

**Madison Brame**

From: ecomment@pa.gov
Sent: Tuesday, November 21, 2023 10:54 AM
To: Environment-Committee@pasenate.com; environmentalcommittee@pahouse.net; regcomments@pa.gov; Osenbach, Matt; Glendon King; Franzese, Evan B.; Eyster, Emily; IRRC
Cc: c-jflanaga@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:

No text comments were provided as part of this comment submittal. Please refer to attachments below.

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

Comments Attachment: [Triennial Review Comments -- Riverways.pdf](#)

Please contact me if you have any questions.

Sincerely,
Ezra Thrush

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The Riverways Collaboration consists of 6 non-profit organizations working together to create facilitated and equitable safe access to the tidal Delaware River for the urban residents of Philadelphia and Camden, especially the youth. We have individually and collectively been doing this work for the past 15 years, with marked success, enabling thousands of residents to enjoy their cities in wholly new, healthful ways. Members include Bartram’s Garden, Discovery Pathways, Glen Foerd, and LandHealth Institute, all in Philadelphia, and both the Center for Aquatic Sciences and UrbanPromise in Camden. We emphasize that the waters of the Delaware do not respect state boundaries, and that the inactions of PADEP in this regard negatively and unjustly affect the residents of New Jersey and Delaware as well as those of Philadelphia and Chester; and we note that New Jersey has spent many tens of millions of dollars in recent years creating new waterfront parks and boat facilities along the tidal Cooper River and the Petty’s Island back channel, including a possible swimming beach, all directly across the Delaware River from Philadelphia.

We are therefore unanimously appalled by the irresponsibly weak language in the draft PADEP 2023 Triennial Review on this subject (<https://www.dep.pa.gov/PublicParticipation/EnvironmentalQuality/Pages/2023-Meetings.aspx>). The proposed language retains primary contact recreation designation removals¹ in two areas of the state: i. the stretch of the Delaware River from Philadelphia to Wilmington; and ii. the Outer Erie Harbor/Presque Isle Bay area. In light of recent documentary history, the language regarding the Delaware is almost inexplicable.

In 2017, the DEP submitted a draft Triennial Review for public comment, to which the EPA then provided the following response:

“PADEP also reexamined the removal of the water contact use from the Delaware River between River Miles 108.4 to 81.8. In the proposed rulemaking, PADEP states that the WC use remains

¹ The word “removal” is in the Triennial Review, and this negative connotation is necessary since the default presumption in the Clean Water Act is that all waterways can achieve Primary Contact status. Primary Contact does not need to be justified, but its “removal” does require justification.

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excluded from the designated uses in this portion of the Delaware River because of impacts from combined sewer overflows (CSO) and hazards associated with commercial shipping and navigation. EPA believes that this conclusion needs to be reconsidered since EPA's Combined Sewer Overflow Policy was issued in 1994 and incorporated into the Clean Water Act in 2000. Long Term Control Plans are now under development or in place for the CSOs in this portion of the river. In addition, 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.”

— Dec. 20, 2017 Letter from EPA to PADEP
Environmental Quality Board with comments on the then draft
Triennial Review²

The public comment period for that 2017 Triennial Review was soon thereafter significantly extended, presumably due to the extensive range of comments received, and indeed the final version was not actually published until Nov., 2019, almost two years later (in effect, that Triennial Review became a Quinquennial review instead, and the expected 2020 Triennial was therefore also skipped, so this matter has already been “kicked down the road” for the past 6 years). During that extension period, and apparently in response to the EPA, the DRBC Water Quality Advisory Committee offered the following comments about the Delaware River exclusion zone:

" 1988 Attainability report envisioned upgrading Zones 3 & upper 4 to primary contact in the future*

** Contact recreation is happening right now, today*

** CSO management programs are in place and expanding*

² “WC” is short for Water Contact, which terminology is used by the State of PA as its equivalent to the Primary Contact language of the Clean Water Act, or CWA

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- * CSO prediction capability is strong*
- * Tools for predicting which sets of conditions are likely to contribute to exceedances have been demonstrated*
- * Evidence that new recreational use / criteria should be attainable*
- Not every condition / circumstance*
- Improved ability to attain over time?"*

— From Slide Deck, July 18, 2018, DRBC Water Quality
Advisory Committee Presentation

This did seem to indicate a constructive response to the EPA. However, in stark contrast, the final “Triennial” Review document of that year, published by the DEP just a few months later in Nov. 2019, essentially punted on both the foregoing EPA recommendation and the DRBC presentation, with the following language:

