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INDEPENDENT REGULATORY
REVIEW COMMISSION

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Independent Regulatory Review Commission
14th Floor, Harrisstown 2
333 Market Street
Harrisburg, PA 17101

Environmental Quality Board
Post Office Box 8477
Harrisburg, PA 17105-8477

Re: Environmental Quality Board
Proposed Rulemaking, July 11, 2009
Chapter 302, Administration of the Water and Wastewater Systems Operators
Certification Program
Regulation I.D. # 7-433

Dear Commissioners and Board Members:

I am writing to express my concerns regarding the referenced rulemaking. I am a professional certified wastewater operator. Based on my experience, I believe that the proposed regulations would significantly negatively impact my ability to do my job as a professional. I have many concerns, and I endorse the comments being prepared by the Eastern PA Water Pollution Control Operators Association. I am writing separately to express my personal views.

The issues discussed below are of special concern to me personally because they impose arbitrary and unreasonable requirements, including the creation of new obligations and new forms of personal liability not provided for in the Certification Act.

In addition, these new rules are so radically different from the current program, I must state my deep concerns about the short time allotted for public comment and with DEP's refusal to meet with representatives from the professional operators' associations during the course of drafting the regulations. I urge the Board and the Commission to recommend strongly to DEP that it return to the drawing board and work with the regulated community to develop reasonable and practical regulations. As drafted, the regulations could result in wholesale loss of qualified operators.

In particular, I am concerned about the following:

Creation of new sources of liability not in the Certification Act

Suspension/revocation of certification for "failure to comply with the duties assigned to a certified operator."

Section 1004 of the Certification Act provides that my certification may be revoked for violation of a number specific things. However, sections 302.308(b)(6) and (7) of the draft regulations would subject me to loss of my certification for things that are not even mentioned in the Act. These sections add new obligations in addition to the items mentioned in the Act, which appear in (b)(1) through (5).

Paragraph 308(b)(6) creates a new form of liability that is not mentioned in the Act. Here it is "creating a potential threat to public health, safety, or the environment." I have no idea how to interpret this requirement, or what I need to do to avoid losing my certification under this new requirement. If my operators' certificate is to be taken I should at least know what it is that would put me at risk. By definition, the operation of water and wastewater facilities always has the "potential" to affect public health whenever anything goes wrong. That is an essential duty of the operator—to recognize and correct "potential" problems. To allow the Board to revoke my certificate for almost anything that goes wrong at a treatment plant because it is a "potential threat" is absurd.

Paragraph (7) is similar. I have no idea what "failure to comply with the duties assigned to a certified operator" means, since it clearly means something different from the things stated in the first five paragraphs. Who "assigns" the "duties," DEP or my employer? Can I lose my certification because I don't take out the trash, which is one of my "duties"? I cannot operate my treatment system if I do not know what I am liable for and what I am not. Paragraph (7) creates new obligations not stated in the Certification Act, but doesn't tell me what they are.

Expansion of the falsification of records provision.

The Act provides that my certification may be denied or revoked if, among other things, I am guilty of "falsification of operating records." Section 308(b)(3) of the proposed regulations would change this statutory requirement to also impose liability for falsification of any governmental documents or records. This broadening of the liability beyond the limits of the statute makes it possible that I could lose my certification for an error on my tax returns. The regulations should not make up new rules, they should stick to those that are in the Act.

Liability for "consequences" of Process Control Decisions.

Section 1014(c) of the Act provides that certified operators are liable for failure to undertake their duties as set forth in section 1013. These duties are clearly spelled out and I understand them. Section 302.1201(d) of the proposed Regulation creates an entirely new class of civil liability that is not mentioned in or authorized to be created by the Act. Specifically, this section imposes liability for "consequences" of process control decisions. First, as with the other newly invented obligations in these regulations, I have no idea what this is supposed to mean. I suppose that it imposes liability for any adverse result of a process control decision, whether or not it was reasonably anticipated. This requirement reflects a lack of basic understanding of the

complexity of treatment plant processes. Process control decisions do not always result in the desired results, for a variety of reasons. Making individual operators personally liable for anything that happens at a treatment plant is a guaranteed way to create mass resignations of certification. I will certainly reconsider whether I should retain my certification in light of this vague and unreasonable requirement.

Liability for permit violations

Another attempt to create liability where none exists in the Act is in section 1206(e). This is an attempt to make the Operator in Responsible Charge legally liable for any and all NPDES permit violations that may occur when a Standard Operating Procedure (SOP) is being followed. Not only is this not authorized by the statute, it is illogical. Permit violations can occur for many reasons. This regulation makes the unfounded assumption that whenever a permit violation occurs, it must be a result of using the SOP. In other words, I would be legally responsible for a violation that occurred as a result of a power failure, pump malfunction, or break in a chemical feed line, merely because an SOP that I had approved was in use at that time. In addition to this liability not appearing anywhere in the Act, it is so arbitrary that the only rational response is to never generate or use any Standard Operating Procedures at my plant. In other words, rather than be subject to random liability, I will have no choice but to refuse to provide direction and help to my fellow operators.

