

NOTICE OF PROPOSED RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
25 Pa. Code, Chapter 93
Stream Redesignations (Clarks Creek, et al.)

Preamble

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code §§93.9f, 93.9j, 93.9o and 93.9r to read as set forth in Annex A.

This proposal was adopted by the Board at its meeting of _____.

A. Effective Date

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

B. Contact Persons

For further information, contact Richard H. Shertzer, Chief, Division of Water Quality Standards, Bureau of Water Standards and Facility Regulation, 11th Floor, Rachel Carson State Office Building, P.O. Box 8467, 400 Market Street, Harrisburg, PA 17105-8467, 717-787-9637 or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, 717-787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD-users) or 1-800-654-5988 (voice users). This proposal is available electronically through the Department of Environmental Protection (Department) Web site (<http://www.depweb.state.pa.us>).

C. Statutory and Regulatory Authority

This proposed 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 provisions of The Clean Streams Law, and Section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which grants to the Board the power and duty to formulate, adopt, and promulgate rules and regulations for the proper performance of the work of the Department. In addition, Section 303 of the Federal Clean Water Act (33 U.S.C. § 1313) sets forth requirements for water quality standards and the federal regulation at 40 CFR § 131.32 (relating to Pennsylvania) sets forth certain requirements for portions of the Commonwealth's antidegradation program.

D. Background of the Proposed Amendments

Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements, effluent limits, and best management practices (BMPs)) on individual sources of pollution.

The Department may identify candidates for redesignation during routine waterbody investigations. Requests for consideration may also be initiated by other agencies. Organizations, businesses, or individuals may submit a rulemaking petition to the Board.

The Department considers candidates for High Quality (HQ) or Exceptional Value (EV) Waters and all other designations in its ongoing review of water quality standards. In general, HQ and EV waters must be maintained at their existing quality, and permitted activities shall ensure the protection of designated and existing uses.

Existing use protection is provided when the Department determines, based on its evaluation of the best available scientific information, that a surface water attains water uses identified in regulations at 25 Pa. Code sections 93.3 and 93.4. Examples of water uses protected include the following: Cold Water Fishes (CWF), Warm Water Fishes (WWF), HQ and EV. A final existing use determination is made on a surface water at the time the Department takes a permit or approval action on a request to conduct an activity that may impact surface water. If the determination demonstrates that the existing use is different than the designated use, the water body will immediately receive the best protection identified by either the attained uses or the designated uses. A stream will then be “redesignated” through the rulemaking process to match the existing uses with the designated uses. For example, if the designated use of a stream is listed as protecting WWF but the redesignation evaluation demonstrates that the water attains the use of CWF, the stream would immediately be protected for CWF, prior to a rulemaking. Once the Department determines the water uses attained by a surface water, the Department will recommend to the Board that the existing uses be made “designated” uses, through rulemaking, and be added to the list of uses identified in the regulation at 25 Pa. Code section 93.9.

These streams were evaluated in response to four petitions, as well as requests from the Department’s Southcentral Regional Office (SCRO) and the Pennsylvania Fish and Boat Commission (PFBC), and a corrective amendment by BWSFR as follows:

- Pine Creek** (Schuylkill Co) - Petition: (Friends of Pine Creek)
- Cacoosing Creek** (Berks Co) - SCRO
- Unnamed Tributary 00926 to Schuylkill River; locally Spring Mill Run** (Montgomery Co) - Petition: (Steven S. Brown, Chairman; Whitmarsh Township Environmental Advisory Board)
- Unnamed Tributary 28600 to Lackawanna River; locally Clarks Creek** (Wayne Co) - Petition: (Glen Abello)
- Unnamed Tributary 07792 to Conestoga River** (Lancaster Co) - PFBC
- Hammer Creek** (Lebanon and Lancaster Co’s) – Petition: (Heidelberg Township)
- Toms Run** (Clarion and Forest Co’s) – Correction (BWSFR)

These regulatory changes were developed as a result of aquatic studies conducted by the BWSFR. The physical, chemical, and biological characteristics and other information on these waterbodies were evaluated to determine the appropriateness of the current and requested designations using applicable regulatory criteria and definitions. In reviewing whether waterbodies qualify as HQ or EV waters, the Department considers the criteria in § 93.4b (relating to qualifying as HQ or EV Waters). Based upon the data and information collected on these waterbodies, the Department recommends the Board adopt this proposed regulation as described in this preamble and as set forth in Annex A.

