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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

October 9, 2009

Honorable John Hanger, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-433 (IRRC #2774)
Environmental Quality Board
Administration of the Water and Wastewater Systems Operators' Certification Program

Dear Chairman Hanger:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Mary Jo White, Majority Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-433 (IRRC #2774)

Administration of the Water and Wastewater Systems Operators' Certification Program

October 9, 2009

We submit for your consideration the following comments on the proposed rulemaking published in the July 11, 2009 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (Act) (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Determining whether the regulation is in the public interest.

Section 5.2 of the Act (71 P.S. § 745.5b) directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. When making this determination, IRRC considers criteria such as economic or fiscal impact and reasonableness. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. The IRRC also considers the information a promulgating agency is required to provide under Section 5 of the Act (§ 745.5(a)) in the Regulatory Analysis Form (RAF).

This regulatory package deletes three existing chapters of the EQB's regulations and replaces them with one comprehensive chapter that includes 12 subchapters. The 12 subchapters incorporate much of the language contained in technical guidance documents that are being used to administer the water and wastewater operator's certification program (program). The Preamble contains information related to the history of the program and the rulemaking and the fee structure being proposed. However, the Preamble does not include an adequate description of the numerous sections of the rulemaking and the rationale behind the language. Without this information, IRRC is unable to determine if the regulation is in the public interest. The lack of information could also be a reason for the misunderstandings between the EQB and the regulated community as described below. In the Preamble submitted with the final-form rulemaking, the EQB should provide more detailed information required under § 745.5(a) of the Act, including a

description of the language proposed for each section of the regulation and why the language is required.

2. Advanced Notice of Final Rulemaking.

In developing this regulatory package, the EQB, on numerous occasions, consulted with several of its water and wastewater advisory committees. The EQB also met with members of the regulated community. In addition, the public comment period was extended from 30 days to 60 days. We acknowledge the amount of time and effort that the EQB put into this package. Despite these efforts, certain segments of the regulated community believe that they were excluded from providing meaningful input on the proposed regulation. After meeting with both the EQB and the regulated community, it is clear that there is a basic misunderstanding of the intent, scope and nature of this regulation.

Section 2 of the Act, pertaining to legislative intent, provides the following direction: “To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.” 71 P.S. § 745.2(a).

In order to resolve many of the objections raised by commentators, we strongly encourage the EQB to continue to meet with the regulated community on this rulemaking. In addition, we suggest that the EQB issue an Advanced Notice of Final Rulemaking. This would allow interested parties and the EQB the opportunity to resolve as many concerns as possible prior to the submittal of the final-form regulation. 63 P.S. § 1003(c).

3. Reasonableness of the regulation; Protection of the public health, safety and welfare and the effect on the Commonwealth’s natural resources.

In the RAF submitted with this rulemaking, the EQB has noted that a significant number of water and wastewater treatment systems do not have appropriately certified operators making process control decisions. The EQB believes this represents a significant public health risk to the citizens of this Commonwealth. To complicate matters, the EQB notes that a recent survey indicates the shortage of certified operators will dramatically increase over the next five years.

Commentators agree that there will be a shortage of operators in the future and believe that this rulemaking will exacerbate the situation. Increased costs associated with obtaining and maintaining an operator’s certificate and increased liability placed on operators are cited as reasons why commentators believe the rulemaking will lead to fewer certified operators.

The Preamble to the final-form regulation should explain why this rulemaking will not have an adverse effect on the number of certified operators in the Commonwealth. In addition, the EQB should also explain what actions will be taken to protect the public health if the rulemaking does create a shortage of operators.

4. Reasonableness; Need.

Throughout the proposed regulation, it appears that the EQB requires more information than necessary to administer the program. For example, Section 302.1201(b) includes 16 tasks that may be necessary for certified operators to control the operation and provide for the maintenance of water and wastewater systems. In Section 302.1203(c), the Department may require a water or wastewater system to have a process control plan that includes 15 pieces of information. And finally, Section 302.605 even details permitted use of items (like calculators) in a certification exam.

We recognize the importance of including details in order to ensure the language in the regulation is as clear as possible. However, there needs to be a balance between providing necessary detail and micromanaging the regulated community in their normal course of business.

