

Regulatory Analysis Form

(Completed by Promulgating Agency)

INDEPENDENT REGULATORY REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency:

Environmental Protection

(2) Agency Number: 7

Identification Number: 571

IRRC Number:

(3) PA Code Cite: 25 Pa. Code Chapter 93

(4) Short Title: Water Quality Standards – Site-Specific Water Quality Criteria

(5) Agency Contacts (List Telephone Number and Email Address):

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(6) Type of Rulemaking (check applicable box):

Proposed Regulation

Final Regulation

Final Omitted Regulation

Emergency Certification Regulation

Certification by the Governor

Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The proposed amendments to 25 Pa. Code Chapter 93 (relating to water quality standards) will update and revise the process for developing and adopting site-specific water quality criteria in § 93.8d (relating to the development of site-specific water quality criteria), delete the statewide total mercury criterion of 0.05 µg/L for Ebaughs Creek and add a site-specific methylmercury water quality criterion of 0.00004 µg/L for Ebaughs Creeks to § 93.9o (relating to Drainage List O). This site-specific criterion addition to § 93.9o will be used to develop new National Pollutant Discharge Elimination System (NPDES) effluent limitation requirements for the York County Sanitary Landfill operated by the York County Solid Waste and Refuse Authority (YCSWRA), located in Hopewell Township, York County.

(8) State the statutory authority for the regulation. Include specific statutory citation.

This proposed rulemaking is authorized under sections 5(b)(1) and 402 of The Clean Streams Law (CSL) (35 P.S. §§ 691.5(b)(1) and 691.402), which authorize the Environmental Quality Board (Board) to develop and adopt rules and regulations to implement the CSL (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 of Environmental Protection (Department). In addition, sections 101(a)(2) and 303 of the Federal Clean Water Act (CWA) (33 U.S.C.A. §§ 1251(a)(2) and 1313) set forth requirements for water quality standards, which states must meet to implement the CWA. Section 101(a)(3) of the CWA declares the national policy that the discharge of toxic pollutants in toxic amounts be prohibited (33 U.S.C.A. § 1251(a)(3)). Section 303(c)(2)(B) directs states to adopt numeric criteria for toxic pollutants if they are present in a discharge that

could be reasonably expected to interfere with a state's designated uses and are necessary to support those uses.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

Under sections 4, 5 and 402 of the CSL, the Department has the duty to formulate regulations that prevent and eliminate water pollution. 35 P.S. §§ 691.4, 691.5, and 691.402. "Pollution" is defined by the law as "contamination of any waters of the Commonwealth such as ... to render such waters harmful, detrimental or injurious to public health..., or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life..." (35 P.S. § 691.41). This term includes contamination by alteration of the physical, chemical, or biological properties of water. The definition of "pollution" requires the Department to determine when a discharge constitutes pollution and to establish standards to determine whether such discharge constitutes pollution. Section 1920-A of the Administrative Code of 1929 authorizes the Board to formulate, adopt and promulgate such rules and regulations as may be determined by the Board for proper performance of the work of the Department (71 P.S. § 510-20(b)). The development of water quality criteria meets this legal obligation.

States are required to protect existing and designated uses of their surface waters and develop criteria to protect those uses. This proposed regulation will modify existing regulations that allow the development of site-specific criteria to protect water uses. Further, the proposed regulations establish a site-specific standard for methylmercury to protect the use of Ebaughs Creek.

Water quality standards must be reviewed and approved by the United States Environmental Protection Agency (EPA) for consistency with the mandates under the CWA. Section 101(a)(2) of the CWA, 33 U.S.C.A. § 1251(a)(2), establishes the national goal that wherever attainable, water quality should provide for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water. Section 303(c)(2)(A), 33 U.S.C.A. § 1313(c)(2)(A), requires water quality standards to include designated uses of waters and criteria necessary to protect those uses, taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes. The federal water quality standards regulation at 40 CFR 131.11(b)(1) requires states and authorized tribes to adopt numeric water quality criteria that are based on criteria recommendations developed by the EPA under CWA section 304(a), EPA section 304(a) criteria recommendations modified to reflect site-specific conditions, or other scientifically-defensible methods. The site-specific criteria proposed in this rulemaking are consistent with these mandates. Section 303(c)(2)(B) directs states to adopt numeric criteria for toxic pollutants if they are present in a discharge that could be reasonably expected to interfere with a state's designated uses and are necessary to support those uses.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Water quality standards are necessary to protect the surface waters of this Commonwealth. Pennsylvania's surface waters, through the water quality standards program, are protected for a variety of uses, including: drinking water supplies for humans, livestock and wildlife; industrial water supplies; irrigation for crops; aquatic life uses; and recreation and fish consumption. All of the residents and visitors of this Commonwealth will benefit from updating the Chapter 93 water quality standards to provide the appropriate level of water quality protection for all water uses and users of surface waters of this Commonwealth.

