

**NOTICE OF PROPOSED RULEMAKING**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**ENVIRONMENTAL QUALITY BOARD**  
**25 Pa. Code, Chapter 93**  
**Stream Redesignations (Fishing Creek, et al.)**

**Preamble**

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code §§93.9c, 93.9d, 93.9f, 93.9l and 93.9o to read as set forth in Annex A.

This proposal was adopted by the Board at its meeting of \_\_\_\_\_.

**A. Effective Date**

These amendments are effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

**B. Contact Persons**

For further information, contact Roberta Radel, Bureau of Water Standards and Facility Regulation (BWSFR), 11th Floor, Rachel Carson State Office Building, P.O. Box 8467, 400 Market Street, Harrisburg, PA 17105-8467, 717-787-5017 or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, 717-787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD-users) or 1-800-654-5988 (voice users). This proposal is available electronically through the Department of Environmental Protection (Department) web site (<http://www.depweb.state.pa.us>).

**C. Statutory and Regulatory Authority**

This proposed rulemaking is being made under the authority of sections 5(b)(1) and 402 of The Clean Streams Law (35 P.S. §§ 691.5 (b)(1) and 691.402), which authorize the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law (35 P.S. §§ 691.1 – 691.1001), and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which grants to the Board the power and duty to formulate, adopt, and promulgate rules and regulations for the proper performance of the work of the Department. In addition, section 303 of the Federal Clean Water Act (33 U.S.C. § 1313) sets forth requirements for water quality standards.

**D. Background of the Proposed Amendments**

Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements, effluent limits, and best management practices (BMPs)) on individual sources of pollution.

The Department may identify candidates for redesignation during routine waterbody investigations. Requests for consideration may also be initiated by other agencies.

Organizations, businesses, or individuals may submit a rulemaking petition to the Board.

The Department considers candidates for High Quality (HQ) or Exceptional Value (EV) Waters and all other designations in its ongoing review of water quality standards. In general, HQ and EV waters must be maintained at their existing quality, and permitted activities shall ensure the protection of designated and existing uses.

Existing use protection is provided when the Department determines, based on its evaluation of the best available scientific information, that a surface water attains water uses identified in §§ 93.3 and 93.4. Examples of water uses protected include the following: Cold Water Fishes (CWF), Warm Water Fishes (WWF), HQ and EV. A final existing use determination is made on a surface water at the time the Department takes a permit or approval action on a request to conduct an activity that may impact surface water. If the determination demonstrates that the existing use is different than the designated use, the water body will immediately receive the best protection identified by either the attained uses or the designated uses. A stream will then be “redesignated” through the rulemaking process to match the existing uses with the designated uses. For example, if the designated use of a stream is listed as protecting WWF but the redesignation evaluation demonstrates that the water attains the use of CWF, the stream would immediately be protected for CWF, prior to a rulemaking. Once the Department determines the water uses attained by a surface water, the Department will recommend to the Board that the existing uses be made “designated” uses, through rulemaking, and be added to the list of uses identified in § 93.9 (relating to designated water uses and water quality criteria).

The streams in this proposed rulemaking that are candidates for redesignation were all evaluated in response to petitions as follows:

<b>Stream</b>	<b>County</b>	<b>Petitioner</b>
Buck Hill Creek	Monroe	Buck Hill Conservation Foundation
Lehigh River (upper)	Lackawanna, Monroe, Wayne, Luzerne	North Pocono Citizens Alert Regarding the Environment (CARE)
Little Lehigh Creek	Lehigh, Berks	Mid-Atlantic Environmental Law Center
Gallows Run	Bucks	Gallows Run Watershed Association
French Creek & Beaver Run	Chester	Green Valleys Association
Tannery Hollow Run	Cameron	Cameron County Conservation District
Fishing Creek	Lancaster	Patrick McClure
Deer Creek & Little Falls	York	Shrewsbury Township

These regulatory changes were developed as a result of aquatic studies conducted by the BWSFR. The physical, chemical, and biological characteristics and other information on these waterbodies were evaluated to determine the appropriateness of the current and requested designations using applicable regulatory criteria and definitions. In reviewing whether waterbodies qualify as HQ or EV waters, the Department considers the criteria in § 93.4b (relating to qualifying as High Quality or Exceptional Value Waters). Based upon the data and information collected on these waterbodies, the Department recommends the Board adopt this proposed regulation as described in this preamble and as set forth in Annex A.