In the Preamble to the final-form regulation, we ask the EQB to explain the need for such a prescriptive regulation. In addition, the EQB should review the regulation to ensure that each provision of the final-form regulation is necessary and achieves that appropriate balance.

Subchapter A. GENERAL PROVISIONS

5. Section 302.101. Definitions. - Statutory authority; Need; Implementation procedures; Clarity.

Administrative Code

This term is defined, but it does not appear to be used anywhere in the proposed regulation. Therefore, we recommend that this term be deleted from this section in the final-form regulation.

Board-designated agent

This definition refers to a “committee member,” but never explains what committee is at issue. The final-form regulation should specify what particular committee is being referred to in this definition.

Board Secretary

This term is defined as “A Department-recommended staff member who acts on behalf of the Board to implement administrative aspects of the program.” We raise two issues. First, what is meant by the term “program?” Second, Section 1003 of the Water and Wastewater Systems Operators’ Certification Act (Certification Act) requires an election of the Board Secretary and the Chairman. 63 P.S. §1003(c). Since the definition does not require an election but only a “Department-recommended staff member,” the final-form regulation should provide the EQB’s statutory authority for deviating from the Certification Act’s mandate.

Certificate program

The proposed definition is vague for two reasons. First, the definition does not provide enough information to explain how it is related to this Chapter or the subject matter contained therein. Second, the definition refers to a “type” of “Department-approved training.” Without explaining how this definition is relevant to the Chapter, it is difficult to understand what “types” the definition refers to. The definition in the final-form regulation should clarify the relationship of the term to this Chapter and provide examples of Department-approved training.

Contact hour

What is considered a “Department-approved education experience?” In addition, the definition does not establish the specific amount of time that would constitute a “contact hour” (for example, would a contact hour be considered 50 minutes or 60 minutes?). The final-form regulation should clarify these issues.

Direct filtration

Paragraph (ii) begins with the phrase “The term normally includes flocculation after coagulation....” The term “normally” is nonregulatory language which results in a vague definition. The definition should be amended to specify under what circumstances “flocculation after coagulation” is, and is not, considered “direct filtration.”

Fee

This definition indicates that fees are only charged to an “applicant.” The definition does not address operators who take training courses for continuing education. Aren’t they charged course fees? The final-form regulation should clarify this issue.

Operator

This definition is inconsistent with Section 1002 of the Certification Act. The Certification Act includes a definition for “operator” that exempts industrial wastewater treatment facilities operators from obtaining an operator’s certificate. However, this exemption was excluded from the regulatory definition for this term. The EQB should explain this exclusion.

Permitted average daily discharge flow

A commentator was concerned that the inclusion of the term “hydraulic design capacity” in this definition will cause confusion among the regulated community. What was the EQB’s intent in using this term in the definition?

Person

Paragraph (i) includes “political subdivision” as an example of what would be considered a person. However, the term is not included as an example in the statutory definition (see Section 1002 of the Certification Act) and the term is not included as an example in paragraph (ii) of the proposed definition. The EQB should explain the reason for these inconsistencies.

Satellite collection system

A commentator suggests that this definition would require regulation of conveyance systems that are not regulated by the Certification Act, and that it would also waive regulation of privately-owned collection systems that are required to be regulated by the Certification Act. According to the commentator, the main reason for this result is that unlike the Certification Act, the regulation omits the term “collection facilities” and uses the term “wastewater system.” Through this change, the commentator contends that the end result would be that anyone making process control decisions at facilities like hotels, restaurants or schools would be required to maintain a Class E operator’s certificate. (see Section 302.109.) What is the EQB’s intent and statutory authority for making this change?

6. Section 302.103. Scope. - Clarity

According to the *Pennsylvania Code and Bulletin Style Manual*, a “scope” section should only be used to the limit the applicability of the chapter. This section contains substantive provisions that are inappropriate for a “scope” section. For example, it lists what an applicant must do to become an operator. If this language is needed, we recommend that it be moved to more appropriate subchapters and sections.

Subchapter B. GENERAL REQUIREMENTS FOR APPLICATIONS FOR CERTIFICATION ACTIONS

7. Section 302.201. Form of application. - Reasonableness; Implementation procedures; Clarity.

Subsection (a) requires “a complete application with required documentation using the appropriate Department-approved forms.” The final-form regulation should include information as to where or how a Department-approved form can be obtained.

