December 5, 2007

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Cathleen Curran Myers
Alternate Commissioner, Delaware River Basin Commission &
Deputy Secretary for Water Management
Department of Environmental Protection
Rachel Carson State Office Building, 16th Floor
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Hon. Kathleen McGinty, Secretary
Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

Re: Comments on September 28, 2007 Proposed Rulemaking: Proposed Amendments to the Delaware River Basin Commission Water Quality Regulations, Water Code and Comprehensive Plan to Classify the Lower Delaware River as Special Protection Waters ("SPW") and Define "Existing Water Quality"

Dear Ms. Collier, Commissioner Myers, and Secretary McGinty:

On behalf of its 24,000 members and customers, representing the spectrum of Pennsylvania industry, business, and commercial enterprises, the Pennsylvania Chamber of Business and Industry appreciates the opportunity to provide comments concerning the proposed amendments to DRBC's water quality regulations, Water Code, and Comprehensive Plan to "permanently" classify the Lower Delaware River as Special Protection Waters and define existing water quality.

In late 2004, the Chamber provided detailed comments concerning the original proposal to designate the Lower Delaware River as special protection waters, expressing serious

reservations regarding the need for, and impact of, that proposed action. Among the serious questions that we raised was the lack of any evaluation of the impact of this designation, and the attendant restrictions that it imposes, upon economic recovery and development in the significant portion of the basin that it effects ***including the entire Lehigh Valley region.*** DRBC acted in January 2005 only to provide a "temporary designation" of the lower river, suspending the effectiveness of those regulatory provisions relating to "no measurable change" in existing water quality pending further study. Unfortunately, we now observe that nearly three years later, the Commission has still not conducted an evaluation of, nor provided satisfactory answers to, the questions posed in 2004 as to the full impacts of this regulatory action. The Commission seems poised to take a very serious action, with no adequate understanding of, or ability to explain, how this action affects the communities and businesses that occupy nearly 50 % of the basin area. Simple questions asked at the public meetings on this proposal have gone largely unanswered, and as discussed below those responses that have been provided have given us even more concern regarding what these regulations will mean once implemented. ***Until those questions are answered, thoughtfully and carefully, this proposal is not ready for adoption.***

The Chamber's Perspective

As reflected by the Chamber's advocacy for the passage of the Pennsylvania Water Resources Planning Act (Act 220 of 2002), we support efforts to promote and pursue proper management of the ground and surface waters, considering both quality and quantity issues, based upon sound science. We recognize that the waters of the Delaware basin are a vital natural resource, providing a foundation and engine of both the region's economy and environment. Managed and used wisely, these waters are, and can continue to be, a strong base for economic development, providing a competitive advantage over other regions of this nation that are not blessed with such abundant, renewable, and sustainable supplies.

The quantity and quality of the Delaware Basin's waters are substantial and ample, if we develop, conserve and use them wisely. As we stated in 2004, we do not need to, and should not, erect a big fence around the region or its resources, creating a cocoon of protectionist programs to keep out new populations or uses. The Delaware River is a beautiful river, but it is also a working river that supports a wide range of communities and enterprises. It can well sustain a vital economic renewal for a region competing in a global marketplace, while supporting a high level of environmental quality, water based recreation, and other uses of the river's resources.

The past five decades have resulted in improved water quality in the Delaware River mainstem. But the Chamber has serious reservations regarding the justification for upgrading the Delaware River from the Water Gap downstream to Trenton as a "special protection water," and we have even more serious concerns regarding the consequences (whether intended or unintended) of this proposal on the future economic viability and development of the Delaware Valley and some of its key tributary watersheds (including the entire Lehigh Valley).

Respectfully, we believe that the real world consequences and broader impacts of this proposal to upgrade the mainstem to special protection status have largely remained unevaluated, unstated and unexplained to a Basin community that could be profoundly impacted. Moreover,

we firmly believe that such a drastic step is not needed in order to provide for proper stewardship of the resource. Less draconian alternatives are available to preserve the stated values and uses without thwarting beneficial economic renewal and development over a substantial portion of the Basin.

1. Redesignation of the entire Delaware River from the Water Gap south to Trenton as "special protection waters" is not needed to protect the desired uses of the River, and is not supported by currently available data.

(a) Where existing water quality programs are working, there is no need to redesignate the Delaware River as special protection waters in order to assure continuing good water quality.

