Environmental Quality Board
IRRC # 2366 (#7-386)
Title: Triennial Review of Water Quality Standards
Agency Comments

(Form A)		
NAME	ADDRESS	DATE of CORRESPONDENCE
Abel, Jennifer L.	322 E. Broad St., 2nd Floor, Bethlehem, PA 18018	12/8/03
Albright, Arcana	1700 Naudain Street, Philadelphia, PA 19146	12/15/03
Anderson, Joan G.	625 Woodcrest Ave., Ardmore, PA 19003	12/2/03
Aronson, Nancy	2150 Diamond Rock Hill Road, Malvern, PA 19355	12/2/03
Avey, Tricia	1019 S. 47th St., Philadelphia, PA 19143	12/4/03
Bale, Lawren S.	101 Elmwood Ave., Narberth, PA 19072	12/2/03
Barker, Sean	516 Curtis Drive, Morrisville, PA 19067	12/2/03
Bauer, Christine	1530 Eaton Ave., Bethlehem, PA 18018	12/17/03
Baxter, Jackie	341 Old Lincoln Hwy, Malvern, PA 19355	12/17/03
Benson, Penny	1125 Futurity Drive, York, PA 17404	12/11/03
Bernardini, Judy	279 Darlan Hill Drive, Plum, PA 15239	12/4/03
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Buell, Thomas	6625 Virginia Avenue Pittsburgh, PA 15202	12/12/03
Carter, Beatrice	2618 Board Street, Bethel Park, PA 15102	12/2/03
Caruba, S.	1534 Pine Street #34, Philadelphia, PA 19102	12/17/03
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Chapaitis, Pat	914 Allegheny Ave., New Kensington, PA 15068	12/4/03
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Clark, Steve	205 Mill Road, Havertown, PA 19406	12/11/03
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	19096	
Cunatola, Bob	434 Claremont Street, Springfield, PA 19064	12/17/03
DeWyngaert, Susan	236 Pine Street, Philadelphia, PA 19106	12/4/03
Dumont, Mary	1511 West Woodbank Way, West Chester, PA 19380	12/2/03
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Empson, Kim	46 West Tulpehocken Street, Philadelphia, PA 19144	12/11/03
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Fish, Laurie	1076 Ryan's Run, Boothwyn, PA 19061	12/4/03
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Graeber, Glenn	600 Valley Road, Havertown, PA 19083	12/2/03
Ham, Jeff	3107 Winchester Ave., Philadelphia, PA 19136	12/2/03
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Heggenstaller, Shonna	11 Ivy Drive, Lock Haven, PA 17745	12/4/03
Heydt, Andrew	320 Conner Drive, Exton, PA 19341	12/12/03
Jamieson, Robert	205 Bobby Jones Dr., Etters, PA 17319	12/10/03
Johnson, Malcolm	2424 Hirst Terrace, Havertown, PA 19083	12/17/03
Komm, Pamela	73 Soldier Square, Wayne, PA 19087	12/17/03
Lee, James	342 Glen Ridge Road, Haverford, PA 19083	12/17/03
Leitner, Kip	880 Corinthian Ave, Philadelphia, PA 19130	12/11/03
Lexie, Eva	3245 Kathy Lane, Huntingdon Valley, PA 19006	12/5/03
Lindstrom, Adrienne	134 Manton Street, Philadelphia, PA 19147	12/2/03
Little, Victoria	15 W. Mt. Pleasant Ave., Philadelphia, PA 19119	12/2/03
Love, Harold	5814 Hampton Street, Pittsburgh, PA 15206	12/2/03
Low, Marsha	8018 Hammond Road, Cheltenham, PA 19012	12/5/03
Lubar, Jodi	75 W. Hillcrest Ave., Havertown, PA 19083	12/6/03
McCann, Christopher M.	444 Penn Ave., Glenside, PA 19038	12/4/03
McGinley, Erin	534 Drayton Road, Oreland, PA 19075	12/4/03
McMaster, Ellen	221 Trenton Road, Fairless Hills, PA 19030	12/2/03
Mehalick, Russell	207 Valley Road, Morrisville, PA 19067	12/15/03
Melissa	100 Old York Road, Jenkintown, PA 19046	12/2/03

Miles, Jeremy	324 S. 11th Street, Apt 9, Philadelphia, PA 19104	12/2/03
Pepper, Mark L.	2427 Franklin Ave., Secane, PA 19018	12/2/03
Perugino, Kristin	400 Swathmore Ave., Folsom, PA 19033	12/8/03
Peruso, Mark	15 West Wyneva Street, Philadelphia, PA 19144	12/2/03
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Powers, Todd	416 B S. 2nd Street, Philadelphia, PA 19147	12/2/03
Price, Mark L.	104 Crosshill Road, Wynnewood, PA 19096	12/2/03
Rajotte, Heather	Bryn Mawr, PA 19010	12/2/03
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Spencer, Miranda	2225 Spruce Street, Philadelphia, PA 19103	12/3/03
Stremple, Linda A.	313 Chateau Court, Pittsburgh, PA 15239	12/8/03
Stump, Greg & Karen	129 Robin Road, Media, PA 19063	12/4/03
Szczesniak, Regina	2421 Perot Street, Philadelphia, PA 19147	12/2/03
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Toland, Thomas	5257 Apache Lane, Drexel Hill, PA 19026	12/9/03
Weber, Debora	Po Box 663, Narberth, PA 19072	12/15/03
Weller, Ann	803 Holenback Street, Moosic, PA 18507	12/9/03
Wilden, Eric	5753 Keith Ln., Emmaus, PA 18049	12/10/03

Christine Bauer
1530 Eaton Ave
Bethlehem PA 18018

Original: 2366

Environmental Quality Board
PO Box 8477
Harrisburg PA 17105-8477

RE: **Water Quality Standards**

Members of the Environmental Quality Board:

As a concerned citizen I urge you to ensure that our state's Water Quality Standards apply to all activities that affect water quality, not just discharges. I urge you to support proposed DEP regulations that would ensure continued control of runoff, the leading cause of stream impairment in Pennsylvania. Removing runoff from our Water Quality Standards would destroy many of our best streams and could lead to contaminated drinking water supplies. We cannot afford to allow our waters to get more polluted.

Thank you
Sincerely,

Christine Bauer

Original: 2366

IRRC

From: Jewett, John H.
Sent: Monday, December 22, 2003 4:21 PM
To: IRRC
Cc: Sandusky, Richard M.; Wyatte, Mary S.; Stephens, Michael J.; Pagan, Elena V.
Subject: FW: EPA's Comments on Chapter 93/Triennial Review of WQS [33 Pa.B. 5190]

Please file this email under "Proposed comments" for #2366. Thanks!

-----Original Message-----
From: EP, RegComments [mailto:regcomments@state.pa.us]
Sent: Monday, December 22, 2003 4:14 PM
To: Jewett, John H.
Subject: FW: EPA's Comments on Chapter 93/Triennial Review of WQS [33 Pa.B. 5190]

FYI

Sharon F. Trostle
Regulatory Coordinator
Department of Environmental Protection
(717) 783-1653
shtrostle@state.pa.us

-----Original Message-----
From: Macknight.Evelyn@epamail.epa.gov
[mailto:Macknight.Evelyn@epamail.epa.gov]
Sent: Wednesday, December 17, 2003 11:23 AM
To: RegComments@state.pa.us
Cc: Hakowski.Denise@epamail.epa.gov; Atkinson.Cheryl@epamail.epa.gov; ebrezina@state.pa.us; cayoung@state.pa.us; Lueckenhoff.Dominique@epamail.epa.gov; Day.Christopher@epamail.epa.gov; Capacasa.Jon@epamail.epa.gov
Subject: EPA's Comments on Chapter 93/Triennial Review of WQS [33 Pa.B. 5190]

December 17, 2003

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

Dear Sir or Madam:

The U.S. Environmental Protection Agency (EPA), Region III, has reviewed the proposed amendments to Chapter 93 of the Commonwealth's environmental regulation. This proposal, which was announced for public review and comment in the Pennsylvania Bulletin on October 18, 2003, constitutes Pennsylvania's current triennial review of its water quality standards, as required by the Clean Water Act (CWA) Section 303(c)(1). The purpose of this letter is to provide EPA's comments on the proposal. Please note that the comments and recommendations contained in this letter are strictly for the Environmental Quality Board's (EQB) consideration and are not a determination by the EPA Administrator under

CWA Section 303(c)(4)(B) that a revised or new standard is necessary to meet the requirements of the Clean Water Act.

EPA fully supports Pennsylvania's proposal to modify the Scope of the water quality standards regulation found in §93.2. Water quality standards identify the uses of a waterbody and the criteria necessary to support those uses. Attainment of those uses and criteria can be impacted by many factors that should not be assumed to be limited to point source discharges. By eliminating the phrase "pertaining to the Department's regulation of discharges," EPA believes it will clearly indicate that the condition of a water body can be impacted by many sources, including nonpoint sources, atmospheric deposition, as well as point sources. EPA echoes the Pennsylvania Department of Environmental Protection's (PADEP) position that the water quality standards in Chapter 93 are to be used whenever the environmental statutes authorize PADEP to make decisions or approvals relating to stream quality protection.

EPA also supports Pennsylvania's proposed modification to the dissolved oxygen criteria for the protection of the Cold Water Fishes use, but we do have several issues related to this modification that we would like addressed. First, PADEP needs to provide details as to how these criteria will be applied in its 303(d) listing methodology for lakes. Second, PADEP needs to specify how they will implement the narrative water quality criteria to protect the hypolimnion in a stratified lake. Third, PADEP needs to define hypolimnion and expand the definition of epilimnion to address temporal and spatial concerns. Finally, EPA would like to reiterate our position that for those lakes that are Warm Water Fishes that have been classified as Cold Water Fishes, we would support a redesignation to Warm Water Fishes use if accompanied by a use attainability analysis (UAA) as required by 40 CFR 131.10(j)(2).

EPA is requesting that Pennsylvania reconsider during this triennial review the adoption of EPA's recommendation of using E.coli or enterococci as an indicator of bacterial contamination in surface water. In the document Ambient Water Quality Criteria for Bacteria - 1986, EPA recommended that states and tribes use E.coli or enterococci to protect bathers from gastrointestinal illness in recreational waters. That document was produced in part due to the criticism of EPA's bacteria criteria recommendations that used fecal coliform as an indicator. The results of the studies performed for the development of the document indicated that fecal coliforms showed a very weak correlation to gastroenteritis both in marine and fresh water, whereas E.coli and enterococci showed strong correlation. EPA recognizes that Pennsylvania's Department of Health has proposed to monitor for E.coli to provide enhanced public health protection to individuals who bathe and swim in public bathing beaches. However, even when this provision is finalized, it will only apply to protected beaches. With few exceptions, all surface waters of the Commonwealth are designated for water contact recreation.

Further, Pennsylvania leads the nation in Combined Sewer Overflow (CSO) permitted outfalls and communities. Pennsylvania's CSO communities are in the process of developing Long Term Control Plans (LTCPs) to meet water quality standards, including those for bacteria, in CSO-impacted waters. Over 70% of the Commonwealth's CSO communities do not yet have an approved LTCP, and it is PADEP's responsibility to ensure that the most scientifically defensible endpoint for bacteria is available to these communities for LTCP development and implementation.