Subsections (b)(2)(ii) and (e)(3)(ii) refer to written verifications of direct knowledge of an operator’s work experience before February 21, 2002. How would a supervisor “verify” this information?

Subsection (e) pertains to applications for certification action for reciprocity. It requires an applicant to provide a copy of their Pennsylvania State Police (PSP) criminal history. If an applicant is from outside the Commonwealth, would the PSP criminal history provide the necessary information? Should the criminal history from the applicant’s state of residence be required in addition?

8. Section 302.202. Operation certification program fees. - Statutory authority; Implementation procedures; Reasonableness; Need; Clarity.

Fee structure

The Fee Report Form submitted with the proposal notes that the fee schedule found in this section is designed to cover the costs for administrative aspects of the program services and the costs for Department training course development and delivery not covered by federal funding. It is also designed to replace the general fund money dedicated to this program since 2003 for technical support and compliance assistance. We have two concerns. First, commentators believe the fee structure goes beyond what is permitted by the Certification Act. An example of their concern is the fee that is to accompany the submittal of annual reports. For each of the fees listed in Subsection (d), the EQB should provide a citation to the specific section of the Certification Act that permits the fee to be imposed.

Second, what is the EQB’s statutory authority for a fee structure that is intended to cover the cost of the water and wastewater program not covered by federal funding?

Exemption to fees

Region III of the United States Environmental Protection Agency (EPA) submitted comments with concerns about a lack of exemptions for training providers such as the EPA. They contend that they would be unable to pay fees associated with obtaining approval to provide training and therefore, would not be able to offer training to system operators. If allowed by the Certification Act, the EQB should consider providing exemptions to training providers such as the EPA.

Subsections (a) and (c)

These subsections state that IDs or permit numbers “should” be included on the check or money order. We have two concerns. First, use of the word “should” indicates that this provision is optional. If these provisions are retained in the final-form regulation, we recommend that “should” be amended to “shall.” Second, under Subsection (a), how would a new applicant know what their “client ID” number will be?

Subsections (e) and (h)

Subsection (e) states: “The maximum fee a training provider or owner will be charged is \$10,000 per year,” and Subsection (h) states: “No person regulated by this act shall pay more than a total of \$10,000 annually to the Commonwealth operator certification fees specified under...[the Certification Act].” We have three concerns.

First, we question the EQB’s statutory authority for imposing the \$10,000 limit. Sections 1004(b)(6) and 1004(c)(3) of the Certification Act allow for the imposition of certain fees, but also contain the following language: “...as may be reasonable and appropriate to recover the cost of providing such services.” The Certification Act requires recovery of costs associated with providing services and does not provide exemptions from this mandate.

Second, we understand that the purpose of the \$10,000 limit is to insure that no person is covering a large percentage of the total costs of the program. However, commentators believe that the proposed limit transfers the costs from larger training providers and municipalities to smaller ones. They believe it will make it more difficult for smaller training providers to compete with larger providers, making specialized training more expensive and the remaining training courses more general and vague. In the Preamble to the final-form regulation, we ask the EQB to explain why this approach is reasonable and to consider the effects it could have on small businesses.

Third, given the language of Subsection (h), what is the need for Subsection (e)?

Subsection (f)

Under this subsection, operators holding a valid certification when this rulemaking becomes effective will be exempt from paying “certification fees.” Should this exemption be narrowed to “*initial* certification fees”?

Subchapter C. BOARD PROCEDURES AND ACTIONS

9. Section 302.301. Board procedures for certification action. - Statutory authority; Implementation procedures.

Timeframes

A commentator is concerned that the regulation should provide more specific times for review and action. For example, in subsection (b), the phrase “...notified, in a timely manner from receipt of the application” is vague. In addition, in Subsection (d), the requirement that action occur on a completed application “within two scheduled Board meetings” lacks clarity, since it is unclear when these meetings would actually occur. We recommend that the EQB review these subsections and clarify these timeframes in the final-form regulation.

Subsection (a)

This subsection provides that applications for certification action will be reviewed by the Department “under the supervision of the Board Secretary.” What is the EQB’s statutory authority for permitting this type of supervision?

Subsection (d)

What does the EQB consider to be “sufficient information” for the Board to make a decision? The final-form regulation should clarify this issue.

