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Kathy Cooper

From:	ecomment@pa.gov
Sent:	Monday, September 25, 2017 3:50 PM
To:	Environment-Committee@pasenate.com; IRRC; eregop@pahousegop.com; environmentalcommittee@pahouse.net; regcomments@pa.gov; apankake@pasen.gov
Cc:	c-jflanaga@pa.gov
Subject:	Comment received - Proposed Rulemaking: Safe Drinking Water General Update and Fees

Re: eComment System

The Department of Environmental Protection has received the following comments on Proposed Rulemaking: Safe Drinking Water General Update and Fees.

Commenter Information:

Robert Hirst
International Bottled Water Association (bhirst@bottledwater.org)
1700 Diagonal Road Suite 650
Alexandria, VA 22314 US

Comments entered:

September 25, 2017

Dear Secretary McDonnell and Members of the Environmental Quality Board:
The International Bottled Water Association (IBWA) is pleased to comment on the Pennsylvania Department of Environmental Protection's proposed revision of Chapter 109. IBWA is the trade association representing all segments of the bottled water industry, including spring, artesian, mineral, sparkling, well, groundwater and purified bottled waters. Founded in 1958, IBWA represents domestic and international bottlers, distributors, and suppliers, including several small, medium, and large companies doing business in Pennsylvania.

Pursuant to Pennsylvania's Regulatory Review Act (71 P.S. § 745.5a(a)) we respectfully request notification from the Environmental Quality Board or Department of Environmental Protection (DEP) of any information related to the final-form regulation and the text of the final-form regulation which the State intends to adopt. Please provide us with a copy of the final-form regulation or a copy of all changes to the proposed regulations incorporated into the final-form regulation on the same date these materials are submitted to the Independent Regulatory Review Commission and legislative Committees as specified in 71 P.S. § 745.5a(b).

We would offer comments on several elements of the proposed Chapter 109 regulations.

{Comments submitted in attached letter}

These links provide access to the attachments provided as part of this comment.

Comments Attachment: PADEP EQ Board Ch109 092517 FINAL.docx

Please contact me if you have any questions.

Sincerely,
Jessica Shirley

Jessica Shirley
Director, Office of Policy
PA Department of Environmental Protection
Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063
Office: 717-783-8727
Fax: 717-783-8926
ecomment@pa.gov

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IBWA
International Bottled Water Association

1700 Diagonal Road, Suite 650
Alexandria, VA 22314
(703) 647-4611
Fax (703) 683-4074
Email: bhirst@bottledwater.org

September 25, 2017

Hon. Patrick McDonnell
Chairperson
Environmental Quality Board
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building, 16th Floor
400 Market Street
Harrisburg, PA 17101-2301

Re: Proposed Rulemaking: 25 Pa. Code Ch. 109, Safe Drinking Water; General Update and Fees, 47 Pa. Bulletin 4986 (August 26, 2017).
Submitted Via eComment: http://www.ahs.dep.pa.gov/eComment.

Dear Secretary McDonnell and Members of the Environmental Quality Board:

The International Bottled Water Association (IBWA) is pleased to comment on the Pennsylvania Department of Environmental Protection's proposed revision of Chapter 109. IBWA is the trade association representing all segments of the bottled water industry, including spring, artesian, mineral, sparkling, well, groundwater and purified bottled waters. Founded in 1958, IBWA represents domestic and international bottlers, distributors, and suppliers, including several small, medium, and large companies doing business in Pennsylvania.

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We would offer comments on several elements of the proposed Chapter 109 regulations.

1. **The permitting fee provisions as applied to bottled water systems warrant reconsideration and modification.**

IBWA opposes levying of user fees or taxes intended to fund the normal work needed to operate a routine regulatory program. However, we do understand that the challenges of maintaining an adequate permit review and inspection program staff are real, and we are sympathetic to the issues highlighted in the proposed rulemaking preamble. However, there also needs to be an alternative means of supporting the program, such as legislative appropriations. Other key elements to reaching the Department's objectives are:

- Continuing efforts to improve efficiency in the regulatory program delivery (including better tools for electronic permit submissions and reporting, improved training, and streamlining processes to focus on those issues most important to protecting public health.
- Increased support of adequate General Fund appropriations to reflect the public's stake in the drinking water program.
- Ongoing support from federal program grants.

As the Department knows, all of these elements are critical. Raising permit fees alone won't solve the challenge or meet the objective. Moreover, any fees must bear a reasonable relationship to the actual cost of providing the services.

With this perspective, IBWA opposes the proposed very significant increases in permitting fees to help defray a significant portion of the cost of drinking water program administration. We believe that the state's program provides a public benefit and should be paid for with appropriated funds.

