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ENVIRONMENTAL QUALITY BOARD

August 13, 2009

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

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

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:

We are writing to express our concerns regarding the referenced rulemaking. We employ four professional certified wastewater operators who have been certified for 18, 16, 15 and 5 years. In addition, we encourage all of our non-certified employees to participate in training programs for the purpose of becoming certified operators.

We believe the proposed regulations would significantly negatively impact our employees in doing their jobs as professionals. We have many concerns, and we endorse the comments being prepared by the Eastern PA Water Pollution Control Operators Association. The issues discussed below are of special concern to us 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.

These new rules are so radically different from the current program, we must state our 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. We urge the Board and the Commission to recommend strongly to DEP that it returns 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, we are 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 of specific things. However, sections 302.308(b)(6) and (7) of the draft regulations would subject our employees to loss of 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). Paragraph (7) is not only in conflict with the law; it is too vague to understand. Please redefine the reasons for revocation of certifications. We 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." 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 the 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 certificates for almost anything that goes wrong at a treatment plant because it is a "potential threat."

We object to this provision because it is irrational, because it is vague, 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 is vague and unwarranted. The regulations should not make up new rules; they should stick to those that are in the Act.

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. Our certified operators understand and have complied with this requirement since the law was passed in 2003. Our facilities superintendent routinely reports to the Board members on any malfunctions, maintenance requirements, and other matters that, if left uncorrected, could compromise the sanitary sewer 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. Our operators understand that making reports is part of their obligations under the Certification Act. The current practice of reporting (not written, by certified mail, or receipted, but orally) 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. We do not want our certified operators to spend all their time writing reports instead of operating the treatment plant and the collection system. We understand that in some circumstances, it would be in our best interests to have a written record and our operators provide adequate documentation.

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. Process control decisions do not always result in the desired results, for a variety of reasons. This penalty fails to recognize the complexity of the process systems. 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 the certified operators dropping (or not pursuing) their certifications in order to keep their 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. This is not authorized by the statute. 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 and not correctly followed. 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 our plant. In other words, rather than be subject to random liability, we will have no choice but to refuse to provide direction and help to our certified 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. Because the provision in the statute is open to interpretation it is particularly important to us that it be clarified in the regulations.

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) mandates 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.

**Cc: James M. Jacquette, Esquire, Solicitor to the Authority
Thomas F. Zarko, Consulting Engineer to the Authority
Charles J. Fealy, Superintendent of Facilities for the Authority
Beverly Brown, Manager of the Authority**

Section 1203(e) of the draft regulation attempts to create an exception to the statutory definition. No such exception is in the Act.

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, under the current system that certified operators are encouraged to not take needed training because they already have sufficient credits, and to take pointless training because they needed to obtain credits before the end of their 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, taking courses that they need, when the courses are offered. 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 correction of 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 the operator's certification expired on December 31 and the Board acted on January 5 to renew it, the operator would be uncertified until April 1. Once a certificate is approved, it should become effective immediately. The "effective issuance date" should be the date that the Board takes action.

In summary, we strongly object to the proposed regulations because they clearly conflict with and in some cases contradict the law, because they impose requirements that NO operator could reasonably comply with, and because some of the provisions are so vague that interpretation is impossible. If these regulations are adopted, many certified operators will resign their certifications.

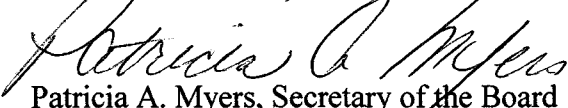
Very Truly Yours,



Sam Dugan, Chairman of the Board



Michael J. Nicholas, Vice Chairman of the Board



Patricia A. Myers, Secretary of the Board



Gary Christensen, Treasurer of the Board

