



CPWQA

Central Pennsylvania Water Quality Association

2774

July 30, 2010

Chairman Arthur Coccodrilli
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RECEIVED
IRRC
2010 JUL 30 P 3:50

RE: EQB Final-Form Regulation# 7-433 (IRRC# 2774): " Administration of the
Water and Wastewater Systems Operators' Certification Program"
CPWQA Comments

Dear Chairman Coccodrilli:

Attached please find comments from the Central Pennsylvania Water Quality Association
(CPWQA) for the referenced proposed rulemaking.

Thank you for your consideration and if you have any questions regarding the CPWQA
comments, please contact me at 717-939-8898.

Sincerely,

Jess Rosentel
Certifications Committee Chairman
Central Pennsylvania Water Quality Association

CC: CPWQA Officers
Scott Schalles, IRRC
Michaele Totino, IRRC
Michele Tate, EQB

Comments by the Central Pennsylvania Water Quality Association on the *Advance Notice of Final Rulemaking, Administration of the Water and Wastewater Systems Operators' Certification Program, 25 Pa Code Chapter 302, IRRC Docket #2774*

Ever since the Clean Water Act created the NPDES program in 1972, compliance with permit requirements has been the obligation of the permittee—the industry or the municipality that owns and operates the treatment system. The same can be said of Safe Drinking Water Act permits. Although at least some permit violations are probably the result of an operator's error, enforcement action by the regulatory agency has always been taken against the permit holder, not the individual employees. It has been left to the employer to decide if, and to what extent, action against the employee is warranted when permit violations occur. This concept goes back to basic principles of agency under the common law, and is commonly referred to as *respondeat superior*. The only time that an individual might be prosecuted is when he acts with malice or obviously outside of his scope of employment, so that the employer cannot reasonably be held to be responsible.

Similarly, government has rarely interfered with employer-employee relations by dictating the duties of employees. While professional employees have always been subject to regulation, the scope of their employment has been left to be decided by employees and employers.

The final form rulemaking changes both of these concepts in a manner that is unprecedented and a violation of both statutory and common law.

Provisions at Issue:

§ 302.1201(a) provides, “. . . The Department will consider reports submitted to the owner in accordance with subsection (c) and the owner's response as defined in § 302.1202(a)(4) (relating to duties of owners) when deciding if a certified operator is in compliance.”

§ 302.1201(c) provides that “Certified operators shall report to the system owner any known violations or system conditions that may be or are causing violation of any federal or state law or rules and regulations promulgated thereto [*sic*] or permit conditions and requirements applicable to the operation of water or wastewater systems. When submitted, the report must include the following: . . . (3) The nature of the violation or system conditions. (4) The suspected cause of the violation or system conditions, including the lack of needed resources. (5) The degree of severity or threat to public health, safety or the environment of the violation or system conditions. (6) Any actions or mitigating measures associated with process control necessary to prevent or eliminate a violation . . .” [Emphasis added.]

§ 302.1201(d) states, “The available operators making process control decisions are responsible for those decisions and consequences, unless the owner fails to respond to a report as required in subsection (c) or there is deliberate action with malice or negligence on the part of an employee under the supervision of the available operator.” [Emphasis added.]

§ 302.1202(a) provides, "An owner of a water or wastewater system shall: . . . (4) Take appropriate action in a timely manner in response to reports required under § 302.1201(c) (relating to duties of operators) from certified operators."

§ 302.1201(b) includes a list of "available operator tasks necessary to control the operation and provide for the maintenance of a water or wastewater system." This list is referenced in § 302.308(b): "The Board may suspend, revoke, or modify a certificate for misconduct for reasons including: . . . (4) Incompetence or failure to use reasonable care and professional judgment in performing the duties of a certified operator as described in § 302.1201 (relating to duties of operators)."

Finally, § 302.1209 reflects the Department's interpretation of § 1014(c) of the statute, regarding the imposition of civil penalties for violation of operator or owner duties under the Certification Act. It provides that no penalties for these violations may be assessed unless the operator or owner has violated an order issued under the Certification Act. (Note that this provision does not address in any way civil penalties that may be assessed under the Clean Streams Law or the Safe Drinking Water Act, 35 P.S. §§ 691.605 and 721.13(g).)