Copies of the Department's stream evaluation reports for these waterbodies are available on the Department's website or from the contacts whose addresses and telephone numbers are listed in Section B.

The following is a brief explanation of the recommendations for each waterbody:

Pine Creek – Pine Creek (stream code 02269) is a tributary to the Little Schuylkill River in the Delaware River drainage basin. The Pine Creek basin is located in Delano, Rush, and Ryan Townships in Schuylkill County. The Pine Creek basin is currently designated CWF, MF and was evaluated for redesignation based on a petition submitted by the Friends of Pine Creek. Pine Creek was evaluated for redesignation as EV waters. Candidate station metrics were compared to Pine Creek (01701), which is an EV, MF stream in Berks County. The reference stream (Pine Creek; 01701) is a tributary to Manatawny Creek. The candidate basin failed to meet the 83% comparison standard and as a result does not qualify for either an EV or HQ-CWF use designation under the Department's regulatory criteria (§93.4b(b)(1)(v) and §93.4b(a)(2)(i)(A)). The Department recommends that Pine Creek basin retain its current CWF, MF designation.

Cacoosing Creek – Cacoosing Creek (stream code 01850) is a tributary to Tulpehocken Creek in the Delaware River basin. The Cacoosing Creek basin is located west of Reading in South Heidelberg, Lower Heidelberg, and Spring Townships; and the Boroughs of Sinking Spring and Wernersville in Berks County. The only named tributary to Cacoosing Creek is Little Cacoosing Creek and both were inadvertently omitted from Chapter 93. The fish populations of the Cacoosing Creek basin were sampled during various surveys conducted by Department and PFBC staff. While the Cacoosing Creek fishery was very diverse and dominated by species commonly associated with cold-water habitats (trout, blacknose and longnose dace, white sucker and mottled sculpin) the Little Cacoosing Creek fishery was dominated by the banded killifish, a warm water species. The Department recommends that the Cacoosing Creek basin (excluding the Little Cacoosing Creek subbasin) be designated CWF, MF and the Little Cacoosing Creek basin be designated WWF, MF.

Unnamed Tributary 00926 to Schuylkill River, (locally known as Spring Mill Run) – Spring Mill Run is a tributary to the Schuylkill River in the Delaware River watershed. The candidate basin is a limestone influenced stream located in Whitmarsh Township, Montgomery County. Spring Mill Run is currently designated WWF, MF and was evaluated for redesignation as a Special Protection water-body in response to a petition from Mr. Steven S. Brown (Chairman of the Whitmarsh Township Environmental Advisory Board). Elk Creek (Centre County) was selected as a reference stream because it is a limestone influenced stream that is designated EV, MF in Chapter 93. All stations on Spring Mill Run had biological condition scores less than 83% of the reference station on Elk Creek. This indicates that Spring Mill Run does not qualify for Special Protection designation under the Department's regulatory criterion (§ 93.4b(b)(1)(v)). The Department recommends that the Spring Mill Run basin be redesignated to CWF, MF. This recommendation is based on the cold water fish populations that are found in Spring Mill Run.

Unnamed Tributary 28600 to Lackawanna River, (locally known as Clarks Creek) – Clarks Creek is a tributary to the Lackawanna River in Clinton Township, Wayne County and it is included in the Susquehanna River watershed. Clarks Creek basin is currently designated CWF, MF, and was evaluated for redesignation as HQ-CWF based on the petition submitted by Glen

Abello. Candidate stream metrics were compared to Dimmick Meadow Brook, which is an EV, MF reference stream. This reference stream is a tributary to Sawkill Creek located in Pike County and has comparable drainage area to Clarks Creek. The Department recommends that the protected use designation of Clarks Creek be changed from CWF, MF to EV, MF based on biological condition scores greater than 92% of the reference station score.

Unnamed Tributary 07792 to Conestoga River (UNT Conestoga River) – UNT Conestoga River is a limestone creek which flows through Earl and East Earl Townships in Lancaster County before entering the Conestoga River which is included in the Susquehanna River drainage basin. The Department conducted an evaluation of UNT Conestoga River in response to a request by the PFBC. The current Chapter 93 designated use for UNT Conestoga River is WWF, MF. The UNT Conestoga River supports a cold water fishery as indicated by the available physical, benthic macroinvertebrate, and fish data. The Department recommends that the UNT Conestoga River basin be redesignated CWF, MF.

