

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-475 (IRRC #2954)

Triennial Review of Water Quality Standards

September 20, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the July 7, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (Board) to respond to all comments received from us or any other source.

As noted by the Board in the Preamble to this proposal, this rulemaking fulfills the federally-required triennial review of water quality standards as mandated by the Clean Water Act (CWA) (33 U.S.C.A. §§ 1251—1387). The water quality standards consist of the existing and designated uses of the surface waters of the Commonwealth, along with the specific numerical and narrative criteria necessary to achieve and maintain those uses, and an antidegradation policy.

Included in the rulemaking are new standards for chloride, sulfate, and molybdenum. The inclusion of these new standards has generated substantial interest from various parties. Concern was also expressed about the new standards for resorcinol, strontium and 1,4-dioxane. Comments one through six below relate to all of these new standards.

1. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA directs the Independent Regulatory Review Commission (Commission) to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and need. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under §745.5(a) in the Regulatory Analysis Form (RAF).

The information contained in the RAF is not sufficient to allow this Commission to determine if the regulation is in the public interest. Of particular concern are the Board's responses to the following questions:

- Describe who and how many people will be adversely affected by the regulation. How are they affected? (RAF Question #12)
- List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply. (RAF Question #13)
- Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived. (RAF Question #14)
- Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived. (RAF Question #15)
- Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations. (RAF Question #21)
- How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states? (RAF Question #22)

Without more complete responses to the questions noted above, we cannot determine if this proposed regulation is in the public interest. In the RAF submitted with the final-form rulemaking, the Board should provide more detailed information required under § 745.5(a) of the RRA.

2. Possible conflict with statutes.

According to the Board, this rulemaking is being promulgated, in part, under Sections 5(b)(1) and 402 of the Clean Streams Law (Law) (35 P.S. §§ 691.5(b)(1) and 691.402). While we do not question the Board's authority under these provisions, we do question whether the regulation is consistent with Section 5(a) of the Law (35 P.S. § 691.5(a)). That section of the Law requires the following factors to be considered, where applicable, when adopting rules and regulations:

1. Water quality management and pollution control in the watershed as a whole;
2. The present and possible future uses of particular waters;
3. The feasibility of combined or joint treatment facilities;
4. The state of scientific and technological knowledge; and
5. **The immediate and long-range economic impact upon the Commonwealth and its citizens.** (Emphasis added.)

We question whether proper consideration was given to the fifth criterion of Section 5(a). We are aware of the Board's position that under the CWA, the Department of Environmental Protection (DEP) is not to consider achievability or the cost of compliance when developing water quality criteria. However, both the Law and the RRA require it. If the Board submits the final-form regulation without addressing economic impact as required by the Law and the required cost estimates of the RRA and RAF, we request a specific citation to the section of the CWA that is being relied on and a detailed explanation of why the CWA takes precedence over the Law and the RRA.

3. Whether the regulation is supported by acceptable data; Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources.

If data is the basis for a regulation, promulgating agencies are required to provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. This information is required by Section 5(a)(14) of the RRA (71 P.S. § 745.5(a)(14) and Question #11 of the RAF. We appreciate the time and effort spent by the Board in preparing the seven rationale documents submitted as part of this regulatory package.

The House and Senate Environmental Resources Committees (Committees) and other legislators, as well as some members of the regulated community, have questioned various aspects of the data used by the Board to support this rulemaking. Most of the concerns relate to the standards being established for chloride, sulfate and molybdenum. Some commentators expressed concern with the standards being established for resorcinol, strontium and 1,4-dioxane. Those that raised concerns explained why they believe that the data relied on by the Board is not acceptable and, in some instances, provided their own studies and research in support of their positions.

Other members of the regulated community, including the Pennsylvania Fish and Boat Commission, believe that the standards being proposed for chloride and molybdenum should be strengthened to provide greater protection of the Commonwealth's water.

As the final-form regulation is being developed, we encourage the Board to work closely with the regulated community, including DEP's Water Resources Advisory Committee, to build a consensus on what data is appropriate and acceptable. We ask the Board to explain why the data used is appropriate, as compared to the data and contentions raised by each of the commentators.

4. Need for the regulation.

Commentators, including the Committees and other legislators, have questioned the need for the new standards. They note that there is no federal mandate to impose these standards and that the Board has not adequately explained the environmental need for the standards. They also note that existing regulations, including § 95.10, relating to treatment requirements for new and expanding mass loadings of total dissolved solids, and the osmotic pressure parameter found in Table 3 of § 93.7, relating to specific water quality criteria, adequately protect the environment from any potential harms of sulfate and chloride. Regarding molybdenum, it is noted that no statewide problem has been documented or identified.

We agree that the Board has not demonstrated the need for the new standards. If the new standards are retained in the final-form rulemaking, we ask the Board to provide a more detailed explanation of why the new standards are needed and why the benefits of the new standards outweigh the costs to the regulated community.

5. Direct and indirect costs to the Commonwealth, political subdivisions and private sector; Adverse effects on prices, productivity or competition.

Commentators, along with the Committees and other legislators, have raised concerns with the costs imposed by the new standards and have questioned the correlating benefit to the environment and human health. Included in those concerns is the fiscal impact that the new chloride standard will have on existing conventional oil and gas operations in the Commonwealth. Commentators contend that the chloride standard for discharges will render many existing oil and gas treatment and discharge systems unusable and that this will add to the abandoned well problem in Pennsylvania.

Our first and second comments asked the Board to provide more detailed information about the fiscal impact of the rulemaking. We encourage the Board to work with the regulated community to compute an accurate estimate of the costs associated with implementing this rulemaking. We will use that information to determine if this rulemaking satisfies the economic or fiscal impact criterion of the RRA.

6. Feasibility; Reasonableness; Implementation procedures.

Commentators have raised concerns with the feasibility of complying with the rulemaking. They believe it is unreasonable to expect compliance when the necessary technology to comply with the regulation may not be readily available. For example, can water be tested for the presence of 1,4-dioxane? Does the technology exist to treat water discharges to a level that would be in compliance with the rulemaking? Are the test methodologies approved by DEP's Laboratory Accreditation Program appropriate for all of the substances listed in the rulemaking? We ask the Board to explain how DEP will implement the regulation and how the regulated community can comply with all aspects of it.

7. Advanced Notice of Final Rulemaking.

In the Preamble to the proposed regulation, the Board states it may consider changes to the section on temperature in the final-form rulemaking. The Board expressly seeks technical and scientific information, data and studies regarding the rate of temperature change and its effect on aquatic organisms.

In order to give the regulated community and other interested parties an opportunity to provide input on changes the Board makes as a result of this request for input, we recommend that the Board publish an Advanced Notice of Final Rulemaking (ANFR). An ANFR would provide the opportunity to review and resolve remaining issues before submittal of a final-form regulation.

8. Section 93.4d. Processing of petitions, evaluations and assessments to change a designated use. – Fiscal impact; Reasonableness.

Subsection (a) is being amended to delete the requirement that petitions or assessments of stream redesignations be published in local newspapers. Instead, the required notice can be made "by other means designed to effectively reach a wide audience." A commentator has suggested that

all owners of property affected by the potential redesignation be directly notified of the petition and assessment. Since redesignations of streams could have a fiscal impact on land owners, we believe this suggestion is reasonable and ask the Board to consider it as it develops the final-form regulation.