



**INDEPENDENT REGULATORY REVIEW COMMISSION  
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**November 25, 1998**

**Honorable James M. Seif, Chairman  
Environmental Quality Board  
Rachel Carson State Office Building  
400 Market Street, 16th Floor  
Harrisburg, PA 17105**

**Re: IRRC Regulation #7-338 (#1975)  
Environmental Quality Board  
Water Quality**

**Dear Chairman Seif:**

**Enclosed are our Comments on your proposed regulation #7-338. They are also available on our website at <http://www.irrc.state.pa.us>.**

**The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.**

**If you want to meet with us to discuss these Comments, please contact Fiona Wilmarth at 783-5438 or Chuck Tyrrell at 772-3455.**

**Sincerely,**

A handwritten signature in black ink that reads "Robert E. Nyce".

**Robert E. Nyce  
Executive Director**

**REN:kcg**

**Enclosure**

**cc: Sharon Freeman  
Barbara Sexton  
Glenn Maurer  
Stuart I. Gansell  
Office of General Counsel  
Office of Attorney General  
Pete Tartline**

**COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION**

**ON**

**ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-338**

**WATER QUALITY**

**NOVEMBER 25, 1998**

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to consistency with other regulations and statutes, effect on the Commonwealth's natural resources, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

**1. Continuation of protection of potable water supply as a statewide use. – Need and Reasonableness.**

In the Preamble, the EQB asked for comment on whether protection of potable water supply should continue to be a statewide use. There is no legal requirement to retain protection of potable water supply as a statewide use. It is our understanding that even with the elimination of this statewide criterion, the obligation to protect aquatic life and fish consumption remains. In a meeting with Department of Environmental Protection (DEP) staff, they explained that protection of potable water supply was initially established in the early 1970s as a statewide use because designations for the Commonwealth's waters were not in place. Although the standard served a purpose in the 1970s, it is no longer necessary. Some commentators have opposed elimination of potable water supply as a statewide use. However, the commentators have not identified the harm that would result from the elimination of this statewide criterion. Consequently, we do not object to the elimination of protection of potable water supply as a statewide use.

In its comments on the proposed revisions to Chapter 93, the U.S. Environmental Protection Agency (EPA) examines the possible elimination of the statewide potable water supply use standard. Although the EPA does not necessarily oppose elimination of the standard, it states that new analysis and criteria would be needed to protect uses that are currently protected by the potable use standard. Before it publishes a proposed rulemaking to eliminate the potable water supply use standard, the EQB needs to address the EPA's comments.

**2. Requirement for a notice of intent for an NPDES application. – Need and Reasonableness.**

The Water Resources Advisory Committee (WRAC) recommended that the public notification process in Section 92.61 be amended to require an applicant for a National Pollutant

Discharge Elimination System (NPDES) permit for a new discharge to publish a notice of the applicant's intent to submit an application. In the Preamble, the EQB requested comment on this proposal. We have two comments on this issue.

The usefulness of the WRAC's proposal is uncertain. The notice would need to contain details about the proposed discharge in order to give potential commentators something substantive upon which they could comment. Furthermore, the need for an additional comment period has not been demonstrated. Currently, the DEP publishes notice in the *Pennsylvania Bulletin* when a complete NPDES permit application is submitted. In addition, current regulations require a 30-day public comment period. We object to another requirement for public notice without further information regarding its need and any requirements for the content of the proposed notice.

Second, current statutes and regulations impose additional public notice requirements on municipal facility dischargers beyond those that apply to industrial facility discharges. Any change in the public notice requirements for NPDES permits ought to address this disparity. For example, any new requirement for public notice should not duplicate additional notice requirements that already exist for proposed municipal discharges.

### **3. Section 92.1. Definitions. - Clarity.**

#### *Point source.*

This term is defined, in part, as "Any discernable, confined or discrete conveyance..." (Emphasis added.) We note the corresponding federal definition at 40 C.F.R. § 122.2 uses "and" instead of "or." The EQB needs to modify this definition to be consistent with the federal definition.

