

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-571 (IRRC #3384)

### Water Quality Standards - Site-Specific Water Quality Criteria

**January 18, 2024**

We submit for your consideration the following comments on the proposed rulemaking published in the November 4, 2023 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

#### **1. Clarity; Implementation Procedures; and Possible conflict with or duplication of statutes or existing regulations.**

The United States Environmental Protection Agency (EPA) has submitted comments on the proposed rulemaking. The comments:

- State that the Department is proposing to revise 25 Pa. Code Section 93.8d(a)(1) in such a way as to limit the development of site-specific water quality criteria to just aquatic life criteria and asks the Department to indicate whether site-specific human health criteria can be developed under Section 93.8d(a)(1) or some other authority. It further notes that site-specific methylmercury criteria for Ebaugh Creek is developed for the protection of human health;
- Ask the Department, regarding Section 93.8d(c)(3), to consider adding clarification that new or updated site-specific criteria for aluminum in freshwater systems may be developed using the multiple linear regression consistent with the EPA's Final Aquatic Life Ambient Water Quality Criteria for Aluminum 2018 (EPA-822-R18-001); and
- Ask the Department, regarding proposed Section 93.8d(c)(5)(c.3), to provide information on how it intends to meet the public participation requirements of federal regulation at 40 C.F.R. Section 131.20(b) and 40 C.F. R. Part 25.

In the Regulatory Analysis Form submitted with the proposed rulemaking, the EQB states the following: "These proposed amendments are critical to ensuring the Department receives the information necessary to determine if site-specific water quality criteria are applicable, to develop site-specific water quality criteria recommendations that are protective of surface water uses, and to incorporate the site-specific criteria into the Commonwealth's water quality

standards.” Since the site-specific criteria are not effective under the Clean Water Act until approved by the EPA, it is important that the EQB work with the EPA to ensure that the issues raised above are adequately addressed in the final-form rulemaking. We ask the EQB to review the concerns raised above and to amend the rulemaking or provide further explanation on implementation procedures to ensure compliance with EPA requirements.

## **2. Section 93.8d. Development of site-specific water quality criteria. --Clarity; Reasonableness of requirements; and Implementation procedures.**

Subsection (a) provides that the Department will consider a request for site-specific criteria when certain conditions apply. Subsection (a) is being amended to clarify that **the Department may develop site-specific criteria on its own initiative** under those same conditions.

The Preamble states that the proposed amendments in § 93.8d(a) are intended to clarify when site-specific water quality criteria may be requested. It concludes that “[n]o significant changes were made to this existing regulation.” Subsection (a) is being amended to clarify that two paths are available in the development of site-specific water quality criteria. Those two paths are applicant requests and those developed by the Department on its own initiative. The responses to several RAF questions appear to address only the applicant requests for site-specific criteria. Neither the Preamble nor the RAF discusses situations where the Department may develop site-specific criteria on its own initiative.

Additionally, the Preamble does not provide a description of or the need for proposed subsection (c.2). Subsection (c.2) states that the Department will incorporate approved site-specific criteria into this chapter and maintain a publicly available table of EPA-approved site-specific criteria. This language seemingly replaces § 93.8d(f)(4) which currently requires the Department, if it determines that site-specific criteria are appropriate, to prepare a recommendation to the EQB in the form of proposed rulemaking, incorporating that criterion for the water body segment. The Preamble states that:

“Once a site-specific water quality criterion is developed and publicly noticed for comment, the Department will **prepare a rulemaking for the adoption of the new criterion into Chapter 93. All water quality criteria will be developed through rulemaking and the appropriate rulemaking processes**, consistent with the Commonwealth’s laws.

Site-specific water quality criteria are used to develop effluent limitations in permits. Given the need for timely permit development, **the Department intends to explore all options available for expediting rulemaking procedures to promulgate site-specific water quality criteria** while maintaining robust public participation. **Although 93.8d(f)(4) is proposed for deletion, the obligation remains to promulgate site-specific criteria as regulations.**” Emphasis added.

While we acknowledge the Department’s efforts regarding permit development, it is unclear why § 93.8d(f)(4) is being deleted before any options to expedite the rulemaking process have been explored. In the Preamble and RAF submitted with the final-form rulemaking, the Department

should provide a more detailed description of the language proposed for each section of the regulation and why the language is required. It should also review responses to RAF questions and include, where appropriate, information pertaining to all key elements of the rulemaking such as Department-initiated development of site-specific criteria.