



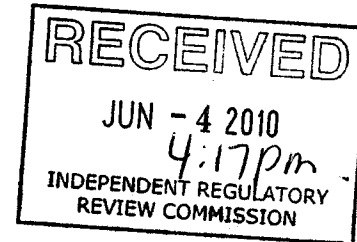
Pennsylvania Chemical Industry Council  
*Your Advocate for the Business of Chemistry*

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2806

June 4, 2010



Arthur Coccodrilli  
Chairman  
Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101

Re: Environmental Quality Board Regulation #7-446 (IRRC #2806); Revisions to 25 Pa. Code Chapter 95 – Wastewater Treatment Requirements

Dear Chairman Coccodrilli:

The Pennsylvania Chemical Industry Council (PCIC) submits the following comments regarding the final-form regulation to amend 25 Pa. Code Chapter 95 – Wastewater Treatment Requirements (the Final Rule) as it relates to Total Dissolved Solids (TDS). PCIC understands that the Department of Environmental Protection (DEP) is intent on promulgating this regulatory package as it currently stands, however, it is clear from the continued questions and legal concerns that the Final Rule has not been developed based on sound data, continues to be confusing, lacks crucial definitions, creates legal questions, and relies on yet to be developed guidance documents that do not carry the force of law to make fundamental legal and policy decisions. For these reasons, PCIC must urge IRRC to disapprove the Final Rule so that the Environmental Quality Board (the EQB) will re-examine the issues presented more carefully and clarify the language and concepts laid out in the Final Rule.

**1. The EQB has Utterly Failed to Estimate the Economic Impact of the Final Rule on Industries other than the Natural Gas Industry.**

PCIC notes as an initial matter that the EQB fails to consider the immediate and long-range economic impact upon the Commonwealth and its citizens of the Final Rule, as required by Section 5(a)(5) of the Clean Streams Law, 35 P.S. § 691.5(a)(5). This failure was evident in the proposed regulation, and was commented on by several industrial organizations and IRRC, which requested that the EQB submit a “detailed fiscal impact study” with the final-form regulation. The materials provided by the EQB in

support of the Final Rule fail to respond to this request and, guided by the factors set forth in Section 5b of the Regulatory Review Act, 71 P.S. §§ 745.5b, IRRRC should disapprove the Final Rule.

In its response document accompanying the Final Rule, the EQB relies on estimates of costs for treatment of TDS of \$0.12 to \$0.25 per gallon, based on discussions with providers of treatment facilities available for installation at gas drilling operations, whether individual or collective. Relying on cost estimates from third-party suppliers is itself dubious, but, in any event, this explanation fails to address the costs for the highly differentiated and complex treatment technologies and processes that would be required by industrial facilities outside of the natural gas industry. Instead, the EQB attempts to justify these costs by pointing out that the Final Rule adopts a new, watershed-based approach for industries other than the natural gas industry, and that these industries are not in a growth phase or on a scale as the natural gas industry.

PCIC is unable to grasp how simply shifting to a watershed-based approach constitutes a thoughtful or reasonable analysis of the costs that this Final Rule will impose on industries other than the natural gas industry. This approach certainly does not eliminate the costs of the regulation -- in fact, permitting costs will probably cost more under the new approach and expensive additional treatment operations will probably still be required in many industrial facilities. Under the Final Rule, the EQB is just trying to camouflage these facts by pushing decisions on TDS limits off into the uncertain future.

This clearly does not comply with Section 5 of the Clean Streams Law, which requires the EQB to consider the "immediate and long-range economic impact upon the Commonwealth and its citizens." The watershed approach is an analytic process for determining whether a variance to the regulatory limit is appropriate, not an economic analysis. Further, the EQB's unsubstantiated statements that non-natural gas industries are not growing are broad-based and do not constitute a consideration of economic impacts. Manufacturing, including chemical manufacturing, is widespread in the Commonwealth, employing hundreds of thousands of Pennsylvanians. According to the Pennsylvania Manufacturers Association website:

The manufacturing sector is the largest contributor to Pennsylvania's economy, generating 13.6 percent of Gross State Product and directly adding over \$75 billion in value every year. Nearly 575,000 Pennsylvanians are directly employed in manufacturing. Pennsylvania manufacturers sell almost \$21 billion worth of goods overseas, representing 92 percent of all Pennsylvania exports.

