for every discharge, but this policy has never come under public scrutiny.

We recommend DEP should retain and implement this language, or if DEP wants to institute a mixing zone policy, then it should go out to public comment and be incorporated into policy.

93.6 One area not covered by Pennsylvania regulations is instream flow and habitat.

Because PA has no comprehensive water resources management, we recommend DEP develop instream flow and habitat criteria and incorporate them into this chapter of regulation. We also recommend that DEP include language here protecting instream flows and instream habitat.

Other states have such protection, and the U.S.Supreme Court has ruled that states are permitted to protect instream flows.

Chapter 96: Water Quality Standards Implementation.

96.4 This section gives DEP authority to approve effluent trading, with only minimal requirements. DCVA's position is that trading cannot be permitted until there is a mechanism to enforce it. Since we don't have enforceable controls on nonpoint pollution in PA, a trade whereby pollution reductions are allocated to nonpoint sources from point sources cannot be inserted into permit conditions and enforced. DCVA feels this section on Total Maximum Daily Loads (TMDLs, which deal with how clean up will occur on waters determined to be impaired) completely ignores nonpoint source problems. The design conditions (for calculating discharge limits) are listed for low flow conditions, but are silent on how modeling will be done for rain-induced pollution. In addition, it is unclear whether the design flows apply only for impaired waters.

We recommend that DEP should include a separate section for modeling done on waters that are not impaired, should incorporate nonpoint sources into their modeling in particular for impaired waters, and should include how clean up activities dealing with nonpoint source pollution will be implemented.

The Layfield family is dedicated to working with government agencies and local environmental groups to protect and preserve our valuable watershed resources. We know
firsthand that high quality water resources means clean water for more economic growth
and protection of human health in Pennsylvania.

Thus, we hope that the EQB will make the above and any other changes to improve our
water quality, and not relax protection of it.

Sincerely,

The Layfield Family
Chip
K.C.
Kit
Caroline

cc: Greg Vitali, State Representative
Delaware County Commissioners

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Environmental Quality Board
Harrisburg, PA

My wife and I are against quality water standards.

Yours truly
Warren Jeskey

SMS

R. James Macaleer
Chairman

October 30, 1998

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Mr. James Sief
Secretary
Department of Environmental Resources
P. O. Box 2063
Harrisburg, PA 17105-2063

Dear Secretary Sief:

I am astonished, very disappointed, and, yes, outraged at the planned changes in clean water regulations that would permit a higher level of discharge of toxic materials into Pennsylvania streams. I am not at all convinced that these changes are "just bringing our regulations up to date". A lot of Pennsylvanians have worked very hard to improve the quality of the water in Pennsylvania streams. This is clearly a step backward. I strongly urge you to do whatever it takes to stop these changes.

Sincerely,

R. James Macaleer

RJM/pap

MAIL TO: ENVIRONMENTAL ACTION [illegible]
LENHARTSVILLE PA 19534 (E.A.C.)

