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INDEPENDENT REGULATORY REVIEW COMMISSION

Chambers, Laura M.

From: george Kraynick [gkraynick@westviewwater.org]
Sent: Monday, August 10, 2009 9:52 AM
To: EP, RegComments
Subject: Regulation I.D.#7-433 (IRRC#2774)

Dear Commissioners and Board Members:

I am writing to express my concerns regarding the referenced rulemaking. I am a professional certified water operator and have been employed as such for 15 years. In my experience, the proposed regulations would significantly negatively impact my ability to do my job as a professional. I have many concerns, and I endorse the comments being prepared by the Operator Associations. The issues discussed below are of special concern to me not only because they directly conflict with the Act (the Water and Wastewater Systems Operators Certification Act) but because they impose arbitrary and unreasonable requirements, including the creation of new forms of personal liability. In some cases these requirements are so poorly worded that I cannot determine what my risks as an operator would be under these rules.

Stakeholder Input

DEP failed to engage in meaningful dialogue with the regulated community or allow stakeholder input into the new proposed regulations. I have reviewed and am familiar with the current interim operator certification program currently administered under the informal Guidelines and the current ("old") regulations at Chapters 301, 303 and 305. Virtually none of the issues discussed in these comments appears in either the Guidelines or the "old" regulations. Accordingly, with so many new proposed provisions and such a radical change in the proposed program, it was incumbent on DEP to request input from stakeholders as part of the development of these technical rules. It is extremely disappointing that the Department denied the regulated community (certified operators) inclusion into the regulatory development process.

The Draft Regulations Have Not Been Subject To Stakeholder Input And Should be Withdrawn for Regulatory Negotiation

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 support the request for stakeholder input. 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.) I believe this is sound guidance.

These new rules are so radically different from the current program, I must state my deep concerns about the short time allotted for public comment and with DEP's refusal to meet with representatives from the professional operators' associations during the course of drafting the regulations. I urge the Board and the Commission to recommend strongly to DEP that it return to the drawing board and work with the regulated community to develop reasonable and practical regulations. Otherwise, this profession is in deep trouble.

In particular, I am concerned about the following:

Creation of new sources of liability not in the Certification Act

Suspension/revocation of certification for "failure to comply with the duties assigned to a certified operator." Section 1004 of the Act provides that certification may be revoked for violation of specific things. However, sections 302.308(b)(6) and (7) of the draft regulations would subject me to loss of my certification for things that are not even mentioned in the Act. These sections refer to the duties imposed by the Act in addition to the items mentioned in the Act, which appear in (b)(1) through (5).

I have no idea what "failure to comply with the duties assigned to a certified operator" means, since it clearly means something different from the things stated in the first five paragraphs. Who "assigns" the "duties," DEP or my employer? Can I lose my certification because I don't take out the trash, which is one of my "duties"? I cannot operate my treatment system if I do not know what I am liable for and what I am not. Paragraph (7) is not only in conflict with the law, it is too vague to understand. I should not lose my certification for reasons that are so vague.

I have the same concerns about Paragraph 308(b)(6), which again creates a new form of liability that is not mentioned in the Act. Here it is "creating a potential threat to public health, safety, or the environment." I have no idea how to interpret this requirement. If my operators' certificate is to be taken, or I am to be fined, I should at least know what it is that would put me at risk. By definition, the operation of water and wastewater facilities always has the "potential" to affect public health whenever anything goes wrong. And minor events occur weekly, if not every day. This is one reason we have operators on staff—to find and correct minor problems while they are still minor and easily corrected. But anything that goes wrong is a "potential" threat to public health. Hence, the proposed rule would allow the Board to revoke my certificate for almost anything that goes wrong at a treatment plant because it is a "potential threat." I object to this provision because it is irrational and because it is so vague that I cannot determine what my duties are, and because it is not authorized by the statute.

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

Absurd Reporting requirements. Section 1013(e) if the Act requires certified operators to "report to the system owner" such things as violations, problematic system conditions, and actions necessary to prevent or eliminate a violation. The Act does not specify the content of the reports or the manner in which they are to be made. I understand and have complied with this requirement since the law was passed in 2003. I routinely receive reports from my operators concerning any malfunctions, maintenance requirements, and other matters that, if left uncorrected, could compromise my system. The vast majority of these reports are made orally and receive prompt attention. This method of reporting is not only effective, it is efficient.

Section 1201(c) of the regulations, however imposes significant and irrational requirements on the method of reporting and on the contents of the reports. In a typical day, I may make as many receive as a dozen reports of system conditions from my operators. These range from minor maintenance issues to operational problems or needs of every kind. The vast majority of these reports concern minor matters, but many of them could result in changes to water quality if left uncorrected, and so I understand that making the reports is part of my operators obligations under the Certification Act. It is ridiculous,

however, to require me my operators to leave their job and go to the post office several times a day to mail a certified letter to the Authority Board about each of these things, as the regulation demands. The current practice of having my operators report to me in person is more than sufficient to handle most, if not all, of the issues that arise from day to day, and is all that is required by the Act.

Even the requirement to prepare a written report, outlining the "degree of severity or threat to public health" from such minor things, and to demand that I provide a "receipt" for each report is absurd. [It calls into question, whether the regulation writers have any knowledge of how treatment plants work]. Since it will be impossible for my operators to prepare a multi-page written report for every little thing, if these regulations were to pass as drafted, they would have no choice but to resign their certification, rather than face penalties of $1000 a day for not spending all of their time writing reports instead of operating the treatment plant. I understand that in some circumstances, it would be in my interests to have a written record documenting that I complied with the reporting requirement. But making me submit a multi-page written report every time a pump seal leaks, or some other minor maintenance issue or change occurs, at the risk of being fined by DEP if I don't, is ridiculous.