"In April 1989, the Pennsylvania Department of Environmental Resources (DER) cooperated with the Delaware River Basin Commission (DRBC), EPA and other DRBC signatory parties on a comprehensive Use Attainability Analysis (UAA) study in the lower Delaware River and Delaware Estuary. This study resulted in appropriate recommendations regarding the swimmable use, which the DRBC included in its regulations for water use classifications and water quality criteria for portions of the tidal Delaware River in May 1991. The appropriate DRBC standards were referenced in §§ 93.9e and 93.9g in 1994. The WC use remains excluded from the designated uses for river miles 108.4 to 81.8 because of continuing significant impacts from combined sewer overflows (CSOs), and hazards associated with commercial shipping and navigation. However, the Board received comments indicating there are multiple instances where commenters have participated in and documented water contact on this stretch of the Delaware River and Estuary. In

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response to these comments, the Department will initiate an effort with DRBC and the other signatory parties to reevaluate the applicable standards, and an updated recommendation regarding the WC use will be considered in the next triennial review of water quality standards, following outcome of this collaboration.”

— Executive Summary, Triennial Review, Nov. 2019

This language was particularly notable in its reference to a **30-year-old UAA** — one which, as the EPA and DRBC had each already noted, was conducted long prior to the development of the CSO Long Term Control Plans in Philadelphia, Camden, Chester, and Wilmington, also before the recognized significant increase in on-water recreation that had since evolved (the latter clearly having become an existing use), and also before significant improvements in fish propagation on the river were acknowledged. The decision to retain the designation removals was therefore already on shaky grounds, but at least the promise that “an updated recommendation regarding the WC use will be considered in the next triennial review” held out constructive hope.

However, in the new draft 2023 Triennial language there seems to be no follow-through on that promise whatsoever. Indeed, since that prior publication, the Philadelphia Water Department (PWD) has led the charge in the opposite direction, doubling down both on vocal opposition to expanding recreation as well as especially upon re-emphasizing the “hazards associated with shipping and navigation” concern. PWD did indeed commission a purported “study” of navigational safety (the *Delaware River Recreation Safety Study* — <https://water.phila.gov/pool/files/delaware-river-recreation-safety-study-2023-06.pdf>), then persuaded the relevant DRBC committee in 2022 to defer consideration of re-designation at least until that study was in hand, and then submitted the completed study this past spring to the PADEP Environmental Quality Board for consideration as part of the 2023 Triennial Review. Not surprisingly given its origin, that completed study is notably flawed and biased, with hallmarks of having been organized to a pre-determined recommendation that the WC removal should continue — so much so that

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even the PA Fish & Boat Commission (PAFBC) has recently published a letter disavowing the study's conclusions (https://drive.google.com/file/d/1rdaYPOp_n_Xl6wUtare0YbB7ydJQvYiC/view). And it is, in truth, decidedly odd that a water utility, whose primary purpose is to clean the waters, should lead the charge in delaying improved water quality targets, in particular doing so on the basis of a field — “recreation safety” — which falls neither within its operational purview nor its areas of technical expertise (and then file its “study” under the *Watershed Protection* tab of its website, which the “study” patently does not address).

Fortunately, however, the EPA and others have also noted that reference to “hazards associated with commercial shipping and navigation” are in fact irrelevant to the Clean Water Act, which the Triennial Review is specifically required to address, and is therefore simply not a reasonable basis for deferring a review of the designation removal (and, as PAFBC notes in its letter, in fact there is decidedly little evidence that these supposed “hazards” have had any significant impact on recreational safety despite the significant increase that has occurred in the latter over the past 40 years). PWD’s study has therefore apparently and rightfully been put aside, and, indeed, the new draft Triennial Review therefore does quietly remove reference to these so-called “shipping hazards” — although the study’s influence still seems to lurk in the background of the draft Triennial language.

Additionally, that new language also quietly dilutes reference to the ancient Delaware River UAA, presumably recognizing it is no longer relevant under changed circumstances (as both the EPA letter and the DRBC presentation had previously suggested over 5 years ago). Notably therefore, whereas the paragraph retaining the primary contact removal on Outer Erie Harbor/ Presque Isle Bay, also referencing an equally old UAA, includes the language “Because the same conditions exist today, as described in the UAA, no change is proposed to the designated use,” yet there is no such language regarding the Delaware River (as the conditions have indeed clearly changed). Indeed, the Executive Summary rightfully does not even mention the 1989 UAA at all. We note as well that a designation upgrade does not require a UAA under the CWA.

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Finally, the new language also does not reference CSOs, presumably because the existence of the LTCPs materially changes the circumstances here as well. CSO reduction plans are in fact in place.