EPA recognizes the PADEP had previously identified concerns with adopting E.coli or enterococci at this time, essentially that implementation guidance has not yet been finalized and that the analytical procedures for bacteria indicators in ambient waters and effluents were not yet approved by EPA. However, the ambient waters method approval was finalized in July 2003 and EPA's Implementation

Guidance for Ambient Water Quality Criteria for Bacteria is nearing completion and should be final prior to PADEP's conclusion of this triennial review. EPA is still in the process of putting the analytical method for effluents in place. However, based upon our experience with other states, EPA would be able to provide assistance to PADEP in identifying methods use to issue effluent limits based on E.coli or enterococci criteria for National Pollutant Discharge Elimination System (NPDES) permits.

Finally, the Commonwealth must recognize that the Beaches Environmental Assessment and Coastal Health Act of 2000, also known as the BEACH Act, requires coastal and Great Lakes states, by April 2004, to adopt EPA's recommendations or water quality criteria and standards for pathogens and pathogen indicators that are as protective as EPA's recommended criteria. The BEACH Act further directs EPA to propose and promulgate such standards for states that fail to do so.

One additional topic EPA would like the EQB to consider for inclusion during this triennial review is the adoption of regulations that would allow the Commonwealth to grant variances. Currently, Pennsylvania's Wastewater Treatment Requirements at §95.4 allow for extensions of time to achieve water quality-based effluent limitations. However, these time extensions are done without the opportunity for public participation or notice that the applicable limits are not achieving water quality standards. EPA believes that this extension of time is more appropriately addressed as a variance to a water quality standard that would need to meet EPA requirements as described in 40 CFR 131.10, which include public participation. To utilize a variance, Pennsylvania would need to adopt regulations in Chapter 93 that provide the authority to do so and submit those variances to EPA for review and approval.

Thank you for this opportunity to provide comment on Pennsylvania's triennial review of its water quality standards regulation. EPA would be happy to assist the Commonwealth as necessary to complete this triennial review. EPA has also provided to PADEP comments on the proposed modifications to Chapter 16, the Water Quality Toxics Management Strategy - Statement of Policy. If you have any comments concerning this letter, please contact me at (215)814-5717 or Denise Hakowski of my staff at (215)814-5726.

Sincerely,

Evelyn S. MacKnight, Chief
PA/DE/WV Branch (3WP11)
Office of Watersheds
U.S. Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103

Phone: (215-814-5717)
Fax: (215-814-2301)

Tate, Michele

From: Smitherman, Katherine [KSmitherman@paconserve.org]
Sent: Wednesday, December 17, 2003 8:38 PM
To: 'RegComments@state.pa.us'
Subject: proposed amendments to Title 25, Chapter 93

Original: 2366

December 17, 2003

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

Dear Environmental Quality Board Members,

On behalf of the 25,000 Western Pennsylvania Conservancy (WPC) donors, members and volunteers, I applaud Pennsylvania Department of Environmental Protection (DEP) and the Environmental Quality Board's (EQB) proposed amendments to Title 25, Chapter 93 of the Pennsylvania Code to clarify the scope of the *Clean Streams Law*. The proposed regulations recognize that water quality and water quantity are inextricably connected. This connection is vital for successful protection of Pennsylvania's water.

Western Pennsylvania Conservancy 's mission is to save the places we care about by connecting people to the natural world. WPC works to improve water through our Northwest Field Station in the French Creek watershed, the Sideling Hill Creek Center and the Watershed Assistance Center. WPC protects water to safeguard the health of communities and the natural world, to enhance the economy of surrounding communities, to ensure present and future use and enjoyment of waterways, to protect a living scientific database of healthy ecosystems, and to reserve these natural amenities for future generations as sources of inspiration.

As the health of Pennsylvania's water is integral to Western Pennsylvania Conservancy's mission, we appreciate having the opportunity to provide input in the proposed rulemaking process. Attached are WPC's one-page comments to provide to each member of the Board.

Thank you for your consideration of my comments. If you would like to discuss this further, please contact me at 412-586-2376 or lschweiger@paconserve.org. My address is 209 Fourth Avenue, Pittsburgh, PA 15222.

Sincerely,

Larry J. Schweiger
President

Attachment

Original: 2366

Executive Summary of Western Pennsylvania Conservancy's Comments to Pennsylvania Department of Environmental Protection (DEP) and the Environmental Quality Board's (EQB) Proposed amendments to the Pennsylvania Code Title 25, Chapter 93

1. **Maintain the proposed amendment to Section 93.2(a) that clarifies the scope of Title 25, Chapter 93 to ensure compliance with both the *Pennsylvania Clean Streams Law* and the federal *Clean Water Act.*** The court in Oley Township v. DEP and Wissahickon Spring Water, Inc. held that Pennsylvania's *Clean Streams Law* and the state's Chapter 93 antidegradation regulations authorize DEP to prevent water withdrawals where those withdrawals would adversely affect a wetland. Further, the in PUD No.1 of Jefferson County v. Washington Department of Ecology, a local utility challenged the state's inclusion of a minimum flow requirement for a dam to maintain water quality standards to ensure habitat for fish downstream in a NPDES permit. The court upheld this requirement as part of Section 401. The court held that use of water is part of a water quality standard for which certification may be required.

2. **Develop specific water quality criteria to protect aquatic species populations in Section 93.7.** Currently, degradation is allowed within streams as long as the existing use remains. For instance, Warm Water Fisheries may be degraded and particular species may be lost. However, the existing use may be maintained by more pollution tolerant species. In order to address this problem, DEP must clarify that existing use protection would be violated if it can be shown that pollution has eliminated a species of fish, mussel, or aquatic insect from a section of a stream.

   WPC supports DEP's efforts to create a statewide Index of Biotic Integrity (IBI) for Warm Water Fisheries Pennsylvania. WPC recommends that DEP create an IBI for Coldwater Fisheries as well. A statewide IBI can be used to establish procedures to determine when an existing use is violated as a result of reduced numbers or biomass of a particular species of fish.

3. **Propose biological criteria to assess water quality – in addition to chemical criteria – for the specific water quality criteria found in Chapter 93.7.** The use of biological criteria would provide DEP and others a fast and accurate gauge of stream health that captures the impacts of all factors that may be affecting the stream's aquatic life use.

4. **Adopt water quality standards for total nitrogen and phosphorous loads to protect Pennsylvania's water and downstream waters, such as the Chesapeake Bay and the Gulf of Mexico hypoxia zone.**

5. **Adopt the E. Coli and/or enterocci water quality criteria recommended by the U.S. Environmental Protection Agency (EPA).**

6. **Adopt EPA's Standard for Methylmercury.**

Stacey Lynn Dudek
1198 Beth Lynn Dr.
Harrisburg, PA
17112

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

Original: 2366

To Whom it May Concern
at the Dep,

I am very concerned about the quality of our drinking water. Please protect our water from discharges and runoff - all activities affect our water so all should be regulated.

Stacey L Dudek

Original : 2366

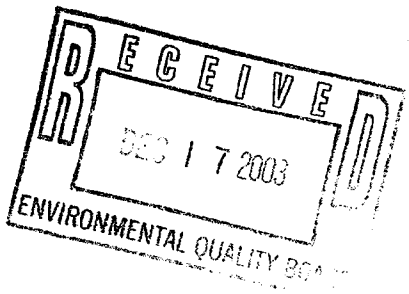
RECEIVED
2003 DEC 29 PM 3:37
REVIEW COMMISSION

Scott Sherman
206 Cowbell Lane
Willow Grove PA 19090

To the DEP;

Please do not weaken our water quality standards. Lowering the standards helps no one. It only benefits polluters financially, and passes the clean-up cost onto the tax payers.

Scott Sherman



Trostle, Sharon F. - DEP

From: Bob Wendelgass [bwendelgass@cleanwater.org]
Sent: Wednesday, December 17, 2003 12:23 PM
To: RegComments@state.pa.us
Subject: Comments on Proposed Changes to Chapter 93

Original: 2366

Attached are comments from the PA Campaign for Clean Water and 32 other organizations regarding the proposed changes to Chapter 93. I have also attached a one-page summary for distribution to members of the Environmental Quality Board

Feel free to contact me with any questions or concerns. Thank you for your consideration of our comments.

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

PENNSYLVANIA CAMPAIGN FOR CLEAN WATER
100 N. 17th Street, 9th Floor
Philadelphia PA 19103
215-640-8800

SUMMARY OF COMMENTS ON CHANGES TO CHAPTERS 93 AND 16: The following comments are submitted on behalf of the PA Campaign for Clean Water and 32 other watershed, environmental and conservation organizations in Pennsylvania.

1. The Department's proposal to amend Section 93.2(a) clarifies the scope of Chapter 93 and is consistent with both the Pennsylvania Clean Streams Law and the federal Clean Water Act. The Campaign supports the proposed amendment to Section 93.2(a). That amendment clarifies the scope of Chapter 93 by eliminating the potentially confusing language "and will be considered by the Department in its regulation of discharges."

2. The Department should propose the addition of biological criteria to the specific water quality criteria set forth in Chapter 93. Without numeric or narrative biocriteria protecting aquatic life uses, the biota of Pennsylvania streams may continue to suffer irrespective of whether the chemical and physical parameters established in Section 93.7 are met.

3. The Warm Water Fishes and Cold Water Fishes Use Definitions Fail To Protect Their Existing Uses. The definitions of Warm Water Fishes (WWF) and Cold Water Fishes (CWF) in § 93.3 fail to protect the existing uses of the Commonwealth's waterways by allowing warm water and cold water communities to be drastically altered.

4. DEP Lacks A Specified Level of Protection or Procedures in Its Water Quality Standards to Ascertain When Uses Are Impaired. DEP lacks tools to actually determine, in many cases, when an activity will impact an existing use. DEP must develop tools to determine when an activity will impact an existing use and include them in its water quality standards.

5. DEP Should Develop a "Cool Water Fishes" or "Transitional Fishes" Use.

6. Pennsylvania Must Move Expeditiously To Adopt Water Quality Standards For Total Nitrogen and Phosphorous That Protect Pennsylvania Waters And Downstream Waters Such as the Chesapeake Bay. DEP must adopt nitrogen and phosphorous criteria that assures the protection of not only local Pennsylvania waters, but also downstream waters.

7. Pennsylvania should adopt criteria for E. coli and/or enterococci as indicators for human health risks from recreational contact.

8. Pennsylvania Should Not Eliminate Protections for Bottom Waters In Lakes and Impoundments. The proposed change is unnecessary and eliminates Dissolved Oxygen. protections for certain waters and aquatic species in some of the best lakes, ponds, and impoundments in the Commonwealth.

9. The Department Should Adopt EPA's Standard for Methylmercury.

PENNSYLVANIA CAMPAIGN FOR CLEAN WATER
100 N. 17th Street, 9th Floor
Philadelphia PA 19103
215-640-8800 phone
215-640-0930 fax

The undersigned organizations submit the following comments to the PA Department of Environmental Protection and Environmental Quality Board as part of the Triennial Review of Chapters 93 and 16:

1. The Department's proposal to amend Section 93.2(a) clarifies the scope of Chapter 93 and is consistent with both the Pennsylvania Clean Streams Law and the federal Clean Water Act.

The Campaign supports the proposed amendment to Section 93.2(a). That amendment clarifies the scope of Chapter 93 by eliminating the potentially confusing language "and will be considered by the Department in its regulation of discharges."

