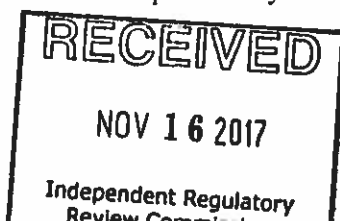


**WRITTEN TESTIMONY OF THOMAS M. DUNCAN, ESQUIRE  
ON BEHALF OF POCONO MANOR INVESTORS, LP  
REGARDING ENVIRONMENTAL QUALITY BOARD REGULATION #7-535 (IRRC #3150)  
BEFORE THE INDEPENDENT REGULATORY REVIEW COMMISSION  
PUBLIC MEETING HELD ON NOVEMBER 16, 2017**

Good morning. My name is Tom Duncan, and I am an attorney with the firm, Manko, Gold, Katcher & Fox, LLP. I serve as counsel to Pocono Manor Investors, LP, and I am pleased to testify today on their behalf as you consider Environmental Quality Board Regulation 7-535.

Pocono Manor owns and manages Pocono Manor Resort & Spa in Monroe County. The Pocono Manor Resort encompasses approximately 3,000 acres, and it is situated almost entirely within the upper reaches of the Swiftwater Creek basin. The redesignation of Swiftwater Creek to EV would dramatically alter the regulatory regime applicable to future activities and projects at Pocono Manor Resort and would impose considerable financial hardships, such as increased costs in engineering, construction, and operation associated with any significant onsite redevelopment.

Pocono Manor advised DEP at the outset of this process in 2007 that Pocono Manor was strongly opposed to the reclassification of Swiftwater Creek to EV. However, DEP repeatedly failed to keep Pocono Manor informed of its actions. In 2007, Pocono Manor submitted timely objections to the petition filed by the Brodhead Creek Watershed Association, which had requested the redesignation of Swiftwater Creek to EV. Then, after DEP conducted its water quality sampling in 2008 and through 2011, Pocono Manor's consultants periodically requested DEP's sampling results, but were told that they would be provided when DEP issued its Report. However, Pocono Manor was not contacted by DEP when the Report was issued. At no time did DEP provide notice to Pocono Manor of DEP's actions or the EQB's rulemaking efforts over the past two years. This continued lack of communication is even less comprehensible in light of the



fact that DEP's Report acknowledges that "[t]he majority of the petitioned area is within the privately owned The Inn at Pocono Manor property." Despite repeated requests for information and a clear understanding as to the potential ramifications to Pocono Manor of DEP's decision to reclassify the stream, Pocono Manor was excluded from the process.

Based on our review of the materials developed by DEP and the EQB, we believe that Regulation 7-535 is not in the public interest in accordance with Section 5.2 of the Regulatory Review Act because it is not consistent with DEP's and the EQB's statutory authority, and it is not supported by acceptable data. Specifically, DEP's 2016 Stream Redesignation Evaluation Report, which serves as the underlying technical basis for the regulation, is technically and legally flawed in several respects. Not only did DEP fail to sample a sufficient number of sampling stations as required by its regulations and its Water Quality Antidegradation Implementation Guidance, the sampling stations selected did not account for several relevant features along Swiftwater Creek, such as a golf course, a dam, and an impoundment, which were required by DEP Guidance to be considered in a stream reclassification assessment.

Last week, Pocono Manor retained a consultant, Normandeau Associates, Inc., to conduct water quality sampling along Swiftwater Creek and DEP's selected reference stream in accordance with DEP's approved sampling procedures to determine the proper classification of Swiftwater Creek. We provided those results to the Commission on Monday, November 13th. In the stretch of the stream where DEP had sampled only two stations, Normandeau sampled seven stations. The biological scores determined by Normandeau at these seven stations ranged from 50 to 82.5. Thus, none of the stations qualified for an EV classification, which requires a

score of at least 92 under DEP's regulations. These findings suggest that if DEP had sampled the stream in accordance with its regulations and Guidance as Normandeau did, DEP would have determined that Swiftwater Creek would not meet applicable EV criteria. Accordingly, DEP's Report is technically and legally deficient, and not in the public interest under Section 5.2 of the Regulatory Review Act.

