

**Senate Environmental Resources and Energy Committee
Hearing on Pennsylvania Special Protection Waters Program**

**Testimony of Henry Ingram
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On Behalf of
The Pennsylvania Landowners Association
and
The Pennsylvania Bluestone Association**

My name is Henry Ingram. I am presenting this testimony on behalf of the Pennsylvania Landowners Association and the Pennsylvania Bluestone Association. I'm from Pittsburgh and I have practiced law throughout Pennsylvania for over twenty-five years in the natural resource and environmental law areas. In fact, the small law firm where I now practice is called Resource Law Partners and concentrates in those areas. I have been involved in the DEP Special Protection Waters program for two decades.

PLA is a statewide, non-profit, volunteer organization of individuals whose livelihoods are dependent on the use and development of privately owned land in the Commonwealth. PLA's objective is to advance the interests of private landowners, particularly those individuals who have limited resources in comparison to those of state, local and federal agencies which are frequently arrayed against landowners in matters involving environmental and land-use regulation.

The Pennsylvania Bluestone Association is a non-profit association whose objective is to further the economic development of the bluestone industry in Pennsylvania. The bulk of its members live and operate quarries in the Northeastern Tier Counties of Pennsylvania. The Bluestone Association is the spokesperson for smaller, independent quarrymen, many of whose families have been quarrying for generations.

PLA and the Bluestone Association are greatly concerned about the proliferation of legislative and regulatory initiatives dealing with water resource management and statewide watershed management and appreciates the opportunity to present this testimony.

PLA and the Bluestone Association recognize the importance of sound use of Pennsylvania's land, water and abundant natural resources and good stewardship in land use practices. Indeed, the members of both organizations are dependent on land and water resources for their livelihoods. They also recognize the importance of protecting our streams but want to make sure that regulatory measures for such protections account for and enhance economic development and individual liberty with as little government intrusion as possible.

Our members get a little nervous when they see so many legislative and regulatory initiatives emerging and even converging at the same time. As the Committee is well aware, the DEP is well into the process of implementing watershed management across the state, which we understand to be the comprehensive and holistic approach contemplated by or responsive to, wholly or substantially, the recommendations of the 21st Century Environment Commission (see Report pages 42 -45).

At the same time, rural landowners are engaged in assessing and responding to the impacts of the USEPA's new TMDL regulations which DEP is also in the process of implementing as part of the NPDES point source control program. This is important to PLA and the Bluestone Association because surface water runoff flows, not heretofore considered point source discharges, are coming into the regulatory equation and will be accounted for in ascertaining whether streams are impaired and for the purpose of establishing TMDLs, i.e. effluent limitations based on actual water quality and intended to restore impaired streams.

These concerns mounted as we have, somewhat apprehensively, observed the emergence of Pennsylvania's antidegradation or special waters protection program and related policies, following the alarming takeover of the program by the Federal government several years ago.

Finally, PLA and the Bluestone Association share some fundamental principles, the reiteration of which here, we hope, will help the Committee understand their members' perspective on DEP's Special Protection Waters.

First, they believe in less rather than more government regulation. Indeed, both have in the past advocated and continue to call for legislation to reduce the regulatory burdens on their members. Judging from what is on the regulatory agenda, the trend is in the opposite direction, more rather than less. Keep in mind that PLA and the Bluestone Association are comprised of smaller landowners. These individuals don't own parcels in several townships or watersheds. If a regulation requires a permit application containing some study by a technical consultant, the project is probably dead on arrival because they can't afford the expense and don't have anyone to pass the costs onto. If a government agency requires elaborate testing or "zero discharge," they usually can't develop a site or even use the land.

This brings me to the second guiding principle. If government regulation goes too far and a landowner can't use all or a portion of his property for any economically viable purpose, a compensable taking has occurred. If the restriction is for the public good, the public should pay for it or the government should not impose the restriction. I know that some of you may think the Commonwealth can't afford to provide compensation or want to let the Courts decide on a case by case basis. But smaller landowners don't have the resources to go to court and the Commonwealth always seems to be able to find the money to acquire more land for itself. PLA

and the Bluestone Association believe that if the state wants to regulate out or exclude certain uses of private land, it has the obligation to compensate the owner of the property so affected.

