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

April 14, 2010

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

Re: Regulation #7-443 (IRRC #2819)
Environmental Quality Board
National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance

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
wbg
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
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission

Environmental Quality Board Regulation #7-443 (IRRC #2819)

National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance

April 14, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the February 13, 2010 *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 (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. **Basis and support for the calculation of fee amounts. – Economic impact; Fiscal impact; Lesser standards for small sources; Reasonableness; Implementation procedures; Clarity.**

Fee Amounts

This regulation increases existing fees and creates new fees. The fees are listed in Sections 92a.28 and 92a.62. The EQB provided an explanation of the fees in the Preamble which, in part, states:

> The Commonwealth has long subsidized the costs of administering the NPDES program and the associated regulation of point source discharges of treated wastewater, but this is no longer financially feasible or environmentally appropriate. The proposed fee structure will cover only the Commonwealth's share of the cost of administering the NPDES permit program (about 40% of the total cost, with the other 60% covered by Federal grant). The proposed fees are still only a minor cost element compared to the cost of operating a sewage or industrial wastewater treatment facility. The artificially low fees that have been charged have been increasingly at odds with the Department's emphasis on Pollution Prevention and nondischarge alternatives. The proposed fee structure will better align the revenue stream with the true cost of point source discharges to surface waters, from both management and environmental standpoints. The sliding-scale fee structure assures

> that smaller facilities, which may be more financially constrained and also have a lower potential environmental impact, are assessed the lowest fees. The Department's proposal to provide for a permit-by-rule for discharges from SRSTPs [Single-Residence Sewage Treatment Plants], and the application of pesticides under §§ 92a.24 and 92a.25 relieves some permittees of any fee.

The comments on the proposed regulation include the following:

- Some commentators questioned whether the fees are "reasonable," citing the requirement for "reasonable filing fees" in 35 P.S. § 691.6.

- Based on the EQB's explanation, commentators raised issues with the number of employees required to run the program, the efficiency of the dollars expended and the accountability of the expenditures.

- The fees will impose costs on systems that are already experiencing cost increases for mandated system and treatment process improvements from programs such as the Chesapeake Bay Tributary Strategy and the United States Environmental Protection Agency.

- The fees will shift the cost burden of the programs from state government to local government.

Contrary to most comments on the proposed fees, one commentator states the proposed regulation "would appropriately end the Commonwealth's subsidizing the costs of administering the NPDES program by placing those costs on the people and entities who hold NPDES permits and discharge wastewater pursuant to them."

The Preamble provides general information on the activities the fees will cover. However, we agree with many commentators that the EQB has not provided enough detail regarding the calculation of the dollar amount of each fee. Consequently, we are unable to fully determine whether each fee is a fair representation of the activities it covers. We recommend that the EQB provide with the final-form regulation the fully detailed calculation of each fee to establish that the fees are reasonable.

Mining activity

Related to the fees for industrial waste, a commentator questions whether treated mine drainage could be classified as a "mining activity" rather than a discharge of industrial waste. The EQB should clarify fees relating to treated mine drainage.

Exclusion for agencies of the Commonwealth

The Pennsylvania Department of Transportation (PennDOT) requests explicit exclusion from the fee provisions for agencies of the Commonwealth. PennDOT cites other regulations that exclude them from paying fees. The EQB should explain why it did not exclude PennDOT from the fee provisions in the new Chapter 92a.

2. Description of amendments in the Preamble. – Reasonableness; Clarity.

Several commentators have noted that the Preamble does not describe all of the sections in the regulation. We agree that several descriptions are missing. For the final-form regulation's Preamble, the EQB should describe each section of the final-form regulation.

3. Section 92a.2. Definitions. – Reasonableness; Clarity.

Immediate

In our review of the regulation, we found the term "immediate" used only in Subsection 92a.41(b). Therefore, we recommend incorporating this time limitation into that section rather than defining "immediate" in Section 92a.2. In addition, the EQB should explain how the time limit is reasonable.

"Minor amendment" and "Major amendment"

A commentator believes the definition of "minor amendment" does not include everything that could be a minor amendment and requests some discretion in that determination. Another commentator questioned why a change of ownership or operational control is not included as a "minor amendment."

