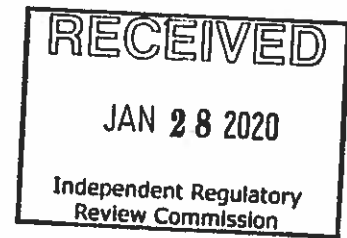


3182



PennFuture



January 28, 2020

Sent Via Email

Independent Regulatory Review Commission
333 Market St., 14th Floor
Harrisburg, PA 17101
irrc@irrc.state.pa.us

Re: Environmental Quality Board Regulation #7-534 (IRRC #3182)

Dear Commissioners:

On behalf of Citizens for Pennsylvania's Future (PennFuture) and its members, please accept these comments on the final Environmental Quality Board (EQB) Regulation #7-534 (IRRC #3182). We have reviewed the comments of both the Monroe County Clean Streams Coalition (MCCSC) and the House Environmental Resources and Energy Committee. We write to clarify some points made in those letters¹ and encourage the Independent Regulatory Review Commission (IRRC or the Commission) to approve these regulations in order that they may be submitted to EPA for approval, as is required by the Clean Water Act and accompanying regulations.

PennFuture has a significant interest in the issues and procedures raised in those letters. PennFuture was a party to the litigation brought by MCCSC before the Environmental Hearing Board (EHB) challenging the existing use of several Exceptional Value streams in Monroe County.² PennFuture also submitted extensive comments on the 2017 Triennial Review,³ including asking for the Department of Environmental Protection (DEP) to adopt post-2000 Clean Water Act Section 304(a) human health and aquatic life criteria in the final rule as amendments to 25 Pa. Code § 93.8c, Table 5, as it is required to do.⁴

First, PennFuture supports full, robust, and meaningful public participation in the rulemaking process. While DEP's notifications may not appease everyone, the Department is undertaking seemingly reasonable measures to inform the public of changes to stream designations. DEP's January 14, 2020 response to MCCSC's letter (received by IRRC on January 15, 2020) explains how the agency has attempted to provide the general and local public, and especially local permittees, with multiple opportunities to provide data and information in the stream evaluation process. Specifically identifying vague and undefined "affected landowners"⁵ would prove difficult for the agency since the effects of a

¹ This letter also responds to similar points made in the American Forestry and Paper Association's January 27, 2020 letter to IRRC, received by the Commission on the same date.

² See EHB Docket No. 2017-107-L.

³ The previous Triennial Review was in 2013.

⁴ PennFuture's February 15, 2018 comments on the 2017 Triennial Review are available at: <http://www.pennfuture.org/Files/Admin/20180215-PennFuture-triennial-review-comments.pdf>. This letter hereby incorporates these comments by reference.

⁵ See Letter from Johnathan E. Rinde to Environmental Quality Board (Feb. 16, 2018), attached to MCCSC's January 3, 2020 letter to Chairman Bedwick, EQB (January 3, 2020) and received by IRRC on January 6, 2020.

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stream reclassification is unknown prior to it being applied through a further action of the agency to have legal effect on anyone's rights or liabilities.

To be certain, both the EHB and the PA Commonwealth Court have concluded, in cases brought by MCCSC and Pocono Manor Investors (a prominent member of MCCSC), respectively, that a landowner or operator is not "impacted" by changes to either the existing or designated uses unless and until they apply to DEP for a permit for activities that may impact the receiving water.⁶ The vast majority of riparian landowners and businesses in Pennsylvania will never need such a permit.

As the EHB explained in dismissing MCCSC's challenge to the existing use classification of several Monroe County Exceptional Value streams:

In sum, it is the permit that affects individual rights, not the listing of a stream's uses that is used to devise the permit. The inclusion of a stream on the Department's unenforceable [existing use] list has no legal impact by itself. Including a stream on a list does not grant or deny a pending application or permit or direct anyone to take any action or impose any obligations on anyone.⁷

As MCCSC admitted before the House Environmental Resources and Energy Committee on January 15, 2020, an Exceptional Value designation for Swiftwater Creek in Monroe County did not stop the forthcoming \$250 million Pocono Springs Village project from being developed.⁸ Nor did an Exceptional Value existing use classification of Swiftwater Creek prevent the Kalahari Resort (another member of MCCSC) from being built next door in 2013.⁹ Any claim that Pennsylvania's business community and property owners will be hampered is not even borne out by MCCSC members' own experiences.¹⁰

⁶ See *Monroe County Clean Streams Coalition v. DEP*, 2017 EHB 798; *Pocono Manor Investors, LP v. DEP*, 212 A.3d 112 (Pa. Cmwlth. 2019); see also *Concerned Citizens v. DEP*, 632 A.2d 1 (Pa. Cmwlth. 1993).

