

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-534 (IRRC #3182)

### Triennial Review of Water Quality Standards

March 19, 2018

We submit for your consideration the following comments on the proposed rulemaking published in the October 21, 2017 *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 sources.

#### 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).

#### *Comparison to other states*

RAF Question #12 asks how this regulation compares to other states and how it will affect Pennsylvania's ability to compete with other states. This proposal includes updates to Table 5 of § 93.8(c), relating to human health and aquatic life criteria for toxic substances. The updates are based on Environmental Protection Agency (EPA) recommendations issued in 2015 for 94 pollutants. Several commentators have noted that EQB is not obligated to incorporate the 2015 EPA recommendations and that EPA regulations found at 40 C.F.R. § 131.11(b) provide a state with flexibility on how it chooses to meet EPA requirements. Commentators point out that other states have developed a regulatory framework more reflective of their own environment. In the Preamble, EQB explains that for the 94 individual recommended criteria updates contained in EPA's 2015 guidance, it is adopting 73 recommendations, adding 11 new compounds and retaining 10 that are the same as EPA's. We ask EQB to provide a comparison of its approach to adopting the 2015 EPA guidance on human health water quality criteria to other states surrounding Pennsylvania. Have those states adopted the EPA guidance or taken another approach allowed by 40 C.F.R. § 131.11(b)?

### *Cost of compliance*

RAF Question #19 states that the costs and savings to the regulated community cannot be determined because each activity that will result in pollution to waters in the Commonwealth must be reviewed based on site-specific considerations. The Preamble indicates the proposed rulemaking may impose additional costs on the regulated community. Commentators have expressed concern with the lack of financial data related to costs imposed by this rulemaking. A particular concern raised relates to the revised criteria for ammonia found in Table 3 of § 93.7(a), relating to specific water quality criteria. We ask EQB to consult with members of the regulated community to gain a better understanding of the fiscal impact this rulemaking will have and to include a more complete fiscal analysis with the final-form rulemaking.

## **2. Section 93.7. Specific water quality criteria. – Reasonableness; Implementation procedures; Fiscal impact.**

### *Ammonia*

EQB is proposing to replace the current statewide aquatic life use criteria for ammonia found in Table 3 with the new federally recommended criteria. A commentator has stated the new criteria are designed to protect a sensitive mussel population that is only present in 15 of Pennsylvania's 67 counties. They believe that implementing the criteria on a statewide basis would be costly to the regulated community and provide no benefit to the environment. We ask EQB to explain the need to impose the more stringent Federal standard on a statewide basis. Has EQB considered a more site-specific approach to regulating ammonia?

### *Bacteria*

EQB is proposing to amend its existing bacteria criteria by replacing the current fecal coliform based criteria for water contact sports during the swimming season (May 1 to September 30) with 2012 EPA Recreational Water Quality Criteria recommendations. We note that the existing regulations currently recognize a swimming season and a non-swimming season, and there are different standards for both. Some commentators have suggested that having different standards for each season could be confusing to the regulated community. We ask EQB to explain how it currently implements this standard and if it has had any problems with implementation of it. Will the new criteria require a different implementation strategy? If so, what will be required?

Other commentators are concerned that natural sources of bacteria could make it difficult for dischargers to meet the more stringent standard being proposed. Suggestions by these commentators include: an additional feasibility study conducted by the Department of Environmental Protection; review of scientific material submitted by a commentator; and adding a provision to the rulemaking to allow a discharger to provide scientific data to show they are not the cause of elevated levels of bacteria. We ask EQB to work with these commentators to gain a better understanding of their concerns and, if appropriate, amend the rulemaking accordingly.

**3. Section 93.8c. Human health and aquatic life criteria for toxic substances. – Implementation procedures; Clarity;**

*Subsection (a)*

A commentator has concerns with the following language that is being added to this subsection, “. . . instream measurements or best estimates, representative of the median concentrations or conditions of the receiving stream for the applicable time period and design conditions.” They question how it will be implemented. We agree that the new language, as written, would be difficult to implement. In the final-form regulation, we ask EQB to amend the regulation to clarify implementation of this requirement.

*Table 5 Water Quality Criteria for Toxic Substances*

As noted above, EQB is adopting updated criteria for 73 compounds, adding 11 new human health compounds and retaining 10 criteria that are the same as EPA’s recommended criteria. EQB states in the Preamble that it reviewed the EPA recommendations and determined the criteria are scientifically sound and applicable to the protection of Pennsylvania waters. Commentators argue that EPA used conservative default values when making its determinations and that national standards are not necessarily applicable to Pennsylvania waters. In the Preamble to the final-form regulation, we ask EQB to explain why it believes the standards developed by EPA are appropriate for the protection of Pennsylvania waters instead of more site-specific standards or other scientifically defensible criteria.

**4. Section 93.8d. Development of site-specific water quality criteria. – Implementation procedures; Clarity.**

The following language is being added to Subsection (c): “The Department may require the use of the Biotic Ligand Model (BLM) for the development of new or updated site-specific criteria for copper in freshwater systems.” A commentator has asked when the BLM will be required and whether other scientifically defensible methods will be allowed. We agree that EQB should identify in the final-form regulation the circumstances when the use of the BLM will be required. We also ask if other scientifically defensible methods were considered and why EQB believes the BLM is appropriate.