<http://www.pamanufacturers.org/> (last accessed, June 2, 2010). But the continued robustness of Pennsylvania's manufacturing base is clearly challenged by the competitive environment, cost pressures, and increasingly complex regulation. In this context, the importance of a reasonable review of the Final Rule's costs and economic impact on "other" industries is even greater than for the natural gas industry. The EQB, however, fails utterly to approach the issue in a thoughtful and reasonable manner, in

contravention of Section 5 of the Clean Streams Law and despite the requirements of Executive Order 1996-1 (Feb. 26, 1996).<sup>1</sup>

To assess the Final Rule's economic impact on our members, we asked them to estimate the costs to install and operate the TDS treatment that would be required under the Final Rule. One PCIC member company estimated that the costs for the installation of the necessary reverse osmosis treatment system, including pretreatment, would be \$13 million, with annual operating costs of \$5 million. This member also estimated that the increased electrical demand required to operate the system would result in increased annual air emissions of 2.5 tons of NOx and 2,000 tons of CO2, with accompanying pollution control costs. In addition, depending on the location of the TDS removal in the wastewater stream and the wastewater classification, the resulting salt cake and sludges from the treatment required by the Final Rule may be classified as a hazardous waste, disposal of which would cost an estimated \$1,500 per ton. At this point, our members were not able to determine how many tons of hazardous waste sludge would be generated from a TDS treatment system. These costs are significant and will have a deleterious impact on Pennsylvania's chemical and other industrial facilities.

Finally, the uncertainty left in the Final Rule (discussed further below) means that changing process flows or even product lines creates uncertainty as to the Final Rule's applicability, akin to the mass confusion found in the federal Clean Air Act's New Source Review program. This places Pennsylvania's existing industrial facilities at a competitive disadvantage for new or modified products and makes Pennsylvania appear inhospitable compared to competing states. These costs must be considered in formulating any regulation under the Clean Streams Law and there is no indication that the EQB considered them in a reasonable and defensible fashion.

In its summary of its response to comments, the EQB agrees that the different industries have vastly different wastewaters that would require many different technologies for treatment and concedes that the costs for treating to a given standard could create an "inequitable economic problem." While not actually estimating these costs, the EQB claims that the Final Rule's 2,000 mg/l standard for "new and expanding loads" of TDS in sectors other than the natural gas industry, when combined with the Final Rule's variance provisions, mitigates these costs.

The EQB fails to quantify these costs, fails to explain how it came to the conclusion that the 2,000 mg/l limit would be applied by DEP with such prudence as to avoid economic impacts, and fails to truly consider the Final Rule's economic impact on industries other than the natural gas industry. As discussed below, the Final Rule fails to provide a proper delineation between "new and expanding loads" and existing loads of TDS. Considering that the Final Rule will apply to approximately 100 Standard Industrial Classification codes, the EQB's failure to estimate the potential costs or the

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<sup>1</sup> Executive Order 1996-1 requires state agencies to follow specific guiding principles in promulgating regulations. Most critical among these are the principles that costs of regulations shall not outweigh their benefits, that they be promulgated to address a compelling public interest, that they shall not hamper Pennsylvania's ability to compete effectively with other states, and that they be clear and concise. The EQB has ignored these principles and others in the Executive Order with the promulgation of the Final Rule.

magnitude of the applicability of the Final Rule outside of the natural gas industry belies an intent to ride the Marcellus Shale play to create an entirely new regulatory structure on unrelated industries, without reasonable consideration of the economic impact.

