



# Senate Environmental Resources and Energy Committee

Senator Mary Jo White  
Chairman

Patrick Henderson, Executive Director

Room 168 • State Capitol Building  
Mailing address: Senate Box 203021 • Harrisburg, PA 17120-3021  
Phone: 717-787-9684 • FAX: 717-787-6088

January 23, 2004

The Honorable Kathleen A. McGinty, Chair  
Environmental Quality Board  
15<sup>th</sup> Floor Rachel Carson Building  
P.O. Box 8477  
Harrisburg, PA 17105-8477

Original: 2366  
E-mail received 11:28 am,  
January 23, 2004

**RE: Reg. # 7-386 – Triennial Review of Water  
Quality Standards**

Dear Chairwoman McGinty:

We are writing on behalf of the Senate Environmental Resources & Energy Committee to express our concern regarding the Environmental Quality Board's Triennial Review of Water Quality Standards proposed rulemaking.

Specifically, the Senate Environmental Resources & Energy Committee (Committee) is concerned that the Environmental Quality Board's proposed modification of the scope section within the existing water quality standards rule (25 Pa Code §93.2) not only significantly alters the Department of Environmental Protection's (DEP) existing regulatory authority, but further does so without appropriate statutory authority. As you know, the proposed regulation would delete the phrase "*and will be considered by the Department in its regulation of discharges*". A brief discussion of the implications of this potential change will better illustrate the Committee's concerns.

Chapter 93 sets forth the specific water quality standards for surface waters of the Commonwealth, including wetlands. The most notable provisions of Chapter 93 relate to the Commonwealth's anti-degradation requirements. These provisions establish a tiered system of protected existing and designated uses for waterways and wetlands and implement DEP's responsibility – under the federal Clean Water Act – to protect these uses. Chapter 93 also derives its statutory authority from the Commonwealth's Clean Streams Law (Act 394 of 1937).

DEP requested the EQB to modify the scope section to clarify its contention of long standing jurisdiction to regulate any activity that may impact existing water quality – rather than to regulate "discharges" that impact or could impact existing water quality. The Committee's use of the term "discharge" includes both point and non-point source discharges, and is intended to be consistent with existing DEP regulations. In the Committee's judgment, modification of

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the scope section, as proposed by the EQB, may be interpreted as authorizing DEP to regulate a host of activities or actions that in DEP's judgment might impact water quality. There should be no doubt of the Committee's desire to protect our critical water resources, however doing so must be done in accordance with applicable state and federal statute.

The Committee does not concur with DEP's assertion that DEP possesses unquestioned authority to regulate non-discharge activities. In fact, the Environmental Hearing Board (EHB) ruled – and then subsequently withdrew its findings – that DEP did not possess such authority (Consol PA Coal Co. v. DEP et al (EHB Docket #2002-112)). It is our understanding the EHB withdrew its findings for procedural, rather than legal, reasons. However, the opinion demonstrates that it is reasonable to question whether such long-standing jurisdiction actually exists. The Committee is very concerned and troubled by DEP's characterization of this opinion as a "misunderstanding" and "misinterpretation".

The Triennial Review of Water Quality Standards is a requirement imposed by the federal Environmental Protection Agency (EPA) that states periodically, but at least every three years, review and update (if applicable) state water quality standards. We are not aware that an amendment to the scope section (25 Pa Code §93.2) is required for the Commonwealth to retain primacy of the water quality or anti-degradation program. We recognize that comments submitted by the EPA (Evelyn S. McKnight, Chief, Office of Watersheds, EPA Region III - December 17, 2003) are supportive of the modification, but again there is no indication to believe that failure to adopt the amendment to the scope section threatens DEP's primacy over these programs. Therefore, the Committee must rely upon the statutory guidance and limitations imposed by the Clean Streams Law.

Under the "Background and Purposes" discussion of the proposed amendment, DEP states that water quality standards are "in-stream water quality goals...implemented by imposing specific regulatory requirements...on individual sources of *pollution*" (emphasis added). DEP further clarified – properly we contend – the purpose of the amendment in an email to EQB Board members by stating the amendment was being proposed to reflect DEP's jurisdiction under the Clean Streams Law, "which is based upon prevention of *pollution* of the waters of the Commonwealth" (emphasis added).

The Committee therefore refers to the statutory guidance within the Clean Streams Law related to the prevention of pollution of waters of the Commonwealth. Specifically, the definition of "pollution" outlines DEP's role under the Clean Streams to "determine when a discharge constitutes pollution, as herein defined, and [DEP] shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined" (Act 394 of 1937 §1). Other references throughout the Clean Streams Law refer specifically to the concept of regulating discharges.

