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MARY S. WYATTE, CHIEF COUNSEL
LESLIE A. LEWIS JOHNSON, DEPUTY CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

February 1, 2007

Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-403 (IRRC #2585)
Environmental Quality Board
Water Resources Planning

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 regulatory 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 me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy
Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and
Energy Committee
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy
Committee
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and
Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation #7-403 (IRRC #2585)

Water Resources Planning

February 1, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the December 2, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Section 110.1. Definitions. - Consistency with statute; Clarity.

We have identified three issues with this section.

First, some of the definitions in this section restate verbatim the statutory definitions from Section 3102 of Title 27 Pa.C.S.A. Chapter 31 (relating to water resources planning) (Act) (27 Pa.C.S.A. § 3102) while others cross-reference defined terms in Section 3102 of the Act. The EQB should consistently use one method for defining terms in the regulation. It should either restate each statutory definition verbatim or provide a cross-reference to the statutory citation for each definition.

Second, the regulatory definition for “water conservation project or practice” is practically identical to the statutory definition for the term “water conservation practices and measures” in Section 3102 of the Act. The regulation should use the term “water conservation practices and measures” from the Act rather than new words for a term defined by the statute.

Finally, the definition of “Statewide Committee” should reference the specific section of Chapter 31 (27 Pa.C.S.A. § 3114), which establishes the Committee and requirements for its membership.

2. Section 110.3. General requirements. - Reasonableness; Clarity.

Subsection (b)(2) states that a person that submits information and claims it is confidential should provide justification for its confidential nature. We have three questions.

First, what criteria and process will the Department of Environmental Protection (Department) use to determine whether the justification is valid?

Second, if the Department determines the justification is insufficient, how will it notify the person of the basis for its determination? Will that person have an opportunity to offer additional information or appeal the Department's determination?

Third, if the Department agrees that the information submitted should be confidential, what steps will it take to protect the confidentiality of the information? We recommend that the proposed regulation reference the statutory provisions for confidential information in Section 3119 of the Act.

3. Section 110.4. Inspection authorization. - Clarity.

This section requires registrants to provide records and grant access to the Department "upon request." Under what circumstances will the Department make such a request? Will this request be in writing? The final-form regulation should include this information.

4. Section 110.5. Coordination with reports under other statutes. - Fiscal impact; Consistency with statute; Reasonableness; Need; Clarity.

The provisions of this section in the proposed regulation are not consistent with Section 3118(b)(4) of the Act (27 Pa.C.S.A. § 3118(b)(4)). For example, Section 110.5(b) of the proposed regulation requires persons to file "...joint reporting forms developed by the Department to facilitate the submission of information required under other statutes and regulations administered by the Department, compact basin commissions, and other Federal and state agencies...."

On the other hand, Section 3118(b)(4) of the Act reads:

To avoid duplication, regulations implementing the periodic reporting requirements of this subsection shall provide that the requirements may be satisfied by the filing of discharge monitoring reports prepared under the Clean Streams Law, water supply reports prepared under the Safe Drinking Water Act, water withdrawal and use reports prepared and submitted pursuant to regulations adopted by the Delaware River Basin Commission and Susquehanna River Basin Commission, or other reports submitted under other applicable statutes and regulations....

The statute directs that the regulation provide that reporting requirements may be satisfied via existing reports. The statute does not direct the Department to develop new "joint reporting forms." If the Department already has access to this information via other required reports, then there is no need to create new forms for persons to complete and file. The final-form regulation should identify the existing reports that will fulfill the reporting requirements.

Finally, Subsections (a) and (b) both contain the phrase "...required under other statutes and regulations administered by the Department, compact basin commissions, or by other Federal and state agencies." It is not clear what "other statutes and regulations" are included in this reference. The final-form regulation should identify and cross-reference these other regulatory and statutory requirements.

5. Section 110.6. Effect of registration. - Clarity.

Subsection (a) appears to be a narrative statement describing the potential benefits of registration. Its need or purpose as a substantive rule or procedure for water suppliers or users is unclear. The language of this subsection is more appropriate for the narrative in the Preamble. Subsection (a) should be deleted in the final-form regulation. The letter “(b)” for the second subsection would also be deleted and the single sentence in Subsection (b) would be the only content in Section 110.6.

