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From: ecomment@pa.gov
Sent: Tuesday, November 21, 2023 4:41 PM
To: Environment-Committee@pasenate.com; environmentalcommittee@pahouse.net; regcomments@pa.gov; Osenbach, Matt; Glendon King; Franzese, Evan B.; Eyster, Emily; IRRC
Cc: c-jflanagan@pa.gov
Subject: Comment received - Proposed Rulemaking: Triennial Review of Water Quality Standards (#7-577)

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**Re: eComment System****The Environmental Quality Board has received the following comments on Proposed Rulemaking: Triennial Review of Water Quality Standards (#7-577).**

Commenter Information:

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Comments entered:

i am submitting these comments on behalf of the American Littoral Society, PennEnvironment, Upstream Alliance, Andrew Krikun and Carol R. Collier

These links provide access to the attachments provided as part of this comment.

Comments Attachment: [PA Triennial Comments .docx](#)

Please contact me if you have any questions.

Sincerely,
Ezra Thrush

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November 21, 2023

We, the American Littoral Society, PennEnvironment Environment and Policy Center, Upstream Alliance as well as Andrew Kricun and Carol R. Collier are writing today to submit formal comments regarding the Pennsylvania Department of Environmental Protection (PADEP) 2023 Triennial Review Proposal [53 Pa.B6170] and call on the Department to make changes to the significant shortcomings in the current draft document.

The American Littoral Society is a membership based coastal conservation organization with over 2000 members, many of whom live in the Commonwealth or who use, recreate on and fish in the waters of the Commonwealth, including the Delaware and Schuylkill Rivers and their tributaries. www.littoralsociety.org

The PennEnvironment Research & Policy Center is dedicated to protecting our air, water and open spaces. We work to protect the places we love, advance the environmental values we share, and win real results for our environment. For more information, visit www.pennenvironmentcenter.org.

Upstream Alliance is a non-profit organization that works on public access, clean water, and a more resilient coast, with a particular focus on the Delaware River in and around Philadelphia and Camden.

Andrew Kricun is a consulting engineer and water resources expert, former Executive Director of Camden County Municipal Utilities Authority and a member of USEPA National Environmental Justice Advisory Council.

Carol R. Collier is a former Executive Director of the Delaware River Basin Commission.

Before we provide specific comments on the Triennial Review document relevant to the 27-mile stretch of secondary contact waters of the tidal Delaware River— please consider this: imagine that you live in Philadelphia in too small a home with too many people. Your window air conditioner does not work well, and it is another day in the string of 90+ degree days. Where can you take the kids to cool off? You don't have a car; you don't even have a driver's license. The closest city pool is closed – no lifeguard. You could walk or take the bus to the River or a creek nearby – it would be great if the kids could wade and splash in the water. If only there were access sites organized for water recreation where the water is clean enough to play in. Unfortunately, the City Parks and Recreation Department forbid access to the river and creeks from their sites, and the river is not designated for primary contact due to the ongoing discharge of 15 billion gallons of combined sewage overflows as well as other chronic sources.

For the whole 310 miles of the Delaware River only 27 miles from north Philadelphia through Chester is not designated for swimming and splashing. It is time that changed, and standards of water quality be equal for everyone. Primary contact recreation such as paddling, jetskiing and swimming is already occurring and should be protected. Primary contact water quality is attainable in the foreseeable future, and is in fact already occurring many days of the year in locations along the river. Many cities in the U.S. and around the globe have upgraded their systems to meet primary contact standards. Philadelphia, a world-class city, should be doing the same.

Governor Shapiro has prioritized addressing environmental justice and equity issues. With this new, energized administration, DEP can make a difference. This 27-mile stretch has been disregarded for years. It has been on the Commonwealth's Triennial Review, but no forward motion. This is a long-standing and overdue environmental justice and equity issue that needs to be rectified.

The federal Clean Water Act set a national goal of “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(2). These are often referred to as the fishable/swimmable goals. States must achieve water quality sufficient to support fishable and swimmable waters, wherever it is attainable. 33 U.S.C. § 1252(a)(2). The water quality regulations establish a “rebuttable presumption that fishable/swimmable uses are attainable and therefore should apply to a water body unless it is affirmatively demonstrated that such uses are not attainable.” Advanced Notice of Proposed Rulemaking on the Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,749 (col. 3) (July 8, 1998).

