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Via Electronic Mail and First-Class Mail

Chairman George D. Bedwick
Pennsylvania Independent Regulatory Review Commission
333 Market St, 14th Floor
Harrisburg, PA 17101
irrc@irrc.state.pa.us

Re: Environmental Quality Board Regulation #7-535 (IRRC #3150)
Stream Redesignation – Swiftwater Creek

Dear Chairman Bedwick:

Pocono Manor Investors, LP (“Pocono Manor”) submits the following comments on the Environmental Quality Board’s (“EQB”) Regulation #7-535 (IRRC #3150), which would reclassify the Designated Use of Swiftwater Creek to Exceptional Value (“EV”). The technical basis for Regulation #7-535 is a Stream Redesignation Evaluation Report (the “Report”), dated February 2016, prepared by the Pennsylvania Department of Environmental Protection (“PADEP” or the “Department”). Based on (1) PADEP’s failure to keep us apprised of its evaluation of Swiftwater Creek despite our repeated requests, and (2) our belief that the findings in the Report are not supported by sound science or consistent with PADEP’s regulations and guidance, we request that the Independent Regulatory Review Commission (“IRRC”) defer action on Regulation #7-535 to allow time for Pocono Manor to thoroughly review PADEP’s underlying data and develop additional factual information regarding the proper classification of Swiftwater Creek to present to PADEP, the EQB, and IRRC, as appropriate.

I. BACKGROUND

A. Pocono Manor Investors, LP

Pocono Manor owns and manages Pocono Manor Resort & Spa located at One Manor Drive, Pocono Manor, PA 18349. The Pocono Manor Resort encompasses approximately 3,000 acres and is situated almost entirely within the upper reaches of the Swiftwater Creek basin. It currently includes a hotel, conference facilities, an 18-hole golf course, and residences along with a number of other recreational amenities. The Pocono Manor Resort has been in continuous operation since 1902 and is currently listed on the National Register of Historic Places (ID 97000287). Recently, the Kalahari Resort and Conference Center was constructed on a portion of the Pocono Manor Resort property.

The proposed redesignation of the Swiftwater Creek basin to EV would dramatically alter the regulatory regime applicable to future activities and projects at Pocono Manor and would impose considerable financial hardships on Pocono Manor. The financial hardships would take

Pocono Manor Investors, LP

The Inn at Pocono Manor PO Box 38, Pocono Manor, PA 18349 570.839.0603 Fax: 570.839.1017
www.theinnatpoconomanor.com

the form of increased costs in engineering, construction, and operation associated with any significant onsite redevelopment. For these reasons, it is imperative that PADEP's analysis is thorough, complete, and in full compliance with the stream reclassification criteria in the applicable regulations.

B. History of Designation of Swiftwater Creek

The Swiftwater Creek basin is currently designated High Quality – Cold Water Fishes, Migratory Fishes (“HQ-CWF, MF”). This designation appears to have been made, not on the basis of scientific study or analysis, but simply by a declaration by the Department decades ago. On July 2, 2007, the Brodhead Creek Watershed Association submitted a petition to the EQB requesting that the designated use of the Swiftwater Creek basin, from its source to State Route 611, be reclassified to EV (the “Petition”). The EQB accepted the Petition for further study on October 16, 2007. The Petition represents that Pocono Manor would benefit from the reclassification of Swiftwater Creek, an assertion that is both unsubstantiated and false. Moreover, this assertion appears to have been carried forward and relied upon by PADEP in its Regulatory Analysis Form, which concludes that Pocono Manor would not suffer any specific financial harm as a result of the reclassification of Swiftwater Creek. The statements in the Petition and by PADEP regarding potential benefits were refuted by Pocono Manor early in this process.

PADEP conducted aquatic life use and stream survey work in the Swiftwater Creek basin on May 1, 2008. Nearly eight years later, PADEP issued a report, dated February 2016, recommending that the Swiftwater Creek basin, from its source to UNT 04960, be designated as EV, MF.¹ PADEP did not provide a copy of the Report to Pocono Manor despite our expressed interest in this matter and repeated attempts to obtain this information from PADEP.