The regulated community and the public will benefit from having regulations that clearly outline the site-specific criteria development and adoption process. 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. The proposed amendments will clarify when site-specific criteria may be requested and how to submit a request. Furthermore, the proposed amendments will enable the Department to implement site-specific criteria in NPDES permits in the most efficient and timely manner available.

The site-specific methylmercury water quality criterion contained in this proposed rulemaking is specific to Ebaughs Creek. YCSWRA's discharge is currently the only known discharge to Ebaughs Creek containing mercury and YCSWRA will benefit by having a permit with effluent limitations that were developed based on this site-specific water quality criterion. Persons proposing a new discharge containing mercury to this stream would likely be afforded the same benefit.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

No. The proposed regulations are not more stringent than federal standards.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

Other states are also required to maintain water quality standards based on the federal mandate identified in the response to question #9. Therefore, the proposed amendments will not put Pennsylvania at a competitive disadvantage to other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No other regulations are affected by this proposal.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Department used data and information collected and reported by YCSWRA, based on a Department-approved study plan, to develop a site-specific criterion for Ebaughs Creek, York County. This data and information supports the Board's proposed rulemaking for a methylmercury site-specific criterion, as set forth in Annex A.

On March 16, 2023, the Department met with the Water Resources Advisory Committee (WRAC) to present its recommended updates to § 93.8d and the site-specific methylmercury water quality criterion for Ebaughs Creek. WRAC voted to support presentation of this proposed rulemaking to the Board. Additionally, the Department presented draft regulatory amendments to the Agricultural Advisory Board (AAB) on March 15, 2023, explaining the proposed changes.

The public will be afforded the opportunity to comment on this proposed regulation, which will include a public hearing during a 45-day public comment period following publication in the *Pennsylvania Bulletin*.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

When site-specific criteria are necessary either to protect more sensitive intervening uses or for substances currently lacking statewide numeric criteria in Chapter 93, persons with NPDES permits may need to conduct the required studies to develop site-specific criteria and may need to install treatment to comply with their NPDES permit effluent limitations. In cases where a person with an NPDES permit elects to request a site-specific criterion or criteria, the individual would need to conduct the required studies and to comply with their NPDES permit effluent limitations. Requests for site-specific criteria are often initiated by persons with NPDES permits for any number of different pollutants. For example, if a toxic pollutant will be discharged to surface water as a result of a remediation, and no statewide water quality criterion is available to develop effluent limitations, a person may request development of a site-specific criterion. A person who wants to be eligible for the cleanup liability protection under the Commonwealth's Land Recycling and Environmental Standards Act must attain compliance with environmental standards.

The proposed site-specific methylmercury water quality criterion will impose new NPDES effluent limitation requirements on an existing wastewater discharge from York County Sanitary Landfill operated by the YCSWRA. The Department has not identified any additional permitted discharges of mercury to Ebaughs Creek. As such, no additional entities are expected to be affected by this site-specific methylmercury water quality criterion.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

The proposed site-specific methylmercury water quality criterion will impose new NPDES effluent limitation requirements on an existing wastewater discharge from York County Sanitary Landfill operated by the YCSWRA. The Department has not identified any additional permitted discharges of mercury or methylmercury to Ebaughs Creek. As such, no additional entities are expected to be affected by this site-specific methylmercury water quality criterion.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

Currently, the proposed site-specific methylmercury water quality criterion only impacts a single existing wastewater discharger, which is YCSWRA. If any new or existing point source discharge to Ebaughs Creek was found to contain mercury or methylmercury and required water quality-based effluent limitations, the permit effluent limitations would be based on the proposed site-specific methylmercury water quality criterion.

In general, persons requesting site-specific criteria would need to satisfy the requirements under § 93.8d and may incur costs associated with the need for retention of scientific consultants and to conduct data collection. However, since the proposed amendments do not significantly increase or decrease the existing

study requirements detailed presently in § 93.8d, the proposed amendments do not establish any new or additional costs for any persons requesting site-specific criteria under § 93.8d.