Interpretation of Statutory Liability

Section 1014(c) of the Act states the following: “. . . the department may assess a civil penalty upon any person who violates any provision of section 13 or any operator who violates section 5(d) or 6(d) and any order issued by the department under section 4(b)(2).” As a certified operator, I am subject to Section 13; non-certified operators are subject to sections 5(d) and 6(d).

This provision is open to two interpretations: (1) I am liable for any violation of my duties under section 13, but non-certified operators are liable only if they both make a process control decision and also violate an order of the department; or (2) everyone is subject to liability only if they violate both the respective statutory provision and an order of the Department. Since either interpretation is possible, but the level of liability is different for each, it is important to me to understand how DEP will interpret this provision. I have heard that different DEP officials have claimed both interpretations at different times. The regulations provide the opportunity to clarify this, reduce uncertainty, and establish a single interpretation.

Other concerns

In addition to the new liabilities introduced by the regulations which are discussed above, there are several more practical problems of concern to me.

Absurd Reporting requirements.

Section 1013(e) of the Act requires certified operators to “report to the system owner” such things as violations, problematic system conditions, and actions necessary to prevent or eliminate a violation. The Act does not specify the content of the reports or the manner in which they are to be made. I understand and have complied with this requirement since the law was passed in 2003. I routinely report to my superiors, sometimes several times a day, on

malfunctions, maintenance requirements, and other matters that, if left uncorrected, could compromise my system. The vast majority of these reports are made orally to my immediate superior and receive prompt attention. This method of reporting is not only effective, it is efficient and practical.

Section 1201(c) of the regulations, however imposes new and irrational requirements on the method of reporting and on the contents of my reports. In a typical day, I may make many reports of system conditions to my supervisor. These range from minor maintenance issues to operational problems or needs of every kind. The vast majority of these reports concern minor matters, but still are important because ignoring them could lead to malfunctions in the system. To require that each and every one of them be put in a lengthy written report, containing information that I do not have access to (such as the eventual effect on public health), is absurd. To further require that I demand a receipt from my boss or, even worse, to take time off from work several times a day to send them via registered mail to the owner of the treatment plant, is absolutely ludicrous. The current practice of reporting to my supervisor in person is more than sufficient to handle most, if not all, of the issues that arise from day to day, and is all that is required by the Act.

Process Control Decisions by Untrained DEP workers

The term "Process Control Decision" is defined in the Act. It is basically any decision that affects the quantity or quality of water or wastewater in a substantial way. Sections 1005(d), 1006(d) and 1013(e)(5) mandate that Process Control Decisions may only be made by properly certified operators such as myself. There is no exemption for uncertified, untrained, or unqualified people to make these decisions in any situation. As an operator, I understand that this is an important requirement. Process control decisions should not be made by anyone who is not certified to make them.

Section 1203(e) of the draft regulation attempts to create an exception to the statutory definition to allow untrained DEP employees to make these important decisions. This is exactly the opposite of what is required by the Act. My primary concern, however, is not that it is contrary to the law, but that the ONLY apparent reason for this provision is to allow people who do not have training to come into my plant and order changes that may be detrimental to its operation. If DEP staff wants to make process control decisions, then let them do what I and my fellow operators have done: take the training, get the experience, and pass the certification test. To do any less is to risk significant environmental problems. The very idea of allowing someone to make operational decisions BECAUSE they have no training is not only directly contrary to the law, it is absurd.

Excess Credits should be carried forward.

The program that has been administered for six years under the informal Guidelines has shown a need to be able to carry training credits forward into the subsequent three year training cycle. Operators should be encouraged to obtain training that is applicable and useful for their employment, not just randomly chosen classes to generate "credits." Because courses are offered at different times, it has been my experience under the current system that I have not taken needed training because I already had sufficient credits, and I have taken pointless training because I needed to obtain credits before the end of my renewal cycle. The current system does not always allow the operators to take the training they need, it only creates pointless "credit

counting." This counterproductive scheme is repeated in the draft regulations at sections 306(d) and 802(d). Changing this rule to allow excess credits to carry forward into subsequent training cycles will allow operators to be more judicious in their choice of training, taking courses that we need, when they are offered. Since the credit reporting system is computerized, making this important improvement would be a simple matter. There is no prohibition on carrying forward credits in the statute or in the EPA Guidelines for these programs.

In summary, I strongly object to the proposed regulations because they clearly conflict with and in some cases contradict the law, because they impose absurd requirements that no operator could reasonably comply with, and because some of the provisions are so vague that I have no idea what I could be held liable for. As I stated above, if these regulations are adopted, I and many of my fellow operators will have no choice but to resign our certifications rather than to try to work under the arbitrary, and bizarre requirements included in these rules.

Very Truly Yours,

Gregory Rapp

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