C. Legal Framework

PADEP's antidegradation regulations are intended to protect the designated uses of surface waters, which are those uses identified in PADEP's regulations for each water body or segment regardless of whether they are being attained. 25 Pa. Code § 93.1. The most restrictive types of uses are High Quality (“HQ”) and Exceptional Value (“EV”). Facilities discharging to HQ waters may rely upon a social or economic analysis to define applicable discharge requirements, considerations that are not available to facilities discharging to EV waters. 25 Pa. Code § 93.4c(b)(1)(iii). Classifying a stream as EV also has the effect of classifying all wetlands in the floodplain of the stream as EV, and those EV wetlands then are also subject to increased special protection. Projects such as ford crossings, utility line stream crossings, minor and temporary road stream crossings, and new docks and boat ramps in EV streams must all obtain individual state permits, whereas general state permits may be obtained for HQ waters.

¹ See Swiftwater Creek, Water Quality Standards Review, Stream Redesignation Evaluation Report (Feb. 2016), attached to Regulatory Analysis Form at pp. 65-76.

Furthermore, PADEP's regulations prohibit the permitting of non-water dependent projects in EV wetlands. Thus, the consequences of an EV reclassification are significant.

Surface waters may qualify as HQ if they meet either certain chemical or certain biological standards. To qualify *chemically* as HQ, the surface water must have at least 1 year of data that exceeds levels necessary to support the propagation of fish, shellfish and wildlife and recreation in and on the water by exceeding the water quality criteria in 25 Pa. Code § 93.7, Table 3 or otherwise authorized by 25 Pa. Code § 93.8a(b), at least 99% of the time for twelve separate parameters, such as temperature and pH.² 25 Pa. Code § 93.4b(a)(1). To qualify *biologically* as HQ, the surface water must either: (a) achieve an integrated benthic macroinvertebrate score of at least 83% based on Rapid Bioassessment Protocols for Use in Streams and Rivers: Benthic Macroinvertebrates and Fish, Plafkin, et al., (EPA/444/4-89-001), as updated and amended, by comparing the surface water to a reference stream or watershed; or (b) have been designated a Class A wild trout stream by the Fish and Boat Commission following public notice and comment. 25 Pa. Code § 93.4b(a)(2).

A surface water may qualify as EV if it either: (a) is a "surface water of exceptional ecological significance," or (b) meets the requirements of an HQ surface water and at least one of the following:

- (i) The water is located in a National wildlife refuge or a State game propagation and protection area.
- (ii) The water is located in a designated State park natural area or State forest natural area, National natural landmark, Federal or State wild river, Federal wilderness area or National recreational area.
- (iii) The water is an outstanding National, State, regional or local resource water.
- (iv) The water is a surface water of exceptional recreational significance.
- (v) The water achieves a score of at least 92% (or its equivalent) using the methods and procedures described in subsection (a)(2)(i)(A) or (B).
- (vi) The water is designated as a "wilderness trout stream" by the Fish and Boat Commission following public notice and comment.

25 Pa. Code § 93.4b(b) (emphasis added).

² The full list of parameters includes: dissolved oxygen, aluminum, iron, dissolved nickel, dissolved copper, dissolved cadmium, temperature, pH, dissolved arsenic, ammonia nitrogen, dissolved lead, and dissolved zinc. 25 Pa. Code § 93.4b(a)(1).

II. LACK OF SUFFICIENT NOTICE

Pocono Manor submitted timely objections to the Petition by letter to PADEP dated October 4, 2007. The Petition was scheduled for consideration by the EQB on October 16, 2007. We were informed prior to the EQB meeting that only the Petitioners would be able to speak at the meeting. Nevertheless, because of our interest in this matter, I attended the EQB meeting on behalf of Pocono Manor. I, however, was not afforded an opportunity to offer any comments at that meeting despite the fact that the Petitioners described conversations they had with me. In addition, there was no mention made at the meeting that our written objections to the Petition had been sent to the EQB.

