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Department of Environmental Protection
Response to Comments Submitted to the Independent Regulatory Review Commission
Chapter 302, Administration of the Water and Wastewater Systems
Operators' Certification Program

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Background:

The Department of Environmental Protection (Department) underwent extensive outreach to finalize the regulations for the Administration of the Water and Wastewater Systems Operators' Certification Program. A comprehensive listing of this outreach is included in the Comment Response Document that was presented to the Environmental Quality Board with the final-form rulemaking on June 15, 2010. It should be noted that the following industry associations and Department advisory committees have written letters of support for the final regulations:

1. The Pennsylvania Rural Water Association
2. The National Association of Water Companies
3. The Western Section of the Pennsylvania Water Pollution Control Operators Association
4. The State Board for Certification of Water and Wastewater Systems Operators
5. The Certification Program Advisory Committee
6. The Small Systems Technical Assistance Center Advisory Board

In addition to the above-noted outreach, the Department conducted numerous working sessions with representatives of the four organizations that submitted comments to IRRC regarding the final-form regulations. Their valuable input helped the Department clarify and improve the regulations. Despite playing a role in developing the language in the rulemaking, the commentators are voicing concerns with language that has been included in the regulations since they were first released in their draft form in 2003. It should be clarified also that some of the language the commentators are proposing was considered and debated by the General Assembly as statutory language for the Water and Wastewater Systems Operators' Certification Act (Act); however, the language was ultimately not included in the bill that became law. The Department believes it has made every effort to consider the concerns of the entire regulated community and has crafted a thorough rulemaking.

Specific Responses to Issues:

Issue #1 – Content of the Operator Report to Owners

Section 13(e) of the Act specifically states that “[i]t shall be the duty of all certified operators to comply with the applicable Federal and State laws, and rules and regulations associated with a water or wastewater system, including, but not limited to,....” the paragraphs cited by the commentators. The Department believes this language allows additional elements to be added to this report by regulation in order to further clarify or facilitate the effective use of these reports. As stated in the Department's Response to Comment 41 in the Advance Notice of Final Rulemaking, the sole reason this requirement was established in statute was to provide the operator with some level of protection should a violation occur where the Department intends to implement some form of enforcement action. In order for the operator to make the decision as to whether the

situation warrants making a report or not, the operator should have some reasonable understanding of the potential or actual cause of the violation and an estimate of the severity of the threat. This is critical information the owner will need in order to determine how best to respond.

Issue #2 – Creation of Operator Liability

The quoted language of the commentators is out of context. The regulation at issue, Section 1201(d), provides that “[t]he available operators making process control decisions are responsible for those decisions and consequences, unless the owner fails to respond to a 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.” Simply stated, an available operator is responsible for the consequences of any decisions he/she makes with respect to process control. This is as it should be. Operators are licensed for a reason. They are professionals responsible for public health and safety and the protection of the environment. Like any other professional licensed to complete certain duties, they need to exercise their best professional judgment in completing those duties. These regulations do not expand the operator’s liability; but clarify the duties and responsibilities an operator, as a licensed professional, has always had.

It should also be noted that under these regulations, an operator will not be subject to civil penalties unless the operator is in violation of an order issued by the Department, as stated in Section 14 of the Act (63 P.S. § 1014). Stated another way, if an operator is in violation of the act, the Department will first issue an order to the operator. If the operator fails to comply with the order issued by the Department, the Department may then assess civil penalties as appropriate.

Issue 3 – Protection Against Actions Taken Under the Clean Streams Law or the Safe Drinking Water Act.

The Act does not provide any “protection” from civil penalties which may be assessed under the Clean Streams Law or the Safe Drinking Water Act in the manner asserted by the commentators. Section 14 of the Act sets forth enforcement and penalty provisions for violations of the Act. Nowhere in the Act is there any language requiring the Department to provide for the “protection” of operators from violations of other relevant statutes or rules and regulations. In fact, Section 13(e) of the Act requires the opposite, by stating that one of the duties of all certified operators is to comply with the applicable Federal and State laws, and rules and regulations associated with a water or wastewater system.

Issue 4 – Reversal of Legal Precedent

The Department has never held the permittee/employer solely responsible for permit violations. Each violation is investigated on a case-by-case basis and appropriate action taken. Over the years, the Department has taken the following actions against operators whose actions have resulted in consistent non-compliance of rules and regulations and permit conditions:

1. File criminal charges against the operator -- In fact, the State Board for Certification of Water and Wastewater Systems Operators has denied the application for certificate renewal for six operators due to a criminal history related to the operation of a water or wastewater system.