We believe the distinction sought by the commentators is important because there is a direct relationship established in the regulation between the definitions of "minor amendment" and "major amendment." As a result, what is not included in the definition of "minor amendment" by default is a "major amendment." The EQB should review the public comments and consider whether the list in the definition of "minor amendment" is inclusive of all actions the EQB will consider to be minor amendments. Consequently, the EQB should also consider whether amendments to the definition of "major amendment" are also needed.

New source

A commentator states that this definition should include the full definition in 40 CFR § 122.2, by adding subsection (b) of the federal definition. The EQB should explain why 40 CFR § 122.2(b) was not included.

Schedule of compliance

This definition is identical in both existing Section 92.1 and proposed Section 92a.2. Therefore, the EQB has continued the use of its current definition. A commentator suggests that the definition should be amended to include the phrase "in a permit" to be consistent with the federal definition in 40 CFR § 122.2. The EQB should explain why it did not include the phrase "in a permit."

Significant biological treatment

Based on our review of the regulation, we could only find the term "significant biological treatment" used in Subsection 92a.47(a). Therefore, we recommend incorporating this definition into that section rather than defining it in Section 92a.2.

In addition, commentators believe the definition is overly restrictive or implies the exclusion of other treatment approaches or methods. The EQB should explain why its definition of "significant biological treatment" is appropriate.

4. Section 92a.3. Incorporation of Federal regulations by reference. – Statutory authority; Need; Reasonableness; Clarity.

Future amendments and supplements thereto

Subsections (a) and (b) incorporate by reference the federal NPDES regulations, "including all appendices, future amendments and supplements thereto...." While the Department of Environmental Protection (Department) may impose requirements already mandated by the federal government, the incorporation by reference of future, and consequently unknown, requirements may be an improper delegation of the agency's statutory authority. Further, new obligations may be imposed without members of the regulated community and other parties having the opportunity for public comment as provided for in the Commonwealth Documents Law and the Regulatory Review Act. Additionally, section 1.6 of the PA Code and Bulletin *Style Manual* provides:

> A rule adopting a code, standard or regulation by reference does not include subsequent amendments, rescissions or editions. If an agency wishes to incorporate subsequent amendments, rescissions or editions, the agency **must explicitly** do so by amendment of its existing rules or by rescinding its existing rules and promulgating new rules. [Emphasis added.]

Therefore, the Department should delete the phrase "future amendments and supplements thereto" in reference to incorporating the federal regulations.

"Applicable and not contrary" and "In the event of a conflict"

A commentator questions the clarity of Subsections (a) and (c) stating this language creates ambiguity over the fundamental question of which law or regulation applies. Consistent with our comment above regarding future amendments, the regulation should incorporate only existing, known federal provisions. Therefore, we question the need for language in Subsections (a) and (c) stating the incorporation by reference is to the extent that these provisions are "applicable and not contrary to the law of the Commonwealth" and "In the event of a conflict between Federal and regulatory provisions of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent." The EQB should explain the need for these phrases and how the reader of the regulation can reasonably determine their meaning.

5. Section 92a.5. Prohibitions. – Reasonableness, Economic impact.

Commentators note that existing Paragraph 92.73(8) states that

> A permit will not be issued, modified, renewed or reissued under any of the following conditions: ...(8) For a sanitary sewer overflow, except as provided for in the Federal regulations.

In comparison, the new provision in Subsection 92a.5(b) does not include the phrase "except as provided in federal regulations." Commentators believe this may exclude provisions such as 40 CFR 122.41(m)(4)(i)(A)-(C) which provide exceptions for a treatment system bypass. We recommend that the EQB explain why the phrase "except as provided in federal regulations" is no longer needed, particularly since it relates to federal regulations which would appear to be consistent with this rulemaking.

6. Section 92a.8. Confidentiality of information. – Possible conflict with statutes or existing regulations; Clarity.

Consistency with existing regulations

Subsection (a) incorporates 40 CFR 122.7(b) by reference, which states:

> (b) Applicable to State programs, see Sec. 123.25. Claims of confidentiality for the following information will be denied:
>
> (1) The name and address of any permit applicant or permittee;
>
> (2) Permit applications, permits, and effluent data.

