

Original: 2366

IRRC

From: Bob Wendelgass [bwendelgass@cleanwater.org]
Sent: Friday, October 22, 2004 4:56 PM
To: IRRC
Subject: Comments on Regulation #7-386 (#2366)

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
333 Market Street
Harrisburg PA 17101

Dear Mr. McGinley:

Attached please find comments submitted on behalf of over sixty environmental, conservation and watershed groups supporting the Department of Environmental Protection's proposed Triennial Review of Water Quality Standards.

The groups endorsing this statement strongly believe that DEP must retain the authority to apply Water Quality Standards to all activities that affect water quality, not just point and non-point source discharges. This has been the long-standing practice of the Department, and one which we believe is supported by -- indeed, even required by -- the Clean Water Act and Clean Streams Law.

If you have any questions about our position, please feel free to contact me at the address below. Thank you for your consideration of our comments, and we urge the IRRC to support DEP's proposed regulation.

Sincerely,

Robert Wendelgass
Chair,
Pennsylvania Campaign for Clean Water
100 N. 17th Street, 9th Floor
Philadelphia PA 19103
215-640-8800 phone
215-640-0930 fax
bwendelgass@cleanwater.org

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PENNSYLVANIA CAMPAIGN FOR CLEAN WATER

100 N. 17th Street, 9th Floor

Philadelphia PA 19103

215-640-8800 phone

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WATER QUALITY STANDARDS CANNOT BE RESTRICTED TO DISCHARGES ONLY

As part of the Triennial Review of Water Quality Standards, the Department of Environmental Protection has proposed new language at the final rulemaking stage clarifying its existing authority that Water Quality Standards do not just apply to discharges, but will be considered whenever the DEP has authority to protect surface water quality. The undersigned organizations support this proposed language which is consistent with DEP's longstanding practice and with the Pennsylvania Clean Streams Law and the federal Clean Water Act.

Water quality standards are the backbone of the program to regulate and protect surface waters in the Commonwealth. This program establishes appropriate uses for each waterbody segment, water quality criteria to protect those uses, and a special program (antidegradation) that prevents impacts to the best waters of the state and to the existing uses of all waters of the Commonwealth.

The Campaign supports the proposed amendment to Section 93.2(a) that clarifies the scope of Chapter 93 by eliminating the phrase that says that the Department will consider water quality standards "in its regulation of discharges." The section will now read: "This chapter sets forth water quality standards for surface waters of this Commonwealth, including wetlands. These standards are based upon water uses which are to be protected and will be considered by the Department in implementing its authority under the Clean Streams Law and other statutes that authorize protection of surface water quality." (new language emphasized).

The potential for confusion over the scope of water quality standards manifested itself when the Environmental Hearing Board (EHB) issued an opinion in the case of *Consol Pennsylvania Coal Company v. DEP et al.*, EHB Docket No. 2002-112 (December 31, 2002). In ruling on motions for summary judgment, the EHB erroneously concluded that the scope of Chapter 93 was limited to only point source discharges. The EHB has since granted petitions for reconsideration, withdrawn its erroneous opinion, and reinstated the permit condition based upon Chapter 93 that was challenged by coal mining interests in the case. DEP's proposed amendment to Section 93.2(a) will avoid this kind of misunderstanding.

As pointed out in the preamble to the proposed rulemaking, it has been DEP's "longstanding position" that the Chapter 93 water quality standards apply "whenever the environmental statutes authorize the Department to make decisions or approvals relating to stream quality protection." DEP has historically applied water quality standards in cases dealing with mine subsidence,

water withdrawals and hazardous site cleanups, in addition to point and non-point discharges. Accordingly, this proposed amendment does not broaden DEP's authority under Chapter 93. Rather, it merely clarifies the scope of DEP's existing authority in a way should prevent future misinterpretations.

DEP's longstanding position that it may apply Chapter 93 to non-discharge activities and non-point sources of pollution as well as point source discharges is more than good policy, it is required by both the state Clean Streams Law and the federal Clean Water Act.

In *Oley Township v. DEP and Wissahickon Spring Water, Inc.*, 1996 EHB 1098, the EHB held that Pennsylvania's Clean Streams Law and the state's antidegradation regulations under Chapter 93 authorize DEP to prevent water withdrawals that require a DEP permit where those withdrawals would dewater nearby wetlands, thereby adversely affecting existing physical and biological conditions of those wetlands.