By letter dated January 14, 2008, we requested that PADEP provide timely advance notice before any proposed entry on the Pocono Manor Resort property so that we could arrange to have our environmental consultants present during any such visit. In May 2008, Pocono Manor and its consultant, EcolSciences, Inc., accompanied PADEP during its field sampling. After observing PADEP's sampling during the morning of May 1, 2008, the group broke for lunch and agreed to meet at a specific time after lunch at the proposed reference station along Devil's Hole Creek to observe the remaining sampling activities which was to serve as the baseline for Swiftwater Creek. Pocono Manor and EcolSciences arrived at the identified reference station location at the agreed-upon time only to find that PADEP had already completed its sampling at that location. When EcolSciences requested PADEP's sampling results, they were informed that the results would not be made available until PADEP issued its report. PADEP's draft report was not issued until seven years later in 2015, and neither Pocono Manor nor EcolSciences was directly notified of its availability, despite Pocono Manor's consultant's continuous requests for PADEP's reports and data.

PADEP's Report acknowledges that "[t]he majority of the petitioned area is within the privately owned The Inn at Pocono Manor property." See Report at 1. However, since 2008, PADEP failed to provide Pocono Manor with any actual notice of its actions related to the potential reclassification of Swiftwater Creek. On the other hand, the Report indicates that PADEP provided actual written notice of the availability of a draft version of the Report to the Monroe County Planning Commission and Tobyhanna, Pocono, and Paradise Townships. Once the Report was finalized, PADEP made it available to the Petitioner, the municipalities, the County Planning Commissions, the County Conservation Districts and other State Agencies on September 4, 2015 with a public comment period ending 45 days later. Again, PADEP did not notify Pocono Manor when the Report was completed, nor did PADEP provide the Report to Pocono Manor, despite repeated requests to be notified when the Report was completed.

If PADEP had provided us with the sampling results or a draft of the Report, we could have reviewed the findings, supplemented the data or conducted our own studies to determine if the reclassification criteria in Swiftwater Creek were met before the Report was finalized and

presented for approval. Instead, we are left rushing to catch up with the last 5-10 years of PADEP's actions. Nevertheless, in less than two weeks, we have already taken the following steps to properly examine stream conditions: (1) retained a consultant, (2) reviewed the Report and developed some preliminary comments that are summarized in this letter, (3) submitted a Right-to-Know Law request to PADEP seeking all public records associated with the reclassification of Swiftwater Creek, and (4) met with various stakeholders in the region who have an interest in Regulation #7-535. We are committed to participating in the process to fully respond to the Petition in accordance with applicable regulatory requirements and are requesting the opportunity to do so now.

III. PADEP'S STREAM STUDY DID NOT COMPORT WITH GOOD SCIENCE OR PADEP'S POLICY

In light of the inadequate notice provided by PADEP, Pocono Manor would like time for its consultant to fully evaluate the Report and conduct further fact-finding. We are aware that other proposed stream redesignations in the region are currently being reviewed for lack of compliance with PADEP's regulations and guidance on grounds similar to those raised in this letter. Although we have had very limited time to review the Report, Pocono Manor has concluded that PADEP's data set is incomplete and lacks a credible scientific basis for the proposed reclassification of Swiftwater Creek, as set forth below.

A. PADEP Did Not Sample An Adequate Number of Stations

The stations that PADEP relied upon for its proposed redesignation to EV – Stations 1SC and 2IR – are not representative of the segment of Swiftwater Creek proposed to be reclassified. On the basis of PADEP's guidance, Stations 1SC and 2IR are inadequate to serve as the basis for the redesignation of such expansive stretches of the stream. PADEP's Water Quality Antidegradation Implementation Guidance (2003) states that stations should be placed "along the mainstem every 2-3 miles, or at closer intervals if there is a noticeable change in stream flow, instream habitat, or riparian land use/land cover." PADEP has proposed to redesignate approximately 7.69 miles of Swiftwater Creek as EV, relying on data from only two stations over this stretch, equating to a rate of one station for every 3.845 miles. PADEP's guidance requires samples to be collected from least three stations along this stretch. Furthermore, because there are noticeable changes in the riparian land use along the stretches of Swiftwater Creek that PADEP seeks to reclassify as EV (an 18-hole golf course and a dam and drainage pipe located just downstream of PADEP's Station 1SC), PADEP's guidance would require more than three sample stations.