Liability for "consequences" of Process Control Decisions. Section 1014(c) of the Act provides that certified operators are liable for failure to undertake their duties as set forth in section 1013. This is the ONLY civil penalty liability provided for in the Act. Section 302.1201(d) of the proposed Regulation creates an entirely new class of civil liability that is not mentioned in or authorized to be created by the Act. Specifically, this section imposes liability for "consequences" of process control decisions. While the language is extremely vague, it appears to impose liability for any adverse 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 result in the desired results, for a variety of reasons. Making individual operators personally liable for anything that happens at a treatment plant is a guaranteed way to create mass resignations of certification. Therefore, in addition to being contrary to the law and too vague to understand, the provision will result in me and many of my colleagues dropping our certification in order to keep our jobs.

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

Interpretation of Statutory Liability

Section 1014(c) of the Act states the following: ". . . the department may assess a civil penalty upon any person who violates any provision of section 13 [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)."

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; or (2) everyone is subject to liability only if they violate both the respective statutory provision and an order of the Department. I am

aware of one case in which DEP threatened to prosecute operators under interpretation (1), but I also know that some DEP officials have claimed that the correct interpretation is number (2). Obviously, I and other operators prefer number (2), since it provides more notice of what DEP considers to be a violation before I would be liable.

Because the provision in the statute is open to interpretation, it is particularly important to me that it be clarified in the regulations. It is strange that an important issue like this does not appear in the draft regulations. It is important to me and my co-workers that DEP establish one interpretation and stick to it. The uncertainty that we have faced over the past few years, with different people claiming different interpretations, must stop. Including an interpretation of this liability provision in the regulation is necessary and important.

Creation of an unauthorized "stand alone" subclass for laboratory supervisor. Section 1006 of the draft regulations creates "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. The proposed subclass of "Laboratory Supervisor" is therefore not authorized by the Act.

It should also be noted that the proposed definition of Subclassification in the definitions section of the regulation conflicts with the definition in the Statute and should be corrected.

Other concerns

Process Control Decisions by Untrained DEP workers The term "Process Control Decision" is defined in the Act. It is basically any decision that affects the quantity or quality of water or wastewater in a substantial way. Sections 1005(d), 1006(d) and 1013(e)(5) mandate that Process Control Decisions may only be made by properly certified operators. There is no exemption for uncertified, untrained, or unqualified people to make these decisions in any situation.

Section 1203(e) of the draft regulation attempts to create an exception to the statutory definition. When untrained and unqualified DEP employees make a Process Control Decision it is magically not a process control decision. Obviously, no such exception is in the Act. My primary concern, however, is that the ONLY reason for this provision is to allow people who DO NOT HAVE TRAINING to come into my plant and order changes that may be detrimental to its operation. If DEP staff wants to make process control decisions, then let them do what I and my fellow operators have done: take the training and get the experience. To do any less is to risk significant environmental problems. The very idea of allowing someone to make operational decisions BECAUSE they have no training is not only absurd, it is directly contrary to the law.

Excess Credits should be carried forward. The program that has been administered for six years under the informal Guidelines has shown a need to be able to carry training credits forward into the subsequent three year training cycle. Operators should be encouraged to obtain training that is applicable and useful for their employment, not just randomly chosen classes to generate "credits." Because courses are offered at different times, it has been my experience under the current system that I have not taken needed training because I already had sufficient credits, and I have taken pointless training because I needed to obtain credits before the end of my renewal cycle. The current system does not allow operators to take the training they need, it only creates pointless "credit counting." This irrational scheme is repeated in the draft regulations at sections 306(d) and 802(d). Changing this rule to allow excess credits to carry forward into subsequent training cycles will allow operators to be more judicious in their choice of training, taking courses that we need, when they are offered. Since the credit reporting

system is computerized, making this important improvement would be a simple matter. There is no prohibition on carrying forward credits in the statute or in the EPA Guidelines for these programs.

Unreasonable delay in certification renewal after expiration. As drafted, if an operator's certification expires for cause, such as submitting an application late or incomplete, section 306(g) of 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, which makes sense. 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 my certification expired on December 31 and the Board acted on January 5 to renew it, I would be 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

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.

"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 a bureau's entire budget. 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), but instead was created by taking the entire budget of the Division of Technical and Financial Assistance (minus monies received from EPA) and dividing 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 cost of 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.) 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, owners, and municipalities that receive absolutely no benefit from the activities. If its budget is insufficient, its remedy lies with the legislature, not in imposing unlawful and arbitrary taxes.

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. This, of course, is further evidence that the "fees" are really poorly disguised taxes.

According to the Act, 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 issues 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 are administered. 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. This is undoubtedly the most egregiously illegal provision of the "fee" schedule, for several reasons. Water systems and wastewater systems 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. In spite of this, DEP proposes to use taxes on systems to fund 53% of its operating budget (see 39 *Pa. Bul.* 3592).

Further, 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 examined and evaluated, as well as filed, and of far greater significance, are not subject to fees. For instance, there is no fee charged for accepting the monthly Safe Drinking Water reports or 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. The fact that the "fee" is based solely on the design flow of the plant is adequate evidence that it is an unlawful tax.

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.

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 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 the 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.

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 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 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. Two concepts are derived 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 - a truly questionable 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 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.

It is understood 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.

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

Sincerely,

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