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Sent: Friday, February 12, 2010 2:58 PM
To: EP, RegComments
Cc: RWiedman@eckertseamans.com; DRockman@eckertseamans.com
Subject: Eckert Seamans' Comments to 39 PaB 6467. 6547
Attachments: ECKERT SEAMANS TDS COMMENT LETTER (J1368047).PDF

Attached please find the comments of Eckert Seamans Cherin & Mellott on behalf of similarly situated clients to the proposed rulemaking for Wastewater Treatment Requirements Establishing New Effluent Standards for New Sources of Wastewaters Containing High Total Dissolved Solids (TDS) Concentrations, published in published in the Pennsylvania Bulletin on November 7, 2009, 39 Pa.B. 6467 with a correction published on November 14, 2009, 39 Pa. B. 6547.

If you have any difficulties in opening the attachment, please let me know.

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(See attached file: ECKERT SEAMANS TDS COMMENT LETTER (J1368047).PDF)

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February 12, 2010

Environmental Quality Board
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Re: Comments Regarding Proposed Rulemaking for Wastewater Treatment Requirements Establishing New Effluent Standards for New Sources of Wastewaters Containing High Total Dissolved Solids (TDS) Concentrations (39 Pa.B. 6467, 39 Pa.B. 6547)

Dear Sir or Madam:

These comments are being submitted by Eckert Seamans Cherin & Mellott, LLC ("Eckert Seamans") on behalf of similarly situated clients, regarding the proposed rulemaking establishing new effluent standards for new sources of wastewaters containing high total dissolved solids ("TDS") concentrations, published in the Pennsylvania Bulletin on November 7, 2009, 39 Pa.B. 6467[1] (the "Proposed Rule").

We represent a number of industrial and manufacturing clients as well as clients who have assumed responsibility for former industrial sites where historical conditions are being addressed. Common to each situation is the fact that some level of TDS loading emanates from the facility or site in question and discharges to a receiving stream through discernable discharge points, some of which are subject to existing NPDES permits and some of which may become subject to such permitting requirements as conditions are addressed. In each case, the TDS loading in question existed prior to April of 2009. In each case, it may become desirable to relocate or consolidate the discharges for environmental or business purposes, although it is not anticipated that in doing so that the TDS loadings in question would be affected by doing so.

Eckert Seamans' specific comments are set forth below.

Definition of "New Discharge" is Overbroad and Ambiguous

The Proposed Rule, at 25 Pa. Code § 95.10, would impose new effluent standards for TDS, chlorides and sulfates on any "new discharge" of High-TDS wastewater. In turn, the Proposed Rule broadly defines "new discharge" to include "an additional discharge, an expanded

[1] A correction to this Proposed Rule was published on November 14, 2009, 39 Pa. B. 6547, that extended the comment time period to February 12, 2010.

discharge or an increased discharge from a facility in existence prior to April 1, 2009." The terms "additional discharge," "expanded discharge," and "increased discharge" are not defined.

The definition of "new discharge" is overly broad because it arguably could be extended to existing dischargers who are repairing, modifying/consolidating or relocating discharges and/or facilities, but who are not increasing their existing aggregate TDS concentrations or loadings into the relevant receiving stream. For example, the current definition arguably could extend to a facility that merely wants to relocate or consolidate its outfalls where there would be no change in its aggregate TDS effluent concentrations or loadings. It is not uncommon for dischargers to need to revise, relocate or combine discharge facilities or locations to account for changes in property access rights or rights of way, or due to new development. Similarly, there are situations where it makes both environmental and business sense to consolidate discharge points and thereby reduce the monitoring and reporting burden. Where the nature and amount of the discharge, including TDS, is not affected such a situation should not constitute a "new discharge" or trigger applicability of the Proposed Rule.

The definition of "new discharge" also could arguably include a relocation of an outfall to a different receiving stream located downstream of the original stream, where the discharge itself is unaffected. For example, we are aware of situations where a discharger has the ability to relocate a discharge from a small stream to a much larger river that is the receiving waterbody for the small stream. This would remove the discharge from the much smaller and more fragile stream, without any increase in pollutants or pollutant loadings to the larger river, since it was the ultimate receiving waterbody anyway. In this case, such a relocation would be beneficial to the small stream and would not change the current TDS concentrations or loadings in the ultimate receiving stream.

Further, a "new discharge" could arguably include a discharge where the discharger upgrades its treatment facilities for constituents unrelated to TDS, using a technology or equipment that has no affect on TDS. In such event, there would be no change in TDS concentrations or loadings, but again, the mere fact of change in the discharge scheme could arguably result in triggering a "new discharge" under the proposed regulations. Even a change in a discharge that decreases TDS concentrations and loadings might arguably trigger the new rules, as such a situation could be argued to fall within the scope of the definition of a "new discharge."

