

NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
25 Pa. Code, Chapter 93
Stream Redesignations (Big Brook, et al.)

Order

The Environmental Quality Board (Board) by this order amends 25 Pa. Code §§93.9b, 93.9f, 93.9g, 93.9n, 93.9o, and 93.9r to read as set forth in Annex A.

A. Effective Date

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

B. Contact Persons

For further information, contact Richard H. Shertzer, Chief, Division of Water Quality Standards, Bureau of Water Standards and Facility Regulation, 11th Floor, Rachel Carson State Office Building, P.O. Box 8467, 400 Market Street, Harrisburg, PA 17105-8467, 717-787-9637 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 final-form 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 authorizes the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law, 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 and the federal regulation at 40 CFR § 131.32 (relating to Pennsylvania) sets forth certain requirements for portions of the Commonwealth's antidegradation program.

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 and effluent limits) 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 regulations at 25 Pa. Code sections 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 the regulation at 25 Pa. Code section 93.9.

These streams were evaluated in response to five petitions, as well as requests from the Department’s Southeast Regional Office (SERO), Southcentral Regional Office (SCRO) and Bureau of Water Standards and Facility Regulation (BWSFR) as follows:

- Big Brook - Petition: (Lebanon Twp. (Wayne Co.) Board of Supervisors)
- Mill Creek - BWSFR
- Brooke Evans Creek - Petition: (Larry Piasecki)
- Wissahickon Creek - Petition: (Upper Gwynedd Twp; Montgomery Co.)
- Beaver Creek - SERO
- Stone Creek - SCRO
- Furnace Run - Petition: (students from Conestoga Valley High School, Lancaster County)
- Clarion River - Petition: (Iron Furnace Chapter of Trout Unlimited, the Alliance for Wetlands and Wildlife, the Commissioners of Clarion County, and Reliant Energy Mid-Atlantic Power Holding LLC)

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 collected in these surveys, the Board has made the designations in Annex A.

E. Summary of Comments and Responses on the Proposed Rulemaking

The EQB approved the proposed rulemaking for the Big Brook, et al. package at its February 20, 2007 meeting. The proposed rulemaking was published in the *Pennsylvania Bulletin* on May 12, 2007 (37 Pa.B 2190) with provision for a 45-day public comment period that closed on June 26, 2007. Comments were received from 2 commentators including the U.S. Environmental Protection Agency (EPA) Region 3 and the Upper Gwynedd Township.

The EPA Region 3 office supported the package in general, but also requested additional clarification in the stream redesignation evaluation for the Clarion River regarding which of six factors in 40 CFR 131.10 (g) the Department is basing its decision that the CWF use is not attainable for the lower portion of the Clarion River. Subsequent discussions have satisfied the EPA that the Department's position is sufficiently supported by statements provided in the stream redesignation evaluation report which are based on provisions at § 93.4 (b), which is also equivalent to 40 CFR 131.10(g).

Upper Gwynedd Township (petitioner) commented that there is no justification to maintain the Trout-Stocking (TSF) designation in the head-waters of the Wissahickon Creek where trout do not exist. The Department maintains that although the head-waters of the Wissahickon Creek are currently impaired, the designated use (TSF, MF) can be attained through water quality improvements.

F. Summary of Changes to the Proposed Rulemaking

No changes were made to the redesignations recommended in the proposed rulemaking.

G. Benefits, Costs and Compliance

1. **Benefits** – Overall, the Commonwealth, its citizens and natural resources will benefit from these changes because they provide the appropriate level of protection in order 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 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 or best management practices 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 point source discharges. Treatment costs and best management practices 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 and best management practices 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 Pennsylvania 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 redesignations 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 (SEJ) 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.

H. 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 reduce the overall level of pollution to the environment by remediation of the effluent through the soil.

I. Sunset Review

These 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.

J. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 27, 2007, the Department submitted a copy of the proposed rulemaking published at 37 Pa.B 2190 on May 12, 2007, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under Section 5(c) of the Regulatory Review Act, the Department provided IRRC and the Committees with copies of the comments received, as well as other documentation. The Department has considered all public comments in preparing this final-form regulation. No comments were received on the proposed rulemaking from IRRC or the Committees.

Under Section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), this final-form regulation was deemed approved by the House and Senate Committees on _____. Under Section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved the final-form regulation.

K. Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under Sections 201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§1201 and 1202) and regulations promulgated thereunder, 1 *Pa. Code* §§7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) This final-form regulation does not enlarge the purpose of the proposal published at 37 Pa.B 2190 (May 12, 2007).
- (4) This final-form regulation is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Order.
- (5) This final-form regulation does not contain standards or requirements that exceed requirements of the companion federal regulations.

L. Order

The Board, acting under the authorizing statutes, orders that:

The regulations of the Department, 25 *Pa. Code* Chapter 93, are amended by amending §§93.9b, 93.9f, 93.9g, 93.9n, 93.9o, and 93.9r to read as set forth in Annex A..

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval and review as to legality and form, as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees, as required by the Regulatory Review Act.

(d) The Chairperson shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

KATHLEEN A. MCGINTY,
Chairperson