6. Section 110.201. Registration requirement. - Reasonableness; Clarity.

Commentators stated that Subsection (3), which requires an entity connected to a public water system and has a consumptive use of over 100,000 gallons per day to register and report its usage, is redundant and not needed because public water suppliers already report this usage. The EQB should state its reason for requiring this extra reporting or delete the provision from the final-form regulation.

7. Section 110.202. Submission of registrations. - Clarity.

This section states that registrations must be submitted by March 16, 2004, or 90 days following the initiation of a water withdrawal. The phrase “March 16, 2004 or” should be deleted.

8. Section 110.203. Content of registration. - Reasonableness; Clarity.

A commentator stated that the specific location of a public water supplier’s intakes should be considered confidential security information and protected from public disclosure. Has the EQB considered keeping this information confidential?

Also, another commentator asserted that Paragraph 2, which requires the reporting of each consumptive and non-consumptive use, is burdensome and has no value in water resource planning. Rather, the **total** consumptive and non-consumptive water use is the only relevant information. What is the EQB’s rationale for requiring reporting of each consumptive and non-consumptive use?

9. Section 110.302. Submission of reports. - Clarity.

This section states that reports shall be submitted to the Department on an annual basis “...or less frequently as may be prescribed by the Department...” In what instance would a report be filed less frequently than on an annual basis? What are the criteria for determining the frequency of submittals? How will the registrant know if the Department changes the frequency for filing the report? This information should be clearly set forth in the final-form regulation. A similar concern applies to Section 110.603.

Also, because Subsection (2) uses the term “including,” the phrase “Other user” in Subsection (2)(viii) is not necessary. It should be deleted in the final-form regulation.

10. Section 110.305. User-specific contents of report. - Statutory authority; Reasonableness; Need; Clarity.

Commentators noted that this section is vague concerning the type of information that is to be included in the required reports. One commentator questioned the need for the “employment” information required in Sections 110.305(3)(i), (4)(i), (5)(i), (7)(iii) and (8)(iv). We agree that the descriptions of the “user-specific” information are vague and do not provide sufficient detail.

In addition, we question the statutory authority of the EQB to include these provisions in this regulation. Part of Section 3118(b)(1) of the Act (27 Pa.C.S.A § 3118(b)(1)) describes the reporting requirements:

... Such regulations shall require water users subject to the registration requirements of this section to monitor, maintain records and submit to the department periodic reports regarding the **source, location and amount** of withdrawals or uses or both from surface waters and groundwaters, including the **amount** of consumptive and nonconsumptive uses, the locations and **amounts** of any waters returned and discharged and the **amounts** of water transferred between public water supply agencies via interconnections. Such regulations shall not require submission of periodic reports more frequently than annually.... [Emphasis added.]

The specific language of the statute requires that these reports include the “source, location and amount of withdrawals or uses.” There is no mention of employment data, storage information, irrigation information or other details regarding the business using the water. In other words, the focus of the Act is location, source and amount of water being used. There is no mention of documenting other information. The EQB and Department should justify the need for this information and explain the statutory authority for requiring its submittal. If these data requirements are retained in the final-form regulation, this section should include specific details describing the type of data that must be included in the reports.

11. Section 110.402. Retention of records. - Clarity.

This section states that records must be maintained for five years. In what format must these records be maintained? Do they need to be maintained on paper or can they be retained electronically or by other media? This should be clearly stated in the final-form regulation.

12. Section 110.501. Metering and measuring requirement. - Consistency with statute; Reasonableness; Clarity.

We have four concerns with this section.

First, what alternative methods for determining usage are acceptable to the EQB? Section 3118(b)(1) of the Act (27 Pa.C.S.A § 3118(b)(1)) states “...With respect to withdrawal uses...involving a withdrawal of less than 50,000 gallons per day in a 30-day period, the regulations shall provide for the use of alternative methods to obtain a reasonable estimate or indirect calculation of such in lieu of direct metering or measurement.” To be consistent with the Act, the EQB should establish these alternative methods in the final-form regulation.