Likewise, any narrower interpretation of Chapter 93 would violate the federal Clean Water Act, and would threaten to undermine federal approval of Pennsylvania's Water Quality Standards. The United States Supreme Court itself has spoken on this issue, and it has made clear that the Clean Water Act governs not only discharges, but also the loss of water quantity where that loss results in violation of state Water Quality Standards. See *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). Justice O'Connor, writing for the 7-2 majority, explained:

Petitioners also assert more generally that the Clean Water Act is only concerned with water 'quality,' and does not allow the regulation of water 'quantity.' This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution.

PUD No. 1, 511 U.S. at 719.

Industrial interests representing mining companies and other facilities that may impact water quality are waging an all-out campaign to defeat DEP's attempts to clarify the scope of the water quality standards regulations. They are proposing to limit the scope of the regulations to point and nonpoint source discharges. If they succeed, they could preclude the standards from applying to the many activities that impact water quality, but that do not necessarily involve a discharge, such as large water withdrawals, underground mining that impacts streams above the mine, and other activities. That is why it is important to act.

The undersigned organizations support the language in Section 93.2(a) in the Final Rulemaking for the Triennial Review of Water Quality Standards. It does not expand DEP's existing authority but simply clarifies longstanding practice. It is also consistent with, and indeed required by, the Clean Streams Law and Clean Water Act. We urge the House and Senate

Environmental Committees and the Independent Regulatory Review Commission to support the Final Rulemaking.

Supported By:

Robert Wendelgass
Pennsylvania Campaign for Clean Water

David Swope
Adams County Chapter 323 of Trout
Unlimited

Lauren Imgrund
Alliance for Aquatic Resource Monitoring

Martin Boksenbaum
Alliance for Sustainable Communities,
Lehigh Valley

Sara Nicholas
American Rivers

Jad Daley
Appalachian Mountain Club

Charles Baughman
Brodhead Watershed Association

Joy Bergey
Center for the Celebration of Creation

Bill Gerlach
Chesapeake Bay Foundation

Matt Royer
Citizens for Pennsylvania's Future

Joseph Otis Minott, Esq.
Clean Air Council

Myron Arnowitt
Clean Water Action

Eric Wilden
Clean Water Fund

Michael R. Helfrich
Codorus Creek Improvement Partnership

Jim Leaman
Codorus Creek Watershed Association

Joanne Rossi
Community Labor Refinery Tracking
Committee

Vivian VanStory
Community Land Trust Corporation

Leonard E. Hess
Conemaugh Valley Conservancy

Maya K. van Rossum
Delaware Riverkeeper Network

Doniele Andrus
Friends of McConnell's Mill State Park Inc.

Tom Pelikan
Friends of the Wissahickon

Bill Brogley
Greater Pottstown Watershed Alliance

Catherine Swan
Green Valleys Association

Thomas Grote
Kiski Basin Initiatives

Leonard E. Hess
Kiski-Conemaugh River Basin Alliance

Thomas Grote
Kiski-Conemaugh Stream Team

Bernard McGurl
Lackawanna River Corridor Association

- Susan Gobreski**
League of Conservation Voters Education Fund
- Elizabeth Milner**
League of Women Voters of Pennsylvania
- Mike Siegel**
Little Lehigh Watershed Coalition
- Nancy Tobias**
Local Environment Awareness Development
- Dani-Ella Betz**
Lower Merion Conservancy
- Drew Banas**
Loyalhanna Watershed Association
- Roseann Weinrich**
Mahanoy Creek Watershed Association
- Jennifer Murphy**
Mid-Atlantic Environmental Law Center
- Beverly Braverman**
Mountain Watershed Association
- Rick Spencer**
National Wildlife Federation
- Colleen Willison**
Neville Island Good Neighbor Committee
- David Masur**
PennEnvironment
- Charles Marshall**
Pennsylvania Environmental Defense Foundation
- Melody Zullinger**
Pennsylvania Federation of Sportsmen's Clubs
- Catherine Hammond**
Pennsylvania League of Conservation Voters
- Judith Jordan**
Pennsylvania Organization for Watersheds and Rivers
- George Mellinger**
Pennsylvania Trout
- David Robertson**
Pennypack Ecological Restoration Trust
- Ingrid E. Morning**
Pine Creek Valley Watershed Association
- John C. O'Herron, II**
Raymond Proffitt Foundation
- Mable Mallard**
Right to Know Committee
- Phil Coleman**
Sierra Club, Pennsylvania Chapter
- Bruce Hazen**
Slippery Rock Streamkeepers
- Virginia Fitzpatrick**
Stony Creek Angler's Watershed Committee
- John Shearer**
Susquehanna Smallmouth Bass Alliance
- Dan Derber**
Ten Mile Creek Watershed Conservancy
- Herb Wile**
Tobyhanna Creek/Tunkhannock Creek Watershed Association
- Beverly Braverman**
Tri-State Citizens' Mining Network

