EASTERN PENNSYLVANIA WATER POLLUTION CONTROL OPERATORS ASSOCIATION

244 Mountain Top Road
Reinholds, PA 17569-9077
epwpcoa@ptd.net
(610) 670-6072
Fax (610) 670-6076
Visit us on the web at www.epaops.org

2774.

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

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:

The attached Summary contains the Eastern Pennsylvania Water Pollution Control Operators Association's comments on the Operators Certification Program. Our Association is extremely concerned about these issues and their effect on the wastewater industry now and for the future. We humbly request you give our summary on these most concerning regulation changes your utmost review and attention.

Sincerely,

Joseph A. DiMatteo

Joseph A. DiMatteo
President 2009

PROPOSED RULEMAKING—TITLE 25, CHAPTER 302—Administration of the Water and Wastewater Operators' Certification Program
Regulation I.D. # 7–433

Comments of the Eastern Pennsylvania Water Pollution Control Operators Association to the Independent Regulatory Review Commission

The Eastern Pennsylvania Water Pollution Control Operators Association ("Association") constitutes a membership of over 1000 water and wastewater operators, as well as owners, consultants, and other professionals in the field of water and wastewater treatment. The Association has reviewed the Proposed Rulemaking and has the following comments.

Our comments to the IRRC are limited to issues within the purview of the Commission. Accordingly, certain matters of a more technical nature, which are being provided to the Environmental Quality Board (the "Board" or "EQB"), are not included in these comments.

PROCEDURAL SHORTCOMINGS

Our first comments are with regard to the procedure, or lack thereof, that the Department of Environmental Protection (DEP) followed in drafting the regulations and bringing them to the Board for publication. We believe that DEP's failure to follow the reasonable and required process of engaging in meaningful dialogue with the regulated community prior to proposing regulations to the EQB for adoption is a major cause of the many deficiencies in these draft rules.

We have reviewed and are familiar with the current operator certification program carried out under the Interim Guidelines and the current ("old") regulations at Chapters 301, 303 and 305, which will be rescinded as part of this Rulemaking. Virtually none of the issues discussed in these comments appears in either the Guidelines[1] or the old regulations. Accordingly, with over two dozen wholly new proposed provisions, it was incumbent on DEP to request input from stakeholders as part of the development of these technical rules. Additionally, it was legally required for the EQB to provide adequate public notice in the *Notice of Proposed Rulemaking* of the many entirely new requirements being proposed.

This issue is germane to IRRC review not only because of the violation of the *Commonwealth Documents Law*, but also because EPA requirements for stakeholder involvement are at issue. The failure of the Department to follow EPA-required procedures renders the acceptability of the rules questionable and may result in EPA not approving the regulations as acceptable under the federal Safe Drinking Water Act. Disapproval, in turn, could result in loss of federal funds. Accordingly, IRRC should recommend to the EQB that the rules be withdrawn from further consideration until the required procedures have been followed under EPA's guidelines and the Department's Regulatory Negotiation policy; this includes active and meaningful stakeholder involvement. Our specific comments regarding procedure follow.

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[1] We are aware that PaDEP staff has claimed that the proposed regulations are substantively similar to the existing Guidelines. Those claims are demonstrably false.

1. *The Draft Regulations Have Not Been Subject To Stakeholder Input And Should be Withdrawn for Regulatory Negotiation*

In support of our concern about the lack of stakeholder input, we refer to the EPA *Guidelines for the Certification and Recertification of the Operators of Community and Nontransient Noncommunity Public Water Systems*, 64 F.R. 24, pp 5915–5921, February 5, 1999. These guidelines are simple and straightforward. Among other things, EPA requires meaningful stakeholder input into the regulatory program, "States must include ongoing stakeholder involvement in the revision and operations of State operator certification programs. Public comment on rule revisions is not adequate stakeholder involvement." (*Id.* at 5920.) This is sound guidance with which we fully agree.

While the Association did participate in a regulatory negotiation ("reg-neg") process with DEP in 2003 and 2004, which was showing signs of progress, the process was abruptly terminated by DEP in 2004 without discussing, much less reaching consensus on, a number of important issues. No formal discussion with regard to the proposed regulations has been allowed by DEP since 2004.[2] In addition, the Certification Program Advisory Committee was informed of the proposed regulations in early 2008, but did not submit any substantive comments on the draft rules. As is evident from the many comments below, there are a large number of outstanding matters of great importance to the regulated community that have never been discussed with DEP. We believe that this program has not met the stakeholder involvement requirement of EPA and should have been subject to meaningful dialogue with DEP staff.

Hence, our first comment is that the regulations should be subjected to further review, preferably under DEP's reg-neg policy, and brought back to the EQB for further consideration and republication as provided by 45 P.S. § 1202 once the issues have been aired and discussed in detail with stakeholders, as EPA requires.

2. *The publication of the proposed rulemaking did not conform to the requirements of the Commonwealth Documents Law.*

Publication of proposed rulemaking is governed by 45 P.S. § 1201, which requires that the notice contain "a brief explanation of the proposed administrative regulation or change therein." (§ 1201(3).) Typically, this statutory requirement is met by the provision of a "Preamble" accompanying the *Notice of Proposed Rulemaking* which itemizes and discusses the proposed new rules, or the changes from existing rules. As is evident from the extensive comments we are providing, the proposed regulation contains well over a dozen completely new rules, as well as a number of other substantive changes to the existing program that has been implemented under the Interim Guidelines.

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[2] DEP did hold a number of public meetings to discuss and explain the interim program Guidelines which it developed in 2003 and under which it has operated the certification program for the past 6 years. However, the proposed regulations are significantly different from those Guidelines; hence, the issues raised here were not discussed with DEP or anyone else during the public meetings held to discuss the Guidelines.

The only changes or new rules that are mentioned in the *Notice of Proposed Rulemaking* are the proposed new fees and taxes, and a change in how certification reciprocity will be handled. Subsections J and L of the regulations, which are comprised almost entirely of new rules and which are the subject of over 20 of our comments, are not even mentioned in the Preamble. Accordingly, the public and the regulated community were not properly notified of the scope and extent of the proposed rulemaking, as the law requires.

3. *The proposed regulations will impose gross fiscal impacts on the public and private sector in excess of one million dollars a year and therefore a Regulatory Analysis should be requested under 71 P.S. § 745.5(b).*

The scope of Commission review includes whether proposed regulations will have a disproportionate, unjustified, and significant economic impact on municipalities and regulated individuals. (71 P.S. § 745.5(e)(1).) The Association believes that, in combination with the imposition of drastic new forms of liability, the new taxes, fees, and costs proposed by the rule will have a significant and discouraging effect on the profession, resulting in the loss of certified water and wastewater system operators, which will potentially have adverse effects on public health.

The "Fee Report Form" (December 31, 2008) generated by DEP staff in support of the proposed taxes and fees (see comment 13 under Direct Conflict with the Statute below) indicates that the purpose of the new taxes and fees is to produce revenues of $1,128,491 in FY 2009 and $938,128 in FY 2010. On page 2 of that Report, the projected income to DEP from the combined fees and taxes on individuals and municipalities is projected to be $961,370 per year. However, the statute requires that a regulatory analysis be submitted (on the request of the Commission) whenever "gross fiscal impacts on either the public sector, the private sector, or both" are imposed by the regulations. The statute cites a figure of $1 million, but also provides that "other major impacts [may be] determined by the Commission." § 745.5(b). Such impacts need not be confined to the actual fees and taxes created by the new rules, but may also include other costs related to compliance. Analyzing the proposed regulations with the limited information made available by the Department, it is clear that the impact on individuals and municipalities will be significantly greater than $1 million a year.

Because of the lack of detail provided by the Department, it is very difficult to estimate the actual financial impact on individuals and municipalities from the fees and taxes alone. However, a quick estimate of some of the larger fees and taxes based on the Report makes it clear that a significant fiscal impact will arise from these charges alone:

- Applications for Renewal (9600 operators renewing every 3 years) 3200 x $60 = $192,000/year
- Taxes on 2000 water and wastewater systems (range from $500 to $65) ≈ $ 400,000/year

Hence, nearly $ 0.6 million in fees and taxes will be paid to DEP under these two items alone. As noted above, DEP estimates a total income from all fees and taxes at over $960,000 a year.

