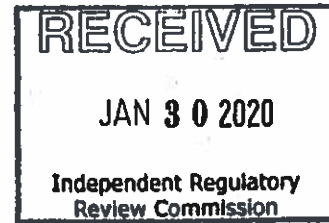




3182

EMBARGOED MATERIAL



January 28, 2020

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

Re: No. 3182 Environmental Quality Board Regulation #7-534: Triennial Review of Water Quality Standards – January 31, 2020 IRRC Meeting

Dear Commissioners:

Delaware Riverkeeper Network (DRN) is writing on behalf of our 23,000 members who live and work throughout the Delaware River Basin. Please consider these comments pertaining to the triennial review of water quality standards being taken under consideration at the January 31, 2020 regularly scheduled Independent Regulatory Review Commission (IRRC) meeting. In short, DRN encourages the IRRC to approve this long standing and overdue triennial review step required by the Clean Water Act. The approval will move the review to the EPA and is a necessary and much needed step at this time. The triennial review should not be delayed or undermined by private developer interests or by the tactics being used by the majority House Environmental Resources and Energy Committee members looking to appease those private developer interests at the expense of our freshwater and the community members that rely upon them.

Pennsylvania's Water Quality Standards, which are set forth in part at 25 Pa. Code, Chapter 93, implement the provisions of Sections 5 and 402 of the Clean Streams Law and Section 303 of the Federal Clean Water Act, 33 U.S.C.A. § 1313. Water quality standards consist of designated water uses, the specific numeric and narrative criteria necessary to achieve and maintain the water uses, and existing use protection that is referred to as antidegradation requirements. These standards are critical components necessary to further protect the public trust of freshwater using existing and designated in-stream water uses and are an essential part of ensuring Pennsylvania is in keeping with the requirements of the federal Clean Water Act, the Pennsylvania Clean Stream Law and the Environmental Rights Amendment of the Pennsylvania Constitution. Delaware Riverkeeper Network has submitted redesignation petitions and supported community conservation efforts of anti-degradation for over two decades. DRN has participated and co-chaired the statewide Campaign for Clean Water Exceptional Value Work Group since 2007. As part of those long standing community protection efforts, DRN has seen first-hand the lengthy public comment process at various iterative stages for these stream redesignation reviews that DEP provides and that remarkably the developers are now claiming do not exist.

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Though Delaware Riverkeeper Network would like to see additional state standards and more stringent water quality parameters for this current triennial review included and as fully outlined in DRN comments submitted to the DEP on Dec 6, 2017 and February 16, 2018 and our January 30, 2018 public testimony on the triennial review in Norristown, PA - to increase protections to all Pennsylvanian's - we believe it is important now to approve this triennial review to the next phase of EPA review and for the IRRC to approve the regulation at this time. At the same time, DRN and the conservation community will continue to collectively work to improve and include standards for the next round of triennial review to further protect Pennsylvania streams and the Clean Water Act tools necessary to better protect Pennsylvania's freshwater. Some of the work required but not yet realized for Pennsylvania streams and cited in DRN's 2018 triennial review comment includes: setting higher dissolved oxygen standards and adding existing fish propagation uses that protect the federally endangered Atlantic Sturgeon and other fish currently living and reproducing in the Delaware River main stem and Estuary; ensuring conservation easements held in the public and private trust are considered water quality protective measures when communities seek out stronger stream designations to protect streams; and setting strong numeric nutrient criteria and chloride standards to protect aquatic life from harm. The last triennial review for Pennsylvania occurred in 2013 so this next step is long overdue.

Delaware Riverkeeper Network would like to address a few points made by Mr. Rinde on behalf of the Monroe County Clean Streams Coalition (MCCSC) and Pocono Manor Investors in a January 3, 2020 letter and submission to the Environmental Quality Board. These comments follow on the heels of a lawsuit, Pocono Manor Investors v. Department of Environmental Protection, 212 A.3d 112 (2019) in which the developers contested the decision by the DEP and the EQB to redesignate Swiftwater Creek as an Exceptional Value stream. The Pennsylvania Commonwealth Court found Pocono Manor's claim that they did not have notice of the redesignation lacked merit and their request that the Court review the matter was unripe as they had not exhausted administrative remedies and because any current harms were self-inflicted.¹

The Commonwealth Court found:

“In its Amended Petition, Petitioner further claims that Respondents failed to provide Petitioner with proper notice and opportunities to be heard while redesignation of Swiftwater Creek was being considered. Amended Petition, ¶93(d). However, during oral argument before this Court, Petitioner conceded that it had been fully aware of Swiftwater Creek's consideration by Respondents for redesignation and had, in fact, participated throughout the process.”

