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August 10, 2009

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Independent Regulatory Review Commission
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Environmental Quality Board
Post Office Box 8477
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Re: Environmental Quality Board
Proposed Rulemaking, July 11, 2009
Chapter 302, Administration of the Water and Wastewater Systems Operators Certification Program
Regulation I.D. # 7-433

Dear Commissioners and Board Members:

I am writing to express my concerns regarding the referenced rulemaking. I am a professional certified wastewater operator and have been employed as such for 20 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 Eastern PA Water Pollution Control Operators Association and the PWEA. 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.

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 may cease to exist.

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 a number specific things. However, sections 302.308(b)(6) and (7) of the draft regulations would subject me to loss of my certification for things that are not even mentioned in

the Act. These sections 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, because it is so vague 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 report to my superiors and, receive reports from my operators on 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 as a dozen reports of system conditions to my supervisor. I may also receive as many 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 effluent water quality if left uncorrected, and so I understand that making the reports is part of my and my operators' obligations under the Certification Act. It is ridiculous, however, to require me and my operators to leave our job and go to the post office several times a day to mail certified letters to the Executive Director and the Authority Board about each of these things, as the regulation demands. The current practice of reporting to my supervisor and 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 my supervisor and I provide a "receipt" for each report is absurd. Whoever drafted this section has absolutely no idea how treatment plants work. Since it will be impossible for me and my operators to prepare a multi-page written report for every little thing, if these regulations were to pass as drafted, we would have no choice but to resign our certifications, rather than face penalties of $1000 a day for not writing reports instead of operating the treatment plant. I understand that in some circumstances, it would be in our best interests to have a written record that we complied with the reporting requirements, but making us submit a multi-page written report every time a pump seal leaks, at the risk of being fined by DEP if we 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 produce 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 may 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. 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 operators have faced over the past few years, with different officials claiming different interpretations, must be corrected. Including an interpretation of this liability provision in the regulation is necessary and important.

Other concerns

Process Control Decisions by Untrained DEP workers. The term "Process Control Decision" is defined in the Act, and 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 somehow not construed to be a process control decision. Obviously, no such exception is in the Act. My primary concern, however, is that this provision will allow people who DO NOT HAVE TRAINING to come into plants and order changes that may be detrimental to its operation and the licensed operator will be held liable. 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 and pass the test. To do any less is to risk significant environmental impact. The very idea of allowing certain indivguals to make operational decisions without proper training and certification, while others must have proper training and certification is not only absurd, it is directly contrary to the law.

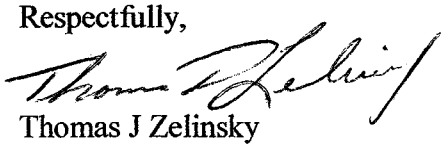
Excess Credits should be carried forward. The program that has been administered for six years under the informal Guidelines has shown a need to be able to carry training credits forward into the subsequent three year training cycle. Operators should be encouraged to obtain training that

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 applicable 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 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. 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.

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

Respectfully,



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