In addition to taxes and fees paid directly to DEP, significant additional costs will be imposed by the regulations. The most important one is training costs for certified operators:

> Approximately 9600 operators, taking 10 hours of training a year (see § 302.803), @ current rate of $35 per training hour (based on rates currently charged by most training providers) = $ 3,360,000 a year.
>
> Part of the cost charged for training covers the various DEP fees and taxes on training providers, which amounts to an estimated $ 2–3 per credit hour per student, so the total additional cost to certified operators can be estimated at 9600 x 10 x $32 = **$ 3,072,000 a year.**

Using the above figures, the total cost to municipalities, individuals, and operators for fees, taxes, and compliance costs is in excess of $4,000,000 a year.

The Association recognizes that the training costs discussed above are currently incurred under DEP's current Interim Guidelines (*Pennsylvania's Interim Program for Operator Certification,* Technical Guidance No. 383-2300-001). However, the *Regulatory Review Act* does not provide an exception for costs that may have been in place prior to the regulations under an informal program.

The Association is not, in this comment, challenging the propriety of the proposed fees and taxes (although see Comment 13 below with respect to certain of them). We are simply stating that because of the significant fiscal impact on individuals and municipalities, that the Commission request a regulatory review under the cited regulation, so that the full fiscal impact of these proposed regulations can be properly evaluated.

SUBSTANTIVE COMMENTS

The comments below are submitted because, as discussed in detail below, the various portions of the proposed rulemaking:

- Are contrary to the statutory authority of the Environmental Quality Board;
- Are contrary to the intention of the General Assembly in enacting the enabling statute (the *Water and Wastewater Systems Operators' Certification Act,* Act 322 of 1968, as amended by P.L. 134, Act 11 of 2002; 63 P.S. § 1001 *et seq.* – the "Act");
- Create several new major policies of such scope and effect that they require legislative review;
- Risk public safety and health (this issue is particularly with respect to proposed section 302.1203(e), discussed in comment 11 below);

- Are ambiguous, vague, and unclear; or
- Are unnecessary, unreasonable, or impossible of performance.

As several of the provisions are appropriately addressed under more than one of the above criteria, classification by topic is difficult. Therefore, except for our comment on fees and taxes, which appears at the end of the first section due to its length, our comments are in roughly the order in which the provisions appear in the proposed regulation; the order does not necessarily denote a prioritization of our level of concern. Our concerns are presented under two general headings: *Direct Conflict with the Statute* (addressing the first through fourth bullets above), and *Technical Deficiencies* rising to the level of requiring IRRC attention under the last two bullet points.

With regard to one of the bullet points above—ambiguity—we are aware that PaDEP's position is that ambiguous regulations are acceptable, and are properly addressed by constant application of enforcement discretion and case-by-case interpretation. We disagree. Common sense, as well as substantive and procedural due process concerns, dictate that regulations are to be clearly worded, not purposely (or inadvertently) written so as to invite multiple interpretation. Moreover, the Statutory Construction Act applies to regulations as well as statutes (1 Pa.C.S.A. § 1502(a)(1)(ii)). That Act states that "words and phrases shall be construed according to rules of grammar and according to their common and approved usage . . . ." (1 Pa.C.S.A. § 1903(a)). Hence, promises that the regulations will undergo constant interpretation may be a violation of that statute. Therefore, the Department's stated intent to create ambiguous and vague rules, and then to interpret them as it sees fit from case to case, is potentially a violation of the law as well as common sense and principles of equity and fairness.

The Association believes that regulations should be clearly stated, without ambiguity, so as to inform the regulated community of what its obligations are and avoid inequitable and irrational enforcement. Enforcement discretion and interpretation should be the exception in the exceptional case, not the rule to be applied to intentionally vague regulations.

Direct Conflict with the Statute

1. *Erroneous Definition of "Satellite Collection System" Results in Regulation Of Industrial, Commercial And Other Privately-Owned Conveyance Systems Not Intended to Be Regulated By The Statute.* §§ 302.301 & 902(a)(5). *Unauthorized exemption from regulation,* § 302.1209

The Act (§1005(a)) provides for a Class E operator's certificate for the operation of "wastewater systems consisting only of collection facilities with pumping stations which discharge untreated wastewater into another system." The draft regulations, however, change this requirement in two ways. First, the regulation includes a number of facilities not intended to be regulated by the Act. Specifically, the regulation adds the following definition (§302.101): "Satellite Collection System – a wastewater system, with at least one pump station, which is designed to convey in excess of 2000 gallons per day of untreated wastewater to a wastewater

system owned by a different entity." [Emphasis added.] The regulation (§ 302.902) then defines Class E as pertaining to a Satellite Collection System.

The problem is that the definition differs from the statute by omitting the term "collection facilities" used in the Act and substituting for it the term "wastewater system." Since a "wastewater system" is defined (§ 302.101) to be "a structure designed to collect, convey, or treat wastewater . . . " [emphasis added], systems consisting only of "conveyance" (*i.e.*, a pipe linking a single source of the waste with the downstream collection system) are included as a Satellite Collection System. Under the Statute, only "collection" systems (*i.e.*, systems that collect wastewater from more than one source and then convey the collected wastes to the downstream system) are included as a Class E system, but under the proposed regulations a system that only "conveys" (but does not "collect") wastewater is also included. Hence, under the regulation, a system that "conveys" wastewater from a hotel, restaurant, apartment building, or industrial facility using a pump station is a "Satellite Collection System" and required to be operated by a Class E certified operator under § 902(a)(5). This expansion of the regulated facilities to include thousands of small privately-owned conveyance facilities is not contemplated or authorized by the Act.

In other words, by inventing a new term and defining it to include any "wastewater system" instead of any "collection facility," the draft regulations would require anyone making a process control decision at a hotel, restaurant, school, apartment building, or industry that discharges more than 2,000 gpd to a municipal sewer system through a pump station to obtain a Class E operator's certification. This is regulation that is not authorized by the statute. The correction of this conflict is simple: redefine "Satellite Collection System" to include only "collection facilities with at least one pump station."[3] This correction would bring the regulations into conformance with the statute and eliminate regulation of facilities that are not authorized to be regulated by the Act.

Secondly, the proposed regulations also conflict with the Act with regard to collection system operation in Section 1209. That section provides that only publicly-owned collection systems are required to retain a Class E operator, and that other systems will be required only if the Department determines it is necessary. No such exemption appears in the Act. While operators of industrial wastewater treatment facilities are exempt from the provisions of the Act (see the statutory definition of "Operator"), operators of privately-owned collection facilities are not. Hence, in the case of a privately-owned collection system there is no discretion on the part of DEP as to whether or not a certified (Class E) operator is required. See § 1005(a) and (d) of the Act.

In sum, the provisions of the regulations require regulation of conveyance systems that are not regulated by the Act, and then waive regulation of privately-owned collection systems that are required to be regulated by the Act.

On this topic, we also note that the statute provides for a subclass of wastewater operators for "operators of collection system facilities associated with wastewater systems." (§ 1004(c)4).)

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[3] Alternatively: omit the newly-coined term altogether and simply use the words of the Act.

Such a subclass would be helpful to larger systems that have dedicated collection system crews, who might wish to become certified in this area of expertise. The Association requests that the final regulations include this subclassification in §§ 302.902 and 1003 as an option for those who wish to pursue it.

2. *Suspension/revocation of certification for "failure to comply with the duties assigned to a certified operator" and "threats to public health."* § 302.308(b)(6) & (7).

The Act provides specific criteria for loss of certification at § 1004(a)(3). Since proposed subparagraph 308(b)(5) (as well as 301(g) and 306(a)) refers to "violation of State or Federal laws and the rules and regulations promulgated thereunder associated with the operation of a . . . system,"[4] it would appear that the purpose of subparagraph (b)(7) is to refer to something other than the duties assigned by the Act and the Chapter 302 regulations. However, there is no indication of what that might be. Who "assigns" these duties? Is it the Owner or the Department? How does an operator determine what duties are "assigned" so as to avoid liability? Will the Certification Board rely on job descriptions prepared by the Owner, or will DEP field inspectors assign duties to individual operators for purposes of creating violations? Do the "duties" include only those directly associated with making Process Control Decisions, or do they include other duties assigned by the Owner? Who decides that the duties were not complied with? Is the itemization of "available operator tasks" in § 302.1201(b) intended to impose all of these items as "duties"? The striking ambiguity of this proposed rule is of considerable concern to operators.