However, Subsection (b) of the proposed regulation implies a broader scope of confidentiality than Subsection (a) by stating:

> The Department may protect any information, other than effluent data, contained in NPDES forms, or other records, reports or plans pertaining to the NPDES permit program as confidential upon a showing by any person that the information is not a public record for the purposes of section 607 of the State Act (35 P. S. § 691.607)....

Subsections (a) and (b) appear to be inconsistent regarding what information can be considered confidential. For example, a request for confidentiality of a permit or permit application must be denied under Subsection (a), but it appears that under Subsection (b) it may be possible for the Department to grant confidentiality for that same information. The EQB should reconcile these subsections.

Consistency with statute

In addition to the above concern, a commentator believes Subsection (b) is inconsistent with the Clean Streams Law (35 P.S. § 691.607), which states that "all papers, records and documents of the department, and applications for permits pending before the department shall be public records open to inspection," with an exception for the chemical and physical analysis of coal. The commentator points specifically to language in the second sentence of Subsection (b) which states "...and those that are confidential commercial information or methods or processes entitled to protection as trade secrets under State or Federal law." The EQB should provide an explanation and clarification in the regulation regarding what state or federal law, in addition to the Clean Streams Law, will be considered in regard to confidentiality of information.

7. Section 92a.12. Treatment requirements. – Economic impact.

PennDOT questions how the requirements of Subsection (d) will be applied. PennDOT explains that Subsection (d), by including Chapter 102, could retroactively require post construction controls on existing roadways. The EQB should explain how it will apply this provision and why it is reasonable to include Chapter 102 in Subsection (d).

8. Section 92a.21. Application for a permit. – Clarity.

Subsection (a) lists provisions of 40 CFR 122.21 that are incorporated by reference, but concludes with the phrase "except as required by the Department." The phrase "except as required by the Department" is broad and infers the Department may unilaterally change the requirements of the federal regulation outside the regulatory review process. This would allow changes without notice and review by the public, regulated community, legislature or the Commission. We recommend deleting the phrase "except as required by the Department."

9. Sections 92a.24. Permit-by-rule for SRSTPs. And 92a.25 Permit-by-rule for application of pesticides. – Consistency with statute.

A commentator believes the permit-by-rule allowed in both of these sections violates the definition of "permit" in 40 CFR § 122.2. The EQB should explain how these sections are consistent with the federal definition of "permit."

10. Section 92a.26. New or increased discharges, or changes of waste streams. – Economic impact; Reasonableness.

Treatment standards

A commentator is concerned that the notification of facility expansion or process modifications required in Subsection (a) could trigger a Department determination that the discharge must meet tertiary treatment standards. We agree that the Department should be notified of a facility expansion or process modification. However, Subsection (a) is directed toward the process that occurs after the discharge changes.

The EQB should explain how it will review the notification after the increased discharge begins. If the notification can result in more stringent requirements, the EQB should explain how the owner of a facility can have a facility expansion or process modification reviewed for its implications prior to the investment so that the owner has the opportunity to explore alternatives.

Facility expansion or process modification

A commentator lists other factors that could result in increases of permitted pollutants, such as adding another shift at a manufacturing plant or changing the chemicals used in the process. Neither of these changes would meet the condition of a facility expansion or process modification. The EQB should review Subsection (a) to determine if other factors beyond facility expansions or modifications should be considered in determining whether the Department should be notified of increases of permitted pollutants.

60-day notice

Subsection (a) requires a 60-day notice. However, the regulation should specifically state what action starts the 60-day time period.

Department action

Subsection (a) requires Department approval in writing for increases of pollutants or new discharges. The regulation does not specify when the Department will respond which could delay needed changes to discharges or waste streams. The regulation should include a time period within which the Department will respond.

11. Section 92a.36. Cooling water intake structures. – Implementation procedure; Reasonableness; Feasibility.

Several commentators stated the federal government is in the process of amending the federal requirements relating to cooling water intake structures. They cite particular concerns with the implementation of Best Technology Available (BTA) requirements that are still under development. The commentators believe that until BTA is clearly defined in the new federal rule, the EQB should not move forward with this section. In light of the public comments, the EQB should explain how the public was provided with the opportunity to provide effective comments and how this provision will be reasonably implemented.