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Mizner
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I have brought with me petitions signed by people who support my feelings on what I am about to say. These people have entrusted me to speak for them, just as we in Pennsylvania have entrusted you, the EQB, with the task of creating tough standards and regulations for not only preserving but also improving our water, land, and air. I am here today because I do not think you have served Pennsylvania or its people well. These proposed amendments delete and re-define what are toxic, waste, and pollution all under the guise of "streamlining", "beneficial use" and let us not forget that word, "recycle". The deleting of Chapter 97(on page 4445)--Industrial Wastes--has me quite concerned because provisions seem obscure. Who will benefit--industry to discharge? Why hasn't the Department received "delegation from the EPA to administer an industrial waste pretreatment program"? Why doesn't the Department plan to seek delegation to administer this program? The EPA sets minimum standards on everything. I hope Pennsylvania would always be on the maximum standard. This brings me to the distressing statements (on page 4431) giving the background and purpose of this amendment. It reads: "A new chapter on water quality standards implementation is needed to consolidate Total Daily Loads into the regulatory calculus." The word "consolidate" in this case means take out important regulations. "The Regulatory Basics Initiative is a multi step process to evaluate regulations considering several factors including whether requirements are more stringent than Federal Regulations without good reason; impose economic costs disproportionate to the environmental benefit, etc." When it comes to these industrial waste requirements, it is always better to err on the side of "stringent". How often do we hear not to "impose economic costs to the industry disproportionate to the environmental benefit"? In other words, don't step on the toes of industry. Industry is providing jobs. Industry is providing mountains of toxic waste that the EQB, DEP and EPA are trying to "streamline" into every corner of our life under the guise of "beneficial use". Industry is providing great sums of money to all our politicians. That is what is DISPROPORTIONATE! The environment needs every stringent regulation that EQB can give industry. Even the CEO's and their families breath the Pennsylvania air that has become more and more polluted, they drink the Pennsylvania water that the EQB wants to pour more toxic chemicals into and they eat the Pennsylvania food grown on municipal/industrial sewage waste sludge "Without local, state, federal and international cooperative efforts, disease predominance will continue its rapid rise throughout the world diminishing the quality of life for all humans." The EQB is intending to lessen its standards to "streamline"? Are we streamlining to allow more trash to be brought into Pennsylvania? In 1997 Pennsylvania received 8.7 million tons of waste from Puerto Rico, Canada, the District of Columbia and 25 other states. Privatizing PA landfills means landfills have to make a profit so let's streamline that trash so our landfills fill up quicker and we can expand. The landfills PA can't expand become golf courses and soccer fields covered with the EQB's proposed regulations of "clean fill" which is little dirt and a lot of toxic waste. These golf courses are fertilized with sewage sludge and watered with heaven only knows what kind of discharges.

The proposed amendments to increase discharges of known toxic chemicals into the waterways and to eliminate regulation of 20 toxic chemicals are also very disturbing. DEP is proposing a major roll back regarding criteria for toxins, which includes deleting aquatic life criteria for about 70 chemicals with the reasoning that there isn't enough data. What has happened to the idea of erring on the side of caution? These are people's lives and health we are talking about. Of the 80,000 chemicals, the US EPA has

criteria for only 99. Pennsylvania has standards for only 140 chemicals thus there are no standards or discharge limits for over 99% of all chemicals in use today. According to the Federal Government's General Accounting Office, 77% of toxic pollutants being discharged into water are not listed on permits, so their release is uncontrolled and unknown. The permitting process does not address the accumulation of persistent toxic chemicals in sediments or aquatic life. DEP doesn't evaluate the effects of multiple discharges to the same stream. How can you ignore the regulation of non-point source pollution in impaired waters? We feel our tax dollars are being used to devaluate our land. PA Farmland Preservation Program is actually "preserving" these farming dumps along with the added support of $600,000 from you, our commissioners. All this sludge money, preservation money & county money is our tax dollars, and we do not approve! The bottom line is that Berks County is not pleased with the way the EQB or the DEP are handling the fragile environment of Pennsylvania. The proposed EQB regulation must not be streamlined for beneficial use. The amendments should be thrown out, started over again with input from us. They should be written in simple terms without cross-referencing and hiding; then put on display (libraries, schools, colleges & other such public places) for the public to read and comment on. An 800 number would also be helpful. The EQB should at least hold 6 statewide public hearings and allow 60 more days to further comment. The EQB is a very important part of our environmental protection process. The EQB is the people's only forum for speaking--please give us a chance. With open arms, Pennsylvania is welcoming trash and cleaning up toxic waste for "beneficial use" and now the EQB is loosing up on all regulations under the guise of "streamlining" red tape. Is this the business PA is looking for? Pennsylvania's quality of life is being "streamlined "and" recycled" into oblivion!

Thank you.

ENVIRONMENTAL ACTION COMMITTEE [EA.C]
BX 200
LENHARTSVILLE
PA 19534
610 756685

ENVIRONMENTAL QUALITY BOARD HEARINGS 1998

We, the people listed below, have asked MATT POLIS [EA.C.] to speak for us on this very important matter regarding the proposed rulemaking by the Environmental Quality Board (EQB). We believe strongly that these proposals will greatly weaken the already too weak regulations for Water Quality, Residual Waste and Municipal Waste. Further more, we believe that the present environmental regulations should be made much tighter ,not "streamlined" to encourage trash as Pennsylvania's number one business under the guise of recycling. The EQB,DEP and PA government have a duty to preserve a safe and healthy quality of life for every person in PA.

