

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-496 (IRRC #3121)

Remining Requirements

December 2, 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 (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (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. Compliance with the RRA.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this 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 reasonableness. To make that determination, the Commission must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under Section 745.5(a) in the Regulatory Analysis Form (RAF). EQB did not respond to question #23 on the RAF related to fiscal savings and costs associated with implementation and compliance for the regulated community, local government and state government for the current year and five subsequent years. We ask EQB to include a response to each question on the final-form RAF.

2. RAF -- Clarity and lack of ambiguity.

EQB states in response to RAF question #11 that Section 87.210 (d)(2), (3) and (5) include requirements to establish an in-stream pollutant baseline in certain circumstances. EQB states that these provisions are more stringent than federal requirements. These same provisions are found in parallel Sections 88.510 and 90.310. We ask EQB to include all provisions which are more stringent than federal requirements in its response to the final-form RAF.

3. Section 87.204. Application for authorization. -- Protection of the public health, safety and welfare; Need for the regulation.

In Subsection (b), EQB currently requires the operator seeking authorization to continue the water quality and quantity monitoring program required by Subsection (a)(2) after making the authorization request. The operator is currently required to submit the results of this monitoring

program to the Department of Environmental Protection on a monthly basis until a decision on the authorization is made. EQB states in the Preamble that on the recommendation of the Mining and Reclamation Advisory Board, EQB proposes to allow—rather than require—the operator to continue water monitoring until the permit is issued. We ask EQB to explain in the final-form RAF and Preamble the need for this change, and how this proposed change will adequately protect the public health, safety and welfare.

We ask EQB to address these same concerns related to parallel Sections 88.504 and 90.304 (relating application for authorization).

4. Section 87.210. Effluent limitations. — Clarity and lack of ambiguity.

We have clarity concerns in Subsection (d) (relating to in-stream requirements). Paragraph (d)(1) states:

If the [Department of Environmental Protection (Department)] determines that it is infeasible to collect samples for establishing the baseline pollutant levels **under this subsection**, and that remining will result in significant improvement that would not otherwise occur, the permit applicant **may** establish an in-stream baseline concentration at a suitable point downstream from the remining operation and the numeric effluent limitations in subsection (c)(1) do not apply. [Emphasis added.]

The circumstances under which it is infeasible to collect samples are found in Paragraph (d)(4). EQB should include a reference to the specific paragraph in order to make clear for the regulated community how the Department makes the determination.

Also, Paragraph (d)(1) states that a permit applicant may establish an in-stream baseline concentration at a suitable point downstream from the remining operation. Does EQB intend for this provision to be optional? Paragraph (d)(5) includes circumstances under which the Department may waive the in-stream monitoring requirements. It appears that EQB intends to require permit applicants to establish an in-stream baseline concentration at a suitable point downstream from the remining operation **unless** the Department grants a waiver. If so, EQB should amend the language to clarify that establishing an in-stream baseline concentration at a suitable point downstream from the remining operation is a requirement unless the Department grants a waiver under Paragraph (d)(5).

We ask EQB to make these same clarifications in parallel Sections 88.510 and 90.310 (relating to effluent limitations).

5. Section 87.213. Procedure for calculating and applying an annual trigger. — Clarity and lack of ambiguity.

Subsections (b) and (c) provide methods for calculating the annual trigger. The methods are taken from paragraphs III.A and III.B of Appendix B in 40 CFR Part 434, respectively. We ask EQB to clarify the calculations as follows.

Based on subparagraph III.A.4 of the CFR, the calculation in paragraph (b)(4) should include an additional set of parentheses.

$$T_b = M + ((1.815 * R) / \text{SQRT}(n))$$

Based on subparagraph III.A.6 of the CFR, the calculation in paragraph (b)(6) should include an additional set of parentheses.

$$T_m = M' - ((1.815 * R') / \text{SQRT}(m))$$

Based on subparagraph III.B.3.b of the CFR, the calculation in subparagraph (c)(7)(ii) should use a small letter “m” rather than a capital.

$$\text{Critical Value} = 0.5 * n * (N + 1) - 3.0902 * \text{SQRT}(n * m * (N + 1) / 12)$$

Based on subparagraph III.B.3.c of the CFR, the calculation for V in subparagraph (c)(7)(iii) should include additional parentheses.

$$V = ((n * m * S) / (N * (N - 1))) - ((n * m * (N + 1)^2) / (4 * (N - 1)))$$

We ask EQB to make these same clarifications in parallel Sections 88.513 and 90.313 (relating to procedure for calculating and applying an annual trigger).