

**REPORT TO THE ENVIRONMENTAL QUALITY BOARD
RESPONSE TO COMMENTS
CONCERNING PROPOSED AMENDMENTS
TO 25 PA. CODE CHAPTERS 92, 93 AND 95
PENNSYLVANIA WATER QUALITY STANDARDS
RELATING TO ANTIDegradation**

In January 1997, the Department recommended proposed changes to 25 Pa Code, §§ 92.81, 92.83, 93.1, 93.3, 93.4, 93.7, 93.9a-93.9z, and 95.1; and the addition of § 93.4a, relating to water quality standards antidegradation requirements, to the Environmental Quality Board. These proposed regulatory changes were developed to respond to EPA's disapproval of portions of Pennsylvania's antidegradation regulations. The proposed rulemaking was based, in part, on input from a regulatory negotiation stakeholders group, and considered public comments received during an earlier public comment period.

The Environmental Quality Board approved the proposed rulemaking on January 21, 1997. The proposal was published in the Pennsylvania Bulletin on March 22, 1997, (27 Pa B 1459). It included provisions for a 60-day public comment period and a public hearing to receive additional comments. The EQB public hearing was held on May 7, 1997 at the Rachel Carson State Office Building in Harrisburg. The proposed rulemaking public comment period concluded on May 21, 1997. The Department also held a public hearing on May 7, 1997 to receive additional information on the implementation of these amendments through a new Chapter 15, Statement of Policy.

Nearly 1700 comments were received on the proposal. This includes 6 witnesses at the May 7, 1997 public hearings. The comments are considered below:

Supportive Comments

Although several commentators acknowledged that some of the provisions of the proposal are acceptable, they still suggested that EQB withdraw DEP's entire proposal so it can be rewritten.

Neutral Comments

Two commentators (13, 573) submitted comments indicating they do not know enough to form a valid opinion on the proposal. They urge the Department and EQB to decide what is best and do what is right. Another commentator indicated that Pennsylvania's standards should reflect our best efforts to promote clean, healthy water. (1687)

Opposing Comments

The comments, except for the two neutral ones, and all the testimony received by the EQB or Department during the hearings, were opposed to the proposed regulatory revisions. The reasons the commentators oppose the proposal vary greatly. There are claims that it is more stringent than necessary, exceeds federal requirements, and will cause regulatory and/or economic hardship. But there are also claims that it is less protective than federal requirements, and is an environmental setback from DEP's original antidegradation and Special Protection program. This dichotomy of

reasons for opposing the regulatory recommendations generally followed a pattern of affiliation. Regulated parties (including industry, business, builders and/or developers) oppose it because they feel it is too stringent. Other regulatory agencies (including U.S. EPA), environmental and/or conservation groups oppose it because they feel it is not stringent enough.

Another group of commentators stated that the proposed regulatory amendments should be rejected by the EQB, but did not provide specific reasons or address particular issues.

The following is a summary of specific issues or comments raised by commentators during the proposed rulemaking public comment period, and the Department's response to each issue or comment:

Comment - Approximately 410 commentators asked the EQB to reject the proposal without explaining their objections, why it should be rejected, how it should be revised, or recommending alternative proposals. (2-5, 7-10, 12, 27, 29-32, 34, 36, 38-40, 42-44, 47, 48, 51, 53, 55, 59, 62, 63, 65, 68, 73, 75, 76, 81, 82-84, 86, 87, 93, 94, 96, 101-103, 106-109, 111, 115, 118, 125-132, 134-136, 141, 145, 146, 148, 151, 154-156, 159, 161, 164, 170-171, 175-178, 180, 186, 189, 190, 192, 193, 197, 198, 201, 204, 205, 208, 209, 212, 213, 217-218, 220, 222, 224, 226, 228, 231, 232, 239, 242, 247-250, 253, 254, 257-260, 265-268, 270, 272, 273, 275, 283, 286, 291, 295, 297, 303, 310-313, 323-327, 330-339, 341-343, 347, 348, 351, 354, 355, 357, 358, 360-362, 370-374, 379, 386, 388, 393, 400, 405, 410, 414, 419, 426, 428, 429, 431, 433, 435, 439-445, 448-450, 452, 454, 455, 457-461, 477-480, 482-484, 486-488, 490, 492-499, 501-513, 535, 548, 549, 556-559, 561, 571, 577, 602, 618, 625, 626, 635, 638, 642, 645, 651, 652, 658, 662, 665, 681, 691, 692, 694, 697, 699, 729, 741, 742, 776-778, 781, 784, 804, 829, 832, 834-836, 1177-1182, 1184-1186, 1190-1192, 1194, 1195, 1197, 1209, 1215-1217, 1227-1233, 1250, 1313, 1316, 1317, 1336, 1351, 1361, 1389, 1390, 1411, 1416, 1456, 1459, 1484, 1492, 1574, 1575, 1586-1591, 1603, 1623, 1624, 1626, 1627, 1629-1636, 1638, 1669, 1671-1673, 1680)

An additional 260 commentators also asked the EQB to reject the DEP's current antidegradation proposal, but added that the EQB should adopt what the commentators described as the simpler, better standards of the EPA. Some of these commentators also said that any change in regulations that would lower water quality standards is unacceptable, and emphasized that the issue of clean water is something that must not be compromised. (6, 14-16, 18-26, 28, 33, 35, 37, 41, 45, 46, 49, 50, 52, 54, 56-58, 60, 61, 64, 66, 67, 69-72, 74, 77, 80, 85, 88-92, 95, 98-100, 104, 105, 110, 112-114, 116, 120, 121-124, 133, 137-140, 142-144, 147, 149, 150, 158, 160, 163, 165-169, 172, 179, 181-185, 187, 188, 191, 194, 199, 202, 203, 206, 207, 210, 211, 214-216, 219, 221, 225, 227, 229, 230, 233, 234, 241, 243-246, 251, 252, 255, 256, 261-264, 269, 274, 278, 285, 287, 288, 290, 292, 293, 296, 300, 302, 306, 314, 315, 319, 320, 328, 329, 340, 344-346, 349, 350, 353, 356, 359, 366, 380, 381, 389, 390, 394, 395, 407, 409, 413, 418, 421-425, 427, 436, 437, 447, 451, 453, 456, 475, 481, 485, 489, 491, 500, 543, 545, 550-552, 560, 562, 572, 576, 582-584, 627-629, 633, 634, 636, 637, 641, 643, 644, 647, 649, 650, 656, 659, 664, 679, 693, 695, 700, 738-740, 779, 780, 783, 817, 828, 1183, 1187-1189, 1193, 1210, 1214, 1218, 1234, 1315, 1320, 1350, 1386, 1387, 1399, 1476, 1584, 1585, 1602, 1628, 1637, 1639, 1667)

Approximately 460 commentators recommended that the EQB reject the proposal, suggesting that if adopted, the proposed regulations would lower water quality in Pennsylvania. These commentators indicated that standards must protect our waterways from degradation. Most of these commentators also indicated that new regulations must provide for no new discharges into EV streams; return to the current standard for selecting HQ streams; and provide interim existing use protection while any proposal to reclassify a stream is being reviewed. (237, 322, 396, 397, 408, 463, 536, 575, 669, 841-1066, 1068-1176, 1337, 1494-1569, 1570, 1576, 1609)

Many commentators suggested that the EQB withdraw the proposal, and that it be rewritten and republished in the *Pennsylvania Bulletin* for public review and comment. Most commentators, regardless of their affiliation or their stated objections, recommended that the proposal be replaced by final regulations that are similar to those promulgated by the EPA in December 1996. Also, the Independent Regulatory Review Commission (IRRC) requested that DEP provide compelling reasons why Pennsylvania's antidegradation regulations need to be more stringent than the federal requirements. (1694)

EPA Region 3 commended PADEP for its efforts to adopt comprehensive language into regulation to address the important implementation issues. However, since there is such a large response from the public expressing a preference for the "simpler, clearer" Federal language, they strongly recommended that the Commonwealth clearly state its "...baseline antidegradation policy ...", perhaps in a separate policy statement inserted in the regulation, which clarifies what is intended as policy vs. implementation. (1490)

Response - Since there was an overwhelming response objecting to the proposed antidegradation regulation, the Department is recommending that the original proposal be reformatted and revised. This reformatting and the revisions to the proposal are believed to result in a simpler antidegradation regulation that is consistent with the provisions and requirements of the federal antidegradation policy.

