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CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

February 16, 2018

Environmental Quality Board
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<http://www.ahs.dep.pa.gov/eComment>



**RE: Chesapeake Bay Foundation Comments to the Proposed Rulemaking:
*Triennial Review of Water Quality Standards***

Dear Environmental Quality Board:

On behalf of the Chesapeake Bay Foundation (CBF), we respectfully submit the following comments on the Proposed Rulemaking: *Triennial Review of Water Quality Standards*.

CBF is the largest nonprofit organization dedicated to the protection and restoration of the Chesapeake Bay, its tributaries, and its resources. With the support of over 200,000 members across the country, our staff of scientists, attorneys, educators, and policy experts work to ensure that policy, regulation, and legislation are protective of the quality of the Chesapeake Bay and its watershed. Since 1986, CBF's Pennsylvania Office has worked through education, restoration and collaboration with a broad range of stakeholders - including schools, government officials, businesses, farmers, landowners, and others - to protect and restore the rivers and streams in the Commonwealth that ultimately flow to the Chesapeake Bay. Central to our efforts has been our award-winning restoration program in which we have worked with over 5,000 farmers and landowners on projects that keep nutrients and soil on the land instead of in the water.

In general, we support the Department's proposal in its Triennial Review of Water Quality Standards (WQS) to update the ammonia criteria for freshwater aquatic life¹ and the *E. coli* bacteria criteria for freshwater recreational water quality.²

We have concerns, however, with the Department's suggested *definition* of a *conservation easement* as it pertains to how conservation easements may be considered in stream evaluations/redesignations. As we understand it, the Department may consider recommending a new definition of a conservation easement (to be included in Chapter 93 of the Pennsylvania Code) to the Board in a future proposed rulemaking for the next WQS review. CBF has an interest in conservation easements for a variety of reasons, including that they provide an opportunity to protect existing and restored forested buffers and other sensitive habitat that are critical to maintaining local stream health, meeting Pennsylvania's Watershed Implementation Plans³

¹ U.S. Environmental Protection Agency. Office of Water. April 2013. Aquatic Life Ambient Water Quality Criteria for Ammonia-Freshwater 2013. EPA 822-R-13-001. <https://www.epa.gov/sites/production/files/2015-08/documents/aquatic-life-ambient-water-quality-criteria-for-ammonia-freshwater-2013.pdf>

² U.S. Environmental Protection Agency. Office of Water. November 2012. Recreational Water Quality Criteria. EPA 820-F-12-058. <https://www.epa.gov/sites/production/files/2015-10/documents/rwqc2012.pdf>

³ Chesapeake Bay Watershed Implementation Plans (WIPs). <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-watershed-implementation-plans-wips>

established under the Chesapeake Bay Total Maximum Daily Load (TMDL),⁴ and meeting the goals of the 2014 Chesapeake Bay Watershed Agreement.⁵

A large and robust number of peer-reviewed scientific studies have documented the expansive water quality, ecological, societal, and economic benefits associated with riparian buffers. In particular, riparian or streamside forest buffers filter pollution, and the Chesapeake Bay Program estimates that they “remove 19-65 percent of the nitrogen; 30-45 percent of the phosphorous, and 40 – 60 percent of the sediment that would otherwise enter the stream.”⁶ Indeed, forested buffers represent the second most important practice the Commonwealth is relying upon to meet its agricultural commitments required in the Chesapeake Bay TMDL. CBF is, of course, supportive of conservation easements being considered in the evaluation of stream redesignations as proposed by the Department, but we are concerned that the proposed definition will not achieve its intended purpose and may result in a narrow understanding of what constitutes a conservation easement in the State.

The Department explains its proposal for the next WQS review and its suggested definition of a conservation easement in that context as follows:

Section F. Consideration for Next Water Quality Standards Review.

The Department is seeking comments on whether the definition of “outstanding National, State, regional or local resource water” in § 93.1 (relating to definitions) should be amended in the next water quality standards review to clarify how conservation easements can be considered in an evaluation for a stream redesignation. The Department is also seeking comment on the following suggested definition of “conservation easements” to describe which types of easements may be considered in the stream evaluation. Based on the comments received during this review, the Department may recommend that the Board clarify the use of conservation easements in the water quality program in a future proposed rulemaking.

