

**FINAL RULEMAKING**  
**ENVIRONMENTAL QUALITY BOARD**  
**[ 25 PA. CODE CH. 93 ]**  
**Stream Redesignations (Sobers Run, et al.)**

The Environmental Quality Board (Board) amends §§ 93.9c, 93.9f and 93.9i (relating to Drainage List C; Drainage List F; and Drainage List I) to read as set forth in Annex A. The rulemaking fulfills the Commonwealth's obligations under State and Federal laws to review and revise, as necessary, water quality standards that are protective of surface waters.

This final-form rulemaking is given under Board order at its meeting on \_\_\_\_\_.

*A. Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* as a final-form regulation.

*B. Contact Persons*

For further information, contact Thomas Barron, Bureau of Clean Water, 11th Floor, Rachel Carson State Office Building, P.O. Box 8774, 400 Market Street, Harrisburg, PA 17105-8774, (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 Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (DEP) web site at [www.dep.pa.gov](http://www.dep.pa.gov) (select "Public Participation," then "Environmental Quality Board (EQB)").

*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 authorize the Board to develop and adopt rules and regulations to implement The Clean Streams Law (35 P.S. §§ 691.1—691.1001), and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which grants to the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of DEP. In addition, section 303 of the Federal Clean Water Act (33 U.S.C. § 1313) sets forth requirements for water quality standards.

*D. Background and Purpose*

Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements, effluent limits and best management practices (BMP)) on individual sources of pollution. Section 303(c)(1) of the Federal Clean Water Act requires states to periodically review and revise, as necessary, water quality standards. Water quality standards include designated uses, numeric and narrative

criteria, and antidegradation requirements for surface waters. These regulatory changes are the result of stream evaluations conducted by DEP.

DEP may identify candidate streams for redesignation of uses during routine waterbody investigations. Requests for consideration may also be initiated by other agencies. Members of the public may submit a rulemaking petition to the Board.

DEP 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. The purpose of this rulemaking is to update the designated uses so that the surface waters of the Commonwealth are afforded the appropriate level of protection.

Existing use protection is provided when DEP determines, based on its evaluation of the best available scientific information, that a surface water attains water uses identified in 25 Pa. Code § 93.3 (relating to protected water uses). Examples of water uses protected include: 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 DEP 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. After DEP determines the water uses attained by a surface water, DEP will recommend to the Board that the existing uses be adopted as "designated" uses, through rulemaking, and be added to the list of uses identified in 25 Pa. Code § 93.9 (relating to designated water uses and water quality criteria).

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

<b>Stream</b>	<b>County</b>	<b>Petitioner</b>
Swiftwater Creek	Monroe	Brodhead Creek Watershed Association
Sobers Run	Northampton	Bushkill Township
Mill Creek	Berks and Chester	Delaware Riverkeeper Network
Silver Creek	Susquehanna	Silver Lake Association

These amendments are the result of stream evaluations conducted by DEP in response to the four petitions that were submitted. 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, DEP considers the criteria in 25 Pa. Code § 93.4b (relating to qualifying as High Quality or Exceptional Value Waters). Based upon

the data and information collected on these waterbodies, DEP recommends the Board adopt this rulemaking as described in this order and as set forth in Annex A.

*E. Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking*

*Data Collection and Rulemaking Development*

Prior to the development of the proposed rulemaking, DEP published notice in the *Pennsylvania Bulletin* and on its web site that an evaluation was to be conducted on all or portions of the subject streams to determine the proper Aquatic Life Use or Special Protection designations for the Commonwealth's Water Quality Standards. As a part of this notice, DEP asked the public to submit technical data concerning the water quality, instream habitat or biological conditions of these stream sections for consideration in the assessment. DEP also notified municipalities located in the watershed study areas by letter of the stream evaluations and asked them to provide any readily available data.