Secondly, because the requirement in subparagraph (b)(7) is clearly intended to refer to duties other than those imposed by the Act (recited in subparagraphs (1) to (5)), the cited provision is objectionable because it conflicts with the Act by adding liability for matters not contemplated by the statute. Section 1004(a)(3) of the Act states that the Certification Board "may revoke, suspend or modify a certificate for misconduct, including, but not limited to, negligence in the operation of a water or wastewater system, fraud, falsification of application, falsification of operating records, incompetence or failure to use reasonable care or judgment in performance of duties as specified in this act, or other applicable laws administered by the department." [Emphasis added.] While this is a broad standard, there is no indication that this power was intended by the General Assembly to extend to "duties assigned to a certified operator" by anything other than the Act itself or another applicable statute (Clean Streams Law, Safe Drinking Water Act).

The Association believes that this clause is invalid and should be deleted from the final-form rulemaking both as too vague to comply with and as contrary to law.

The same concerns apply to subparagraph (6), which concerns "creating a clear or potential threat to public health." In addition to this phrase not appearing in the statute, it is too vague to understand. Any disruption or disturbance in the operation of water and wastewater

[4] Similarly, paragraphs 301(g) and 306(a) refer separately to "the requirements of the act [and] the regulations promulgated under the act."

systems always poses a "potential" threat to public health. Minor malfunctions, or at least the need for operational adjustments, happen frequently, and the vast majority are addressed without incident. However, the proposed rule would allow the Board to revoke a certificate for almost anything that goes wrong at a treatment plant, no matter whether it was immediately corrected or not. If the livelihoods of thousands of operators are to be at risk, the standards that DEP and the Certification Board will use should be clearly stated.

We agree that actions that "clearly threaten" public health should be actionable, and these can be defined as those that result in contamination of water supplies or pollution of waters of the Commonwealth, as provided by the relevant statutes (Safe Drinking Water Act and Clean Streams Law). The concern is with the "potential threat" clause, which can be interpreted in many arbitrary ways. For the remedy of certification rescission, the standard should be that a real event occurred, not merely some vague "potential" threat might have existed. Reliance on DEP assurances of enforcement discretion with regard to an unreasonable rule is not the answer; a clear and reasonable regulation is.

3. *Expansion of the falsification of records provision.* §302.308(b)(3) As recited above, the Act provides that certification may be denied or revoked if, among other things, an operator is responsible for "falsification of operating records." The proposed regulation, however, would allow this result for "falsification of State, local or Federal documents or records." Clearly, this is much broader than the cause contemplated by the Act and is in conflict with the narrow scope of liability created by the General Assembly. In effect, certification could be revoked for an error on personal income taxes or a false statement on a deed. While these absurd results are probably not intended by the proposed rule, that is exactly why the final rule should be changed to conform to the provisions in the law—so that unintended consequences requiring constant application of interpretation and enforcement discretion do occur.

4. *Arbitrary changes in classification and subclassification.* §302.902(c). The classification of water and wastewater Systems is established by the Act and it is the intent of the regulations to establish a uniform method of subclassification, as provided by § 1004(c)(4) of the Act. Therefore, changes in either classification or subclassification must be based on specific changes, such as an increase in the design flow or a change in the treatment process. Any such change would be reflected in a permit. Hence, changes may not be made "upon written notice," but must be made through issuance of a permit or permit amendment. This is particularly important in light of the confusion created by the use of the wrong criterion for determining design flow for wastewater plants (see comment 3 under Technical Deficiencies below). As drafted, the regulation may result in misunderstanding by Department staff as to the manner in which a change in classification and subclassification is made under the Act. The Association suggests that section 902(c) state:

> Upon issuance of a permit changing the classification or subclassification of a system, the Department will provide notice to the Owner and all Certified Operators of record for the system of the change.

5. *Creation of an unauthorized "stand alone" subclass for laboratory supervisor.* Section 1006 of the draft regulations purport to create a "subclassification" which is not related to any classification. The regulations claim that this is a "stand-alone" subclass. The creation of subclassifications is governed by § 1004(c)(4) of the Act. Subclassifications are established "within classifications" and are based on "the size and complexity of the . . . systems and the quality of source water." Accordingly, the law does not authorize the creation of a "subclassification" when there is no classification, nor does it authorize subclassifications for facilities and operations not related to the size or complexity of the system. If the General Assembly had intended for there to be "stand alone" subclassifications, it could have provided for such in the Act. The proposed subclass of "Laboratory Supervisor" is not authorized by the Act and is *ultra vires.*

We would also note that the proposed definition of Subclassification in the definitions section of the regulation conflicts with the definition in the Statute and should be corrected.

6. *Requirement to provide notice by specific means.* § 302.1201(c). The Act (§ 1013(e)) 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. Hence, any regulatory scheme developed under the Act should be both reasonable and workable, as well as effective and not unduly burdensome to the operators. The proposed Regulation is none of these. The Association believes that the proposed rules are so contrary to common sense and sound operational practices that they constitute a conflict with the Act.

The draft Regulation requires that an operator making a report of "known violations or system conditions that may be or are causing violations of any Department regulation or permit conditions or requirements" to submit that report in writing, either by mail or other method producing a delivery receipt, or by hand delivery, obtaining a receipt from "the owner."

The first option (registered mail or overnight delivery service) is expensive, time consuming, burdensome, and slow. First, an operator would need to take personal time during business hours to travel to a post office or other package carrier to mail the report. If the employer does not give him time off to do this, mailing would be delayed until the operator could get to an open post office (perhaps on Saturday?). Moreover, the requirement would actually interfere with the owner's ability to respond. Understanding that supervisory personnel are considered agents of the Owner, and in accordance with the chain of command of many systems, most operators would normally make the required reports directly (and orally) to their immediate supervisor. This would allow a responsible person to quickly become aware of and take immediate action to correct a situation. However, if a report were mailed to the "owner" as defined in the Act, in many cases it would be delivered (a day or two later) to a Borough or City Council or an Authority Board, with two adverse consequences: First, response action would be further delayed, sometimes for days, while the information was obtained, evaluated, and then sent to the appropriate operations personnel for action. Second, routine reports of minor matters

would be artificially elevated to a status unrelated to their importance. It is one thing to tell a supervisor that a pump requires repair or it could fail, potentially creating a violation; it is quite another to file a formal report via certified mail addressed to the City Council on the very same subject matter. Except in the most egregious circumstances, no operator with any common sense would make a report via registered mail. Which brings us to option two.

If the reports are hand-delivered, another problem will be created. We believe that, after a few weeks of receiving and handing out receipts for dozens of daily reports, supervisors will become increasingly reluctant to continue to do so. The proposed regulation, however, would place the operator in the position of being in violation of the Act and subject to penalties if the owner refuses to give a receipt for each notice. That is, as the regulation is drafted if the owner does not provide a receipt, the owner incurs no liability, but the operator would then have to mail the report using the methods discussed above, at his own cost (including personal leave time to mail the report) in order to avoid civil penalties under the Act.

The most important observation, however, is that the proposed regulation does not reflect the nature of treatment plant operations. Many routine maintenance and operating events are potential permit violations if not corrected. The examples are endless. One can imagine without difficulty that daily reports of several "conditions that may potentially cause" permit violations would be necessary in many plants. Virtually everything appearing on a daily corrective maintenance schedule could fall under this category (all NPDES permits include a requirement to "properly operate and maintain" the treatment facility; hence, all maintenance issues are potential Permit violations and subject to the rule). The burden of writing down every such report would be overwhelming. As noted above, it is likely that supervisors will become fed up with the constant stream of written reports and simply stop giving receipts, since there is no consequence for doing so. The manner in which reports are to be provided to the owner should be flexible, efficient, and reasonable. The rule as drafted not only is none of these, it could actually interfere with efficient plant operation.

The Association acknowledges that when a certified operator makes a required report under the terms of the Act, that documentation in the form of a receipt is sometimes desirable, especially in circumstances where past reports have been ignored or the situation is potentially serious.[5] However, it is a completely different matter to require, as a matter of enforceable law subject to penalties, that this method be followed for every such report. Given the strict liability provisions of the Act (§ 1014(c)), an operator can be fined thousands of dollars merely for not sending a report via registered mail of some minor maintenance requirement, or when the owner refuses to provide a receipt for a hand-delivered report. As operators, we believe that if the proposed rule were adopted, large numbers of certified operators would drop their certifications rather than be subject to the extreme and arbitrary liability that this section imposes.

Finally, as initially noted, the proposed provisions regarding the method of notice are not explicitly authorized by the Act. While a reasonable interpretation of the statutory requirement might be acceptable, attempting to expand on statutory requirements in the manner proposed is unreasonable, arbitrary, and, therefore, contrary to the Act and unacceptable.

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[5] Especially in light of the onerous provision at § 1201(d), discussed in comment 8 below.

7. *Requirement to provide notice with specific information.* § 302.1201(c).