Issues Identified by Commenters

1. The Statute (Water and Wastewater Systems Operators Certification Act, 63 P.S. § 1001 *et seq.*) requires only that operators report (1) system conditions that are or may be causing violations, and (2) any action necessary to prevent or eliminate a violation. See, e.g., 63 P.S. § 1013(e) (2) & (4). The addition of two extra reporting requirements—the "cause" of the condition, and the "degree of severity or threat to public health, safety or the environment" (hereafter the "cause and effect" elements)—are not encompassed by the statute and in many cases would be difficult, if not impossible, for many operators to determine.
2. Operators will be held responsible for "consequences" of their decisions unless they (1) submit a report under § 1012(c)—including the "cause and effect" information—and (2) the owner fails to "take appropriate action in a timely manner." Since the term "consequences" implies, as a matter of law, those results that are not a direct and immediate result of an action, the regulation creates significant personal liability for operators for such things as Permit violations unless they submit reports including the "cause and effect" information, which is in many cases simply impossible for them to obtain.
3. Since there is no "protection" under § 302.1209 (requiring that an Order be issued and subsequently violated) for civil penalties assessed under the Clean Streams Law or Safe Drinking Water Act, operators can be subject to substantial civil penalties for permit violations under those acts without any notice or direction from DEP, such as would be provided by a Notice of Violation or an Order, explaining the operator's duties and how they might be breached.
4. The proposed regulations reverse 40 years of legal precedent by making individual employees, rather than the permittee/employer, liable for permit violations. This is a radical change in liability exposure that is not contemplated by the Statute. Nowhere in the Certification

Act does it say that the Legislature intended for operators to be held legally responsible for permit compliance in the routine performance of their duties. The Statute provides that certified operators must provide for suitable operations and make all process control decisions (63 P.S. § 1013(e)(3) & (5)), but does NOT state that operators are then legally responsible for all "consequences" of such actions and decisions.

5 The regulations not only shift new and unprecedented liability onto the shoulders of individual operators, they substantively exempt employers/permittees, for the first time in history, from liability for permit violations. That is, the owner escapes liability for permit violations in two ways: if the operator does not submit a lengthy and complicated report including "cause and effect" information, there is no duty of the owner to do anything and all liability falls on the operator; and (2) as long as the owner takes some sort of action in response to a report that does include the "cause and effect" information, even if that action is ultimately unsuccessful, the operator is liable (operators only escape liability if the owner fails to take action).

6 The list of "duties" (some of which are not within the reasonable control of most operators—e.g., #3: operators cannot "control the flow" of wastewater systems to the environment, since sewage arrives at the treatment plant as it is discharged by customers) along with the provision that operators can be sanctioned for not fulfilling these enumerated duties intrudes on the work assignments of operators.

7 The result of this radical change in the law (none of which is contemplated by the Statute) is that:

a. Operators will be held liable for permit violations in nearly all cases unless they undertake to conduct difficult and complicated investigations into the cause and potential effect on the environment or human health of any system condition that they notice which might be or become a violation and then take the time to draft extensive reports of this information to submit to the owner.

b. Operators can be held liable for not performing the duties invented by DEP and listed in the regulation.

c. Operators must, to protect themselves from these new sources of liability, have the ability to perform whatever tasks they determine are necessary to meet their obligations.

8. The result of these new requirements¹ is that owners/employers cannot establish work assignments or restrict the duties of their certified operators, since doing so would increase the liability of the operators and thereby put them at increased risk of fines and loss of their certification. In essence, the obligation of permit compliance has been substantially shifted from the owner/permittee to the individual operator, and in return, the owner/employer has been effectively divested of its rights to establish the work assignments of the employees who are certified operators.

This conclusion is fully supported by the documented Responses of the Department to these issues, as set forth in its *Comment/Response* Documents, as discussed next.

¹ None of these requirements have EVER been imposed on certified operators, either by regulation or policy.