PADEP's guidance also requires stations to be placed in a way that "bracket[s] population centers, reservoirs, nonpoint sources, point sources, land use changes, etc." PADEP acknowledged in the Report that there are multiple permits and authorizations along Swiftwater Creek, but the station locations it selected are not bracketed to account for these features.

Additionally, PADEP only identified one permitted water withdrawal, but Pocono Manor actually has four permitted surface water withdrawals. Again, none of PADEP's sample stations are bracketed to account for these features. In addition, four NPDES permits have been issued for this portion of the basin since PADEP conducted its testing in 2008, but the Report fails to account for all of these NPDES permits. The stations are not bracketed to account for the 18-hole golf course or the historical dam and drainage pipe located downstream of Station 1SC. Instead, PADEP applied Section 1SC's score throughout this entire stretch, through the dam and drainage pipe to a location near Station 3SC, which had produced a very low benthic macroinvertebrate score of 45%, far below the 92% required to qualify as an EV stream.

B. PADEP's Reference Station

Approximately seven months after PADEP sampled Swiftwater Creek and the reference station Devil's Hole Creek on May 1, 2008, PADEP informed Pocono Manor and Ecolsciences that PADEP had decided to use a different reference station located along Dimmick Meadow Brook. Neither Pocono Manor nor Ecolsciences was ever provided the results of sampling at Devil's Hole Creek or an explanation for the change in location. PADEP has not provided data to support its decision not to use Devil's Hole Creek, located only 4 miles from Swiftwater Creek, and to instead use Dimmick Meadow Brook, located 30-40 miles from Swiftwater Creek.

C. PADEP's Sampling Stations And Report, As Well As The Petition, Do Not Account For The Permitted Dam Along Swiftwater Creek

Pocono Manor holds a permit for a dam located on its property along Swiftwater Creek (Permit No. D45-086). This dam is located just downstream of PADEP's sample station 1SC, as indicated in Figure 1 of the Report. By holding water behind the dam, the dam raises the temperature of Swiftwater Creek above and below the dam and acts as a barrier to the migration of aquatic life. In fact, Manor Sports (and its predecessor), which has operated a shooting and fishing concession on the Pocono Manor Resort property for years, has continually had to stock fish upstream of the dam because the stream does not support a natural habitat. This suggests that the existing dam may have an effect on the biota in Swiftwater Creek, which is unaccounted for in the Report.

IV. CONCLUSION

For the reasons set forth above, Pocono Manor requests that IRRC defer action on Environmental Quality Board Regulation #7-535 (IRRC #3150) to allow Pocono Manor an opportunity over the next six months to thoroughly review the Report and related data, and to conduct its own studies should that be necessary to properly assess water quality in Swiftwater Creek to determine if it meets the criteria for reclassification to EV waters.

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We look forward to the opportunity to appear at the upcoming public hearing scheduled for November 16, 2017 to elaborate on the information set forth in this letter as part of our testimony in opposition to Environmental Quality Board Regulation #7-535 (IRRC #3150).

Thank you for your consideration of this information.

Respectfully submitted,



James M. Cahill, PLS, PP
Managing Partner
Pocono Manor Investors, LP

cc: Patrick McDonnell, PADEP Secretary
The Honorable Senator Gene Yaw, Chair, PA Senate Environmental Resources and Energy Committee
The Honorable Senator John Yudichak, Minority Chair, PA Senate Environmental Resources and Energy Committee
The Honorable Representative John Maher, Chair, PA House of Representatives Environment Resource and Energy Committee
The Honorable Representative Mike Carroll, Minority Chair, PA House of Representatives Environment Resource and Energy Committee
Annie Lamberton, Supervisor, Tobyhanna Township
George Ewald, Supervisor, Tunkhannock Township
William Pipolo, Jr., Supervisor, Barrett Township
Steve Pine, Director of Development, Kalahari Resort and Conference Center
David W. Moyer, President, Papillon & Moyer
Karl M. Weiler, Chairman, Weiler Corp.
Nick Igdalsky, CEO, Pocono Raceway