



CHESAPEAKE BAY FOUNDATION  
*Saving a National Treasure*

February 25, 2013

**By Electronic and First Class Mail**

The Honorable Shawn Garvin, Regional Administrator  
USEPA Region 3  
1650 Arch Street  
Mail Code: 3RA00  
Philadelphia, PA 19103-2029

**Re: Pennsylvania 2012 Integrated Water Quality Monitoring and Assessment Report; Lower Susquehanna River Smallmouth Bass**

Dear Administrator Garvin:

In 2011, American Rivers, the Chesapeake Bay Foundation, PennFuture, and the Pennsylvania Chapter of Trout Unlimited cosigned a data submittal letter and petition by the Pennsylvania Fish and Boat Commission (PFBC) to include 98 miles of the Susquehanna River, from the Adam T. Bower Memorial Dam in Sunbury, PA to the Holtwood Dam near Holtwood, PA to be listed as impaired pursuant to section 303(d) of the Federal Clean Water Act, 33 U.S.C.A. §1313(d). In 2012, the Pennsylvania Department of Environment (DEP) released a Draft 2012 Pennsylvania Integrated Water Quality Monitoring and Assessment Report, Clean Water Act Section 305(b) Report and 303(d) List which did not include the petitioned section of the River. American Rivers, the Chesapeake Bay Foundation (CBF), and PennFuture provided comments and data to Pennsylvania Department of Environment (DEP) concerning the DEP's Draft Report. Those comments recommended reconsideration of DEP's decision. Since those comments were submitted, DEP has finalized the 2012 report (Final Report). Unfortunately, DEP did not identify the Susquehanna River in the Final Report. We write to request the U.S. Environmental Protection Agency (EPA) approve conditionally or partially disapprove the DEP's Final Report and that the 98 mile section of the River be included in an approved Final Report.

Collectively, American Rivers and CBF represent national, regional and state perspectives emphasizing the importance of the Susquehanna River's health to Pennsylvania and the Chesapeake Bay, and our national values for clean water.

American Rivers is the leading national organization working to protect and restore the nation's rivers and streams which connect us to each other, nature and future generations. With headquarters in Washington, DC, and offices across the nation, including three in Pennsylvania, American Rivers works to preserve these connections.

CBF is the largest non-profit organization dedicated to restoring the Chesapeake Bay, and represents more than 200,000 members nationwide and has an office in Harrisburg, PA. CBF is active in federal, state and local legislative and regulatory arenas, and employ scientists, land planners, attorneys, educators, policy and technical experts to advocate on behalf of the nation's largest estuary and a vital economic and ecological region.

By not listing the Susquehanna River as impaired, the Final Report violates the letter and the spirit of federal and state law. First, the Clean Water Act requires that each State identify those waters within its boundaries for which the effluent limitations required for point sources and public treatment works are not stringent enough to implement any water quality standard applicable to such waters. 33 U.S.C.A. § 1313(d)(1)(A). *See also* 40 C.F.R. § 130.10(d)(6). The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Act also requires that each state submit a bi-annual report to the Administrator of EPA. 33 U.S.C.A. § 1315. The report must, among other things, describe the water quality of all navigable waters of the State, an analysis of the extent to which all such waters provide for the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water. *Id.* at (b)(1)(A) and (B) (emphasis added). DEP recognizes these obligations in the Preface of the Final Report on its website.<sup>1</sup> Unfortunately, DEP failed to comply with those obligations.

Second, the reporting requirements under Sections 303(d) and 305(b) are not merely record keeping devices but help EPA determine where to focus its grant funds to the states. 40 C.F.R. § 130.0(f). Moreover, the biennial report helps the development of water quality management plans to address the problems identified in the report. 40 C.F.R. § 130.8(a). Thus, DEP's failure to list the Susquehanna River as impaired or to identify it as not attaining water quality standards for fish and aquatic life harms the State's ability to receive funds and limits the State's ability to develop plans designed to address these problems.

Third, federal law requires that the state assemble and evaluate all existing and readily available water quality-related data and information to develop the lists required by Sections 303(d) and 305(b). 40 C.F.R. § 130.7(5). Further, once a water body is identified as impaired the State must develop Total Maximum Daily Loads (TMDLs) and water quality-based effluent limitations (WQBELs) for the water body. 40 C.F.R. § 130.7(c). Pennsylvania law recognizes these federal obligations. 25 Pa. Code § 96.4(c) provides that "TMDLs and WQBELs shall be developed to meet the requirements of § 96.3." In turn, 25 Pa. Code § 96.3 provides that:

the water quality criteria described in Chapter 93 (relating to water quality standards), including the criteria in §§ 93.7 and 93.8a(b) (relating to specific water quality criteria; and toxic substances) shall be achieved in all surface waters at least 99% of the time, unless otherwise specified in this title

and

[t]he general water quality criteria in § 93.6 (relating to general water quality criteria) shall be achieved in surface waters at all times at design conditions.