Also, the definition of "point source" contains a list of the sources which require NPDES permits. This is a substantive provision, which should be included in the permitting section of the regulation. We suggest the EQB include this provision in Section 92.3 *Permit requirement*.

#### *Pollutant.*

The existing definition of this term is consistent with the corresponding federal definition. The EQB should retain the existing definition or explain why the proposed revisions are necessary.

#### *Process Wastewater.*

The definition of this term states that it includes any discharges covered by an Effluent Limitation Guideline (ELG). The corresponding federal definition does not include a reference to ELGs, even though ELGs are defined in the federal regulations. Why is the EQB including a reference to an ELG in the definition?

*Stormwater discharge associated with construction.*

The proposed regulation defines “stormwater discharge associated with construction “ as follows:

The discharge or potential discharge into surface waters of this Commonwealth, municipal separate storm sewers or nonmunicipal separate storm sewers from any conveyance which is used for collecting and conveying stormwater and which is related to construction activities including clearing, grubbing, grading and excavation. These activities require a permit under this chapter whether or not they discharge to waters of this Commonwealth. The term does not include operations that result in the disturbance of less than 5 acres of total land area which are not part of a larger common plan of development or sale.

The definition references a “potential discharge” and requires a permit for activities that do not discharge into waters of the Commonwealth. In its comments, the Pennsylvania Oil and Gas Association (POGA) acknowledges the broad discretion granted to the DEP by the EPA to regulate potential pollution. However, POGA notes that the EQB has not articulated the compelling Pennsylvania interest that is served by this requirement. We request the EQB explain the basis for its decision to impose a permit requirement on potential discharges.

In addition, the meaning of “larger common plan of development or sale” is not clear. We suggest the EQB define this phrase. The EQB should also include the criteria, which will be used to determine if a project or activity will fall under a common plan of development or sale.

**4. Section 92.2. Incorporation of federal regulations by reference. – Clarity.**

In Section 92.2, the EQB is incorporating by reference a number of federal regulatory provisions. Future amendments, appendices and supplements are also incorporated by reference, provided they do not conflict with or are less stringent than Pennsylvania regulations. However, Paragraph (c) excludes any new or amended federal regulation which “creates a variance to existing substantive or procedural NPDES permitting requirements.” What regulatory changes at the federal level would not have either a procedural or substantive effect? If there are none, Paragraph (c) should be deleted.

**5. Section 92.2b. Pollution prevention. – Clarity.**

*Vague language.*

This section contains language which states that permittees “are encouraged to” and “should” engage in certain practices related to pollution prevention. In a meeting with the DEP staff, they explained that the DEP wants to encourage permittees to engage in pollution prevention practices. The provisions in the this section, however, are not mandates.

Pollution prevention strategies should be promoted. However, a regulation is not the proper vehicle for making recommendations. Regulations establish binding norms of general applicability and future effect. Unless the DEP intends to enforce the provisions related to

pollution prevention, they should be deleted. They would be more appropriately placed in a policy statement or guidance document.

*Definition of “practicable.”*

Section 92.2b(b) states that pollution load wastes should be reduced “to the maximum extent practicable.” Section 97.14 of the existing regulation provides that practicable is not limited to practices which are profitable or economical. The proposed regulation contains no guidance on the meaning of “practicable.” We suggest the EQB include the criteria for determining what is practicable in the final-form regulation.

**6. Section 92.4. Exclusions from permit requirements. – Clarity.**

This section lists several activities exempted under federal regulations from NPDES permit requirements, including certain agricultural and silvicultural activities. Federal regulations also exempt uncontaminated runoff from oil and gas exploration and production projects (40 C.F.R. § 122.26(a)(2)). This federal exemption is incorporated by reference, but not listed in Section 92.4. In its comments, POGA suggested that for clarity purposes, this exemption should be spelled out in Section 92.4. Why did the EQB list the exemptions related to agricultural and silvicultural activities, but not related to oil and gas exploration and production projects? If the EQB does not have a valid reason for doing otherwise, it should include this exemption in Section 92.4.