The same section discussed in comment 6 above also proposes to dictate the contents of each and every report submitted by an operator to an owner regarding potential noncompliance. As for the method of making the notice, no such provisions appear in the Act, and the provisions as drafted are unreasonable, unnecessary, and create potential liability for operators where none was intended by the Act.

In particular, the proposal mandates that a report of a violation include "the suspected cause of the violation, ... the degree of severity or threat to public health, safety or the environment," and "any actions or mitigating measures associated with process control necessary" to address the violation or potential violation. § 302.1201(c)(4)–(6). In many, probably most, cases an operator will be unable to provide all of this information, thereby violating the regulations and becoming subject to civil penalties. In effect, the proposed regulation creates a new and arbitrary source of violation where none exist in the Act itself.

Furthermore, as discussed above, the provisions are unreasonable in that they would require all of the indicated information in each and every report, no matter how minor the problem or how difficult the information would be to obtain. An example: under the Act an operator could tell his supervisor that a piece of equipment is "making a funny noise" and that if it breaks it could change the rate of flow of a chemical feed to a process stream. That eventuality might potentially affect the quality of effluent. Reporting this information alone is sufficient to meet the operator's duties under the Act (see Act § 1013(e)(2) and (4)), but would be an actionable violation under the proposed regulations. Under those regulations, the operator would have to not only write this down, she would also have to evaluate the cause of the noise (requiring consultation with a mechanic or engineer), establish the various possible scenarios that could result if the equipment stopped functioning or reduced its ability to function (which might require consulting the plant's basis of design along with an engineer), and then determine the possible impacts on public health and the environment for each of these scenarios (requiring the operator to consult with biologists and public health professionals).[6] The absurdity of mandating this process for each and every report is self-evident. No such requirement is provided in the Act and the Board should not invent such ridiculous and counter-productive obligations.

With regard to reports, the Association recommends that the regulations for reporting only provide what the Act does: certified operators must "report to the system owner (or its authorized agent) any known violations or system conditions that may be or are causing violations of any regulation or permit condition or requirement, and any action necessary to prevent or eliminate a violation of any laws, regulations, or permit conditions and requirements." If the Department wants to encourage written reports and suggest the contents of the reports in non-binding guidance to aid operators in understanding their obligations and potential liability, we have no objection to that approach.

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[6] We have no idea what "degree of severity" as stated in the regulation is supposed to mean.

8. *Liability of Operators for operational problems.* (§ 302.1201(d).) This provision creates significant new liability to operators which is not authorized by the Act. The Act provides that certified operators are liable for failure to undertake their duties as set forth in sections 1013, and non-certified operators are liable for violations of § 1005(d) or 1006(d). (See § 1014(c) of the Act). This is the ONLY civil penalty liability provided for in the Act. The proposed Regulation creates an entirely new class of civil liability and is contrary to the Act and therefore must be omitted from the final rule.

Specifically, this section imposes liability for "consequences" of process control decisions. While the language is extremely vague, it appears to impose liability for any result of a process control decision, whether or not it was reasonably anticipated. Again, the draft regulations reflect a lack of basic understanding of the complexity of treatment plant processes. Process control decisions do not always create the desired result, for a variety of reasons. If an operator makes an unreasonable or imprudent decision which has adverse consequences, she may be liable under the Clean Streams Law or some other statute if that consequence is a permit violation. There is no need to create additional liability in these regulations that is not contemplated by the Act.

Additionally, the language of this section is particularly vague in virtually all respects. What does the term "consequences" mean? Does the regulation create personal liability for, *e.g.,* property damage if a decision results in "consequences" that amount to damage to treatment plant equipment but no violation of a treatment plant's permit conditions? That is, could an owner rely on this provision to hold an operator personally liable for property damage? Or is the newly-created liability only to the Department?

Moreover, the exception is as vague as the provision itself. What is meant by an owner "fail[ing] to respond to a written report"? Who determines what "response" was appropriate, or at what level a response was a "failure"?

In addition, the phrase "deliberate action with malice or negligence on the part of an employee" is also confusing. Is this two conditions or one? There cannot be "deliberate negligence," so it would appear to be the intent to impose two different exceptions: deliberate action with malice," and "negligence." Assuming that intent, the sentence should read ". . . a deliberate action with malice, or there is negligence . . . " This would clear up the grammatical confusion, but not the overall legal problem with the provision: If an employee other than the certified operator undertook a "deliberate action" (so not negligent) which was contrary to the process control decision made by the operator, but that action was made by mistake and not with malice, the employee would not be liable and the certified operator would be, even though his instructions were not followed correctly.

Finally, the exception only applies to misconduct by "an employee under the supervision of the available operator." Hence, negligence and even misconduct by employees not under the supervision of the operator would result in civil liability for the operator. This is highly objectionable. And, again, we note that promises of enforcement discretion do not cure a fatally vague regulation.

Since the proposed provision is so ambiguously worded as to be unenforceable ("void for vagueness"), and because it clearly intends to create liability not provided for by the Act, as well as liability for things totally beyond the control of the operator (*i.e.*, substantive due process violations), it cannot be included in the final regulation.

9. *Provision of permits to operators.* (§ 1202(a)(6) and 1202(d).) The Act provides that owners will provide copies of permits to the operator(s) in responsible charge. (Act § 1013(f)(3).) The proposed Regulation changes this statutory provision by requiring owners to provide permits to all "available operators," which by definition may be a different, and certainly a larger, group of personnel. Hence, this provision is clearly contrary to the Act. The Association does not object to the intent of this provision, but cannot agree with a direct violation of the statute, no matter what the intent. Again, the proper way to address this issue is for the Department to make a recommendation to owners in non-binding guidance.

10. *Imposition of planning requirements on systems.* (§ 302.1203(c).) This proposed regulatory provision would create a new power in the Department to require wastewater system owners[7] to develop and implement a "process control plan." No such power is created by the Act. The duties of the owner are set forth in § 1013(f) of the Act; "requiring, supervising and directing certified operators to take such action" as may be necessary to comply with permits and regulatory requirements, is among those obligations. There is nothing about developing special operating plans.[8] Additionally, the powers of the Department are set forth in § 1004(b) of the Act, which does not give the Department the power to impose extensive planning requirements on wastewater systems. Neither is the Board empowered by the Act (or any other statute) to simply invent new powers from thin air and bestow them on the Department. This entire proposed subsection is unauthorized by the Act. We also note that no such power is granted by other applicable laws, such as the Clean Streams Law.

In addition, on a practical note, we must note that the provisions of this subsection may or may not be reasonable for any particular system. Certain of the requirements are not even practicable for some processes (*e.g.*, a list of "trigger parameters for each unit that requires a process control decision").

11. *Revised definition of Process Control Decision* (§ 302.1203(e).) The term "Process Control Decision" is defined in the Act. It is (to paraphrase): any decision that affects the quantity or quality of water or wastewater (including keeping it constant) such that it might affect public health or the environment. The Act provides no exceptions for process control

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[7] With respect to water systems, a similar provision already exists in the Safe Drinking Water regulations (25 Pa. Code § 109.702), so that this provision is solely an attempt to create new law applicable to wastewater systems, without statutory authority to do so.

[8] The Board recognizes that such plans are not mandatory under the Act by stating that the plans will only be developed if required by the Department.

decisions based on who makes them; to the contrary, it mandates that Process Control Decisions may only be made by properly certified operators. (Act §§ 1005(d), 1006(d), 1013(e)(5).)

The Proposed Regulation, however, attempts to create an exception to the definition based on *who is making the decision.* Proposed subsection 1203(e) states that when DEP employees make a Process Control Decision "to obtain compliance with permit requirements, and rules and regulations or to address permit requests and compliance issues" it is magically not a Process Control Decision, not because it does not "maintain or change the water quality or quantity . . . in a manner that may affect the public health or environment," but because (and ONLY because) the decision is being made by someone not qualified to make it: whose only qualification is that he is employed by the Commonwealth. (If the DEP person making the Process Control Decision is a certified operator, then she would be qualified to do so under the Act and would not need the proposed exception.) The contradiction of the proposed rule with the statute is apparent.

Without belaboring the point, we must also point out the vagueness of the proposed rule. It would allow DEP personnel to make Process Control Decisions "to address permit requests and compliance issues." After careful consideration, the professional operators who reviewed this proposal have absolutely no idea what this condition is supposed to mean. If the EQB is to invent and grant DEP new powers not provided for by statute, it should at least say what they are, so that both the Department and the regulated community know their limits.