A third key principle is the notion that land use regulation should originate and be implemented primarily at the local level. Local elected officials are more accessible, they ordinarily directly share their concerns, understand the local culture and face the same problems as their constituents do, on the same terrain. Their ownership of property is typically confined to one township or borough. Anything that excludes or prohibits a land use on that home turf because it is mandated as part of a statewide regulation, is, at best, problematic for them, not to mention, their local elected officials.

Hoping this background on these organizations' principles will help you understand where we are coming from, I would like to turn to the concepts and some details of the DEP's anti-degradation strategy, specifically DEP's Special Protection Program.

PCA and the Bluestone Association share the views of other witnesses from the regulated community about the importance of a balanced antidegradation program. As noted above, they believe Pennsylvania needs a program that is no more stringent than federal regulations require. They support provisions to allow meaningful input and participation by private property owners, local officials and others who may be affected by the redesignation of waters as "high quality" or "exceptional value" under the antidegradation policy.

These are some of the minimum requirements for such a program. The Department has produced and EQB has approved, a regulatory scheme that will unnecessarily create problems for anyone who needs discharge permits, particularly smaller businesses and individual landowners.

First, DEP's program and implementing regulations are substantially more stringent than what the federal regulations require — particularly in their expansive definition of "exceptional value" waters and in the identification of high quality and exceptional value waters as water "uses" for purposes of the Clean Water Act.

Second, the regulatory scheme eviscerates the regulatory review process for stream redesignations and does not foster the meaningful participation of members of the public who may be affected.

Finally, the antidegradation program will make it easier for the Department, the Fish and Boat Commission or third parties to identify and designate waters that would clearly fall outside the scope of the federal program as "exceptional value," sometimes with little data or scientific justification.

In addition, the petitioning and designation process makes it easier for anti-development groups to invoke the stream designation process as a tool to block the issuance of permits. Past experience has been that it will be practically impossible to obtain mining permits and any other land use or water discharge permits in exceptional value watersheds, and we expect it will be more difficult to obtain permits in high quality watersheds as well.

As the Committee knows, Governor Ridge issued an Executive Order, number 1996-1, requiring regulations to be no more stringent than federal requirements, except to serve a compelling state interest or to comply with unique state law requirements. Other provisions of the Order provided safeguards to ensure regulations are necessary, that their costs and benefits were well understood and that those affected by regulations have early, meaningful input in their development.

The Order, known as the "Regulatory Basics Initiative" or RBI, has improved the regulatory process, but it appears to have ignored in developing the antidegradation program.

In that this program is in response to *a federal* law and *federal* policy, there is no unique or compelling state interest at stake here. Yet the Pennsylvania program greatly expands the reach of this federal policy.

For example, under the federal antidegradation requirement, Tier Three — the highest level of protection — is limited to "outstanding national resource waters." Pennsylvania's program goes far beyond this requirement. In addition to outstanding national resource waters, outstanding state, regional and even *local* resource waters qualify.

Additionally, the Pennsylvania program affords the highest level of water protection simply because a comparison of biological organisms using part of an EPA test that was *not* designed as an antidegradation tool — tells the Department that if the biological community is at least 92 percent of what would be found in a reference stream that the Department selects, the stream qualifies.

A high quality water may also be designated per se as exceptional value if the Fish and Boat Commission designates it as a wilderness trout stream. Significantly, the Fish and Boat Commission is not subject to the regulatory review process the Department must follow—including review by the Environmental Quality Board, the Independent Regulatory Review Commission and the standing Committees of the House and Senate. There is virtually no opportunity for meaningful, independent review of these decisions.