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For these reasons, the Committee urges the EQB to eliminate its proposed amendment to the scope section (25 Pa Code §93.2) and retain the current regulatory language. As an alternative, the Committee would be agreeable to the EQB's adoption of the Independent Regulatory Review Commission's (IRRC) suggestion to instead insert the phrase "point and nonpoint source" before "discharges".

While the Committee certainly supports DEP's effort to prevent pollution and protect the Commonwealth's waterways, it believes adoption of the proposed scope section amendment will have drastic and far reaching implications. More importantly, it believes the proposed language exceeds the statutory authority contained in the Clean Streams Law. For these reasons, we respectfully suggest that failure to modify this section and address the concerns raised in our comments, as well as the comments of numerous other parties (including IRRC) may result in the Committee's formal disapproval of Regulation # 7-386.

Thank you very much for your consideration of the Senate Environmental Resources & Energy Committee's comments.

Sincerely,

  
Mary Jo White, Chairman  
Senate Environmental Resources  
& Energy Committee

  
Raphael J. Musto, Democratic Chairman  
Senate Environmental Resources  
& Energy Committee

cc: Environmental Quality Board Members  
Independent Regulatory Review Commission



# Senate Environmental Resources and Energy Committee

Senator Mary Jo White  
Chairman

*Patrick Henderson, Executive Director*

Room 168 • State Capitol Building  
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August 3, 2004

The Honorable Kathleen A. McGinty, Chair  
Environmental Quality Board  
15<sup>th</sup> Floor Rachel Carson Building  
P.O. Box 8477  
Harrisburg, PA 17105-8477

**RE: Reg. # 7-386 – Triennial Review of Water  
Quality Standards**

Dear Chairwoman McGinty:

We are writing on behalf of the Senate Environmental Resources & Energy Committee to express our objection to proposed changes to the scope section in the Environmental Quality Board's Triennial Review of Water Quality Standards final rulemaking.

As you know, on January 23, 2004 the Senate Environmental Resources & Energy Committee (Committee) wrote you to express its concern that the Environmental Quality Board's (EQB) proposed modification of the scope section within the existing water quality standards rule (25 Pa Code §93.2) not only significantly alters the Department of Environmental Protection's (DEP) existing regulatory authority, but further does so without appropriate statutory authority. Although the final rulemaking, scheduled for consideration by the EQB on August 17, 2004, makes additional modifications to the scope section, we remain opposed to the final language as it currently exists.

As you know, the final rulemaking under consideration would modify the scope section as follows:

§ 93.2. Scope

- (a) 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 [its regulation of discharges] **IMPLEMENTING ITS AUTHORITY UNDER THE CLEAN STREAMS LAW AND OTHER STATUTES THAT AUTHORIZE PROTECTION OF SURFACE WATER QUALITY.**

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The Committee questions the need to alter the existing scope section at all. On November 8, 2000 the EQB finalized amendments to its Water Quality Standards, including amendments to §93.2 (a). Specifically, the EQB amended the scope section to state the water quality standards applied to surface waters of the Commonwealth, including wetlands. To our knowledge, neither the EQB, DEP nor the Water Resources Advisory Committee raised any objection to the scope section or its reference that the water quality standards “will be considered by the Department in its regulation of discharges”. With that said, we will refocus our comments on the language currently under review.

Chapter 93 sets forth the specific water quality standards for surface waters of the Commonwealth, including wetlands. The most notable provisions of Chapter 93 relate to the Commonwealth’s anti-degradation requirements. These provisions establish a tiered system of protected existing and designated uses for waterways and wetlands and implement DEP’s responsibility – under the federal Clean Water Act – to protect these uses. Chapter 93 also derives its statutory authority from the Commonwealth’s Clean Streams Law (Act 394 of 1937).

DEP requested the EQB modify the scope section to clarify its contention of long standing jurisdiction to regulate any activity that may impact existing water quality – rather than to regulate “discharges” that impact or could impact existing surface water quality. The Committee’s use of the term “discharge” includes both point and non-point source discharges, and is intended to be consistent with existing DEP regulations. In the Committee’s judgment, modification of the scope section, as proposed by the EQB, will be interpreted as authorizing DEP to regulate a host of activities or actions that in DEP’s judgment might impact water quality. There should be no doubt of the Committee’s desire to protect our critical water resources, however doing so must be done in accordance with applicable state and federal statute.

The Committee does not concur with DEP’s assertion that DEP possesses unquestioned authority to regulate non-discharge activities. In fact, the Environmental Hearing Board (EHB) ruled – and then subsequently withdrew its findings – that DEP did not possess such authority (Consol PA Coal Co. v. DEP et al (EHB Docket #2002-112)). It is our understanding the EHB withdrew its findings for procedural, rather than legal, reasons. However, the opinion demonstrates that it is reasonable to question whether such long-standing jurisdiction actually exists.