Subsection (e)

This subsection states that the Board Secretary *will* issue the operator’s certificate within 60 days of Board action. However, subsection (i) states that the Board will not notify an applicant of a denial of a certificate until 60 days after the Board’s decision. In both subsection (e) and (i), what is the reason for such a long delay in issuing a certificate or a denial?

Subsection (h)

This subsection authorizes the Board Secretary to deny an application for certification without Board approval under certain circumstances. The final-

form regulation should explain the EQB's statutory authority to delegate authorization to the Board Secretary in these specific situations contained in the subsection.

Subsection (i)

This subsection explains the process for denial of an application for certification. However, because the proposed regulation does not specify once a notice of denial is received by an applicant, it is unclear how long the applicant has to file an appeal with the Environmental Hearing Board (EHB). The final-form regulation should provide this information, or if appropriate, include a cross-reference to that section of the Code pertaining to deadlines for filing appeals.

10. Section 302.304. Issuance of certificate through reciprocity. - Clarity.

Commentators are concerned with the strictness of the reciprocity requirements imposed by this section. Please explain how these requirements are consistent with those contained in Section 1009 of the Certification Act.

11. Section 302.306. Certificate renewal. - Need; Implementation procedures; Clarity.

Subsection (d)

We raise two issues concerning this subsection. First, the proposed regulation does not address carry-over credits for continuing education credits.

Commentators believe the ability to carry over credits would help them comply with the continuing education requirements and lessen the financial burden this rulemaking will impose. Would a certified operator be permitted to carry forward continuing education credits from one period to the next? A similar concern is raised by Section 302.802(d), which states that: "A certified operator may not apply excess contact hours to a subsequent 3 year renewal cycle."

Second, this subsection appears to conflict with Subsection (h). Subsection (d) states that: "A certified operator who fails to complete the continuing education requirements within the 3 year cycle shall apply for recertification." However, Subsection (h) allows a certified operator whose certification has expired not to apply for recertification but to renew their certificate within 24 months following the expiration date of the certificate, provided that the operator has completed the continuing education requirements. The EQB needs to rectify the inconsistency between these two subsections. Similar language is also found in Subsection (l).

Subsection (g)

What is the EQB's rationale for delaying the renewal of a certificate until the next quarter if an applicant submits a late or incomplete application? In addition, commentators suggest that this provision conflicts with Subsection 302.308 (c), which states that suspensions, revocations, modifications or reinstatements become effective immediately.

Subsection (k)

The second sentence of this subsection begins with the phrase "if possible." This phrase is nonregulatory language and should be deleted from the final-form regulation. If there are instances in which the Secretary will not send a copy of the letter to the parties identified in Subsection (k), then those instances should be identified in the final-form regulation.

Subsection (l)

This subsection provides an operator with 14 days to submit additional documentation pertaining to completed continuing education. A commentator suggests that this is too short a timeframe, and recommends 30 days. How did the EQB determine that 14 days is an appropriate timeframe?

12. Section 302.307. Extensions. - Implementation procedures; Clarity.

Subsection (a)(3) states that any Board extension is consistent with "only those specific powers and duties granted to the Board." The final-form regulation should specify the relevant powers and duties, and include a cross-reference to those sections of the Certification Act that list them.

In Subsection (b), within what timeframe will the Board Secretary provide an explanation of the Board's decision and any requirements for compliance?

13. Section 302.308. Suspensions, revocation or modification of an operator's certificate. - Statutory authority; Implementation procedures; Clarity.

Subsection (b)(1)

This subsection refers to "negligence" in an operating system. However, the proposed regulation does not define "negligence." Since there are varying degrees of negligence, the final-form regulation should include a definition for this term.

Subsection (b)(2)

This subsection refers to “fraud,” which is an undefined term. Since there are different types of fraud, the final-form regulation should include a definition for this term.

Subsection (b)(6)

This subsection includes as an example of misconduct: “Creating a clear or **potential threat** to public health, safety or the environment.” (Emphasis added.) Numerous commentators objected to the phrase “potential threat,” stating that since virtually any official action undertaken by an operator has the ability to be a potential threat, operators would be engaging daily in misconduct. They also believe it will greatly increase potential liability for operators. We believe the word “potential” is vague and we recommend it be deleted from the final-form regulation.