Second, the EQB should consider adding language to limit the 5% accuracy to withdrawals. A commentator suggested that Subsection (a) be clarified to state that the accuracy of reporting is applicable only to withdrawals because consumptive use is too hard to quantify in power plant systems.

Third, Subsection (d) allows for exceptions to the 5% performance standards, but does not set forth the method for requesting these exceptions. These methods should be clearly stated in the final-form regulation.

Finally, Subsection (f) requires certain persons to measure or calculate their withdrawals "by a means acceptable to the Department." Will these "means" be different than the ones set forth throughout this regulation? If so, these alternate means should be set forth in the regulation. If the Department is going to consider suggestions for alternative "means" for measuring or calculating withdrawals, then the process for submitting these proposals and the criteria that the Department will use in determining whether they are "acceptable" should be set forth in this subsection.

13. Section 110.502. Recording frequency. - Reasonableness; Clarity.

A commentator stated that this section is unclear about how frequently a person must record withdrawals and uses if that person is both a large user (subject to Section 110.501(c)) and a user subject to the compact basin commission requirements (under Section 110.501(e)). The final-form regulation should clearly state the recording frequency for those users that fall into multiple categories under this section.

Also, this section states that both withdrawals and uses should be reported weekly. Commentators indicated that it is hard to quantify consumptive uses and a monthly estimate would be more appropriate. Has the EQB considered monthly reporting for consumptive users?

14. Section 11.503. Measuring requirement in critical water planning areas. - Statutory authority; Reasonableness; Clarity.

This section would allow the Department to require increases in the accuracy and frequency of reports filed by users that exceed 10,000 gallons per day in any 30-day period if the Department determines this is necessary in a critical water planning area. One commentator asserted that Section 3118 of the Act does not give the EQB the statutory authority to impose additional reporting, documentation and quantification requirements in critical water areas. We have identified two issues.

First, the Act does not appear to envision the prospect of increasing the stringency of reporting requirements in certain areas or for certain users. In fact, the opposite is true. Section 3118(b)(2) of the Act reads:

The regulations may provide for the adjustment of or variations in registration, recordkeeping or periodic reporting requirements for identified classification of user or volume of withdrawal if such requirements are **not** necessary to obtain information required to adequately assess water uses, monitor demands and

otherwise prepare accurate and complete regional and State water plans and, if applicable, critical area resource plans. [Emphasis added.]

The EQB should clearly state its authority to require extra reporting in critical water planning areas.

Second, Subsection (a) states that the Department “may” require persons in a “critical water planning area” to measure or calculate their water withdrawals with greater accuracy and greater frequency. However, it is unclear when and how the Department will decide “that more accurate data is required.” Subsection (b) states that the Department will consider the “necessity” for the data and the “costs to registrants” in making the determination. If this section is retained, the process and criteria for this determination need to be described. Also, the regulation should state that the “written notice” will include an explanation of the basis for the Department’s determination.

15. Forms - Clarity.

Some sections in the proposed regulation require the completion of a form or forms prescribed by the Department. Will these forms be available on the Department’s website? If not, how will affected parties obtain copies?

Facsimile Cover Sheet



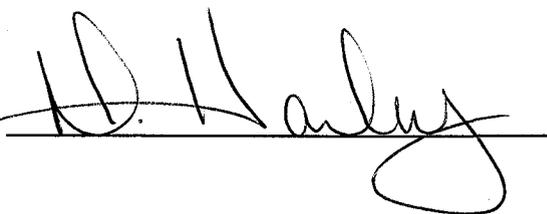
Phone: (717) 783-5417
Fax #: (717) 783-2664
irrc@irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Debra L. Failor
Agency: Department of Environmental Protection
Phone: 7-2814
Fax: 705-4980
Date: February 1, 2007
Pages: 8

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Environmental Protection's regulation #7-403 (IRRC #2585). 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:



Date:

2-1-07