We would also note the internal inconsistency between this proposed section and proposed Section 1201(d), discussed above, which would hold Certified Operators responsible for the "consequences" of their decisions, even when someone else has actually caused the problem. No such "responsibility" provision appears in the redefinition section; hence, it appears that it is the Department's intent not only to allow non-certified and unqualified personnel to make Process Control Decisions, but to also exempt them from any accountability for their actions. The inequity of this proposal is apparent.

As for emergency actions, there is no need to contradict the statute by saying that a Process Control Decision is not a Process Control Decision in an emergency. It would be more in keeping with the statute if the exception for emergencies would say that the Department will exercise enforcement discretion and consider the circumstances in the case that a Process Control Decision is made by someone not certified under the Act in an emergency situation. Emergencies are not an excuse to make things worse, and such cases should be subject to liability if necessary. And they are rare enough that providing for enforcement discretion is appropriate.

We would also note that PaDEP has the power to issue Orders regarding treatment plant operations under both the Certification Act and the Clean Streams Law; there is no need to circumvent the protective provisions of the Act by changing a statutory definition.

The Association notes that it does not object to the provisions that local government actions to approve land development are not Process Control Decisions because this is merely a clarification of a common sense idea. Approval of land development plans is clearly not the sort of decision that is intended to be encompassed by the term, any more than adoption of zoning

ordinances or permitting of restaurants, or allowing the sale of fluoridated toothpaste, all of which may, in some way, eventually affect water or wastewater quality. Similarly, for the purposes of clarification, it would also be worthwhile to include a notation that the administration and operation of a municipal industrial pretreatment program is not a Process Control Decision for the same reason—it is too remotely linked to water quality and operation of the water or wastewater system and occurs too far outside of the treatment system, to come within the definition intended by statute.

12. *Liabilities and Duties of Operator In Responsible Charge.* (§ 302.1206(e).) This section purports to add liabilities and responsibilities for Operators In Responsible Charge that are not provided for in the Act. Three specific new provisions are provided here: the approval of standard operating procedures, the responsibility to develop a process control plan, and "liability for any permit violations or violations of any applicable rules and regulations which may occur when an operator follows . . . standard operating procedures [developed by the Operator In Responsible Charge]." Each is discussed separately below.

Standard Operating Procedures. (¶ 1206(d)(1).) With respect to approval of Standard Operating Procedures, since the Act defines the term to be the operator "designated by the Owner to . . . make the process control decisions," such a requirement is not in conflict with the Act, and appears to be reasonable. The Association does not object to the requirement that the Operator In Responsible Charge approve all SOPs (see also proposed § 302.1204(c)). We note that the proposed regulations do not require that SOPs be developed at all, or that they be developed exclusively by the Operator In Responsible Charge, a concept with which we also agree.

Develop Process Control Plan. (¶ 1206(d)(2).) The concept of a mandatory process control plan and how it conflicts with the Act is addressed above. For purposes of this discussion only, we assume that such a plan could, under some circumstances, legitimately be required by the Department. The proposed regulation would usurp the powers and responsibilities of the owner by mandating certain work assignments to a particular operator, regardless of job description, training, or the wishes of the owner. If an owner desires or is required to develop a process control plan, it should be able to choose who will do so. This may include all of the owner's available operators, third party consulting operators, the owner's staff engineer, the consulting design engineer, equipment manufacturers, and other qualified professionals each of whom might have different valuable information that the Operator In Responsible Charge would not have.[9] For the Board to legally deny the owner the use of all of these professionals and mandate that only the Operator in Responsible Charge may develop such plans is to go far beyond the Board's legal authority, as well as simple common sense.

Additionally, there is no requirement in the Act, or in the proposed regulations, for an owner to actually designate an Operator in Responsible Charge. Hence, if PaDEP decided to require development of a Process Control Plan, that decision would effectively also mandate that

[9] In fact, some of the information required in a process control plan is more properly developed by process design engineers, not operators. See ¶¶ 302.1203(c)(4), (6), (9), (11), (12), and (14) of the proposed regulation.

the Owner designate an Operator in responsible Charge to develop it. Since no power to require such designation appears in the Act, this is yet another new and unauthorized power created in PaDEP by the proposed regulations.

When the provisions of section 1203(c) (regarding development of process control plans) are deleted from the final rule, this § 1206(d) should be revised accordingly to remove any reference to process control plans.

In the alternative (again assuming that Process Control Plan requirements can be legally justified), the provision should state, at the most, that such plans shall be developed "with the participation of the Operator in Responsible Charge, if any."

Liability for permit violations (¶ 1206(e).) As discussed above (comment number 8) regarding the attempt to make certified operators liable for all "consequences" of their Process Control Decisions, the attempt to create new responsibilities and liabilities not provided for in the Act is not within the powers of the Environmental Quality Board. It may be true that action or inaction by an operator could result in a permit violation, in which case liability might lie under the Pennsylvania Clean Streams Law. That fact alone illustrates why attempting to create new liabilities under the Certification Act is not necessary (as well as unauthorized).

As already noted, the Act clearly establishes the liabilities of operators in section 1014 as those with regard to the duties enumerated in section 1013. Additionally, since one of the duties of a certified operator is to operate the water or wastewater system "utilizing available resources" in conformance with applicable regulations and permits (Act § 1013(e)(3)), violation of a permit may result in liability of the operator under certain circumstances. Specifically, such liability would only lie if the violation occurred because the operator did not provide for "suitable operation . . . utilizing available resources." Hence, the liability established by the statute is defined and delineated to a stated standard. Although strict, it is not without limits.

The proposed regulation, however goes beyond these statutory provisions by imposing liability for actions which may not be a result of the operator's decisions. In other words, the proposed regulation simply states that ANY permit or other violation that occurs "when an operator follows the[] standard operating procedures" developed by the Operator In Responsible Charge is automatically to be laid at the feet of the Operator In Responsible Charge, regardless of the circumstances under which the violation occurred, or even with any reference to causation. There is no rational or legal basis for doing so. While the Act provides a strict liability standard with respect to the operators' enumerated duties, the proposed regulation purports to create an entirely new standard to which strict liability also applies: liability for all permit violations, regardless of cause. This is a direct violation of the Act (and probably Constitutional due process protections) and is unacceptable.

Again, the Association recognizes that circumstances may occur when use of an SOP creates a violation which can be attributed to error by the Operator In Responsible Charge in developing the SOP. In such a case, the provisions of the Act would apply and liability could legitimately attach. However, the proposed regulation would ALSO create liability for violations that are not the result of errors in developing the SOP, but which result from unanticipated unusual weather conditions, equipment malfunction, or other circumstances for which the

provisions of the Act would not impose liability. The regulations should not create liability where none exists under the statute. (And, again, we note that promises of enforcement discretion do not remedy an unacceptable regulation. The remedy is to have lawful rules in the first place.)

13. *Imposition of taxes is not authorized by the Statute.* § 302.202. The "fees" presented in this section are substantially in conflict with the requirements of the Act and many of them have no legal basis whatsoever. In fact, with some exceptions, the proposed fee schedule appears to be an unlawful attempt to tax the regulated community. The Association objects to the proposed fee schedule for three reasons:

A. Some of the proposed charges are taxes, not fees.

"Fees" are lawfully imposed to recover the costs of services provided. "Taxes" are charges made purely for the purpose of generating revenue and are not related to any specific governmental service. Fees may be charged (when authorized by law) by administrative agencies. Taxes may only be created by legislative action. To the extent the proposed "fees" are intended purely as a means of generating revenue and not of reimbursing the agency for costs incurrent in providing a service, they are an unlawful tax.

According to Department-provided documents, the proposed fee schedule is intended to cover the entire budget of the Division of Technical and Financial Assistance not funded by EPA monies. There is no statutory authorization—either in the Act or in any other statute—to simply assess a tax on all regulated entities to provide income for the Department to cover its entire budget. As discussed in part C below, the Act authorizes imposition of fees for specific "services" and limits the fees to the cost of providing the services. Several of the proposed "fees" have absolutely no relationship to any services at all. Others are not reasonably related to the cost of providing the services. Consequently, the proposed fees are in reality an unlawful tax.

It is obvious from the schedule of fees, as well as from the documents developed by the Department in support of the proposed regulations, that the fee schedule was not based on the statutory requirements (as set forth in comment C below), but instead was created by taking the entire budget of the Division of Technical and Financial Assistance (minus monies received from EPA) and divvying it up arbitrarily among the operators, training and examination providers, and owners. Even the proposed definition of "fee" (§ 302.101) reflects this approach: the proposed rules state that a fee is "assigned to cover . . . the expenses of the program," instead of the services rendered, as the law requires.