The potential for confusion over this language 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, relying on the phrase quoted above. The EHB has since granted petitions for reconsideration and has withdrawn its erroneous opinion. The Board's proposed amendment to Section 93.2(a) will avoid this kind of misunderstanding.

As pointed out in the preamble to this 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." 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 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.

2. The Department should propose the addition of biological criteria to the specific water quality criteria set forth in Chapter 93.

Conspicuously absent from the proposed changes to Chapter 93 are any specific narrative or numeric biological criteria (also known as "biocriteria"). Presently, all specific water quality criteria established in Section 93.7 are based on either chemical or physical (i.e., temperature) parameters. There are no specific water quality criteria based on the biological condition of waterbodies. Biocriteria that are protective of aquatic life uses should be added to this proposed rulemaking.

Despite the lack of biocriteria in Chapter 93, DEP does recognize the importance of biological communities in assessing water quality and stream health. DEP's stream assessment program for determining whether waters of the Commonwealth are impaired relies on a protocol that utilizes biological surveys of instream macroinvertebrate communities (the "Modified Rapid Bioassessment Protocol"). DEP uses a bioassessment approach because it gives a fast and accurate gauge of stream health that captures the impacts of all factors that may be affecting the stream's aquatic life use.

This disconnect between the established water quality criteria and the methodology for assessing stream impairment results in the following paradox: a stream that meets all applicable water quality criteria in Section 93.7 can be assessed as impaired for failing to meet its designated aquatic life use. Big Spring Creek in Cumberland County was classified as severely impaired even though the identified source of the impairment, the discharge from the Pennsylvania Fish and Boat Commission (PFBC) Big Spring Fish Culture Station, regularly met effluent limits that had been modeled to satisfy the instream criteria set forth in Section 93.7(a). Although not as severely impaired, the same situation exists for the receiving streams below the PFBC Fish Culture Stations at Bellefonte, Benner Spring, Huntsdale, Oswayo, Pleasant Gap and Tylersville.

In all of these situations, the effluent limit modeling geared to the Section 93.7 criteria failed to prevent impairment of the aquatic life use that was detected using biological assessment tools.

The narrative, general water quality criteria in Section 93.6 also failed to prevent these impairments from occurring. Establishment of biocriteria would provide clear standards for directly assessing the condition of the aquatic communities in the receiving streams. Particularly where other water quality criteria are satisfied, the existence of specific biocriteria would provide a clear basis for enforcement actions, adjustment of permit limits, or other measures to eliminate the causes of impairment. Coupled with regular instream monitoring, biocriteria also would facilitate the detection of stream degradation before it impairs an existing or designated aquatic life use.

EPA has made it a priority to support and encourage states to develop biocriteria and incorporate them into specific water quality standards. In 1988, EPA established its Bioassessment and Biocriteria Program to achieve the establishment of "[q]uantifiable biocritera . . . in all state/tribal water quality standards to protect aquatic life uses." EPA recognizes that, among other uses, biocriteria can be utilized to "evaluate the effectiveness of NPDES permit requirements and detect previously unmeasured point and nonpoint source water quality problems."

In December 2002, EPA issued a report that inventoried the status of state, tribal and interstate commission bioassessment and biocriteria programs throughout the United States. The report revealed that, as of 2001, 29 states, tribes and interstate commissions had developed narrative biocriteria, and 11 additional entities had narrative biocriteria under development. Four entities (including the Delaware River Basin Commission and the state of Ohio) had adopted numeric biocriteria, while 11 entities were in the process of developing numeric criteria. Pennsylvania was not among the states listed as having developed or developing narrative or numeric criteria. This Triennial Review would leave Pennsylvania as one of the dwindling handful of states that lag behind the times by failing to include any biocriteria in their water quality standards.

Presently, Section 93.6(a) (relating to General Water Quality Criteria) states that "[w]ater may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life." However, EPA's Biocriteria Report pointed out that cursory statements such as these fail to qualify as even "narrative" biocriteria, because they fail to describe the biological integrity of aquatic communities inhabiting waters of a designated aquatic life use, and do not clarify how the criteria are operationally defined in the water quality standards. Moreover, as the examples of stream impairment cited above make clear, Section 93.6(a) has been ineffective at filling gaps left by Section 93.7's specific criteria and thereby preventing impairments to aquatic life uses. Without numeric or even narrative biocriteria protecting aquatic life uses, the biota of Pennsylvania streams may continue to suffer irrespective of whether the chemical and physical parameters established in Section 93.7 are met.

EPA's review of a state's Triennial Review submission must include a determination whether the State has adopted criteria that protect the designated uses. Pennsylvania's current criteria do not satisfy this standard. To qualify for EPA approval, this Triennial Review must correct that deficiency by including biocriteria that more fully protect the designated uses of Pennsylvania waters.

3. The Warm Water Fishes (WWF) and Cold Water Fishes (CWF) Use Definitions Fail To Protect Their Existing Uses.

The definitions of Warm Water Fishes (WWF) and Cold Water Fishes (CWF) in § 93.3 fail to protect the existing uses of the Commonwealth's waterways by allowing warm water and cold water communities to be drastically altered by activities such as subsidence from underground mining, and yet be considered to still be within the WWF or CWF use. The current WWF and CWF use definitions fail to protect all flora and fauna in existing warm water and cold water communities.

The EPA has provided guidance on when an existing use is impaired in its Water Quality Standards Handbook (1994), stating in Chapter 4 that:

> *No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards...Non-aberrational resident species must be protected, even if not prevalent in number or importance. Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed...An existing aquatic community composed entirely of invertebrates and plants, such as may be found in a pristine alpine tributary stream, should still be protected whether or not such a stream supports a fishery.*

When viewed within the context of the EPA Guidance, the WWF and CWF uses are under-protective in numerous situations. A prime example is the impact of subsidence from under-round mining. In some streams, subsidence from underground mining has altered the hydrology from a riffle/run habitat to a pool/glide habitat, resulting in drastic changes in the fish and aquatic life in the stream. Other situations where the use is under-protective include where a dam on a stream eliminates a species, such as darters or mussels, but still supports a warm water or cold water fishery, even though the species composition has changed. An activity which introduces a large amount of sedimentation into a stream may eliminate species such as darters, which are very sensitive to sediment, and result in the presence of species such as green sunfish, which tolerate sediment. Finally, a water withdrawal project may eliminate much of the flow in a stream, and substantially reduces biomass, yet species still remain, albeit at stressed levels in small populations.

In all these situations, an activity that significantly impairs flora and fauna in a warm water or cold water environment results in the replacement of that flora and fauna with others that are tolerant of pollution. The WWF and CWF definitions in § 93.3 fail to protect the prior-existing warm water and cold water flora and fauna by allowing their destruction while providing the legal imprimatur of a WWF or CWF use for the replacement community. The existing uses of the prior-existing warm water and cold water flora and fauna are not protected because DEP allows for its destruction and replacement by other warm water or cold water flora and fauna.

In order to address this problem, DEP must clarify that existing use protection would be violated if it can be shown that pollution has eliminated a species of fish, mussel, or aquatic insect from a reach of stream.

DEP should also establish procedures for determining when existing use protection has been violated as a result of reduced numbers or biomass of a particular species of fish. The studies for the development of IBI's (Index of Biotic Integrity) for the different regions of Pennsylvania should be completed so that the procedures can be put in place. IBI will help determine when an activity has impaired the fish community to the extent that the existing use has been eliminated. DEP must develop a methodology for determining when existing uses have been so impacted that they can be said to have been impaired.

DEP must also redefine and/or subdivide the WWF and CWF uses to accurately include the flora and fauna that compose these uses. DEP needs to ensure that it provides and implements existing use protection for all non-aberrational warm water flora and fauna from activities that may impact the flora and fauna. DEP cannot allow the elimination and replacement of one type of flora and fauna by another. To do so fails to protect and maintain the stream's existing use.

4. DEP Lacks A Specified Level of Protection or Procedures in Its Water Quality Standards to Ascertain When Uses Are Impaired.

DEP is legally prohibited from issuing permits or approvals for an activity that will fail to meet water quality standards. Despite this prohibition, DEP lacks tools to actually determine, in many cases, when an activity will impact an existing use. DEP must develop tools to determine when an activity will impact an existing use and include them in its water quality standards.

In the context of water withdrawals, DEP began work on a document that proposed standards for examining how much water could be withdrawn from a headwater stream while still protecting various stream uses. The proposal, titled Proposed Technical Guidance 392-2130-013 - Policy for Protecting Aquatic Resources And Related Stream Uses in Processing Approvals for Water Rights Acquisitions in Certain Waters of the Commonwealth, appeared for public comment in August of 2001 but was never finalized. DEP should finalize this document, after incorporating changes suggested by the environmental community in comments. This would provide a threshold for determining whether uses are impaired by water withdrawals.

In addition, DEP should perform studies and develop procedures and thresholds for the impacts of activities such as subsidence caused by underground mining; the construction and operation of dams, and activities that cause excessive sedimentation. These thresholds should then be incorporated into the Department's water quality standards.

Finally, as noted above, DEP should complete development of its IBI which will help determine when an aquatic community has been impaired. Currently, DEP is unable to accurately determine when an existing warm water or cold water community has been severely impacted because it has not established thresholds and measures.

5. DEP Should Develop a "Cool Water Fishes" or "Transitional Fishes" Use.

In general, the DEP classifies a stream as WWF (Warm Water Fishes) if species such as white suckers, creek chubs and blacknose dace dominate the fish community. These species are not fully protected by this designation, as a result of their thermal requirements. In the past, the DEP has attempted to "downgrade" a stream from CWF to WWF when the fish community was dominated by those species.

In response to a downgrade petition in 1992, PFBC reviewed the literature and determined that of Pennsylvania's three major aquatic life designated uses, Cold Water Fishes, Trout Stocking, and Warm Water Fishes, only Cold Water Fishes would protect all life stages of the three species. PFBC, supported by USFWS and EPA, has repeatedly argued against downgrading of CWF-designated streams to WWF where cooler water fish are present and the redesignation could the stream to fail to support these species.

We recommend that DEP develop temperature criteria for "cool water" or "transitional" streams that fully protect the aquatic life that typically dominate the fish community of such streams.

6. Pennsylvania Must Move Expeditiously To Adopt Water Quality Standards For Total Nitrogen and Phosphorous That Protect Pennsylvania Waters And Downstream Waters Such as the Chesapeake Bay.

Currently, Pennsylvania contributes approximately 40% of the loading of nutrients (nitrogen and phosphorous) to the Chesapeake Bay. Nutrient pollution has resulted in the Chesapeake Bay and its tidal tributaries being placed on EPA's § 303(d) list of impaired waters. Despite the severe impact of Pennsylvania nutrients on the health and water quality of the Bay, the Commonwealth has no water quality standards in place that are designed to restrict the amount of nitrogen and phosphorous in Pennsylvania waters that drain into the Bay. While some phosphorous standards are in place to protect local water quality in Pennsylvania, no comprehensive nitrogen and phosphorous standards are in place to protect downstream waters. The failure of Pennsylvania to have comprehensive nitrogen and phosphorous water quality standards that assure the protection of downstream waters is an express violation of federal regulations adopted under the Clean Water Act (CWA).

The federal regulation at 40 CFR § 131.10(b) specifically provides that "in designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and *shall ensure that the water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.*"(emphasis added). The lack of such standards is a compelling reason for EPA disapproval and federal promulgation of Pennsylvania nutrient water quality standards that are protective of downstream waters such as the Chesapeake Bay.

