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August 5, 2009

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

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

Dear Board Members:

I have been a certified wastewater system operator since 1981. In addition to twelve years as an active operator, I have had an additional twelve years of experience as an operations consultant for a prominent environmental engineering company. I have a Masters Degree in Environmental Pollution Control from Penn State. I am admitted to the Pennsylvania and Maryland Bars and have practiced environmental law for nearly ten years, including consultation with certified operators and owners of water and wastewater systems regarding compliance with the Water and Wastewater Systems Operators' Certification Act (the "Act," 63 P.S. § 1001 *et seq.*). In addition, I have developed and received PaDEP approval of two wastewater training courses dealing specifically with the legal obligations of certified operators. I believe that I have credentials adequate to submit comments on the proposed rulemaking that deserve thought and consideration.

Procedural Deficiencies

I was an active participant, on behalf of the Eastern Pennsylvania Water Pollution Control Operators' Association and the Pennsylvania Water Environment Association, in regulatory negotiation (reg-neg) sessions with PaDEP staff in 2003 and 2004. Those initial meetings made significant progress, but many concerns were outstanding when PaDEP abruptly terminated the meetings in 2004 without explanation. In reviewing the version of the regulations that was under discussion when that happened, I note that many of the issues that are objectionable in the published draft were present in those early drafts, but had not yet been discussed and resolved. Had PaDEP not cancelled that promising reg-neg program before these issues could be discussed, many of the comments being submitted in this Proposed Rulemaking would likely not have been necessary.

Dwelling on PaDEP's procedural failures is not mere griping. It explains the source of the many significant problems with these draft regulations, and a way to remedy them. Because

many of the deficiencies clearly arise as a result of PaDEP's lack of understanding of how treatment plants operate, and many others from a lack of understanding of the Act itself, face to face meetings between PaDEP staff and experienced operators and other stakeholders will go a long way toward making the final rules understandable, practical and reasonable. I urge the Board to require that PaDEP engage in a meaningful regulatory negotiation program to address the many issues raised by the regulated community before undertaking any further consideration of this rulemaking.

Finally, as an introductory comment, I must respond to certain statements made by Mr. Hines at the EQB meeting on April 21, which are repeated in two recent letters from Secretary Hanger to stakeholders organizations: (1) that the Department engaged in significant stakeholder outreach over the last few years, and (2) that the proposed regulations differ from the existing Guidelines in only two substantive ways. I do not know who provided Mr. Hines and Secretary Hanger with this information, but they owe them both an apology. Both statements could not be farther from the truth. The comments being prepared by the operators' organizations will make that fact evident. Again, this is relevant not because it represents dishonesty among some PaDEP staff or because dishonesty is personally repugnant to me, but because it interferes with the progress of reasonable rulemaking and has an effect on the regulated community, not the least of which was the unreasonably short public comment period, which denied many operators the opportunity to review and comment on regulations that will affect their livelihood.

No Documentation Of The Basis Of Any of The "Fees"; Attempt To Impose Unlawful Taxes On Municipalities And Exam Providers.

Although PaDEP provided no detailed accounting or explanation of its costs, as it is required to do,[1] the proposed "fees" for operators and training providers appear generally to be reasonable (except for the outlandish $60 fee to renew certification, which has no rational basis). However, no attempt was made by PaDEP to demonstrate that the costs are actually related to the Department's costs of providing services, as required by the statute (the Water and Wastewater Systems Operators Certification Act—the "Act"). Hence, even those fees that are authorized by the statute and appear superficially reasonable are questionable because of the lack of the required documentation. It is not acceptable to simply make up fees out of thin air, as appears to be the case here. The statute requires otherwise.

Of most concern, however, is that the expressed purpose of many of the "fees," as stated in the draft regulations themselves, as well as in the *Pennsylvania Bulletin* notice, is to "cover the expenses of the program" (*e.g.*, see definition of "fee" in the proposed rulemaking). The sparse documentation provided by PaDEP indicates that these "expenses" include many items not directly related to providing operator training, approval of third party training, or certification/ recertification. Hence, it is the stated purpose of the "fee schedule" to raise funds for general revenue purposes to support an entire PaDEP Bureau. This is the definition of a tax, not a fee.

[1] The Fee Report Form is notable for its generalities and lack of detail. For instance, the costs of "certification" include not only certification activities, but attendance at Board meetings and criminal investigations.