Subsection (b)(7)

This subsection refers to the “Failure to comply with the duties assigned to a certified operator.” This provision lacks clarity. How will the Board know what duties are assigned to a certified operator? Are the duties based on an operator’s job description? Who would assign these duties, an employer or the Department? Would a failure to comply with functions not involving wastewater or water operations warrant loss of certification? Without addressing these issues, commentators are concerned that this provision exceeds the liabilities listed in Section 1004(a)(3) of the Certification Act. The final-form regulation needs to clearly identify what duties must be complied with in order to prevent a violation.

Subsection (d)

This subsection discusses the Board’s ability to suspend or modify a certificate, based on violations of this section. Will a certified operator have the opportunity to challenge a Board action under this section? What will be the process for such a challenge?

Subchapter D. CRIMINAL HISTORY RECORDS

14. Section 302.402. CHR [criminal history records] investigations. - Reasonableness; Need; Clarity.

Subsection (a)(2) states that: “A misdemeanor that appears to be related directly to activities associated with carrying out duties and responsibilities as

a certified operator” requires further investigation. Given the language of Subsection (a)(2), we question the need for Subsection (a)(3), which requires further investigation for a misdemeanor that “appears to pose a threat to public health, safety or the environment.” In addition, the language in Subsection (a)(3) is vague. Many misdemeanors can potentially pose a threat to “public health, safety or the environment” and not be related to the operation of a water or wastewater system. We recommend that this provision be deleted.

15. Section 302.403. Review of CHRs by the Board. - Reasonableness; Implementation procedures; Clarity.

Subsection (c)

Under this subsection, why is the written report from the Department submitted to the Board or a Board-designated agent, and not the preliminary review committee?

Subsection (d)

This subsection requires a Department employee on the preliminary review committee to solicit further information from the appropriate regional office as it relates to the circumstances that resulted in a *conviction* and the applicant’s record as an operator. While it may be appropriate to solicit information pertaining to the applicant’s record as an operator, we question the reasonableness of soliciting information pertaining to any conviction. Why would a regional office have any information about a felony or misdemeanor conviction of an applicant, especially if the conviction was not related to the operation of a water or wastewater facility?

Subsection (e)

When will the preliminary review committee provide reasons and documentation for their recommendation?

Subsection (i)

This subsection requires the Department to complete its investigation “in a timely manner.” This phrase is vague and should be defined further.

16. Section 303.404. Board actions as the result of a CHR. - Need; Implementation procedures; Clarity.

Subsection (a)

This subsection states that: “The Board will act on all CHR’s submitted with an application for certification action.” Subsection (b) states that no further Board action is necessary when an applicant’s CHR shows no convictions. Why must the Board act on all applications, even application with no convictions on a CHR?

Subsection (e)

Under this subsection, when will the Board Secretary notify an applicant of the Board’s decision to deny an application? This should be included in the final-form regulation.

Subsection (g)

Under this subsection, what is the timeframe for appealing an action of the Board to the EHB? To assist the regulated community in understanding their appeal rights, we recommend that this information be included in the final-form regulation, and if available, include a cross-reference to other Chapters detailing the appeals process.

Subchapter F. PREPARATION AND ADMINISTRATION OF CERTIFICATION EXAMINATIONS

17. Section 302.601. General provisions. - Clarity.

In Subsection (a), who determines whether a certification examination is “valid”?

18. Section 302.602. Approved examination providers. - Fiscal impact; Implementation procedures; Clarity.

Subsection (b)

This subsection allows examination providers to charge fees to cover certain costs of administering the examination. We have two concerns.

First, is this fee in addition to the fees found in Section 302.202, related to operator certification program fees? If so, what is the potential fiscal impact of these fees?

Second, while this subsection discusses “examination providers,” Section 302.601(g) references “third-party examination proctors.” The final-form regulation should clarify whether “examination providers” and “third-party examination proctors” are the same thing. Has the EQB determined whether a proctor can, like an examination provider, charge a fee? If so, such a fee should be included in the final-form regulation.

Subsection (c)

This subsection prohibits examination providers from being in possession of Department-developed examination materials or content. What is the intent of this provision? How can an exam be administered if the examination providers cannot be in possession of the necessary materials or content?