Hammer Creek – Hammer Creek (stream code 07664) is a tributary to Cocalico Creek in the Susquehanna River drainage basin and is located in Cornwall, South Lebanon, and Heidelberg Townships in Lebanon County and Penn and Elizabeth Townships in Lancaster County. Hammer Creek basin is characterized by both freestone and limestone/limestone-influenced streams. The candidate section of Hammer Creek basin from its source to the Speedwell Forge Lake Dam is currently designated HQ-CWF, MF and was evaluated for a redesignation to Trout Stocking (TSF) in response to a petition submitted by Heidelberg Township.

Based on the Department's evaluation of the Hammer Creek basin, the following revisions and redesignations are recommended:

The Department has determined the forested and relatively undisturbed nature of the headwaters of the Hammer Creek basin upstream of the second Rexmont Road Crossing justifies retention of the current HQ-CWF designation. Therefore, the Department recommends no change to the designated use above the second Rexmont Road Crossing.

The remaining portion of the upper Hammer Creek basin from the second Rexmont Road crossing downstream to, but not including UNT 07678, was originally and erroneously designated HQ based on a misclassification of the existing use as indicated by water quality evaluations conducted in the mid-1970's. A review of the historical data, recent field surveys, and land use reviews does not establish that an HQ existing use was ever realized for that portion of the basin. The current HQ-CWF designated use of this portion of the upper basin cannot be attained by either implementing effluent limits required under the Federal Clean Water Act, or implementing cost-effective and reasonable best management practices (BMPs) for nonpoint source control. The human caused conditions that prevent the attainment of the designated use cannot be remedied to the level needed for HQ-CWF use attainment. The Department recommends that the Hammer Creek basin from the second Rexmont Road crossing downstream to, but not including UNT 07678 be redesignated as CWF.

Walnut Run enters Hammer Creek below the mouth of UNT 07678. The station on Walnut Run had a biological condition score greater than 92% of the EV reference station on Segloch Run (tributary to Furnace Run; Lancaster County). It is recommended that Walnut Run be redesignated as EV, based on the biological condition scoring criteria at 25 Pa. Code §93.4b(b)(1)(v).

While Department findings indicate that much of the upper Hammer Creek basin (above the confluence with UNT 07678) does not now and never has displayed HQ existing uses, there are some remaining portions of the lower Hammer Creek basin that exhibit better water quality conditions. These reaches of the Hammer Creek basin are (1.) from and including UNT 07678 downstream to Walnut Run; (2.) from Walnut Run to the inlet of Speedwell Forge Lake; and (3.) UNT 07671, which is a northern tributary to Speedwell Forge Lake. The condition of the lower basin is better than that of the upper portion of Hammer Creek and, even though portions of the lower basin do not currently meet HQ biological condition scoring criteria, a lack of historical information on the lower basin precludes removal of the HQ designation. The Department recommends that the Hammer Creek basin from and including UNT 07678 downstream to the inlet of Speedwell Forge Lake (except Walnut Run) and the basin of UNT 07671 should retain the current HQ-CWF designation.

Speedwell Forge Lake, constructed in 1966, is characterized by the predominance of warm water conditions and it has historically supported a warm water fish community since it was constructed, and it has been managed by the PFBC as such. The Department recommends that Speedwell Forge Lake be redesignated as WWF.

The Department recommends that the entire Hammer Creek basin should maintain its current Migratory Fishes (MF) designated use.

Toms Run – In addition to these recommended revisions, the Department proposes a correction to an error that occurred during the 2000 RBI WQS Triennial Review rulemaking. Toms Run is a tributary to the Clarion River in Forest County. Toms Run basin (except Little Hefren Run) was redesignated from CWF to EV as a result of the French Creek, et al. stream redesignations package. The French Creek package was published as a proposed rulemaking in the Pennsylvania Bulletin on March 22, 1997 (27 PaB 1449), and as a final rulemaking on September 5, 1998 (28 PaB 4510). At the same time, the RBI WQS Triennial Review proposed rulemaking was considered and approved by the EQB on June 16, 1998, and published on August 29, 1998 (28 PaB 4431). The RBI WQS Triennial Review intended to eliminate the site specific criteria for Threshold Odor Number (TON), which affected much of the Clarion River basin (§93.9r), including Toms Run. Unfortunately, while drafting the RBI WQS Triennial final rulemaking, the then recent final redesignation for Toms Run basin was not updated, thereby incorrectly reverting the EV designation back to CWF when the RBI WQS Triennial was published as final rulemaking on November 18, 2000 (30 PaB 6059). Therefore, the Department recommends that Toms Run basin (except Little Hefren Run) be corrected to EV as approved in the French Creek, et al rulemaking. Little Hefren Run basin will remain CWF.

