

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-494 (IRRC #3119)

### Safe Drinking Water; Revised Total Coliform Rule

December 30, 2015

We submit for your consideration the following comments on the proposed rulemaking published in the October 3, 2015 *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.

#### Subchapter A. GENERAL PROVISIONS

##### 1. Section 109.1. Definitions. – Clarity.

This rulemaking incorporates regulations adopted by the United States Environmental Protection Agency (EPA) that amended 40 CFR Part 141, relating to National primary drinking water regulation. This federal regulation is referred to as the Revised Total Coliform Rule (RTCR). The rulemaking is necessary for the Commonwealth to retain primacy with respect to EPA's RTCR.

According to the Preamble, the proposed definitions of “Level 1 assessment” and “Level 2 assessment” reflect the new definitions of the RTCR. Both of the definitions require evaluations, and “when possible,” the likely reason that triggered the required assessment. Does the Department of Environmental Protection (DEP) or the public water system (PWS) determine when something is possible? This should be clarified in the final-form regulation.

#### Subchapter B. MCLs, MRDLs OR TREATMENT TECHNIQUE REQUIREMENTS

##### 2. Section 109.202. State MCLs, MRDLs and treatment technique requirements. – Clarity; Implementation procedures.

Subsection (c)(4)(ii) requires a Level 2 assessment if certain conditions occur. Commentators expressed concern with the clarity of Subsection (c)(4)(ii)(B) and how it will be implemented. They suggest that assessments should be limited to reasons associated with the RTCR and note that DEP has the authority to do other investigations as needed. In the Preamble to the final-form rulemaking, we ask EQB to explain how it will implement this subsection as it relates to the issue raised by commentators.

## Subchapter C. MONITORING REQUIREMENTS

### 3. Section 109.301. General monitoring requirements. – Clarity; Implementation procedures; Possible conflict with or duplication of statutes or existing regulations.

#### *Paragraph (3)(i)*

This paragraph pertains to the frequency of monitoring requirements for coliforms. Commentators have asked for the flexibility to collect more samples than required under Paragraph (3)(i)(D) in unusual circumstances, such as following positive samples. Would the collection of more samples be allowed? If so, what procedures would a PWS have to follow after collection of additional samples? This should be explained in the final-form regulation.

According to the Preamble, Paragraph (3)(i)(E) reflects the requirements of 40 CFR 141.854(c)(2). A commentator has noted that the first sentence of this paragraph does not accurately reflect the Federal rule because it fails to specify that it applies only to noncommunity water systems “using only groundwater.” We suggest that the final-form regulation be amended to include this terminology.

#### *Paragraph (3)(ii)*

Repeat monitoring requirements are outlined in this paragraph. This proposed rulemaking deletes existing Paragraph (3)(ii)(B), which required systems collecting only one routine coliform sample per monitoring period to collect four check samples because 40 CFR 141.858(a)(1) requires all PWSs to collect a minimum of three check samples instead of four. According to the Preamble, the RTCR gives states an option to allow alternative sampling locations under certain circumstances. The Small Water Systems Technical Assistance Center (TAC) Advisory Board to DEP recommended EQB allow alternate check sample locations. In the Preamble, EQB is specifically requesting comment on TAC’s recommendation and commentators have provided feedback on this topic. We will review EQBs responses to the suggestions of commentators and any changes made to this paragraph in our review of the final-form regulation to determine whether it is in the public interest.

#### *Paragraph (3)(iii)*

This paragraph pertains to the invalidation of total coliform samples. According to the Preamble, the amendments being made to Paragraph (3)(A)(III) include *E. coli* MCL and assessment language to clarify how compliance is determined for the RTCR. Commentators have suggested the invalidation procedures outlined in all of Paragraph (3)(iii) should be applied to both total coliform and *E. coli*. We ask EQB to review the entirety of this paragraph to ensure all of the changes are consistent with the RTCR.

## Subchapter D. PUBLIC NOTIFICATION

### 4. Possible conflict with or duplication of statutes or existing regulations.

A commentator has asked if EQB has reviewed the effect the changes being proposed under this rulemaking will have on EQB's existing regulations on public notification requirements. We ask EQB to review its public notification regulations to ensure that the proposed changes do not create conflicts with existing regulations.