19. Section 302.603. Examination eligibility. - Fiscal impact; Implementation procedures; Clarity.

Under Subsection (a), why must an applicant for an examination pay a fee to have their request to take the exam processed? Is this processing fee in addition to the fees required by Section 302.202? Why is the fee set by the exam provider and not the Department or the EQB? What is the potential fiscal impact of this fee? Will applicants be charged for taking the exam?

20. Section 302.604. Examination administration. - Implementation procedures.

In Subsection (d), when will the Board notify an applicant that they have agreed to their request for exceptions to the scheduled date and location of the examination?

Subchapter G. EDUCATION, EXAMINATION AND EXPERIENCE REQUIREMENTS

21. Section 302.702. Examination requirements. - Clarity.

In Subsection (c), who sets the “minimum numerical score”? This information should be included in the final-form regulation.

22. Section 302.703. Experience requirements. - Implementation procedures; Clarity.

Under Subsection (d)(2), what process will the Department use to approve associate degrees in water or wastewater operation? How will the regulated community know if a particular degree program has been approved?

23. Section 302.705. Accelerated certification requirements for system modifications. - Clarity.

Subsection (a) requires operators to upgrade their certificates “when an increase in treatment capacity of the system no longer qualifies the available operator to make process control decisions for that system.” A commentator has asked if an upgrade is required if the classification of the system does not change, and if so, why? This provision should be clarified.

Subchapter H. CONTINUING EDUCATION AND TRAINING

24. Section 302.804. System security training requirements. - Fiscal impact; Implementation procedures; Clarity.

Fees

This section requires certified operators to complete a system security training course. However, unlike other sections of the proposed regulations relating to training or continuing education, this section does not appear to impose a fee. Is there a fee associated with the security training course? If so, is it in addition to the fees found in Section 302.202? The final-form regulation should explain the fiscal impact of these training requirements.

Subsection (a)

With respect to the system security training course itself, how many contact hours will the course be? Is this course required every three years? What types of courses are acceptable to the Department? In addition, what constitutes successful completion of the course? The same concern applies to Subsections (f) and (g). The final-form regulation should clarify these issues.

Subsection (c)

What criteria will be used to determine if a person has successfully demonstrated the knowledge, skills and abilities contained in the course? The final-form regulation should clarify this issue.

Subsection (g)

This subsection states that the Department “may” require certified operators to attend and successfully complete additional system security courses. Under what circumstances would the Department require this?

Subchapter I. SYSTEM CLASSIFICATION AND SUBCLASSIFICATIONS

25. Section 302.901. Classifications and subclassifications of water systems. - Clarity.

In Subsection (d), the final-form regulation should clarify what “changes in the conditions or circumstances at the system” would warrant a change in the system’s classification or subclassification. The same concern applies to Section 302.902 (c).

26. Section 302.902. Classifications and subclassifications of wastewater systems. - Statutory authority; Implementation procedures; Clarity.

Subsection (c) would allow the Department to change the classification or subclassification of a wastewater system by written notice. A commentator suggests that since the classification system is created by Section 1004(c)(4) of the Certification Act, any change should be done through the issuance of a permit. What is the EQB’s statutory authority for allowing changes to occur simply through written notice?

In addition, in Section 302.901(b), the Department may reclassify a water system “upon written request by the owner.” (Emphasis added.) Why is a comparable provision not included for wastewater systems in Section 302.902?

Subchapter J. OPERATOR CLASSES AND SUBCLASSIFICATIONS

27. Sections 302.1006. Laboratory supervisor certification. - Reasonableness; Need; Implementation procedures; Clarity.

This section pertains to certification under a laboratory supervisor subclassification. We raise two issues.

First, several commentators have noted that certifications for laboratory supervisors are already addressed in 25 Pa. Code Chapter 252. What is the need for including this section in the proposed regulation? In addition, because there are two different provisions concerning this issue, commentators are concerned that the provisions contained in the proposed rulemaking are unclear. For example, will laboratory supervisors now have to become certified operators? If so, will existing laboratory supervisors be grandparented as certified? The EQB needs to justify the need for the existence of these provisions in two entirely different Chapters.

Second, if the EQB can justify the need for provisions in both Chapters, then there appears to be contradictory language between them, which the EQB should explain. For example, Subsection 252.302(h)(3) states:

Until 12 months after a certificate under the Water and Wastewater Systems Operators' Certification Act for laboratory supervisor in the appropriate water or wastewater subclassification becomes available from the Department, 2 years of experience performing testing or analysis of environmental samples using the methods and procedures currently in use by the environmental laboratory may be substituted for a laboratory supervisory certificate.