The existing regulations allow a stream that is protected for the HQ use to be redesignated to EV use if it is an outstanding National, State, regional or local resource water. High quality waters, along with related terms, is defined in § 93.1. Conservation easements protecting waters being evaluated for classification as EV waters are often submitted with petitions for stream redesignations, since many are designed to protect water quality in perpetuity. In many conservation easement documents, resource management plans are included that describe water quality protections. The Department is seeking comments on suggested language to guide decisions concerning which types of conservation easements are appropriate for use in this stream redesignation context. Suggested language that the Department may consider recommending to the Board in a future proposed rulemaking is as follows (language added to the existing definition is bold):

Outstanding National, State, regional or local resource water—A surface water for which a National or State government agency has adopted water quality protective measures in a resource management plan, or regional or local governments have adopted coordinated water quality protective measures along a watershed corridor. **The term includes a surface water protected by one or more conservation easements situated along a watershed corridor, in a manner that provides protection to significant reaches of the corridor.**

Conservation easements—Easements held in perpetuity, where a governmental unit with taxation powers, a national government agency, or a state government agency is the holder, long-term steward, or responsible beneficiary related to repair and perpetual

⁴ The Chesapeake Bay TMDL was developed under the federal Clean Water Act (CWA), Chesapeake Bay TMDL Document. <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>

⁵ 2014 Chesapeake Bay Watershed Agreement. https://www.chesapeakebay.net/what/what_guides_us/watershed_agreement

⁶ *Forest buffer research reveals more benefits than previously thought*, Karl Blankenship, Bay Journal, November 17, 2014, https://www.bayjournal.com/article/forest_buffer_research_reveals_more_benefits_than_previously_thought

maintenance of the easement. Such easements must be recorded, provide for the maintenance and enhancement of water quality through water quality protective measures and cannot be revised, rescinded, or amended by any party.⁷

We appreciate that the proposed definition references the duration of the easement (in perpetuity) and the requirement that the easement be recorded and provide for the maintenance and enhancement of water quality through water quality protective measures. The definition proposed by the Department *does not, however, capture the numerous conservation easements held in Pennsylvania by non-governmental organizations.* To that end, we'd like to see the suggested definition of a conservation easement ***expanded***.

One option the Department could use to achieve this would be to incorporate language from the Internal Revenue Code definition of a *qualified organization* as part of the State's definition. This is the generally accepted definition for non-profit organizations holding conservation easements and includes qualified, tax-exempt 501(c)(3) charitable organizations with a commitment to protect the conservation purposes of the donations, and the resources to enforce the restrictions.

The Internal Revenue Code regulations define a qualified organization as

(c) Qualified organization -

(1) Eligible donee. To be considered an eligible donee under this section, an organization must be a qualified organization, have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions. A conservation group organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) will be considered to have the commitment required by the preceding sentence. A qualified organization need not set aside funds to enforce the restrictions that are the subject of the contribution. For purposes of this section, the term *qualified organization* means:

(i) A governmental unit described in section 170(b)(1)(A)(v);

(ii) An organization described in section 170(b)(1)(A)(vi);

(iii) A charitable organization described in section 501(c)(3) that meets the public support test of section 509(a)(2);

(iv) A charitable organization described in section 501(c)(3) that meets the requirements of section 509(a)(3) and is controlled by an organization described in paragraphs (c)(1) (i), (ii), or (iii) of this section.⁸

Another option (as a starting point for *expanding* the definition of a conservation easement to include those beyond those held by governmental entities) would be to include, as part of the State's definition in this section, easements that meet the requirements of a *conservation easement* found in the Commonwealth's Conservation and Preservation Easements Act⁹ as follows:

A nonpossessory interest of a holder in real property, whether appurtenant or in gross, imposing limitations or affirmative obligations, the purposes of which include, but are not limited to, retaining or protecting for the public and economic benefit the natural, scenic or open space values of real property; assuring its availability for agricultural, forest, recreational or open space use; protecting, conserving or managing the use of natural resources; protecting wildlife; maintaining or enhancing land, air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property.¹⁰

⁷ *Proposed Rulemaking: Triennial Review of Water Quality Standards*, Saturday, October 21, 2017, <https://www.pabulletin.com/secure/data/vol47/47-42/1766.html>

⁸ *Emphasis added*, 26 C.F.R. § 1.170A-14(c); *See also*: 26 U.S.C. § 170(h).

⁹ 32 P.S. §§ 5051-5059.

¹⁰ 32 P.S. § 5053.

Given the purpose of the Triennial Review, in addition to expanding the types of conservation easements that would be considered in stream evaluations/reconsiderations to include those held by non-governmental organizations as discussed above, the definition should include a more detailed explanation of the purposes behind the easement that include, but are not limited to, *improving water quality*, and it should also reference *enforcement provisions*. Unless an easement can clearly and readily be enforced by the grantee or owner of the easement, and such provisions are present in the conservation easement instrument, the easement loses its conservation value.

CBF fully supports adding the consideration of conservation easements to the Department's analysis of stream evaluations/re-designations. For that consideration to have the intended effect of improving water quality, and to avoid confusion as to what constitutes a conservation easement in the State, however, the Department's proposed definition must be expanded to include the numerous easements held by non-governmental organizations. Thank you for the opportunity to comment on the Commonwealth's Proposed Rulemaking: *Triennial Review of Water Quality Standards*. We welcome questions you may have and look forward to participating in the development of these standards in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Harry Campbell", written in a cursive style.

Harry Campbell,
Pennsylvania Executive Director
Chesapeake Bay Foundation