



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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October 22, 1997

Honorable James M. Seif, Chairman
Environmental Quality Board
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: IRRC Regulation #7-323 (#1876)
Environmental Quality Board
Wastewater Management

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-323. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Fiona Wilmarth at 783-5438. She has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg

cc: Sharon Freeman
Barbara Sexton
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-323

WASTEWATER MANAGEMENT

OCTOBER 22, 1997

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to the reasonableness, need for and clarity of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. § 91.1. Definitions. - Clarity

National Pollutant Discharge Elimination System (NPDES) Permit.

The proposed regulation contains the following definition of NPDES Permit:

A permit or equivalent document or requirements issued by the Administrator of the EPA or, when appropriate, by the Department to regulate the discharge of pollutants under section 402 of the Federal act (33 USCA § 1342).

The definition is unclear because it does not explain under what circumstances the Administrator of the EPA or the Department would issue "requirements" and what these requirements would be if they are not a permit. We recommend that the EQB clarify the definition to explain the meaning of "requirements" and when these documents would be issued in lieu of a permit.

Stormwater.

The proposed regulation defines "stormwater" as "Stormwater runoff, snow melt runoff, and surface runoff and drainage." In his comments, Randall Hurst, an environmental consultant, (Mr. Hurst) notes that defining "stormwater" as "stormwater runoff" is a circular definition which is not very useful. We agree that, where possible, circular definitions should be avoided and recommend that the EQB revise the definition to more meaningfully define "stormwater."

Wastewater impoundment.

The proposed regulation defines "wastewater impoundment" as "A depression, excavation or facility situated in or upon the ground, whether natural or artificial and whether lined or unlined." In its comments, the Pennsylvania Department of Agriculture (Agriculture) points out that this definition addresses what an impoundment is but does not incorporate the wastewater component of the term. Consequently, any natural low point in a farm field would be considered a wastewater impoundment.

Agriculture recommends that the definition be expanded to include a description of wastewater. We agree that the clarity of the regulation would be improved if it specifically addressed wastewater. We recommend that the EQB make this clarification in the final-form regulation.

Water quality management permit.

The regulation defines “water quality management permit” in part as “A permit or equivalent document or requirements issued by the Department...” It is unclear what “requirements” would be considered the equivalent of a water quality management permit. We recommend the EQB clarify the meaning of “requirements” in the final-form regulation.

Definitions to be added to the final-form regulation.

The definition of “industrial waste” uses the term “establishment” but does not define this term. We recommend that “establishment” be defined in the final-form regulation. In addition, we note that the term “animal manure storage facilities” is used in Section 91.36 of the regulation but is not defined. We recommend that this term be defined in the final-form regulation.

2. § 91.15. Basin-wide compliance. - Reasonableness of referencing a policy statement

Section 91.15(a) states that the Department of Environmental Protection (DEP) will require concurrent compliance with Chapters 93, 95, and 16 relating to water quality standards; treatment requirements; and water quality toxics management strategy. In his comments, Mr. Hurst points out that Chapter 16 is a policy statement which, by definition, is not binding and cannot be made binding merely by incorporating it into a regulation.

Mr. Hurst asserts that the reference to Chapter 16 must acknowledge that policy statements are not made binding by referencing them in a regulation. He recommends that the Section 91.15(a) be revised to state that DEP will consider the water quality criteria in Chapter 16 in determining if the water quality standards in Chapters 93 and 95 being met. We agree that the regulation should clearly state that the policy statement in Chapter 16 contains non-binding guidelines. We recommend that the EQB clarify this point in the final-form regulation.

3. § 91.27. General water quality management permit. - Reasonableness of public notice requirements

Section 91.27(b)(1) provides that DEP will publish a notice in the *Pennsylvania Bulletin* of its intent to issue or amend a general permit and will provide an opportunity for interested parties to file comments. The Chesapeake Bay Foundation (CBF) commented that notice of all applications to use general permits should be printed in the *Pennsylvania Bulletin* and in local newspapers in the affected area to give the public the opportunity to raise issues of concern prior to construction of facilities.

Publishing applications for general permits in local newspapers and the *Pennsylvania Bulletin* would help to ensure that affected parties are aware of and have the opportunity to comment on a pending general permit. We recommend that the EQB adopt CBF’s suggestion or explain why it is not in the public interest to do so.

4. § 91.35. Wastewater impoundments and § 91.36. Pollution control and prevention at agricultural operations. - Clarity of freeboard requirements

Eight commentators question whether the freeboard requirement of at least two feet in Section 91.35(a) applies to manure storage facilities. The commentators note that the freeboard requirements in Section 91.35 conflict with the requirements in DEP's "Manure Management for Environmental Protection" publication and with the requirements in the Pennsylvania Technical Guide for Soil and Water Conservation (PA Tech Guide) developed by the Natural Resources Conservation Service.