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United States Department of the Interior

FISH AND WILDLIFE SERVICE

TESTIMONY OF MARK HERSH, U.S. FISH AND WILDLIFE SERVICE ON PENNSYLVANIA'S REVISIONS TO ITS WATER QUALITY REGULATIONS

OCTOBER 20, 1998

Good afternoon. My name is Mark Hersh and I am an Environmental Contaminants Specialist in the Pennsylvania Field Office of the U.S. Fish and Wildlife Service. Our office has been actively involved in Pennsylvania's water quality standards program for some time, as clean water is the basis for protection of the fish and wildlife resources under our jurisdiction. We will be submitting written comments on the entire regulatory package; my testimony this afternoon concerns a few aspects of the water quality standards.

The Department of Environmental Protection has been in the process of reviewing all of its water quality regulations under a directive from Secretary Seif known as the "Regulatory Basics Initiative." This effort involves comparing existing State regulations to a number of criteria, most notably benchmarks concerned with clarity, pollution prevention, and the federal regulatory analogue. These benchmarks spoke more to the needs of dischargers than they did to an agency like the Service, who is dependent on the standards to help protect federal trust resources. Only recently has the Department publicly stated that the Regulatory Basics Initiative review of the standards also constitutes the Triennial Review of water quality standards. This seems to us to have been an afterthought, because there are certain required elements to a Triennial Review that are absent from this regulatory package, such as a review of all waters of the Commonwealth where Clean Water Act Section 101(a)(2) goals are not designated. More importantly, one central purpose of a Triennial Review is to ensure that the standards extend adequate protection to existing and designated uses of waterbodies. Our understanding is that the Regulatory Basics Initiative never mentioned as a goal, the adequacy of regulations from the standpoint of protection of fish and wildlife and their habitats. Aside from examining certain numeric water quality criteria in light of new scientific information, this Triennial Review does not address the question of the protection afforded to fish and wildlife. To that end, my testimony this afternoon will discuss some additions to Pennsylvania's standards that we believe are necessary to protect fish and wildlife resources.

We believe that the protected water use, "wildlife water supply," needs to be revised. Currently, this use is considered a "water supply" use, similar to "potable water supply" and "livestock water supply." Wildlife is a natural resource similar to aquatic life and is afforded protection in both the Clean Streams Law and the Clean Water Act. However, the definition of "wildlife water

supply" as defined in Pennsylvania's water quality standards, "use for waterfowl habitat and for drinking and cleansing by wildlife," limits the protection extended by both laws.

For example, consider a waterbody with fish contaminated with a bioaccumulative chemical that is not detected in the water column. It could be argued that the eating of those fish by mink is not protected by the "wildlife water supply" use. Mink are certainly not "waterfowl" and if the water quality was simply sufficient for their "drinking and cleansing," then the "wildlife water supply" use would be attained. However, if because of the bioaccumulative nature of the contaminant, the reproduction of the mink is impaired, both the spirit and letter of the Clean Streams Law and the Clean Water Act would be violated.

Waters of the Commonwealth are used by wildlife for essential life functions--food, habitat, migration, as well as for drinking and cleansing. We have drafted language for a revision of the "wildlife water supply" use. First of all, we believe that the protected water use for wildlife belongs with the "aquatic life" protected water uses, and removed from the "water supply" category of uses. Just as the proposed rulemaking changes the "recreation" heading to "recreation and fish consumption," we believe that the "aquatic life" heading should be changed to read "aquatic life and wildlife." The new "wildlife" protected water use in Chapter 93.3 would simply read:

W *Wildlife*--**Use by wildlife for habitat or life cycle functions.**

The new wildlife use would become a "statewide water use" as is the "wildlife water supply" use is currently in Chapter 93.4. Three new definitions are necessary, for "habitat," "life cycle functions," and "wildlife." Those definitions are as follows:

Habitat --The area which provides direct support for a given species, population, or community, including important food, shelter, migratory or overwintering areas, or breeding areas for aquatic life and wildlife, due to plant community composition and structure, hydrologic regime, substrate or other characteristics.