At the outset, we note the incredible improvements to the River's water quality resulting from the five-decades of efforts by the Commission, Basin States, private enterprise and basin communities, to upgrade municipal and industrial wastewater treatment and reduce other sources of pollution. What was described in 1796 as a "mess" and grew to a severely impaired waterway at the dawn of the 1960's has turned 180-degrees to an example of how a watershed serving major metropolitan areas can come back from the environmental brink to support a viable migratory fishery and some of the best water-based recreation in the country.

Virtually all of the justification for redesignation is built around monitoring data that suggest that the water quality in the river is generally good. That is hardly surprising, considering the literally hundreds of millions of dollars of investment made throughout the Delaware basin, including the industrial valleys of the Lehigh Basin and other tributaries, to correct past pollution problems, upgrade treatment works, and adopt more sophisticated processes that reduce the generation and introduction of pollutants into wastewaters. The improvement of the Delaware River mainstem water quality, and its current good quality, is a testament to the fact that ***the current regulations and standards are working***.

One does not need to leap to special protection status to protect the River; we are protecting the River right now with a very stringent set of standards that have produced demonstrable results in the real world. Where, might one ask, do we intend to site the municipalities, agriculture, industrial and commercial enterprises that will almost inexorably have discharges of treated wastewaters? What are the potential unintended consequences on redevelopment of brownfield sites, such as the former Bethlehem Steel site? How do we recover and restore production at existing industries and attract new enterprises to the populated Lehigh Valley – rebuilding the economy of Allentown, Bethlehem and Easton – with "caps" on existing discharges based on 2003 loadings?

There is no need to classify the Delaware River in either the extreme of degraded or special protection. Streams that have good water quality and meet use standards can be recognized as such – as places where water quality standards are working, and where efforts to be sustained to **"***maintain the course.*"

(b) Water quality data does not justify designation of the entire reach of the Lower Delaware as special protection.

We believe that the picture painted by the Commission studies of the River's overall water quality (which is being used to justify upgrading the entire reach below the Water Gap to the head of tide at Trenton) fails to evaluate with proper precision sections of the River where water quality, while meeting basic standards, would probably not be categorized as so extraordinary as to merit placing the river on a special protection pedestal.

Regarding the data and rationale offered to justify upgrade of the mainstem, the Chamber offers three major observations.

First, it appears that DRBC has unjustifiably set a much lower threshold for qualifying for special protection than would be applicable under, for example, the Pennsylvania antidegradation rules (25 Pa. Code §§94.4a *et seq.*). The Pennsylvania regulations require that in order to qualify as "high quality" waters, long-term water quality data over at least a year be better than instream water quality criteria ***at least 99% of the time***. When one examines the data compiled by DRBC, only 74% of the station/parameter data were better than criteria levels at all times, 20% of the data met criteria about 90% of the time, and approximately 6% of the station/parameter data never met the water quality criteria.[1]

Second, when members of the Chamber's Water Work Group examined the data offered by the Commission as allegedly justifying the upgrade, they noted that virtually all of the monitoring points selected were located ***upstream*** (but not in the near reaches downstream) of major power plant, municipal or other discharges. For example, the sampling point at the Borough of Portland was located just upstream of a tributary that was a well-known conduit for the conveyance of raw sewage from wildcat sewers, and upstream of one of the Basin's largest coal-fired power plants. Similarly, the sampling point at Martins Creek is on the tributary upstream of another major power plant, and the sampling point is not located so as to evaluate conditions in the River below that power station. The Milford sampling point on the mainstem is upstream of Hakihokake Creek and industrial facilities, as well as much of the towns of Milford and Upper Black Eddy. Using water quality data collected at stations designed to show "good quality," while not evaluating the river in a Representative manner provides an unsound basis for regulatory decision-making.

Third, given the range of uses and activities along the River's mainstem and its tributaries, we believe that the Commission cannot justify classifying all of the mainstem (in an unbroken chain from the Water Gap to Trenton) as "significant resource waters." Such classification is, by definition, limited to reaches that have "exceptionally high scenic, recreational, and economical values that require special protection." To make that determination, the Commission needs to evaluate the facts properly.

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[1] *Lower Delaware River Eligibility Determination for DRBC Declaration of Special Protection Waters* (August 2004) at p. 11.

As noted in our 2004 comments, when one looks at the maps and facts closely, this proposal clearly attempts to evaluate data in insufficient detail and as a result, overly generalizes the quality, and therefore the intended designation of the Lower Delaware:

- The 2006 Delaware River 305(b) list[2] indicates that segments within the Lower Delaware basin are impaired for aquatic life (high TDS), recreational use (fecal coliform), and fish consumption.

