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June 25, 2018

Independent Regulatory Review Commission
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RE: Comments on EQB: Final-Form Rulemaking: Safe Drinking Water General Update and Fees (25 Pa. Code, Chapter 109) (EQB #7-521) (IRRC #3177)

Dear Commissioners:

The NAWC (www.nawc.org) represents all aspects of the private water service industry including ownership of regulated drinking water and wastewater utilities and the many forms of public-private partnerships and management contract arrangements. The Pennsylvania Chapter consists of five member companies that provide safe and adequate drinking water service to over 3.1 million Pennsylvanians in 492 communities in 39 counties. In addition, three member companies provide wastewater service to approximately 195,000 Pennsylvanians in 34 communities across nine counties.

On April 17, 2018, the Environmental Quality Board (EQB) adopted the Final-Form Rulemaking to amend Chapter 109 (relating to safe drinking water). During the EQB discussion, Rep. Maher (R-Allegheny/Washington) raised the issue regarding the Department of Environmental Protection's (DEP) removal of the Table [*Annual Fees (Based on Population) vs. Cost of Providing Select Services*] identifying cost to provide service in between EQB approval and publication in the *Pennsylvania Bulletin*.

According to the Table [*Annual Fees (Based on Population) vs. Cost of Providing Select Services*] on page 40 of the Preamble,ⁱ the annual fee for a system serving a population of 100,000 or more is \$40,000, while the cost of services is only \$4,778 or **837 percent of cost of services**.

Rep. Maher also asked that a copy of the "tolling memo" be shared with the EQB members.

Below are the relevant comments made by NAWC (September 25, 2017)ⁱⁱ to the proposed rulemaking, which we believe were not adequately addressed by the DEP in the Final-Form Rule.

Subchapter C. MONITORING REQUIREMENTS

§ 109.301 (11) (Monitoring requirements for entry points that do not provide water continuously)

Under § 109.301 (11), the proposed rulemaking would, at a minimum, require all entry points (EPs) to provide water to the public on an annual basis to ensure all sources and entry points are included in routine compliance monitoring.

In the Final-Form Rulemaking, **DEP has deleted the proposed §109.301 (11) (ii)** regarding monitoring requirements for entry points that do not provide water continuously. Instead, DEP has included the parameters set forth in paragraph (14) [*Monitoring requirements for radionuclides*] under §109.301 (11).

In addition, DEP has added a new (15) to address monitoring requirements for reserve entry points and entry points supplied by one or more reserve sources. While DEP understands that many facilities are not used on a “24/7” basis, these amendments will ensure that all permitted sources and entry points are monitored at least annually, or when in use. DEP anticipates that select purchased interconnections will be able to retain the “emergency” designation if certain criteria are met. **DEP anticipates proposing technical guidance in the near future that addresses the following criteria:**

- Using the last three years of historical water use data, the water supplier can demonstrate that the purchased interconnection has only been used for emergency purposes.
- Emergency use has not occurred more than 14 days per year, excluding use under Commonwealth or Federal emergency declarations.
- The Department has conducted an annual compliance check using reported water use data.

On a case-by-case basis, DEP may allow the use of the “reserve” designation for select sources and entry points, without conducting routine annual compliance monitoring, if documentation is provided to DEP that supports the use of this designation. Select sources and entry points that meet these criteria will be covered by a special condition in the permit that requires DEP notification and completion of compliance monitoring prior to use.

While the NAWC supports the approach taken by the DEP in the Final-Form Rule, we remain concerned that DEP proposes to follow up with technical guidance, which may or may not happen, regarding select purchased interconnections retaining the “emergency” designation. NAWC believes that the criteria DEP is proposing should be included in the Final-Form Rule.

Subchapter E. PERMIT REQUIREMENTS

§ 109.511 (General permits)

Under this provision, the DEP may issue a general permit, in lieu of issuing a construction and operation permit for a specific category of modifications.

The NAWC suggested that minor permit amendments are excellent candidates for general permit management. For example, minor amendments are required for tank paintings, equipment upgrades, and minor chemical changes.