Data was not received for Swiftwater Creek. DEP received comments regarding Swiftwater Creek including a notice from Tobyhanna Township stating that they do not support the petition to upgrade Swiftwater Creek. DEP did receive data from Bushkill Township to augment DEP's assessment of Sobers Run. Hanover Engineering Associates submitted the latest Coldwater Conservation Plan (2009) completed for the Upper Bushkill Creek Watershed and the Northampton County Conservation District submitted water chemistry results collected by the Retired Senior Volunteer Program. This data was used as documentation and support for the Sobers Run special protection assessment. The Delaware Riverkeeper Network provided DEP with water quality data for Mill Creek including a copy of the 1994 Pennsylvania Fish and Boat Commission Report, information pertaining to the Pennsylvania Fish and Boat Commission "Natural Trout Reproduction Layer" and information pertaining to local angler observations. This data was used as supporting documentation of the water quality of the Mill Creek basin in conjunction with the findings of DEP's survey. DEP also received two supportive responses from local citizens regarding the redesignation of Mill Creek. DEP did not receive data regarding Silver Creek. DEP did receive one letter of support for the redesignation of Silver Creek.

DEP utilized submitted data and conducted its own evaluations of the subject streams to create draft stream evaluation reports and notified the affected municipalities, county planning commissions, county conservation districts, other State agencies and petitioners of the availability of a draft evaluation report for their review and comment. The draft stream evaluation reports were also made available on DEP's website for a minimum 30-day public review and comment period.

Comments were not received in response to this notice for either Swiftwater Creek or Silver Creek. Nine commentators offered supportive comments for DEP's recommendation to redesignate Sobers Run. During the initial comment period, three stakeholders offered comments pertaining to the Mill Creek report, one in support and two in opposition. In addition, the Delaware Riverkeeper Network requested an extension of the original 30-day public comment period. In response, DEP provided a 30-day extension to the comment period for the Mill Creek stream report. The Delaware Riverkeeper Network provided additional comments in support of

DEP's EV recommendation but stated opposition to the recommendation for the unnamed tributary to Mill Creek at 40°14'33.8"N; 75°43'49.6"W to remain unchanged.

DEP considered all data and comments received in response to these notifications and public comment periods in the determination of DEP's recommendations to the Board.

Copies of DEP's stream evaluation reports for these waterbodies are available on DEP's website or from the contacts whose addresses and telephone numbers are listed in Section B of this order. The data and information collected on these waterbodies support the Board's final-form rulemaking as set forth in Annex A.

### *Rulemaking Summary*

This final-form rulemaking amends two stream names as they appear in § 93.9c. The United States Geologic Survey maintains the National Hydrography Dataset (NHD) Flowline. The stream nomenclature and the fluvial geomorphology given in the *Pennsylvania Code* are governed by the NHD Flowline. These corrections are included to maintain consistency between the *Pennsylvania Code* and the NHD Flowline. Saw Kill Creek and Raymond Kill Creek are corrected to Sawkill Creek and Raymondskill Creek, respectively, to be consistent with the NHD Flowline.

This final-form rulemaking also converts all references to river mile indexes (RMI) in Annex A to a set of coordinates (latitude and longitude), with the eventual goal to be the conversion of all RMIs in §§ 93.9a—93.9z to the coordinate system. DEP staff recognizes the RMI system to be antiquated. When determining the RMI, it is possible to derive differing RMIs depending on the technique used. It is easy to consistently determine the latitude and longitude along any point of a stream or river while in the field with a hand-held GPS unit or using a Geographical Information System (GIS) software application (DEP standard projected coordinate system is PA\_Albers\_Equal\_Area\_Conic; the geographic coordinate system is North American Datum 1983 or NAD 1983). It is very difficult to determine the RMI while in the field. Referring to the latitude and longitude will make it much easier for the regulated community and others to apply the zone description in § 93.9 to a particular project or activity, and determine whether the project discharges within or the activity is otherwise related to the referenced stream zone.