In each of these situations there are a multiplicity of environmentally neutral or environmentally beneficial projects where repairs, consolidations, modifications or relocations of outfalls, or enhancement of existing non-TDS related treatment, could be deemed to a be a "new discharge" despite the fact that there is no increase in pollutant loadings, including TDS loadings. If interpreted in such a fashion, the Proposed Rule would deter and penalize such projects. Such a result would be detrimental to environmental protection and unduly and inappropriately burdensome to affected dischargers.

We note that the April 11, 2009 Permitting Strategy for High Total Dissolved Solids (TDS) Wastewater Discharges set forth a strategy that did not pose the risks and concerns noted above. The Permitting Strategy outlined an approach where existing dischargers would only trigger the new limitations if they "propose to expand or increase their existing daily discharge load of any pollutant of concern." This is a more logical approach that would avoid the problems noted above while still accomplishing the goals of the Proposed Rule.

In accordance with the above, we suggest that the definition of "new discharge" be clarified to exclude those situations where an outfall or discharge is relocated, consolidated, or discharge facilities are updated or modified and there is no increase in the pre-existing aggregate TDS concentrations or loadings from the discharger.[2]

Exception for Treatment of Contaminated Water from the Definition of New Discharge

Under the Proposed Rule, new AMD treatment facilities would not be included in the definition of "new discharge." Specifically, the Proposed Rule states that a new discharge" is not intended to include discharges from treatment facilities for abandoned mine discharges (AMD), which existed on April 1, 2009, where new treatment facilities are installed or existing facilities are modified. This is important to assure that efforts to treat AMD by third parties (watershed groups, trustees or the government) are not thwarted by imposing limits on these projects with overwhelming positive environmental benefits."

Based on the same logic for excluding AMD treatment facilities, other projects, which have overwhelming positive environmental benefits, such as collection and treatment of surface or groundwater from Act 2 sites or treatment of other contaminated surface or groundwater, should also be excluded from the definition of "new discharge." Treatment of contaminated surface or groundwater from Act 2 or other sites, especially for heavy metals, is similar to the treatment for AMD. Further, there is likely no change in the preexisting loading of TDS into the streams from these sites. As with the treatment of AMD, treatment of such waters should not be viewed as a new discharge since the contaminated surface or groundwater was already making its way to a stream prior to the treatment. Accordingly, there would not be an increase from the preexisting loading of TDS in treating these contaminated waters.

Thus, it follows that such projects that treat contaminated waters should also not be thwarted by imposing effluent limitations for TDS due to their overwhelming environmental benefits and because there is ultimately no change in the TDS loading to the streams.

[2] Note that we are not suggesting any changes or modifications to the manufacturing processes itself be included in this clarification.

Definition of High-TDS Discharge

There is ambiguity in the definition of High-TDS wastewaters, and this ambiguity multiplies if relocation or consolidation of existing discharges is considered to be a "new discharge", or if TDS loadings from existing discharges of contaminated surface or ground water are not exempt as pre-existing discharges *i.e.* outside the definition of "new discharge." Initially, the proposed regulations appear to approach the issue of whether a discharge is or is not a High-TDS discharge as a yes or no question. For discharges that are truly new discharges, such as from new operations or new facilities, there may be the ability to predict, with a high degree of confidence, whether or not the new discharge will be a High-TDS discharge. However, for other discharges, there may not be the same degree of confidence. The rule appears to be silent on how such discharges should be addressed.

In the absence of an appropriate exemption or clarification of the definition, this ambiguity becomes extremely problematic in the case of existing discharges that are relocated or consolidated, or for discharges from Act 2 sites or other circumstances of contaminated surface or ground water. In some cases, there may be existing data that describes the discharges – and will show concentrations and loadings in the discharge flow from which one can accurately predict the expected concentrations and loadings from the relocated or consolidated discharge and anticipate that these will occur on an consistent basis. However, the Proposed Rule does not take into consideration variable situations where the TDS concentration is sometimes above 2,000 mg/L and sometimes below, and where the sometimes-above and sometimes-below concentrations are expected to continue after relocation or consolidation of the outfalls or discharges. It also presents questions as to whether the High-TDS status is to be measured by the mean or median of the available data, or some other statistical approach, or whether a single data point of greater than 2,000 mg/L is sufficient to push the discharge into High-TDS status. Similarly, it does not address the relevant time period – how far back into the past can, or should, the discharger consider data in evaluating whether the discharge is a High-TDS discharge.