Only the General Assembly can create taxes (or the authority in subordinate units of government to create them). Neither the Act nor any other legislation confers on the Environmental Quality Board or PaDEP the power to create and assess taxes. To the contrary, the Act creates a very narrow power to charge fees "to recover the cost of providing the services." 63 P.S. §§ 1004(b)(6) and (c)(3). The "cost of providing services" is not the entire budget of the Bureau (the "expenses of the program"), but must be related in some way to services actually provided. The proposed "fees" on facilities and on examination providers are not authorized by law, and are not related to any services provided by PaDEP. For instance, the fact that the amount of the "fees" for Systems is based on the design flow of the treatment facility is clear evidence that these "fees" are based on "ability to pay," not on "cost of services" as the Act requires. (Not to mention that the Act does not provide for ANY fees to be assessed on exam providers or systems and the fact that no services are provided to Systems at all.)

Furthermore, the Department has clearly documented that ALL of the fees were developed arbitrarily, using the concept of "all entities [should] pay a fair share of program costs." (39 *Pa.Bull.* 28, at 3592.) In other words, the Department admits that the very basis of the "fees" is an attempt to distribute charges evenly among the participants in the program. This is not only an unreasonable method of setting fees, it directly contradicts the mandate of the Act and is unlawful.

I do not object to legitimate fees, which are authorized by law and collected to reimburse the costs of providing services. I strongly object to the blatantly illegal attempt to create a system of taxes and arbitrary fees with no rational or legal basis.

Creation of new sources of liability not in the Certification Act

The comments being prepared by the CPWQA and EPWPCOA discuss in detail the several newly-invented requirements in the proposed rules. These new forms of liability, not contemplated by the Act, not hinted at in the current (Chapters 301, 303 and 305) regulations, and not included in the current Guidelines (Pa Guidance No. 383-2300-001),[2] are of special concern, not only because of the conflict with the statute, but because, as stated above, PaDEP proposed them without any prior notice to or discussion with stakeholders. When new requirements of this magnitude, and so completely different from existing programs are proposed, it behooves PaDEP to at least discuss them with stakeholders whose livelihood will be affected for many years to come.

The following sections create new liability that is not provided for in the Act and are, in my opinion, *ultra vires*. Perhaps more importantly, most of these provisions are so poorly worded that it is impossible for anyone to understand what obligations are being created. In spite of 24 years of active operating experience, a Masters Degree, and a law degree, I cannot determine what some of these new requirements are supposed to mean. As counsel, I cannot advise clients as to their obligations or liability. In fact, if these bizarre rules are adopted, the only advice I can in good conscience provide to certified operators as an attorney bound by the Rules of Professional Conduct to give sound counsel, will be to resign their certifications or seek comprehensive indemnification from their employers. Anything less would leave thousands of

[2] As Mr. Hines and Secretary Hanger falsely claimed.

operators at the mercy of arbitrary "interpretations" of vague rules and random enforcement against them personally.

These new, unlawful, and ambiguous provisions include:

Suspension/revocation of certification for "creating a potential threat to public health, safety, or the environment" and "failure to comply with the duties assigned to a certified operator." §§302.308(b)(6) and (7).

Since the requirements of Section 1004 of the Act are itemized in subparagraphs 308(b)(1) through (5), it is clear that the additional provisions in subparagraphs (6) and (7) are intended to add new liability not contained in the Act. This is bad enough. But the requirements themselves are so vague that compliance is literally impossible. I have met with and discussed these provisions with other certified operators, and none of us has any idea what "failure to comply with the duties assigned to a certified operator" means. Is this supposed to refer to the list of "tasks" that appears in § 1201(b)? Who knows?

Similarly, how does one determine when there is a "threat" to public health or the environment? It is the very nature of professional system operations that malfunctions and changes in treatment efficiency will occur from time to time. As they occur, they present a conceptual "threat" to public health, because they may affect water or effluent quality if left uncorrected. It is the very purpose of having certified operators available to recognize and correct these problems. The regulation does not recognize this, but allows that whenever a "threat" occurs, the operator on duty could lose her certification.

It is not a rational response to say the PaDEP will exercise enforcement discretion in these matters. The purpose of enforceable regulations is NOT to create ambiguous situations which require the constant application of discretion; to the contrary: the purpose of writing down the rules is so that everyone knows what they are. It is unreasonable, not to mention legally questionable under substantive due process principles, to draft ambiguous rules, and then leave it up to individual enforcement officers to interpret and apply them on a case-by-case basis as they see fit. And, as already mentioned, the provisions are not authorized by law and represent an attempt by PaDEP clerical staff to usurp the prerogatives of the Legislature by creating new forms of liability from whole cloth.

Expansion of the falsification of records provision. § 308(b)(3).

