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**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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January 16, 2004

Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 15th Floor
Harrisburg, PA 17105

Re: Regulation #7-386 (IRRC #2366)
Environmental Quality Board
Triennial Review of Water Quality Standards

Dear Chairperson McGinty:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulation review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director

sfh

Enclosure

cc: Honorable William F. Adolph, Jr., Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee
Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation No. 7-386

Triennial Review of Water Quality Standards

January 16, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Environmental Quality Board (EQB) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on December 17, 2003. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. Section 93.2. Scope. - Economic impact; Need for the rule; Clarity.

The proposed regulation would delete the phrase “and will be considered by the Department [Department of Environmental Protection] in its regulation of discharges” from Subsection (a). The definition of “discharge” in Section 92.1 seems to be limited to point sources. Beyond including “nonpoint sources” as defined in Section 93.1, what is the need for the deletion?

Commentators including the Pennsylvania Farm Bureau and Pennsylvania Oil and Gas Association expressed concerns with the breadth of this change, its potential impact on permit review and compliance actions, and lack of clarity. To increase clarity, the EQB should include the phrase “point and nonpoint source” before “discharges” rather than deleting language from Section 93.2(a).

In addition, the proposed deletion raises serious questions over the types of activities that are currently regulated under Chapter 93. The Department needs to describe in detail in the regulation what will be regulated under Chapter 93. For example, how does Chapter 93 pertain to the regulation of stream withdrawals or mine subsidence?

2. Section 93.7. Specific water quality criteria. - Effect on the Commonwealth’s natural resources; Consistency with federal standards; Reasonableness; Clarity.

Commentators expressed serious concerns with the proposed changes in the dissolved oxygen (DO) criteria under Table 3 in Section 93.7. The U.S. Environmental Protection Agency Region 3 (EPA) and U.S. Fish and Wildlife Service (USFWS) both expressed support for the proposed changes in the DO criteria. However, they raised several issues related to clarifying the application of the criteria and the stratification process.

The EQB should clarify the new language in Table 3 or define the new phrase “process of stratification” in the final-form regulation. Another approach would be creating an exception that states the DO criteria will apply only to the epilimnion of a lake, pond or impoundment if stratification is documented.

3. Water Quality Issues raised by Commentators. - Fiscal impact; Effect on the Commonwealth’s natural resources; Consistency with federal statutes; Implementation procedure; Clarity.

Commentators raised several substantive concerns regarding Chapter 93 that were not addressed in this proposed regulation. The commentators indicated that they have been discussing many of these areas with the Department for years. These areas include the following topics:

- Adoption of the EPA recommendation concerning the use of *E. coli* or enterococci as an indicator of bacterial contamination instead of fecal coliform;
- EPA concern involving time extensions under Section 95.4 that should be governed by variances under Chapter 93;
- EPA water quality criterion for Chloride;
- DO criteria from EPA Goldbook;
- Addition of biological criteria to Chapter 93;
- Mixing zones;
- “Cool water fishes” or “transitional fishes” use; and
- EPA criteria for Methylmercury.

If the EQB finds merit in one or more of these issues and decides to amend its existing regulations, it should submit the amendments as a new proposed rulemaking. Section 303(c)(1) of the Federal Clean Water Act (33 U.S.C. § 1313(c)(1)) requires a state to hold public hearings for the purpose of modifying or adopting water quality standards. Submitting a proposed rulemaking would allow the EQB to meet the federal requirement and insure all parties have an opportunity to comment on any additional changes to Chapter 93.

Facsimile Cover Sheet

Kristine M. Shomper
Administrative Officer



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IRRC COMMISSION

To: Shirley Wright
Agency: Department of Environmental Protection
Phone: 7-2814
Fax: 705-4980
Date: January 16, 2004
Pages: 4

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-386 (IRRC #2366). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Shirley Wright Date: 1/16/04