This letter is not intended to suggest direct answers to these issues, although it does appear that clarification is warranted. Rather, these issues demonstrate the logic of recognizing that when existing discharges are relocated or consolidated, or where treatment facilities are modified for non-TDS related reasons, or where the discharges consist of contaminated surface or groundwater from an Act 2 or similar type of site, that such circumstances simply should not constitute "new discharges" for purposes of the proposed new rules.

Exception for De Minimis TDS Total Loading for New Discharges

The dual thresholds for High-TDS status arbitrarily and disproportionately affect small dischargers that pose a lesser concern than certain exempt much higher TDS dischargers. Specifically, the proposed rule applies to new High-TDS discharges with a TDS concentration of

more than 2,000 mg/L or a TDS loading that exceeds 100,000 lbs per day. This results in a problematic and objectionable result that:

Scenario	Concentration	Loading	Status
1.	2,100 mg/L	1,000 lbs/day	Triggers
2.	1,900 mg/L	95,000 lbs/day	Does Not Trigger

Even without taking the above scenarios to their utmost extreme (i.e. what if the loading in scenario 1 was 10 lbs/day), it is clear that the thresholds in the new rule may lead to perverse results. It is not conceivable that protection of the waters of the state would dictate favoring scenario 2 over scenario 1. Yet, the 95,000 lbs/day discharged under scenario 2 would not be subject to the new rule, while the discharge from scenario 1, at an almost equivalent concentration, but a loading that is two orders of magnitude less, would be subject to the new requirements.

Accordingly, new discharges that exceed the 2,000 mg/l concentration standard for TDS should be exempted where the total loading per day of TDS from the discharge is truly de minimis (*e.g.* less than 1,000 lbs/day). It would be an unwarranted burden for such a facility to comply with the proposed effluent limitations. Further, it would discourage environmentally beneficial measures, *e.g.* a facility would not consolidate outfalls, in order to keep the TDS concentration below the threshold for a new discharge under the Proposed Rule.

As indicated in the Proposed Rule, the major concern with TDS, sulfates and chlorides is that the rivers and streams in the Commonwealth are limited in their capacity to assimilate new large loads of TDS, sulfates and chlorides. A high-TDS concentration yet a very low total loading per day from a discharge, on the other hand, would not materially affect a stream's capacity to assimilate TDS or contribute to total TDS loading in the stream. Thus, the rule should not punish new dischargers with a truly de minimis TDS loading per day. Rather, the proposed new effluent standards should target large dischargers that contribute both a high loading and high concentrations.

Outfall by Outfall vs. Facility-Wide Considerations:

The foregoing comments have all assumed that the proposed TDS regulations will be applied on an outfall by outfall basis, rather than on a facility-wide basis that would aggregate all wastewaters discharges, even if discharged through separate outfalls. This is not expressed in the proposed regulations, but is assumed based on typical application of the NPDES permitting program. Yet, in responding to the issues raised in this comment letter, it is appropriate for the Board to view the issues raised here in the context of overall facility discharges.

Consider the following scenario - if one assumes a facility with a high TDS loading of more than 100,000 lbs/day from the facility, but where the discharge is below 2,000 mg/L, it is evident that a discharger could manipulate the outcome by deliberately separating the wastewater discharge into separate flows, where each separate flow has a loading below 100,000 lbs/day. It is not the purpose of this letter to suggest whether such division of flows and the resulting manipulation of High-TDS status is or is not appropriate. Instead, it is to observe that a facility with a TDS loading of 250,000 lbs/day, but TDS concentrations below 2,000 mg/L, could avoid application of the regulations by splitting the discharge into three or more separate outfalls. In contrast, as noted above, a facility with an aggregate 500 lb/day loading but a 2,100 mg/L concentration at a given outfall could be subject for all outfalls over the concentration threshold. Such a result is simply illogical, counterproductive and ultimately arbitrary and capricious.

The illogical result noted in the example above not only demonstrates the relevance and importance of an exemption for discharges with de minimis TDS loadings, but also re-emphasizes the importance of considering how the proposed regulations apply to discharges on a whole-facility basis. The mere relocation or consolidation of outfalls, or pre-existing discharges where there is no change in aggregate facility or site loadings, should not be deemed a "new discharge" or considered as a trigger for application of the proposed regulations.

We appreciate the Department's and the Environmental Quality Board's consideration of these comments.

Sincerely,

Richard S. Wiedman
David A. Rockman
Jessica L. Sharrow

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