The Preamble published in the *Pennsylvania Bulletin* states, with respect to fees, "A major focus of the discussions that was incorporated into the [fee] structure was the necessity for all entities to pay a fair share of the program costs." (39 Pa. Bul. 3592; emphasis added.) The "Fee Report Form" distributed by the Division confirms this assessment: costs for such unrelated activities as "technical support to the administrative staff and compliance assistance to the regulated community" (a total cost of over $369,000) are to be funded by the proposed fees on operators and owners, even though none of these costs are related to any service as the statute

mandates. If the Department intends to recover costs of technical assistance, it must recover those costs from the entities to whom it provides that assistance, not from operators and municipalities that receive absolutely no benefit from the activities. If the Bureau's budget is insufficient to cover all of its expenses, its remedy lies with the legislature, not in imposing unlawful and arbitrary taxes.

B. The proposal assesses fees on persons not subject to fees

In the Preamble cited above, and in its presentation to the Environmental Quality Board on April 21, 2009, DEP stated that "the fee structure is based on the premise that 'everyone should pay'" (see PowerPoint presentation attached to the minutes of that meeting, page 9). The Act, however, provides for assessing fees only for certain activities with regard to certain entities. Under §§ 1004(b)(6) and (c)(3) of the Act, fees may be assessed only for the following services:

- Department-sponsored training
- Approval of continuing education conducted by others
- Examinations
- Applications by operators for certification, recertification and renewal of certification

In reviewing the proposed fee structure, we note that the restrictions in the Act have been ignored: fees are proposed to be imposed on persons and for activities for which fees are not authorized.

Expanding on the itemization in the Act, we understand that services for which fees may be charged include: reviewing and confirming information on an operator certification renewal form; preparing and administering an examination; and reviewing a proposal to offer a training course. Items that are NOT authorized to be subject to fees include approval of an examination provider; and fees for owners. Each of these is discussed in detail below.

Examination Provider Fees. There is no provision in the Act that would allow the Department to charge fees for approving an examination provider. The proposed fee schedule (§ 202(d)) is devoid of information regarding what services are to be charged for under "approved examination providers." In fact, since examination providers do not administer the examinations, but only provide the service of scheduling exams and providing the facilities, it would be more reasonable for DEP to pay the providers for their services. Moreover, the proposal to charge wildly different fees depending on the number of exams that they administer makes no sense. An examination provider's credentials and capabilities are not related in any way to the number of exams that he administers. Additionally, it would appear that the credentials of an examination provider would be considerably less rigorous than for a training provider, as the only qualifications are honesty and the ability to rent a suitable room to give the exam in. Consequently, if a fee of $90 is sufficient to vet a training provider (as provided on the Fee Schedule), a fee of less than that amount should be sufficient to cover the cost of review of a prospective examination provider. Hence, even if such fees were authorized by the Act, the

proposed fees have no rational basis. Simply charging people money because they make a small profit by arranging for exams is the very definition of a tax, and is unlawful.

Owner fees. POTWs are proposed to be assessed an annual fee based on the design flow of the treatment plant. As already noted, no fee is authorized by the Act to be assessed against owners for any purpose. Therefore, no such fees may be charged.

Again, however, given the necessity of making all of our comments in a single document, we also provide these additional observations regarding owner fees. First, the proposed regulations do not suggest that any service is provided in return for these fees. The only interaction between the Department and the owners is that the owners are required to annually submit a list of the certified operators in their employ (proposed § 1202(b)). The regulations do not require any action by the Department in response to these lists, and it would appear that the only "service" provided is placing the reports in a file. Filing has no benefit to the Owners. Other reports required to be filed, of far greater significance, are not subject to fees. For instance, there is no fee charged for accepting the monthly Discharge Monitoring reports.

Secondly, no justification for different fees based on the design flow of the treatment plant is presented. Even if some justification for charging a fee for filing the paperwork can be found, the total time involved would appear to be less than five minutes to: (1) check for completeness; (2) confirm that the operators listed are certified operators, using the computerized system and the individual I.D. numbers; and (3) place the report in a file or authorize a form letter to the owner listing any needed corrections. There is no difference in this time requirement for an "A" classification facility or a "D" classification, since facilities of every size will have similar-size (*i.e.,* one or two page) reports. Hence, ignoring the fact that any such fee is illegal, if a fee were to be charged for the "service" of filing reports, the fee for *all* owners should be uniform and no more than $10.

C. The proposal assesses fees that are not related to the services provided

All fees must, by statute, be "reasonable and appropriate to recover the cost of providing the services." (See Act §§1004(b)(6) and (c)(3).) As discussed above, certain activities (operator certification and training course approval) are legitimately subject to fees under the Act. However, many of the proposed items are not reasonable and appropriate to recover the cost of the services as the law requires.

Although the Department provided very little information regarding the costs of providing services, it is more than reasonable to assume an hourly rate of $100 (including wages, benefits, and overhead costs) for clerical staff to undertake their various tasks. The discussions below, therefore, are based on an estimated cost of $100 an hour to provide the various services.

As noted above, many of the proposed fees are assessed using criteria unrelated to the services provided. The absurdity of assessing fees for approval of examination providers based on the number of exams they administer is discussed above, as is the irrationality of assessing fees for owners based on the design flow of their systems. In addition to these examples, the following are objectionable.

Certificate renewal fee of $60. The "Fee Report Form" provided by the Department does not provide any justification for the proposed fee of $60. The only accounting provided lumps together "580 applications for certification, 3200 applications for certification renewal, 8 Certification Board Meetings[10], and 10 Criminal investigations annually" into a single cost category, claimed (without any documentation) to amount to the astounding (and amazingly precise) cost of $240,053 annually. No discussion of the cost for providing the various services is provided in any document made available by the Department. At our generous allowance of $100 an hour, the claim is that over 2,400 staff hours, or 1.2 FTEs are consumed each year in providing these enumerated services. With no supporting data, we attempted to evaluate the validity of that claim, using generous estimates of time and cost.

An application for renewal contains only a small amount of information, such as the operator's name, address, and phone number. The only required administrative work related to a renewal is (1) making any corrections to the address or phone number; (2) confirming that the operator has accumulated sufficient training credits—a process that can be done in seconds using the on-line database—and (3) confirming that the Certification Board has not suspended, revoked, or otherwise made an adverse decision regarding the operator's credentials. The other tasks would include adding the name to a list for Board approval, and later printing and mailing the certificate, all of which should be well automated by now. The entire process should involve no more than a few minutes of DEP staff time for the vast majority of operators. Even including the cost of the 10 criminal investigations and 10 Board meetings in the overall costs for all operators would add little to the time or cost per renewal, since it would be distributed among 3200 applications. Therefore, assuming 15 minutes per application (including a pro-rated share of the other time expenditures) these activities for 3200 applications might consume 600 to 800 hours of staff time at a cost of $60 – 80,000 a year. It would appear that a fee of perhaps $25 (1/4 of $100) would be sufficient to cover the cost of the service for certification renewal. There does not appear to be any justification for charging a fee of $60.00, representing more than a half hour of staff time for this simple process, nor does there seem to be any basis for claiming an overall expense of over $240,000 for the effort. This analysis is necessarily based on estimates (given DEP's failure to provide supporting data), but it strongly indicates that the proposed operator renewal fee is in large part a tax, intended to generate revenues to cover costs not associated with the processing of the renewals.

Post-presentation credit application fee of $250. This item was presented by DEP staff as not being based on the cost of doing the review, but on a stated intent to discourage operators from obtaining training not available through DEP-approved courses. We take two lessons from this: (1) the actual cost of doing the approval is less than $250, so that the fee is unlawful, and (2) DEP intends to discourage necessary and appropriate training, an inappropriate goal.

Operators take such courses because they desire the training; they know that there will be delay and effort to obtain DEP post-approval but take them anyway because they offer valuable information not available in DEP-approved courses. Hence, the point of charging $250 to

[10] In fact, the recitation of the costs of attending Board meetings as part of the basis of the "fee" is an admission that the proposed "fee" is in part a tax. Attending Board meetings is not a service for which fees can be charged to anyone.

approve the class is *to discourage operators from obtaining appropriate and useful training.* If a course is useful for a certified operator's professional development, and the operator went to the trouble of finding, paying for, traveling to, attending, and documenting the class for approval, what purpose is served by discouraging this activity? The proposed fee is counterproductive and unjustified, as well as contrary to the express provisions of the Act.