Life cycle functions--Includes, but is not limited to, spawning, breeding, incubation, setting, molting, hibernacula, refuge, brooding, nursery, feeding, pupation, territory establishment and defense, and migration for breeding, spawning, temperature regulation, feeding, dispersal, and other life cycle functions.

Wildlife---Terrestrial flora and fauna that are wholly or partially dependent on waters of the Commonwealth for habitat or life cycle functions.

Other areas where new water quality standards are needed are narrative criteria protecting hydrologic regimes and habitat. The Environmental Protection Agency's Water Quality Standards Handbook mentions that a Triennial Review of water quality standards should take into account, among other things, "legal decisions involving applications of standards." Since Pennsylvania's last Triennial Review, at least two important court cases have clarified the relationship between water quality standards and hydrologic and biological integrity. In 1994 the U.S. Supreme Court decided that the employment of water quality standards to protect designated and existing uses also extended to water quantity issues *(P.U.D. #1 of Jefferson County* v. *Washington Department of Ecology* 114 S.Ct. 1900 (1994)). In 1996, the Pennsylvania Environmental Hearing Board ruled that biological alteration of wetlands through groundwater withdrawal constituted "pollution" as defined in Pennsylvania's Clean Streams Law (*Oley Township,* et al. v. *Commonwealth* EHB Docket 95-101-MG).

On at least two recent occasions, Pennsylvania has supported the contention that water quantity and hydrological and biological integrity are related and can be regulated through water quality standards. Pennsylvania joined 43 other States in filing an *amicus curiae* brief in the *Jefferson County* case, agreeing with the position of the State of Washington, which prevailed. Citing *Jefferson County* extensively, Pennsylvania also used the concept that water quality standards included the protection of biological and hydrological integrity in a Memorandum of Law seeking that a denial of Section 401 Water Quality Certification be upheld (June 30, 1994 Memorandum of Law, *City of Harrisburg* v. *Commonwealth,* et al. EHB Docket No. 88-120-W).

While biological integrity is afforded some protection through the aquatic life protected water uses, there is no regulatory language protecting habitat. It follows, then, that Pennsylvania's water quality standards should include provisions protecting the habitat and hydrological integrity of surface waters of the Commonwealth. This would entail modifying one and adding two sub-sections to "Chapter 93.6. General water quality criteria." The modifications to sub-section "(a)" follow the definition of "pollution" in the Pennsylvania's Clean Streams Law:

(a) Water may not contain substances attributable to point or nonpoint source [waste] discharges in concentration or amounts sufficient to be**, nor shall waters be altered such that the alteration is** inimical or harmful to [the water] **designated or existing** uses [to be protected] or to human, [animal, plant or] aquatic life **or wildlife**.

The new sub-section "(c)," would simply read:

(c) Human-induced alterations in hydrologic regime, including instream flow, shall not be inimical or harmful to designated or existing uses, including recreation and aquatic life and wildlife. Natural seasonal and daily variations shall be maintained.

The new sub-section "(d)" protects habitat:

(d) Human-induced alterations in habitat shall not be inimical or harmful to designated or existing aquatic life and wildlife uses.

Three new definitions are needed in Chapter 93.1 in order to support these additions.

Aquatic life--Desirable aquatic flora and fauna that are wholly or partially dependent on waters of the Commonwealth for habitat or life cycle functions.

Flow--A hydrologic regime to which aquatic life have naturally adapted.

Hydrologic regime--The regular pattern of occurrence, circulation, and distribution of water in surface waters.

All these additions to Pennsylvania's standards reflect the existing State and federal laws, and simply bring the standards in compliance with the existing laws. We appreciate the opportunity to present our views on these proposed regulatory changes, and will present other suggestions in our written comments. Thank you.

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Although dredging is an EPA remedy for Delaware River contamination, the Environmental Quality Board is proposing to exclude discharges from dredge and fill material from NPDES permit requirements. (Section 92.4 Subsection (a)(1) p. 4434 Pa. Bulletin) This is part of regulatory basics initiative that is purported to revue existing water management. Pennsylvania has already declared dredge "beneficial" and has contracted to import material dredged from heavily polluted river beds. Briefly, PCBs contains as many as 209 chemicals, degrades very slowly, mimics dioxin, adheres to everything and accumulates up the food chain. An EPA spokesman. David Sternberg has said the EPA would certainly acknowledge that dredge and its toxins are a problem and does need to be dealt with. Anytime the mass preponderance of scientific data suggests that something causes cancer we need to take that very seriously and regulate it as such.