DEP's draft "Nutrient Criteria Development Plan" (8/22/02), which has been submitted to and reviewed by EPA, contains no component for developing nitrogen criteria for rivers and streams in the Commonwealth. Indeed, DEP admits in the Plan that it fails to meet the requirements of

the CWA and its regulations when it states that "nitrogen criteria will not be developed for use within Pennsylvania waters." (emphasis added). This is a clear derogation of the Commonwealth's duty to adopt water quality standards that protect downstream waters.

In the draft Plan, DEP states that "for downstream waters such as the Chesapeake Bay and the Gulf of Mexico where nitrogen is identified as the nutrient that must be controlled, Pennsylvania will protect these waters through the management of load allocations to major tributaries". This mechanism fails to satisfy CWA requirements because DEP has not committed to adopt the load allocations into its water quality standards. These load allocations, which arise out of Pennsylvania's participation in EPA's Chesapeake Bay program, are not binding, as water quality standards are, but instead are merely goals that need only be voluntarily addressed. Moreover, since DEP's submission of the Plan to EPA, Governor Rendell agreed with other Bay watershed Governors on March 21, 2003 to reduce nitrogen loadings in the Bay watershed by 110 million pounds/year. Accordingly, any load allocation contemplated in the 8/02 Plan is not only voluntary, but it is also outdated. Finally, DEP's attempts to develop tributary strategies to address the Governor's commitments by April, 2004 are seriously deficient and behind schedule.

DEP must adopt nitrogen and phosphorous criteria that assures the protection of not only local Pennsylvania waters, but also downstream waters such as the Chesapeake Bay. Pennsylvania must include binding requirements for nutrient reductions in its water quality standards, whether in the form of adequate, enforceable water quality standards for nitrogen and phosphorous that are protective of the Bay, and/or binding load allocations, and/or a total maximum daily load (TMDL) for nutrients.

7. Pennsylvania should adopt criteria for E. coli and/or enterococci as indicators for human health risks from recreational contact.

Since 1986, EPA has been recommending that states use E. coli and/or enterococci as the water quality criteria for protection of primary contact freshwaters. This recommendation is based on epidemiological studies conducted by EPA and others that demonstrated that E. coli and enterococci are better predictors of acute gastrointestinal illness than fecal coliform. Therefore, EPA's position is that E. Coli and enterococci are more appropriate indicator parameters to determine human health risks from recreational contact.

EPA issued draft "Guidance for Ambient Water Quality for Bacteria" in June 2002 (final expected Dec. 2003) that reiterated this recommendation. EPA's draft guidance also allows states to include both fecal coliforms and E. Coli/enterococci in their water quality standards for a limited period of time. This will help states to assure consistency and continuity in their regulatory programs, while they collect data on these indicators in order to incorporate the new criteria into their water quality programs. Furthermore, in EPA's letter (August 2, 2001) approving Pennsylvania's last triennial review of water quality standards, EPA expressed concern that Pennsylvania continues to use fecal coliform criteria. In particular the letter states that PA is required to adopt the bacteria criteria under the Beach Act Amendment to the Clean Water Act by 2004 because it has coastal and Great Lakes waters. In addition EPA stated that there is a need for "current, defensible" criteria due to the development of bacteria-based TMDLs

and the implementation of long-term control plans to address combined sewer overflows.

DEP should adopt E. Coli and/or enterococci water quality criteria as recommended by EPA:

--E. coli: geometric mean of 126 cfu/100 ml
single sample maximum allowable density 235 cfu/100ml

--Enterococci: geometric mean of 33 cfu/100 ml
single sample maximum allowable density of 62 cfu/100 ml

8. Pennsylvania Should Not Eliminate Protections for Bottom Waters In Lakes and Impoundments.

The EQB proposes to amend Table 3 to eliminate the numerical dissolved oxygen (D.O.) criteria for the hypolimnion (bottom area) of stratified lakes, ponds and impoundments, including waters that are classified as High-Quality (HQ) waters. Pennsylvania's proposed standards for D.O. outline new standards considering the "natural process of stratification in lakes, ponds, and impoundments." The EQB proposal would apply the narrative water quality criteria outlined in § 93.6 to the hypolimnion in a stratified lake and a new proposed D.O. criteria outlined in § 93.7 to the epilimnion for a nonstratified lake.

As a general matter, we recognize that lakes can naturally stratify creating depressed D.O. levels at the lower levels due to isolation from the effects of wind mixing and from the lack of light needed for photosynthesis. The study of water quality in lake systems is a complex science requiring the consideration of a host of inputs that contributes to the overall health of a naturally occurring lake system.

Dissolved oxygen is critical to the survival of fish and other aquatic life. The proposed change attempts to mimic natural processes of stratification in these waters throughout a year, but fails to do so. In essence, the change provides DEP with a stealth way of eliminating protection for aquatic species in some of the Commonwealth's best lakes, ponds, and other impoundments without any requirement for public notice and comment.

The language of the proposal is so vague that there is no definition or any standard or parameter delineating what is considered "stratified". There is also no requirement to consider the seasonality and variability of stratification; this requirement is important because D.O. varies seasonally and even diurnally. Under the proposal, DEP has the boundless discretion to declare a waterbody "stratified." Also, there is no language specifying how the determination of what is "stratified" will be implemented by the Department in permit actions it reviews. Moreover, there is no language describing how the antidegradation requirements of Chapter 93 will come into play. Finally, there is not even a requirement that a study or evaluation be performed. At a minimum, a study of the waterbody should be required before DEP declares it to be "stratified," and thus without D.O. protection for fish and aquatic life.

As a practical matter, the change means that dischargers could propose a discharge into the bottom areas of stratified lakes, ponds, or impoundments and not be subject to any requirement to protect the dissolved oxygen content of the waterbody from the discharge; only narrative, general water quality criteria would apply. Also, if the proposal is enacted, DEP can remove lakes, ponds, and impoundments from DEP's list of impaired waters solely on the basis of a DEP biologist's finding, without any criteria, sideboards, or parameters for the public to review the determination against, that a waterbody is "stratified". There are already mechanisms in the Department's regulations for addressing water uses that do not attain a water quality criterion; these Use Attainability Analyses (UAAs) must proceed through a publicly accountable regulatory revision process, unlike the proposal.

Moreover, the proposal should not apply to "impoundments". By definition, impoundments are not natural occurrences and should not be characterized alongside the "natural" phenomenon of thermal stratification in lakes and ponds. The physiochemical and biological impacts of impoundments vary widely and create lentic conditions such as cold and sometimes oxygen-depleted water. These are not natural conditions for the stream segment that has been impounded, and more importantly, those natural conditions can be restored through improved operation of a hydropower or water supply dam or through dam removal.

The inclusion of "impoundments" in the new standard will create a barrier to possible improvements. Over the past 10 years, hundreds of dams nationwide have been improved, or modernized, improving water quality conditions and the overall health of the rivers system. By making operational changes in hydroelectric facilities, dam owners have been able to restore more natural river flows, minimize fluctuations of reservoir levels, restore habitat for river wildlife and better maintain appropriate water quality parameters such as temperature and oxygen levels in a river. These operational changes have been made by modifying "peaking" operations that can switch flows between raging torrents and mere trickles within minutes. The changes can also include minimizing the fluctuation of reservoir levels. Water quality impacts from impoundments can be traced to the amount and timing of the water quality from the reservoir as well as the depth at which the water is drawn from. Lastly, through demonstrated use of improved technology, dam operators can improve temperature and dissolved oxygen levels using improve technology. All of the changes we mention above have occurred without the removal of a dam and, on average, result in an average loss 1.6% of a dam's energy generation.

Because dams are built to last an average of 50 years, these impoundments should be considered temporary landscape features that have the potential to revert to free-flowing stream and river stretches once the uses of a dam are no longer required and the dam is breached or removed. The proposed standards should recognize this potential and not exempt these impounded areas from future D.O. standards.

The proposed change is unnecessary and eliminates D.O. protections for certain waters and aquatic species in some of the best lakes, ponds, and impoundments in the Commonwealth. It fails to accurately reflect the principles of limnology, and gives the Department boundless discretion to categorize a lake or impoundment as "stratified," without the need or requirement for any study, or without any definition of "stratification," or consideration of seasonality or

variability. As drafted, DEP could potentially use the provision to eliminate a lake from the § 303(d) list of impaired waters through a stealth process undertaken without any opportunity or requirement for public input or notice. A UAA process for changing use designations already exists, and includes an opportunity for public input. Also, there is no language on how antidegradation requirements, such as existing use protections, in Chapter 93 would apply, and how the new language would be implemented in permit decisions. Finally, the proposal inappropriately extends to "impoundments". By doing so, Pennsylvania writes off any potential future use of the impounded surface water as a stream.

9. The Department Should Adopt EPA's Standard for Methylmercury.

In 2001, EPA adopted a human health criterion of 0.3 mg/kg for this substance based on concentrations in fish and shellfish tissue. DEP should incorporate EPA's criterion.

Submitted By:

Robert Wendelgass,
Pennsylvania Campaign for Clean Water

Robert Silber,
Allegheny Riverkeeper

Martin Boksenbaum,
Alliance for Sustainable Communities
Lehigh Valley

Sara Nicholas,
American Rivers

Verlin Renner,
Berks County Conservancy

Joy Bergey,
Center for the Celebration of Creation

William Gerlach,
Chesapeake Bay Foundation

Judith Auten,
Chester Ridley Crum Watershed Association

Matthew Royer,
Citizens for Pennsylvania's Future

Myron Arnowitt,
Clean Water Action

Joanne Rossi,
Community Labor Refinery Tracking
Committee

Leonard Hess,
Conemaugh Valley Conservancy

Maya van Rossum,
Delaware Riverkeeper Network

Tom Pelikan,
Friends of the Wissahickon

Leonard Hess,
Kiski-Conemaugh River Basin Alliance

Susan Gobreski,
League of Conservation Voters Education
Fund

Elizabeth Milner,
League of Women Voters of Pennsylvania

Jan Keim
Little Lehigh Watershed Coalition

Roseann Weinrich,
Mahanoy Creek Watershed Association

James Stuhltrager,
Mid Atlantic Environmental Law Center

Beverly Braverman,
Mountain Watershed Association

Erin Ballard,
Penn Environment

Ron Evans,
Pennsylvania Environmental Defense Foundation

Joy Bergey,
Pennsylvania Interfaith Climate Change Network

Catherine Hammond,
Pennsylvania League of Conservation Voters

Judith Jordan,
Pennsylvania Organization for Watersheds and Rivers

Doris Loud,
Pennsylvanians for Environmental Protection

Robin Mann,
Sierra Club Pennsylvania Chapter

Aimee Chamberlain,
Ten Mile Protection Network

Dan Derber,
Ten Mile Creek Watershed Conservancy

Shelley Nixon,
Three Rivers Paddling Club

Herbert Wile,
Tobyhanna Creek/Tunkhannock Creek Watershed Association

Beverly Braverman,
Youghiogheny Riverkeeper

DEPT. OF ENVIRONMENTAL PROTECTION

IT IS MY UNDERSTANDING THAT THE INDUSTRIES MOST RESPONSIBLE FOR POLLUTING OUR STATE STREAMS ARE FIGHTING TO REDUCE PA WATER QUALITY STANDARDS.

