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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

December 21, 2007

Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-407 (IRRC #2637)
Environmental Quality Board
Safe Drinking Water; Public Notification Revisions

Dear Chairperson McGinty:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation #7-407 (IRRC #2637)

Safe Drinking Water; Public Notification Revisions

December 21, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the September 22, 2007 *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 (Board) to respond to all comments received from us or any other source.

1. General - Fiscal impact; Protection of public health and safety; Reasonableness; Consistency or conflict with other regulations; Implementation procedures; Feasibility; Need; Clarity.

The following paragraphs identify issues, concerns or questions relating to more than one section in the proposed regulation.

Fiscal impact, need, feasibility, implementation procedure

In item #24 on page 7 of the Regulatory Analysis Form (RAF) for this proposed regulation, the RAF states: "All the provisions are more stringent than federal regulations." Both the RAF and Preamble indicate that the proposed regulation will impose additional costs on water systems. Some water systems claim it is not feasible for them to quickly comply with the regulation. They will need time to generate funding, and develop and implement components of the proposed regulation. There are two areas of related questions and concerns.

First, what negative impacts on public health and safety occurred due to shortcomings in the current notification system under the existing regulations in Pennsylvania? What were the economic impacts? This information should accompany the final-form regulation submittal.

Second, why does this regulation need to be effective immediately upon final publication in the *Pennsylvania Bulletin*? When new regulations require significant change, promulgating agencies often give existing facilities a specific time period in which they can bring their operations into compliance. The Board should consider amending the final-form regulation to include a grace period or additional time for water systems to upgrade their notification programs. In addition, the Board should fully investigate all methods or alternatives that reduce the proposed regulation's fiscal impact.

Probable

In the existing regulations, the term "probable emergency situations" is used only in Section 109.707(a)(1) relating to emergency response plans. The proposed regulation adds the word

“probable” to the words “emergency situation” in Sections 109.407(a)(6), 109.408(a)(7) and 109.701(a)(3)(iii), all of which pertain to responses to emergencies. Preparing for “probable” emergencies in developing an emergency response plan as required by Section 109.707 is understandable.

Commentators expressed concern that other language in the proposed regulation expands what constitutes an emergency situation and unduly increases the frequency of reporting and public notices. The insertion of the word “probable” may further expand what constitutes an emergency and require additional reporting and notices. What is the intent? Is the Board asking water systems to report situations that **may** become emergencies as well as actual emergencies? How do water system operators determine the level of probability that would require reporting? Existing language already describes Tier 1 emergencies as events with “significant potential to have serious adverse effects on human health.” Is the word “probable” necessary in other sections beyond Section 109.707?

Coordination with other state agencies

In addition to the Board, another agency is proposing revisions to its notification requirements for water utilities. On October 14, 2006, the Pennsylvania Public Utility Commission (PUC) published a notice of proposed rulemaking to amend notification requirements specifically for water utilities. Not every water system is subject to oversight by the PUC. However, commentators encouraged the Board and Department of Environmental Protection (DEP) to work with the PUC to develop consistent notification procedures and reduce confusion and conflicts that may place duplicative and unnecessary burdens on the regulated community. We agree.

Furthermore, to assist water systems during disruptions caused by natural disasters or similar emergencies, the Board and DEP should consider consulting the Pennsylvania Emergency Management Agency (PEMA) in order to coordinate water systems’ emergency response plans with PEMA as well as local emergency management agencies. PEMA and local emergency management agencies may already have contact networks in place which would assist water systems in notifying the public and with other contingencies related to emergencies.

2. Section 109.407. General public notification requirements. - Clarity.

In Subsection (c)(4), the proposed regulation directs water systems to notify “additional recipients” identified in its “emergency response plan under § 109.707(a).” The required contacts are listed in Section 109.707(a)(2). The citation in Section 109.407(c)(4) should be specific and refer to Section 109.707(a)(2).

3. Section 109.408. Tier 1 public notice - categories, timing and delivery of notice. - Implementation procedure; Clarity.

Subsection (c) contains new options for delivery of Tier 1 public notices including hand delivery, electronic mail and “automatic telephone dialing systems or other best available technology.” In the existing regulations, Section 109.411 sets forth content requirements for the public notice and also includes provisions in Section 109.411(c)(2) for public notices in languages other than English. However, it is unclear how these multilingual provisions would apply to new delivery options such as electronic mail or “automatic telephone dialing systems.” In addition, it is

unclear what steps a water system may need to take in delivering notices to persons with disabilities. The final-form regulation should provide direction for the new delivery options to address the needs of consumers for whom English is a second language and consumers with disabilities.

