

## **EXECUTIVE SUMMARY**

### **Triennial Review of Water Quality Standards 25 Pa. Code Chapter 93**

The Department of Environmental Protection (Department) recommends the Environmental Quality Board (Board) adopt amendments to 25 Pa. Code Chapter 93 regarding water quality standards by amending §§ 93.1, 93.7 Table 3, 93.8a, 93.8c, 93.8 c Table 5, 93.8d, 93.8e, 93.9b – 93.9g, 93.9j – 93.9t, 93.9v – 93.9x, and 93.9z, to read as set forth in Annex A.

**PURPOSE OF THE REGULATION** - Section 303(c)(1) of the Federal Clean Water Act (CWA) requires that states periodically, but at least once every 3 years, review and revise as necessary, their water quality standards. This rulemaking constitutes Pennsylvania's current triennial review of its water quality standards.

Pennsylvania's water quality standards, which are codified in Chapters 93 and 16, are designed to implement the requirements of Sections 5 and 402 of The Clean Streams Law and CWA Section 303 (33 U.S.C.A. § 1313). The water quality standards consist of the designated uses of the surface waters of this Commonwealth, along with the specific numerical and narrative criteria necessary to achieve and maintain those uses and an antidegradation policy. Thus, water quality standards are instream water quality goals that are implemented by imposing specific regulatory requirements, such as treatment requirements and effluent limitations, on individual sources of pollution.

**SUMMARY OF THE REGULATION** - The final rulemaking includes amendments to 25 Pa. Code Chapter 93 in order to: add a definition for *7-day average* in § 93.1; update the water quality criteria in § 93.7, Table 3 and § 93.8c, Table 5; delete the reference to Appendix A, Table 1A in § 93.8a(b), since Table 1A is being deleted in Chapter 16; delete reference to the Federal regulation in 40 CFR 131.32(a) in § 93.8a(j)(3), since this federal promulgation had been removed by the United States Environmental Protection Agency (EPA); clarify in §§ 93.8c(b) and 93.8e(b) that criteria in Table 5 may apply to the Great Lakes System for those substances not listed in Table 6; clarify in § 93.8d(c) that the Biotic Ligand Model (BLM) will be required for the development of new or updated water quality criteria for copper in freshwater systems; add reference in § 93.8d(f)(2) that identifies a new online table is available for a list of site-specific criteria that have been developed, and are being used by the Department in permitting and other pollution control measures; and change and correct the drainage lists and typographical and translation errors that occur in the chapter.

**Exceptions for fishable/swimmable waters** - As part of each triennial review of water quality standards, states are required to reexamine water body segments that do not meet the fishable or swimmable uses specified in CWA Section 101(a)(2). In Pennsylvania, there are two waterbodies where these Section 101(a)(2) uses are not currently met: (1) the Harbor Basin and entrance channel to Outer Erie Harbor/ Presque Isle Bay (§ 93.9x), and (2) several zones within a portion of the Delaware Estuary (§§ 93.9e and 93.9g).

Because the same conditions and hazards exist today, for the excluded portion of Lake Erie, no change is proposed to the designated use for Outer Erie Harbor/Presque Isle Bay, and the water contact sports (WC) use remains excluded from the designated uses in § 93.9x.

In April 1989, the Pennsylvania Department of Environmental Resources (DER) cooperated with the Delaware River Basin Commission (DRBC), EPA and other DRBC signatory parties on a comprehensive Use Attainability Analysis (UAA) study in the lower Delaware River and Delaware Estuary. This study resulted in appropriate recommendations regarding the swimmable use, which the DRBC included in its regulations for water use classifications and water quality criteria for portions of the tidal Delaware River in May 1991. The appropriate DRBC standards were referenced in §§ 93.9e and 93.9g in 1994. The WC use remains excluded from the designated uses for river miles 108.4 to 81.8 because of continuing significant impacts from combined sewer overflows (CSOs), and hazards associated with commercial shipping and navigation. However, the Board received comments indicating there are multiple instances where commenters have participated in and documented water contact on this stretch of the Delaware River and Estuary. In response to these comments, the Department will initiate an effort with DRBC and the other signatory parties to reevaluate the applicable standards, and an updated recommendation regarding the WC use will be considered in the next triennial review of water quality standards, following outcome of this collaboration.

Zones 3, 4, and upper Zone 5 of the Delaware Estuary also do not meet the CWA Section 101(a)(2) fishable uses. Surface waters in these zones have limited aquatic life uses for Warm Water Fishes (WWF) and Migratory Fishes (MF). These are described in Drainage Lists E and G (§§ 93.9e and 93.9g) as WWF (Maintenance Only) and MF (Passage Only) for tidal portions of the basin in Pennsylvania, from river mile 108.4 to the Pennsylvania-Delaware state border. The current designated uses within these Zones do not include propagation, and thus refer to DRBC's standards which were developed to protect fish maintenance and passage only. Recent data and observations, however, suggest recovery is occurring in propagation for some species in portions of these Zones.

The Board received comments on Pennsylvania's continued limited uses for Zones 3 and 4 of the Delaware Estuary, as incorporated into §§ 93.9e and 93.9g. The commenters refer to the federally endangered Atlantic sturgeon (*Ancipenser oxyrinchus*) and other reproducing fish that currently live and breed in the tidal Delaware River (Zones 3, 4, and 5) indicating the need for higher dissolved oxygen (DO) standards, and immediately protecting these zones for fish propagation. Commenters state that the Board should fulfill its obligation under 40 C.F.R. § 131.10(h)(2)(ii) to update the applicable designated uses during the current triennial review. They suggest the available data are sufficient to establish an existing use of fish propagation in Zones 3 and 4 and the upper portion of Zone 5 of the Delaware Estuary. Thus, the commenters contend that the Board, in issuing its final rule, should change the designated use of these portions of the Delaware Estuary to match their existing use.