### *Changes from Proposed to Final-Form Rulemaking*

This final-form rulemaking includes no changes to the initial proposed regulatory amendments.

### *F. Summary of Major Comments and Responses*

The Environmental Quality Board approved the proposed rulemaking for the Sobers Run, et al., Stream Redesignation Package at its April 19, 2016 meeting. The proposed rulemaking was published in the Pennsylvania Bulletin on June 11, 2016 (46 Pa.B. 2970), with provision for a 45-day public comment period that closed on July 25, 2016.

Five commentators submitted comments. Two commentators offered support of the entire proposed rulemaking; one commended DEP in its efforts, and one commentator offered support for the redesignation of Mill Creek. All public comments were supportive of the proposed regulatory amendments. IRRC submitted comments requesting amendments to the regulatory analysis form (RAF) for the final-form rulemaking. The RAF was amended accordingly and is included as part of this final-form rulemaking package. A more detailed summary of the comments submitted to the Board and the Department's responses to those comments are available in the comment and response document that also accompanies this final-form rulemaking package.

## *G. Benefits, Costs and Compliance*

### *Benefits*

Overall, the Commonwealth, its citizens and natural resources will benefit from these changes because they provide the appropriate level of protection to preserve the integrity of existing and designated uses of surface waters in this Commonwealth. Protecting water quality provides economic value to present and future generations in the form of a clean water supply for human consumption, wildlife, livestock, industrial use and irrigation; recreational opportunities such as fishing (also for consumption), water contact sports and boating; and aquatic life protection. It is important to realize these benefits and to ensure opportunities and activities continue in a manner that is environmentally, socially and economically sound. Maintenance of water quality ensures its future availability for all uses.

DEP identified three public water supply facilities with raw water intakes that are no further downstream than 17.0 stream miles of the candidate stream sections for redesignation in this rulemaking package. These three public water suppliers which serve over 103,000 citizens will benefit from this rulemaking package because their raw source water will be afforded a higher level of protection. This is an economic benefit because the source water treatment costs for the drinking water will be less costly to customers if less treatment is needed due to the maintenance of water quality in exceptional value waters.

Small businesses in the outdoor recreation industry will be positively affected by these regulations. The maintenance and protection of the water quality will ensure the long-term availability of these outdoor recreation opportunities in pristine waters.

### *Compliance costs*

The amendments to Chapter 93 (relating to water quality standards) may impose additional compliance costs on the regulated community. This final-form rulemaking is necessary to improve total pollution control. The expenditures necessary to meet new compliance requirements may exceed that which is required under existing regulations.

The redesignations will be implemented through DEP's permit and approval actions. Persons who presently are operating under a general permit will need to apply for an individual permit upon permit expiration. 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 BMPs to meet the designated and existing uses of the stream. For example, these increased costs may take the form of higher engineering, construction or operating cost for point source discharges. Treatment costs and BMPs 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 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 BMPs may be offset by potential savings from an increased value of improved water quality through more cost-effective and efficient treatment over time.

Ten National Pollutant Discharge Elimination System (NPDES) permitted facilities are located within the portions of the streams that are candidates for redesignation in this Sobers Run, et al., Stream Redesignation Package. The types of NPDES discharges identified include industrial stormwater, sewage, and pesticides. Discharges in existence at the time of the stream surveys have been factored into the evaluations of the existing water quality of the 4 streams and the subsequent recommendations for redesignation to exceptional value waters (EV). Since the presence of such discharge activities did not preclude the attainment of EV status, no changes to the discharge treatment technology are necessary as long as the discharge characteristics (both quality and quantity) remain the same. Thus, redesignation to EV does not automatically impose any additional special technology requirements on the 10 NPDES permitted entities.