The Association understands that the effort of post-presentation course approval is significant, but any special fee for that service should be related to the service provided. *It should not be official DEP policy to discourage professional training.* It should take no more than an hour to review the course materials provided by the operator and approve a class. At our $100/hour cost estimate, a fee of $100 is more appropriate than the $250 proposed.

D. Proposed Fees that Are Acceptable

In spite of the many objections discussed above, the Association approves of the following:

Fee for Initial Certification and Reciprocity Determination: Using the $100/hour standard for costs, the proposed fees for initial certification amount to 1 ½ hours of time for an A, B, C, or D certificate, and 1 hour for a D or E certificate. These appear to be realistic estimates of the cost of providing the service. The Association notes, however, that excessive fees are a barrier to the recruitment of new operators. Therefore, we strongly recommend that the Department consider imposing low fees for certification and reciprocity determinations.

Examination Session: Based on the information presented in the "Fee Report Form," a charge of $35 to take an examination appears to be reasonably related to the cost of providing the service.

Course and Conference Approvals Based on the complexity and effort the Association has experienced in applying for a course or conference approval, we believe that the proposed fees for processing these applications are reasonably related to the effort involved.

Fees for Department-offered Training the proposed fees for DEP-developed training (classroom and web-based) appear to be reasonably low and, therefore, acceptable.

We would also note that DEP erred significantly in its Compliance Costs analysis as set forth in the Notice of Proposed Rulemaking (39 Pa.Bul. 3593). Because excessive taxes are proposed to be imposed on examination providers, 100% of these fees will be passed on to the operators taking the tests or training classes. For instance, for a small examination provider offering only two examinations per year, the $600 tax will be passed on to perhaps 20 or 30 exam takers, for a cost per operator of $20 or more in addition to the $35 exam fee. It is difficult to estimate the overall cost to operators from the proposed taxes and fees, but it is not acceptable to pretend, as DEP has done, that the costs of training and exam providers will not be passed on to the operators. Setting aside the many illegalities of the proposed "fees," the failure to conduct a valid cost analysis constitutes a procedural failure in publication of the draft regulations and does not honestly apprise the public of the potential costs of this program.

It is worth noting again that not a single one of the 13 issues discussed above (and several of those discussed in the next section) appears in the Department's current program under its Interim Guidelines or in the current ("old") regulations at Chapters 301, 303 and 305. Thus, the proposed regulations include well over a dozen new or changed provisions which should have been disclosed and discussed in the Preamble published in the *Pennsylvania Bulletin*. The failure to include even an acknowledgement of these many new substantive provisions is a violation of 45 P.S. § 1201.

Technical Deficiencies

The comments below refer to objectionable provisions that, while they are not in direct conflict with the Act, as the issues above are, are of concern for a variety of practical reasons, including clarity, reasonableness, and lack of necessity.

1. *Liability of Operators.*

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 [pertaining to duties of certified operators and owners] or any operator who violates section 5(d) or 6(d) [requiring Process Control Decisions to be made only by certified operators] and any order issued by the department under section 4(b)(2)."

Because of the two consecutive conjunctions in the same sentence ("or" followed by "and") this provision is open to two interpretations: (1) certified operators and owners are liable for any violation of their 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;[11] or (2) everyone is subject to liability only if they violate both the respective statutory provision and an order of the Department. Since both interpretations are equally valid under the Statutory Construction Act, the Department has the discretion to assert which one it will follow. Also, since the two interpretations result in vastly different liability exposure for certified operators and owners, the interpretation is of substantial interest to the Association.

Because the provision in the statute is open to interpretation it is particularly important to state it in the regulations, so that it is not arbitrarily subject to re-interpretation and change in the future. Operators need to know the limits of liability to be imposed by the Department. And the Department and EQB have an obligation to provide this guidance in the regulations, as they have in other programs. See, *e.g.*, § 92.93 (NPDES) and § 263a.26 (transporters of hazardous wastes).

The Department staff, the Certification Board, Department counsel, and former Secretary McGinty all have been adamant over the last three years that interpretation (2) above is correct: liability attaches to owners and certified operators under § 1014(c) of the Act ONLY after (1) the person violates a requirement in § 1013, AND (2) the person also subsequently violates an Order of the Department issued under the Act. In fact, Ms. McGinty wrote a letter to Representative

[11] This interpretation is supported by § 1014(b), which requires ONLY non-certified operators to both violate a statutory provision and a DEP order before being held liable for a summary offense.

George on November 1, 2007 stating exactly that. Since this is the clearly and repeatedly stated interpretation of the Department's most senior officials, we expected to see this stated in the draft regulations. It is not. This is of great concern to the Association. The Department's interpretation of this ambiguous statutory provision is of great importance to thousands of certified operators and hundreds of owners. A clarification in the final regulations (adopting the previously stated position of DEP) is of utmost importance.

2. *Definition of Operator* § 302.101. The Act includes as part of the definition of operator a provision that operators of industrial wastewater treatment facilities are not required to obtain an operators certificate. This is the only place that the exemption appears. The rest of the statute, including the definition of wastewater system and process control decision, and the requirements that all process control decisions must be made by certified operators, do not point out this exemption. Hence, without the exemption in the definition, the statute would appear to require that industrial wastewater treatment facilities be operated by certified operators.

The proposed regulations copy the provisions in the Act inaccurately by excluding the industrial facility exemption in the definition of "Operator." Hence, reading the regulations without reference to the Act, the rules appear to require operators of industrial waste treatment facilities to be certified. This is contrary to the Act. The error can easily be corrected by including the exemption in the definition of Operator as it appears in the Act.

We note that an attempt to include the exemption is provided in § 103(c)(3)(and (4). While this section does appear to include most industrial waste treatment systems, it is possible that a situation could arise that is not included there (for instance, an industrial waste treatment system that discharges to a POTW but is not a "pretreatment" system). Adoption of the statutory language is always preferred to attempts to reinterpret and re-state what is clear in the statute in some other form.

3. *Definition of "Permitted Average Daily Discharge Flow."* § 302.101 The proposed definition of Permitted Average Daily Discharge Flow will introduce considerable confusion because it erroneously refers to "hydraulic design capacity," or maximum monthly design flow.

The term Permitted Average Daily Discharge Flow is used in the statute and in the proposed regulations with respect to the classification of systems, so requires a definition. However, the standard terminology for wastewater system classification uses the annual average daily discharge flow, not the maximum monthly flow, as the nominal "design flow" of a treatment plant. Thus, a POTW with a "design flow" of 4 mgd may also have a "hydraulic capacity" of 5.5 mgd. All treatment plants are permitted to their nominal (annual average daily) flow capacity, but not all plants have the maximum monthly flow capacity in their permits (since this term was invented by DEP after the issuance of many Part II permits). Also, "hydraulic design capacity" is a specialized term used only for Chapter 94 purposes related to evaluation of wet weather hydraulic loading; it has no other regulatory purpose. Using it in other contexts will create confusion among owners and operators, as well as DEP staff. Therefore, the correct

definition of "Permitted Average Daily Discharge Flow" should be the "annual average daily design flow" as set forth in the facility's construction permit, which is the WQM permit for wastewater plants, and the construction permit for water plants. For clarification of this issue, see § 43.4 of the DEP *Domestic Wastewater Facilities Manual.*

4. *Definition of "Upgrade"* The term is not clear and does not appear to be correct. The concept is that a certification is "upgraded" to reflect an increase in the classification, or an addition of a new subclassification of an operator's certification. This does not "increase" the operator's authority "of a system of a specific flow," but changes his authority to include operation of a system that has been modified so that it is now of a different classification or subclassification.

5. *Designation of Available Operator* § 302.103 Although included in the "scope" section of the regulations, and therefore unlikely to be carefully reviewed for substantive requirements, this provision implies that owners must formally designate "available operators" in order for them to be allowed to make process control decisions. While the Association does not object to the principle that certified operators be designated as available operators in order to be authorized to make Process Control Decisions at a particular facility, there is ambiguity in this provision regarding how such designation must be made. We suggest that the rule be clarified by stating that designation of available operators be "by any means determined to be appropriate by the owner."

6. *Inclusion of non-regulated water systems.* § 302.103(c)(5) The proposed rule would exempt ONLY a "water treatment device that serves a single private residence." However, water systems that serve as many as fourteen connections or serve 24 people are not public water supplies and not required to be operated by certified operators. By mis-stating the exemption, the rule appears to require certified operators to be employed for these unregulated water systems.