Copies of the Department’s stream evaluation reports for these waterbodies are available on the Department’s web site or from the contacts whose addresses and telephone numbers are listed in Section B.

The following is a brief explanation of the recommendations for each waterbody:

*Buck Hill Creek* (stream code 05023) – Buck Hill Creek is a tributary to Brodhead Creek in the Delaware River drainage basin. The Buck Hill Creek basin is located in Coolbaugh and Barrett Townships in Monroe County. The candidate portion of the Buck Hill Creek basin is upstream of the Buck Hill Falls and it extends from and including unnamed tributary (UNT) 05028 to and including UNT 05026. The candidate portion is currently designated HQ-CWF. It was evaluated for redesignation as EV based upon a petition submitted by the Buck Hill Conservation Foundation. Candidate stream metrics were compared to a reference station on Buck Hill Creek downstream from the candidate segment. The Buck Hill Creek reference station has a designated use of EV. The candidate portion had a biological condition score (BCS) of 100% of the reference station score, which surpasses the requirement for EV designation based on BCS greater than 92% of the reference station score (§93.4b(b)(1)(v)). The Department recommends that the candidate portion of the Buck Hill Creek basin be designated EV. This will affect 2.03 stream miles. Currently, the entire Buck Hill Creek basin is erroneously designated migratory fishes (MF) in §93.9c. The Department recommends correcting the basin designation by deleting the MF designated use above Buck Hill Falls. Corrections to §93.9c are also being included to accurately characterize the fluvial geomorphology of the surrounding waters. There are three named tributaries to Middle Branch Brodhead Creek and they are Spruce Mountain Run, Laurel Run, and Leavitt Branch (listed in order from the source to the mouth of Middle Branch Brodhead Creek). The origin of Brodhead Creek is at the confluence of Middle Branch Brodhead Creek and Buck Hill Creek.

*Upper Lehigh River* (stream code 03335) – The upper Lehigh River, located northeast of White Haven and a tributary to the Delaware River, was evaluated for redesignation from HQ-CWF, MF to EV, MF. The North Pocono Citizens Alert Regarding the Environment (CARE) submitted a petition to redesignate the upper Lehigh River basin from the source to but not including Tobyhanna Creek. This portion of the upper Lehigh River basin is located in Buck Township, Luzerne County; Tobyhanna and Coolbaugh Townships, Monroe County; Thornhurst, Clifton, and Covington Townships, Lackawanna County; and Lehigh and Sterling Townships, Wayne County. The candidate portion of the basin qualifies for redesignation based upon several different criteria in §93.4b. (1.) Sand Spring Creek surpassed the EV qualifying criterion at §93.4b(b)(1)(v) with a BCS of 100%. (2.) Black Bear and Bender Swamps Natural Areas in Tobyhanna State Park and Spruce Swamp Natural Area in the Lackawanna State Forest have been designated by the Department of Conservation & Natural Resources (DCNR) to be maintained in a natural condition. Based on the Department’s review of these natural area designations, these HQ designated waters qualify for designation as EV as provided by §93.4b(b)(1)(ii). (3.) The water quality protective measures described in DCNR – Bureau of Forestry and Pennsylvania Game Commission resource management plans meet the “outstanding National, State, regional, or local resource waters” definition and apply to stream segments within State Game Lands 91, 127, 135 and 312; and the Lackawanna State Forest within the upper Lehigh River basin. (4.) There are 22 ecologically significant upper Lehigh River watershed that qualify for designation as EV based upon the criteria at §93.4b(b)(2). The exceptional ecological significance is based on the presence of several rare endemic plant and ecological community types. These areas provide an important function as ecological filtering systems for the Lehigh River and an important ecological connectance that supports the natural diversity found in the Lehigh River petition area, which has resulted in the ecology and hydrology of the upper Lehigh River basin remaining largely intact and undisrupted. The distribution and high concentration of these ecologically significant rare and unique endemic

natural communities support the EV recommendation. The Department recommends that the upper Lehigh River basin from its source to but not including Tobyhanna Creek be redesignated EV, MF. The candidate portion of the basin includes 219.2 stream miles.