- Detailed studies conducted of the Delaware mainstem and its uses as part of evaluations as to the potential eligibility of those reaches for inclusion in the National Wild & Scenic River System found that significant segments of the Delaware River mainstem were found ***not*** to qualify for inclusion in any of the categories of the wild and scenic rivers system – even as a "recreational segment."[3]

While segments of the River support various forms of recreation, healthy fisheries, and have pleasant visual aspects, they also host a variety of communities, wastewater treatment plants, power generation facilities, and industries. The proposed "permanent" designation of the entire Lower Delaware disregards these facts, and uses the regulatory equivalent of a broad "highlighter" pen to color over the segments that fail to qualify for any form of special designation. Given the results of the detailed studies, and the "working river" reality of the on-the-ground situation, we believe that the Commission lacks the evidence that would support such a broad-brush finding that all of the mainstem below the Water Gap to Trenton exhibits "exceptionally high scenic, recreational, and economical values that require special protection." Recreational uses of the River (including canoeing and swimming) do not automatically equate to "exceptionally high" recreational values; and the fact that a number of municipalities draw their water from the River does not equate to the river having "exceptionally high" water supply values. Recreation and water supply uses occur throughout most of the Delaware Basin, and the mere observation of those uses does not mean, and cannot be used to justify, an "exceptionally high" value finding.

Further, we strongly dispute the contention that all portions of the river must be designated as having special protection status to prevent degradation of water quality in those

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[2] *2006 Delaware River and Bay Integrated List Water Quality Assessment* (October 2006) at page 2.

[3] Those segments determined not to qualify include, for example: (1) the reach between the Portland Borough/Columbia, N.J. toll bridge and downstream of the Reliant Portland power plant at the Erie Lackawanna Railroad Bridge; (2) two additional segments above the Belvidere area; (3) the segment from R.M 196.0 to R.M 193.8; and (5) the reach from R.M. 185.55 to the southern border of Phillipsburg, N.J. (including the area around Easton and Phillipsburg, where the Lehigh River joins the Delaware)

segments that may qualify as having exceptionally high values. That logic disregards longstanding water regulations and river science. Many of the parameters of concern are readily assimilated in the Delaware River, given its size and flow characteristics. Under DRBC's rules, the "no measurable change" criterion is to be measured at the point where particular waters (be they tributary streams or upstream sections of a stream) enter a designated special protection reach. Thus, a properly treated discharge from a modern wastewater treatment process within a 5 or 10 mile segment that is not designated might well not result in "measurable change" to water quality in a downstream designated area, even though the discharge's effect might be measurable within a mixing zone and the immediate area downstream of the outfall. This is the very logic behind DRBC's control point concept for tributaries that are not special protection waters entering designated special protection areas. DRBC does not need to designate every upstream tributary as special protection to protect the downstream areas, and likewise, it need not designate every section of the mainstem special protection waters to accord reasonable protection to the reaches ultimately determined to be exceptionally high in value.

In this case, we believe that the evidence supports neither the finding of "exceptionally high" values for the entire proposed mainstem segment, nor a finding that special protection is required to protect existing recreational, water supply or other values on the mainstem. ***The designations should be revised to include only those areas that are within the scenic river system or have truly exceptional water quality.***

2. The impacts of the proposed redesignation have not been thoroughly evaluated, or communicated to the public; and we believe that the proposal as currently framed would have substantial (although perhaps unintended) consequences on beneficial economic renewal and development over a significant portion of the Basin.

The Chamber is very concerned that, at public forums where Commission staff were to explain this proposal, DRBC was unable to explain just how this designation would impact economic restoration and development in the existing communities that are affected. Some of the responses provided, however, were incredibly troubling – including those suggesting that existing discharges would be judged (and apparently "capped") based on loadings from 2003 or 2004, with increases allowed only through "trading." ***From what limited information was provided, it seems that we are backing into something akin to the Chesapeake Bay tributary strategy, but this time covering a much larger set of parameters with even less understanding of what will happen.***

The proposal to reclassify the Delaware mainstem from the Water Gap downstream to Trenton as significant resource waters – the equivalent of "high quality" waters in the parlance of state water quality regulations – will have profound influence on the future direction of the entire basin and its citizens.