Joan Jessen
Washington County Watershed Alliance

John Johnson
**West Chester Fish, Game and Wildlife
Association**

John Dawes
**Western Pennsylvania Watershed Protection
Program**

Jennifer Murphy
**Widener University School of Law
Environmental and Natural Resources Clinic**

Tom Kerr
Wildlands Conservancy

Dan R. Kunkle
Wildlife Information Center, Inc.

Sarah Low
Wissahickon Restoration Volunteers

Beverly Braverman
Youghiogheny Riverkeeper

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2004 OCT - 1 AM 9/28/04

9/28/04

IRRC
333 Market Street, 14th Fl.
Harrisburg, Pa. 17101

Dear IRRC,

I am writing to urge you to support DEP's final rulemaking on the triennial review of water quality standards.

Mining and runoff are among the biggest sources of pollution in our state, exempting them from our water quality standards would condemn thousands of miles of our rivers and streams to destruction.

Exempting them would also violate the federal Clean Water Act and state Clean Streams Law and weaken long standing state policy.

All activities that affect our streams and rivers should be covered by our Water Quality Standards, not just discharges.

* Please Reply:

Amy Messner
115 Pennsylvania Ave.
West Chester, Pa. 19380

Sincerely,

Mrs. Amy L. Messner

October 3, 2004

Original: 2366

(271)

Independent Regulatory Review
Commission

REVIEW OF DEP'S

Gentlemen:

This letter is to ask you to please support DEP's Final Rulemaking on Water Quality Standards.

All activities that affect our streams and rivers should be covered by our Water Quality Standards, not just discharges.

I will appreciate your support of these Water Quality Standards by the DEP.

Thank you.

Sincerely,
Carolyn Wodzinski

Original: 2366

Mrs. Norman A. Baglini
4103 Battles Lane
Newtown Square, Pennsylvania 19073

(2)

Sept. 28, 2004

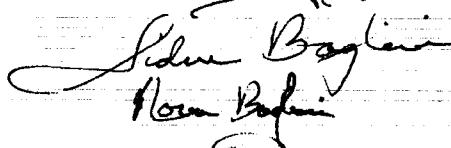
Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Dear Members of I.R.R.C.:

As an active volunteer for several organizations working to protect Pennsylvania's waterways, I am writing to encourage you to support the D.E.P.'s Final Rulemaking on the Review of Water Quality Standards. We cannot afford to limit regulation only to discharges since there are so many other activities that can cause impairment of our water quality. Over the past 30 years, we have learned that non-source runoff, toxic waste sites, mining practices, insufficient protection of construction site erosion, etc., all contribute to the destruction of our watersheds and should be subject to state regulation. Discharges are merely part of the problem and we can't afford to overlook any part of the problem.

Thank you for your attention to this request.

Sincerely yours,


Norman A. Baglini

Original: 2366

23 : Cornell, Jr.

The Peter Rock, 17th & 5th.

Sept. 29, 1911.

RECORDED IN CITY

Independent Registering Engineers Association

I am writing to urge you to adopt
the Final Rules of the Water Quality
Standards.

It is vitally important that all activities
that affect our streams and rivers should be
measured by our Water Quality Standards, yet
it is difficult.

Please do everything within your
power to expedite the necessary legislation.
Thank you.

Sincerely,

Franklin C. Cornell