The Final-Form Rule establishes in § 109.511 (relating to general permits) the regulatory basis for the issuance of general permits for high volume, low risk modifications or activities to streamline the permitting process. The DEP is currently evaluating the types of modifications that may best be served by a general permit. When the DEP is ready to move forward with issuing a draft general permit(s), the public participation process will ensure ample opportunity to provide comment on the scope and coverage of the general permit(s)

While the NAWC agrees that the Final-Form Rule needs to establish the regulatory basis for the issuance of general permits, we remain concerned that DEP proposes to follow up with draft general permits, which may or may not happen, instead of including them in the Final-Form Rule. NAWC believes that the Final-Form Rule should state which types of modifications will be eligible for general permits.

Subchapter G. SYSTEM MANAGEMENT RESPONSIBILITIES

§ 109.606 Chemicals, materials, and equipment

Provides for acceptability of certain equipment certified in conformance with Guidelines for Public Drinking Water Equipment Performance issued by NSF (referred to as "PDWEP")

The Small Water Systems Technical Assistance Center (TAC) explained that NSF certification for equipment that is commonly used in the water industry is not readily available or in some cases not available at all. For example, some products such as magnetic chemical transfer pumps do not provide NSF certification but are preferred to be used because of their leak proof design characteristics.

In response to public comments, § 109.606 (a) – (d) was amended in the Final-Form Rule to clarify that chemicals, materials and equipment that come in contact with the water or may affect the quality of the water must be acceptable to the Department. In other words, these requirements apply to the wetted parts of materials and equipment, and exclude motors, casings and the like that do not come in contact with the water.

Finally, § 109.606 allows the use of other standards to meet these criteria. For example, the use of materials, such as concrete and stainless steel, which meet American Water Works Association (AWWA) standards, would be acceptable to the Department.

NAWC appreciates the DEP's clarification regarding the requirement's application to the wetted parts of materials and equipment, excluding motors, casings and the like that do not come in contact with the water. However, DEP merely states that §109.606 will allow for the use of other standards to meet the certification criteria but does not identify what those standards are or what procedure a PWS should follow. The Final-Form Rule should identify the standards and procedures deemed to be compliant by the DEP.

§ 109.708 (System service and auxiliary power)

Under the proposed rulemaking [Pg. 5 Preamble], “water suppliers will need to provide on-site auxiliary power sources (i.e., generators), or connection to at least two independent power feeds from separate substations; or develop a plan for alternative provisions, such as interconnections with neighboring water systems or finished water storage capacity.”

DEP made several modifications to the proposed regulatory language. First, DEP expanded the alternative provision options further to include “a combination of alternative provisions,” “portable generators,” and a category of “other alternative provisions,” within this category, system specific alternative provisions may be proposed to insure uninterrupted system service.

Additionally, due to the variety of system specific challenges, the DEP has included in a new §109.708 (c) the option to submit a corrective action schedule for necessary improvements that have not been completed by the compliance deadlines specified in §109.708 (a) for submittal of the Uninterrupted System Service Plan (USSP). More specifically, this new approach requires certification of completion of the USSP form created by the DEP by the deadlines specified in §109.708 (a). However, if the USSP identifies that deficiencies exist that prevent a **continuous supply of safe and potable water** as specified in §109.708 (a), and community water supplier has not addressed those deficiencies by the deadline for USSP submittal, a schedule must be submitted within six months which includes detailed corrective actions and corresponding completion dates.

NAWC appreciates the DEP’s modifications to this section expanding the alternative provision options to include “a combination of alternative provisions,” “portable generators,” and a category of “other alternative provisions,” which allows for system specific alternative provisions. However, the NAWC is concerned with the expectation in the Final-Form Rule that there will be “uninterrupted system service.” Unfortunately, it is inevitable that events will happen to interrupt service. The Public Utility Commission’s (PUC) regulations recognize that utilities will have service interruptions. For example, a “continuous supply of safe and potable water” cannot be assured during a “Super Storm Sandy” or “Hurricane Katrina” type event. Therefore, NAWC remains concerned that non-compliance will be tied to service continuity under this Final-Form Rule.

