

May 12, 2004

Ron Horansky, Watershed Manager
Pennsylvania Department of Environmental Protection
Greensburg District Mining Office
Armbrust Professional Center
R.D. 2, P.O. Box 603-C
Greensburg, PA 15601

**Re: Draft "Brush Creek Watershed TMDL"
34 Pa. Bull. 1518 (March 13, 2004)**

Dear Mr. Horansky:

Citizens for Pennsylvania's Future (PennFuture) submits the following comments on the Draft Total Maximum Daily Load (TMDL) for the Brush Creek Watershed in Westmoreland County.

1. Pipes are point sources, and discharges from pipes are point source discharges.

The Brush Creek Watershed TMDL is being prepared to satisfy requirements under Section 303(d) of the federal Clean Water Act, 33 U.S.C. § 1313(d). The Clean Water Act makes it clear that a pipe constitutes a "point source" as that term is used in the Act. Section 502(14) of Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14)(emphasis added). The "Coal Run discharges" flow from two pipes (point sources) through a culvert (also a point source) into Coal Run. The "Irwin discharges" flow from two pipes (point sources) into Tinkers Run. Thus, the Coal Run and Irwin discharges are point source discharges within the meaning of the Clean Water Act.

Like all Pennsylvania mine drainage TMDLs, however, the draft Brush Creek TMDL attempts to redefine the term "point source" as a source of a contaminant discharge for which there is a current NPDES permit, or for which there otherwise is a responsible party. Nothing in Section 303(d) of the Clean Water Act, however, suggests that the term "point source" takes on a different meaning for TMDL purposes than the definition supplied in Section 502(14). Under that definition, a discharge of contaminants into the waters of the United States from a pipe constitutes a point source discharge.

Even if the Clean Water Act did make the presence or absence of a responsible party the determinative factor, however, the Irwin discharges still would constitute point source discharges. Whoever owns and controls the "Glass Plant" depicted on page 7 of the draft TMDL report presumably owns, controls, and maintains the sump under the plant and the two pipes emanating from the plant that discharge the AMD into Tinkers Run. The plant owner therefore is

responsible for treatment of the discharges under Section 316 of The Clean Streams Law, 35 P.S. § 691.316. DEP (then DER) has in the past required the treatment of mine drainage from off-site abandoned mines in remarkably similar circumstances. See The Carbon/Graphite Group, Inc. v. DER, 1991 EHB 234 (Section 316 authorized DER to require plant owner to treat mine drainage that flowed onto and beneath plant property from off-site abandoned mines and entered plant's storm drain system and furnace basements). Similarly, any person who constructed or installed the pipes from which the Coal Run discharges emanate, or the successors in interest to those person(s), might be responsible for treating those discharges. See 33 U.S.C. §§ 1311(a), (g)(2), 1342(a), (b), 1362(14); 35 P.S. §§ 691.307(a), 691.315(a), 691.316; 25 Pa. Code § 92.3. See also Commonwealth v. Barnes & Tucker Co., 371 A.2d 461 (Pa. 1977). DEP should conduct an exhaustive search for potentially responsible parties before characterizing these mine drainage sources as "abandoned."

2. Applicable Water Quality Criteria

In other mine drainage TMDLs, DEP properly identifies the instream water quality criterion for dissolved iron (0.3 mg/l as an instantaneous maximum) as one of the applicable water quality criteria. The draft Brush Creek Watershed TMDL improperly omits this criterion without offering any explanation for its inconsistency on this score with other mine drainage TMDLs.

In its response to comments submitted on other TMDLs, DEP has asserted that the water quality criterion for total iron (1.5 mg/l as a 30-day average) is more conservative than the instantaneous maximum criterion for dissolved iron. In general, however, an instantaneous maximum criterion is more conservative (less forgiving) than a monthly average criterion because with an instantaneous maximum criterion, above-average readings cannot be canceled out by below-average readings. (For a given stream, would you rather bet that that the monthly average total iron concentration is less than or equal to 1.5 mg/l for 99% of the months, or that the dissolved iron concentration is less than or equal to 0.3 mg/l for 99% of the grab samples?) The water quality criterion for dissolved iron is applicable, and the TMDL should ensure that it is satisfied at least 99% of the time in all stream segments in the Brush Creek watershed.

DEP also has in the past cited data limitations as a reason for not modeling the dissolved iron instream criterion when preparing a TMDL for a stream impaired by mine drainage. But at least in the situation where the agency conducts a limited number of rounds of sampling for the express purpose of preparing a TMDL, as appears to be the case here, the samples easily could be analyzed for both dissolved and total iron. Future monitoring for the purpose of developing TMDLs for watersheds impaired by mine drainage should include both dissolved and total iron, and future TMDLs in such watershed should address both of the applicable instream criteria for iron.

3. Normality of Log-Transformed Data

The draft TMDL states: “For each source and pollutant, it was assumed that the observed data were log-normally distributed.” (p. 8) Why assume that fact instead of determining whether the log-transformed data are normally distributed? Particularly if normal distribution of the data is important for proper functioning of the “@Risk” Monte Carlo simulation, this characteristic should be verified rather than assumed.

Please feel free to contact me at 717-214-7920 if you would like to discuss PennFuture’s comments.

Sincerely,

Kurt J. Weist
Senior Attorney
Harrisburg Office