**7. Section 92.8a. Changes in treatment requirements. – Clarity.**

*Paragraph (a) – Vague language.*

Paragraph (a) states that permittees “should consider” pollution prevention practices to comply with this section. We reiterate our concern raised in **Issue 5** related to vague language in Section 92.2b. This provision is not a regulatory requirement. Therefore, it should be deleted and placed in a policy statement or guidance document.

*Paragraph (b) – Reporting requirement.*

Paragraph (b) requires a permittee to submit a report to the DEP within 90 days of receiving a notice, or “within a lesser period as the Department [DEP] may specify.” Under what circumstances would the DEP require a report in less than 90 days? This provision gives the DEP broad discretion without providing permittees with any notice of the circumstances that would prompt a reduced reporting period. We suggest the EQB clarify in the final-form regulation the circumstances that would cause the DEP to impose a time period of less than 90 days.

**8. Section 92.13. Reissuance of permits. - Consistency with the Clean Streams Law.**

The language in Sections 92.31 and 92.83 is inconsistent with Section 609 of the Clean Streams Law (CSL) (35 P.S. § 691.609). The language of these sections requires a permittee or applicant to be in compliance with all existing “NDPES permit terms, conditions, requirements

and schedules of compliance or provide for denial of an application when a discharger has a significant history of noncompliance with a prior NPDES permit.”

Section 609 of the CSL does not limit the compliance requirement to NPDES permits. It states that the DEP cannot issue or renew a permit if after an investigation it finds that the applicant has shown a lack of ability or intention to comply with similar laws as evidenced by past or continuing violations. In *Belitskus v. DEP*, EHB Docket No. 96-196-MR., the Environmental Hearing Board (EHB) ruled that Sections 609 and 611 of the CSL (35 P.S. §§ 691.609, 691.611) require the DEP to investigate compliance with any and all permits, not just NPDES permits, before approving an application for coverage under a general NPDES permit. This decision was issued on August 20, 1998, or nine days before this proposed regulation was published in the *Pennsylvania Bulletin*. According to the DEP counsel, the DEP staff is reviewing the EHB decision. We object to provisions that are inconsistent with Sections 609 and 611 of the CSL, as interpreted by the EHB in *Belitskus*.

**9. Section 92.21. Applications. - Clarity.**

Paragraph (a) requires an applicant to complete an application 180 days prior to the date the applicant wants to start the discharge of pollutants. As written the applicant would be required to submit the application exactly 180 days prior to discharging. We suggest the EQB insert the words “at least” before “180 days.”

**10. Section 92.52a. Site specific permit conditions. – Clarity.**

The last sentence of this section provides that permittees are “encouraged” to implement pollution prevention plans. These plans are not a requirement. As discussed in **Issues 6 and 8**, provisions which are not requirements should not be included in the regulation. This provision should be deleted and placed in a policy statement or guidance document.

**11. Section 92.81. General NPDES permits. – Clarity.**

Paragraph (d) provides that the DEP has the discretion to authorize a discharge under a general permit without requiring a notice of intent (NOI) from the discharger. This would occur “when the Department [DEP] finds that an NOI requirement would be inappropriate.” The regulation is silent regarding when the DEP would determine that an NOI is inappropriate. The final-form regulation should specify conditions under which an NOI is inappropriate.

**12. Section 92.81(a)(5). General NPDES permits, toxic or hazardous substances. – Need, Reasonableness and Clarity.**

The proposed regulation would replace existing language in Section 92.81(a)(5) with a new provision that would allow a permittee to obtain “general NPDES permits” with effluent limitations for the discharge of toxic or hazardous substances. Representatives Robert D. Reber, Jr., and Camille George, Chairmen of the House Environmental Resources and Energy Committee (House Committee), in a letter dated November 17, 1998, expressed concern on this issue, as well as other sections of the proposed regulation. Over 260 individuals and organizations also submitted comments on this proposed revision. The overwhelming majority of these commentators expressed concerns similar to those of the House Committee.

