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INDEPENDENT REGULATORY
REVIEW COMMISSION

To:
Independent Regulatory Review Commission
14th Floor, Harrisstown 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:

As a Service Employee, I want to thank you for this opportunity to share my thoughts with you. I see myself as a Water Quality Protector, take my job seriously and currently hold the following certifications:

Pennsylvania Sewage Treatment Plant Operator Class A,E - 1,2,3,4
Pennsylvania Sewage Enforcement Officer
Pennsylvania Nutrient Management Specialist
Maryland Nutrient Management Certificate
Certified Public Pesticide Applicator (Category 16)

I am actively involved with trade associations and attend seminars to keep current on the issues. Thirty-two (32) years of involvement with the water and wastewater industries have seen them come a long way, both positive and negative. The referenced rulemaking generates concerns. I endorse the comments being prepared by the Eastern PA Water Pollution Control Operators Association and trust they will weigh heavily in your deliberations. 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.

I sent a letter to the State Board for Certification of Water and Wastewater Systems Operators dated September 27, 2007, concerning the new testing program and some ideas for proposed rule changes. I have yet to receive a written response. I also spoke with one of the Board Members and they had not seen or heard of such a letter even coming to the Board. Why the secrecy?

I came before the EQB to testify December 8, 1994, concerning the proposed biosolids regulations and am happy to report they have been working very well. Thank you for your wise involvement at that time. The last 14 years are a testimony to a job well done by all.

Now in particular to the task at hand, after reviewing the proposed rule making I am concerned about the following:

Creation of new sources of liability not in the Certification Act

Section 1004 of the Act provides that certification may be revoked for violation for a number of specific things. However, sections 302.308(b)(6) and (7) of the draft regulations would subject one to loss of certification for things that are not even mentioned in the Act.

Sections (b)(1) through (5) clearly refer to the duties imposed by the Act but Paragraph 308(b)(6), "*creating a potential threat to public health, safety, or the environment*" creates a new form of liability that is not mentioned in the Act. If my operators' certificate is to be taken, or I am to be fined, I should at least know specifically what it is that would put me at risk. By definition, the operation of a water or wastewater facility always has the "potential" to affect public health whenever anything goes wrong. Minor events occur and for that very reason, operators on staff—find and correct minor problems while they are still minor and easily corrected to avoid major events. 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 may be determined a "potential threat."

I have the same concerns about Paragraph 308(b)(7) "*failure to comply with the duties assigned to a certified operator*" which appears to be in addition to and different from the things stated in the first five paragraphs. My big question is 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 a 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 but is also too vague. Should one lose certification for reasons that are so vague?

I humbly request the Board remove these two provisions because they are irrational, vague and cannot be predetermine what ones duties are, and because they are 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." I agree an operator must be honest and truthful in reporting operations and performing operational duties and held accountable however, Section 308(b)(3) of the proposed regulations appears to 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 one could lose certification for an error on a tax return. The regulations should not make up new rules but should only pertain to those in the Act.

Expansion of the Reporting requirements. Section 1013(e) of the Act requires certified operators to "*report to the system owner*" such things as violations, problematic system conditions, and actions necessary to prevent or eliminate a violation. The Act does not specify the content of the

reports or the manner in which they are to be made. I understand and have complied with this requirement since the law was passed in 2003. I routinely report to my superiors on any malfunctions, maintenance requirements, and other matters that, if left uncorrected, could compromise the 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 302.1201(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, one may encounter dozens of situations requiring attention. To have to stop work and make a formal report of system conditions to my supervisor and go to the post office to mail a certified letter would not allow time to fix the problem in a timely manor. The current practice of reporting to my supervisor in person or over the phone 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. Please direct this section to be redrafted to stay within the bounds of the current Act.

Liability for "consequences" of Process Control Decisions. Section 1014(c) of the Act provides that certified operators are liable for failure to undertake their duties as set forth in section 1013. 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 may create mass resignations of certified operators. Therefore, being contrary to the law and too vague to understand, please drop this provision from the regulations.

Liability for permit violations Section 302.1206(e) of the proposed regulation attempts to make the Operator in Responsible Charge legally liable for any and all NPDES permit violations that may occur as a result of Standard Operating Procedures (SOP's) being followed. Not only is this not authorized by the statute, it is illogical. Permit violations can occur for many reasons. This regulation appears to makes the assumption that whenever a permit violation occurs, it must be because an SOP was in use. Would one 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 approved SOP 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 Standard Operating Procedures. Rather than be subject to random liability, one may choice not to provide direction and help to fellow operators. Please drop this provision from the regulations.

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. Option (2), is the just option since it provides fair notice of what DEP considers to be a violation before one becomes liable.

Because the provision in the statute is open to interpretation it is particularly important to me that it be clarified in the regulations. Please clarify this liability provision in the regulation as stated in interpretation two above.

Other concerns

Process Control Decisions by Untrained DEP or emergency 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. If DEP or other Emergency staff want to make process control decisions, then they should fall under the same requirements and take the training and get the experience and become certified. To do any less is inconsistent and poses an environmental risk. Allowing someone with no training or certification to make operational decisions is in direct contradiction to the law. Please require these people to become certified.

Excess Credits should be carried forward. The current program (in place 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 needed “credits.” Because courses are offered at different times, it has been my experience under the current system that I may not take needed training (due to added cost) because I already had sufficient credits or I have taken pointless training (wasted cost) because I needed to obtain credits before the end of my renewal cycle. The current inflexible system does not encourage operators to take the training they need, it seems to create 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 truly enhance education, when they are offered. Since the credit reporting system is computerized, making this important improvement would be a simple matter as is currently done in the Sewage Enforcement Officer (SEO) program. There is no prohibition on carrying forward credits in the statute or in the EPA Guidelines for these programs.

Excessive credit requirement I carry certifications for Nutrient Management in MD & PA, Pesticide Applicators License in PA, and am a PASEO which all require CEU's. I found the CEU's required in these other programs less in number (20 or less per 3 yr cycle vs. 30) and more suited for preparing me for the job and for passing exams than in the wastewater program. Maybe that is due to my limited exposure to these other areas and my primary focus and broader experience & education with wastewater. Or maybe it is due to the tight focus of these fields and the broader focus of wastewater treatment operations.

Additionally, more operators at my facility are becoming certified requiring additional time away from work draining additional employer resources. Therefore, please consider reducing the needed training from 30 to 15 credits per 3-year cycle. Effectively that reduces the training from 2 to 1 day per year, which seems reasonable in my experience. With the new cost structure required for training providers, I anticipate the training to be more costly & difficult to obtain. Reducing the credit requirement could proactively reduce the anticipated operator burden and drain on scant employee resources.

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.

In summary, please consider the above requests favorably since they clearly conflict with and in some cases contradict the law.

Sincerely,



Jay R. Snyder