12. Section 92a.38. Department action on NPDES permit applications. – Consistency with statute; Reasonableness; Economic impact.

Applicable

Paragraph (a)(2) requires an application to be consistent with "other applicable statutes and regulations administered by the Commonwealth," and "if applicable, river basin commission requirements created by interstate compact." There are two concerns with these phrases.

First, the scope of these provisions cannot be determined. Who determines what is "applicable"? The phrases quoted above do not provide the reader with the information needed to comply with the regulation. We recommend either deleting these phrases or amending them to provide specific compliance requirements.

Second, because the scope of the above quoted phrases cannot be determined, we recommend that the EQB explain its authority to enforce "other applicable statutes and regulations administered by the Commonwealth." Also, the EQB should explain its authority over "river basin commission requirements created by interstate compact."

Renewal of permits

Subsection (b) provides for the review of permit applications and the Department's consideration of local and county plans and zoning ordinances. A commentator questions how the review of a permit renewal will be conducted in relation to Subsection (b). We agree that while these reviews may be appropriate for a new facility, there is a legitimate question as to how this would apply to existing facilities applying for renewal of a permit. The EQB should amend this provision to explain how a permit renewal will be reviewed.

13. Section 92a.41. Conditions applicable to all permits. – Feasibility; Reasonableness; Need; Economic impact; Implementation procedures.

Proposed Subsection (c) states:

> The discharger may not discharge floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits.

P.H. Glatfelter Company (Glatfelter) commented that it has invested tens of millions of dollars over decades to comply with the requirements related to color in its NPDES permit under existing regulations. Glatfelter's numerical limit for color and a timeline for compliance were established as a result of litigation in both the Environmental Hearing Board and federal district court. Glatfelter believes the proposed regulation "institutes an outright ban that is not technically achievable by many facilities in Pennsylvania..." and observes the limitation is "frankly unnecessary considering that many waters of the Commonwealth have considerable natural color." Glatfelter suggests that Subsection (c) begin with the phrase "[E]xcept as may be set forth explicitly in this permit" to allow for a variance for all of the parameters specified in proposed Subsection (c).

In addition to Glatfelter, several other commentators took issue with the EQB's explanation and support for the amendment from existing regulation explained in the Preamble. Some commentators request that the EQB maintain existing language which allows "amounts sufficient to be inimical to the water uses" found in existing Section 92.51.

We believe the commentators have outlined a significant change from existing regulation of water quality. While we agree that the phrase "inimical to the water uses" is vague and should be made clearer, we question the effect and basis for the proposed language which imposes a ban on all of these parameters in discharges. Based on the comments and the Preamble, it does not appear that the proposed language was developed to address specific violations or damage occurring to the environment. To the contrary, via NPDES permit, the Department has for many years allowed Glatfelter to meet a different standard than what is proposed in Subsection (c) for color. Therefore, we request a detailed explanation of why Subsection (c), as proposed, is reasonable, feasible and necessary. In addition, we request an explanation of the direct and indirect costs imposed on permit holders to meet Subsection (c) and how many permits would be either invalidated or would not be renewable under Subsection (c).

14. Section 92a.47. Sewage permit. – Need; Reasonableness; Economic impact.

In the Preamble, the EQB states the following relating to compliance costs:

> The proposed rulemaking addresses wastewater treatment facilities, including industrial wastewater treatment facilities, POTWs, and other facilities that treat sanitary wastewater. The treatment requirements of the NPDES regulation affect operational costs to some extent, but the proposed rulemaking does not include any new broad-based treatment requirements that would apply to most facilities. The compliance costs of the proposed rulemaking for most facilities is limited to the revised application and annual fees.

To the contrary, commentators believe Section 92a.47 imposes many changes to existing requirements that will pose major economic challenges for sewage treatment systems across the state. Commentators concerns include:

- Subsection (a) does not include key variance provisions from 40 CFR 133 that allow for modification of effluent limits.

- There is no indication the EQB has conducted a detailed legal, technical and economic analysis of these changes.

- Environmental Hearing Board decisions do not provide justification for eliminating variances.