In response to comments objecting to this proposed revision, the DEP indicated the final-form regulation may not include the new language. Instead, the EQB may retain the existing language in this subsection that prohibits toxic or hazardous discharges as a condition of a “general NPDES permit.”

However, the new language allowing general permits for toxic discharges is part of the proposed rulemaking. The Preamble did not provide any explanation of the need for or intent of the revision to Section 92.81(a)(5). However, the Preamble does indicate that most of this regulation is a result of the Regulatory Basics Initiative (RBI). The Commission supports the RBI and the efforts of the EQB to streamline regulatory provisions and eliminate unnecessary regulations. However, with regard to this provision and other concerns identified by the House Committee (see Issues 14 and 17) and the public, the EQB needs to explain the intent of the regulation, the basis for changes in the final-form regulation, and how the regulation accomplishes the goals of the RBI without any negative impact on the quality of the Commonwealth’s waterways.

**13. Section 92.81(a)(8). General NPDES permits, special protection waters. – Consistency with other Regulations and Clarity.**

The EPA expressed the concern that revisions to Section 92.81(a)(8) could trigger conflicts with antidegradation policies including the policy established for Pennsylvania by the EPA at 40 C.F.R. § 131.12. The proposed revisions would allow discharges into “Special Protection Waters” under a “general NPDES permit.” The EQB needs to explain how antidegradation requirements would be addressed during the development of a “general NPDES permit.”

**14. Section 93.7. Specific water criteria. – Consistency with federal standards and Clarity.**

The EPA states that the EQB should update parameters that are listed in Table 3 and are referenced in Section 93.7. The parameters include aluminum, ammonia, bacteria, chloride and dissolved oxygen. One goal of the RBI is greater consistency with federal standards. We request the EQB explain how the parameters in Table 3 are consistent with the federal standards.

The House Committee also expressed reservations over deletions and changes to certain chemical criteria in Table 3 that might allow the potential increase of toxic discharges into the Commonwealth’s waterways. In addition, it questioned the removal of the aquatic life standard for certain chemicals. The EQB needs to explain the impact of the changes in Table 3 and the aquatic life criteria on Pennsylvania’s waterways.

**15. Section 96.1. Definitions. – Clarity.**

*Load allocation.*

The proposed regulation defines “load allocation” as follows:

The portion (sic) of a surface water’s loading capacity that is assigned or allocated to existing and future nonpoint sources or natural quality and is expressed in narrative or numeric terms. (Emphasis added.)

The corresponding federal definition at 40 C.F.R. § 130.2 does not reference a narrative expression of the load allocation. The EQB should delete “narrative or” from this definition, or explain why a narrative expression of the load allocation should be included in the definition.

The word “poriton” is typographical error. This word should be replaced with “portion” in the final-form regulation.

*TMDL – Total maximum daily load.*

In its comments, the EPA notes that the corresponding federal definition of “TMDL” at 40 C.F.R. § 130.2 includes a discussion of how a TMDL can be expressed. Specifically, the federal definition states that “TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure.” To improve the clarity of the regulation, we suggest the EQB include this language in the final-form regulation.

#### **16. Section 96.3. Water quality protection levels. – Consistency with federal standards and Clarity.**

The EPA and other commentators expressed several concerns with this section. First, they objected to the phrase “99% of the time.” This phrase is used to set an attainment goal for water quality criteria. The EPA said that the DEP must demonstrate that the use of this standard will be as protective as the frequency and duration policy specified for the EPA’s acute and chronic criteria. The EQB needs to explain the use of this term and its precise meaning as well as its relationship to the frequency, duration and magnitude standards used by the EPA.