DEP has stated the purpose of the modifications to the scope section is to assist DEP’s efforts to prevent the polluting of the waters of the Commonwealth. The Committee therefore refers to the statutory guidance within the Clean Streams Law related to the prevention of pollution of waters of the Commonwealth. Specifically, the definition of “pollution” outlines DEP’s responsibility under the Clean Streams Law to “determine when a discharge constitutes pollution, as herein defined, and [DEP] shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined” (Act 394 of 1937 §1). Other references throughout the Clean Streams Law refer specifically to the concept of regulating discharges. By failing to mirror the statutory guidance

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provided in the Clean Streams Law, the Committee is concerned DEP will assume the authority to regulate a host of activities never envisioned by the General Assembly. More specifically, DEP may seek to assert its authority (or a third party may seek to force DEP to assert its authority) to prohibit an activity which does not require a departmental permit, plan approval or other official action.

An example of this would be water withdrawals from a stream not subject to a withdrawal permit from the respective river basin commissions or under the Water Rights Law (1939 A365). The registration process required under the Water Resources Planning Act (2002 A220) could therefore have a perverse effect. On one hand the Act is clear that DEP cannot require withdrawal permits (27 P.A.C.S. §3104 (4)). On the other hand, DEP or an interested third party may use the data gathered to argue – under the Chapter 93 Water Quality Standards – that such a withdrawal is having a “polluting” impact on the waterway and require the water user to reduce or desist the withdrawal.

The same scenario holds true for water withdrawals of lesser amounts, or a variety of other activities that may constitute “pollution” under a court’s interpretation of the term. The net effect could result in DEP asserting authority in situations the General Assembly clearly never envisioned. While an aggrieved party may technically have a remedy through litigation, such a process is time consuming and costly – factors themselves which may serve as a deterrent to challenge a departmental action.

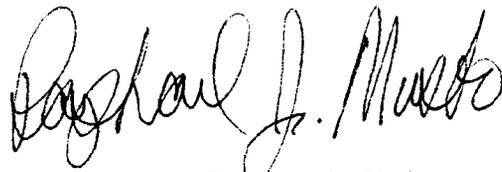
With this in mind, the Committee would like to propose two options for consideration by DEP. The first, and more preferable option, would be to adopt the recommendation offered by the Independent Regulatory Review Commission (IRRC) to add the phrase “POINT AND NON-POINT SOURCE” before “discharges” in the existing scope section. The second option proposed by the Committee would be to insert the phrase “DURING THE PERMIT OR APPROVAL APPLICATION OR REVIEW PROCESS” after “IMPLEMENTING ITS AUTHORITY” in the **final rulemaking** scheduled for consideration by the EQB.

We appreciate DEP’s assistance to date in reviewing and discussing this regulation, and your willingness to consider these options. We are sure that, working together, we will arrive at a final rulemaking that meets with the approval of the EQB, the Committee and IRRC. Please do not hesitate to contact us if you require any additional clarification or information.

Sincerely,



Mary Jo White, Chairman  
Senate Environmental Resources  
& Energy Committee



Raphael J. Musto, Democratic Chairman  
Senate Environmental Resources  
& Energy Committee



# Senate Environmental Resources and Energy Committee

**Senator Mary Jo White**  
Chairman

*Patrick Henderson, Executive Director*

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2004 OCT 19 AM 10:20  
REGULATORY  
REVIEW  
COMMISSION

October 18, 2004

Robert E. Nyce, Executive Director  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

**Re: # 7-386 Triennial Review of Water Quality Standards**

Dear Mr. Nyce:

We are writing on behalf of the Senate Environmental Resources & Energy Committee to follow up on previous correspondence shared with you regarding the above-referenced proposed regulation.

As you know, the Senate Environmental Resources & Energy Committee had expressed concerns regarding changes to the scope section of Title 25 PA Code Chapter 93. We are pleased to share with you that language offered as an amendment at the August 17, 2004 Environmental Quality Board meeting has alleviated the concerns of the Committee. We are very grateful for the willingness and assistance we received from Secretary McGinty and staff at the Department of Environmental Protection in arriving at a final regulation that all can support.

If you have any questions, please do not hesitate to contact Patrick Henderson (Senator White) or Richard Fox (Senator Musto) to discuss in greater detail. Thank you very much.

Sincerely,

  
Mary Jo White, Chairman  
Senate Environmental Resources  
& Energy Committee

  
Raphael J. Musto, Democratic Chairman  
Senate Environmental Resources  
& Energy Committee

cc: Honorable Kathleen A. McGinty  
Secretary of Environmental Protection