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## INDEPENDENT REGULATORY REVIEW COMMISSION

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

July 15, 2010

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

Re: Regulation #7-457 (IRRC #2841)  
Environmental Quality Board  
Ambient Water Quality Criterion; Chloride (Ch)

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](http://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  
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 #7-457 (IRRC #2841)

### Ambient Water Quality Criterion; Chloride (Ch)

July 15, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the May 1, 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 (Board) to respond to all comments received from us or any other source.

#### **Section 93.7. Specific water quality criteria.**

This rulemaking amends Subsection (a) and Table 3 of the Board's regulations by adding numeric limits for chloride. The amendments include a four-day average for chloride of 230 mg/l and a one-hour average standard of 860 mg/l. The chloride standards included in the proposed rulemaking are the current national chloride criteria for the protection of aquatic life recommended by the United States Environmental Protection Agency in its 1988 publication *Ambient Water Quality Criteria for Chloride* (1988 criteria). We have five concerns that relate to the criteria contained in the Regulatory Review Act.

#### *Reasonableness*

Commentators representing business and industry and commentators representing environmental interests have questioned the reasonableness of basing the new chloride criteria on the 1988 criteria. The commentators have argued that better and more recent scientific studies prove that the 1988 criteria are flawed. Commentators representing environmental interests are especially concerned about the recent efforts to extract natural gas from the Marcellus Shale formation, the large volumes of wastewater that extraction requires, and the various compounds containing chloride that may be in the wastewater. They do not believe the 1988 criteria adequately protect Pennsylvania waterways and aquatic life from the potential harms of Marcellus Shale wastewater.

We agree that basing the new criteria on outdated data when more recent data is available is not reasonable. Given the amount of opposition to the inclusion of the 1988 criteria in this rulemaking, we recommend the Board withdraw the proposed rulemaking and reevaluate the current state of scientific and technological knowledge of chloride and the effects it has on Pennsylvania's waterways and aquatic life. We encourage the Board to work with the various segments of the regulated community to develop a regulatory package that reflects the most recent science, adequately protects Pennsylvania's waterways and aquatic life, and keeps Pennsylvania business and industry competitive with the surrounding states.

If the Board does not withdraw the rulemaking, we recommend that it issue an Advanced Notice of Final Rulemaking to fully vet the changes that may be made to the regulation. This would provide the regulated community an opportunity to provide input on the scientific basis for the chloride standards, review any changes that have been made to the rulemaking, evaluate the impact it would have, and provide the Board with additional feedback.

#### *Economic or fiscal impact of the regulation*

Commentators representing business and industry in Pennsylvania have serious concerns with the potential fiscal impact of this regulation throughout the Commonwealth. They correctly note that the Regulatory Analysis Form (RAF) and the Preamble provide little analysis on the impact the regulation will have on the regulated community.

While we acknowledge the Board's attempt to quantify the cost of treating wastewater using several techniques, a detailed analysis of the overall fiscal impact the rulemaking could have throughout Pennsylvania is lacking. In fact, the Board has stated in Section 17 of the RAF that the fiscal savings and costs to the regulated community are "not measurable." Without a more detailed fiscal analysis, this Commission is unable to determine if the regulation is in the public interest. For example, what are the capital costs and annual operation and maintenance costs associated with installing the facilities needed to treat wastewater? What are the costs for the increased monitoring required by the rulemaking? What are the costs of dealing with treatment residuals?

We urge the Board to work with the regulated community to calculate the full fiscal impact the regulation will have throughout the Commonwealth, not just the per gallon cost for treating wastewater that was included with this proposal.

In the Preamble and RAF submitted with the final-form rulemaking, we request the Board provide a detailed fiscal impact analysis taking into consideration the above-noted concerns of commentators and this Commission.

rationale for imposing this new standard on industry not involved with natural gas extraction from the Marcellus Shale formation? What problems will be fixed by imposing the rulemaking on all industries in Pennsylvania?

*Implementation procedures*

Under questions 15 and 16 of the RAF, the Board has indicated that persons proposing “new or expanded activities or projects which result in impacts to the waters of the Commonwealth” will be affected by the rulemaking. Several commentators disagree with this statement and believe that “all NPDES permit holders will be subject to the regulation.” Will this rulemaking affect all NPDES permit holders? In the final-form regulation, the Board should clarify what qualifies as “new or expanded activities or projects.”

*Adverse effects on prices of goods and services, productivity or competition*

Under question 25 of the RAF, the Board has explained that other states, including Virginia, West Virginia and New Jersey have already adopted the 1988 criteria. The Board believes that the proposed amendments will not put Pennsylvania at a competitive disadvantage to other states. Commentators disagree with the Board’s position on this matter. They believe that competitors in other states will not be required to comply with similar standards and this will put Pennsylvania businesses at a competitive disadvantage with other states.

We ask the Board to provide a more detailed description of how this regulation compares to other states. In particular, we ask the Board to identify all the states that use the 1988 criteria. For the states that do use the 1988 criteria, are there any exceptions to how those standards are implemented? Are the standards implemented in the same way as proposed in Pennsylvania?

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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
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**To:** Debra L. Failor  
**Agency:** Environmental Quality Board  
**Phone:** 7-2814  
**Fax:** 705-4980  
**Date:** July 15, 2010  
**Pages:** 6

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-457 (IRRC #2841). 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:** *Jammy Adams* **Date:** 7/15/10