

# Attachment 3

## Nick Patton

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**From:** MacKnight, Evelyn <MacKnight.Evelyn@epa.gov>  
**Sent:** Wednesday, July 27, 2016 5:45 PM  
**To:** Nick Patton  
**Subject:** FW: EPA comments on DRBC Existing Use Report

Per your request. See message below.

*Evelyn MacKnight*

Associate Director, Office of Standards, Assessment, and TMDLs (3WP30)  
Water Protection Division  
U.S. EPA Region III  
Tel (215) 814-5717  
Fax (215) 814-2318  
[macknight.evelyn@epa.gov](mailto:macknight.evelyn@epa.gov)

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**From:** McFadden, Angela  
**Sent:** Friday, January 15, 2016 12:55 PM  
**To:** Fikslin, Tom <[Tom.Fikslin@drbc.nj.gov](mailto:Tom.Fikslin@drbc.nj.gov)>  
**Cc:** Jackson, Wayne <[Jackson.Wayne@epa.gov](mailto:Jackson.Wayne@epa.gov)>; Keating, Jim <[Keating.Jim@epa.gov](mailto:Keating.Jim@epa.gov)>; Hakowski, Denise <[Hakowski.Denise@epa.gov](mailto:Hakowski.Denise@epa.gov)>; Richardson, William <[Richardson.William@epa.gov](mailto:Richardson.William@epa.gov)>; Lai, Kuo-Liang <[Lai.Kuo-Liang@epa.gov](mailto:Lai.Kuo-Liang@epa.gov)>; Ambrogio, Edward <[Ambrogio.Edward@epa.gov](mailto:Ambrogio.Edward@epa.gov)>; Capacasa, Jon <[Capacasa.jon@epa.gov](mailto:Capacasa.jon@epa.gov)>; MacKnight, Evelyn <[MacKnight.Evelyn@epa.gov](mailto:MacKnight.Evelyn@epa.gov)>; [Erik.Silldorff@drbc.nj.gov](mailto:Erik.Silldorff@drbc.nj.gov); Jensen, Heather N NAP <[Heather.N.Jensen@usace.army.mil](mailto:Heather.N.Jensen@usace.army.mil)>  
**Subject:** EPA comments on DRBC Existing Use Report

Tom,

In response to a request from Heather Jenson of the U.S. Army Corps of Engineers Philadelphia District Planning Division, EPA has prepared formal comments on the September 30, 2015 Delaware River Basin Commission report, "Existing Use Evaluation for Zones 3, 4, & 5 of the Delaware Estuary Based on spawning and Rearing of Resident and Anadromous Fishes".

We also wanted to provide these comments, which were prepared in coordination with EPA's Region 2 office, to DRBC directly. I am providing them to you on behalf of Evelyn MacKnight, who is out of the office today.

EPA's comments are as follows:

- With respect to maintenance and propagation of aquatic life, the report indicates that the full Clean Water Act Section 101(a)(2) use exists in Zones 3, 4, and upper Zone 5 of the Delaware estuary. The report states that, for all nine fish species evaluated, successful reproduction was clearly demonstrated. Demonstration of propagation, even if "weak and inconsistent" and spatially limited, is nonetheless demonstration of this existing use.
- In conducting its evaluation, DRBC considered nine fish species: Atlantic Sturgeon, American Shad, Striped Bass, White Perch, Bay Anchovy, Atlantic Silverside, Alewife, Blueback Herring, and Atlantic Menhaden. This analysis appears to have focused on migratory or semi-migratory fish species. DRBC's evaluation should include resident

Delaware River fish species and freshwater mussel species in Zones 3, 4, 5 (e.g., catfish species, centrarchids, resident cyprinids) for evaluating the extent of propagation of aquatic life in these urban zones.

Page 30 of the report states:

“Many more species of fish were captured and recorded as part of the New Jersey Seine Surveys. Shortnose Sturgeon data, for instance, were too sparse in any data set to assess this endangered fish species within this report. In addition, distribution and abundance data exist for species such as freshwater mussels and benthic invertebrates, but these data sets typically provide little specific information on the question of “successful reproduction”.”

EPA notes that the references cited in the report do not include freshwater mussel survey findings from the Partnership for the Delaware Estuary (PDE), which found both juvenile and adult native mussel species in the estuary during 2012 and 2013 surveys in PDE mussel research (see PDE Report 15-01, “Freshwater Mussel Scientific Research and Community Involvement for Improved Water Quality in the Urban PA Coastal Zone”). In addition, EPA recommends that DRBC review and consider Appendix I of the document “Guidance for Carrying Out Endangered Species Act Section 7 Consultations with NMFS Greater Atlantic Regional Fisheries Office” provided to the U.S. Army Corps of Engineers by the National Marine Fisheries Service. This appendix includes a discussion of the occurrence of Shortnose Sturgeon in the Delaware River.

There may be additional valuable data available for resident fish species from PA Fish and Boat Commission and/or Philadelphia Water Department Office of Watersheds that could indicate resident fish and mussel species are reproducing in these zones. In conducting a use evaluation, it is important to address the most sensitive aquatic life species to which the maintenance and propagation use applies in order to ensure subsequent promulgation of Water Quality Criteria is truly protective of the designated use.

- EPA’s implementing regulations require that Water Quality Standards protect for full fishable swimmable uses unless such uses are demonstrated to be unattainable through a Use Attainability Analysis, effectively creating a rebuttable presumption of attainability.

If there are any questions please don’t hesitate to let us know.

Thank you,

Angela

Angela McFadden  
Regional Technical Advisor - Oil & Gas Sector

U.S. Environmental Protection Agency, Region III  
Water Protection Division  
1650 Arch Street (3WP00)  
Philadelphia, PA 19103-2029

215-814-2324  
215-814-2301 (fax)