Moreover, Regulation 7-535 is not in the public interest because it will result in unreasonable economic and fiscal impacts, including costs to Pocono Manor and to the Commonwealth and its political subdivisions through lost revenue; adverse effects on the cost of Pocono Manor's services, productivity, and competition; costs to prepare required reports, forms, and other paperwork; and costs of consulting services that Pocono Manor will be expected to incur.

I would like point out that I understand that many stakeholders have submitted comments in opposition to this regulation and have requested that the Commission defer a decision in this matter. Rather than defer a decision, which we understand the Commission may not do at this time, these stakeholders have asked me to request on their behalf that the Commission disapprove Regulation 7-535 for the reasons I have stated previously.

Additionally, we received correspondence yesterday from the Pennsylvania House of Representatives, Environmental Resources and Energy Committee, requesting an additional review period to consider whether to report a concurrent resolution to disapprove Regulation 7-535. By deferring a decision on this regulation, the House Committee has acknowledged the seriousness of the issues raised by the commenters.

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For these reasons, we respectfully request that the Commission disapprove Regulation 7-535. I appreciate the opportunity to testify today on behalf of Pocono Manor Investors, LP, and I welcome any questions you may have.

**Brodhead Watershed Association (BWA) comments to IRCC**

**From: Robert Heil, Executive Director**

**RE: Environmental Quality Board Regulation #7-535 (IRRC #3150) Stream Redesignation — Swiftwater Creek**

**November 16, 2017 Public meeting**

**Brodhead Watershed Association supports the EQB decision of August 15, 2017 in regards to the EV upgrade of the Swiftwater Creek in Monroe County PA.**

**BWA is deeply concerned about the recent, well-organized opposition raised to the petition submitted by BWA to re-designate the Upper portion of Swiftwater Creek and its tributary Indian Run as Exceptional Value. BWA is commenting in response to that opposition.**

**Initially, we note that there was ample opportunity to submit scientific information and comments to the EQB in response to the notice of proposed rulemaking published in the Pennsylvania Bulletin on June 11, 2016, or to DEP in response to the earlier request for technical data concerning Swiftwater Creek (and other waters) published on May 12, 2012.**

**We learned of the last minute opposition yesterday morning, and have viewed the letters submitted by Pocono Manor Investors as well as the form letters signed by municipal officials and businesses, some of which are nowhere near the Swiftwater watershed.**

**Certainly the science we presented in our petition supported the designation of Swiftwater Creek as Exceptional Value. The studies done by DEP also supported that designation. As the result of those studies, the upper Swiftwater and Indian Run were placed on the "Existing Use" list as deserving protection as Exceptional Value streams. We have briefly reviewed the study prepared by Normandeau Associates early in November. The information the opposition presents is inconsistent with previous studies done on the Swiftwater Creek.**

**When the Swiftwater Creek was upgraded to Existing Use of Exceptional Value, there was no impact on economic development. In contrast, the local economy flourished in the presence of the EV Existing Use determination. Subsequent to the EV Existing Use determination was the construction of Kalahari Resort on property purchased from Pocono Manor Investors.**

**Kalahari Resort includes 977 luxury guest rooms and suites, a 220,000 square foot indoor water park, seasonal outdoor water area, a 230,000 square foot convention center a 40,000 square foot arcade and 6000 square feet of retail space including four full-service restaurants, built at the absolute headwaters of Swiftwater Creek. The protection of the Upper Swiftwater as Exceptional Value did not deter that construction, plans were reviewed by the Monroe County Conservation District and necessary permits were issued and construction took place. Although numerous violations occurred at the site during construction, Exceptional Value Use protection DID NOT deter the approval of the project.**

**The opposition to this EV upgrade is misinformed as to the economic impacts of an EV petition and has made their opposition based on limited information.**

The PADEP study on which the EQB's redesignation is based showed that the Swiftwater Creek is indeed an Exceptional Value stream, despite some last minute opposition from those who believe otherwise. Anyone who disputed the methods or conclusions of that study, or who otherwise opposed the EQB's proposal to redesignate a portion of the Swiftwater Creek basin as Exceptional Value, had plenty of time to make their objections known and present any data to PADEP and the EQB. BWA respectfully requests the IRCC to uphold the decision of the EQB and the PA DEP in designating Swiftwater Creek an Exceptional Value Stream.