Also see the response to question #15 regarding eligibility for cleanup liability protection under the Commonwealth's Land Recycling and Environmental Standards Act.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

Establishing site-specific criteria and adding clarification for the process of developing and adopting site-specific criteria will benefit this Commonwealth's residents, industries, and visitors. Clarifying the regulations will help permit applicants avoid spending resources to request criteria when it may be harmful to surface waters of this Commonwealth. Additionally, clarity on the site-specific criteria development process will help permit applicants navigate how to pursue site-specific criteria. The majority of requests for site-specific criteria will be initiated by persons with NPDES permits. Depending upon the site-specific circumstances and the study data and information, site-specific criteria may provide relief from statewide criteria. Economic impacts are generally limited to the person(s) submitting the request.

(19) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The proposed site-specific methylmercury water quality criterion will impose new NPDES effluent limitation requirements on YCSWRA. These new effluent limitations may result in additional treatment costs being incurred by YCSWRA. A specific cost estimate is not possible at this time because site-specific operating factors and potential treatment options are still being considered by YCSWRA.

Monitoring requirements are determined on a permit-by-permit basis, so the Department cannot estimate costs to specific facilities. However, the Department reviewed sampling cost information for methylmercury that was available in the National Environmental Monitoring Index (NEMI). NEMI is a freely available compendium of information on a variety of environmental analytical test methods that was developed by the National Water Quality Monitoring Council in collaboration with partners in the federal, state, and private sectors. A review of NEMI has revealed information for one methylmercury analytical method developed by the United States Geological Survey (USGS). The average cost per sample for this analytical test method ranges between \$51 and \$200.

The proposed changes to § 93.8d will not immediately impose costs to the regulated community. Additionally, the site-specific criteria will only apply in lieu of statewide criteria or if no statewide criterion is available.

(20) Provide a specific estimate of the costs and/or savings to the local governments associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No costs will be imposed directly upon local government by the proposed amendments to the site-specific criteria development process in § 93.8d.

The proposed amendments to the mercury criterion for Ebaughs Creek were requested by the YCSWRA, and these amendments are not expected to impact any other active NPDES discharges to Ebaughs Creek. The YCSWRA is currently evaluating mercury removal treatment technologies and associated costs.

This proposed regulation will be implemented through existing Department programs, procedures and policies.

(21) Provide a specific estimate of the costs and/or savings to the state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No costs will be imposed directly upon Commonwealth government by this proposed regulation. This proposed regulation will be implemented through existing Department programs, procedures and policies.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The Department will use existing procedures to implement this regulation. Existing, new or expanded discharges of mercury or methylmercury to Ebaughs Creek may be subject to NPDES permit effluent limitations based on the site-specific methylmercury water quality criterion in this proposed rulemaking. Additionally, all consulting procedures incurred by YCSWRA to develop a site-specific criterion are based on their request to pursue an alternative to the total mercury statewide criterion.

(22a) Are forms required for implementation of the regulation?

No additional forms are required as a result of this regulation.

(22b) If forms are required for implementation of the regulation, attach copies of the forms here. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.

No additional forms are required as a result of this regulation.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY 2018/19	FY +1 2019/20	FY +2 2020/21	FY +3 2021/22	FY +4 2022/23	FY +5 2023/24
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable
Local Government	“	“	“	“	“	“
State Government	“	“	“	“	“	“
Total Savings	“	“	“	“	“	“
COSTS:						

Regulated Community	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable
Local Government	“	“	“	“	“	“
State Government	“	“	“	“	“	“
Total Costs	“	“	“	“	“	“
REVENUE LOSSES:						
Regulated Community	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable
Local Government	“	“	“	“	“	“
State Government	“	“	“	“	“	“
Total Revenue Losses	“	“	“	“	“	“

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY -3 (2019/20)	FY -2 (2020/21)	FY -1 (2021/22)	Current FY (2022/23)
160-10381 Enviro Protection Operations	\$84,023,000	\$94,202,000	\$98,036,000	\$102,719,000
161-10382 Enviro Program Management	\$27,920,000	\$32,041,000	\$34,160,000	\$35,739,000

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.

Currently, YCSWRA is the only business directly impacted by the proposed site-specific methylmercury water quality criterion in this proposed rulemaking. The Department cannot predict how many small businesses will be affected by the proposed clarifications to the process for site-specific criteria development, but it is expected the effect will be positive since the proposed amendments clarify the process for prospective facilities to follow in the event site-specific criteria are pursued for the waters to which the facilities discharge. When this proposed regulation goes into effect, no additional discharges beyond YCSWRA will be affected.

(b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.