Many of the commentators expressed that the Board should adopt EPA's allegedly simpler antidegradation water quality standards. EPA Region 3 (1490) acknowledged that this notion that EPA's regulation is simpler is a misconception that had likely been created by the Department's initiative to fully disclose how the antidegradation program will be implemented. EPA also said the December 1996 federal promulgation provides the Commonwealth with an antidegradation policy, but does not prescribe implementation methods.

An Advance Notice of Final Rulemaking was published in the Pennsylvania Bulletin on January 23, 1999 (29 Pa.B 455) to announce the Department's recommendations prior to returning to the EQB for final rulemaking, allowing for additional public review and comments. The Department held three (3) combined public meetings/hearings on the ANFR.

There are four provisions in this proposed regulatory package that are more expansive than the federal regulations. First, the proposed definition of "Exceptional Value Waters" is

more expansive in scope than the federal definition of Tier 3 waters. The proposed definition of Exceptional Value Waters (EV) includes outstanding National, State, regional and local waters. The scope of federal regulations includes only outstanding national waters. The EQB believes that there is a compelling interest in protecting outstanding regional and local waters, as well as outstanding national and state waters. Next is the inclusion of a requirement that proposed dischargers to High Quality and Exceptional Value Waters must evaluate alternatives to stream discharge, and where cost-effective, implement an alternative which is environmentally sound and has the least adverse impact on water quality. Although there is no equivalent federal provision, Pennsylvania has had a similar provision in Section 95.1 since 1980 which has proved workable and effective. Third, the Pennsylvania regulations contain extensive public participation provisions for the assessment of waters and review of evaluations and petitions for HQ and EV designation, including a provision for public meetings and fact finding hearings to obtain information regarding these proceedings. Fourth, the Department must hold a public hearing, when requested by an interested person, on a new or expanded discharge to waters classified as EV. This is a modification of an existing requirement in §95.1(c) wherein a public hearing is required for all new or expanded discharges to EV waters, even if such hearing is not requested. The EQB believes that public participation opportunities are vital in the antidegradation program in both surface water classifications of HQ and EV and in proposed discharges to EV waters.

Comment - The quality of PA's waters has improved due to stronger regulations. Continue to keep tight control on what is discharged from local industries into the waters. Do not lower the protection we currently have achieved. We need stronger protection and stronger antidegradation laws. (1, 11, 17, 78, 97, 119, 153, 157, 162, 174, 195, 196, 200, 223, 235, 236, 277, 284, 289, 294, 298, 307, 309, 317, 318, 376, 378, 383, 398, 399, 430, 432, 464-469, 516, 517, 523, 524, 530, 537-539, 544, 565, 567, 568, 570, 574, 578, 581, 586, 589, 595, 600, 601, 604-606, 611, 613, 614, 616, 621, 623, 624, 646, 648, 653, 660, 666, 668, 670, 674, 678, 680, 688, 696, 705, 725, 744, 746-775, 785, 837, 838, 1196, 1198, 1205, 1220, 1249, 1346, 1354, 1355, 1368, 1408, 1413, 1476, 1478, 1479, 1482, 1483, 1487, 1488, 1489, 1491, 1570-1573, 1576, 1582, 1592, 1609, 1625, 1640, 1668, 1679, 1681, 1682, 1685, 1689, 1690) We should be phasing out all permitted discharges and protecting all streams at least to current levels. Zero Discharge is mandated in the Clean Water Act. (515, 744)

Response - The Department agrees that the Clean Water Act contains provisions that encourage a goal of zero discharge to surface waters. The Department encourages, and where appropriate, requires waste minimization, discharge reduction and alternatives to stream discharge where technically and economically feasible. The Department places a strong emphasis on promoting pollution prevention. Specific language on pollution prevention was included in the final regulation at §93.4c(b)(1)(i)(A).

Comment - The language in the "existing uses" section is insufficient. (472, 520, 683, 801, 1419) The Department should return to the current standard for selecting HQ streams, and provide interim existing use protection while reclassification is reviewed, without delays, without loopholes, and without degradation. (398, 399, 515, 547, 597, 830, 831, 1201, 1219, 1246) Unfortunately, DEP's proposal says that existing uses will be protected only after DEP

evaluates the technical data. Until then, DEP is under no obligation to protect the existing uses. The Clean Water Act requires that ‘existing in-stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.’ (1, 11, 79, 173, 401, 415, 417, 474, 531, 538, 701, 746-775, 1337, 1454, 1458, 1480, 1483, 1485, 1489, 1490, 1570-1573, 1578, 1610, 1679, 1682, 1684, 1685, 1691) The proposed amendments should also elaborate on how the quality of EV Waters is to be “maintained and protected”. (734, 1490)

Response - The final regulations at § 93.4a(b) protect existing uses as required by federal regulations by tracking the federal protection standard at 40 CFR § 131.12(a)(1). Section 93.4c(a)(1)(i) specifies that existing use protection shall be provided when the Department’s evaluation of information indicates that a surface water attains or has attained an existing use. As such, existing use protection is provided based on the best available information that has been provided to the Department. The final determination on existing use protection is made in the context of a final Department permit or approval action. There is no way for such protection to be provided without a Department evaluation, just as a Department permit or approval cannot be issued by an entity other than the Department. Such evaluations are conducted based on the best available information during a permit or approval proceeding. Both the public and the person(s) seeking the permit or approval have the opportunity in the permit or approval proceeding to submit supplemental information regarding the existing use of the water.

The maintenance and protection of HQ and EV waters occurs through the implementation of antidegradation requirements. For example, when wastewater discharges are proposed, nondischarge alternatives must be utilized where they are cost-effective and environmentally sound. If no such alternative exists, the discharger must demonstrate that its’ discharge will not adversely measurably change the long-term average water quality of the receiving waters. Other activities which require a Department permit or approval which may adversely affect an HQ or EV water will not be authorized until a demonstration has been made showing how the activity will not adversely affect existing quality and will maintain and protect such quality. With regard to nonpoint sources, the final regulation tracks the federal regulations by specifying that the Department will assure that cost-effective and reasonable best management practices for nonpoint source control.

Comment - The Department should not remove HQ or EV from the list of protected water uses in § 93.3, removing EPA oversight and approval for any proposed changes in stream designation. (195, 238, 271, 276, 279-282, 299, 301, 304, 308, 316, 321, 363-365, 367-369, 375, 377, 384, 382, 385, 387, 391, 392, 403, 404, 406, 412, 434, 438, 446, 462, 515, 538, 541, 546, 547, 553-555, 579, 580, 597, 632, 639, 640, 654, 655, 663, 698, 701, 734, 743, 782, 818-820, 833, 839, 1199, 1202-1204, 1206-1208, 1211-1213, 1235, 1314, 1337, 1388, 1412, 1570-1572, 1576, 1601, 401, 415, 417, 474, 531, 540, 791, 1364, 1419, 1421-1423, 1454, 1480, 1485, 1489, 1577-1579, 1581, 1609, 1619, 1644, 1668, 1676, 1679, 1685) If these categories are to be removed as protected water uses there should be some assurance to prevent DEP from independently (without EQB or EPA approvals) downgrading waters from these special protection classifications. Suggests using specific language found in the Conservation Stakeholders’ report to provide this safeguard. (117, 519, 1485, 1570, 1675)

Response - In response to numerous comments, DEP has abandoned its proposal to eliminate EV and HQ as uses and has maintained High Quality and Exceptional Value Waters as protected water uses. This approach has been in place since 1978 and has proved workable since it integrates antidegradation management categories into the water quality standards program. EPA questioned the 3/22/97 proposal which would have removed HQ and EV waters as protected uses. The existing quality of HQ and EV waters must be protected regardless of whether the waters are protected uses or not. Moreover, retention of uses for HQ and EV waters was supported by a majority of persons commenting on the issue.