**2. The Final Rule Fails to Adequately Distinguish between “New and Expanding Loads” of TDS and Existing Loads.**

PCIC is concerned that the proposed 25 Pa. Code § 95.10(a) fails to provide a definitive definition of the universe of discharges that are covered by the Final Rule. The term, “authorized by the Department,” is imprecise at best. In the April 14, 2010 meeting of the Water Resources Advisory Committee, DEP explained that this exemption intends to exempt all previously-authorized discharges up to designed, permitted or established levels. DEP further stated that the existing authorized TDS load could be reflected in a permit limit or the permit application if there is no permit limit, or subsequent sampling data requested by DEP if TDS was not contained in the permit or permit application. In the proposed Order accompanying the Final Rule, the EQB explains that if a permit application contained TDS loads, but the resulting permit itself did not, it means that the DEP has authorized the load for discharge without limits. The EQB also states that previously-approved loads that are not reflected in current permits nevertheless qualify the previously-approved load for exemption from regulation.<sup>2</sup> The EQB fails to clarify whether these previously-approved loads would include those loads “authorized” by DEP when a particular facility was owned by a predecessor.

This aspect of the Final Rule is capable of wildly differing interpretations by the various DEP regions. While the EQB promises that DEP guidance documents will provide more clarity on what loads have been previously-authorized, the failure to provide detailed and concrete definition in the Final Rule creates an inordinate amount of uncertainty. As noted above, this uncertainty places existing Pennsylvania industrial facilities at a competitive disadvantage for new or modified product lines, and portrays the Commonwealth as an inhospitable host for new industry. Pushing off the uncertainty to be clarified by guidance documents is not appropriate and may, in fact, be unenforceable by DEP and indefensible by permit holders. The lack of clarity in the Final Rule violates Executive Order 1996-1, is contrary to Section 5b of the Regulatory Review Act, and may even be so fundamental as to rise to the level of a violation of constitutional rights to due process.

Notwithstanding these troubling defects and not meaning to imply that the Final Rule is “fixable,” PCIC suggests the following changes to the proposed 25 Pa. Code §95.10(a) to clarify it as much as possible:

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<sup>2</sup> PCIC notes that the categorical application of this concept may not be permissible under the antibacksliding provisions of the Clean Water Act and the Clean Streams Law regulations. *See, e.g.*, 33 U.S.C. § 1342(o). The application of antibacksliding is a complicated legal question that necessitates a more detailed understanding of a particular factual scenario, but in any event the mere uncertainty of how the U.S. EPA would react to a particular attempt to rely on previously-approved loads is a further indicator of the absence of sound rationale and data upon which this regulation has been developed.

The following are not considered new and expanding mass loadings of TDS and are exempt from the treatment requirements in this section:

- (1) Maximum daily discharge loads of TDS or specific conductivity levels that were authorized by the Department prior to *[insert effective date of regulation]*. Authorized loads of TDS include its components and all loadings previously allowed to be discharged from a point source by the department, even if in fact the facility has typically discharged a lesser load than that set forth in its current discharge permit (if any), regardless of the identity of the owner or permit holder. Such discharge loads shall be considered constitute existing mass loadings by the Department under this section.
  - (i) Relocation or combination of existing discharge points of existing mass loadings of TDS do not constitute a new or expanding mass loading unless total mass loadings are increased. Reissuance of a discharge permit after the effective date of this regulation that reiterates previously-authorized loads will not be considered to be new and expanding mass loadings of TDS, whether or not such pre-existing authorized loads were set forth as permit limits.

Also, the EQB now relies on the maximum daily discharge loads of TDS or specific conductivity levels as touchstones for the regulation, without explaining how these two measures may interact or which controls. While PCIC appreciates the flexibility this provides, the Final Rule should explain the correlation between the two measures and specify which controls. In addition, there is no definition for the term, “industrial waste treatment facilities.”

### **3. Existing permits with more stringent limits**

Nowhere during the process of developing the revisions for 25 Pa. Code Chapter 95 – Wastewater Treatment Requirements has DEP or the EQB contemplated the impact of the revisions on permittees that currently have more stringent standards for the discharge of TDS than what is contemplated under the Final Regulation. It is unclear whether these facilities will be required to maintain their current limitations or if they will be able to request a permit modification. This must be addressed.