Each request for site-specific criteria requires a review that is based on site-specific considerations. NPDES permits and other approvals will identify the required reporting and recordkeeping necessary for compliance. The proposed regulation establishes water quality standards. 25 Pa. Code Chapter 92a establishes how the standards will be applied, including the compliance mechanisms. Recordkeeping and monitoring

requirements for effluent limitation compliance will continue to apply to all discharges, as applicable under Chapter 92a. Existing Department procedures will be used to implement this proposed regulation.

(c) A statement of probable effect on impacted small businesses.

Currently, YCSWRA is the only business directly impacted by the proposed site-specific methylmercury water quality criterion in this proposed rulemaking. The Department cannot predict how many small businesses will be affected by the proposed clarifications to the process for site-specific criteria development. The effect will likely be positive since the proposed amendments clarify the process for prospective facilities to follow in the event site-specific criteria are requested for a wastewater discharge. When this proposed regulation goes into effect, no additional discharges beyond YCSWRA's will be affected.

(d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

The proposed regulations involve a site-specific methylmercury water quality criterion for YCSWRA's discharge to Ebaughs Creek. The YCSWRA discharge contains concentrations of mercury sufficient to exceed either the statewide total mercury criterion or the site-specific methylmercury water quality criterion for Ebaughs Creek. As such, treatment of the discharge will be required. There are no known less intrusive or less costly alternatives to the proposed rulemaking. However, the facility may use any less intrusive or less costly operation or treatment methods that will result in compliance with the permitted effluent limit established based on the site-specific criterion.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

While no special provisions are included, it is important to note that this proposed rulemaking will afford the water quality protections necessary to ensure clean water for all residents, industries, and visitors of this Commonwealth.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

This proposed regulation will meet the Commonwealth's obligations under the CSL and the CWA to protect water uses. The proposed regulations present a modified process to develop site-specific criteria. This process will produce criteria that provide the most appropriate level of protection for specific waterbodies. No alternative regulatory schemes are available to achieve the correct level of protection for the subject waters of this Commonwealth.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

a) The establishment of less stringent compliance or reporting requirements for small businesses;

The proposed regulation establishes water quality standards. 25 Pa. Code Chapters 92a and 96 establishes how the standards will be applied, including the compliance mechanisms. Recordkeeping and monitoring requirements for effluent limitation compliance will continue to apply to all discharges, as applicable under

Chapter 92a. This proposed regulation does not establish or revise compliance or reporting requirements for any entity, including small businesses.

b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

Schedules of compliance and reporting requirements to meet the site-specific criteria may be considered when permit or approval actions are taken, in accordance with 25 Pa. Code Chapter 92a. This proposed regulation does not establish compliance schedules for any entity, including small businesses.

c) The consolidation or simplification of compliance or reporting requirements for small businesses;

Compliance and reporting requirements to meet the standards of this rulemaking may be considered when permit or approval actions are taken, in accordance with 25 Pa. Code Chapter 92a. This proposed regulation does not establish compliance or reporting requirements for any entity, including small businesses.

d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and

The proposed regulation represents performance standards, but it does not dictate the design of treatment plants to meet the performance standards for any entity, including small businesses. Site-specific water quality criteria establish the in-stream water quality protection goals for specific waterbodies and does not identify the design or operational standards that must be used to meet the goals.

e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

There were no such exemptions of small businesses to consider in this case.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

See the detailed information and recommended site-specific methylmercury water quality criterion for Ebaughs Creek, York County described in the attached “Development of a Site-Specific Methylmercury Water Quality Criterion for Ebaughs Creek”.

(29) Include a schedule for review of the regulation including:

- | | |
|---|--------------------------------------|
| A. The length of the public comment period: | <u>45 days</u> |
| B. The date or dates on which any public meetings or hearings will be held: | <u>One public hearing</u> TBD |

C. The expected date of delivery of the final-form regulation:

TBD

(within 2 years following close of public comment period)

D. The expected effective date of the final-form regulation:

Upon publication of the final-form rulemaking

E. The expected date by which compliance with the final-form regulation will be required:

Upon publication of the final-form rulemaking

F. The expected date by which required permits, licenses or other approvals must be obtained:

No expectation that a permit must be obtained. New, additional, or increased discharges will be subject to the regulation that is in effect at the time a permit application is filed and a Department decision is made.

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Board is not proposing to establish a sunset date for this proposed regulation because it is needed for the Department to carry out its statutory authority. The Department will continue to closely monitor this proposed regulation for its effectiveness and recommend updates to the Board as necessary.

Also, since the CWA requires review and revision of water quality standards as necessary, but at least once every three years, a schedule for review is inherently established.