Pocono Manor Investors v. DEP, 212 A.3d 112, nte 9 (Commw. Ct. 2019)”

Furthermore, Delaware Riverkeeper Network understands from reports of MCCSC's own testimony before the House Environmental and Energy Resources Committee regarding Kalahari Resorts built in 2013 and the future “Pocono Springs Village Entertainment” project in Tobyhanna Township (Monroe County), EV designation has not stopped these massive developments at the headwaters of the creek from being built in the first place or beginning construction for the next phase of the neighboring “entertainment village”.² Controls on wastewater discharges caused from these “Disney like” developments are required in order to protect the Exceptional Value integrity of the Swiftwater Creek and these controls have not stopped the developer from its plans³. There are countless other examples of developments in EV watersheds that have moved forward and been implemented successfully and permitted – one need only look at Valley Creek an

¹ Pocono Manor Investors, LP v. Department of Environmental..., 212 A.3d 112 (2019). May 6, 2019

² PA Environmental Digest. Republicans On House Environmental Committee Vote To Recommend IRRC Disapprove Triennial Water Quality Standards/ Stream Designation Regulation. January 22, 2020.

http://paenvironmentdaily.blogspot.com/2020/01/republicans-on-house-environmental.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+PaEnvironmentDaily+%28PA+Environment+Daily+Blog%29

³ Pocono Springs Project Update. PA HomePage.Com May 8, 2019. <https://www.youtube.com/watch?v=a7F61wflZUg>

EV stream in Chester County for hundreds of examples alone. DRN would argue that when private developers come knocking to have the privilege of operating or building in some of the cleanest watersheds of the Commonwealth that remain, they must at a minimum protect the community's freshwater in their designs and limit their impacts extensively to protect the public trust. Our Pennsylvania residents and communities deserve this protection from all private interests that look to profit.

The Commonwealth Court in its review of the Pocono Manor case and claims of harm to its business located in the Swiftwater Creek headwaters in Monroe County stated as follows:

Petitioner's decision to initiate development of its property while Swiftwater Creek's redesignation was still under formal consideration, rather than the redesignation itself, which stands to cause potential harm to Petitioner. **Petitioner's choice to move forward with the Pocono Springs Entertainment Village project under the circumstances is not dissimilar to a pedestrian leaving the safety of the sidewalk, deliberately jumping into the rush of oncoming traffic, and then faulting the affected drivers for their inability to avoid the resultant collision.** In addition, Petitioner also avers that the value of its property "was immediately diminished upon publication of the redesignation of Swiftwater Creek in the Pennsylvania Bulletin on February 10, 2018." Amended Petition, ¶86. This, however, is far too conclusory and speculative a statement to establish the existence of actual, direct harm to Petitioner as a result of Swiftwater Creek's redesignation. Id at 118.

In conclusion, Delaware Riverkeeper Network urges the IRRC to vote to approve this iteration of the triennial review now. The public process and ability to comment during stream redesignations and as part of the triennial review has been lengthy and inclusive. As a result of the public hearings and extended public comment period and additional Delaware River watershed hearing that the DEP provided in Norristown, the Board received comments on the proposed rulemaking from 776 commenters, including from the Independent Regulatory Review Commission (IRRC)⁴ and almost 100 DRN members who treasure clean water of the Commonwealth⁵. The time is overdue to move these protections and designations along while we continue to work for even stronger designations and standards that better protect Pennsylvania's freshwater from harm. Thank you for your time and consideration in this matter.

Sincerely,



Maya K. van Rossum
the Delaware Riverkeeper

cc:

Mr. Patrick McDonnell, Secretary, Department of Environmental Protection & Environmental Quality Board Chairman

Hon. Daryl D. Metcalfe, Majority Chairman. House Env. Resources & Energy Committee

Hon. Greg Vitali, Minority Chairman, House Env. Resources & Energy Committee

Hon. Gene Yaw, Majority Chairman. Senate Env. Resources & Energy Committee

Hon. Steven J. Santarsiero, Minority Chairman. Senate Env. Resources & Energy Committee

Ms. Laura F. Edinger, Regulatory Coordinator, PA Dept. of Environmental Protection

⁴ Triennial Review Comment and Response Document. PADEP.

http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2019/November%202019/03_7-534_Triennial_Final/04b_7-534_Triennial_Final_CRDoc.pdf

⁵ Analytics engagement. Delaware Riverkeeper Network. August 8, 2018