Subchapter N. DRINKING WATER FEES

With respect to the Safe Drinking Water Program, DEP receives \$7.7 million of its funding from the General Fund. These proposed annual fees, as well as the proposed increases in permit fees in § 109.1404 (relating to community and noncommunity water system permitting fees), are expected to generate the **\$7.5 million** necessary to restore staffing levels and to provide services required under the SDWA to the **8,521 PWSs** in this Commonwealth and the **10.7 million customers** they serve.

§ 109.1402 (Annual fees)

The proposed annual fees in this rulemaking for CWSs, which are based on population, range from \$250 to \$40,000. The per-person costs range from \$0.35 to \$10 per person per year.

Proposed CWS Annual Fees (Based on Population)

Population Served	Annual Fee	Cost/Person/Year
25—100	\$250	\$2.50--\$10.00
101—500	\$500	\$1.00--\$4.95
501—1,000	\$1,000	\$1.00--\$2.00
1,001—2,000	\$2,000	\$1.00--\$2.00
2,001—3,300	\$4,000	\$1.21--\$2.00
3,301—5,000	\$6,500	\$1.30--\$1.97
5,001—10,000	\$10,000	\$1.00--\$2.00
10,001—25,000	\$20,000	\$0.80--\$2.00
25,001—50,000	\$25,000	\$0.50--\$1.00
50,001—75,000	\$30,000	\$0.40--\$0.60
75,001—100,000	\$35,000	\$0.35--\$0.47
100,001 or more	\$40,000	≤ \$0.40

NAWC appreciates the DEP's modifications to this section to defer the effective date of the fees until January 1, 2019 to provide more time for budgeting.

However, NAWC still believes that the annual fees do not meet the statutory requirement in the PA Safe Drinking Water Act (SDWA) that says: "Such fees shall bear a reasonable relationship to the actual cost of providing a service." (Section 4 (c) of Act 43 of 1984).ⁱⁱⁱ

First, DEP anticipates that the annual fees will bring in \$7,650,750, which is \$150,750 more than the \$7.5 million necessary to restore staffing levels and to provide services required under the SDWA.

Second, with 8,521 PWSs in this Commonwealth serving 10.7 million customers, NAWC continues to question the DEP methodology and belief that the annual fees meet the statutory requirement. In the two specific examples that NAWC provided in our comments: (1) Pennsylvania American Water with 66 PWS ID numbers estimates that it would pay annual fees of approximately \$830,000; and (2) SUEZ with 15 PWS ID numbers estimates that it would pay annual fees of approximately \$124,000. Just those two companies would pay an estimated \$954,000 or 12% of the \$7,650,750 total expected to be collected by DEP to regulate the 8,521 PWSs in this Commonwealth. If you were to factor in Aqua America, who commented^{iv} that they estimate paying annual fees of \$400,000, that's three companies paying an estimated \$1,354,000 or 18% of the \$7,650,750 total expected to be collected by DEP.

Moreover, even if DEP considers each PWS ID number to be a separate system, the fees are greatly exaggerated and don't reflect the cost to provide service. How many DEP inspectors or permit reviewers are needed to regulate Pennsylvania American Water alone? DEP could hire 2 or 3 staff dedicate to Pennsylvania American Water and bill them at considerably less cost than the estimated \$830,000 annual fee.

Third, the annual fees are just part of the fee package. The DEP analysis fails to factor in the increased permit fees (see section below) and the overall impact that they will have on PWSs.

Adequate funding for the Safe Drinking Water Program is essential; however, increasing fees inequitably or to shift costs from one industry sector to another doesn't appear to bear a reasonable relationship to the actual cost of providing a service.

§ 109.1404 (Community and noncommunity water system permitting fees)

This section establishes permitting fees, based upon population served, involving the application for a construction permit or a major construction permit amendment.