Comment - Approximately 220 commentators were opposed to allowing general NPDES permits in HQ streams. General NPDES permits are not tracked by DEP, so they would have no way of knowing how much degradation is taking place in any watershed until it was too late. (195, 238, 412, 476, 515, 521, 532, 538, 563, 590, 597, 609, 612, 615, 631, 701, 724, 734, 790, 839, 1067, 1221-1226, 1236-1246, 1251-1312, 1318, 1319, 1321-1335, 1337, 1338-1340, 1353, 1356-1358, 1360, 1362, 1363, 1369-1385, 1394-1398, 1400-1404, 1406, 1414, 1415, 1419, 1424-1427, 1457, 1458, 1460-1471, 1474, 1476, 1480, 1485, 1486, 1489, 1570-1572, 1576, 1578, 1643, 1645-1662, 1668, 1692) If general permits are allowed, then additional review should be made to ensure that water quality is not being degraded. This review should be stricter than for the use of GP's in Tier 1 waters. It should include periodic review of the use of GP's in watersheds to ensure that the cumulative use of the GP's is not degrading the waters. There was a consensus during the regulatory negotiations that preceded this proposed rulemaking that some activities covered by general permits might be applicable to HQ watersheds if they pose no potential threat to water quality. DEP should describe which permits might or might not qualify for use in HQ watersheds. (401, 415, 417, 474, 531, 585, 610, 672, 708, 726, 802, 1342, 1343, 1352, 1417, 1454, 1616, 1620, 1675, 1676, 1684)

EPA Region 3 (1490) commented that they will require a demonstration that *de minimis* dischargers will not have an impact on HQ waters, either through criteria which must be met before a discharger can be eligible for a general permit in an HQ watershed or through special conditions placed in the general permit that would apply in HQ waters. As a result, EPA has determined that this regulatory action will require an amendment to current general permits issued by the Commonwealth, and that these types of modifications to the Commonwealth's NPDES regulation will require EPA approval under 40 CFR § 123.62(b)(4). EPA also explains that such a regulatory revision will be effective upon EPA approval and not immediately upon adoption by the Commonwealth, as is the case for water quality standards regulations.

Response - The final regulation does not address the requirement for an individual permit in HQ watersheds. As part of its Regulatory Basics Initiative (RBI) proposing revisions to Chapter 92, the Department proposed allowing the use of general NPDES permits in HQ watersheds. The Department received a substantial number of comments on that proposal and will address them in that rulemaking package. The *de minimis* provisions for certain minimal impact discharges to HQ Waters without SEJ have been eliminated in response to

comments. The 25% *de minimis* test has been removed because it has proved to be of questionable utility.

Comment - DEP originally could designate “watersheds” as HQ or EV. The proposed regulations, however, provide only for the designation of “surface waters” as HQ or EV. (238, 403, 538, 791, 1364, 1421-1423, 1458, 1485, 1489, 1570, 1582, 1619, 1640, 1644, 1675)
Disappointed that DEP’s proposal does not mention protection for wetlands; EPA’s regulations gives protection to wetlands. This proposal does not provide protection for seeps, springs and wetlands, but should not be ignored to provide overall “watershed” protection not just “surface water” protection. How can wetlands be given HQ or EV protection if the biological criteria to make a “surface water” HQ or EV are based on streams? (195, 238, 271, 276, 279-282, 299, 301, 304, 305, 308, 316, 321, 363-365, 367-369, 375, 377, 382, 385, 387, 391, 392, 401, 402, 411, 412, 415-417, 434, 438, 446, 462, 470, 474, 476, 518, 521, 527, 531, 532, 541, 546, 547, 553-555, 563, 579, 580, 588, 590, 597, 609, 612, 615, 639, 640, 654, 655, 663, 698, 701, 724, 734, 743, 746-775, 782, 790, 801, 818-820, 833, 839, 1067, 1199, 1202-1204, 1206-1208, 1211-1213, 1221-1226, 1235-1245, 1246, 1251-1312, 1314, 1318, 1319, 1321-1335, 1337, 1338-1340, 1344, 1353, 1356-1358, 1360, 1362, 1363, 1369-1385, 1388, 1394-1398, 1400-1404, 1406, 1412, 1414, 1415, 1419, 1424-1427, 1454, 1457, 1460-1471, 1474, 1479, 1480, 1485, 1489, 1571-1573, 1577, 1579, 1581, 1601, 1609, 1610, 1643, 1645-1662, 1664, 1676, 1679, 1691)

EPA Region 3 also requested that the scope of the proposed definition be clarified since the definition of *Surface waters* does not include the term “watershed”, and describe how it relates to the term “waters of the Commonwealth” found in § 93.2. (1490)

Response - The definition of “surface waters” is equivalent to the federal scope of waters protected in the water quality standards program (“Waters of the U.S.”) at 40 CFR § 122.2. Wetlands are included in this definition. Stream classifications will continue to be made on a basin basis. Moreover, the Department has emphasized the “watershed” approach and the recommendations of the 21st Century Environment Commission in several ways in this regulation, most notably in the definition of “Coordinated Water Quality Protective Measures” which provides for the protection of watershed corridors as EV waters where local or regional governments have adopted sound land use water quality protective measures in waters which have the water quality of High Quality Waters or higher. The definition of “Water Quality Protective Measures” also emphasizes watersheds and must be met for certain outstanding state and national resource waters to become EV.

Comment - There is insufficient protection for endangered species. The Department should not remove “*the presence of endangered species*” as an EV selection criterion. The requirement concerning the presence of either endangered or threatened species or their habitat is ambiguous. It should simply state that if Federal or Pennsylvania threatened or endangered species or habitat are present, no activity will be permitted that could adversely affect either the species or the habitat. There should be no added requirement that it be listed in the PNDI. PNDI is one of several databases that are used to house information about the location of state and federally listed threatened and endangered species. It should not be considered as the sole source of such information. (1, 11, 79, 153, 162, 173, 174, 195, 238,

401, 406, 415, 417, 472, 474, 515, 520, 531, 538, 597, 683, 701, 734, 1419, 1454, 1458, 1480, 1485, 1571, 1572, 1675, 1679, 1684)

Another commentator agrees that this language should not contain the phrase “listed in ‘the Pennsylvania Natural Diversity Inventory’ PNDI”. But they are more concerned that this reference to PNDI could cause some confusion implying that special protection is to be afforded to every single species listed on the PNDI. Therefore, they suggest that this language should be amended to remove the PNDI reference, and that the implementation or definitions for “limited”, “confirmed”, and “aquatic species” are further clarified. They contend that modern society cannot continue to operate on the basis that all species must be preserved at any cost. They believe the human need for food, fiber, shelter and energy should have priority over the protection of endangered species. (1596)

Response - The Department and EPA Region 3 believe that the protection of endangered species and their habitat are a fundamental requirement of Tier 1 protection of existing uses. Pennsylvania’s water quality criteria protect threatened and endangered species in all waters of the Commonwealth. In response to comments, DEP has modified the language in § 93.4c(a)(2); DEP agrees that the PNDI database is not “all inclusive”. Other organizations, such as natural resource agencies, museums, and universities may have information about threatened and endangered species that have not yet been provided to PNDI. By referencing PNDI in § 93.4c(a)(2), DEP did not intend to imply that valid information from other agencies would not be considered. Therefore, the phrase “... listed in the Pennsylvania Natural Diversity Inventory (PNDI)...” has been removed from § 93.4c(a)(2).

Comment - Existing uses and the antidegradation policy should apply to more than just point source discharges. The reference to *Discharge* under the level of protection should be replaced with *Activities*. It should apply to all activities that could affect water quality. Strong non-point source pollution control language is also essential. (195, 238, 401, 403, 412, 415, 417, 472, 474, 520, 531, 538, 597, 683, 701, 734, 745, 791, 839, 1246, 1337, 1364, 1419, 1421-1423, 1454, 1458, 1476, 1480, 1485, 1489, 1570-1572, 1577, 1581, 1582, 1619, 1644, 1663, 1666, 1668, 1679, 1684, 1691)

The Federal antidegradation policy also refers to “waters”, although actions considered to potentially lower water quality include those in the watershed as a whole and not merely in the “water”. (1490)

No activities that would degrade water quality in HQ and EV streams should be allowed. (515, 542, 1572, 1682, 1684, 1691, 1692)

Response - The scope of activities subject to review is consistent with EPA’s regulations. All existing uses must be maintained and protected. This protection occurs during the evaluation of an application for a Department permit or approval which could impact a surface water.