(a) The lack of understanding regarding the impacts of this proposal

Unlike most special protection designations, this proposal does not affect a small watershed of relatively rural or undeveloped character. As of the year 2000, some 1.38 million people lived in the area along or upstream of mainstem areas currently designated or now

proposed to be designated as special protection waters, including the entire industrialized Lehigh Valley. Some of the fastest developing watersheds in the basin, including the Lehigh Valley (9.5% growth in the last 10 years) and the region from the Water Gap to below the Lehigh confluence (17.5% growth from 1990 to 2000), are directly or indirectly impacted. Several of our more significant power generation facilities are located along, or draw water from, the affected stretches of the Delaware mainstem, and several additional major power plants are located on the tributaries that flow into the stretches proposed for special protection designation. These power facilities represent substantial megawatts of generating capacity, providing energy to the integrated PJM grid upon which the entire region relies for a dependable energy supply. With the looming removal of electric rate caps, and Pennsylvania's growing emphasis on clean and alternative fuels energy, if this proposal has the effect of limiting upgrade, redevelopment, or replacement of these existing generating facilities, the special protection waters designation will have an extraordinary impact on the economic and commercial well-being of the affected communities and the basin as a whole.

The Commission has acknowledged that it has not conducted an economic impact study of the proposed regulations on the Lower Delaware watershed, or any evaluation of the costs of implementing these regulations. Considering the importance of these rules and the large area that they impact, the Chamber cannot understand why an economic impact study was not an integral part of this proposal. As we pursue the goal of protecting the river's quality and uses, why were the needs of the growing population and basin economic stability not equally considered?

(b) "No Measurable Change" – the need for exceptions.

We understand that DRBC's policy and regulations state that "there will be no measurable change in existing water quality except towards natural conditions." That measurable change is measured at (1) the point of any direct discharge to the designated river reaches, or (2) for discharges to tributary streams that flow into designated special protection segments, at the boundary point where the tributary enters into the designated stream reach (*e.g.*, the confluence of the Lehigh with the Delaware River).

While the DRBC regulations provide allowances for some limited mixing if the project proves that such localized "degradation" is justified by being "demonstrably in the public interest," additional flexibility is warranted. Unlike Federal and state special protection regulations, which allow some "degradation" beyond mixing zones if there is a demonstration of important social or economic justification, the DRBC water quality standards purport to allow no measurable change (irrespective of justification) outside of the narrow confines of the mixing zone.

An example may be helpful. As the Lehigh Valley works hard to replace old manufacturing jobs with new employment opportunities and enterprises, concerted efforts have been made to attract new major investment. At the former Bethlehem Steel site in Bethlehem, one of the first major new investments was a substantial new electric generation facility, using highly efficient combined cycle technology, which was sited on a classic "brownfields" site. As the result of utilization of recirculating cooling systems (which tend to concentrate dissolved

solids in the incoming water drawn from the Lehigh River), that power plant discharges a non-contact cooling wastewater with somewhat elevated TDS (consisting of mineral salts that generally do not break down in the stream). Given the increasing sophistication by which science can measure in-stream concentrations in ever smaller increments of concentration (or alternatively model in-stream concentrations), it is quite possible that the resulting discharge (combined with other industrial discharges on the Lehigh) could have some "measurable effect" on TDS in the Delaware at the proposed "control point" on the Lehigh River, perhaps by a few milligrams per liter. However, the critical question is whether such a change, even if "measurable," is really a detriment to the River, its uses and biota. Based on the evaluations conducted by the Department of Environmental Protection precedent to issuing the NPDES permit for that project, we think not – but had DRBC's proposed redesignation proposal been in place at the time, those evaluations examining whether there would be real impacts would apparently have been replaced by an absolutist "no measurable change" standard. This is simply not realistic and has the effect of taking away potential future use of an environmental resource.

In our view, DRBC's rigid no measurable change approach will prove unworkable, particularly when one addresses the situations arising from the industrialized Lehigh Valley, and imposition of the no measurable change requirement at the proposed "control point" on the Lehigh River. Given that the classification of the river is the equivalent in Federal regulatory parlance of Tier II and Pennsylvania nomenclature of "high quality," an exception process should be allowed – lest we place the basin in a regulatory straightjacket with unacceptable economic consequences.

(c) Baseline for existing discharges

The Commission has stated that wastewater effluent quality "at time of SPW designation" will be the baseline for determining "no measurable change to existing water quality." At what special protection waters designation time – the "temporary" 2004 re-designation, or the permanent designation under this proposed rulemaking?

In answers at some public forums, the response seemed to be that DRBC was planning to judge existing discharges based on 2004 loadings – irrespective of the permitted discharge rates of the relevant municipal or industrial wastewater treatment plant, or whether or not the discharge volume and loadings had changed from 2004 to present. Without explicitly saying so, it appears that DRBC is planning some future "capping" of existing discharges at levels that may be lower than current rates and much lower than current permitted rates. ***If this is the plan, then it should be explicitly stated, and the impacts should be thoroughly vetted and disclosed.***

We have serious reservations regarding the policy approach for setting a "baseline." The Commission appears not to be considering the following important points:

- Dischargers that have achieved better effluent quality than permit limits are being penalized, versus other facilities which have not incorporated the same higher degree of treatment.

