

PROPOSED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
25 Pa. Code Chapter 93
Stream Redesignations (Sobers Run, et al.)

Preamble

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code §§93.9c, 93.9f, and 93.9i (relating to the Designated Uses and Water Quality Criteria for waterbody segments) as set forth in Annex A. The proposed regulations fulfill the Commonwealth's obligations under state and federal law to review and revise, as necessary, water quality standards that are protective of surface waters.

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

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Rodney Kime, 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 AT&T Relay Service by calling 1-800-654-5984 (TDD-users) or 1-800-654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (Select "Public Participation," then "Environmental Quality Board").

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 (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 the Department. In addition, section 303 of the federal Clean Water Act (33 U.S.C.A. § 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 (BMPs)) 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. The regulatory changes in this proposed rulemaking are the result of stream evaluations conducted by the Department.

The Department 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.

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. 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 the Department determines, based on its evaluation of the best available scientific information, that a surface water attains water uses identified in § 93.3 (relating to protected water uses). 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 adopted as “designated” uses, through rulemaking, and be added to the list of uses identified in § 93.9 (relating to designated water uses and water quality criteria).

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

Stream	County	Petitioner
Swiftwater Creek	Monroe	Brodhead Creek Watershed Association
Sobers Run	Northampton	Bushkill Township
Mill Creek	Berks, Chester	Delaware Riverkeeper Network
Silver Creek	Susquehanna	Silver Lake Association

The regulatory changes in this proposed rulemaking are the result of stream evaluations conducted by the Department in response to 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, 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.

E. Summary of Regulatory Requirements

The Department gave notice, in the Pennsylvania Bulletin and on its website 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 this Commonwealth's Water Quality Standards. Persons who had technical data concerning the water quality, instream habitat or biological conditions of these stream sections were encouraged to make it available to the Department for consideration in the assessment. Potentially affected municipalities were also notified by letter of the stream evaluations and asked to provide any readily available data.

No data were received for Swiftwater Creek. The Department received comments regarding Swiftwater Creek including a notice from Tobyhanna Township stating that they do not support the petition to upgrade Swiftwater Creek. The Department did receive data from Bushkill Township to augment the Department's assessment of Sobers Run. Hanover Engineering Associates submitted the latest (2009) Coldwater Conservation Plan 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 River Keeper Network provided the Department 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 submitted data was used as supporting documentation of the water quality of the Mill Creek basin in conjunction with the findings of the Department's survey. The Department also received two supportive responses from local citizens regarding the redesignation of Mill Creek. The Department did not receive any data regarding Silver Creek. The Department did receive one letter of support for the redesignation of Silver Creek.

The affected municipalities, County Planning Commissions, County Conservation Districts, other State Agencies and petitioners were later notified of the availability of a draft evaluation report for their review and comment. The draft stream evaluation reports were also made available on the Department's website and were offered for an opportunity for a minimum 30-day public review and comment period.

No comments were received in response to this notice for either Swiftwater Creek or Silver Creek. Nine commentators offered their supportive comments for the Department'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 requested an extension of the original 30-day public comment period. In response, the Department provided a 30-day extension to the comment period for the Mill Creek stream report. The Delaware Riverkeeper provided additional comments in support of the EV recommendation and in opposition of the recommendation for the unnamed tributary to Mill Creek at 40°14'33.8"N; 75°43'49.6"W to remain unchanged.

All data and comments received in response to these notifications were considered in the determination of the Department's recommendations to the Board.

Copies of the Department's stream evaluation reports for these waterbodies are available on the Department's web site or from the contacts whose addresses and telephone numbers are listed in Section B of this Preamble. The data and information collected on these waterbodies support the Board's proposed regulation as set forth in Annex A.