The Act (§ 1004(a)(3)) 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." There is no authority for expanding the scope of the statute, nor does it make any sense to risk losing one's operator certification for activities unrelated to operator competence. The Act provides several instances of limiting liability to action or inaction related to operators' duties (see, e.g., § 1004(a)(3), 1013(e), 1014(c)). Moreover, as with the other new

provisions, the requirement is a bit vague and invites abuse of discretion. The regulations should not make up new rules, especially arbitrary ones like this.

Absurd and Impossible Routine Reporting Requirements. § 1201(c)

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.

Section 1201(c) of the draft regulations, however imposes significant and irrational requirements on the method of reporting and on the contents of the reports. In my personal experience covering 24 years in the field, a single operator may make as many as a dozen routine reports of system conditions requiring action to his supervisor in a typical day. The vast majority of these reports are of a minor nature, but are those required by the Act. To require that each of these be converted to a lengthy analytical written report requiring risk analysis and engineering deductions, and then that it either be mailed to the municipality or that the operator demand a written receipt from his superior is the height of absurdity. This ridiculous provision illustrates the need for a reg-neg process, where experienced operators can explain to PaDEP clerical staff how treatment plants work.

I would also note with regard to this provision, that the issue was discussed during the 2003–04 reg-neg process and DEP had agreed at that time NOT to require formal written reports under this provision. The agreement was that the regulation would include a recommendation that reports be in writing, but that this would not be a requirement. Obviously, PaDEP reneged on one of the few issues that was actually resolved during that process.

Liability for "consequences" of Process Control Decisions. § 302.1201(d)

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. As with the other invented provisions discussed above, the language is extremely vague. (For instance, what in heaven's name is a "consequence" of a process control decision?) However, it appears to be the intent to impose personal civil liability ($1000 a day) 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. Certainly, my advice to all of my clients will be to either resign their certifications or demand full indemnification and increased compensation from their employers. The resulting chaos can only be imagined.

Even the exceptions are ridiculous.[3] For instance: if an operator NOT "under the supervision of" the available operator is responsible for the "consequences," the available operator who made the process control decision remains legally responsible for them—essentially imposing liability without any fault whatsoever.

Liability for permit violations § 1206(e)

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 irrational (see also footnote 3) assumption that whenever a permit violation occurs, it must be because the SOP was in use. In other words, the operator in responsible charge 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 he 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 all. The only practical effect this rule will have will be to prohibit experienced operators in responsible charge from providing their experience and expertise to other operators by developing SOPs. The result will be a loss of valuable information for new operators.

And, again, I must note in anticipation of PaDEP's response that promises of enforcement discretion applied to an irrational rule are not a reasonable response, nor is the concept lawful under principles of due process. The rules themselves must be reasonable.

Interpretation of Statutory Liability

Section 1014(c) of the Act states, ". . . 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 statutory 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;[4] or (2) everyone is subject to liability only if they violate both the respective statutory provision and an order of the Department. I have corresponded and spoken with various PaDEP personnel, including ex-Secretary McGinty, and they repeatedly assured me and others that PaDEP intends to apply the second interpretation (requiring both a violation and violation of a subsequent Order). I was pleased to hear the intent to use this interpretation. Now it needs to be codified.

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[3] I apologize for repeating the same adjectives, but my thesaurus suggests only "absurd," "crazy," "ludicrous," "preposterous," "laughable," "rash," and "outlandish." All apply. I would add "idiotic."

[4] An interpretation in keeping with the rules of English construction and supported by the provision in § 1013(b), applying the "violation plus order" requirement only to uncertified operators.

This important and necessary interpretation of an ambiguous statutory provision does not appear in the proposed regulations. This is of concern for two reasons: First, it may be indicative that the Department does not intend to abide by its prior statements, making operators liable without the necessity of a prior Order. Second, by allowing the rule to remain ambiguous, the potential liability of operators cannot be determined. Again, the very purpose of the regulations is to clarify and codify the more general provisions of the statute. By failing to do this, the draft regulations create uncertainty and consternation. Since PaDEP has repeatedly assured the regulated community that it intends to apply one particular interpretation, there should be no hesitancy to state this in the final regulations

Practical Concerns

Process Control Decisions by Untrained DEP Workers

The term "Process Control Decision" is defined in the Act. There is no exemption for process control decisions to be made by untrained people, no matter who employs them. To the contrary, the Act is very clear: Sections 1005(d), 1006(d) and 1013(e)(5) mandate that Process Control Decisions may only be made by properly certified operators.

