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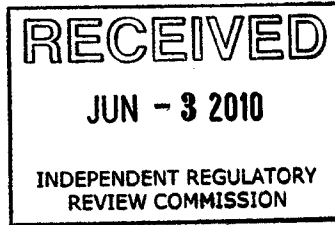
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June 1, 2010

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

Subject: Comments on EQB Regulation 7-446 (IRRC 2806)

To Members of the Commission:

On behalf of the Allegheny Conference on Community, I appreciate the opportunity to comment on the Department of Environmental Protection's proposed revisions to Chapter 95. The Conference and its affiliates – the Greater Pittsburgh Chamber of Commerce, the Pennsylvania Economy League of Southwestern Pennsylvania, and the Pittsburgh Regional Alliance – work in collaboration with public- and private-sector partners to stimulate economic growth and enhance the quality of life in southwestern Pennsylvania.

The Conference is a private-sector leadership organization with more than 300 Regional Investors. These Regional Investors provide the civic leadership to execute a focused agenda for regional improvement. The Conference's history of environmental advocacy is long and distinguished, and we appreciate and respect the Department's concern for water quality in the Commonwealth's waterways. However, we believe the Chapter 95 revisions as forwarded by the Environmental Quality Board should be rejected by the Commission for the following reasons:

1) A failure to provide an Advance Notice of Final Rulemaking: After extensive and productive meetings with stakeholders across the Commonwealth, the Department made significant revisions to the Chapter 95 proposal that the Commission reviewed in March. However, the final language to be reviewed by the Environmental Quality Board was not released to the public until May 6, and then the Department changed the date of the EQB meeting from May 19 to May 17. Those actions by the Department did not provide enough time for

interested parties to understand the potential impact of the proposed regulation. One of the advantages of an Advance Notice of Final Rulemaking is to ensure that the public has an opportunity to identify issues that may have arisen as major modifications are made to a proposed rule. Though it is not required, the Department has used that procedure in the past, and it is most appropriate here, as the language proposed by the Department in both the rule and the accompanying order is unclear, imprecise, and in at least one critical juncture, inconsistent.

2) The Department's intent is not adequately reflected in the language of the proposed rule: In the wake of the Commission's March 15 comments on the rule as originally proposed, the Department met extensively with industry representatives and stakeholders across the Commonwealth to better understand concerns about how the proposed regulation would impact existing industrial users. Throughout those discussions the Department sought to assure stakeholders that the intent of the proposed regulation was to apply only to *new* TDS discharges and would not impact existing discharges. "From the inception of the rule, the intent of the Board was to exempt existing discharges..." (Wastewater Treatment Requirements Order, p. 17)

However, that intent is not captured within the language of the proposed rule itself. Rather, the proposed rule exempts "maximum daily discharge loads of TDS or specific conductivity levels that were authorized by the Department prior to" the effective date of the proposed regulation.

That formulation ignores the reality that most TDS discharges in the Commonwealth are not specifically *authorized* by the Department, but rather are *not prohibited*. The Department attempts to clarify this condition by describing within the Order what constitutes an "authorization" by the Department – in essence, any TDS discharge that the Department is aware of but has not prohibited: "Therefore, if TDS (or conductivity) data have been reviewed by the Department as part of an application for an authorized discharge, the discharge load of TDS has been authorized upon issuance of the permit (or other vehicle), regardless of whether there is an actual limitation or monitoring requirement." (Order, p. 18)

However, this explanation is not consistent with the plain reading of the language in the proposed rule. That inconsistency will make enforcement of the proposed regulation difficult, will place Department personnel assigned to enforce it in an untenable position, and will inevitably lead to unnecessary litigation. The proposed rule should not be promulgated unless and until the language includes appropriate definitions of existing discharges that are exempt from the new proposed regulations.

3) The language in the order is materially inconsistent: While attempting to define existing discharges that are exempt from the proposed regulation, the Department provides conflicting definitions for the same term within the Order. On page 18 of the order, it defines "existing discharge load" as "the maximum daily discharge load authorized 'prior to' the effective date of the final rule...even if the facility has in fact typically discharged at a lower load than that authorized by its permit."

In the very next paragraph, on page 19, the Order states: "...existing discharge loads can be established through sampling of the existing discharge. At least 10 daily composite samples, representative of the discharge during normal operations and taken at least one week apart, should be adequate to characterize the existing discharge load."

These conflicting definitions of a key provision of the proposed regulation – what, precisely, would be subject to the new regulation and what would be exempt – by themselves constitute a fatal flaw in the proposed regulation.

(The above discussion underscores the problem identified in #2: If the contradictory language were in the proposed rule itself, it would be easy to cite 95.10 (sub section) (subsection) contradicted 95.20 (subsection) (subsection). Since the Order contains no such structure, it is difficult to ensure that parties are examining the same sentences when discussing perceived problems.)


4) The proposed regulation treats the oil and gas industry inappropriately: The oil and gas industry is singled out for more stringent treatment requirements than other industrial users. By restricting the natural gas industry from treatment options and procedures that are available to other industrial users places the natural gas industry in a regulatory strait-jacket that is unnecessary and inordinately expensive.

5) Lack of understanding of the fiscal impact of the proposed regulation: In its March 15 comments, the Commission stated: "The EQB needs to demonstrate that it fully considered the potential costs of complying with the regulation. The EQB should submit a detailed fiscal impact study with the final-form regulation." The EQB and the Department have not done such a study. And there remains considerable disagreement over the cost of compliance. The Department asserts the claims by the technology providers that the cost of TDS treatment is \$0.25 per gallon; affected industries that would have to pay the bill claim the cost is much higher.

6) Effective date: The Department proposes that the proposed regulation take effect immediately upon publication in the Pennsylvania Bulletin in its final form. Given technical limitations, including but not limited to the time required to identify, acquire, and install water treatment technology that might be necessary, it is unclear whether affected industrial users would be able to comply even with extraordinary efforts.

Other organizations, including the Pennsylvania Chamber of Business & Industry and the Marcellus Shale Coalition, will be presenting more detailed comments about their concerns with the proposed rule. We urge the Commission to give serious consideration to those comments as well. Thank you for this opportunity.

Sincerely,



Dennis Yablonsky
Chief Executive Officer