A December 2017 letter from EPA Region III to PADEP during the last triennial report process stated strongly that PADEP should reconsider the exclusion of primary contact recreation for the Delaware River between River Mile (RM) 108.4 – 81.8., the 27-mile stretch running from Philadelphia through the City of Chester. The EPA also stated that “recreation which results in contact with the water is occurring in this portion of the river. PADEP should initiate an effort with the Delaware River Basin Commission (DRBC) and the other member states to revise the applicable standards to include designated use protection for water contact/swimming.” Six years have passed since this directive, and yet PADEP's

currently proposed draft of the Triennial Review does not revise the designated use to include swimming, nor does it even describe the efforts undertaken with partners, the remaining steps necessary, or the timeline on which it will do so.

In the proposed Triennial Review, PADEP states only that it will “continue[s] to work in cooperation with the DRBC, the Federal government and other DRBC signatory states to determine the appropriate designated use or uses.” This does not fulfill their duties under the law. Section 303(c) of the federal Clean Water Act requires that at least once every three years, the States shall hold public hearings and, as appropriate, modify and adopt water quality standards. 33 U.S.C. 1313(c)(1); 40 C.F.R. § 131.20(b). Under the applicable regulations, the

“State shall also re-examine any waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly.” 40 C.F.R. § 131.20(a).

New information, including extensive near-shore bacteriological monitoring from 2020-2023 has come available, and this must be analyzed and disclosed to determine if the primary contact recreational use is now attainable. PADEP should also have included in this draft report all other information, data, and efforts it has made since 2017 to reevaluate the appropriateness of the secondary contact recreational use designation.

There is a rebuttable presumption that fishable/swimmable uses are attainable unless the state proves otherwise through a Use Attainability Analysis, and the last such analysis took place in 1989. The triennial review is an important check on the State’s Clean Water Act progress by requiring that every three years the appropriateness of the designated uses are revisited and reconsidered. PADEP’s completely insufficient discussion of this issue does not demonstrate swimmable uses are not attainable. A designated use represents the goals for the water body, and attainability does not mean the water quality is *already* meeting primary contact criteria. Attainability means that is an achievable goal, even if that is over a relatively long period of time. Given that significant water quality improvements have already been made, and there are LTCPs for the CSOs in place, PADEP cannot rely on this outdated use attainability analysis.

Based on EPA’s direction six year ago and the requirements under the Clean Water Act, PADEP should have considered the greatly improved water quality and recreation that is already occurring and upgraded the designated use to primary contact recreation designation in this draft report.

We respectfully request the PADEP designate this 27-mile stretch of the Delaware River and tributaries for “primary contact recreation” within the agency’s finalized 2023 Triennial Review. The PADEP should remove the current exception language in the draft of the Triennial Review and instead demonstrate a commitment to primary contact recreation quality waters for the 27-mile stretch of the river between Philadelphia and Chester to match the protections along the remaining 300 miles of the river.

Having not done so in the draft in the final 2023 Triennial Review of Water Quality Standards [25 PA. CODE CH. 93], PADEP should state what developments have been made since 2017, including any new data and analyses, and what they will be doing to advance this river segment to primary contact recreation (WC waters) quality. While PADEP should improve monitoring and its analysis to inform and guide implementation actions, that is neither required nor should it stop the Department from adopting higher primary contact standards at this time. We believe that implementation actions can be

designed to advance attainment in an equitable and cost-effective manner for regulated entities, particularly given the availability of federal funding through the State Revolving Fund and other sources. Our groups have been actively advocating for such support for the region and utilities to date and are committed to actively continuing to try and bring necessary financial support and new approaches to this issue. While some monitoring has been conducted, a multi-step action plan is needed that spells out what tasks are required, by when, and by whom to guide both short and long-term responses.

Given this we respectfully submit the following comments on 93.9 Designated Uses and Water Quality Criteria – Exceptions for Fishable/Swimmable Waters within the Proposed Triennial Review.