- Communities that have invested in treatment capacity to meet in a timely manner the requirements of projected future growth are being penalized by precluding future volume and loading increases within that permitted capacity.

- Commission staff has publicly acknowledged that the proposed regulations are geared toward municipal authorities, and industrial discharger requirements will be set on a "case-by-case" basis. This vague approach towards industrial dischargers poses a considerable level of economic uncertainty for industries. One of the most serious issues relates to the variable productivity of industry. If the baseline setting approach suggested by DRBC staff is adopted, an industry that was at a relatively low production rate during the baseline year would be penalized, or worse limited and restricted from restoring operations to full capacity and increasing output.

As learned from the experience in the Chesapeake Bay program, at a minimum, permit effluent limits and loadings should be considered in setting baselines, and careful evaluation must be conducted to assure that a level playing field and fair system of allocation is established.

(d) Requirements for consideration of non-discharge alternatives – substantial alterations or additions to existing wastewater treatment facilities.

Section 3.10.3 A.2.c requires the evaluation and rejection of "all non-discharge/load reduction alternatives" prior to implementing any substantial alteration or addition to an existing wastewater treatment facility. The definition of "Substantial Alterations or Additions" is vague and overly broad. What is a "complete" upgrade or modernization? What is considered "substantial"? The definition is also very limited in what projects are considered "exempt" – that is, disinfection and nutrient removal addition. How would the Commission classify, for example, a project upgrading an aeration basin dissolved oxygen control, or the addition of an influent equalization tank to improve control of variable influent volumes? What about a treatment system improvement to handle potential metals in the influent, such as zinc? These are examples of upgrades that improve the operation and treatment efficiency of an existing treatment plant without increasing flow or loading. The Chamber recommends that regulatory definitions be refined, and implementation guidance be developed, before finalizing such a significant rulemaking.

(e) Non-point source control plans

Section 3.10.3 A.2.e(1)(a) of the proposed rulemaking indicates that "no new connection may be approved unless the area(s) served is (are) regulated by a non-point source pollution control plan approved by the Commission." By nature of this proposed rule language, the Commission acknowledges the impact of non-point source pollution to the Delaware River. But throughout this process, the Commission has failed to clearly identify and study the specific sources and nature of non-point source pollution. Instead, the burden has been shifted to the shoulders of municipal and industrial point sources, and thus impacting or restricting growth and economic expansion within the Lower Delaware watershed.

The Chamber recommends that Pennsylvania regulated entities should be exempted from this requirement under subsection 3.10(A) (2)(e)(1)(a) based on Pennsylvania's post-construction storm water management plan requirements and Storm Water Best Management Practices Manual. The relevant non-point source controls are incorporated in that process, with the Department of Environmental Protection assigned with responsibility for implementation.

(f) How will these rules affect use of general permits in the watershed?

Currently, in just Pennsylvania alone, at least 213 facilities holding individual NPDES permits discharge within the area of the mainstem or the tributaries flowing into the mainstem within the proposed reaches to be redesignated. In addition to the 213 sites that hold individual NPDES permits, literally hundreds of "general permits" are issued annually for stormwater associated with construction activities and stormwater associated with industrial activity.

However, the Pennsylvania general permits provide that discharges to "HQ" and "EV" waters designated under the Chapter 93 special protection rules are ineligible to use such general permits, and instead must obtain individual permits. It is far from clear how the DRBC designation of special protection waters relates to the Pennsylvania permitting system. If DRBC designation means that the designated portions of the mainstem and tributaries are also special protection waters under Chapter 93, then DEP will literally face a major administrative burden of hundreds of additional individual permits annually, while the regulated community confronts major delays on virtually every construction project resulting from the more lengthy process involved in processing individual applications.

Concluding Observations

The Chamber would respectfully urge that the highest leadership of the Commission's member states should take a close look at the consequences of this proposal. We fear that the Commission is not looking at the basin holistically. We would suggest that permanently elevating all of the Delaware mainstem from the Delaware Water Gap to Trenton to special protection status is not the only tool, nor the best tool, in the toolbox for achieving long-term sound water quality management. DRBC and the states have the tools, in terms of planning and water quality program authorities, to undertake such efforts to address both non-point source issues as well as point source concerns without resorting to labeling a stream "significant resource" or "special protection."

Sincerely,

Gene Barr
Vice President, Government and Public Affairs

Cc: Pamela Bush, Commission Secretary, Delaware River Basin Commission