



Pennsylvania Fish & Boat Commission

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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COMMISSIONER

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

ENVIRONMENTAL QUALITY BOARD

Dear Members of the Board:

Thank you for the opportunity to review and comment on the Proposed Rulemaking package for the "Triennial Review of Water Quality Standards" that was published in the *PA Bulletin* on January 12, 2008. We believe that the changes generally improve 25 Pa. Code Chapter 93 and will allow the Pennsylvania Department of Environmental Protection staff to better protect and manage the Commonwealth's waters and their uses. However, we do have some specific comments about several changes that are included in the following discussion:

1. Merging sections of Chapter 16 (Policy) into Chapter 93 (Regulations).

This proposal moves the criteria tables for toxics, which are presently found in 25 Pa. Code Chapter 16 policy, and inserts them into 25 Pa. Code Chapter 93 regulation. The Board explains that this "will consolidate the WQSs by allowing all of this Commonwealth's water quality criteria to reside in one chapter." However, the proposed rule fails to explain the history of this change. Despite a thorough background analysis of the history of the Commonwealth's water quality program, the background behind this change was not included. Therefore, it is important to put this proposed change in perspective with past actions of the Board. The Department of Environmental Protection staff previously asked the Board to amend Chapter 16 in 1999. These amendments were opposite of what the Board now proposes. In fact, the toxics criteria originally (prior to 1999) resided in Chapter 93 as regulatory criteria. The Department staff argued that moving them to a policy document as part of the Regulatory Basics Initiative would "streamline and clarify requirements, update the policy to be consistent with Federal requirements, and preserve Pennsylvania-specific requirements to serve our citizens" (30 Pa. B. 6111 (November 18, 2000)). Furthermore the Department, in a Comment and Response document to the public comment received during the 1999 changes, stated that "Maintaining the criteria in policy affords the ability to update criteria more expeditiously to reflect current science. Such updates are always done with full public participation that, at a minimum, meets federal and state requirements for water quality standards." In other words, the Department staff suggested at the time that it would be easier to change policy than regulation in response to new science, but this would be done within plain view of the public and with full disclosure. More importantly, it would not be

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To protect, conserve and enhance the Commonwealth's aquatic resources and provide fishing and boating opportunities.

delayed by a regulatory process that has taken, at times, years to conclude. This is supported by the Board's acknowledgment in the proposed rule that explains that "The Board proposes to delete 'At intervals not exceeding 1 year' in subsection (h) because the regulatory process will generally extend longer than 1 year, and this function will now become part of the triennial review process." These regulatory delays could place people, fish and wildlife and other water users at unnecessary risk, especially when the science is available to support an immediate change. The Pennsylvania Fish and Boat Commission and the entire Board supported this change that was then effected in 2000. It appears that the Department staff has now concluded that this prior change was unnecessary because there have not been any changes effected to this policy since it was changed by the Board in 2000.

It is important to note that in addition to this reversal of position from regulation to policy back to regulation, there are also some proposed changes in protection criteria for certain toxic substances. These include a new chemicals, many of which included human health criteria published in the "EPA National Recommended Water Quality Criteria: 2002 (EPA-822-R-02-047, November 2002), new calculations for existing chemicals using EPA's "new" methodology for deriving human health criteria (Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004, October 2000)", and other criteria based upon new scientific data not previously available for calculating water quality criteria. Many of these changes should have been made at the very least one year after the EPA methodology was revised and published in 2000 or when the new EPA Water Quality Criteria were published in 2002, which would be consistent with the original purpose of the Chapter 16 policy. However, it is now 2008, a full 8 years after the EPA method development and 6 years after the "new" EPA criteria were published, and we are only now revising Pennsylvania's criteria to reflect "new" science. Therefore, we strongly recommend that the Board not approve the changes in Chapter 16 from policy to regulation or the changes to 25 Pa. Code §93.8(a)(h) and require that Department staff present an annual report to the Board discussing any future changes to Chapter 16 Policy.

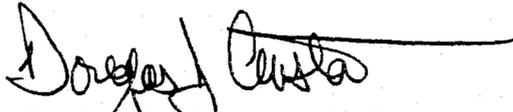
2. Adding "maintenance of golf courses and athletic fields and other commercial horticultural activities" to the definition of irrigation as a Protected Water Use in 25 Pa. Code §93.3.

The present definition of irrigation is limited to "Used to supplement precipitation for growing crops." The Board proposes to expand the definition to include a number of other activities that, although not regulated by the Department, could potentially be regulated by both the Delaware and Susquehanna River Basin Commissions depending on the amount of water withdrawal. It does not make sense to extend a protected water use to activities that qualify as potential pollution sources as defined in section 402 of the Commonwealth's Clean Streams Law. Furthermore, since both state (see *Oley Township, et al. v. DEP and Wissahickon Spring Water, Inc.* EHB Docket No. 95-101-MG) and federal case law (see *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994)) define water pollution to include diminishment of water quantity, it is not reasonable to extend a protected water use to a water withdrawal source that may potentially pollute. The reality is that the protection of all other critical uses including all aquatic life, water

supply, recreation and special protection uses currently in 25 Pa. Code Chapter 93 will protect these new proposed irrigation uses. Therefore, we see no need to expand the definition of irrigation beyond the agricultural uses that it presently contains.

Thank you again for the opportunity to comment on this important rulemaking package.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas J. Austen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Douglas J. Austen, Ph.D.
Executive Director

Enclosure

PA Fish and Boat Commission's Summary Comments
Proposed Rulemaking
Triennial Review of Water Quality Standards

We would like to thank the Environmental Quality Board for the opportunity to submit these comments on this important rulemaking package. We believe that the changes generally improve 25 Pa. Code Chapter 93 and will allow the Pennsylvania Department of Environmental Protection's staff to better protect and manage the Commonwealth's waters and their uses. However, we do have some specific comments about several changes that are included in the following discussion:

1. Merging sections of Chapter 16 (Policy) into Chapter 93 (Regulations)

This proposal moves the criteria tables for toxics which are presently found in 25 Pa. Code Chapter 16 policy and inserts them into 25 Pa. Code Chapter 93 regulation. The Department is reversing its former position that the Board approved in 2000 that moved the toxics criteria from 25 Pa. Code Chapter 93 into the separate Chapter 16 policy document. The Department's rationale for this change is not supported by the historical facts, and our position is thoroughly discussed in our written comments. We strongly recommend that the Board not approve the changes in Chapter 16 from policy to regulation or the changes to 25 Pa. Code §93.8(a)(h) and require that Department staff present an annual report to the Board discussing any future changes to Chapter 16 policy.

2. Adding "maintenance of golf courses and athletic fields and other commercial horticultural activities" to the definition of irrigation as a Protected Water Use in 25 Pa. Code §93.3.

The present definition of irrigation is limited to "used to supplement precipitation for growing crops." The Board proposes to expand the definition to include a number of other activities including maintenance of golf courses and athletic fields and other commercial horticultural activities" to the definition of irrigation as a Protected Water Use in 25 Pa. Code §93.3. We do not believe that the change in definition of irrigation is necessary since other critical protected uses such as the aquatic life, water supply, recreation and special protection uses currently in 25 Pa. Code Chapter 93 will protect these new proposed irrigation uses.