Any person, business, small business, or organization proposing a new, additional, or increased point source discharge would need to satisfy the requirements found at 25 Pa. Code § 93.4c(b)(1). Any new, additional or increased point source discharge to special protection waters must evaluate non-discharge alternatives and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If no alternative is available, the discharge must use a non-degrading treatment technology that is designed to protect the existing water quality. The permit applicant must demonstrate in the permit application that its new or expanded activities will not lower the existing water quality of special protection streams. Point source discharge activities to special protection streams do not qualify for general permits issued under Chapter 92a (related to NPDES permitting, monitoring and compliance). Therefore, these new discharges will require an individual permit. Where on-lot sewage systems are planned, DEP's sewage facilities planning and permitting process, as implemented by DEP under 25 Pa. Code Chapters 71 (Administration of Sewage Facilities Planning Program); 72 (Administration of Sewage Facilities Permitting Program); and 73 (Standards for Onlot Sewage Treatment Facilities), is protective of water quality.

Other permitted activities and approvals, such as those required under Chapter 102 for erosion and sediment control during construction activities and under Chapter 105 in water obstructions and encroachments, must utilize antidegradation BMPs to satisfy the requirements found at 25 Pa. Code § 93.4c. These sets of BMPs may be designed to provide a higher degree of protection than those utilized in non-special protection waters.

DEP cannot accurately estimate who will be affected by these stream redesignations because: (1) persons and businesses will not be impacted until a future activity requiring a new or modified

permit or approval action is proposed; (2) effluent discharges and receiving stream characteristics are unique; and (3) generic technology and cost equations are not available for purposes of comparing the costs and/or savings of a future permitted activity.

#### *Compliance assistance plan*

This final-form rulemaking has been developed as part of an established program that has been implemented by DEP since the early 1980s. The amendments are consistent with and based on existing Department regulations. The amendments extend additional protection to selected waterbodies that exhibit exceptional water quality and are consistent with antidegradation requirements established by the Federal Clean Water Act (33 U.S.C. §§ 1251—1388) and The Clean Streams Law (35 P.S. §§ 691.1-691.1001). 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 DEP's permit and approval actions. For example, the NPDES permitting program bases effluent limitations on the uses of a stream. These permit conditions are established to assure water quality is protected and maintained. New and expanded dischargers, will receive permit conditions with water quality based effluent limitations that are required to provide effluent treatment according to the water quality standards.

#### *Paperwork requirements*

This final-form rulemaking will not impose any new paperwork requirements on persons engaged in regulated activities under existing permits or approvals from DEP. These regulatory revisions are based on existing Department regulations and simply mirror the existing use protection that is already in place for these streams. Some indirect paperwork may be necessary for new or expanding dischargers to streams upgraded to HQ or EV. For example, NPDES general permits are not available for discharges to these streams. Thus, an individual permit, and its associated paperwork, would be required. Additionally, paperwork associated with evaluating nondischarge alternatives and nondegrading discharges is required for all new, additional or increased discharges to HQ or EV Waters.

#### *H. Pollution Prevention*

The Federal Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. DEP encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. These regulatory revisions have incorporated the following pollution prevention incentives.

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 must be evaluated and are required when environmentally sound and cost effective. Nondischarge alternatives, when implemented, remove impacts to surface water and may reduce the overall level of pollution to the environment. In addition, if environmentally sound and cost-effective alternatives are not available, discharges must be nondegrading in most circumstances.

#### *I. Sunset Review*

The Board is not proposing to establish a sunset date for these regulations because they are needed for DEP to carry out its statutory authority. DEP will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

#### *J. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 26, 2016, DEP submitted a copy of the notice of proposed rulemaking, published at 46 Pa.B. 2970, to IRRC and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, DEP has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on \_\_\_\_\_, 2017, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on \_\_\_\_\_, 2017, and approved the final-form rulemaking.

#### *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 46 Pa.B. 2970 (June 11, 2016).
- (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:

- (a) The regulations of DEP, 25 Pa. Code Chapter 93, are amended by amending §§ 93.9c, 93.9f, and 93.9i 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, as approved to legality and form, 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*.

PATRICK McDONNELL,  
Chairperson