To clarify the applicability to non-point sources, the Department has inserted language at §93.4c(b)(2) of its final regulations that tracks the federal language, which provides that

cost-effective and reasonable best management practices for non-point source pollutant control shall be achieved.

Comment - DEP's proposed requirement to pass both a biological and a chemical test used to qualify HQ streams is exceedingly stringent, leaving many outstanding streams unprotected. A stream should not be required to pass both a chemistry and a biological test to qualify as HQ waters. EPA considers only a water chemistry (quality) test. If water quality is better than standards the stream should be given HQ protection. The commentators indicate that EPA stated in its final rule that a violation of one parameter should not disqualify a stream from HQ protection. (1, 11, 79, 153, 162, 173, 174, 195, 387, 398, 399, 401, 403, 412, 415, 417, 474, 476, 515, 531, 538, 597, 701, 734, 791, 830, 839, 1200, 1246, 1337, 1364, 1412, 1419, 1421-1423, 1454, 1458, 1485, 1489, 1570, 1571-1573, 1576-1578, 1581, 1619, 1644, 1668, 1675, 1676, 1679, 1684, 1685, 1694) In the absence of biological data, which is a better long-term indicator of water quality, the commentators recommend that the chemistry test be based on water quality analysis obtained from more than one grab sample and include volatile organic compounds (VOC's). (1485)

It was suggested that, based on recent studies of the DEP's proposed scores for HQ and EV waters classifications, many current and potential HQ and EV streams would be eliminated from the Special Protection Program. (701)

IRRC recommends that the EQB amend the regulation to specify the evaluation criteria for the biology test for HQ and EV streams to clearly define or differentiate between nonimpaired high quality and nonimpaired outstanding aquatic communities since this could be the deciding factor between a stream being HQ or EV. (1694)

EPA Region 3 requested confirmation that it is PADEP's intent to consider the chemistry test as only a screening tool, and that the weight of evidence is in the biology test. They believe that the chemistry test alone is not statistically adequate to disqualify a water from special protection. Certain chemistry test parameters are based on criteria levels that are intended to support the public water supply use and are more stringent than are required for aquatic life use protection. Compliance with these water supply use criteria should not be expected to limit high quality protection of streams for the purposes of aquatic life uses. (1490)

Response - The Department has clarified that a watershed can qualify for HQ designation based on passing either the water quality chemistry or biological test; the chemistry test has been modified to be a "long-term" test as opposed to a grab sample test.

DEP agrees the chemical parameters should be consistent with the HQ/EV definitions. The chemical parameters are specific to levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. DEP agrees that nitrite plus nitrate nitrogen, manganese, sulfate and total dissolved solids are water quality criteria designed to protect a potable water supply use and are therefore not necessary to determine whether a surface water meets the HQ/EV definition. They have been deleted from the final regulation. Total recoverable aluminum, dissolved arsenic, cadmium, copper, lead, nickel, zinc, and

temperature have been added because these are naturally occurring aquatic life related compounds. The list of chemicals, when reviewed on a long-term basis, tells the “story” of the quality of the stream.

Those streams currently meeting HQ or EV standards will continue to be protected as such by the Department.

In response to the comment, and to eliminate confusion, the term “nonimpaired” has been eliminated from the final regulation.

Comment - The PFBC suggests that Ecoregion Reference streams used in the RBP evaluation of Special Protection candidate streams should be immediately designated as EV Waters because of their ecological significance. (1675)

Response - The EQB will continue to designate EV Waters based on whether they meet the criteria for inclusion as EV waters; these qualifying criteria are set forth at § 93.4b(b).

Comment - Under DEP’s proposal polluters could damage streams and then claim that they don’t meet the standards and ask for a roll back to a lower designation. (401, 415, 417, 474, 531, 1454, 1573, 1579, 1582)

Response - Dischargers will not be able to damage streams and then claim that they don’t meet the standards. This is contrary to state and federal requirements and protection of existing uses which provides that if a water attains an existing use on or after November 28, 1975, that existing use must be maintained and protected. Stream uses cannot be designated to uses that do not protect existing uses.

Comment - DEP proposes a system where it could go back and redesignate streams to lower categories than current uses, all without EPA being able to object. DEP would give itself the power to undo all the hard work done to upgrade the stream uses in the state, and therefore undo all the protection that all of us have fought so hard to achieve. (701, 1573) Existing HQ and EV designations should be “grandfathered” allowing for ongoing protection, not affected by the proposed regulatory changes. (1570)

If it is the Commonwealth’s intent to remove the current HQ or EV designations from any of the current Special Protection Waters, the Commonwealth would have to provide justification, which would be reviewable by EPA and the public, in accordance with §131.10(j)(2). Although EPA would not have authority to review and approve waters that will be listed in the future based on the proposed management categories scenario, antidegradation is still a water quality standard and would need to be treated as such for purposes of Section 401 certification and other situations requiring compliance with water quality standards. (1490)

Response - In the final regulation, DEP has abandoned its proposal to delete HQ and EV waters as protected uses and has thus addressed the commentator’s concerns. HQ and EV waters will continue to be protected as such.

Comment - Opposes the use of the minimal impact discharge provision (using up to 25% of the stream's assimilative capacity). This has no basis in federal regulations. Dischargers should be required to demonstrate that environmentally sound alternatives are cost-prohibitive, not simply that they are not cost-effective as proposed in § 93.4d(a). (195, 238, 384, 401, 403, 412, 415, 417, 474, 476, 531, 538, 597, 631, 701, 734, 745-775, 791, 839, 1246, 1364, 1337, 1366, 1421-1423, 1454, 1458, 1485, 1486, 1489, 1571-1573, 1576-1579, 1619, 1644, 1668, 1691, 1692) IRRC recommends that the DEP and EQB consider the conservationists' concerns, and if they opt to retain use of this provision, that DEP and EQB must explain and further justify its use. (1694)

HQ streams should not be allowed to have a discharge into them that exceeds 10% of the stream's ability to assimilate those discharges. The proposed 25% is much too high. It is proposed that dischargers who use 25% or less of the assimilative capacity of a stream will not be required to demonstrate social or economic justification. (476, 1676, 1684)

Public hearings should be held on any proposed discharge to HQ waters. (195, 538, 1337, 1458, 1571) IRRC, on the other hand, suggested that there is no need to hold a public hearing on a proposed discharge into an EV stream if no one is interested in testifying. Therefore, §§ 92.61(d) and (e) should require that DEP hold a public hearing on a pending application if it is requested. (1694)

Response - In response to comments, the final regulations remove the minimal impact discharge 25% SEJ provision. The final regulations retain the provisions that all dischargers to HQ or EV waters are required to evaluate environmentally sound non-discharge alternatives.

The Department will continue to require that applicants of proposed activities within EV waters demonstrate that the proposed activity will not have an adverse effect on the existing water quality. Social or economic justification to lower existing water quality is not permitted in EV waters.

A public hearing is available for a proposed discharge into HQ waters under §92.61 if there is sufficient public interest in a hearing for that discharge.

Comment - "Unassessed" waters are proposed to receive only basic level of protection until the stream is assessed and shown to qualify for a higher level of protection. These unassessed streams should be protected at least at Tier 2 (HQ) level unless a permit applicant can demonstrate otherwise. The public resources should get the benefit of the doubt. This does not support our state Constitution's guarantee that the citizens have a right to clean water. (271, 276, 279-282, 299, 301, 304, 308, 316, 352, 363-365, 367-369, 375, 377, 382, 385, 387, 391, 392, 401, 412, 415, 417, 420, 434, 438, 446, 462, 474, 515, 531, 538, 540, 541, 546, 547, 553-555, 579, 580, 597, 639, 640, 654, 655, 663, 698, 743, 745, 782, 818-820, 833, 839, 1199, 1202-1204, 1206-1208, 1211-1213, 1235, 1246, 1314, 1337, 1388, 1412, 1454, 1458, 1476, 1477, 1486, 1489, 1579, 1581, 1601, 1609, 1663, 1666, 1668, 1676, 1679, 1684, 1691)

EPA Region 3 (1490) requests that PADEP explain how adequate antidegradation protection will be ensured when new or expanded discharges are contemplated to unassessed waters. They would also like to know what interim protection applies for waters that have not yet been assessed. EPA recommends the presumption that waters are HQ when a new discharge is proposed unless proven otherwise by the applicant.