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

Swiftwater Creek (stream code 04954) – The Brodhead Creek Watershed Association submitted a petition requesting that the upper portion of Swiftwater Creek be considered for redesignation to EV. The petition describes the candidate portion of Swiftwater Creek basin as that portion that lies upstream of SR 611. This upstream portion of Swiftwater Creek basin flows through Tobyhanna Township, Pocono Township, and Mount Pocono Borough in Monroe County. Swiftwater Creek is in the Brodhead Creek basin which is a tributary to the Delaware River. The indigenous aquatic community is an excellent indicator of long-term water quality conditions and is used as a measure of both water quality and ecological significance. The integrated benthic macroinvertebrate score test described at §93.4b(b)(1)(v) was applied to Swiftwater Creek. Dimmick Meadow Brook (05244) served as the EV reference for stream metrics comparisons. The two stations farthest upstream both met the 92% comparison required to qualify for EV Waters therefore the Department recommends that the Swiftwater Creek basin, from its source to (but not including) UNT 04960 be redesignated as EV, MF. The remainder of the Swiftwater Creek basin should remain HQ-CWF, MF.

Sobers Run (stream code 04646) – Sobers Run basin lies entirely in Bushkill Township, Northampton County. Bushkill Township submitted a petition which requested that the entire Sobers Run basin be redesignated from HQ-CWF, MF to EV. Sobers Run is a tributary to the Bushkill Creek which flows into the Delaware River. Based on applicable regulatory definitions and requirements of §93.4b, the Department recommends that the entire Sobers Run basin be redesignated EV based on §93.4b(b)(2) (exceptional ecological significance). Sobers Run basin qualifies for the exceptional ecological significance criterion based on the presence of endemic plant communities dependent on water quality or hydrology and their rarity in Pennsylvania. This redesignation recommendation includes the surface waters that additionally meet other qualifiers for outstanding local resource waters and the DEP integrated benthic macroinvertebrate scoring test.

Mill Creek (stream codes 01714, 01715, 01716) – Mill Creek is currently designated WWF, MF and it flows through two townships in two different counties. Mill Creek originates in North Coventry Township in Chester County and its mouth lies in Union Township in Berks county where Mill Creek empties into the Schuylkill River. The Schuylkill River is part of the Delaware River watershed. The entire Mill Creek basin was evaluated for potential redesignation to EV in response to a petition submitted by the Delaware Riverkeeper Network. The indigenous aquatic community is an excellent indicator of long-term water quality conditions and is used as a measure of both water quality and ecological significance. The integrated benthic macroinvertebrate score test described at §93.4b(a)(2)(i)(A) and §93.4b(b)(1)(v) was applied to Swiftwater Creek. Metrics scores obtained from stations in the Mill Creek basin were compared

to a reference station located at UNT 64027 to Sixpenny Creek. The reference station was located in Union TWP, Berks County. The macroinvertebrate communities were evaluated at four stations in the Mill Creek basin. Three of the four stations had biological condition scores that ranged from 93–100% of the reference station score. As a result these stations exceeded the threshold of 92% required to qualify for an EV designation under the Department's regulatory criterion. The remaining station was located on stream code 01714 just upstream of the confluence of 01714 and 01715 (i.e. the station with the lowest score was located on the unnamed tributary to Mill Creek just upstream of its mouth. The coordinates of the mouth of unnamed tributary = 40°14'33.8"N; 75°43'49.6"W). The Department recommends that Mill Creek basin excluding the unnamed tributary at 40°14'33.8"N; 75°43'49.6"W should be redesignated to EV, MF. The remaining unnamed tributary at 40°14'33.8"N; 75°43'49.6"W should retain its current designated use of WWF, MF.