*Little Lehigh Creek* (stream code 03420) – Little Lehigh Creek, a combination of freestone (headwaters) and limestone influenced habitat, is a tributary to the Lehigh River in the Delaware River watershed. The candidate basin is located in Longswamp Township (Berks County) and Lower Macungie and Salisbury Townships and the City of Allentown (Lehigh County). The mainstem of the Little Lehigh Creek is currently designated HQ-CWF, MF. The Department conducted an evaluation of the Little Lehigh Creek in response to a petition that was submitted by the Mid-Atlantic Environmental Law Center on the behalf of the Little Lehigh Watershed Coalition requesting that the mainstem be redesignated to EV, MF. The petitioner originally requested that the Department redesignate Little Lehigh Creek mainstem as an Outstanding National Resource Water based on qualifying criteria at 40 CFR 131.32(3). This request was based on candidate waters being located in the Delaware and Lehigh Canal Heritage Corridor and Heritage State Park and the presence of an exceptional recreational fishery. The integrated benthic macroinvertebrate score test described at §93.4b(a)(2)(i)(A) and §93.4b(b)(1)(v) was applied to Little Lehigh Creek. Candidate stream metrics were compared to Elk Creek (Centre County). None of the 6 sample stations had BCS that met the criteria for HQ, which is a prerequisite for redesignation to EV. In addition to applying the above antidegradation scoring test, the Department's benthic metric Index of Biotic Integrity (IBI) was also employed. The IBI scores at the 6 sample stations revealed stressed conditions that are consistent with aquatic life use impairment. As a result of these IBI scores, the mainstem of Little Lehigh Creek from Lower Longswamp to the mouth was listed on Pennsylvania's 2008 303(d) list of impaired waters. The Department recommends that the Little Lehigh Creek mainstem should retain its current HQ-CWF, MF designation.

*Gallows Run* (stream code 03278) – Gallows Run is a tributary to the Delaware River. Gallows Run flows through Nockamixon, Durham, and Springfield Townships in Bucks County and is currently designated CWF, MF. The Gallows Run Watershed Association submitted a petition recommending that Gallows Run basin be redesignated as HQ-CWF, MF. The Department conducted an evaluation of Gallows Run and used Pine Creek in Berks County as an EV reference station. Based on applicable regulatory definitions and requirements of §93.4b, the Department recommends that the Gallows Run basin remain designated in Chapter 93 as CWF, MF. This recommendation is based on the presence of a cold water biological community with a BCS lower than 83% of the reference score, and the presence of a modest brown trout fishery and American eel population.

*French Creek & Beaver Run* (stream codes 01548 & 01573) – Beaver Run is a tributary to French Creek. French Creek is in the Scuykill River watershed and is included in the Delaware River Basin. The French Creek basin, from and including Beaver Run to the Junction of West Vincent, East Vincent and East Pikeland Townships (except Birch Run basin, which is EV) is currently designated HQ-CWF, MF and the remaining downstream portion of the basin is currently TSF, MF. The Department conducted an evaluation of Beaver Run and the lower French Creek basin in response to a petition submitted by the Green Valleys Association. The qualifying criteria applied when considering this redesignation was the DEP integrated benthic macroinvertebrate scoring test described at §93.4b(a)(2)(i)(A) and §93.4b(b)(1)(v). Selected EV reference stations included Kettle Creek in Clinton County and Rock Run, a tributary to French

Creek. Based on the applicable regulatory definitions and requirements of §93.4b, the Department recommends that the Beaver Run basin and the French Creek mainstem from Beaver Run to the T522 bridge (Kennedy Covered Bridge) be redesignated EV, MF and the unnamed tributary basins to this reach of the mainstem from Beaver Run to East Pikeland Township retain their current HQ-TSF, MF designation and the unnamed tributary in East Pikeland Township retain its current TSF, MF. This recommendation will add 16.3 miles of exceptional value water located in West Vincent, East Vincent, East Pikeland, East Nantmeal and South Coventry Townships, all in Chester County.