Response - The final regulations specify that all existing uses of surface waters are protected based on the best available information evaluated by the Department. If a water has been assessed by the Department, or if a non-Departmental entity submits an antidegradation evaluation which satisfies Department protocols for data quality assurance, the Department will consider such information in providing existing use protection for the water. Also, any applicant for a DEP permit or approval, or any interested member of the public, may present information in the permitting or approval review stage regarding the appropriate existing use for a water that may be impacted by an activity.

The Department has also committed to an extensive water quality assessment project that is aimed at evaluating all of the Commonwealth's "unassessed waters". This will, however, take considerable time to complete, and until these "unassessed waters" assessments are completed those streams that are proposed for permitted discharge activities may be given priority as is needed.

Comment - Urges that all streams designated as Class A Wild Trout Streams (by the PFBC) should automatically receive, at the very least, an HQ designation, but should not be precluded from consideration as EV waters. Wild trout constitute a unique biological, genetic, and recreational resource, and meet the Federal definition of Tier 2. Therefore, wild trout streams that are not Class A should also be given consideration for HQ designation. Wilderness Trout Streams should be considered a recreational rather than a biological component. (476, 1458, 1675, 1684, 1691) "Heritage Trout Angling" streams should also be considered as an example of EV Waters. (1691) The PFBC and other commentators suggest that HQ designations should not be limited to just Class A Wild Trout waters, but should also include Class A, B, C, and D streams since they are all indicative of high quality waters supporting wild trout. (538, 1458, 1572, 1675)

Response - The Department agrees that all Class A Wild Trout Streams designated by PFBC, following public notice and comment, should be protected at HQ level. These streams will not be precluded from consideration as EV Waters, and may be so evaluated if requested or petitioned, or where the Department determines that such an evaluation is warranted. Streams other than Class A Wild Trout Streams are also assessed for possible inclusion as HQ Waters upon request or petition.

Comment - Fecal coliform counts should not be used as a measure of water quality. High fecal coliform levels often indicate the need for increased enforcement of sewage disposal regulations. Failure to enforce existing regulations should never justify a reduction of protection. (538, 1458)

Response - The Department agrees that high fecal coliform levels, in and of themselves, should not be used to preclude a stream from additional protection, or conversely, be used to justify a reduction in protection.

Comment - The proposal contains a loophole that allows discharges and degradation in EV Waters. (1, 79, 173, 271, 276, 279-282, 299, 301, 304,305, 308, 316, 321, 352, 363-365, 367-369, 375, 377, 382, 385, 391, 392, 412, 434, 438, 446, 462, 515, 540, 541, 546, 553-555, 579, 580, 597, 639, 640, 654, 655, 663, 698, 743, 746-775, 782, 818-820, 830, 831, 833, 839, 1199, 1200, 1202-1204, 1206-1208, 1211-1213, 1235, 1246, 1314, 1337, 1388, 1412, 1480, 1489, 1570, 1581, 1601) Applicants proposing to discharge into HQ streams should be required to use waste minimization and pollution prevention techniques to decrease their impact on the stream as a condition of any permit to discharge to HQ streams. No new or expanded discharges should be permitted on EV streams, and general permits for discharge should not be permitted at all. (476, 538, 1337, 1458, 1570-1572, 1668, 1676, 1679, 1692)

Response - Language in the regulation requires that dischargers to HQ or EV waters must evaluate environmentally sound discharge alternatives, including waste minimization and pollution prevention techniques. An alternative must be utilized in lieu of a discharge where the alternative is environmentally sound and cost-effective. Applicants proposing to discharge to these streams will also be required to give public notification of their intent to discharge to these streams. Public hearings for proposed discharges to EV waters will be required where an interested person requests a hearing on the proposal.

The Department believes that prohibiting all discharges into EV waters would be a draconian measure; economic development can be compatible with outstanding water quality. Nondischarge alternatives are required where they are environmentally sound and cost-effective. Any discharges which are permitted in EV waters must demonstrate that their discharge does not degrade the quality of the water before a permit is approved. Moreover, the Department's antidegradation regulations specifically mirror the federal Tier 3 protection requirement that the existing quality of Tier 3 (EV) waters be "maintained and protected". Finally, no general NPDES permits are allowed to be utilized in EV waters under §§92.81-92.83.

Comment - Contrary to Federal regulations, no weight is given to public lands in the selection process. (1, 11, 173, 271, 276, 279-282, 299, 301, 304, 307, 308, 316, 352, 363-365, 367-369, 375, 377, 382, 384, 385, 387, 391, 392, 412, 420, 434, 438, 446, 462, 538, 541, 542, 546, 547, 553-555, 579, 580, 597, 639, 640, 654, 655, 663, 698, 734, 743, 746-775, 782, 818-820, 833, 839, 1199, 1202-1204, 1206-1208, 1211-1213, 1235, 1246, 1314, 1337, 1388, 1412, 1489, 1572, 1573, 1581, 1601, 1668, 1679) The selection criteria in the proposed Chapter 15 do not consider public lands in any way. The EPA regulations consider many streams on public lands to be "Outstanding National Resource Waters" (ONRW's). DEP's "old" Special Protection Waters Implementation Handbook considers State Parks, Forests, Game Lands and other public lands as examples of streams which qualify as Exceptional Value waters. (401, 415, 417, 474, 531, 538, 1454, 1458, 1572, 1684)

Response - The Department agrees that many watersheds containing public lands may be examples of waterbodies warranting Special Protection and has amended its EV selection criteria at §93.4b(b) to specifically enumerate categories of certain waters on public lands which may qualify for EV status. These waters are protected as EV existing uses where the best available information at the time of Department action on a request for permit or approval indicates that the water satisfies the HQ biological or chemical qualifying criteria, and one or more EV qualifiers in §93.4b(b)(1). Waters which meet the HQ qualifying criteria and which are outstanding national or state resource waters subject to a resource management plan adopted by a national or state government agency which provides water quality protective measures which ensure long-term protection for a watershed corridor merit EV status under the regulation.

Comment - When considering “environmentally sound discharge alternatives”, what does this phrase mean? Who determines which alternatives are environmentally sound and which are not? Also, the alternatives must be “cost-effective when compared with the cost of the proposed stream discharge.” Is this the environmental cost the public pays when its waters are further degraded; or the anticipated cost incurred to construct the proposed treatment system that will discharge to the waters; or a combination of both? How is environmental cost to be quantified, and who makes this determination? How is “cost-effectiveness” determined? (538)

Response - The Department explains the above concepts and phrases in more detail in its Special Protection Waters Implementation Handbook. This Handbook will be revised, with full opportunity for public input and participation, once these regulatory changes are finalized.

Comment - EPA and other commentators recommend that §93.4e(d)(3), (*Public participation requirements for proposed discharges to High Quality or Exceptional Value Waters*), include a requirement that the public notice of complete application and fact sheet for proposed dischargers to HQ waters include the basis and results of the SEJ review. This should allow that the public has adequate information to comments on the proposed discharge. They also suggest the process should provide for intergovernmental coordination consistent with the Federal regulation. (1458, 1490, 1572, 1676, 1682, 1693)

Response - DEP agrees that the public notices for proposed discharges should include information on the basis and results of the SEJ review, or where this information can be obtained if desired for public review. This provision has been moved to §93.4c(b)(1)(ii)(B). The language in §93.4c(b)(1)(iii) tracks the federal regulation by specifically providing for intergovernmental coordination.