However, proposed Subsection 302.1006(e) simply requires applicants to have the above-mentioned two-year experience. Why are these two subsections different?

In addition, Subsection 302.1006(f) requires that:

An applicant for laboratory supervisor's certification for drinking water or wastewater systems shall hold a valid operator's certificate and demonstrate the knowledge, skills and abilities needed to be a laboratory supervisor by obtaining a passing score on either the Part II Laboratory Supervisor for Water Systems or Part II Laboratory Supervisor for Wastewater Systems examination.

However, Chapter 252 does not appear to require such a test. What is the need for this addition?

Subchapter K. PROFESSIONAL ENGINEERS

28. Section 302.1102. Issuance of initial certification for a professional engineer. - Clarity.

What does the EQB consider to be appropriate "written proof" of a valid professional engineer's license? The final-form regulation should clarify this issue.

Subchapter L. SYSTEM OPERATION

29. Section 302.1201. Duties of operators. - Statutory authority; Implementation procedures; Reasonableness; Need; Clarity.

Subsection (a)

This subsection generally outlines the duties of a certified operator and describes the Department's role in determining compliance. We have two

concerns. First, certified operators are required to comply with “applicable Federal and state laws.” We believe the regulated community would benefit from knowing what those laws are and recommend they be specified in the final-form regulation.

Second, this subsection describes the Department’s role in determining compliance as follows: “The Department will **recognize** the ability of the certified operator to meet these requirements is in part dependent upon the available resources and responsibilities assigned by the system owner.” (Emphasis added.) Given the potential liability associated with being a certified operator, a commentator believes that the term “recognize” does not provide adequate protection to certified operators. We agree that the term “recognize” is vague and does not adequately describe how this section will be administered if an owner has not provided the proper support to a certified operator. As suggested by the commentator, the regulation should be revised to state that the Department *will* consider owner-provided resources when deciding if a certified operator is in compliance.

Subsection (b)

This subsection lists 16 tasks that may be necessary for certified operators to control the operation and provide for the maintenance of water and wastewater systems. What is the need for listing all of the tasks? Wouldn’t operators, by way of their education, training, experience, and actual certification, know to perform such tasks as “adjusting system processes based on monitoring data” or “starting or stopping pumps or increasing or decreasing pump rates”?

If the EQB determines that the list of tasks is necessary, we note that a commentator believes that the requirement of “self-monitoring” of samples under Subsection (b)(14) is problematic because operator certification training does not adequately prepare a system technician to evaluate and interpret self-monitoring data against the requirements. How will this provision be administered and enforced by the Department?

Subsection (c)

Under this subsection, certified operators must “submit a written report to the system owner documenting any known violations or system conditions that may potentially cause or are causing violations of any Department regulation or permit condition or requirements.” This subsection also provides very prescriptive details for delivering the report to system owners. We have four concerns.

First, we recognize the fact that language quoted above is similar to language found in the Section 1013(e)(2) of the Certification Act. However, inclusion of

the phrase “may potentially cause” in the regulation has commentators concerned. They correctly note, that within a 24-hour period, many situations arise that may, if left unattended, could result in a violation. They believe, and we concur, that documenting and reporting every potential violation is unreasonable. We urge the EQB to reconsider this provision and provide a less burdensome requirement to certified operators, while still ensuring the protection of the environment.

Second, the Certification Act does require that violations be reported to system owners, but does not prescribe the method for reporting. Why has the EQB limited reporting options to mail or hand delivery? Has the EQB considered providing different mechanisms for reporting problems to owners, such as electronic notification?

Third, this subsection requires reports to be delivered to system owners. In situations where a system is owned by a municipal authority or a local government, to whom would the reports be sent?

Finally, under Subsection (c)(5), what is meant by “degree of severity or threat to public health...”? This phrase is vague and should either be deleted or defined.

Subsection (d)

This subsection reads as follows:

The available operators making process control decisions are responsible for those decisions and consequences, unless the owner fails to respond to a written report as required in subsection (c) or there is a deliberate action with malice or negligence on the part of an employee under the supervision of the available operator.