With regard to the requirement to include information not required by the statute in reports:

“[T]he sole reason this requirement was established in statute was to provide the operator with some level of protection should a violation occur where the Department intends to take some form of enforcement action. Therefore, in order for the operator to make the decision as to whether the situation warrants making a report or not, the operator should have some reasonable understanding of the potential or actual cause of the violation and an estimate of the severity of the threat. These reports were never intended for every ‘required report of system conditions’ as stated by the commentator.” April 27, 2010 Comment Response Document, #41.²

In the same document DEP also stated, “the reference is designed to differentiate these reports [*under § 1201(c)*] from any number of reports filed by an operator in any given day. This is another reason why the content of the report as defined in paragraph (c) is needed.” Response # 42(d). Similar statements appear in Responses to Comments #124 through 127 in the March 30, 2010 Comment Response Document. (Again, these responses contradict the text of the regulation.)

With regard to the expansion of Operator liability to encompass permit violations:

“[T]he word ‘consequence’ is to be used in a common sense manner to indicate that the available operator is responsible for process control decisions that are in violation of the act. It should be noted that any term used in a regulation has a legal meaning and is to be applied in the context of applicable law.” (April 27, 2010 *Comment Response Document*, response # 42(a).) [Emphasis added.]

With regard to the shift of liability from permittees to operators: “Only in some cases, such as when the owner has not provided the necessary resources to the operator to adequately complete the duties of an operator, will the owner have the final accountability.” (March 30, 2010 *Comment Response Document*, response to Comment # 122).

With regard to the assignment of duties by the employer to the Operator:

“The owner’s responsibility is to designate an available operator(s) and ensure all process control decisions regarding the operation of the system are made by that available operator(s). How this is accomplished is up to the available operator, not the system owner. . . . Adding the wording suggested by the commentator to reflect [that] these duties are assigned by an owner is not possible, unless that owner is also certified and has been designated as an available operator for the system. . . . The operator is the one responsible for performing the necessary duties to ensure the system is in compliance” (April 27, 2010 *Comment Response Document*, comments # 40 and 42(f).) [Emphasis added.]

Finally, while not documented by the Department, DEP employees have stated on several occasions that the reversal of liability was done at the request of some system owners who believed that their employees, not they, should be held responsible for permit violations.

² Note that this comment contradicts the plain text of the Statute and the proposed regulations, which make these reports, and all of the itemized contents, mandatory.

The plain text of the regulation and DEP's interpretive comments, confirm that it is the purpose and intent of the regulations to reverse long-standing legal precedent of *respondeat superior*, to hold individual employees, rather than permittees, personally responsible for permit and other violations, and to usurp the authority of owners/employers to determine the duties of operators by imposing such potential liability on operators that they must have the right to determine their own job duties in order to control that liability.³

None of these requirements are contemplated by the Statute, none were intended by the Legislature, and none are within the legal authority of the EQB or the Department to impose.

All of the regulatory provisions quoted above must be deleted and/or revised to comply with statutory and common law.

³ Note that any action of an owner to interfere with a certified operator's performance of the duties, as the operator understands them, is subject to a "whistleblower" complaint under § 1015.1 of the Statute.

2774

From: Schalles, Scott R.
Sent: Friday, July 30, 2010 3:29 PM
To: IRRC; Gelnett, Wanda B.
Cc: Wilmarth, Fiona E.
Subject: FW: CPWQA Final Comments on IRRC #2774
Attachments: CPWQA Final Comments to IRRC # 2774, EQB # 7-433.pdf

RECEIVED
IRRC

2010 JUL 30 P 3:49

Public comment on 2774

From: Rosentel, Jess [mailto:JRosentel@cityofhbg.com]
Sent: Friday, July 30, 2010 3:28 PM
To: Schalles, Scott R.; Totino, Michaele
Cc: James Radtke; 'mtate@state.pa.us'
Subject: CPWQA Final Comments on IRRC #2774

CPWQA's final comments on IRRC # 2774 are attached.

Jess Rosentel
Operations Shift Supervisor
Harrisburg A.W.T.F
717-939-8898 ext. 231