Second, the EPA asserts that the language of Section 96.3(b) is unacceptable. This section provides that antidegradation requirements apply only to High Quality and Exceptional Value waters. The EPA states that the antidegradation requirements in Chapters 93, 95 and 105 must apply to all waters. This includes existing use and special protection waters. The EQB needs to explain why it intends to apply the antidegradation requirements only to High Quality and Exceptional Value waters.

Another concern is that Section 96.3(d) establishes the use of “mixing zones.” The EPA asks that the EQB clarify whether it is allowing mixing zones. The Chesapeake Bay Foundation expresses concern with the deletion of a sentence from the existing regulations which prohibited the use of mixing zones. The EQB needs to explain its position on this issue and the role of “mixing zones” in this regulation and water quality management.

#### **17. Section 96.4. TMDLs. – Reasonableness and Clarity.**

*Paragraph (g) Effluent trading program.*

Paragraph (g) provides that the DEP may approve effluent trading programs under certain conditions. However, the regulation contains no details on how effluent trading programs should be structured or how a party obtains approval for an effluent trading program. The Preamble states that the DEP published a description of the effluent trading procedure in the *Pennsylvania Bulletin* and solicited comments. It is not clear if the DEP has established final requirements for these programs or if they are still under consideration. The minimal direction provided in this

regulation lacks sufficient detail to provide meaningful guidance to permittees. In addition, the House Committee contends that this provision may weaken existing rules by not establishing a framework for the effluent trading program. The requirements and procedures for effluent trading programs should be promulgated as a regulation.

*Paragraph (j) Modeling techniques.*

Paragraph (j) provides that mathematical modeling techniques used to determine TMDLs “should” be generally accepted in the scientific community. The appropriate term to indicate a requirement is “shall.” We suggest the EQB make this change in the final-form regulation.

**18. Miscellaneous Clarity Issues.**

- The word “stamdards” in Section 92.2a(b) should be changed to “standards.”
- The term “director” in Section 92.7 should be changed to “Department.”
- The word “a” should be inserted before “permit” in Section 92.31(a).
- The word “to” which appears after “limitations” and before “include” in Section 92.31(a)(5) should be deleted. The word “to” should be inserted after “necessary” in the same sentence. Finally, the word “of” which appears before “the Federal Act” should be deleted.
- The word “in” should be inserted between “include” and “an” in Section 92.52a.

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# INDEPENDENT REGULATORY REVIEW COMMISSION

**To:** Shirley Hartman  
or Cindy Lauderbach  
or Denise Henke  
**Agency:** Department of Environmental Protection  
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**From:** Kristine M. Shomper  
Deputy Director for Administration  
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Commission  
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**Date:** November 25, 1988  
**# of Pages:** 10

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-338. Upon receipt, please sign below and return to me immediately at our fax number 783-2864. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:

Shirley Hartman

Date:

11/25/98

# INDEPENDENT REGULATORY REVIEW COMMISSION

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## MEMORANDUM

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**To:** Fred Taylor  
Hon. Robert D. Reber, Chairman  
House Environmental Resources  
and Energy Committee

Phil DiMartile  
Hon. Roger A. Madigan, Chairman  
Senate Environmental Resources  
and Energy Committee

Rich Thomas  
Hon. Camille George  
Democratic Chairman  
House Environmental Resources  
and Energy Committee

Ron Ramsey  
Hon. Raphael J. Musto  
Democratic Chairman  
Senate Environmental Resources  
and Energy Committee

**From:** Fiona E. Wilmarth - 783-5438 *Few*  
John H. Jewett - 783-5475 *JH*  
Independent Regulatory Review Commission

**Date:** May 18, 1998

**Subject:** Commission's Comments  
Environmental Quality Board  
Regulation #7-338 (#1975)  
Water Quality

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On November 25, 1998, the Commission submitted its comments to the Environmental Quality Board on the referenced proposed regulation. A copy is attached for your review.

If you have comments or questions, please contact Fiona Wilmarth at 783-5438 or John Jewett at 783-5475. Thank you for your time and consideration.

ATTACHMENT