The second sentence of Subsection (c) begins with the phrase: "To reach all persons served" Commentators suggested that the word "served" be replaced with "affected." This would direct public notice of emergency to the consumers that would be affected rather than all the consumers served by the water supplier. There is no need to contact consumers who are not affected and such a contact would only cause unnecessary confusion. This change should be included in the final-form regulation.

Subsections (c)(1)(i)(C), (c)(1)(ii)(C), (c)(1)(iv)(C), (c)(2)(ii), and (c)(4) provide that alternative forms or methods for delivery of public notification may be approved in writing by DEP. Is there an application process that water systems use for this approval? What standards or criteria will DEP use in evaluating the applications? If the application process and review standards or criteria are set forth elsewhere in existing regulations, cross-references to those provisions should be included in this subsection. If not, then the process and criteria or standards should be included in the final-form regulation.

4. Section 109.411. Content of a public notice. - Feasibility; Implementation procedure; Clarity.

Subsection (b)(4) requires that a water system's abbreviated notice include "a telephone number or website address, or both, where consumers can obtain the entire notice." In its comments, the Office of Consumer Advocate suggested that the first "or" should be changed to "and," and the phrase "or both" should be changed to "if available" because not everyone has access to the internet. Hence, a telephone number should always be provided. We agree.

5. Section 109.701. Reporting and recordkeeping. - Fiscal impact; Reasonableness; Feasibility; Need; Implementation procedures; Clarity.

In Subsection (a)(3) relating to one-hour reporting requirements, commentators suggested that the phrase "within 1 hour of discovery" should be changed to reflect language used by the PUC in its existing regulations at 52 Pa. Code § 67.1(c). The PUC provision requires telephone reporting "within one hour after preliminary assessment of conditions." In many situations, water systems may get an alarm from an unmanned facility indicating an event that may be an emergency situation. However, an operator must travel to the unmanned facility to verify whether the alarm is valid. Commentators are concerned that this existing language, combined with the new conditions defining emergency situations, will force water systems to make unnecessary calls to DEP and take other required steps before assessing whether a real emergency exists. The final-form regulation should address this concern.

Commentators questioned the need for the new language in Subsections (a)(3)(iii)(F) and (G) relating to one-hour reporting for "an overfeed" of a chemical or "negative water pressure in any portion of the distribution system." Commentators claim there is no conclusive evidence to demonstrate that such events are a threat to public health and safety. In addition, commentators indicate that incidents involving negative water pressure and chemical overfeeds occur frequently (in excess of 20,000 times annually across the state). However, almost every incident

is managed and corrected in ways that pose no threat to the water system consumers. Hence, mandating reporting and public notices in these situations is unnecessary, would cause undue alarm and confusion among consumers, and would erode public confidence in public water systems. The Board and DEP should work with all segments of the regulated community and the DEP's Technical Assistance Center for Small Systems Advisory Board to refine these provisions in the final-form regulation to precisely target events that pose serious threats and will adversely affect the quality or quantity of drinking water.

Finally, commentators referred to a guidance document or a "draft policy document" that DEP is developing in conjunction with this proposed regulation. Under the section labeled as "Section E. Summary of Regulatory Requirements" in the Preamble, it states that DEP "will be developing guidance to provide additional information about situations that require 1-hour reporting." What types of situations will the guidance address? Any provisions in a guidance document that create a binding norm or impose a standard on water systems should be included in a regulation rather than a policy statement or guidance document.

6. Section 109.707. Emergency response plan. - Reasonableness; Implementation procedures; Clarity.

In Subsection (a)(2)(i) relating to communication procedures and contact information, water systems are required to have contact persons and phone numbers for "local emergency management agencies" within their systems' jurisdiction. There are two questions.

First, does the term "local emergency management agencies" apply only to county and larger city emergency management agencies, or does it also include "local emergency coordinators" in each municipality (e.g., townships and boroughs)? This should be clarified in the final-form regulation.

Second, what is the process for contacting other local officials? As a result of the fluoride overfeed that affected parts of Cumberland and York counties in December 2005, press reports indicated that local government officials did not receive satisfactory notice. Under the proposed regulation, would water systems be responsible for contacting local government officials in the affected areas? An alternative would be to see if the "local emergency management agencies" already have contact networks in place for all the municipalities in their regions.

Facsimile Cover Sheet



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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Debra L. Failor
Agency: Department of Environmental Protection
Phone: 7-2814
Fax: 705-4980
Date: December 21, 2007
Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Environmental Protection's regulation #7-407 (IRRC #2637). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Dijie McCarley Date: 12-21-07