### **4. The Final Rule’s Variance Provisions Injects Unpredictable Delay into the Permitting Process**

The proposed 25 Pa. Code § 95.10(c) provides an effluent limit of 2,000 g/ml of TDS on discharges of “new and expanding mass loadings of TDS” that are not otherwise exempted by the Final Rule or subject to a DEP variance. The proposed Subsections 95.10(d)-(f) provide a process by which such a discharger can seek the variance. PCIC has significant concerns with the limitations on the availability of the variance set forth in the proposed 25 Pa. Code § 95.10(f). In particular, Section 95.10(f)(1) states that a variance will not be available unless DEP performs a watershed analysis and determines that such a variance will not reduce available in-stream assimilative capacity for TDS to less than 25% of the total available assimilative capacity at the next downstream point of water quality standards compliance. A

requirement for watershed analysis injects tremendous uncertainty into the permitting process, as the scope and time requirements of such analyses cannot be predicted.

In addition, the proposed 25 Pa. Code § 95.10(f)(1) should refer to the existing 25 Pa. Code § 96.3(d), which sets the point of compliance for TDS at the point of all existing or planned public drinking water supplies. Similarly, the requirement of the proposed 25 Pa. Code § 95.10(f)(2) creates a new point of compliance for TDS, in contravention of the existing 25 Pa. Code § 96.3(d) and without regard for a reasonable mixing zone. This is, in effect, a limitation on the availability of variances to discharges that meet the instream water quality standards, or 500 mg/l as a monthly average value and a maximum of 750 mg/l. *See, e.g.,* 25 Pa. Code §93.7, Table 3. The limitation set forth in the proposed 25 Pa. Code § 95.10(f)(2) should be deleted to harmonize it with the existing 25 Pa. Code § 96.3(d).

**5. Effective Date**

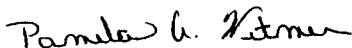
The EQB has significantly revised this regulation since it was first proposed. PCIC believes that the effective date of the Final Rule ought to be extended for industries other than the natural gas industry, in order to allow them to analyze their current facilities performance capabilities in light of projects that are currently scheduled for implementation. PCIC suggests that the effective date for such industries be extended to the date six months from final promulgation.

**6. Netting**

Some of PCIC's member companies use intake water that contains relatively high TDS, including tidal flows. The Final Rule should provide that such quantities of TDS are to be netted out in determining whether a discharge constitutes a new and expanding mass loading of TDS. In a similar vein, the Final Rule should be clarified to exempt non-contact cooling water that is discharged into the same waterbody from which the intake water was drawn.

The members of PCIC appreciate the opportunity to comment on the Final Rule urge the Commissioners to disapprove the revisions to 25 Pa. Code Chapter 95-Wastewater Treatment Requirements due to the continued questions and legal concerns that this regulation has not been developed based on sound data, continues to be confusing, lacks crucial definitions, creates legal questions and will rely on yet to be developed guidance documents that do not carry the force of law. For these reasons, PCIC urges IRRC to disapprove the revisions to 25 Pa. Code Chapter 95 proposed by the Final Rule.

Sincerely



Pamela A. Witmer  
President

cc: House and Senate Environmental Chairs

2806

**From:** Witmer, Pam [witmer@thebravogroup.com]  
**Sent:** Friday, June 04, 2010 4:00 PM  
**To:** IRRC  
**Cc:** Jewett, John H.; Kaufman, Kim  
**Subject:** PCIC - EQB Final Form Amendments to 25 PA Code Ch. 95, IRRC No. 2806, Reg. No. 7-446  
**Attachments:** PCIC\_TDS\_Final\_Rule\_PW3 PZ2.doc

Attached are comments being submitted on behalf of the Pennsylvania Chemical Industry Council in regard to the Final Form Amendments to Ch. 95 as they relate to Total Dissolved Solids

If you have any questions, please let me know  
Pam Witmer



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