Commentators believe this subsection creates new liabilities for certified operators that go beyond what the Certification Act contemplates. They believe it imposes liability for “consequences” of process control decisions and does not account for situations beyond an operator’s control, such as natural disasters. In the Preamble to the final-form regulation, we ask the EQB to explain why this provision is consistent with the Certification Act and how it intends to implement this subsection.

30. Section 302.1202. Duties of owners. - Implementation procedures; Reasonableness; Need; Clarity.

Subsection (a)

This subsection lists the duties of water and wastewater system owners. We have two concerns. First, Subsection (a)(5) includes the phrase “in a timely manner.” This phrase is vague. We recommend that the final-form regulation include a more precise timeframe for responding to problems identified in written reports from certified operators.

Second, Subsection (a)(6), requires owners to provide copies of permits to “all available operators.” However, Section 1013(f)(3) of the Certification Act only requires copies of permits be provided to “operators in responsible charge.” What is the need for expanding the scope of the Certification Act to include all available operators instead of operators in responsible charge?

Subsection (b)

Six pieces of information are required to be reported to the Department on an annual basis under this subsection. We have two concerns. First, commentators believe that the Department is already in possession of this information. What is the need for reporting the information again?

Second, the regulation is silent on when and where the report is to be submitted. If the EQB retains this provision, we recommend that the final-form regulation specify when and where the report should be submitted.

31. Section 302.1203. Process control decisions. - Implementation procedures; Reasonableness; Need; Clarity.

Subsection (c)

This subsection states that the Department may require a water or wastewater system to have a process control plan that includes 15 pieces of information. Under what circumstances would a process control plan be required? How would the system be notified of this requirement? Would the plan require approval by the Department? These questions should be addressed in the final-form regulation.

Subsection (e)

Under this subsection, certain actions taken by the Department, local governments and emergency personnel are not considered process control

decisions. What is the need for including this provision in the final-form regulation?

32. Section 302.1206. Operator in responsible charge. - Statutory authority; Implementation procedures; Reasonableness; Clarity.

Subsection (a)

Are the reporting requirements found in this subsection in addition to the reporting requirements found in Section 302.1202(b)? If so, what is the need for this provision?

Subsection (e)

This subsection states the following:

The operator in responsible charge, who is the approving authority for the standard operating procedures for a system, is accountable for any permit violations or violations of any applicable rules and regulations which may occur when an operator follows these standard operating procedures.

We have two concerns. First, what is meant by the term “accountable”? Similar to the concerns outlined in Section 302.1201(d), commentators believe this subsection creates new liabilities for operators that go beyond what the Certification Act contemplates. We again ask the EQB to explain why this provision is consistent with the Certification Act and how it intends to implement this subsection.

Second, under Section 302.1204(d), the use of standard operating procedures (SOPs) is optional. However, this subsection makes operators in responsible charge accountable for violations when SOPs are followed. Why would an operator in responsible charge develop formal SOPs, as this would lead to additional liability?

33. Section 302.1207. Operation of multiple treatment systems (Circuit Rider). - Clarity.

We recommend that the term “circuit rider” be defined in either this section or Section 302.101, relating to definitions. We also recommend that the term be deleted from the title of this section.

34. Section 302.1208. Programmable logic controls (PLCs) and supervisory control and data acquisition systems (SCADA). - Clarity.

Both of the terms above are also used in Section 302.1203(a). We recommend that the terms be defined in Section 302.101, relating to definitions.

35. Miscellaneous clarity.

Under Sections 302.202(f) and (g), the references to Section 302.202(b) are incorrect. The correct reference is Section 302.202(d).

Several sections of the proposed regulation refer to “other” Department rules, regulations or guidelines and “applicable Federal and State laws” or similar language, including Sections 302.301(g), 302.304(a), 302.306(a), 302.306(b), 302.307(a), 302.1101(a), 302.1201(a) and 302.1202 (a)(1). To facilitate compliance and improve clarity, these phrases should be replaced with cross-references to the specific laws and regulations that apply.

Facsimile Cover Sheet



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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Debra L. Failor
Agency: Environmental Quality Board
Phone: 7-2814
Fax: 705-4980
Date: October 9, 2009
Pages: 24

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-433 (IRRC #2774). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Sammy Adams **Date:** 10/9/09