We are not arguing that state waters should be unprotected, as Jan Jarrett, director of Public Outreach for Penn Futures recently suggested in an editorial in the September 9, 2000 *Environmental Update*. This suggestion is characteristic of the overblown rhetoric of semi-

hysterical advocacy groups. To generalize so grossly by characterizing anyone who seeks a permit for development as a "polluter," as Ms. Jarrett does, is absurd and reveals an unhealthy bias which should have no place in genuine public discourse on important environmental issues. Penn Future's view that the Commonwealth "owns" all natural resources, based on Article I, Section 27, mischaracterizes both the letter and the spirit of the "environmental" amendment to the Pennsylvania Constitution. But the fact is that they are protected — by the Clean Streams Law, the permitting process and the requirement that discharges not be allowed to impair the actual use of the waters receiving the ages. The question is "what level of protection, at what cost?" By linking the protection of resources of state and local significance to the federal law, DEP has enormously expanded the scope of a federal requirement, in a way that is not required by federal law, but which shifts the weight of federal oversight and the attendant costs and burdens onto the people of this state. This radical departure from the federal standard is unwarranted and should be eliminated.

These associations also have concerns about the "protection" for high quality waters — those equivalent to the federal Tier Two category.

The identification and designation of high quality waters adds significant delays and costs to permit applications for discharges to those waters and also must meet certain social and economic justification standards to be approved. By allowing a short-term standard to designate a stream as high quality, DEP may allow a redesignation or identification of a stream even after a permit application has been submitted.

Even worse is the potential for a stream to qualify as a high quality water simply because the Fish and Boat Commission — which, again, is not required to submit its designations to full

regulatory review — identifies the stream as a Class A Wild Trout Stream based on limited data and subjective preferences.

I have had personal and professional experience with such designations, which essentially require the permitting process to begin again under a different set of rules. In one case, an operator had applied for a permit and *as the permit was being written*, the Fish and Boat Commission redesignated a stream segment, in the watershed in which the operation was located, as a Class A Wild Trout stream.

This action came at the end of the permitting process and imposed significant delays on the operation and imposed substantial limitations on the permit.

This broad grant of discretionary authority to the Fish Commission in this process, can lead to abuses and it is anticipated that these problems will increase under the new policies.

As DEP has noted, the federal framework is fairly general and does not specify how states must act to protect streams with water quality which exceeds the standards for fishable and swimmable waters, or outstanding national resource waters. But certainly, nothing would have prevented DEP from taking measures to provide balance, enhance public participation and protect private property. In fact, other states have done this in implementing the federal antidegradation policy.

For example:

In New Jersey, the highest Tier-3 protection — the same protection applied to "exceptional value" waters in Pennsylvania — is reserved for waters entirely within federal or state parks or forests, fish and Wildlife lands, other special holdings and waters within a "Pineland Area" protected by legislation. These limited categories of waters all have special characteristics that may be used to justify the highest level of protection.

Or consider Maryland and Virginia, both of which require efforts to notify and involve affected property owners of the nomination. Maryland requires written permission from the landowner of the area in which the waters are located, in addition to notification of riparian property owners.

Virginia also requires regulations to include an explanation of their costs or, if costs can't be estimated, to give examples of the types of impacts on the regulated community — with a requirement to explain the impact on small businesses.

In contrast, the EQB decided that there was simply too much work involved in notifying property owners. In fact, DEP has sought to expressly limit the type of input private property owners or members of the regulated community may have in the designation process. In defense of this limitation on public participation, DEP claims that the federal antidegradation program does not allow consideration of social and economic factors in determining the appropriate level of protection for "uses."

However, no state law requires state regulations to treat water management categories — such as high quality and exceptional value — as "uses." This is a policy choice DEP made. It has serious implications because the federal law requires existing and designated "uses" to be maintained and protected. And, according to DEP, the federal law prohibits consideration of meaningful input on the economic impact of measures imposed to protect "uses."