*Tannery Hollow Run* (stream code 24991) – Tannery Hollow Run basin is located in Gibson, Lumber and Shippen Townships in Cameron County and Benezette Township in Elk County. Tannery Hollow Run enters Sterling Run in Lumber Township and the basin is included in the Susquehanna River watershed. Tannery Hollow Run basin includes 6.55 stream miles and is currently designated CWF, MF. In response to a petition submitted by the Cameron County Conservation District to redesignate Tannery Hollow Run basin as EV, MF, the Department conducted an evaluation. The biological use qualifying criteria applied to Tannery Hollow Run was the integrated benthic macroinvertebrate score test described at §93.4b(a)(2)(i)(A) and §93.4b(b)(1)(v). Trout Run (stream code 23693; tributary to Kettle Creek; Clinton County) was selected as the EV reference stream. Tannery Hollow Run met the requirement for EV designation based on the BCS of the candidate waters being greater than 92% of the reference station score (§93.4b(b)(1)(v)). The Department recommends the designated use of Tannery Hollow Run basin be changed from the current CWF, MF to EV, MF.

*Fishing Creek* (stream code 07253) – Fishing Creek flows through Drumore and Providence Townships in Lancaster County before entering the Susquehanna River. The Department conducted an evaluation of Fishing Creek in response to a petition submitted by Patrick McClure. The petition requested that the entire Fishing Creek basin be redesignated from its current designation of HQ-CWF, MF to EV, MF. The integrated benthic macroinvertebrate score test described at §93.4b(a)(2)(i)(A) and §93.4b(b)(1)(v) was applied to Fishing Creek. Candidate stream metrics were compared to Rock Run (01591). Fishing Creek failed to meet the biological use qualifying criteria for redesignation as EV at all station locations, however there is a rare species of darters present which qualifies the lower portion of the basin for EV because it is a surface water of exceptional ecological significance based on §93.4b(b)(2). The darter species that is present is the Chesapeake Logperch (*Percina bimaculata*). These darters are part of a disjunct population of the Logperch (*Percina caprodes*) that was historically considered a subspecies (*Percina caprodes semifasciata*). Recent work by Near (2008) and Near and Benard (2004) has shown that this population deserves to be elevated from a subspecies to a true species. The Department recommends that the Fishing Creek basin from and including UNT 07256 (near the T434 Bridge) to the mouth be redesignated EV, MF because the population of Chesapeake Logperch inhabiting Fishing Creek represents a significant portion of the total global population of this species. This recommendation to redesignate 7.27 stream miles is in accordance with §93.4b(b)(2), surface water of exceptional ecological significance.

*Deer Creek & Little Falls* (stream codes 06761 & 06859) – Deer Creek and Little Falls are both freestone streams with the majority of their basins in Maryland. Both streams are in the Susquehanna River watershed. Portions of Deer Creek and Little Falls that lie in Pennsylvania are situated in York County. Candidate portions of the Deer Creek basin flow through Shrewsbury, Hopewell, and Fawn Townships and Shrewsbury, Stewartstown, and Fawn Grove

Boro. Candidate portions of Little Falls basin flow through Shrewsbury Township and New Freedom Boro. Deer Creek is currently designated CWF, MF and Little Falls is currently designated WWF, MF. Portions of both basins that lie in Pennsylvania were evaluated for redesignation as HQ-CWF in response to a petition from the Shrewsbury Township Board of Supervisors. All stations in both basins were compared to an EV reference station on Rock Run, a freestone tributary to French Creek. None of the stations qualified for redesignation as High Quality based on stream metrics. Based on applicable regulatory definitions and requirements of §93.4b, the Department recommends that the Deer Creek basin retain its current Cold Water Fishes, Migratory Fishes (CWF, MF) designation. As indicated by the available physical, benthic macroinvertebrate and fish data, the aquatic habitat found in the Little Falls Creek basin supports a cold water fishery. Portions of Little Falls basin that lie within the commonwealth should be redesignated CWF, MF to reflect the current aquatic life use. The candidate portion of Little Falls includes 5.7 stream miles.

### **E. Benefits, Costs and Compliance**

1. **Benefits** – Overall, the Commonwealth, its citizens and natural resources will benefit from these recommended changes because they provide the appropriate level of protection to preserve the integrity of existing and designated uses of surface waters in this Commonwealth. Protecting water quality provides economic value to present and future generations in the form of clean water for drinking, recreational opportunities, and aquatic life protection. It is important to realize these benefits to ensure opportunity and development continue in a manner that is environmentally, socially and economically sound. Maintenance of water quality ensures its future availability for all uses.
2. **Compliance Costs** – The proposed amendments to Chapter 93 may impose additional compliance costs on the regulated community. These regulatory changes are necessary to improve total pollution control. The expenditures necessary to meet new compliance requirements may exceed that which is required under existing regulations.