⁷ *Monroe County Clean Streams Coalition v. DEP*, 2017 EHB 798, 808.

⁸ See PA Environment Digest Blog, *House Environmental Committee Hears From Industry, Business Groups on Triennial Review of Water Quality Reg. Stream Redesignations* (Jan. 15, 2020), http://paenvironmentdaily.blogspot.com/2020/01/house-environmental-committee-hears.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+PaEnvironmentDaily+%28PA+Environment+Daily+Blog%29. (Note that the recording of the informational meeting is not yet available on the House EREC's website.)

⁹ The Kalahari Resort broke ground in October 2013, opened in July 2015, and an expansion project was completed in 2017. See http://kalaharimedia.com/press/downloads/press_materials/poconos_grand_opening_07-01-15.pdf. The DEP's evaluation of Swiftwater Creek, which resulted in an existing use of Exceptional Value, was on November 21, 2008.

¹⁰ The EHB considered MCCSC's arguments regarding the alleged impacts on property values or development from what the Coalition calls "improper" stream reclassifications "simply too vague, speculative, and generic" and concluded that "this strained chain of events is far too attenuated to conclude that the Department's listing has any immediate effect on the Coalition's personal or property rights." *Monroe County Clean Streams Coalition v. DEP*, 2017 EHB 798, 810. The Commonwealth Court reached a similar conclusion for Pocono Manor Investor's allegations of immediate impact to its property value, finding such allegations "far too conclusory and speculative a statement to establish the existence of actual, direct harm to [the company] as a result of Swiftwater Creek's redesignation." *Pocono Manor Investors, LP v. DEP*, 212 A.3d at 118.



Second, we believe that it is clear that federal regulations intend for the nationally recommended water quality criteria for protection of human health to be adopted by the states since it requires any state not adopting these Clean Water Act Section 304(a) criteria to provide an explanation on why it did not.¹¹ Under the federal Clean Water Act and Pennsylvania's Clean Streams Law, DEP must set criteria that is protective of the quality of water necessary for the designated and existing uses.¹² The criteria EPA provides through 304(a) guidance is generally considered the *minimum* necessary for the protection of these uses. Should DEP develop its own scientifically defensible criteria, which may take an extended period of time and during which water uses must still be protected, the result may very well be even more stringent criteria than EPA's guidance. Because DEP is legally required to adopt protective water quality criteria, adopting the EPA's recommended criteria is not only within DEP's authority, we believe it is DEP's minimum obligation.

In conclusion, this Triennial Review of statewide water quality standards has been years in the making and is years overdue. Over 700 individuals and organizations, including PennFuture, submitted comments suggesting changes and raising concerns during the public comment process. And to be sure – issues that we raised remain outstanding and not resolved by DEP to our satisfaction.¹³ However, PennFuture does not agree that IRRC should disapprove these regulations or prevent them from being submitted to EPA, as is required by the Clean Water Act and accompanying regulations.

PennFuture will continue to work to ensure that DEP protects the quality of Pennsylvania's waters and we will participate fully in the next mandated triennial review, which should already be underway.

Thank you for your consideration of these comments.

Respectfully submitted,

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cc: Hon. Daryl D. Metcalfe, Majority Chairman, House ERE Committee
Hon. Greg Vitali, Minority Chairman, House ERE Committee
Hon. Gene Yaw, Majority Chairman, Senate ERE Committee
Hon. Steven J. Santarsiero, Minority Chairman, Senate ERE Committee
Hon. Patrick McDonnell, Secretary, Department of Environmental Protection & Chairman,
Environmental Quality Board

¹¹ 40 CFR § 131.20(a); *see also* 80 Fed. Reg. 51020, 51028 (Aug. 21, 2015) (explaining that this requirement applies to “new or revised criteria for parameters for which EPA has published new or update CWA section 304(a) criteria recommendations since May 30, 2000”).

¹² *See* 40 CFR § 131.11(a) (“States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.”).

¹³ Notably, PennFuture was not invited to Chairman Metcalfe's “informational meeting” to present our points.