I BELIEVE THAT ELIMINATING RUNOFF FROM MINING, FARMING AND LOGGING FROM OUR EXISTING STANDARDS WOULD INCREASE POLLUTION OF OUR STREAMS AND RIVERS. I THEREFORE URGE YOU, FOR THE SAKE OF MY GRANDCHILDREN, NOT TO FURTHER VIOLATE OUR FEDERAL AND STATE CLEAN STREAMS LAWS.

THANK YOU,

Paul M. Lodl

Tate, Michele

From: Erin Ballard [eballard@pennenvironment.org]
Sent: Wednesday, December 17, 2003 5:26 PM
To: RegComments@state.pa.us
Subject: Triennial Review Comments

Original: 2366

Secretary Kathleen McGinty.doc...

Please accept the attached comments regarding Pennsylvania's Triennial Review of Wqater Quality Standards.

Thank You,
Erin Ballard
Clean Water Associate, PennEnvironment
1334 Walnut Street, 6th Floor
Philadelphia, PA 19107
Phone: 215.732.5897, Fax: 215.732.4599
Email: eballard@pennenvironment.org

Secretary Kathleen McGinty, Chair
Environmental Quality Board
P.O.. Box 8477
Harrisburg, PA 17105-8477

Dear Secretary McGinty:

Original: 2366

Please accept these comments on Pennsylvania's Triennial Review of Water Quality Standards, now open for public comment. Please make a copy of these comments available to the full Environmental Quality Board.

Your recent comments about the inadequacy of the framework for regulating nonpoint source pollution were accurate. There are several changes that should be made to the Triennial Review to begin closing these regulatory loopholes, offering better protection against nonpoint source pollution.

1. PennEnvironment supports the proposed language change to Chapter 93.2. This change is necessary to clarify the scope of DEP's authority. Any further narrowing of DEP's authority would result in the loss of important tools needed for the prevention of water pollution in the Commonwealth, violating Pennsylvania's Clean Streams law and the federal Clean Water Act.
2. PennEnvironment opposes the proposed change to Chapter 93.7(a), Table 3 regarding the elimination of the numerical dissolved oxygen criteria for the hypolimniom, or the bottom areas, of stratified lakes, ponds, and impoundments. The vague language does not adequately state how this change will protect the hypolimniom. Also, DEP should adopt the higher EPA values for dissolved oxygen.
3. In the past, DEP has stated that it would work on a) water quality criteria based on biological criteria, b) language protecting instream flow and habitat, and c) a "Cool-Water Fishes" designated use to protect species that fall outside of the "Cold Water Fishes" designation but which are not adequately protected by the "Warm Water Fishes" designation. DEP has not reported to the public on these issues, even though some of these suggestions are over ten years old. It is time to begin implementation of all three proposals.
4. Pennsylvania allows both mixing zones and variances. If the Commonwealth is going to allow these practices, there must be procedural standards in place. For example, although it would be better to eliminate mixing zones, a good first step would be a policy that allows the public to participate and provide input. Currently, for each discharge, DEP does not provide information in public notices on the size or extent of mixing zones, or the time extensions it may be granting to dischargers.
5. Lastly, DEP needs to protect "existing uses." It is not enough to evaluate activities for their potential to change water chemistry or temperature. Biological species should also be considered. There is existing EPA guidance language to make this change. This information can be found in the EPA's Water Quality Standards Handbook (USEPA 1994. Water Quality Standards Handbook: Second Edition. Office of Water, EPA-823-B-94-005a.), Chapter 4, Antidegradation, page 4-5.

Thank You,

Erin Ballard
Clean Water Associate, PennEnvironment
1334 Walnut Street, 6th Floor
Philadelphia, PA 19107
Phone: 215.732.5897, Fax: 215.732.4599
Email: eballard@pennenvironment.org

Brice Lee Horvath
420 S. 15th St., Apt 1-F
[redacted], PA.
Phila. 19146-1662

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

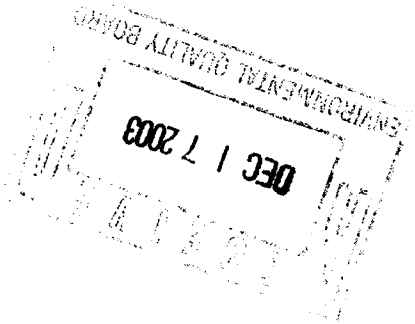
Original: 2366

To Whom it May Concern
at the DEP,

My francée & my fellow fly-fishers at Trout Unlimited have been talking to me about a new threat to our states water quality. Here is a sampling of E(xceptional) [redacted] V(alue) streams in the area: Barren Brook
Birch Run
Black Run (some)
Brandywine Creek (W)
Broad Run
Crum Creek (W)
French Creek (Some)

Indian Spring Run (part)
Jordan Run
Octoraro Creek
Valley
Creek (A)
White Clay Creek (E)

Can you imagine the will that was required to fight to clean, care for & get the highest quality classification for these waterways? Pennsylvania is famous for trout fishing & this brings beauty & tourist dollars.



It's in all of our best interests,

Thank You,

Brian Horvath

To Whom it May Concern:

I am writing in regards to the Clean Water Act. I would like to express my displeasure at the idea that it would be considered acceptable to allow industry to runoff their garbage liquids into our streams and water table. The filth in the factory runoff would be extrordinary. To say that it would not be harmful in the long run is preposterous even though there is no way to quantify such results. Industry and agricultural runoff are some of the major causes of stream, river, ocean and ground water pollution. Just in Pennsylvania the statistics are sickening. Allowing just one company or agricultural institution to produce runoff of any amount pollutes our streams, kills our wildlife and makes our state less enjoyable. Have you ever seen what runoff can do to a small streams environment? Most of the wildlife inherent to the stream is forced to adapt, or dies off, producing bactieria and fungal build-ups that are severly detrimental.

I am asking you to consider what you are doing to our local streams and wildlife and also what possible repercussions it could have on the people that live here, drink out of that water table and what each chemical is doing to OUR State.

Thank you for your time and consideration.

Mr. Jason Frawley

Gary H. Dudek
1109 Bethlynn Dr
Harrisburg, PA
17112

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

Original: 2366

To Whom it May Concern
at the Dep,

It has come to my attention that the largest source of water pollution in our fair state is in jeopardy of becoming legalized. As a true nature lover (I hunt largely as an excuse to hang out in the woods) this hurts & offends me, I'm shocked and ashamed that this could happen. Farms, mining, oil & gas drilling, & logging have fairly relaxed laws governing their run-off as is, & prevention is so much better than a cure.

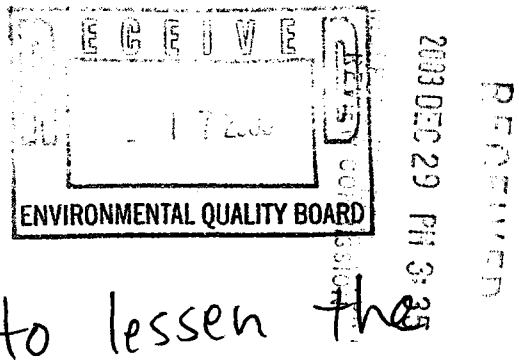
Please allow me to pass the →

legacy of my beautiful, unspoiled acres to my daughters, as Will Rodgers said, "Land is the only thing they're not making more of."

Thank You
for Your Time,
Gary H. Dudek

Original: 2366

CLEAN WATER ACTION



Dear DEP

I forbid you to lessen the Will of all Sentient biengs by weakening the Water Quality Standards in the State of Pennsylvania. To weaken the Standards allowing Industry more freedom to unregulated pollution would be discusting as a fellow citizen I feel you should protect the water Quality standards as runoff is the #1 source of pollution in this State. People should be accountable for Substance being worked with on thier land, so should Industry. Clean water is a basic human right and I believe all should be accounted for. for this is a basic human righ to clean, fresh water.

1124 Tilghman Street, Allentown, PA 18104 ■ (610) 434-9223 ■ FAX (610) 434-5790
1201 Chestnut Street, Suite 602, Philadelphia, PA 19107 ■ (215) 640-8800 ■ FAX (215) 640-0930
100 Fifth Avenue, Suite 1108, Pittsburgh, PA 15222 ■ (412) 765-3053 ■ FAX (412) 765-1737
4455 Connecticut Avenue NW, Suite A300, Washington, DC 20008-2328 ■ (202) 895-0420 ■ FAX (202) 895-0438

Thank you Brian Zeck

original: 2366

TO: Environmental Quality Board
PO Box 8477
Harrisburg, PA 17105-8477

FROM: Elizabeth Milner, President
League of Women Voters of Pennsylvania
226 Forster Street
Harrisburg, PA 17102

RE: Triennial Review of Water Quality Standards
(Amendments to Chapter 93)

As a member of the Pennsylvania Campaign for Clean Water, the League of Women Voters of Pennsylvania supports, and has signed on to, comments submitted for the Campaign.

We wish to comment independently on a topic that is not addressed by the Campaign comments, nor is it addressed in the proposed rulemaking, which is presently before the Board. However it is a subject which has been of concern to the LWVPA for several years, and which we have brought up during discussions of previous proposed regulatory changes and at discussions of the draft Water Quality Antidegradation Implementation Guidance by the Water Resources Advisory Committee. We respectfully request that the Environmental Quality Board review the provisions for public notice for new and expanded permits to discharge treated wastewater to streams – the NPDES permits for wastewater discharge.

As is made clear it the final draft of the Water Quality Antidegradation Implementation Guidance (page 86, last paragraph), no public notice is provided of an application for a new sewage discharge, or a renewal of a sewage or industrial waste discharge permit. The first notice the public has of a pending discharge permit is when a notice of a draft permit is published, by the Department, in the PA Bulletin (page 87, first paragraph). This means that the public learns of the pending permit when the decision is close to complete and that the Department has reviewed the application with no input from the public.

We find this to be grossly inadequate, and unfair to both the concerned public and to the Department staff reviewing the application. The staff is, by default, placed in a "Decide, Announce, Defend" position by the current system.

As mentioned above, the LWVPA has discussed this subject frequently with Department headquarters staff over several years, and has found them not concerned about the lack of public notice. Thus, we come to the Environmental Quality Board with the request that Board use its authority to see that revised public notice provisions are included in Department regulations and Guidance. We believe that early and informed public involvement in Department decision-making will lead to better decisions and fewer appeals of decisions.

Tate, Michele

From: Bonita Hoke [bchoke@epix.net]
Sent: Tuesday, December 16, 2003 10:04 AM
To: RegComments@state.pa.us
Cc: pawaters@yahoogroups.com
Subject: Triennial Water Quality Standards

Attached are comments to the Triennial Water Quality Standards from the League of Women Voters of PA.

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

Jacob Sibley 12/15/03
210 Summit Ave. Willow Grove
19090-2510 PA

Dear DEP,

Original: 2366

Please continue to protect our streams. Mining, farming, and logging Operations Should not be exempted from Water Quality Standards. Exempting them would destroy our streams. The environment is very important to me. Please do not weaken Water Quality Standards.

Sincerly,

Jacob Sibley 12/15/03

Jacob Sibley

Original: 2366

Trostle, Sharon F. - DEP

From: Melody Zullinger [melz@pa.net]
Sent: Monday, December 15, 2003 4:13 PM
To: regcomments@state.pa.us; irrc@state.pa.us; Sec. Kathleen McGinty (DEP)
Subject: Comments on triennial water quality review

Attached are PFSC's comments on DEP's triennial water quality review.
A hard copy has also been forwarded to Sec. McGinty.
Thank you for allowing us the opportunity to comment.