- No rationale has been provided for changing effluent standards in Paragraphs (a)(4) and (5). In addition, these provisions are now more stringent and less flexible than current requirements. The existing provision that triggers a violation when "more than 10% of the samples tested" exceed a limit should be included.

- Why was Paragraph (a)(8) added for Total Residual Chlorine?

- Why does a discharge under Subsection (b) require tertiary treatment? Why is the existing approach not adequate?

- Subsections (b) and (c) establish mandatory new technology-based tertiary treatment standards that exceed current Pennsylvania water quality standards.

- It appears that effluent trading will not be allowed. We find this comment to be significant in relation to the EQB's ongoing proposed regulation #7-451 (IRRC #2821) "Water Quality Standards Implementation."

- The proposed regulation imposes expensive and unnecessary treatment standards.

- These revisions could pose major technical and economic challenges along with major compliance and enforcement problems for many sewage treatment systems across the state.

- It is not clear what is meant by "significant biological treatment" and therefore what is included and excluded.

The EQB should better explain the need to amend existing requirements. The EQB should include a full evaluation of the costs imposed by the amendments and explain why the costs imposed are justified.

In addition, the EQB should explain how this regulation is consistent with regulation #7-451 (IRRC #2821) "Water Quality Standards Implementation," which addresses nutrient credit trading related to nutrient and sedimentation pollution in the Chesapeake Bay.

15. Section 92a.48. Industrial waste permit. – Need; Reasonableness; Economic impact.

Similar to the comment above on Section 92a.47, commentators believe the changes to Section 92a.48 are significantly more drastic than depicted by the EQB in the Preamble. Their concerns include:

- Discharge parameters, such as BOD_5 and TSS, would require as much as a 97% reduction compared to existing regulation and permits.

- The EQB's generalization of industrial waste is not valid for all industrial point source categories.

- It is evident the EQB has not fully considered the economic impact of the proposed regulation, as required by 35 P.S. § 691.5(a)(5). There is no indication the EQB has conducted a detailed legal, technical and economic analysis of these changes.

- The EQB should re-evaluate the specific discharges causing violations rather than changing the standards for all industrial waste discharges.

- The TSS and BOD_5 limits could cause some power plants to use more water.

The EQB should better explain the need to amend existing requirements. In addition, the EQB should provide a full evaluation of the costs imposed by the amendments and explain why the costs imposed are justified.

16. Section 92a.50. CAAP. – Clarity; Economic impact; Reasonableness.

Paragraph (d)(3) requires the use of "the most sensitive analytic method available." It is not clear how to meet this standard. Furthermore, it could require the use of expensive or elaborate equipment that may not be available or even developed yet. The regulation should clearly state what reasonable methods are acceptable.

17. Section 92a.52. Variances. – Implementation procedure; Clarity; Reasonableness.

This provision states:

> Any new or amended Federal regulation enacted after November 18, 2000, which creates a variance to existing NPDES permitting requirements is not incorporated by reference.

The EQB should explain how this provision relates to and is consistent with Section 92a.3. The EQB should also explain the need for this section.

18. Section 92a.54. General permits. – Effect on this Commonwealth's resources.

Threatened or endangered species

The United States Department of the Interior commented that Subsection (a) should also prohibit discharges to waters that support federal or state listed threatened or endangered species. The EQB should explain whether this protection is needed in addition to the other protections listed in Subsection (a).

Denial of coverage

Paragraph (e)(3) states:

> The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, schedule of compliance or order issued by the Department.

This provision is not clear. For example, if a person was cited for past violations, there would be a record of that event and an ability to appeal the result. However, this provision penalizes the person for "lack of ability or intention to comply." How will this provision be enforced and how can an action taken under it be appealed? The EQB should explain the intent of this provision, its reasonableness and how it would be enforced.

19. Section 92a.82. Public notice of permit applications and draft permits. – Protection of the public health

A commentator noted that the regulation does not include the existing requirement in Section 92.61(a)(6) to identify the following:

> The location of the nearest downstream potable water supply considered in establishing proposed effluent limitations under this title, or a finding that no potable water supply will be affected by the proposed discharge.

Why is this provision no longer needed?

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: April 14, 2010
Pages: 15

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-443 (IRRC #2819). 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: Tammey Adams **Date:** 4/14/10

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