This leads to another important point. Because the regulations treat Pennsylvania's special protection water categories as uses, the regulatory review requirements for stream redesignations have been marginalized.

According to the federal law, both *existing and designated* uses must be protected and maintained. So when the Department, or a third party, provides a survey that meets the high

quality or exceptional value criteria, it is considered an "existing use." If the EQB or the Independent Regulatory Review Commission disapproves of the proposed regulation, the Department will still treat the stream as high quality or exceptional value if it has identified that as a "use."

Trout Run is a graphic illustration of this problem. The Department has stated that it will continue to consider Trout Run as an "exceptional value" stream, and that because exceptional value is a "use," DEP must protect it at that level once a determination has been made that "exceptional value" is an existing use. This final determination is not made until a permit application is made on the stream. As noted, the time and expense involved in a permit application on waters that are tentatively identified as "exceptional value" will kill many projects. Therefore, in all likelihood, the water will be protected at exceptional value, even if IRRC and the General Assembly disagree with the Department's decision.

Under the federal program, once an existing use is identified, it must be protected at that level. So it doesn't matter whether the regulation is approved or not.

This is contrary to the requirement that stream designations undergo regulatory review, which provides important safeguards to ensure regulations are in the public interest. The Regulatory Review Act includes a requirement to provide IRRC with an identification of the economic impacts of the proposed regulation. The failure to do so prevents IRRC from carrying out its statutory mandate to consider the economic impact of the final form regulation. But DEP "bunnies the hat" by asserting that the federal program prevents it from considering the economic impact of exceptional value designations. Thus, in addition to making the review process meaningless, DEP has eliminated the opportunity for affected property owners to require

the Department to consider economic impacts and to justify those impacts through the regulatory review process.

It should go without saying that a regulatory program which was designed to avoid the required review of regulations should not be permitted, but that is exactly what has happened here.

Finally, the impact that these policy changes will have on permit applications for members of the PLA and the Bluestone Association and others seeking permits for discharges to high quality and exceptional value waters, is manifest. First, it is virtually impossible to obtain a permit that will involve a discharge to an exceptional value water. The discharge must essentially be equal to or better than the quality of the receiving stream.

Unlike the federal antidegradation program, however, Pennsylvania's regulations provide that the Department may impose a "balancing" test that would require the public benefits of the discharge to outweigh the reduction in water quality caused by the discharge.

The Department has essentially established a two-part test for demonstrating social and economic justification. First, the discharge must be necessary to accommodate important social and economic development in the area in which the surface water is located. This part of the test is substantially similar to the federal standard.

The second part of the test, however, requires the applicant to demonstrate that the discharge will result in "economic or social benefits to the public which outweigh any water quality degradation which the proposed discharge is expected to cause."

This second part is clearly more stringent than the federal counterpart, which has no balancing requirement. No compelling or unique state interest has been articulated for this deviation from the federal requirements for social and economic justification, and there is no

state law requiring the application of a balancing test. As such, this provision is contrary to Executive Order Number 1996-1 or the RBI.

Additionally, this provision is contrary to the spirit of RBI because it is more stringent than corresponding standards in neighboring states, such as West Virginia, Ohio and New Jersey, which have social and economic justification standards that mirror the federal requirements. Thus, Pennsylvania's landowners are at a distinct competitive disadvantage, not only because they must meet a more stringent standard, but because the balancing test provides additional opportunities for opponents of development to add significant time and expense to the permitting process. Therefore, the balancing test should be eliminated.

In conclusion, PLA and the Bluestone Association take their environmental stewardship responsibilities seriously and their members and their families, as landowners and quarrymen, will be directly affected by stream designations. They also inhabit these watersheds and use the streams. Protection of water quality is important to these individuals.

There is a critical need for reform of the stream designation process — to provide meaningful input and protection for private property owners' constitutional rights, to ensure that state regulations impose only necessary costs and allow the thorough review of regulations that the law requires.

This Committee's recognition of these facts and consideration of the foregoing views is appreciated.