Comment - Local governments, residents and polluters should never have a veto power regarding the designation of EV waters. It must be remembered that all the citizens of our state jointly hold all waters, and will always be the water of the Commonwealth. They are not the sole domains of local residents or governing bodies. (401, 403, 412, 415, 417, 474, 515, 531, 579, 597, 791, 839, 1246, 1337, 1364, 1419, 1421-1423, 1454, 1480, 1485, 1489, 1571, 1579, 1581, 1619, 1644, 1668, 1679) Pennsylvania’s numerous world class trout waters attract thousands of visiting anglers every year. The Commonwealth and many local

communities draw millions of dollars from tourism, outdoor opportunities and recreation. Protection and enhancement of these watersheds is the greater good for the citizens of the Commonwealth. (465, 473, 527, 725, 785, 1354, 1412, 1413, 1485, 1663, 1666, 1670, 1691)

Response – Local governments, residents, and polluters have no veto power over the status of an EV water which merits classification as EV under one of the enumerated categories in §93.4b(b). DEP agrees that the waters of the Commonwealth are to be protected for the benefit of all the citizens of the Commonwealth, including future generations. The goals of the Clean Streams Law of Pennsylvania and the Water Quality Standards are to provide overall protection of the Commonwealth’s water resources. The Department also recognizes that the most effective means of providing this protection is to encourage local governments and residents to be involved in this mutual goal of resource protection and management.

Comment - DEP should follow the EPA’s suggestion to create a new “Tier 3 ONRW” category of protection, then hold public hearings and evaluate data on which EV streams would fit in it and ban all discharges in the category. (631, 1485, 1694) The EQB should retain the current EV designation by establishing a Tier 2 ½ classification that would be similar to the current EV classification. The Tier 2 ½ classification would allow for the continuation of the current EV program, and would give DEP and EQB the flexibility to allow certain discharges into these waters. This would address the concerns expressed by the regulated community. (1694) If a no-discharge policy on EV streams is not feasible, then there should be a public hearing held on any proposed discharge into EV waters. (631, 1485)

Response - DEP disagrees with the recommendation to establish an additional “no discharge” Tier 3.5 category as part of the Commonwealth’s antidegradation program since the Department already satisfies the federal Tier 3 regulations set forth at 40 CFR §131.12(a)(3). In addition, the Department believes that economic development can be compatible with outstanding water quality; nondischarge alternatives are required where they are environmentally sound and cost-effective. Any discharges which are permitted in EV waters must demonstrate that their discharge does not degrade the quality of the water before a permit is approved. Moreover, the Department’s antidegradation regulations specifically mirror the federal Tier 3 protection requirement that the existing quality of Tier 3 (EV) waters be “maintained and protected”. §93.4c(b)(1)(A) provides for public hearings on proposed discharges to EV waters when requested by an interested person.

Comment - All streams currently meeting HQ or EV standards should be protected to maintain their existing water quality. (476, 1480, 1485, 1571, 1577, 1579) How will these proposed regulations affect the special regulations now in effect in the watershed of the Upper Delaware and other EV waters presently protected, including those within Delaware Water Gap National Recreation Area (Toms Creek, Adams Creek and Saw Kill Creek)? (1409)

Response - Those streams currently meeting HQ or EV standards will continue to be protected as such by the Department. The proposed revisions to the Department’s antidegradation program do not affect the watershed of the Upper Delaware or other presently protected EV waters. Furthermore, revisions to the Department’s antidegradation program do not revise existing

DRBC designations and regulations which are separate and distinct from the Department's antidegradation policy, regulations, and Special Protection Waters designations.

Comment - Determination of Social or Economic Justification (SEJ) for projects associated with High Quality waters is currently reviewed and coordinated by the Assistant Director of the appropriate DEP Regional Office. An environmental planner for the Montgomery County Planning Commission commented that to improve the review process, the EQB should consider the creation of an independent review board, or utilize an existing board if possible, which is comprised of individuals with background in social and economic analysis, as well as DEP and independent environmental specialists. An independent statewide board would be able to provide a systematic review of all projects, ensuring the uniform protection of High Quality waters, regardless of their location within the state. (1392)

Recommends that §93.4b(e) include the specific requirement that the proposed discharger be required to provide data which demonstrates that the economic/social benefits to the public outweigh any water quality degradation that the proposed discharge is expected to cause. (538, 1490, 1572, 1682, 1684, 1692)

The SEJ should consider only long-term impacts and benefits. There should be a requirement to submit the SEJ to the local governing body for review and approval during the Act 537 planning process. This would make a much-needed connection between the (Special Protection) Program and the local government, and would ensure a review of the SEJ at least at the local level. (1458, 1577, 1676, 1693)

Once the SEJ requirement has been met to allow degradation of HQ Waters, which includes consideration of alternatives to stream discharges that are environmentally sound and cost effective, some form of final mitigation should be required to offset that degradation. This mitigation could involve on- or off-site watershed improvements of non-point source pollution through implementation of BMP's and/or the elimination or improvement of existing point source discharges. The Board should consider adopting a mitigation strategy that requires minimization of any degradation, or a policy of "no net degradation". (1392)

Response – SEJ reviews will continue to be performed by DEP; it is likely that statutory amendments would be needed to enact an independent SEJ review board process which was binding on dischargers. The final regulation provides that SEJ is tied to the Act 537 planning process for projects involving sewage disposal, and thus involves local government. This should eliminate the current requirement which sewage facility proponents face of two SEJ demonstrations – one at the sewage facilities planning stage and one at the wastewater discharge permit stage. With regard to the balancing of economic or social benefits against any environmental degradation the discharge would cause, the language explicitly requiring such balancing which was proposed is not contained in the final regulation; the Department believes that the addition of the word "important" in the SEJ test allows for such balancing. The word "important" is derived from the federal SEJ regulation at 40 CFR §131.12(a)(2). By including the federal language and the balancing test, the DEP is specifically addressing the decision in Big B Mining Co. v. DER, 1987 EHB 815 (1987) *aff'd* Commonwealth of Pennsylvania, Department of Environmental Resources v. Big B Mining Co., 123 Pa.

Commonwealth Ct. 591, 554 A.2d 1002 (1989). Further refinements to the SEJ process will be addressed in revisions to the Department's Special Protection Waters Implementation Handbook. With regard to the mitigation comment, the Department believes that mitigation is not explicitly necessary in the regulation because the balancing of economic or social benefits against environmental degradation which would result from the discharge will, in essence, offset the social or economic importance of the project with the amount of degradation allowed; in other words, mitigation is accomplished in a societal importance context rather than a purely water quality context.

Comment - Section 93.4d(d) of this proposal, (Protection Pending Designation), essentially circumvents the Designation Process. This is clearly inappropriate and would invite enormous complications if a redesignation effort subsequently were rejected by the EQB. The Department should expedite the process to the degree possible when data is obtained that indicates a designation may be appropriate. This section should be eliminated from the proposed amendments. (152, 1583)

Response – The process criticized by the commentator is an existing use protection process. Existing use protection is already required in Pennsylvania by federal regulations promulgated for the Commonwealth at 40 CFR § 131.32(a)(1). Existing uses are determined by the Department based on the best available information during a permit or approval review process; designated uses are made by the EQB in rulemaking. Any DEP antidegradation regulation must meet the federal antidegradation policy, including existing use protection (See 40 CFR § 131.6(d)). The final regulation at §93.4c(a)(1) sets forth procedures for existing use protection, including opportunities for input from the public and persons seeking a Department permit or approval during the permit or approval review process.

Comment - This proposal should be subject to the Governor's Executive Order 1996-1, which requires the Department to revise all of its regulations to bring balance to Pennsylvania's environmental regulations. In several instances, Pennsylvania's program exceeds federal standards. The Department should adopt the federal language that states water quality must "exceed" standards, rather than what is contained in the DEP proposal that it is "generally better than standards." If data indicates the stream does not meet even one water quality standard, the stream should not qualify for HQ or EV Waters designation. The current proposal allows for judgement calls by the Department. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 603, 607, 608, 617, 619, 620, 622, 630, 657, 661, 667, 671, 673, 675-677, 682, 684-687, 689, 690, 702-704, 706, 707, 709-723, 727, 728, 730-733, 735-737, 786-789, 792-800, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1345, 1347-1349, 1359, 1365, 1367, 1391, 1393, 1405, 1407, 1410, 1418, 1420, 1428-1453, 1455, 1472, 1473, 1481, 1493, 1593-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1665, 1674, 1677, 1683, 1694) If the EQB agrees with EPA's philosophy that it is not necessary to pass both the chemistry and biology tests, and that it is not necessary for each parameter to be better than criteria, the EQB must clarify this in the final regulation. (1694)