1. We appreciate the phrase “While the Department continues to work in cooperation with the DRBC, the Federal government and other DRBC signatory states to determine the appropriate designated use or uses, the Department will protect existing uses in accordance with § 93.4c(a) (relating to implementation of antidegradation requirements).” It is important that it is recognized that primary recreation is occurring on this stretch of the river, and the State has a duty to protect the health of those using the water already. Given that there is ample evidence of people swimming, boating, jetskiing and paddling along this portion of the river, it inherently leads to the obligation of the PADEP to protect these uses and the narrative of the Triennial should explicitly articulate and recognize these ongoing and increasing primary contact recreational uses.

- It was reasonable in the past to have secondary contact standards in the urban section of the tidal river. However, times have changed. People are using the river and tributaries. People want access to the river – just look at the popularity of the Bartram’s Garden waterfront. The river is healthier as noted by monitoring and the increase in propagating fish, and there are times during dry weather that it meets WC standards. The large CSOs in Philadelphia, Chester and Camden, NJ (the main contributors to bacterial pollution) have long-term control plans (LTCPs) and progress is being made, but slowly. PADEP can and must step up progress to swimmable waters.
 - EPA guidance has made clear that “In order to protect public health, States must set criteria to reflect recreational uses if it appears that recreation will in fact occur in the stream.” See <https://www.epa.gov/sites/default/files/2015-01/documents/standards-recreation-uses.pdf>. EPA has also instructed that States (and Commonwealths) must do as much as possible to protect the health of the public, because people will use whatever water bodies are available for recreation. We know that is the case here.
- We also appreciate that the previous reference to a safety or hazards study has been removed because such a study is not part of a water quality evaluation.
- The ultimate goal is to upgrade the quality of the waters within the 27-mile stretch to primary recreation consistently and minimize pollution inputs. The public deserves more days on and in the river. There are ways to do this. There are also near-term actions that can be taken to help the environmental justice communities in Philadelphia and Chester. The Department plays a key role in implementing actions, permit conditions and directing funding to needed infrastructure (both green and grey)
- PADEP must develop an action plan, laying out steps and responsibilities in order to reach the primary contact goal in a reasonable time period. This can include:

- forming a PADEP team with a lead senior person responsible for developing the action plan. This plan would include assessing the current conditions in the tidal Delaware and setting steps needed to reach primary contact water quality .
 - developing an action committee from the local area to assist.
 - analyzing and releasing publicly all of the near shore bacterial data that has been collected from 2020 to 2023 with reference to locations and wet weather events so that the regulators, advocates, and the general public can all have the information they need to understand the existing water quality and the ways to improve it.
 - revisiting the DRBC Co-regulator plan and push for actions to start prior to the conclusions of the LTCs. (Note: the current co-regulator statement is not really a plan, but just a list of considerations.)
 - increasing monitoring (maybe by multiple parties) to determine the proportional impact from CSOs, illicit discharges and SSOs. Monitoring is also needed to determine sources of bacteria during dry periods.
 - Discharge of bacteria- laden waters during dry flow periods is illegal but occurring. One direct action PADEP must do to help improve water quality and include in the Triennial is requiring Philadelphia Water Department to end its dry weather discharges or take legal action to do so.
 - Use the 2023 Triennial Review platform to inform the public of your intended actions (required steps, by when, by whom).
- Near-term actions can be taken while PADEP moves forward with primary designation of the whole 27-mile river stretch.
 - A number of areas of the mainstem river and tributaries are currently being used for recreation or have the potential for recreation access, including the Lower Schuylkill River and above Betsy Ross Bridge –the area from Bridesburg Outboard Club (RM 105.5) to Penny Pack Park (Rm 109.15)
 - Work with the cities of Philadelphia and Chester to prioritize action in these CSO sewersheds sooner than proposed in the LTCs. Evaluate whether the bacteria standard for WC waters can be met in these areas solely by green stormwater infrastructure (GSI) or if the addition of gray infrastructure is needed. Develop action plans for these selected areas for near-term change.

Thank you for the opportunity to provide comments on this important process and rule-making. The Delaware River’s water quality has greatly improved over the decades through the tools, requirements and opportunities afforded by the Clean Water Act, and the actions of the public, governmental agencies including PADEP and many supporters of meeting the Clean Water Act’s vision (and requirements) for swimmable and fishable waters for all Americans. Our organizations of course stand ready to continue to assist in this effort.

Sincerely,

Tim

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On behalf of:

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