In answer to the Board's solicitation for comments, I strongly endorse that protection of potable water supply should continue to be a State Wide Use. We need more protection not less. Water seeks its own level not the Board's/ (Section 93.1 Chapter 93) Hold the comment, according to Sectio Section 93.7 , the state wide water criteria and statewide water uses have been reformatted "more clearly set forth " in proposed revisions to 93.4. That's speed polling!

This section informs us that all Delaware River Basin Commission criteria are proposed to be deleted from table 3 and referenced where applicable. The DRBC criteria will be deleted because they are not Department derived or sponsored and the Department is

unable to modify the criteria. It is necessary to ask DRBC for such a deletion. The DRBC has been very helpful to ourorganization in the past and since Pennsylvania is a member of the Commission. cooperation is necessary. Keep the DRBC criteria!

Section 92.83 proposes to clarify that the documents submitted by those seeking NPDES general permits are "NOI" not "applications" Instead of the "NOI" demonstrating that the point source meets the requirements (current requirement), it is now proposed that the discharger "certify" that the point source meets the requirements. (Now that'stough) Currently DEP provides notice of each NOI for ~~for~~ a general permit and each approval by Bulletin publication. This subsection now proposes that DEP have three options one of which is to provide no notice of intent or approval. No to NOI Section 92.5a) A new section is proposed to provide permit-by-rule in certain types of concentrated animal feeding operations. It is proposed that operators of feeding farms will be deemed to have a NPDES general permit by rule if the operator has a nutrient planapproved by county conservation district , implements, maintains according to DEP regulations, is in compliance and the operations do not have or is not proposing a discharge to surface waters. With 1000 animals why wouldn't there be a dischaege? Why would a NPDES general permit be needed if there is no discharge to surface waters? Imagine the horrors of 1000 concentrated animals as neighbors and to think ~~think~~ they all by passed DEP without a hearing. ~~gearubg.~~ But if the operator has more than a 1000 animals He would need a permit on a case to case basis. So now it is

deemed that even one little piggy can break the rule of the discharge elimination system.

Another proposed change in the current system that precludes the issuance of NPDES general permits to point sources which discharge toxic or hazardous pollutants or other other substances which may cause or contribute to increased mortality or morbidity or pose a substantial hazard to health or environment, is proposed to be revised to provide that dischargers under a general permit must satisfy any effluent limitations established in the general permitfor toxic or hazardous substances, which nay be discharged. This should definitely not be allowed.

There is nothing general about toxic waste Why bother to define or regulate waste-- just permit any nuclear or poisonous waste generally and Pa. will glow.

With regard to Chapter 93 it was stated that the aluminum acute criteria development is being revised to match the FEderal EPA, while the Federal chronic aluminum criteria is not proposed for adoption because it is based on dubious science. Is there an explanation for this cafeteria science? Is one EPA criteria accepted because it allows Pa. to lower its standards and another EPA criteria rejected because it would increase the standards? Either way is selective science and is not one of the factors in the multi step process of regulatory basics initiatives to evaluate Pa. regulations. No science is bad sciencebecause science is a theory until it is proven or demonstrated. My home region is harmed not by science but by mitigation,

remediation, or lack of enforcement.It is an area where homes are being obviously destroyed by blasting within the legal limits. Where whole families are ailing with serious diseases from odors emanating from an operation operating according to regulations. Where dubious regulations, not science told town people well water was safe, just take a shower with the windows open. Where residents were told not to spend time in their basements when inversions or odors were heavy. Obviously some legal limits are not reaching the primary goals of the DEP -- protecting Pa. citizens and their envionment.

In keeping with Gov. Ridges interest in encouraging pollution prevention EQB has deleted the existing mandatory pollution prevention language and replaced it with language that does not require but suggests and encourages pollution prevention. Pa environment needs enforcement not encouragement.