

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-528 (IRRC #3140)

Water Quality Standards; Class A Stream Redesignations

May 18, 2016

We submit for your consideration the following comments on the proposed rulemaking published in the March 5, 2016 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Whether the regulation is supported by acceptable data.

As part of our determination of whether a regulation is in the public interest, the Independent Regulatory Review Commission (Commission) must consider whether the regulation is supported by acceptable data. 71 P.S. §§ 745.3, 745.5(a)(14), 745.5b(b)(3)(v) and (b)(7). An agency is required to submit a Regulatory Analysis Form (RAF) which includes:

(14) A description of any data upon which a regulation is based with a detailed explanation of how the data was obtained and why the data is acceptable data. An agency advocating that any data is acceptable data shall have the burden of proving that the data is acceptable.

71 P.S. § 745.5(a)(14). To facilitate review of acceptable data, Regulatory Analysis Form (RAF) Question (28) asks:

If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

In addition to the statutory and RAF requirements, the Commission's regulations require an agency to submit "A completed regulatory analysis form." 1 Pa. Code §§ 305.1(b)(1) and 307.2(c)(1).

The EQB's response to RAF 28 states: "Please see the attached stream evaluation report." The attached report provides a brief summary of 50 stream redesignations representing 207 miles of streams, states the Department of Environmental Protection staff conducted an independent review and provides one biomass estimate for each stream redesignation. The Preamble also states that "Copies of the Department's stream evaluation report for these waterbodies are available on the Department's website or from the contacts whose addresses and phone numbers are listed in Section B of this Preamble."

The amendments in this rulemaking are substantial. They represent 50 stream redesignations, 207 cumulative miles of streams and an unspecified square mileage of property within the drainage area. Clearly, a multitude of data was acquired and reviewed in the development of this rulemaking. However, the supporting data is not described in a way to establish the data meets the standard of acceptable data. Also, one cannot discern the square miles of property affected within the drainage area from the Preamble, RAF or Annex A. We believe the Preamble should better reflect the magnitude of the amendments and the data considered.

We appreciate the public comment in support of redesignating these streams and the benefits of protecting our natural resources. Our concern is that acceptable data was not made directly available and the supporting information does not directly establish acceptable data as required by the Regulatory Review Act. Without direct access to the data and supporting information, the standing committees, public and the Commission are not given a sufficient opportunity to evaluate whether the regulation is supported by acceptable data. In order to meet 71 P.S. §§ 745.5b(b)(3)(v) and (b)(7), 71 P.S. § 745.5(a)(14), RAF (28) and 1 Pa. Code 307.2(c)(1), the final-form regulation submittal should include the information required relating to acceptable data to support that the amendments are in the public interest.

2. RAF (18) Explain how the benefits of the regulation outweigh any cost and adverse effects. – Economic impact.

The response to RAF (18) explains that the benefits of clean water outweigh the cost of treatment technology and best management practices. The response also references responses to RAF (15) and (17). These RAF responses cite multiple benefits that include dollar estimates such as \$3.7 billion annually generated by sport fishing in Pennsylvania between the years 1995 to 1997. While these industry-wide evaluations provide useful information, that is not the question the RAF poses. The question posed is directed at the benefits of the amendments in this regulation. For example, how will this regulation incrementally affect the overall \$3.7 billion sport fishing industry or any of the other benefits presented in the RAF?

In regard to costs, the information presented is vague. The RAF (15) response indicates that the increased protection may result in higher design, engineering, construction and treatment costs, and that there are 11 known pollution control facilities affected. The responses to RAF (19), (20) and (23) do not provide any dollar estimates and state either that the costs cannot be determined because they are site-specific or that there are no costs. The RAF (20) response is inconsistent. It states, "No costs will be imposed directly upon local governments," then states "certain municipalities . . . may be affected," then concludes that the costs would be site-specific. We are concerned that the impact of the redesignations on existing discharges is not sufficiently explained and the costs are not estimated. In addition, the redesignations limit future land uses,

but there is no sufficient explanation or estimation of that impact on current landowners. The RAF asks for a specific estimate of costs associated with compliance with this regulation. Just because costs are site-specific, does not mean there are no costs or that an estimate could not be derived from other projects.

A conclusion that the benefits of this specific regulation outweigh the costs and adverse effects should be based on numbers specific to this regulation. Therefore, we ask the EQB to amend the RAF responses to provide information specific to this regulation. In support of its determination that benefits outweigh any cost and adverse effects, we ask the EQB to provide more thorough and specific explanations of benefits, costs and adverse effects in the RAF submitted with the final-form regulation.

- 3. RAF (22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements. – Economic impact.**

Both the response to RAF (22) and the Preamble's Section F.4. *Paperwork Requirements* explain that some permits and paperwork will be required. However, the response to RAF (22) did not include the detail requested in RAF (22). We ask the EQB to provide a more thorough response to RAF (22) in the final-form regulation submittal.

- 4. RAF (7) Briefly explain the regulation in clear and nontechnical language. – Clarity.**

The first sentence of the second paragraph in this response states, "This proposal modifies Chapter 93 to reflect the recommended redesignation of streams shown on the attached list." We did not find an attachment and are not clear regarding what this response references. The EQB should either include this list with the final-form submittal or amend the response to clarify what document it references.