Persons conducting or proposing activities or projects must comply with the regulatory requirements relating to designated and existing uses. Persons expanding a discharge or adding a new discharge point to a stream could be adversely affected if they need to provide a higher level of treatment to meet the designated and existing uses of the stream. These increased costs may take the form of higher engineering, construction or operating cost for wastewater treatment facilities. Treatment costs are site-specific and depend upon the size of the discharge in relation to the size of the stream and many other factors. It is therefore not possible to precisely predict the actual change in costs. Economic impacts would primarily involve the potential for higher treatment costs for new or expanded discharges to streams that are redesignated. The initial costs resulting from the installation of technologically advanced wastewater treatment processes may be offset by potential savings from and increased value of improved water quality through more cost-effective and efficient treatment over time.

3. **Compliance Assistance Plan** - The regulatory revisions have been developed as part of an established program that has been implemented by the Department since the early 1980s. The revisions are consistent with and based on existing Department regulations. The revisions extend additional protection to selected waterbodies that exhibit

exceptional water quality and are consistent with antidegradation requirements established by the Federal Clean Water Act and The Clean Streams Law. All surface waters in this Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, which prevent pollution and protect existing water uses.

The proposed amendments will be implemented through the Department's permit and approval actions. For example, the National Pollutant Discharge Elimination System (NPDES) permitting program bases effluent limitations on the use designation of the stream. These permit conditions are established to assure water quality criteria are achieved and designated and existing uses are protected. New and expanded dischargers with water quality based effluent limitations are required to provide effluent treatment according to the water quality criteria associated with existing uses and revised designated water uses.

4. **Paperwork Requirements** - The regulatory revisions should have no direct paperwork impact on the Commonwealth, local governments and political subdivisions, or the private sector. These regulatory revisions are based on existing Department regulations and simply mirror the existing use protection that is already in place for these streams. There may be some indirect paperwork requirements for new or expanding dischargers to streams upgraded to HQ or EV. For example, NPDES general permits are not currently available for new or expanded discharges to these streams. Thus an individual permit, and its associated paperwork, would be required. Additionally, paperwork associated with demonstrating social and economic justification may be required for new or expanded discharges to certain HQ Waters, and consideration of nondischarge alternatives is required for all new or expanded discharges to EV and HQ Waters.

#### **F. Pollution Prevention**

The water quality standards and antidegradation program are major pollution prevention tools because the objective is to prevent degradation by maintaining and protecting existing water quality and existing uses. Although the antidegradation program does not prohibit new or expanded wastewater discharges, nondischarge alternatives are encouraged, and required when environmentally sound and cost effective. Nondischarge alternatives, when implemented, remove impacts to surface water and may reduce the overall level of pollution to the environment by remediation of the effluent through the soil.

#### **G. Sunset Review**

These proposed amendments will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

#### **H. Regulatory Review**

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on \_\_\_\_\_, the Department submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Senate and House Environmental Resources and Energy Committees (Committees) for review and comment. In addition to submitting the proposed amendments, IRRC and the Committees have been provided a detailed Regulatory Analysis Form prepared by the Department. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for review by the Department, the General Assembly and the Governor prior to final-form publication of the regulations.

## **I. Public Comments**

*Written Comments* – Interested persons are invited to submit comments, suggestions, or objections regarding the proposed amendments to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments must be received by the Board by \_\_\_\_\_ (within 45 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by \_\_\_\_\_. The one page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the proposed amendments will be considered. If sufficient interest is generated as a result of this publication, a public hearing will be scheduled at an appropriate location to receive additional comments.

*Electronic Comments* – Comments may be submitted electronically to the Board at [RegComments@state.pa.us](mailto:RegComments@state.pa.us). A subject heading of the proposal and return name and address must be included in each transmission. Comments submitted electronically must also be received by the Board by \_\_\_\_\_.

BY:

John Hanger  
Chairperson  
Environmental Quality Board