25 Pa. Code § 96.3(c). Because, as explained in greater detail below, the data that PFBC submitted on August 31, 2011 to DEP demonstrate that a 98 mile stretch of the River is not meeting the requirements set forth in 25 Pa. Code § 96.3(c), DEP must list this section of the River as "impaired" and schedule the development of a TMDL and WQBELs for the River. DEP has neglected to take the first essential step in this process by omitting the River from the 303(d) list.

---

<sup>1</sup>[http://www.portal.state.pa.us/portal/server.pt/community/water\\_quality\\_standards/10556/integrated\\_water\\_quality\\_report\\_-\\_2012/1127203](http://www.portal.state.pa.us/portal/server.pt/community/water_quality_standards/10556/integrated_water_quality_report_-_2012/1127203)

## General Water Quality Criteria and Fishing Use

25 Pa. Code § 93.6(a) sets forth general water quality criteria and provides that:

Water may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.

The data that was submitted on August 31, 2011 to DEP clearly demonstrates that these criteria are not being achieved in the River “at all times” as required by 25 Pa. Code § 96.3(c).

25 Pa. Code § 93.4(a) identifies the statewide water uses that “apply to all surface waters” and that “shall be protected in accordance with [Chapter 93], Chapter 96 (relating to water quality standards implementation) and other applicable State and Federal<sup>2</sup> laws and regulations.” Among these uses is Fishing (F). See 25 Pa. Code § 93.4(a), Table 2. The data that we submitted on August 31, 2011, also clearly demonstrates that this use is not being protected in the Susquehanna River.

The data submission shows the prevalence of disease among young-of-year (YOY) smallmouth bass *Micropterusdolomieu* since 2005 at different reaches of the Susquehanna River. The data also shows the declining catch rates of YOY smallmouth bass *Micropterusdolomieu*at for the middle (Sunbury to York Haven Dam) and lower (York Haven Dam to Holtwood Dam) Susquehanna River. Additionally, the data at Figures 4 and 5 show the declining catch rates of adult smallmouth bass *Micropterusdolomieu*at for the middle (Sunbury to York Haven Dam) and lower (York Haven Dam to Holtwood Dam) Susquehanna River. Based on this data and concerns for a collapse of this economically important fishery, the PFBC imposed certain catch-and-immediate release requirements and closed seasons for bass during the spring spawning period within the Susquehanna River, which constitutes additional data showing that the Fishing use is not being protected in the river.

The requirements of 25 Pa. Code § 96.3 are not being met in the Susquehanna River because the general water quality criteria in § 93.6 are not being achieved “at all times,” and because the Fishing use is not being protected. As a result, DEP must develop a TMDL and WQBELs under 25 Pa. Code § 96.4, and it must begin that process by listing the River as impaired.

## Specific Water Quality Criterion for pH

EPA regulations require that States, Territories, and authorized Tribes assemble all existing and readily available data and information to develop a list of impaired or threatened waterbodies. 40 C.F.R. § 130.22.<sup>3</sup> To facilitate the collection and assessment of submitted data, DEP guidance describes the minimal data requirements necessary for consideration.<sup>4</sup>

---

<sup>2</sup>40 C.F.R. § 130.7(b)(3) provides that for purposes of listing waters, the term “water quality standard applicable to such waters” and “applicable water quality standards” refer to those water quality standards established under section 303 of the [Clean Water] Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.

<sup>3</sup> EPA guidance regarding “Total Maximum Daily Loads (303d) includes as examples of existing and readily available data and information to be considered for § 303(d) listing decisions: (1) “Waterbodies where fishing or shellfish bans and/or advisories are currently in effect or are anticipated and waterbodies where there have been repeated fish kills or where abnormalities (cancers, lesions, tumors, etc.) have been observed in fish or other aquatic

In a letter from DEP Secretary Krancer to PFBC Director John Arway dated April 16, 2012 (the April 16 letter)<sup>5</sup>, the DEP states, without explanation as to the quality of the PFBC data, that “the water quality data collected so far for . . . pH does not indicate a 303(d) listing is factually or legally warranted.” We respectfully disagree.

The segment of the Susquehanna River that is the subject of our listing request has a designated use of Warm Water Fishes (WWF). 25 Pa. Code § 93.9h. The specific water quality criterion for pH associated with that critical use is “from 6.0 to 9.0 inclusive.” 25 Pa. Code § 93.7(a), Table 3. The data from the August 31, 2011 submission show that this criterion is not being achieved in the River “at least 99% of the time,” as required by 25 Pa. Code § 96.3(c).

Because the data indicates that the requirements of 25 Pa. Code § 96.3 are not being met in the Susquehanna River insofar as the water quality criterion for pH at § 93.7 is not being achieved “at least 99% of the time,” the DEP must develop a TMDL and WQBELs under 25 Pa. Code § 96.4 and should list the River as impaired with the cause of pH to begin that process.

In the April 16 letter to PFBC, DEP suggested that the section of the River in question should not be listed for pH because a Pennsylvania’s “Interagency Workgroup” consisting of DEP, USGS, and PFBC members did not recommend that the 98 mile section of the River be listed as impaired for pH. Because we understand that the Interagency Workgroup was not charged with making such a recommendation and did not address the question of whether the River should be listed as impaired, in this case or on other impairment listing decisions, we do not believe that this omission should have any bearing on whether or not the River was or is listed.