As described in the Preamble to the proposed rulemaking, the demonstrated recovery in propagation for these Zones has occurred under the long-term implementation of the current criteria. Recently, the Department has also become aware of improvements in water quality and propagation of key species through data presented from other programs, and from a report submitted to DRBC by the Academy of Natural Sciences of Drexel University (ANSDU) – *A Review of Dissolved Oxygen Requirements of Key Sensitive Species in the Delaware Estuary*

(ANSDU, November 2018) – which describes the occurrence and DO requirements of select key species, including that of the endangered species, Atlantic sturgeon. It has also been determined that Atlantic sturgeon are present and reproducing in these Zones of the Delaware Estuary, further reinforcing the need to reevaluate these designated uses. Furthermore, the National Marine Fisheries Service (NMFS) has recently designated the Delaware Estuary as critical habitat for the Atlantic sturgeon (82 FR 39160), which is federally endangered under the Endangered Species Act. As such, the protection under § 93.4c(a)(2) becomes relevant for the Delaware Estuary and will be provided, on a case-by-case basis, as NPDES permits or other final approvals are issued, or final actions are taken.

As indicated in the DRBC Resolution of September 2017 (DRBC Res. No. 2017-4), the Department will continue to work with the DRBC and other signatory parties in determining the appropriate DO criteria that should apply to this section of the Estuary. An updated recommendation regarding the existing use and designated use, along with the appropriate DO criteria, will be considered in the next triennial review of water quality standards, or at another appropriate time following the conclusion and outcome of this collaboration with DRBC and the other DRBC signatory parties.

**PUBLIC COMMENT** - The regulation was adopted by the Board as proposed rulemaking at its April 18, 2017 meeting, and was published in the *Pennsylvania Bulletin* on October 21, 2017 (47 Pa.B. 6609) with provision for a 70-day public comment period that was scheduled to end December 29, 2017. The Board published a correction to this notice in the *Pennsylvania Bulletin* on October 28, 2017 (47 Pa.B. 6727) to revise a printer error for one of the dates and locations of the public hearings as printed in the original Preamble. The Board held public hearings, for the purpose of accepting comments on the proposed rulemaking, on December 6, 8, and 14, 2017 at the Department's Regional Offices in Wilkes-Barre (Northeast Region - NERO), Harrisburg (Southcentral Region - SCRO), and Pittsburgh (Southwest Region - SWRO), Pennsylvania, respectively. The Board received public comments requesting the public comment period be extended, and that an additional public hearing be held in the southeast area of the Commonwealth. This request was granted and notice of this public comment period extension and additional public hearing was published in the *Pennsylvania Bulletin* on December 30, 2017 (47 Pa.B. 7852). The additional public hearing was held on January 30, 2018, at the Department's Southeast Regional Office (SERO) in Norristown, Pennsylvania. The extended public comment period ended on February 16, 2018.

The Board received comments from 776 commenters including comments from EPA Region 3 and testimony from seven witnesses at the public hearings. The Board also received comments from the Independent Regulatory Review Commission (IRRC). The comments received on the proposed regulation are summarized in Section E of the final Preamble and in the Comment and Response document that accompanies this final-form rulemaking package.

The Department has considered all the public comments received on its proposed rulemaking in preparing this final regulation, and recommends the final-form rulemaking be revised as set forth in Annex A. The following is a summary of the revisions from proposed to this final rulemaking:

A definition for *7-day average* is added to § 93.1, the aquatic life criterion for ammonia (Am) and the Bac<sub>1</sub> criterion for recreational use in Table 3 at § 93.7 are updated to be wholly consistent with the national CWA Section 304(a) recommendations from EPA; toxic substances at § 93.8c, Table 5 are being updated using the latest scientific information and policies developed by EPA under CWA Section 304(a); and clarify that the new online resource at § 93.8d(f)(2) will be available to supplement the publicly available table of site-specific criteria, at Table 1A, Chapter 16, for site-specific criteria that have been developed and are being used by the Department in permitting and other pollution control measures.

There are also further clarifications provided, in response to public comments received on the corrections to the water quality standards for use designations and stream entries found in the Drainage Lists at §§ 93.9b – 93.9g, 93.9j – 93.9t, 93.9v – 93.9x, and 93.9z. The Department would like to reinforce that these changes to the drainage lists are presented to clarify stream names and segment boundaries, to reformat the drainage lists, and to correct typographical and other errors associated with prior rulemaking and/or publication activities and are not intended to impose any redesignation to the applicable protected use.

The rationale documents that support the recommended amendments, revisions, and additions for this final-form rulemaking have also been updated to reflect the changes from proposed to final rulemaking, in response to comments received in the proposed rulemaking.

**AFFECTED PARTIES** - This final-form rulemaking includes revisions to water quality criteria and corrections or clarifications to designated uses. Facilities with point source discharges of treated wastewater to waters of the Commonwealth may be affected since these discharges are assigned effluent limits consistent with achieving water quality standards, including all applicable water quality criteria and designated uses. The final amendments will be implemented through the Department's permitting and other approval actions.

**ADVISORY GROUPS** - The Department discussed this final-form triennial rulemaking with the Water Resources Advisory Committee (WRAC) on May 23, 2019. WRAC voted to concur with the Department's recommendation to present the final rulemaking to the Board. In addition, the Department provided to the Agricultural Advisory Board on April 25, 2019 a regulatory review that included the draft final triennial review of water quality standards.

### **RECOMMENDATION TO THE BOARD**

The Department recommends the Board adopt this final-form rulemaking.