



WATER RESOURCES ASSOCIATION OF THE DELAWARE RIVER BASIN

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VIA ELECTRONIC MAIL

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RE: Designated Aquatic Life Uses and Dissolved Oxygen in the Delaware Estuary

Dear Assistant Administrator Fox and Office of Water Director Nagle,

The Water Resources Association of the Delaware River Basin (WRA) is writing in response to the December 22, 2022 letter from the Delaware Riverkeeper Network, Citizens for Pennsylvania's Future, Clean Air Council and Environment New Jersey (Petitioners) requesting actions in addition to the determination issued by the United States Environmental Protection Agency (USEPA) on December 1, 2022 regarding the timetable for establishment of new water quality standards in the Delaware Estuary.

WRA is a nonprofit, advocacy and public information organization established in 1959 to serve the water users of the Delaware River Basin that promotes the science-based management of water resources within the Delaware River Basin. In 1961, the WRA participated in the development of the federal-interstate compact and the creation of the Delaware River Basin Commission (DRBC). Since then, WRA has been a participant in and an observer of activities relating to water management in the Delaware Basin.



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Background

For more than 60 years, the DRBC has worked with state and federal agencies to bring consistency and rationality to the regulation of the water resources of the Delaware River Basin. Some of DRBC's first water quality regulations in 1967 were directed at improving levels of dissolved oxygen (DO) in the urbanized reach of the river. The success of the DRBC regulations, supported by federal grants to upgrade treatment plants, brought about a dramatic improvement of conditions in the river to the point where seasonal runs of shad and Striped Bass have returned and the overall health of the fishery has improved.

In the past 10 years, fishery scientists have found that species of fish, including the Atlantic and Shortnose Sturgeon, have returned to the Delaware Estuary. There is some limited evidence of species reproduction in the estuary. In August 2016, USEPA sent a letter to DRBC and its member states recommending that the 1967 Water Quality Standards (WQS) be revised. In 2017, DRBC passed a resolution (2017-4) establishing a six-year plan of study to answer questions about whether the urbanized reach of the river should be redesignated for propagation of sensitive species of fish, and if so, what new DO criteria could be achieved. DRBC subsequently extended the timeline for completing final new WQS to March 2025.

DRBC Collaborative Process

Over the past five years, DRBC has guided a collaborative, transparent process involving representatives of three of the Delaware River Basin (DRB) states, two USEPA regions, academics, fisheries scientists, environmental groups, and experts of all types to prepare a **Draft Analysis of Attainability: Improving Dissolved Oxygen and Aquatic Life Uses in the Delaware River Estuary** (Draft Attainability Analysis). DRBC's process of developing this analysis and the series of recommendations it contains has, so far, avoided litigation and brought a diverse group of industries, regulators, and advocates together with a shared vision of options for addressing a challenging issue. This process was on target to be finished by March 2025. While DRBC's process proceeds, it is important to note that conditions in the Delaware Estuary continue to improve and there is strong evidence that populations of sturgeon and other migratory species have increased, not declined.

DRBC established an expert panel to guide the development and application of a complex eutrophication model, and contracted with consultants to study feasibility, cost and affordability of increased treatment to achieve higher DO levels. DRBC also engaged the DRBC Water Quality Advisory Committee (WQAC) to review and guide the process. The WQAC



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includes representatives from each of the basin states, USEPA Region 2 and Region 3, other state and federal agencies, environmental groups, academic institutions, water users and dischargers. It is exactly the kind of group USEPA would need to engage to achieve water quality criteria based on sound scientific rationale – a requirement of the Clean Water Act.

The Draft Attainability Analysis indicates that the designated use of “propagation” of fish is achievable. The draft also proposes that the Highest Attainable Dissolved Oxygen of 5 milligrams per liter (“mg/L”) can be achieved with treatment upgrades at 11 discharge locations at a total cost of **\$153 million per year**. The proposed new target minimum DO level, if achieved, would have the potential to significantly improve water quality conditions when compared to the current DO level of 3.5 mg/L in the 1967 WQS. Unless substantial federal funds are provided, as was done under the Clean Water Act for the implementation of the 1967 DO criteria, the costs will fall on ratepayers including some of the poorest and underserved communities in the Delaware River basin that can least afford it.

Requests for USEPA to Intercede

In April 2022, the Petitioners, who have been involved in the DRBC process every step of the way, filed a “petition” with the Washington DC office of USEPA objecting to the pace and timing of DRBC’s work. On December 1, 2022, the Washington DC office of USEPA issued a determination letter unilaterally declaring “propagation” as a designated use of the urbanized reach of the Delaware Estuary. The determination letter set a timetable of 12 months to establish new water quality standards. This occurred despite USEPA’s long-term commitment to the DRBC process and involvement in that process over the past five years through two USEPA regional offices (Regions 2 and 3). WRA issued a press release in December commenting on the determination and posted a [white paper](#) on the subject.

DRBC, the states, USEPA and experts in cooperation with the Water Quality Advisory Committee have worked transparently and collaboratively to develop a scientific basis for developing new water quality criteria. Without this work, USEPA would be in no position to propose a new use designation and water quality criteria for the Fish Maintenance Area in the Delaware Estuary. DRBC is continuing its work, following a timeline to complete the process by March 2025 (27 months from now). For USEPA now, after five years of active collaboration with DRBC, to suggest that USEPA can accomplish the final step of the process in 12 months is ill-advised and unrealistic. The December 1, 2022, determination letter has the potential to undermine the excellent work done thus far by slowing the process and decreasing the willingness of stakeholders brought together by DRBC to continue to collaborate on the science



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and implementation alternatives. Furthermore, any significant unilateral deviation from the recommendations of the Draft Attainment Analysis without consultation with, or support from, the stakeholders participating in DRBC's robust collaborative approach could derail the entire process, introduce litigation risks and delays, and substantially extend the timetable for implementation of future standards and improvements.

The Petitioners sent a letter to USEPA on December 22, 2022, asking USEPA to publish proposed WQS "no later than 180 days from the date of the determination." In addition to requesting an even more truncated timeframe, the letter claims, without support, that scientific study "focused on the Delaware River population of Atlantic sturgeon makes clear that a criterion between 6.3 and 6.5 mg/L as an average condition is essential to support propagation and early life stage rearing of this endangered species in the Delaware Estuary." The data and recommendations in the Draft Attainment Analysis do not support this statement. The Petitioners' letter also represents a disappointing attempt to persuade USEPA to override the collaborative, data driven process DRBC has been implementing with myriad stakeholders including the Petitioners and USEPA. Finally, the Petitioners' proposed DO criterion disregards the financial implications of setting a difficult to realize criterion, and the legal ramifications of moving in that direction.

Conclusion

For the reasons described above, WRA respectfully requests that USEPA reject both the more accelerated timeframe and the proposed DO criterion put forth by the Petitioners in their December 22, 2022 communication as noted above. USEPA could best advance the next level of water quality improvements in the Delaware Estuary by supporting DRBC's efforts and assisting regulated entities facing significant new costs to secure federal funding for the improvements needed to meet any new water quality standards.

Sincerely,

Preston Luitweiler, P.E.
Chair, WRA Science and Policy Committee



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Skelly Holmbeck
Executive Director, WRA

cc: Adam Ortiz, Regional Administrator, EPA Region 3
Catherine A. Libertz, Director, Water Division, EPA Region 3
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