In short, the new Triennial language simply reaffirms the Delaware River primary contact recreation designation removal, with a weak reference to the 1989 UAA, but without reference to existing recreational use, without directly acknowledging marked water quality improvement in recent decades, without reference to CSOs, and this time therefore without really providing any substantive explanation or justification for the removal at all. It now simply states:

"In April 1989, DER cooperated with the Delaware River Basin Commission (DRBC), the Federal government and other DRBC signatory states on a comprehensive UAA study in the lower Delaware River and Delaware Estuary. This study resulted in recommendations regarding the DRBC's primary contact recreation designated use (synonymous with this Commonwealth's WC protected use), which the DRBC included in its regulations for water use classifications and water quality criteria for portions of the tidal Delaware River in May 1991. The DRBC standards are referenced in §§ 93.9e and 93.9g."

— Preamble, Triennial Review, Oct. 2023

This clearly is an actual regression from the 2019 Triennial language rather than the promised "updated recommendation." Indeed, there is no plan indicated for moving forward other than this subsequent statement: "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 that should apply in the lower Delaware River and Delaware Estuary." Substantially all justification for the WC removal has actually been deleted or diluted, leaving that removal floating essentially without foundation. This seems an effective inversion of the CWA, seeming to make the "removal" as the accepted standard, therefore requiring no

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justification, while “fishable swimmable,” no longer the default standard, must now somehow be justified. There is therefore a certain irony in subsequent language in the new Triennial stating a commitment to “protecting and improving the recovery taking place in the lower Delaware River and Delaware Estuary” (emphasis added).

Of particular note as well is this: the Triennial Review language firmly retains the Delaware River WC “removal” but effectively transfers the state’s responsibility for justifying that removal to a multi-state agency, the DRBC. This places DRBC in an awkward position, with at least one hand tied behind its back, and the other states involved should certainly have the right to comment upon this.

This outcome seems particularly egregious in light of the following:

- The Clean Water Act, which governs the Triennial Review, clearly anticipates a fully “fishable swimmable” Delaware River in some determinable future, absent compelling evidence that this cannot be achieved.
- The Delaware River removal was previously justified on the basis of i. the 1989 UAA, ii. the existence of CSOs, and iii. a reference to supposed “shipping hazards.” Reference to both the “shipping hazards” and the CSOs have now been removed from the new Triennial draft, and the reference to the 1989 UAA diluted (implicitly acknowledging its aged inapplicability in changed current circumstances).
- The 2023 Triennial Review consequently provides no current argument whatsoever that Primary Contact quality waters cannot be achieved in the Delaware Estuary. Indeed, the obvious and acknowledged improvements in aquatic life in the past 30 years manifests that substantive progress has already been made. And as cities all over the world with similar CSO legacies are in fact now working towards, some actually approaching, swimmable waters, it would seem very difficult to argue that the Delaware River is somehow uniquely unable to make that achievement.
- The entire 300+ miles of the Delaware River north of Philadelphia is already designated for Primary Contact Recreation, leaving only this

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27 mile stretch encompassing Philadelphia, Camden, Chester, and Wilmington as under removal — the gross inequities are too obvious to ignore.

- In truth, the CWA by default presumes that all these waters should be "fishable swimmable," and therefore requires explicit justification for any removal of that presumption, and for such removals to be re-evaluated every three years (hence the Triennial Review). The water utilities in Philadelphia, Camden, and Chester all do now have in place LTCPs for their CSOs, each promising to significantly reduce sewage overflows and therefore pathogen levels in the Delaware River by the ends of their scheduled terms, and none having indicated an expectation of failure to abide by those agreements. In other words, specific CSO reduction plans, with specific schedules, are in place.
- In the meantime, Primary Contact recreation is a well established existing use on this section of the tidal Delaware, with a significant growth trajectory, especially as residents respond to climate change and hotter summers.
- Furthermore, at least part of the reason for current water quality deficiencies in the Delaware River lies in known dry weather discharges from sewer systems — discharges which are themselves already prohibited by the EPA, and therefore not justifiable.

So three observations come to mind:

- The DEP is now essentially arguing in a circle, that the existing water quality in the Delaware River is not good enough to allow setting improved water quality targets. Yet setting those targets is the best way to ensure the improvement will happen.
- Those improvement targets should therefore now be set without further delay, even if the waters are currently impaired relative to that target status. This simply acknowledges the clear demands of the CWA, the long term water quality improvements already seen, the existing LTCPs, the rapidly growing recreational existing use, the gross inequities of the status quo, and the recent Federal financial commitments.

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- A Primary Contact designation is therefore a beginning, not an endgame. Instead of a vague promise to look into the matter, the need is for an urgent and specific improvement plan, with clear timelines, for resolving those remaining impairments. Riverways is fully prepared to help with that plan, bringing its experience and expertise to bear.

The current draft 2023 Triennial Review language regarding retention of the removal of Primary Contact Recreation on this last 27 mile stretch of the Delaware River is decidedly insufficient and unsatisfactory.