Melody Zullinger
Executive Director
PA Federation of Sportsmen's Clubs

Always striving to preserve, promote and protect our Outdoor Heritage of Hunting, Trapping, Angling, Boating, the Shooting Sports and the Resource.

Pennsylvania Federation of Sportsmen's Clubs

2426 North Second St. • Harrisburg, PA 17110 • www.pfsc.org
Phone: 717-232-3480 • Fax: 717-232-3480 • info@pfsc.org

December 15, 2003

Kathleen McGinty, Secretary
PA Department of Environmental Protection
Rachael Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063

Re: Triennial Water Quality Standards Review

Dear Secretary McGinty:

The Pennsylvania Federation of Sportsmen's Clubs appreciates the opportunity to provide comments to the Environmental Quality Board during the triennial water quality standards review. We have discussed these comments with Pennsylvania Trout, who has many PFSC affiliated chapters, and have had the opportunity to review their letter commenting on the triennial review. Basically, we are in agreement with the three major issues they have raised, so we will not elaborate on two of those issues. We would however, like to discuss the issue of Existing Use protection.

We are aware that DEP has devoted considerable effort to developing a procedure to determine when a stream should be classified as High Quality or Exceptional Value. We support that effort. However, we are not aware of how the Department determines what degree of biological impairment equates to elimination of an Existing Use, and therefore, what degree of biological impairment violates the antidegradation policy.

As you know, existing use protection is the floor of protection for all waters of the Commonwealth. The question is: What exactly constitutes an existing use, and how can it be determined that an existing use has been eliminated? We are aware that DEP (and the Environmental Protection Agency) define existing uses as "Those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards" (Chapter 93.1). This definition appears to say that the State and federal government actually protects each species of aquatic life in the stream. And, in fact, EPA's guidance in their water quality standards handbook (Chapter 4) says exactly that:

> *No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards...Non-aberrational resident species must be protected, even if not prevalent in numbers or importance. Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed...An existing aquatic community composed entirely of invertebrates and plants, such as may*

be found in a pristine alpine tributary, should still be protected whether or not such a stream supports a fishery.

Despite clear direction to protect each species, DEP's antidegradation policy defines Existing Uses as if they are synonymous with Designated Uses. As Pennsylvania Trout pointed out, this seemingly minor point has major ramifications for aquatic life and implementation of the Department's water quality protection program.

For example, it is fairly well established that most serious point source discharges are under control, and that nonpoint source pollution from agriculture, logging, urban sprawl, highways, mining, and other types of development is now the most serious threat to aquatic life. A recent alert issued by the Chesapeake Bay Foundation pointed out that excess nutrients are the reason why the Environmental Protection Agency placed the Chesapeake Bay, and much of the lower Susquehanna on the list of impaired waters. According to CBF, excess nutrients are the largest source of surface water impairment in the United States, and agriculture is the #1 source of nitrogen pollution in the watershed. Other types of development such as logging, highways, mining and urban sprawl contribute enormous amounts of sediment and other pollutants to streams.

Ordinarily, this type of pollution doesn't cause the spectacular fish kills that makes headlines. The effect is far more insidious. Instead, the aquatic life in the stream (in unimpaired streams) eventually switches from one that does not tolerate pollution, to one that thrives under polluted conditions. In essence, nonpoint source runoff can convert a stream from a smallmouth bass dominated fishery (an Existing Use), to one comprised mainly of carp. That is a gross simplification, but the point is that native fish communities, freshwater mussels, and aquatic invertebrates are being eliminated from miles of streams and, if DEP does not develop a method by which biological condition relates to Existing Uses then the water quality standards are of little use in regulating any activity other than point source discharges.

How can activities that generate nonpoint source pollution that impairs a stream be regulated, and prevented from causing nonpoint source pollution, if the DEP defines Existing Uses as Warm Water Fishes, or Cold Water Fishes? After all, it is unlikely that any nonpoint source pollution would eliminate all in-stream aquatic life: it would be easy to argue that the stream is unimpaired because some aquatic life remains.

To determine if Existing Uses have been eliminated, the DEP needs a scientifically defensible procedure that uses the aquatic life in the stream. If DEP has such a procedure, it needs to be included as part of the Antidegradation Guidance so that the public is aware of the standards that DEP uses.

In fact, at times DEP does use biology to determine when a use has been impaired, or has equated a species to an "Existing Use." Pennsylvania Trout pointed out some of those instances in its letter and we will not repeat them here. Contrast, however, DEP's statement in the recently issued Antidegradation Guidance (page 6):

The uses are protected on a waterbody segment when DEP makes a decision to issue or deny a permit or approval request for an activity that may impact the use. This is accomplished, for WWF, TSF, CWF and HQ waters with SEJ, through the application of numeric water quality criteria found in Chapter 93 of DEP's regulations and the toxic substances criteria found in Chapter 16, Toxics Management Strategy - Statement of Policy. For EV waters and HQ waters where SEJ has not been demonstrated, protection of existing use is accomplished through maintenance of existing quality.

In other words, DEP is telling the public that it relies solely on water chemistry to determine whether an existing use has been protected. DEP's reliance on the numeric water quality criteria to protect uses work well for wastewater discharges, but cannot respond to the numerous ways in which our waters are threatened. For nonpoint source pollution, the problem is that by the time gross changes in the numeric water quality criteria are detected, aquatic biology can be devastated.

Recently, the National Wildlife Federation, of which we are an affiliate, commissioned a review of the State of Washington's water quality criteria, and the adequacy of traditional water quality criteria to protect the designated uses of Washington's streams[1]. Karr et al. found that "Traditional physical and chemical parameters...are often blind to biological condition..." In other words, all point source discharges may be meeting water quality standards, yet the aquatic life in the stream may be grossly impaired; Existing Uses may have been eliminated. Karr recommends that biological criteria become a core component of water quality criteria.

Based on studies by Karr and other scientists, it appears that the chemical quality of water sometimes does not change much as urbanization increases - until urbanization is significantly advanced. Using physical or chemical criteria would not reveal the extent of degradation to the aquatic system until it is too late. The only method that we are aware that can detect the subtle biological changes that signal impairment is the Index of Biological Integrity (IBI) approach.

The need for biological criteria is crucial because biological degradation frequently outpaces measurable physical and chemical water quality degradation in diverse land use contexts (e.g., urban, agriculture, forestry). We are aware that DEP had been funding a position at the Pennsylvania Fish and Boat Commission to sample fish communities throughout the Commonwealth with the goal of developing IBI's for fish communities in the various regions of Pennsylvania. To our knowledge, this work is not finished, and is not being expeditiously pursued.

In 1990, the EPA began recommending the states adopt biological indicators like IBI in their water quality criteria[2]. EPA's guidance (issued in 1990) states "...to meet the objectives of the Act and to comply with statutory requirements under Sections 303 and 304, States are to adopt biological criteria in State standards" and that "It is also EPA's policy that States should designate aquatic life uses that address biological integrity and adopt biological criteria necessary to protect those uses." (Footnote 2).

We are aware that DEP conducts stream assessments to meet their Section 305(b) responsibilities under the federal Clean Water Act, and to determine which streams are impaired. We note that in 1998, agriculture and abandoned mined lands were responsible for impairing over 3,000 miles of streams; in 2002 these activities were responsible for impairing over 6,000 miles of streams.

DEP's web site describes the method used to assess these waters, and it does not appear that water chemistry plays much of a role. Therefore, for the vast majority of the streams, DEP did not determine that these streams were impaired because numeric water quality criteria were violated; rather, DEP determined that these streams were impaired based on lower than expected

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[1] Karr, James R., R. Horner, and C. Horner, Esq. 2003. EPA's Review of Washington's Water Quality Criteria: An Evaluation of Whether Washington's Proposal Protects Stream Health and Designated Uses. Report of the National Wildlife Federation. 25pp.

[2] United States Environmental Protection Agency. 1990. Reducing Risk: Setting Priorities and Strategies for Environmental Protection. *SAB -EC -90 -021*. United States Environmental Protection Agency, Washington, DC

biological conditions. Our question is: Does listing a stream as impaired mean that Existing Uses have been eliminated? If so, we are not aware of an instance where the DEP has taken a regulatory action to rectify, or penalize, an activity that has caused the impairment.

To provide the basic floor of protection to aquatic life in the Commonwealth, we recommend the DEP complete the development of an IBI for fish and/or the benthic community that will allow a scientifically defensible method of determining when Existing Uses have been eliminated.

To further assist in our understanding of this issue, we would appreciate a written response to the following questions:

- Does an activity that significantly reduces the number or biomass of fish violate DEP's antidegradation policy? What percentage constitutes "significantly?"
- Does an activity that replaces a pollution intolerant community with one that tolerates pollution violate DEP's antidegradation policy? In other words, is it permissible to eliminate certain fish, mussels, or species of mayflies, and have them replaced by aquatic life that would still be warm-water or cold-water species, but would be tolerant of pollution?
- Does an activity that eliminates mussels, or certain pollution intolerant species of aquatic insects, violate DEP's antidegradation policy?
- Does an activity that eliminates aquatic life from certain reaches of a stream violate DEP's antidegradation policy? How long must the affected reach be? What percentage of a stream is it permissible to degrade?

We understand that these questions have been asked in the past and that the answer is still unknown. We hope to receive a response to these questions at your earliest convenience.

It is our position that until the DEP completes the development of scientifically defensible biocriteria, EPA's approval of the DEP's triennial review should be withheld or conditioned on a supplemental proposal to add biological criteria.

We thank you for the opportunity to submit the above comments on behalf of those who are perhaps affected most by these critical issues – Pennsylvania's million plus sportsmen.

Sincerely,

Ed Zygmunt, Clean Streams Committee Chairman

Melody Zullinger, Executive Director

Linda L. Dodds
1108 Bethlynn Dr.
Harrisburg, PA 17112

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

Original: 2366

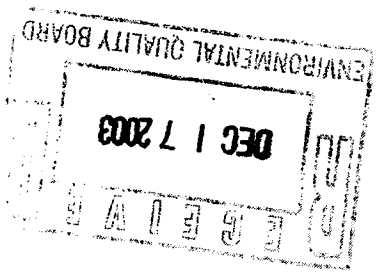
To Whom it May Concern
at the Dep,

From one whom it concerns, as a little background on myself, I am a volunteer, a mother of two, wife, gardener, fisher & make every attempt to be responsible for the bounty of family & earth that I have received. So imagine my surprise to hear that the most copious form of water pollution is going to be taken out of the Clean Water Act. I remember what the country used to be like before 1972, & its not perfect now, but it's BETTER & the point is to keep trying until you get it right →

Simply so those companies can save time & money? Ridiculous! What a flagrant abuse of power, to use money, greed, avarice at its lowest form to pollute for profit.

Keep the law, dump the big money special interests, I appeal to you, your sense of caring & community to use your clout to protect our world.