Silver Creek (stream code 31879) – Silver Creek flows through Silver Lake, Forest Lake, Bridgewater, Liberty and Franklin Townships in Susquehanna County before it enters Snake Creek. Silver Creek is in the Susquehanna River basin. The Silver Lake Association submitted a petition requesting that portions of Silver Creek basin be redesignated from CWF, MF to EV. The portion of the Silver Creek basin that was excluded from the study is the Laurel Lake Creek basin except McCormick Run, which is a tributary to Laurel Lake Creek. The indigenous aquatic community is an excellent indicator of long-term water quality conditions and is used as a measure of both water quality and ecological significance. The integrated benthic macroinvertebrate score test described at §93.4b(a)(2)(i)(A) and §93.4b(b)(1)(v) was applied to Silver Creek. Department staff collected habitat and benthic macroinvertebrate data at seven locations within the petitioned area and from one reference station on West Branch Fishing Creek (28020), Sullivan County. All stations had Biological Condition Scores that exceeded the threshold to qualify for an EV designation under the Department's regulatory criterion. The Department recommends that the designated use of Silver Creek basin, excluding Laurel Lake Creek basin, but also including McCormick Run basin be changed from the current CWF, MF designated use to EV, MF.

The Board is also proposing to correct two stream names as they appear in §93.9c. The United States Geologic Survey (USGS) 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 being proposed to maintain consistency between the Pennsylvania Code and the NHD Flowline. Saw Kill Creek and Raymond Kill Creek will be respectively corrected to Sawkill Creek and Raymondskill Creek to be consistent with the NHD Flowline.

Finally, the Board is proposing that all reference to river mile indexes (RMIs) that are included in the Annex for this proposed rulemaking are to be converted to a set of coordinates (latitude and longitude), with the eventual goal to be the conversion of all RMIs in the drainage lists (§§ 93.9a to 93.9z) to the coordinate system. Agency 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 you are in the field with a hand-held GPS unit; or using a GIS software application (the DEP standard projected coordinate system is PA_Albers_Equal_Area_Conic; and 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 Chapter 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.

F. Benefits, Costs and Compliance

Benefits

Overall, the Commonwealth, its citizens and natural resources will benefit from these recommended 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, irrigation and industrial use; 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.

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.

The proposed redesignations will be implemented through the Department's permit and approval actions. Persons expanding a discharge or adding a new discharge point to a stream could be adversely affected if they need to provide a higher level of treatment or best management practices to meet the designated and existing uses of the stream. For example, these increased costs may take the form of higher engineering, construction or operating cost for point source discharges. Treatment costs and best management practices are site-specific and depend upon the size of the discharge in relation to the size of the stream and many other factors. It is therefore not possible to precisely predict the actual change in costs. Economic impacts would primarily involve the potential for higher treatment costs for new or expanded discharges to streams that are redesignated. The initial costs resulting from the installation of technologically advanced wastewater treatment processes and best management practices may be offset by potential savings from and increased value of improved water quality through more cost-effective and efficient treatment over time.

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 high water quality and are consistent with antidegradation requirements established by the Federal Clean Water Act (33 U.S.C.A §§1251–1387) and The 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 uses of the stream. These permit conditions are established to assure water quality is protected and maintained. New and expanded dischargers with water quality based effluent limitations are required to provide effluent treatment according to the water quality standards.

Paperwork Requirements

The proposed regulatory revisions should have no new 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 evaluating nondischarge alternatives and non-degrading discharges is required for all new or expanded discharges to EV Waters.

G. Pollution Prevention

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§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. This regulation has 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 implemented 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 by remediation of the effluent through the soil. In addition, if no environmentally sound and cost-effective alternatives are available, discharges must be nondegrading in most circumstances.

H. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on DATE the Department submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of 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 of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

J. Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Board. Comments, suggestions or objections must be received by the Board by **DATE**. In addition to the submission of comments, 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 Board by **DATE**. The one-page summary will be distributed to the Board and available publicly prior to the meeting when the final-form rulemaking will be considered.

Comments including the submission of a one-page summary of comments may be submitted to the Board online, by e-mail, by mail or express mail as follows. If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt. Comments submitted by facsimile will not be accepted.

Comments may be submitted to the Board by accessing eComment at <http://www.ahs.dep.pa.gov/eComment>.

Comments may be submitted to the Board by e-mail at RegComments@pa.gov. A subject heading of the proposed rulemaking and a return name and address must be included in each transmission.

Written comments should be mailed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477. Express mail should be sent to the Environmental Quality Board, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

K. Public Hearings

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.

John Quigley
Chairperson