2. Execute a Consent Order and Agreement -- In these agreements the operator has agreed to “voluntarily surrender” his or her license. Since 2006, the Department has reported four of these agreements to the Board for implementation.
3. Petition the Board for Suspension, Revocation or Modification of a License – Since 2006, eleven petitions have been submitted. Of those 11, 1 is pending final action and another 9 settled before the Board could hold a hearing. The Board recently took action to suspend an operator’s license for 15 years for falsification of records. Other violations cited in these petitions include violations of both the Safe Drinking Water Act and the Clean Streams Law.

The Department does not intend to change this long standing process for enforcement and compliance.

Issue 5 -- Exemption of Owners and Permittees from Liability

As stated above, the Department will investigate each and every violation on a case-by-case basis and take appropriate action against the individual or individual(s) responsible for the violation. The regulations do not provide an exemption for owners or permittees.

Section 13(a) of the Act requires owners to “employ the services of a certified operator of the required classification and subclassification who shall have the direct responsibility for the operation of the water or wastewater system...” The licensed, certified operator has the direct responsibility for proper operation of the system, not the owner. In addition, the Federal Guidelines issued by the US Environmental Protection Agency in 2001 require all process control decisions to be made by a certified operator, not the owner or permittee of the system. Therefore, to shift the responsibility to the owner as suggested by the commentators and captured in Comment 40 of the Advanced Notice of Final Rulemaking (ANFR) Comment Response document is not possible. The language is contradictory to both the Act and federal requirements. As stated above, operators are licensed for a reason. Like any other professional licensed to complete certain duties, they need to exercise their best professional judgment in completing those duties. This is what the owner is paying them to do.

What also has to be noted here is that Department responses to Comments 40 and 42 of the ANFR Comment Response Document were taken out of context by these commentators. What the commentators neglected to include was the fact that it was agreed early on that these regulations should not attempt to define the owner/employee relationship. Adding similar language as suggested by these commentators was discussed with a number of representatives of the regulated community including representatives of the organizations making this comment early in the regulatory process and discarded. The Department still agrees with this premise. The commentators need to stand by the policy discussions they participated in early in this process. They are, in essence, seeking a second bite of the apple in the sense that they did not get what they wanted while they were participants in the formulation of the proposed rule.

Issue 6 – List of Duties

The tasks outlined in Section 1201(b) are examples of activities necessary to control the operation and provide for the maintenance of a water or wastewater system. They are not mandatory duties as implied by the commentator. The regulation specifically states that the necessary tasks may include any of the activities listed. The activities which may be necessary at any specific time are system specific, depending on the complexity of the treatment processes utilized and the organizational and managerial structure of the system. Again, this list was developed with help from a number of members of the regulated community and is very similar to language in versions of the draft regulations dating back to 2003. These commentators were all part of these discussions. They need to stand by the language they helped define early in this process.

Issue 7 – The Regulations Cause a “Radical” Change in Policy.

- (a) Section 13(e) of the Act provides that it “shall be the duty of all certified operators to comply with the applicable Federal and State law, and rules and regulations associated with a water or wastewater system” See responses to issues 2, 3 and 4 above.
- (b) The duties of operators set forth in section 1201, are based on authority established in Section 4(c) of the Act which authorizes the Environmental Quality Board to “[s]et standards in regulation for certification, recertification and renewal of certification of water and wastewater systems operators, including minimum education, experience, training and continuing education requirements. Standards for operators shall take into account the size and complexity of the system.”
- (c) No response is necessary.

Issue 8 – Establishment of Work Assignments

The requirements set forth in the regulation are necessary to implement the requirements of the 2002 amendments to the Water and Wastewater Systems Operators’ Certification Act and the requirements set forth in the EPA Federal Guidelines published in February, 2001. This is the first set of regulations to be promulgated in order to ensure compliance with these federal and state legal requirements. To the extent that the regulations set forth “new requirements,” those requirements are needed to ensure this compliance. See response to Issue 5 above.

Conclusions:

It is unclear what the commentators reasons are for the citations of specific language in Department prepared Comment Response documents. The commentators assert the Department’s response “. . . contradicts the plain text of the statute and the proposed regulation, which make these reports, and all of the itemized contents, mandatory”. However, they do not say how it does so. The Department doesn’t see the contradiction. In addition, much of the quoted language is taken out of the context in which it appeared, to further mislead the reader and confuse the issues. For example, viewed in the context in which it appeared, the use of the word “consequence” is very different than implied in the portion of the response to comment which was quoted by the commentators.

It is the Department's position that the purpose of the regulations is simply to implement the requirements of the Act and the EPA Federal Guidelines. As with any professional licensing or certification legislation, appropriate agencies are charged with promulgating regulations implementing the requirements of the enabling legislation. The regulations are nothing more and nothing less.