Thank You,
Follow Your Heart,
Linda
Linda L Dudek



Trostle, Sharon F. - DEP

From: Melanie Cook [mcook@pahomes.org]
Sent: Wednesday, December 17, 2003 2:26 PM Original: 2366
To: RegComments@state.pa.us
Cc: David Martin; Lou Biacchi; jrb@woodstone-homes.com; shcan@aol.com; zghomes@comcast.net
Subject: PA Builders Association Comments on the Triennial Review of Water Quality Standards

December 17, 2003

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105 – 8477
RegComments@state.pa.us
Proposed Rulemaking: Triennial Review of Water Quality Standards
Comments Submitted on Behalf of the Pennsylvania Builders Association
600 North Twelfth Street Lemoyne, PA 17043

The following comments are submitted on behalf of the over 12,000 members of the Pennsylvania Builders Association ("PBA") in response to the Department of Environmental Protection's ("Department") proposal to amend provisions of Chapter 93 relating to Water Quality Standards.

The comments presented are limited to the proposed revisions to Section 93.2. Scope.

Section 93.2(a). Scope currently reads as follows:

(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].

The Department is proposing to delete the language that is bracketed above.

The only justification given is that "It has been the Department's longstanding position that Section 93.2 is broad and that Chapter 93 is not limited to "discharges" or to "point sources" as defined in Section 92.1 (relating to definitions)." The proposed amendment is intended by the Department "to avoid future misunderstandings" like the one it attributes to the Environmental Hearing Board ("EHB") decision *in Consol Pennsylvania Coal Company v. Commonwealth of*

Pennsylvania, Department of environmental Protection et al., **EHB Doc. No. 2002-112.**

The possibility that the EHB correctly interpreted the existing regulatory language, and issued an opinion that was in keeping with the true legislative intent of the *Clean Streams Law* is not a possibility that the Department would like to recognize.

Instead it proposes to amend a regulation by deleting critical language that the Department was solely responsible for drafting in the first place, all the while, insisting that the proposed rulemaking will not impose any significant additional compliance costs on the regulated community; or increase significantly the paperwork impact on the Commonwealth, its political subdivisions or the private sector.

The PA Builders Association's would like for the EQB to ascertain from the Department just how "longstanding " its position is with respect to its assertion that the water quality standards in Chapter 93 are the standards that are to be used whenever the Department is making any decisions, or rendering any approvals relating to stream quality. In its notice of proposed rulemaking the Department notes that it has reviewed and proposed revisions to the state's water quality standards during "1998—2000 and 2002". Without the Department defining just what it means when it uses the term "longstanding" one cannot determine whether or not it is merely attempting through this proposed rulemaking to avoid future decisions by the EHB that would limit the discretionary authority it has been exercising, or would like to exercise in the future, without supporting lawful authority. And, if the Department has successfully and lawfully proceeded to exercise its authority under the provisions of Chapter 93, as written for such a long time, why is it necessary to change the language now?

The Department should not be allowed to modify existing regulations in the hope that it will facilitate its ability to exercise command and control authority, now or in the future, in a manner, which the state's legislature did not intend.

The PA Builders Association respectfully requests that the EQB delete the proposed revisions to Section 93.2 from the final rulemaking.

On behalf of our association members, I thank you for your consideration of the enclosed comments.

Melanie Cook
PA Builders Association
Assistant Director of Governmental Affairs
Phone: (717) 730 - 4380 ext. 3013
E-Mail: mcook@pahomes.org

Jessica Beth Moon
463 Harvard Avenue
Palmerton, PA 18071
610-392-8799

12/17/2003

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

Original: 2366

Dear EQB:

I support the proposed change to 25 Pa. Code § 93.2(a). Anti-degradation protection applies to all regulated activities, not just to discharges. I also write to ask you to change 25 Pa. Code § 93.4c (b) to ensure that the water quality of the HQ and EV surface waters will be as protected from the effects of all regulated activities as it is currently protected from the effects of discharges.

Thank you for considering my comments.

Jessica Beth Moon
PSU Masters Student
Wildlife and Fisheries

Untitled

Original: 2366

To Whom it May Concern:

I am writing in regards to the Clean Water Act. I would like to express my displeasure at the idea that it would be considered acceptable to allow industry to runoff their garbage liquids into our streams and water table. The filth in the factory runoff would be extrordinary. To say that it would not be harmful in the long run is preposterous even though there is no way to quantify such results. Industry and agricultural runoff are some of the major causes of stream, river, ocean and ground water pollution. Just in Pennsylvania the statistics are sickening. Allowing just one company or agricultural institution to produce runoff of any amount pollutes our streams, kills our wildlife and makes our state less enjoyable. Have you ever seen what runoff can do to a small streams environment? Most of the wildlife inherent to the stream is forced to adapt, or dies off, producing bactieria and fungal build-ups that are severly detrimental.

I am asking you to consider what you are doing to our local streams and wildlife and also what possible repercussions it could have on the people that live here, drink out of that water table and what each chemical is doing to OUR State.

Thank you for your time and consideration.

Mrs. Kasia Frawley

Good evening, I am Denise Hakowski, and I am an Environmental Scientist/Water Quality Standards Specialist with the Environmental Protection Agency, Region 3, in Philadelphia. I have reviewed the proposed modifications to Chapter 93, the Commonwealth's Water Quality Standards regulation. EPA fully supports Pennsylvania's proposal to modify the Scope of the water quality standards regulation. Water quality standards identify the uses of a waterbody and the criteria necessary to support those uses. Attainment of those uses and criteria can be impacted by many factors that should not be assumed to be limited to point source discharges. By eliminating the phrase pertaining to the Department's regulation of discharges, EPA believes it will clearly indicate that the condition of a water body can be impacted by many sources, including nonpoint sources, atmospheric deposition, as well as point sources. EPA echoes the Pennsylvania Department of Environmental Protection's position that the water quality standards in Chapter 93 are be used whenever the environmental statues authorize the Department to make decisions or approvals relating to stream quality protection.

EPA will be providing additional written comments by the close of the public comment period. One comment that we will be submitting is to ask Pennsylvania to reevaluate the possibility of adopting EPA's recommendation of using *E.coli* or enterococci as an indicator of bacterial contamination in surface water. In the document *Ambient Water Quality Criteria for Bacteria – 1986* , EPA recommended that states and tribes use *E.coli* or enterococci to protect bathers from gastrointestinal illness in recreational waters. Previous to the 1986 document, EPA recommended the use of fecal coliform as an indicator, which Pennsylvania still maintains. However, as the 1986 criteria document attests, *E.coli* or enterococci are better indicators of bacterial contamination than fecal coliform. Pennsylvania's Department of Health has proposed to monitor for E.coli to provide enhanced public health protection to individuals who bathe and

swim in public bathing beaches. However, even when this provision is finalized, it will only apply to protected beaches. With few exception, all surface waters of the Commonwealth are designated for water contact recreation.

EPA recognizes the Department has concerns with adopting *E.coli* or enterococci at this time, which EPA will address in our written comments, but the Commonwealth must recognize that the Beaches Environmental Assessment and Coastal Health Act of 2000, also known as the BEACH Act, requires coastal and Great Lakes states, by April 2004, to adopt EPA's recommendations or water quality criteria and standards for pathogens and pathogen indicators that are as protective as EPA's recommended criteria. The BEACH Act further directs EPA to propose and promulgate such standards for states that fail to do so.

EPA is prepared to assist the Department in finalizing its triennial review if required. Thank you for this opportunity to provide comments on Pennsylvania's proposed water quality standards revisions.

Spring Creek Trout Unlimited
150 Village Drive
State College, PA 16803
814-237-9509

Original: 2366

December 13, 2003

DEP Secretary
Kathleen McGinty
P.O. Box 8477
Harrisburg, PA 17105-8477

The Spring Creek Chapter of Trout Unlimited has provided the following comments to the Department of Environmental Protection (DEP) during the triennial review process. It is requested that DEP address the following weaknesses in the water quality standards program during this triennial water quality standards review to improve protection for aquatic life:

1. The antidegradation regulations should be revised to clearly define existing uses as the actual fish, mussels and aquatic insects in the stream.

2. A "cool water fishes" or "transitional fishes" use with a thermal requirement should be developed.

Before addressing the weaknesses of the program, we would like to support DEP's proposal to revise the regulatory language of Chapter 93.2. Water withdrawals, land use projects, and agricultural activities all have the potential to affect aquatic life and other uses. DEP must regulate these activities, as well as discharges, in order to protect our waters. We do not believe that this expands DEP's authority, as the application of water quality standards to all activities, not just discharges, is consistent with state and Federal law. In *Oley Township* v. *DEP and Wissahickon Spring Water, Inc.*, the EHB held that Pennsylvania's Clean Streams Law and the state's antidegradation regulations under Chapter 93 authorize DEP to prevent water withdrawals where those withdrawals would dewater nearby wetlands, thereby adversely affecting existing physical and biological conditions of those wetlands. The US Supreme Court has also spoken on this issue, and it has made clear that the Clean Water Act governs not only discharges, but also water withdrawals (*PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700 (1994)).

Existing Use Protection

Existing use protection provides the absolute floor of water quality in all waters of the United States. The DEP's Chapter 93 Water Quality Standards (Section 93.4a(b)) states that *"Existing instream water uses and the level of water quality necessary to protect the existing uses shall be*

maintained and protected." The DEP's recently released *Water Quality Antidegradation Implementation Guidance* (WQAIG) defines "existing uses" as *"Those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards."* This implies that the Department would actually protect each species of aquatic life that exists in the stream as of November 28, 1975. By aquatic life, we mean the various species of fish, mussels, and other invertebrates typically residing in that stream as of November 28, 1975. And in fact, the Department, in other instances has used existing use protection exactly like that (discussed below). But that is not how the WQAIG defines existing uses. Instead, the WQAIG identifies existing protected uses as Warm Water Fishes (WWF), Trout Stocking (TSF), Cold Water Fishes (CWF), HQ and EV waters, as well as others designed to protect water supply and recreation. This seemingly minor difference has major biological implications.

Defining existing uses to mean WWF, or CWF, means that as long as there are warm water fish or cold water fish in the stream, stream pollution (such as increases in temperature, or excess sediment) that eliminates some resident species may not violate the water quality standards because some aquatic life usually remains. For example, if sedimentation reduced the biomass of trout in a reach of stream from 100 kg/hectare to 10 kg/hectare, or if most of the sculpins or mayflies were eliminated, or if a dam eliminated resident stream fish and mussels and replaced them with a lake community, that would not necessarily violate existing use protections because the stream would still support some trout, some other benthic fish, or some other macroinvertebrates, or some other species of fish.

This kind of biological machination is occurring in Greene and Washington Counties, where longwall mining is eliminating the existing fish community from miles of stream. Longwall mining often causes the stream bottom to subside, or deepen. The channel then begins to fill with fine sediment, covering the boulders, cobble and gravel that supported a diverse fish and invertebrate community. Excess sediment eliminates aquatic life intolerant of sedimentation, replacing it with one that thrives in this environment. Although there has been a major shift in the aquatic community to fish tolerant of sediment filled channels, with some sediment intolerant species largely eliminated from those reaches, it could be argued that the prohibition against eliminating existing uses has not been violated because there are still warm water fish in the stream.