According to the commentators, the "Manure Management for Environmental Protection" publication is outdated and doesn't reflect the more recently updated guidelines in the PA Tech Guide. Furthermore, Section 91.36 provides that operations which are required to or volunteer to submit nutrient management plans must comply with the requirements of Chapter 83. The nutrient management regulations in Chapter 83 require that manure storage facilities be designed and operated according to the PA Tech Guide.

The regulation is confusing because it appears that animal manure storage facilities designed and operated in accordance with the "Manure Management for Environmental Protection" publication are exempt from Chapter 91. However, the requirement for compliance with Chapter 83 regulations casts doubt on whether the freeboard requirements in the "Manure Management for Environmental Protection" publication or in the PA Tech Guide are controlling. We recommend that the EQB clarify in what instances, if any, animal manure storage facilities must comply with Chapter 91 and what freeboard requirements are controlling.

5. Section 91.37. Private projects. - Need

Section 91.37(a) and (b) contain language which describes DEP's policy in reviewing permit applications. These provisions are not written in regulatory language and would be more appropriately placed in a policy statement. If the EQB decides to keep these provisions in the regulation, we recommend that the language be revised to read as follows:

(a) The Department will disapprove applications for sewerage permits for private sewerage projects to be located within the built-up parts of cities, boroughs and first and second class townships, unless the applicant can demonstrate a compelling public need for the project.

(b) Issuance of the sewerage permits will be limited to private sewerage projects located in the rural parts of first and second class townships, and for which areas there is no present necessity for public sewerage.

6. Miscellaneous clarity issues.

Clarity of the structure of Section 91.27. General water quality management permit.

Section 91.27(b)(3) states, in part, "The general permit shall commence according to one of the following:..." This language is vague and confusing. It appears that the intent is to allow construction to commence under a general permit if one of four conditions are met. We recommend the EQB revise the language to more clearly reflect this intent.

Section 91.27(b)(3)(i) - (iv) lists the conditions under which general permit coverage becomes effective. Condition (i) states "After a waiting period specified in the general permit." It is unclear if this condition means that an application is deemed approved if the applicant does not

receive a response from DEP within a certain timeframe. We recommend that the meaning of this condition be clarified in the final-form regulation.

Condition (ii) states "On a date specified in the general permit." The meaning of this condition is unclear. We recommend that the EQB clarify the meaning of this condition in the final-form regulation.

Condition (iv) states "Upon receipt of the notice of intent by the Department." This condition is confusing because it could be interpreted to mean that as soon as DEP receives the notice of intent, coverage under the general permit becomes effective, regardless of the outcome of DEP's review of the notice of intent. We do not believe this interpretation accurately reflects DEP's intent because Section 91.27(b)(4) provides that DEP will review the notice of intent to determine if the facility qualifies for a general permit. Consequently, we recommend that DEP clarify condition (iv) in the final-form regulation.

Section 91.27(b)(4) is entitled "Coverage under a general permit." This section, however, describes the application process for a general permit. Therefore, we suggest the title of this section be changed to "Application process for a general permit" to more accurately reflect the content of this section. In addition, the phrase "...except as provided in subsection (c)(1), (2) or (4)." appears to be unnecessary since Section 91.27(c) addresses the conditions under which a general permit will be denied.

Section 91.27(c)(1) - (5) lists the conditions under which a general permit will be denied. We note that condition (3) actually lists two different circumstances which could lead to denial. To improve the clarity of the regulation, we recommend that condition (3) be separated into two separate conditions.

Section 91.27(e) is entitled "Termination of general permit." This section describes when the applicability of a general permit to a specific facility is terminated. Consequently, we suggest the title of this section be changed to "Termination of coverage under a general permit" to more clearly reflect the provisions of this section.

Clarity of Section 91.32. Underground injection of wastes.

Section 91.32 provides that injection of waste must comply with 40 CFR Part 144. To improve the clarity of the regulation, DEP should explicitly state that the provisions of 40 CFR Part 144 are incorporated by reference. Also, the bracket after "program" is a typographical error which should be corrected in the final-form regulation.

Clarity of Section 91.34. Activities utilizing pollutants.

Section 91.34(b) provides the following:

Upon notice from the Department and within the time specified in the notice, the person shall submit to the Department a report or plan setting forth the nature of the activity, the nature of the preventative measures taken to comply with subsection (a) and other information the Department may require.

It is unclear if a report will be required in every instance or if DEP will use its discretion to determine when a report or plan is necessary. The timeframe for the notice is also unclear, as is the meaning of "other information the Department may require." We recommend that the EQB address these clarity issues in the final-form regulation.