E. Benefits, Costs and Compliance

1. **Benefits** – Overall, the Commonwealth, its citizens and natural resources will benefit from these recommended changes because they provide the appropriate level of protection in order to preserve the integrity of existing and designated uses of surface waters in this Commonwealth. Protecting water quality provides economic value to present and future

generations in the form of clean water for drinking, recreational opportunities, and aquatic life protection. It is important to realize these benefits to ensure opportunity and development continue in a manner that is environmentally, socially and economically sound. Maintenance of water quality ensures its future availability for all uses.

2. **Compliance Costs** – The proposed amendments to Chapter 93 may impose additional compliance costs on the regulated community. These regulatory changes are necessary to improve total pollution control. The expenditures necessary to meet new compliance requirements may exceed that which is required under existing regulations.

Persons conducting or proposing activities or projects must comply with the regulatory requirements relating to designated and existing uses. Persons expanding a discharge or adding a new discharge point to a stream could be adversely affected if they need to provide a higher level of treatment to meet the designated and existing uses of the stream. These increased costs may take the form of higher engineering, construction or operating cost for wastewater treatment facilities. Treatment costs are site-specific and depend upon the size of the discharge in relation to the size of the stream and many other factors. It is therefore not possible to precisely predict the actual change in costs. Economic impacts would primarily involve the potential for higher treatment costs for new or expanded discharges to streams that are redesignated. The initial costs resulting from the installation of technologically advanced wastewater treatment processes may be offset by potential savings from and increased value of improved water quality through more cost-effective and efficient treatment over time.

3. **Compliance Assistance Plan** - The regulatory revisions have been developed as part of an established program that has been implemented by the Department since the early 1980s. The revisions are consistent with and based on existing Department regulations. The revisions extend additional protection to selected waterbodies that exhibit exceptional water quality and are consistent with antidegradation requirements established by the Federal Clean Water Act and Pennsylvania Clean Streams Law. All surface waters in this Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, which prevent pollution and protect existing water uses.

The proposed amendments will be implemented through the Department's permit and approval actions. For example, the National Pollutant Discharge Elimination System (NPDES) permitting program bases effluent limitations on the use designation of the stream. These permit conditions are established to assure water quality criteria are achieved and designated and existing uses are protected. New and expanded dischargers with water quality based effluent limitations are required to provide effluent treatment according to the water quality criteria associated with existing uses and revised designated water uses.

4. **Paperwork Requirements** - The regulatory revisions should have no direct paperwork impact on the Commonwealth, local governments and political subdivisions, or the private sector. These regulatory revisions are based on existing Department regulations and simply mirror the existing use protection that is already in place for these streams. There may be some indirect paperwork requirements for new or expanding dischargers to

streams upgraded to HQ or EV. For example, NPDES general permits are not currently available for new or expanded discharges to these streams. Thus an individual permit, and its associated paperwork, would be required. Additionally, paperwork associated with demonstrating social and economic justification (SEJ) may be required for new or expanded discharges to certain HQ Waters, and consideration of nondischarge alternatives is required for all new or expanded discharges to EV and HQ Waters.

F. Pollution Prevention

The water quality standards and antidegradation program are major pollution prevention tools because the objective is to prevent degradation by maintaining and protecting existing water quality and existing uses. Although the antidegradation program does not prohibit new or expanded wastewater discharges, nondischarge alternatives are encouraged, and required when environmentally sound and cost effective. Nondischarge alternatives, when implemented, remove impacts to surface water and reduce the overall level of pollution to the environment by remediation of the effluent through the soil.

G. Sunset Review

These proposed amendments will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

H. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on _____, the Department submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment. In addition to submitting the proposed amendments, IRRC and the Committees have been provided a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for review by the Department, the General Assembly and the Governor prior to final-form publication of the regulations.

I. Public Comments

Written Comments – Interested persons are invited to submit comments, suggestions, or objections regarding the proposed amendments to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments must be received by the Board by _____ (within 45 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be

received by _____. The one page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the proposed amendments will be considered. If sufficient interest is generated as a result of this publication, a public hearing will be scheduled at an appropriate location to receive additional comments.

Electronic Comments – Comments may be submitted electronically to the Board at RegComments@state.pa.us. A subject heading of the proposal and return name and address must be included in each transmission. Comments submitted electronically must also be received by the Board by _____.

BY:

John Hanger
Chairperson
Environmental Quality Board