The EV Waters program should apply only to outstanding resource waters as contained in the federal regulations. DEP's program is much broader in scope and includes streams that

probably never qualify under the federal program. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 603, 607, 608, 617, 619, 620, 622, 630, 657, 661, 667, 671, 673, 675-677, 682, 684-687, 689, 690, 702-704, 706, 707, 709-723, 727, 728, 730-733, 735-737, 786-789, 792-800, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1345, 1347-1349, 1359, 1365, 1367, 1391, 1393, 1405, 1407, 1410, 1418, 1420, 1428-1453, 1455, 1472, 1473, 1481, 1493, 1593-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1642, 1665, 1674, 1677, 1678, 1683)

IRRC commented that the examples of types of waters that may qualify that are currently listed in the EV definition at § 93.1 should not be listed in the definition. If there are specific requirements that a stream must meet, beyond the chemistry and biology tests, they should be included in § 93.4(c) in the final form regulation. They also object to the subjective criteria such as “waters of exceptional recreational or ecological significance.” They recommend the EQB define EV Waters in § 93.1 as: “*Surface waters of high quality which meet the conditions specified in § 93.4(c) (relating to Exceptional Value Waters).*” (1694)

Commentators suggest that EPA’s program only applies to ONRW’s on public lands, but that DEP’s proposal goes further. DEP should not be permitted to designate waters that flow through private lands for EV protection because of the extreme restrictions the designation imposes on individuals and communities who wish to use the waters responsibly to improve their quality of life. If EV designations are allowed to be placed on private watershed lands then the final regulations should be revised to require that DEP get the affected parties to concur on the redesignation decision. The DEP should be required to inform the owners of private watershed lands that would be affected by a new EV designation how it will limit what they can do on their property. The regulations should allow the affected property owners to decide whether they want the EV designation. And DEP should be required to get a formal commitment from the owners of the affected watershed lands to preserve the resource at the strict EV standard before recommending the designation to the EQB. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 607, 608, 617, 619, 620, 622, 630, 667, 676, 684-686, 709-723, 730, 735, 736, 796-800, 1345, 1348, 1349, 1365, 1405, 1407, 1429-1434, 1493, 1597, 1674, 1677, 1678, 1683, 1694) The EV designation should be consistent with local zoning where the stream is designated. The commentator also questions the fairness of an EV designation when a private property owner along the stream objects to the EV designation.

IRRC questioned DEP’s rationale, which allows a stream to be designated as HQ or EV downstream from a stream segment with a lower designation. What are the impacts on those who discharge into the upper portion of a stream when the lower portion has a higher designation? IRRC also indicated that the regulation contains broad, discretionary language. Sections 93.4b(a)(1) and 93.4b(a)(2)(C) allow DEP to consider additional chemical or biological information in the designation of HQ streams. The regulation should require DEP to specifying the additional chemical or biological information needed, and explain why the information is necessary. (1694)

Response – The Executive Order was followed in drafting the regulation. The regulation attempts to track the federal regulations as closely as possible. Additional language is needed to flesh out the barebones federal requirements since Pennsylvania must implement the antidegradation program in the Commonwealth. Requirements which are more stringent than the federal regulations are adopted only where there is a compelling justification for such requirements.

The final regulation eliminates the commentator’s concern regarding the term “generally” better than to provide more certainty. Also, language has been added at §93.4b(a)(1) which tracks the federal language suggested by the commentator. The federal requirement establishes that “*where the quality of the waters exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water; that quality shall be maintained and protected,*” (40 CFR §131.32(a)(2)).

The Department believes that it should not limit the scope of EV protection to outstanding national resource waters; there are many outstanding state, regional, and local resource waters in the Commonwealth which also merit EV protection.

The Department has adopted IRRC’s suggestion and has removed the examples from the definition and into the text.

DEP believes that the waters of the Commonwealth are to be protected for the benefit of all the citizens of the Commonwealth, including future generations. The goals of the Clean Streams Law of Pennsylvania and the Water Quality Standards are to provide overall protection of the Commonwealth’s water resources. The Department also recognizes that the most effective means of providing this protection is to encourage local governments and residents to be involved in this mutual goal of resource protection and management. However, such designations cannot lawfully, under the CWA and federal antidegradation regulations at 40 CFR § 131.12, be limited only to waters that flow through public lands or to those waters on private lands for which the landowners have agreed to such protection.

Only stream segments classified as HQ or EV receive the protection of these classifications. If there is a discharge upstream from a HQ or EV water, the effluent limitations for that discharge must be established to maintain that downstream HQ or EV waters classification.

The Department uses proven scientific methodologies to perform chemical and biological assessments. The Department believes that waters should be able to qualify as HQ waters through an analysis of long-term chemical data, or by meeting biological criteria. Both methods measure long-term water quality conditions, and provide an excellent picture of the stream’s ability to support propagation of fish, shellfish and wildlife and recreation in and on the water. The Department utilizes additional chemical or biological information on a case by case basis in the exercise of its best professional judgment depending on site characteristics and field observations. Moreover, alternate biological assessment tests which are widely accepted and published peer reviewed may be utilized to ensure that the latest and best sound science is utilized in surface water assessments.

Comment - Supports the Department's efforts to reduce the permitting burden with the provisions regarding minimal-impact dischargers and the use of general permits on HQ streams, and support the expansion of this practice to EV streams. (152, 471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 603, 607, 608, 617, 619, 620, 622, 630, 657, 661, 667, 671, 673, 675-677, 682, 684-687, 689, 690, 702-704, 706, 707, 709-723, 727, 728, 730-733, 735-737, 786-789, 792-800, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1345, 1347-1349, 1359, 1365, 1391, 1393, 1405, 1407, 1410, 1418, 1420, 1428-1453, 1455, 1472, 1473, 1493, 1594, 1595-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1665, 1674, 1677, 1678)

IRRC further requests that EQB and DEP explain the process that will be used to amend a general NPDES permit to allow a discharge in a HQ stream.

Some of these commentators also specifically mention that they support a "de minimis" permit threshold where a social and economic justification is not required. They also commented that, despite EPA's insistence that the DEP prohibit new or expanded discharges to EV Waters streams, they believe the current EPA and DEP rules allow for the consideration of such discharges. Discharges resulting in no adverse measurable change to long term water quality should be allowed. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 607, 608, 617, 619, 620, 622, 630, 667, 675, 676, 684-686, 709-723, 730, 735, 736, 796-800, 805-816, 821-827, 1345, 1348, 1349, 1365, 1367, 1405, 1407, 1429-1451, 1493, 1593, 1594, 1596-1599, 1611-1613, 1617, 1674, 1677, 1678, 1683)

Response - The issue regarding whether NPDES general permits should be available in Special Protection Waters has been deferred to the Water Quality Regulatory Basics Initiative (RBI) rulemaking package. When the EQB determines in that package whether NPDES general permits are available in HQ or EV waters, the Department will explain the process used to amend a general permit in special protection waters at that time. Also, the final regulations remove the provision of allowing minimal impact discharges to use up to 25% of the stream's assimilative capacity from the final rulemaking in response to comment. Moreover, the Department will continue to require applicants of proposed activities within EV waters to demonstrate that the proposed activity will not have an adverse effect on the existing water quality. Social or economic justification to lower existing water quality is not permitted in EV waters.

Comment - The proposed regulation requires NPDES permit applicants to solicit public comment on proposed discharges to HQ and EV Waters before applying for the permit. This is an unnecessary burden on the permit applicant that is not required by the federal regulations. It serves no purpose because the DEP will also ask for public comments after the application is submitted. Requiring the permit applicants to ask for public comments is costly, time-consuming and redundant. This requirement should be eliminated. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 607, 608, 617, 619, 620, 622, 630, 667, 676, 684-686, 709-723, 730, 735, 736, 796-800, 1345, 1348, 1349, 1365, 1405, 1407, 1429-1434, 1493, 1596 1597, 1674, 1678, 1684, 1694)

Response - The Department agrees with the commentator. The pre-application public comment process has been eliminated in the final regulation because it is duplicative and burdensome.