The April 16 letter also states that “[s]ince we do not know what the stressor to the fish is at this point there is nothing to appropriately or with factual support impair the river for.” DEP, however, has included thousands of stream miles on the 303(d) list for which it has identified the “cause” or “source” of impairment as “unknown.” *See, e.g.*, 2010 Pennsylvania Integrated Water Quality Monitoring and Assessment Report, at 38, Table 3 (“Source Unknown”) and 40, Table 4 (“Cause Unknown”). Presumably, in these instances DEP studies the waterbodies after listing them to determine the cause or source of impairment and then develops a TMDL based on its findings. Indeed, DEP has developed numerous TMDLs over the years for waterbodies for which the cause or source of impairment was unknown at the time of listing. *See* 2010 Pennsylvania Integrated Water Quality Monitoring and Assessment Report - Streams, Category 4a (Waterbodies with Approved TMDLs).

The April 16 letter also suggests that the river will be studied with great rigor regardless of whether or not it is listed. While we appreciate DEP’s willingness to study the River even in the absence of a listing, the listing of a waterbody does more than just ensure that the waterbody is studied; the

---

life during the last 10 years”; and (2) “Waterbodies where there are restrictions on water sports or recreational contact.” <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/TMDL-ch2.cfm#Chap2.2> (Table 2-1).

<sup>4</sup>[http://files.dep.state.pa.us/Water/Drinking%20Water%20and%20Facility%20Regulation/WaterQualityPortalFiles/2012%20Integrated%20List/AppendixC\\_InfoSheet\\_2012.pdf](http://files.dep.state.pa.us/Water/Drinking%20Water%20and%20Facility%20Regulation/WaterQualityPortalFiles/2012%20Integrated%20List/AppendixC_InfoSheet_2012.pdf);  
[http://www.portal.state.pa.us/portal/server.pt/community/water\\_quality\\_standards/10556/2009\\_assessment\\_methodology/666876](http://www.portal.state.pa.us/portal/server.pt/community/water_quality_standards/10556/2009_assessment_methodology/666876)

<sup>5</sup>[http://www.pennfuture.org/UserFiles/Daze/20120416\\_Letter\\_DEPFBC\\_SusqSmallmouthBass.pdf](http://www.pennfuture.org/UserFiles/Daze/20120416_Letter_DEPFBC_SusqSmallmouthBass.pdf)

listing places the waterbody in the queue for a TMDL and which is a necessary precursor to actually addressing an impairment.

Finally, the April 16 letter appears to suggest that the River does not require listing because of reductions in the levels of nutrients and sediments entering the river that are due to Pennsylvania's Chesapeake Bay Program (Program) and that are expected to result under the Phase 2 Chesapeake Bay Watershed Implementation Plan (WIP). While we applaud DEP for past efforts to reduce nutrients and sediments entering the river and are encouraged by DEP's commitment to continue and expand these efforts, the Program and WIP simply are not relevant to the question of whether or not the 98 mile section of the River should be listed as impaired. Moreover, because DEP purports not to even know the cause or source of the impairment of the Susquehanna River, DEP cannot be certain that these reductions in the levels of nutrients and sediments entering the river will even address the river's impairment. At any rate, listing the River and developing a TMDL likely will compliment DEP's efforts to reduce nutrients and sediments entering the river.

It is our opinion that there is widespread evidence of an impaired fisheries designated use in the River. This, coupled with the pH data collected to date, indicates a serious decline in the health and quality of numerous locations throughout 98 miles of the lower Susquehanna River. While we readily acknowledge the value that may be added by more robust and spatially specific studies, we believe the current information indicates the River is an impaired waterbody and that listing on the 303(d) list is warranted.

### Conclusion

For all of these reasons, we urge EPA approve conditionally or partially disapprove the DEP's Final Report and to include the proposed 98 miles of the Susquehanna River, from the Adam T. Bower Memorial Dam in Sunbury, PA to the Holtwood Dam near Holtwood, PA, pursuant to section 303(d) of the Federal Clean Water Act, 33 U.S.C.A. §1313(d), as a designated use fishery impairment where the source of impairment is unknown, and the cause of impairment is pH.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact us.

Sincerely,

Liz Deardorff  
Director- Clean Water Program,  
Pennsylvania  
American Rivers  
1845 Market St., Suite 206  
Camp Hill, PA 17011

Harry Campbell  
Pennsylvania Executive Director  
Chesapeake Bay Foundation  
The Old Water Works Bldg  
614 N. Front Street, Ste G  
Harrisburg, PA 17101

CC:

Nicholas DiPasquale, Director, USEPA Chesapeake Bay Program Office  
Jon M. Capacasa, Director, USEPA Region 3 Water Protection Division

Kelly Heffner, Deputy Secretary, PADEP Water Management  
Kim Coble, CBF  
Jon Mueller, CBF