Proposed Permit Fees

<u>Title</u>	<u>Current Fee</u>	<u>Proposed Fee</u>
<i>(CWSs and NCWSs)</i>		
Permit/major amendment	\$750	\$300--\$10,000
Minor amendment	\$0	\$100--\$5,000
Operations permit	\$0	\$50
Emergency permit	\$0	\$100
Change in legal status	\$0	\$100
<i>(Additional NCWS Fees)</i>		
Application for approval	\$0	\$50
4-log permit	\$0	\$50

The proposed permit fees/increases will have a significant economic impact on the industry. NAWC opposes the proposal to base permit fees on population served. Permit fees should be based on the scope of work (i.e., type of project, scope of the project, project size and complexity) and are independent of the system size.

NAWC doesn't disagree that system population is appropriate to use to determine monitoring requirements (both the number of samples and the frequency of monitoring), implementation of due dates (many rules phase-in effective dates by system size), and treatment technique requirements (some treatment techniques only apply to certain system sizes). It stands to reason that PWSs serving larger populations will need more sampling points and may have more complex treatment techniques versus a small system with a single groundwater source. However, NAWC disagrees that population size is comparable or appropriate method to determine permit fees.

NAWC reiterates that \$10,000 for a permit/major amendment will have a significant economic impact on the industry. In addition, minor permits should not require extensive DEP review so any such permit fees should be substantially less than the \$5,000 being proposed for systems serving larger populations.

NAWC commented that Pennsylvania American Water, for example, estimates that they require approximately 100 permits annually (permit/major amendment or minor amendment) and would experience a fee increase from approximately \$100,000 to over \$500,000 or an increase in excess of \$400,000 or 5 times the current fee amount. These are costs that the

PUC-regulated systems cannot recover until their next general rate case, which is costly and time consuming. DEP did not respond or address these comments in its comment/response document.

NOTE: On page 5 of the Regulatory Fee Recommendation Report,^v which was handed out at the November 14, 2016 TAC meeting, DEP anticipated permit fee revenues of approximately \$500,000 (this is more than double the current revenues from permit fees).

Therefore, the estimated \$400,000 increase in permit fees (permit/major amendment or minor amendment) by Pennsylvania American Water makes up 80 percent of the \$500,000 anticipated by DEP. The fact that only one company expects to account for 80 percent of the projected revenue to be brought in by these permit fee increases raises serious questions with DEP's estimates and the overall impact they will have on the industry.

Conclusion

For the reasons stated above, the NAWC respectfully requests the IRRC to reject this Final-Form Rule for, among other things, failing to meet the statutory requirement in the PA Safe Drinking Water Act (SDWA) that says: "***Such fees shall bear a reasonable relationship to the actual cost of providing a service.***" (Section 4 (c) of Act 43 of 1984).

In addition, the Final-Form Rule defers other issues to future guidance documents, which may or may not happen, and does not resolve the questions raised by industry.

If you should have any questions, please do not hesitate to contact us.

Respectfully submitted,

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ⁱ Preamble, Proposed Rulemaking: Safe Drinking Water General Update and Fees (25 Pa. Code. Chapter 109), May 17, 2017

http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2017/May%2017/7-521_SDW%20General%20and%20Fees_Proposed/02_7-521_SDW%20General%20and%20Fees_Preamble.pdf

ⁱⁱ <http://www.ahs.dep.pa.gov/eComment/ViewComments.aspx?enc=8YWicHIdijzUAfG53EkjZsi%2bU7zETpGUQj8Jkj%2bS%2f0%3d>

ⁱⁱⁱ <http://www.legis.state.pa.us/CFDOCS/LEGIS/LI/uconsCheck.cfm?txtType=HTM&yr=1984&sessInd=0&smthLwIn d=0&act=0043>

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<http://www.ahs.dep.pa.gov/eComment/ViewComments.aspx?enc=8YWicHldijzUAfiG53EkjZsl%2bU7zETpGUQj8Jkj%2bS%2f0%3d>

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