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By Federal Express and Email

Tony Shaw
Division of Water Quality Standards
Bureau of Water Standards and Facility Regulation
P.O. Box 8467
Harrisburg, PA 17105-8467
tshaw@state.pa.us

**Re: Petition to Redesignate Tributaries to South Fork Tenmile Creek
(Greene County)**

Dear Mr. Shaw:

On behalf of local and statewide organizations (Center for Coalfield Justice (CCJ), Citizens for Pennsylvania's Future (PennFuture), Clean Water Action, Friends of Dunkard Creek, Greene County Watershed Alliance, Izaak Walton League, Mountain Watershed Association (MWA), and Wheeling Creek Watershed Conservancy), local government agencies (Morgan Township, Morris Township, Waynesburg Borough, and West Greene School District), and local businesses (Cornerstone Care, Forever Greene House, Hopkins Store, Red Barn Farm, Rush Funeral Home Inc., Rush Grocery & Video, and White Buck Farm), I respectfully submit the following comments and enclosed reports for your consideration in connection with your evaluation of the above-referenced petition.

Introduction

On June 9, 2008, Foundation Mining, L.P. (Foundation), submitted a rulemaking petition (Petition) to the Commonwealth of Pennsylvania Environmental Quality Board (EQB) seeking to redesignate tributaries to South Fork Tenmile Creek in Greene County (including House Run, Hoge Run, and McCourtney Run), from their current designation of High Quality – Warm Water Fishes (HQ-WWF), as identified in 25 Pa. Code § 93.9v, to Warm Water Fishes (WWF). On August 19, 2008, the EQB accepted the Petition for study under 25 Pa. Code Chapter 23. On November 1, 2008, the Commonwealth of Pennsylvania Department of Environmental Protection (DEP) gave notice of its intention to conduct an evaluation of the streams at issue in the Petition, described by DEP as “McCourtney Run -- Basin, source to confluence with Hargus Creek (excluding the Garner Run subbasin)” (hereinafter referred to as the Petition Area) and invited persons who have technical data concerning the water quality, instream habitat or biological condition of the

Petition Area to make it available to DEP for consideration in its assessment. 38 Pa.B. 6120.

CCJ, MWA and PennFuture retained Dr. Ben M. Stout III, Ph.D., to collect the technical data requested by DEP and to prepare the enclosed report, entitled "Stream Conditions in South Fork Tenmile Creek Watershed, Greene County, Pennsylvania" (hereinafter, the Stout Report), for DEP to consider in connection with its study. CCJ, MWA and PennFuture also retained Schmid & Company, Inc., *Consulting Ecologists*, to review and comment on the Petition (and on the Stout Report) and to prepare the enclosed report, entitled "Review of a Petition to Redesignate Tributaries to South Fork Tenmile Creek from HQ-WWF to WWF" (hereinafter the Schmid & Company Report), for DEP to consider in connection with its study. The Stout Report and the Schmid & Company Report (together, the Reports) demonstrate that it would be contrary to law to redesignate the Petition Area from HQ-WWF to WWF. The organizations, government agencies and businesses therefore respectfully request that DEP not recommend to the EQB the regulatory amendment requested in the Petition. Further, because the Stout Report indicates that segments of streams in the Petition Area have attained an existing use of Exceptional Value (EV), the organizations, government agencies and businesses also respectfully request that DEP provide existing use protection to those segments and any other stream segments in the Petition Area that DEP's evaluation of information indicate have attained an existing use of EV.

Standard for Redesignating to a Less Restrictive Use

It is important to recognize that the standard for redesignating to a less restrictive use is different, and indeed more exacting, than the standard for redesignating to a more restrictive use. Under both federal and state law, less restrictive uses than designated uses may be adopted only when it is demonstrated that:

- (1) The designated use is more restrictive than the existing use; **AND**
- (2) The use cannot be attained by implementing effluent limits required under sections 301(b) and 306 of the Federal Clean Water Act (33 U.S.C.A. §§ 1311(b) and 1316) or implementing cost-effective and reasonable best management practices (BMPs) for nonpoint source control; **AND**
- (3) One or more of the following conditions exist:
 - a. Naturally occurring pollutant concentrations (natural quality) prevent the attainment of the use.
 - b. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met.
 - c. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.

- d. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate the modification in a way that would result in the attainment of the use.
- e. Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life uses.
- f. Controls more stringent than those required by sections 301(b) and 306 of the Federal Clean Water Act would result in substantial and widespread economic and social impact.

See 40 C.F.R. § 131.10(g); 25 Pa. Code §§ 93.4(b), (c). Therefore, at a minimum, all three of these conditions must be satisfied before the Petition Area may be redesignated from HQ-WWF to WWF. As the Reports demonstrate, all three of these conditions have not, and indeed cannot, be met for the streams in the Petition Area.