### 5. Section 109.409. Tier 2 public notice – categories, timing and delivery of notice. – Reasonableness; Need; Fiscal impact.

Subsection (a) addresses general violation categories and other situations requiring a Tier 2 public notice. New Subsection (a)(3) will require a Tier 2 public notice for any failure to report an *E. coli* MCL violation or *E. coli*-positive routine or check sample. Commentators disagree with the requirement for a notice that does not relate to an MCL violation. They believe additional notification could lead to overuse of public notifications. In the Preamble to the final-form rulemaking, we ask EQB to explain why public notification is needed for *E. coli*-positive samples and why the benefits of such a notice outweigh any potential costs associated with such a notice.

## Subchapter G. SYSTEM MANAGEMET REPOSIBILITIES

### 6. Section 109.701. Reporting and recordkeeping. – Reasonableness; Implementation procedures; Possible conflict with or duplication of statutes or existing regulations.

#### *Subsection (a)(3)*

This subsection relates to reporting requirements for PWSs. EQB is adding a requirement that any sample result that is *E. coli* positive be reported to DEP within one hour of discovery. Commentators have requested that the reporting requirement be changed from one hour to the end of the day. What is the need for the one hour reporting requirement and why is it more reasonable than the suggestion of the commentator? In the Preamble to the final-form rulemaking, we ask EQB to explain its rationale for this provision.

#### *Subsection (a)(5)*

This subsection addresses the content of a written sample siting plan, submittal of the plan to DEP and revisions to the plan. According to the Preamble, many of the changes being proposed reflect amendments to the RTCR. Commentators have expressed concern that some of the proposed changes would be difficult to implement and do not provide the flexibility that the RTCR allows. As EQB develops the final-form regulation we ask that it work with the regulated community to provide flexibility, when allowed by the RTCR, while at the same time, ensuring that primacy requirements are met.

**7. Section 109.705. System evaluations and assessments. – Clarity; Implementation procedures.**

Subsection (b) requires a PWS to conduct Level 1 and Level 2 assessments and to comply with any expedited or additional actions required by DEP in case of an *E. coli* MCL violation. EQB has asked for input on whether the report required under Subsection (b)(2) should be submitted to DEP electronically. We will review EQBs responses to the suggestions of commentators and any changes made to this paragraph in our review of the final-form regulation to determine whether it is in the public interest.

In addition, Subsection (b)(3) requires a Level 1 assessment to be conducted by “competent personnel qualified to operate and maintain the water system’s facilities.” We believe the term “competent personnel” is vague. Who would make the determination that the person conducting the assessment is competent? We recommend that this be clarified in the final-form regulation.

Finally, Subsections (b)(3) and (b)(4) require Level 1 and Level 2 assessments to be “conducted” by certain personnel. Commentators have suggested that instead of the specified personnel conducting the required assessments, the personnel could review and approve the results of the assessments performed by others. This suggestion would provide a cost savings to the regulated community. If this suggestion is reflective of the RTCR and protective of the public health, we ask EQB to adopt it.

**Subchapter J. BOTTLED WATER AND VENDED WATER SYSTEMS, RETAIL WATER FACILITIES AND BULK WATER HAULING SYSTEMS**

**8. Possible conflict with or duplication of statutes or existing regulations.**

A member of the regulated community that provides spring water to the bottled water community submitted comments stating that the Food and Drug Administration (FDA) sets regulatory mandates for bottled water. The commentator notes that the Regulatory Analysis Form should be amended to include the appropriate federal references and believe that there is a potential conflict between the FDA’s regulations found at 21 CFR 165.110(b)(2) and § 109.1003(a)(1) of this proposed rulemaking. We note that EQB’s existing Subchapter J regulations on bottled water include references to both EPA and FDA regulations. In the Preamble to the final-form regulation, we ask EQB to explain how DEP’s regulation of bottled water fits into the regulatory framework of EPA’s RTCR and the FDA’s regulations on bottled water.