Hence, the Department's protection of existing uses does not appear to provide the level of protection that the Environmental Protection Agency (EPA) envisioned when they provided guidance to the states on existing use protection. For example, Chapter 4 of EPA's *Water Quality Standards Handbook* (Chapter 4) states that:

> *No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards...Non-aberrational resident species must be protected, even if not prevalent in numbers or importance. Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed...An existing aquatic community composed entirely of invertebrates and plants, such as may be found in a pristine alpine tributary, should still be protected whether or not such a stream supports a fishery.*

In other words, it appears EPA is saying that existing uses are the fish, mussels, invertebrates and plants in a stream, and that all species comprising this community, unless they are aberrational species, should be protected. The Department's Chapter 93 WQS protected use classifications seems to follow EPA's guidance. As an example, the DEP lists Warm Water Fishes as a protected use in Section 93.3:

Warm Water Fishes – Maintenance and propagation of fish species and additional flora and fauna which are indigenous to a warm water habitat.

Although this appears to follow EPA's guidance that "*Non-aberrational resident species must be protected ....*" the Department usually equates existing uses with designated uses, except when they decide it is more convenient for them to follow EPA's guidance.

The following are examples where the DEP appears to acknowledge that individual species must be protected

Dock Street Dam

In the DEP's Memorandum of Law[1] submitted to the Environmental Hearing Board regarding the City of Harrisburg's proposal to raise the dam at Dock Street in the City of Harrisburg, the DEP pointed out that EPA's regulations require the states to develop an antidegradation policy that protects existing uses. The DEP quoted the US Supreme Court's opinion in a western hydropower case[2] that:

> *EPA has explained that under its antidegradation regulation 'no activity is allowable...which could partially or completely eliminate any existing use. EPA, Questions and Answers on Antidegradation 3 (1995). Thus, states must implement their antidegradation policy in a manner "consistent with the existing uses of the stream."*

In defending its denial of the 401 water quality certification request for the Dock Street Dam permit, the DEP stated that "*...a shad fishery is an existing use in the Susquehanna River...*" and the City of Harrisburg had not considered the impact of discharges from the project on the shad fishery. The DEP stated "*The failure of the City to offer testimony on the impact of discharges on this existing use violates EPA's water quality standards regulations at 40 C.F.R. Part 121 (sic) and the implementing requirements described by the U.S. Supreme Court.*"

In this instance, DEP singled out the American shad fish, a single species, as one that should be protected.

Big Spring Hatchery

The DEP's letter to the Pennsylvania Fish and Boat Commission (PFBC)[3] regarding the discharge from the Big Springs Trout Hatchery into Big Spring Creek stated that "*...the existing and designated uses of Big Spring Creek, including the Exceptional Value and Cold Water Fishes uses, have not been protected or maintained.*" Clearly, DEP has differentiated between existing and designated uses here. The DEP acknowledges that although brook trout have been eliminated from a majority of the stream, there are trout in the stream and there is some reproduction above the hatchery discharge. DEP states, "*The once thriving Heritage Trout Angling water is barley able to maintain a naturally reproducing trout population.*" In other words, although the trout population has been significantly impaired, there are trout in the stream.

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[1] Department of Environmental Protection Memorandum of Law sent to Ms. Diane Smith, Secretary to the Environmental Hearing Board, June 30, 1994.

[2] PUD Number 1 of Jefferson County and City of Tacoma v. Washington State Department of Ecology et al., 1994.

[3] February 22, 2001 letter from Leon Oberdick, DEP Southcentral Regional Water Quality Manager to David Truesdale, Pennsylvania Fish and Boat Commission, regarding the NPDES permit application for the Big Springs Hatchery.

Even though the existing use had not been eliminated, the Department correctly argued that the PFBC discharge violated its antidegradation policy by eliminating most trout from the stream.

P.H. Glatfelter Paper Mill

An internal DEP memo[4] regarding the P.H. Glatfelter discharge to Codorus Creek, a warm water stream in York County, summarized the results of fish and macroinvertebrate studies conducted by DEP and Glatfelter's consultant. The memo argued that

> *High stream temperatures during the winter months have also been suspected of eliminating certain species of aquatic insects...the thermal input from the Glatfelter facility has rendered miles of stream uninhabitable for many species of macroinvertebrates...The impact to Codorus Creek due to P.H. Glatfelter's discharge has resulted in the stream not attaining its designated uses as stated in Chapter 93.*

Although the stream supports numerous warm water fish and macroinvertebrates, the DEP biologist correctly argued that Glatfelter's discharge had eliminated certain species of macroinvertebrates that inhabit unimpaired warm water streams, thereby violating the Department's antidegradation policy.

DEP needs to clarify that existing uses are those uses actually in the stream and develop a methodology for determining when those uses have been so impaired that they can be said to have been eliminated. The DEP should state that the existing use protection would be violated if it can be shown that pollution has eliminated a species of fish, mussel, or aquatic insect from a reach of stream. The DEP should also identify when the threshold for existing use protection has been violated when the numbers or biomass of a particular species of fish has been significantly reduced. The DEP should finish the fish community characterization studies they had been working on with the Pennsylvania Fish and Boat Commission that would lead to the development of IBI's (Index of Biotic Integrity) for the different regions of Pennsylvania.

Cool Water Fishes Designated Use

In general, the DEP classifies a stream as WWF (Warm Water Fishes) if species such as white suckers, creek chubs and blacknose dace dominate the fish community. These species are not fully protected by this designation. In the past, the DEP has attempted to "downgrade" a stream from CWF to WWF when the fish community was dominated by those species.

For example, in 1992, an Indiana County company petitioned the Environmental Quality Board (EQB) to redesignate three streams to uses requiring less stringent thermal, and dissolved oxygen criteria. The DEP recommended less stringent designations for the streams to the EQB. The PFBC conducted a literature review of the thermal requirements of three of the resident species: blacknose dace, creek chub, and white sucker. The PFBC concluded that of Pennsylvania's three major aquatic life designated uses, Cold Water Fishes, Trout Stocking, and Warm Water Fishes, only Cold Water Fishes would protect all life stages of the three species. The U.S. Fish and Wildlife Service (FWS), and the Environmental Protection Agency supported the PFBC's report and conclusion. The EPA's letter commenting on the proposed downgrades stated, *"...the proposed downgrades of the use designations for each of these streams may not be protective of existing uses (those uses attained in the water body on*

[4] February 13, 1995, memo from Robert Schott, Water Pollution Biologist, to Leon Oberdick, Southcentral Regional Water Management Manager.

or after November 28, 1975). According to federal regulations, the removal of an existing use is prohibited."[5]

EPA concurred that the downgrades would not protect the fish residing in those streams. In the comment/response document, DEP called the PFBC report "convincing," and withdrew their earlier recommendation.

In 1994, the EQB, on a recommendation from the DEP, voted as proposed rulemaking a WWF designation for Mill Creek (Lancaster County) and retaining the TSF designation for Green Creek (Chester County), designations that would not protect the resident species (existing uses)--blacknose dace, creek chub, and white sucker. Again, the PFBC, the FWS, and EPA argued against the redesignation, citing the previously accepted work on the 1992 case. The PFBC comments[6] on Green Creek stated that *"...we remain concerned that the TSF designation, which was designed to protect stocked trout waters, does not adequately protect these transitional waters that support species endemic to so many of our Commonwealth streams."*

As a result, the DEP changed their recommendations to CWF for both streams. These changes were accepted by the EQB. Also at this time, the Independent Regulatory Review Commission noted, *"...no progress has been made on implementing the results and recommendations of the PFBC study"* and recommended that DEP work to develop the new designated use.

We are aware that the DEP had been considering a downgrade of Swatara Creek in the vicinity of the dam that had been proposed by the Department of Conservation and Natural Resources. The minutes of the July 11, 1996, meeting attended by State and federal agencies to discuss mitigation for the proposed project memorializes (in part) a discussion about the *"Reclassification of the inundated section of Trout Run and other cold-water tributaries..."* Although not explicitly stated, it appears the discussion centered on reclassifying any streams whose inundated portions would no longer support the current CWF designated use (existing uses would be eliminated), because the cold- and cool-water fishery would be converted to a warm-water fishery.

Blacknose dace, creek chub, and white sucker are common in Swatara Creek. Field studies conducted by the U.S. Fish and Wildlife Service in 2003 found healthy brook trout populations in numerous tributaries to Swatara Creek in the vicinity of the proposed impoundment, with adults and fingerlings represented (Jennifer Kagel, personal communication). The PFBC's earlier literature review did not include fallfish, a common species in Swatara Creek, because they were not present in any of the streams in question. According to Trial, *et al.*,[7] fallfish *"...seldom occur in water over 28˚C" (82˚F)."* The temperature criterion associated with the WWF are above 82˚ F from August 16 through September 15, and therefore, a WWF designation would not be protective of fallfish. Similarly, longnose dace, another common Swatara Creek species, are found in habitat that is *"...boulder-strewn, with gravel and rock beds, and may be classified as a 'trout stream'"* [8]They have been found at temperatures as high as

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[5] U.S. EPA Mid-Atlantic Region. 1993. Letter of Comment from Helene Drago on the Proposed Downgrades to Thomas Barron, Division of Water Quality, Pennsylvania Department of Environmental Resources.

[6] Pennsylvania Fish and Boat Commission. 1994. Letter from John Arway to the Environmental Quality Board.

[7] Trial, J.G., C.S. Wade, J.G. Stanley, and P.C. Nelson. 1983. Habitat Suitability Information: Fallfish. U.S. Dept. Int., Fish Wildl. Serv. FWS/OBS-82/10.48. 15 pp.

[8] Edwards, E.A., H. Li, and C.B. Schreck. 1983. Habitat Suitability Index Models: Longnose Dace. U.S. Dept. Int., Fish Wildl. Serv. FWS/OBS-82/10.33. 13 pp.

22.7° C (72.8° F). The WWF temperature criteria are above 72° from July 1 through September 30 and are not protective of longnose dace.

The fish communities at the various sites on Swatara Creek show a transition from a distinct cold-water fishery (Ravine site), to a cool-water/transitional fishery. While some warm-water species are present at some sites, the consistent presence of species such as blacknose and longnose dace, fallfish, creek chub, and white sucker signifies that water temperatures are not those typically found in a warm-water stream.

Given that brook trout are found at the upstream Ravine site, and that numbers of cool-water fish are greater, or at least, roughly equal to the numbers of warm-water species in Swatara Creek, it is clear that this is not a warm-water stream, but at "worst," a transitional stream. It is much more likely that the warm-water species present are at the extreme of their low temperature tolerances, or are the "aberrant" species. A designation of WWF will not protect at least five, and most likely more (detailed temperature data is not available for most species), of the resident fish species. In order to protect the brook trout, blacknose and longnose dace, creek chub, fallfish, and white sucker in Swatara Creek and its tributaries, the streams should remain designated as CWF.

According to federal and State regulations, waterbodies must be designated, at a minimum, to reflect their existing uses (waterbodies can be designated for uses that are not existing uses only when those designated uses require more stringent criteria). States are prohibited from removing designated uses that are also existing uses (40 CFR 131.10(g); 25 Pa. Code, Chapter 93.4(b) and (c)). So-called "downgrades" (changes in designated use from a higher to a lower use) in Pennsylvania do occasionally happen, but are actually cases where the waterbody has not attained the designated use (since November 28, 1975), and was likely mis-designated at the time of initial designation. This is not the case for Swatara Creek.

We recommend that DEP develop temperature criteria for "cool water" or "transitional" streams that fully protect aquatic life that typically dominate the community of these streams. This would also help stop the use of the redesignation process as an avenue to facilitate dubious water development projects, such as the Swatara Creek dam.

We appreciate the opportunity to offer these comments and look forward to your response to our recommendations.

Theodore C. Trostle
President