The designated use of the Petition Area is not more restrictive than its existing use

Existing uses are those uses actually attained in a water body on or after November 28, 1975, whether or not they are included in the water quality standards. See 40 C.F.R. § 131.3(g); 25 Pa. Code § 93.1.

Using DEP-approved biological assessment methods and procedures,¹ Dr. Stout collected samples at six sites in streams in the Petition Area and two sites in Exceptional Value reference streams. (Stout Report, p. 4.) The water at five of the six sites in streams in the Petition Area achieved an integrated benthic macroinvertebrate score of at least 83% when compared with simultaneous sampling at a nearby EV reference stream previously studied by DEP. (Stout Report, p. 11.) Those streams therefore qualify as High Quality (HQ) Waters. 25 Pa. Code § 93.4b(a)(2)(i)(A). Because an HQ use presently is being attained in the streams in the Petition Area, the existing use of these streams is HQ. See 40 C.F.R. § 131.3(g); 25 Pa. Code § 93.1.

The results of the sampling conducted by Dr. Stout comport with the results of historical sampling conducted by DEP in streams in and near the Petition Area. Schmid & Company reported that DEP assessment data collected on or after November 28, 1975, document that streams in and near the Petition Area have consistently attained the designated use of HQ-WWF. (Schmid & Company Report, pp. 7-8.) These historical data also support that the existing use of these streams is HQ. See 40 C.F.R. § 131.3(g); 25 Pa. Code § 93.1.

¹ The Reports detail the ways in which Foundation's biological assessment methods and procedures depart from DEP-approved biological assessment methods and procedures (Stout Report, p. 13; Schmid & Company Report, pp. 13-14), which may help to explain why Foundation's findings and conclusions diverge so significantly from the findings and conclusions set forth in the Reports.

Therefore, the designated use of these streams, HQ-WWF, is not more restrictive than the existing use of these streams as reported for three decades. On that basis, it would be contrary to law to redesignate these streams from HQ-WWF to WWF (i.e., to adopt a less restrictive use (WWF) than the designated use (HQ-WWF)). See 40 C.F.R. § 131.10(g); 25 Pa. Code §§ 93.4(b), (c).

The HQ designated use of any segments of streams in the Petition Area that are not currently attaining the use of HQ can be attained by implementing cost-effective and reasonable BMPs for nonpoint source control

The water at one of the six sites that Dr. Stout sampled -- Site 4 -- did not achieve an integrated benthic macroinvertebrate score of at least 83% (Stout Report, p. 11) and thus does not currently attain the use of HQ. DEP nevertheless should determine that the historical data support that the existing use of the segment of the stream located at Site 4 is HQ, for the reasons explained in the previous section.² DEP should make that same determination based on historic data for any other segments of streams in the Petition Area that may not currently be attaining the use of HQ. Even if DEP does not, however, redesignation of such segments would be contrary to law.

Dr. Stout observed that Site 4 is “downstream of, and suffers from the consequences of, poor land management in terms of in-stream cattle feedlots and lack of best management practices in riparian corridors.” (Stout Report, p. 14.) Dr. Stout noted, however, that “we did capture 8 different taxa at Site 4 with pollution tolerance of zero or 1.” Id. Dr. Stout concluded that “the existence of these taxa at Site 4 indicates rapid recolonization potential following implementation of [BMPs].” Id. Based on this conclusion, Dr. Stout opined that “if other stream sites in the South Fork Tenmile Creek watershed are also degraded, then the source of degradation is not permanent and could be rectified using better land management practices.” Id.

Schmid & Company agreed with this opinion. It observed that Foundation and Dr. Stout obtained their “lowest assessment scores in areas near active pastures and adjacent to residential and commercial uses.” (Schmid & Company Report, p. 8.) Schmid & Company noted, however, that “[i]mprovements in water quality were observed by the Petitioner. . . where land management practices were better, even over a relatively short distance” Id. Based on this observation, Schmid & Company concluded that

[i]f conditions in the lower sections of House Run and McCourtney Run do not meet the 83% minimum needed to qualify as HQ currently, there is every reason to believe that the implementation of simple, cost-effective BMPs and other institutional and legal controls would improve water quality.

(Schmid & Company Report, p. 8.) Schmid & Company even identified some of the opportunities that exist within the Petition Area to implement such BMPs and some of the

² We note that Site 4 is in close geographical proximity to a location sampled by DEP in 2001 (designated in the Schmid & Company Report as “M” on Table 1 and Figure 11), which DEP found was “not impaired” based on its sampling results at that time. (Schmid & Company Report, p.7.)

local and regional plans, programs and funding opportunities that are in place to promote their implementation. (Schmid & Company Report, pp. 8-9.)