Section 1203(e) of the draft regulation attempts to create an exception directly contrary to the statutory definition: when untrained and unqualified people make a Process Control Decision it is magically not a process control decision if the untrained personnel are employed by PaDEP. My primary concern is that the ONLY reason for this provision is to allow people who DO NOT HAVE TRAINING to order changes that may be detrimental to the operation of treatment facilities. If PaDEP staff wants to make process control decisions, then let them do what I and my fellow operators have done: take the training, get the experience, and pass the certification test. To do any less is to risk significant environmental problems. The very idea of allowing someone to make operational decisions BECAUSE they have no training is not only absurd, it is directly contrary to the law. If PaDEP officials feel it is necessary to issue Orders regarding treatment plant operations, they have that power under both the Certification Act and the Clean Streams Law; there is no need to circumvent the protective provisions of the Certification Act by attempting to change a statutory definition.

Excess Credits should be carried forward. §§ 306(d) and 802(d).

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 useful 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 (*etc.*, see footnote 3 again) 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.

The "Stand Alone" Laboratory Supervisor "Subclass" § 1006

The Act (§ 1004(c)(4)) states that subclasses are created "within classifications." The concept of a "stand alone" subclass of any kind is directly contrary to the Act. Furthermore, subclasses are to be based on the "size and complexity" of the system (i.e., the treatment technology). A "laboratory supervisor" subclass has nothing to do with the technology of any system. The proposal is clearly contrary to law.

Issues for Owners—§ 1203(c)

In addition to the illegal taxes proposed to be imposed on POTWs and water treatment plants, the proposed regulations would also create a new power in PaDEP to require wastewater treatment plants to develop "Process Control Plans." No such provision appears in the Act or in the Clean Streams Law, and the Board has no legal authority to create this entirely new and arbitrary requirement. I understand that a similar provision appears in the Safe Drinking Water Act regulations applicable to water treatment facilities. Since that requirement is already in place, there is no need to repeat it in these regulations, or to extend its scope to include wastewater treatment plants.

In summary, as a certified operator and as an attorney practicing in this field, 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 poorly written and vague that I have no idea how to advise clients, either municipalities or operators, on what their responsibilities or potential liabilities might be. I have already heard from a number of treatment plant supervisors that their operators are not renewing certifications because of the arbitrary and unpredictable way that PaDEP has implemented the existing statutory provisions under the Guidelines. There is not the slightest doubt in my mind that if these regulations are adopted as drafted with the many new requirements not in the current Guidelines (and not in the Act), we will see hundreds more operators allow their certifications to expire rather than be subject to these risks.

The above comments are submitted on my personal behalf, as a certified operator, certified training provider, and counsel. I have not been reimbursed by anyone with regard to the preparation of these comments.

Very Truly Yours

Randall G. Hurst/SRK

Randall G. Hurst

One Page Summary of Comments Submitted by Randall G. Hurst

- PaDEP did not engage in stakeholder outreach and developed the regulations in virtual secrecy; the result was many objectionable and unlawful provisions and possible due process violations for the public and the regulated community.
- The proposed regulations are completely different from the existing Guidelines and introduce nearly twenty new substantive provisions not previously published, many of which contradict and conflict with the Certification Act. PaDEP staff misinformed the EQB about this and stated falsely at the April 21 EQB meeting that the regulations are very similar to the existing Guidelines.
- There are at least seven new sources of operator liability not contained in the Certification Act or in the existing Guidelines:
  _ liability for "consequences" of process control decisions,
  _ liability for not producing a full written report for every minor maintenance issue,
  _ liability for not obtaining a receipt for each such report,
  _ liability for NPDES violations when an SOP is in use,
  _ liability for falsification of records unrelated to operations,
  _ liability for "potential" threats to public health,
  _ liability for failure to undertake undefined "duties" in addition to those in the Act.
- Creation of an arbitrary and unlawful system of taxes for POTWs and exam providers, and "fees" for others that are not based on the expenses associated with providing services as the law explicitly requires.
- Creation of a "stand alone subclass" in direct contradiction of the Act.
- Refusal to codify the "official" interpretation of an arbitrary statutory liability provision, leaving operators and DEP field staff uncertain as to the scope of liability.
- Attempt to allow untrained and uncertified PaDEP personnel to make process control decision without penalty in direct violation of the Act.
- Unreasonable restrictions on training requirements which make it difficult for operators to obtain appropriate training.
- Creation of a requirement for POTWs to develop detailed "process control plans" with no statutory authority.

I encourage the Board members to obtain and read all of the comments submitted by various concerned people in their entirety. The process created by PaDEP of hiding actual comments from the Board and only providing you with one page summaries is insulting to both the Board and those people who made an effort, in the very short time allotted, to review these extensive regulations and submit their concerns.