Comment - Because of the many implications an anti-degradation designation will have on a community, the DEP must base its designation on more than just one grab sample. The DEP must have enough actual sound scientific background water quality data before an accurate evaluation can occur and a stream designation can be made. (471, 514, 522, 525, 526, 528, 529, 533, 534, 564, 566, 569, 587, 591-594, 596, 598, 599, 607, 608, 617, 619, 620, 622, 630, 667, 675, 676, 684-686, 709-723, 730, 735, 736, 796-800, 805-816, 821-827, 1345, 1348, 1349, 1365, 1367, 1405, 1407, 1429-1451, 1493, 1593, 1594, 1596-1599, 1611-1613, 1617, 1674, 1677, 1683, 1694)

The Department should clarify what is meant by the phrases that “water quality must be generally better than the water quality criteria”, or that the water is of “natural quality”. The EQB must explain how it is relevant for a stream that does not meet minimum water quality standards, for reasons caused by humans or nature, deserves special protection. Therefore, the commentator recommends that §§ 93.4b(a)(1)(ii) and 93.4c(1)(ii) be deleted. (1694) Another commentator also suggests that “natural quality” should be replaced by the term “background water quality” as is used in the Groundwater Protection Strategy and Act 2 legislation. (152)

Response - The final regulations clarify both the chemical and biological qualifying tests in several ways. First, the final regulation provides that either chemistry or biological information can qualify a water for HQ. Second, the term “generally better than” has been abandoned in order to provide more certainty with the chemical test. Third, the list of chemicals has been modified to more closely reflect the EPA qualifying criteria in 40 CFR §131.12(a)(2). Fourth, the final regulation eliminates grab sample chemical testing in favor of long-term chemical testing of one year or more. The term “natural quality” is not used in the final regulation. It is replaced by the term “Surface waters of exceptional ecological significance”, which is defined as including exceptional value wetlands and thermal springs.

Comment - The Department should be required to consider the social and economic impacts associated with any of its HQ and EV Waters designations during the assessment process. This information should be made available to the public. The SEJ balancing test that requires that the economic or social benefits to the public must outweigh any water quality degradation which the proposed discharge is expected to cause should be eliminated from the final anti-degradation regulation. Pennsylvania should not be placed at an economic disadvantage in comparison to other states’ water quality programs. (599, 675, 805-816, 821-827, 1367, 1435-1451, 1493, 1593, 1594, 1596, 1598, 1599, 1611-1613, 1617, 1618, 1674, 1677, 1678, 1683, 1693, 1694) The cost of additional regulations must be justified and be proven beneficial enough to the environment to justify the additional cost to the user. (1580)

IRRC cited that several commentators including both conservationists and representatives of the regulated community were concerned about the lack of clarity and reasonableness of the SEJ provisions. There is no description of the type of social or economic developments that

DEP will consider to be “important” or “necessary”. Similarly, the proposal does not provide criteria, process or method for comparing a discharge’s benefits to any degradation that it might cause. The current language goes beyond what is required by the federal regulations. The federal regulations do not require that the economic and social benefits of the discharge outweigh any water quality degradation that is expected to occur. They understand that the final decision by DEP on an SEJ application will involve a “judgement call” by DEP staff, but they emphasize that the public deserves an opportunity to review and understand the criteria, factors or standards forming the basis of the “judgement call”.

Response – Under the federal CWA, water quality standards determinations must be made based on water quality rather than on economics or social factors. With regard to SEJ, the final regulations at §93.4c(b)(1)(iii) tracks the federal SEJ regulation at 40 CFR §131.12(a)(2); SEJ language. Proposed language which went beyond the federal regulation by providing that the social or economic benefit to the public of the discharge must “outweigh any water quality degradation which the proposed discharge is expected to cause” has been eliminated on final rulemaking. The Commonwealth is not placed at an economic disadvantage to other states because of its SEJ process because its language tracks the federal language.

The final regulation fleshes out the barebones federal SEJ language in several respects by providing special SEJ provisions for sewage facilities in HQ waters which are proposed to correct existing public health or pollution hazards, and by providing that proponents of sewage facilities need not do an SEJ analysis at both the sewage facilities planning and discharge permit stages if there are no material changes in the project between such stages. The regulation does not specify every implementation detail for SEJ. The Department implements SEJ pursuant to factors and checklists contained in its Special Protection Waters Implementation Handbook; these portions of the Handbook are being revised, subject to public input and comment, to reflect the regulatory changes, as well as recent federal guidance on SEJ implementation in such documents as EPA’s “Water Quality Standards Handbook,” “Questions and Answers on Antidegradation,” and “Interim Economic Guidance for Water Quality Standards”.

Comment - The Department should expand its public participation in regard to its assessment of HQ and EV Waters. Public participation must start during the assessment of the stream. The DEP publishes a notice of acceptance of a petition in the Pennsylvania Bulletin, however not everyone affected by a stream upgrade subscribes to the Bulletin. Many parties that may be adversely affected by a stream upgrade are never made aware of the petition until a proposed regulatory package is already in front of the EQB for consideration. The DEP must notify potentially affected parties in the preliminary stages of the stream evaluation. Notice, by first class mail, must be sent to any applicant with a pending permit, any existing discharge permittees, the appropriate municipalities, planning commissions and all applicants that have received planning or subdivision and land development approval within the last five years. (599, 603, 657, 661, 671, 673, 675, 677, 682, 687, 689, 690, 702-704, 706, 707, 727, 728, 731-733, 737, 786-789, 792-795, 803, 805-816, 821-827, 840, 1247, 1248, 1341, 1347, 1359, 1367, 1391, 1393, 1410, 1418, 1420, 1428, 1435-1453, 1455, 1472, 1473, 1593-1595, 1598-1600, 1604-1608, 1611-1615, 1617, 1618, 1621, 1622, 1641, 1665, 1674, 1677, 1678, 1683, 1685, 1693)

While IRRC agrees that there is a need for greater public participation in the redesignation process, they believe the costs of contacting every landowner within a watershed could be excessive. The public participation rules for assessment of waters for HQ or EV designations ought to parallel the requirements for proposed discharges into HQ and EV waters. They recommend that § 93.4e(b) be amended to require a public comment period after DEP has completed its technical report for the assessment of a stream for reclassification as HQ or EV. DEP should be directed to publish a notice in local newspapers and the Pennsylvania Bulletin; send copies of the notice to all municipalities in the watersheds. The notice would announce that DEP completed its technical report with recommendations for upgrades to EV or HQ. The notice would explain how and where interested parties could obtain copies of the technical reports and recommendations, invite persons to submit comments, and that DEP would hold public hearings if requested. They do agree that notices should be sent to each person with a current permit or pending permit application for a discharge into the candidate stream. (1694)

Response - Even though there are no explicit public participation requirements in the federal antidegradation regulations (except that public participation provisions of the Commonwealth's continuing planning process must be followed in granting a discharger SEJ when proposing a discharge to an HQ stream) the Department believes that additional public participation is in the public interest. The final regulations contain several public participation enhancements to the existing program. Section 93.4d(a) requires the Department to publish notices of intent to assess a water for potential HQ or EV designation in both the Pennsylvania Bulletin and local newspapers. In addition, a notice is also required when a completed evaluation is accepted by the EQB. The Department will also notify all municipalities in the affected watershed. These notices will request submittal of additional information for use by the Department. Section 93.4d(b) further provides for combined public meeting and fact-finding hearings to discuss the assessment or evaluation and solicit additional data. The Department has concluded that having either a petitioner or the Department personally notify each landowner in the watershed is overly burdensome. The Department will pursue additional avenues of public outreach and notification, as described above, as well as exploring radio, web, and television notification where appropriate. The Department agrees that the most effective means of providing this protection is to encourage local governments and residents to be involved in this mutual goal of resource protection and management, as early as possible in the stream evaluation process.

Conclusion - The Department has revised the proposed Antidegradation policy and regulations to more closely mirror federal antidegradation regulations. The revisions are based on the comments received during the public comment periods for Proposed Rulemaking and an Advance Notice of Final Rulemaking, and other information available to the Department during its development of the recommendations for final rulemaking.

LIST OF COMMENTATORS

WATER QUALITY STANDARDS AMENDMENTS Antidegradation Rulemaking Package

(Public Comment Period: March 22 thru May 21, 1997)

Public Hearings: May 7, 1997 at the RCSOB
400 Market Street
Harrisburg, PA

10:00 am: by the Department of Environmental Protection
2nd Floor, Auditorium (for Proposed Chapter 15 only)
and
1:00 pm: by the Environmental Quality Board
1st Floor, Room 105