7. *Notaries do not "affirm" signatures.* § 201(b), (c), (d), and (e) Signatures are "acknowledged" by notaries, not affirmed. It would be impossible to comply with the requirements as drafted.

8. *Notice of Right of Appeal.* § 302.301(i) Although the Secretary is given 60 days to notify an applicant of a denial, and the proposed rule states that the notice will include a description of the right to appeal, it would be helpful if the regulation acknowledged that the right of appeal lasts for 30 days, commencing on the date that the notice is received by the applicant. Including this in the regulation will provide guidance to the Secretary in drafting the notice properly.

9. *Excess Credits should be carried forward.* §§ 306(d) & 802(d) The program that has been administered for six years under the Interim 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 the experience of many operators under the current system that they forego needed training because they already have sufficient credits,[12] and take pointless training (for them) because they need to obtain credits by a date certain. Allowing excess credits to carry forward into subsequent training cycles will allow operators to be more judicious in their choice of training, taking courses that they need, when they are offered, without reference to an arbitrary schedule.

The administration of a carry-forward program would be simple, since the process is already computerized. There is no practical reason not to allow a carry-forward program, and many reasons to provide it. We understand that there should be reasonable limits on such a program, such as limiting the number of credits carried over (perhaps ten), and the time period to carry them into (we suggest only into the next three year training cycle). EPA has no prohibition on a carry forward program under the Safe Drinking Water Act rules, and we believe that the Department should not, either.

10. *Unreasonable delay in certification renewal after expiration.* § 306(g) As drafted, if an operator's certification expires for cause, such as submitting an application late or incomplete, the regulation would allow the Board to renew the certification upon the operator's correcting the deficiency. Until the Board acts, the certification is considered expired. However, this paragraph states that when the Board takes action to renew the certificate, it is NOT renewed until the next quarter following Board action. Hence, if a certification expires on December 31, and the Board acts on January 5 to renew it, the operator will remain uncertified until April 1. There is no rational reason for this delay. Once a certificate is approved it should become effective, not two or three months later. The "effective issuance date" should be the date that the Board takes action, not some arbitrary later date.

Additionally, this section conflicts with § 308(c), which provides that a reinstatement of a certificate suspended for cause becomes effective "immediately upon the Board's action." It makes no sense for a reinstatement following suspension to become effective immediately, but a simple renewal, delayed for some reason, to wait up to three months to become effective.

11. *Unreasonably short time to provide documentation.* § 306(l) The proposed rule would give an operator only 14 days to provide missing continuing education documentation. In light of the probable need to contact the training provider to obtain that information, this is unreasonable. There is no need for extreme haste in deciding to deny renewal of certification and operators

[12] Employers often pay for training, and some will not pay for training when credits are not needed.

should be given a reasonable time to find needed documentation. We recommend at least 30 days.

12. *Appeal of Certification Board actions* § 302.309 An earlier discussion draft of the proposed rulemaking provided a subparagraph (d) in section 309 that stated that actions of the Certification Board are appeallable to the Environmental Hearing Board. That provision reflected the statutory mandate at §1004(a)(1) of the Act. The provision was deleted from the Proposed Rule. While we understand that removing it from the regulations does not negate the provision of the Act, the Association believes that it would be helpful to the regulated community to include this notice in the regulations as originally drafted; there was no need to delete it and we request that the notice be restored in the final version of the regulations.

13. *Criminal History Record—reasons for denial.* § 302.404(f). If the Board denies certification based on its review of a CHR, the reasons should be presented in writing, so that the applicant has a record for an appeal. This section should say that "the Board will provide a written report setting forth the reasons for the denial."

Section 404(g) provides a misleading standard for filing an appeal. Appeals to the Environmental Hearing Board are initiated through a Notice of Appeal, not a "petition" as the proposed rule states. See 25 Pa. Code § 1021.51.

14. *Disclosure of examination scores.* §302.601(i) Obviously, an operator should be able to disclose her examination score to others at her discretion. It also may be a violation of the Right to Know Law to prohibit the disclosure of examination scores by the Department. Certainly, there is nothing in the Act that requires such confidentiality. Assuming that the proposed provision is not in violation of the Right to Know Law, a matter which should be determined by counsel, the Association suggests that this section should say only that the scores will not be disclosed "by the Department." Otherwise, an operator who discloses her score to others, including her employer, could be considered to be in violation of the regulations and subject to penalties.

15. *Clarification of Upgrade provisions.* § 302.705 As drafted, the regulation appears to require a certification upgrade for any increase in system capacity. In fact, this is only necessary when the change in capacity results in a change in the Classification of the system. The second sentence in subparagraph (a) should be revised to say, "When the capacity of a system is increased so as to change the classification of the system, the existing available operators will qualify for . . . ."

A similar concern is with the change in technology provisions in subparagraph (b); simply adding a different treatment technology may not require a certification upgrade; the language should be changed as in the example above.

The statement regarding permits in subparagraph (b)(1) is unclear. We assume that it is intended to mean that the amended permit must include a clause that approves the use of the accelerated certification program. We see no need for such a provision and request that it be deleted. The permitting staff should not be charged with making Certification Act decisions (such as effectively prohibiting the use of accelerated certification by omitting the provision from the permit, either deliberately or inadvertently).

In the case that DEP decides not to delete this provision, it at least needs to be made clear that when applying for the permit amendment, the owner should also request that the new permit include approval of the certificate upgrade program as described in this regulation. Failure to make the process clear will result in many systems not taking advantage of this provision because they fail to understand the need to specifically request it when applying for the permit amendment, and because permit writers may omit the provision if not specifically requested to include it.

Finally, the provision at subparagraph (b)(3) should be revised to make it clear that an operator can be upgraded if he has already passed the appropriate Part II Technology Specific examination. As written, the rule seems to mean that the operator must take the exam after the new technology is installed, which is counterproductive.

16. *Documentation of training.* § 802(g). The draft regulation states that credit is given "in the 3 year renewal cycle in which the training provider documents successful completion of the training." It is more accurate to say that credit will be given "in the 3 year renewal cycle in which the training was provided, as documented by the training provider." Otherwise, if a training provider delayed reporting until the next cycle, the credit would not appear in the proper renewal cycle.

17. *Security Training.* § 302.804 The time provisions for security training require clarification. The proposed rule requires all operators to complete security training "before the conclusion of the operator's first subsequent 3 year renewal period following [publication of the Final Rule]." We interpret this to mean that, upon final publication of the rule, no such training will be required until after the current 3-year training cycle is completed, and then the training will be required sometime during the next ("subsequent") 3 year cycle. Depending on when the current cycle ends, operators will have anywhere from a minimum of three to a maximum of six years to complete this training. If this is not the intent, then the provision needs to be clarified in the final rule.

18. *Annual report from Owner.* § 302.1202(b) The requirement to submit an annual report listing the available operators and their personal information serves no purpose. The Department has on file the reports submitted under the Interim Guidelines, and the requirement to report any change in the operators (§ 1202(c)) will serve to keep that information up to date. The annual report is mere busywork, a waste of paper and postage and serves no useful function.

19. *Circuit Rider Process Control Decisions.* § 1207(f). This rule as written makes no sense and is impossible to understand. It appears to be the purpose of the proposed rule to require each owner to "sign off" on the management plan for his system before the circuit rider is allowed to commence operating that system. This is what the rule should say.

20. The definition of Administrative Hearing and the discussion in § 302.501(d) refer to the rules governing administrative hearings as 2 Pa. C.S.A. Chapter 5, Subchapter A (which is correct). However, these sections also refer to Chapter 7, Subchapter A, which refers to judicial review of the administrative hearing, not the conduct of the administrative hearing. While the Board is subject to judicial review (see § 1101 of the Act), this statutory provision does not govern the conduct of administrative hearings as the proposed regulations state. The citation to Chapter 7 should be removed as irrelevant to the subject matter of the regulation.

21. Correction to caption of § 103(c). The regulations regulate owners and operators, not systems. Therefore, the introductory sentence in this section should say "Owners and operators of the following systems are exempt from the requirements of this chapter."

Thank you for considering our comments. We believe that the regulations as proposed involve so many serious conflicts with the Act, as well as other applicable law (including Constitutional concerns), and so many practical problems, that the best approach to take with regard to this proposal is for the Department to enter into meaningful dialogue with the regulated community. This will provide the perspective and practical experience input necessary to draft regulations that have some connection to the "real world." In addition, we anticipate that the Commission will agree with us that many of the proposed rules are in such distinct conflict with the Act that they should simply be deleted. That would address many of the more onerous provisions, and reduce the number of provisions that require input from the regulated community.