DEP should be well aware of the significant impacts that implementation of such BMPs can have on water quality. See, e.g., Manatawny Creek and Tributary (http://www.epa.gov/nps/success/state/pa_man.htm), Stephen Foster Lake (http://www.epa.gov/nps/success/state/pa_sflake.htm), and Swatara Creek (http://www.epa.gov/nps/success/state/pa_swatara.htm). Segments of streams in the Petition Area not currently attaining their HQ designation likely would attain HQ if some or all of the opportunities identified in the Reports were pursued. Therefore, it would be contrary to law to redesignate from HQ-WWF to WWF even those segments of streams in the Petition Area that may not currently be attaining their HQ designation. See 40 C.F.R. § 131.10(g); 25 Pa. Code § 93.4(b).

At least one of the conditions set forth at 25 Pa. Code § 93.4(b)(1) – (6) must also exist in order to redesignate the Petition Area from HQ-WWF to WWF

Even if it were determined that the designated use of the Petition Area is more restrictive than its existing use and that the designated use cannot be attained by implementing cost-effective and reasonable BMPs for nonpoint source control, at least one of the conditions set forth at 25 Pa. Code § 93.4(b)(1) – (6) must also exist in order to redesignate the Petition Area from HQ-WWF to WWF. Unless it can be demonstrated that at least one of these conditions exists, it would be contrary to law to redesignate the Petition Area from HQ-WWF to WWF. See 40 C.F.R. § 131.10(g); 25 Pa. Code § 93.4(b). Foundation has made no such demonstration.

DEP should provide existing use protection to any stream segments in the Petition Area that DEP's evaluation of information confirms have attained an existing use of EV

The water at three of the six sites in streams at which Dr. Stout collected samples achieved an integrated benthic macroinvertebrate score of at least 92% when compared with the water sampled at a site identified by DEP as an exceptional value reference stream site. (Stout Report, p. 11.) The water at four of the six sites achieved an integrated benthic macroinvertebrate score of at least 92% when compared with the water sampled in the exceptional value reference stream at a site upstream from the identified exceptional value reference stream site. Id. Those segments of streams therefore qualify as EV Waters. 25 Pa. Code § 93.4b(b)(1)(v). Because an EV use presently is being attained in these segments of streams, the existing use of these segments of streams is EV. See 40 C.F.R. § 131.3(g); 25 Pa. Code § 93.1. DEP should therefore provide existing use protection to these segments of streams if its own evaluation of information is consistent with the information collected by Dr. Stout.³ 25 Pa. Code § 93.4c(a)(1)(i).

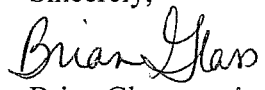
³ The recent additions by DEP of several streams in the Petition Area to its existing use list (see http://www.depweb.state.pa.us/watersupply/lib/watersupply/existing_use/eu_table_list.pdf, [http://www.depweb.state.pa.us/watersupply/lib/watersupply/existing_use/co30\(greene\).pdf](http://www.depweb.state.pa.us/watersupply/lib/watersupply/existing_use/co30(greene).pdf), and attachment), which identifies the existing use of these streams as EV, indicates that DEP's evaluation of

Conclusion

For all of these reasons, it would be contrary to law to redesignate the Petition Area from HQ-WWF to WWF. The organizations, government agencies and businesses therefore respectfully request that DEP not recommend to the EQB the regulatory amendment requested in the Petition. The organizations, government agencies and businesses further respectfully request that DEP provide existing use protection to any stream segments in the Petition Area that DEP's evaluation of information confirms have attained an existing use of EV.

Thank you for your consideration of these comments and the enclosed reports. If you have any questions regarding this letter, please feel free to contact me at (215) 545-9694 or glass@pennfuture.org. If you have any questions regarding the enclosed reports, please feel free to contact the authors directly.

Sincerely,


Brian Glass *mk*
Staff Attorney

Attachment
Enclosures

cc (by U.S. Mail):

- Pennsylvania Environmental Quality Board
- John Hanger, Secretary, DEP
- John Hines, Deputy Secretary, Water Management, DEP
- Dana Aunkst, Director, Bureau of Water Standards and Facility Regulation, DEP
- Glenn Rider, Director, Bureau of Watershed Management, DEP
- Michelle Moses, Regulatory Counsel, DEP
- Greene County Conservation District
- Representative Bill DeWeese
- Krissy Kasserman, Mountain Watershed Association
- Terri Davin, Center for Coalfield Justice
- Joylette Portlock, Ph.D., Citizens for Pennsylvania's Future

information is largely consistent with the information collected by Dr. Stout. (The existing use list was updated to include these additions only after Dr. Stout and Schmid & Company, Inc., finalized their reports, which is why they are not discussed in those reports.) If it has not already done so, DEP should independently assess any streams that it did not add to its existing use list that the information collected by Dr. Stout indicates qualify as EV Waters to determine whether such streams also should be added to the existing use list. DEP should also consider changing the designated use of these streams to match their existing use the next time it compiles the existing use list into a rulemaking action taken before the EQB.