Notwithstanding our stated position on this matter, provided below are IBWA's comments on the proposed methods for which certain other fees are established. In §109.1406(a), the Department has proposed a fee for any new or major amendment to a bottled water construction permit that ranges from $500 to $10,000, depending on the "population served" by the bottled water entity. We have four significant concerns about the structure and lack of fairness of those permitting fees as applied to bottled water systems:

- First, "population served" is not a concept utilized in relation to classification of bottled water operations, and it is far from clear what it means here. Bottled water manufacturers do not have a way to count or ascertain the number of different individuals who drink their product each day or over a year. A small company that produces just 1,000 bottled water cases of 24 16.9-ounce bottles each per day (24,000 bottles/day = 2,400 gallons per day) might be viewed as serving a population over a year of 365,000, if you assume that each case is purchased by a different person, or it could be seen as serving a population of 8,760,000 if you assume each bottle produced in a year is consumed by a separate person. The point is that the calculation of population served by a bottled water system is impossible, and rather meaningless, and bears no relation to the size or complexity of the operation in terms of drinking water permit review and inspection time.
- Second, the fee schedule appears to bear no relationship to the time or cost involved in permit review and inspection for bottled water operations, particularly when compared to community water systems. Using the example above, under the

Department's proposal, the permitting fee under §109.1406 for such a very small bottled water producer (2,400 gpd) would equal that imposed under §109.1404 for the very largest community water systems (with populations of over 100,000), such as Allentown and Philadelphia. To put this in perspective, a community system serving population of 100,000+ population would be expected to have a daily production of 10 million gallons per day (based on consumption of 100 gallons per capita per day) – or about 3,300 times the amount produced daily by the small bottled water producer.1 That seems hard to justify, given that almost all bottled water operations utilize groundwater sources, with relatively straightforward filtration and disinfection systems and no issues related to distribution systems, compared to community and non-community systems which often use surface water or groundwater under the influence of surface water sources, and have extensive distribution systems requiring testing at not only the point of entry but at distant points of delivery.

- Third, from what we can discern, the time and effort of regulating bottled water systems is not related to production volume (bottles produced or number of customers), but rather the nature of the operation. The permitting application for a bottled water producer would be based on an evaluation of a production line that involves storage, filtration, disinfection and bottling, not on the number of bottles produced. We expect the time needed to review a permit for a bottled water company would be considerably less than the time needed to review a traditional municipal water system, and so any fees should be proportionately lower.
- Fourth, the pending proposal suggests that the same fee be imposed for an entirely new construction permit or for any "major construction permit amendment." The concept of "major amendment" under §109.1005(f)(1)(i) includes new sources, additions or deletions of treatment techniques or processes and new types of products. While we don't have any issues with charging a significant application fee for new sources (which clearly require more complexity and review time), some of the other amendments swept into these high fees are of a substantially different nature. Under §109.1005(f), ostensibly the mere addition of an additional ultraviolet light unit, or the production of water in a new size of bottle, could be considered a "major amendment" triggering an application fee of $10,000 for an application that should not take substantial time to review.
- Finally, most of our members are small businesses 2/ and paying even a small fee can constitute a genuine financial hardship. It is not uncommon for governmental user fee programs to provide small businesses with a significantly reduced rate (e.g., 25% or 50% of the standard fee). We urge DEP to employ this same principle to any fees imposed on bottled water companies.

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1 From another perspective, a piped water system that only distributes 2400 gpd would be on the cusp of not even qualifying as a public water system, as that amount would support < 25 individuals at a per capita use of 100 gpd.

2/ The U.S. Small Business Administration (SBA) defines a "small business" as having less than 500 employees.

Reflecting on these concerns, we would suggest that the permit fees for bottled water systems be reconsidered. Operations with similar configuration and complexity should be treated equally, with hourly fees reasonably associated with the time and effort required to review the application.

2. **The requirements in §109.503(a)(1)(A) for a "pre-drilling plan" should be clarified and adjusted to avoid duplication with similar aquifer test plan requirements administered by other agencies.**

The Department has proposed to amend §109.503(a)(1) (construction permit requirements) to add a new step in the process – requiring submission and Department approval of a "pre-drilling plan" for any new groundwater source "prior to well construction and conducting an aquifer test." As part of this "pre-drilling plan," the proposed rule would require submission of the preliminary results of a source water assessment, a hydrogeologic description, an aquifer test monitoring plan, and a proposed well construction design.

We would offer several points for your consideration.

- As we believe the Department knows, many bottled water operators and other public systems operators will conduct preliminary hydrogeologic studies and tests to evaluate potential sources before conducting more formal "aquifer tests." Such hydrogeologic studies often involve drilling a series of test wells and conducting preliminary short duration pumping to evaluate specific capacity and take water quality samples in order to ascertain whether the site is likely a suitable source. In this regard, the proposed language of §109.503(a)(1) is confusing. It refers to a "pre-drilling plan," which suggests by its terms that something must be submitted to and approved by the Department before any well is drilled. But then §109.503(a)(1) also calls for submitting with the plan the preliminary results of source water assessments, a key part of which involves water quality samples – and such source samples can't be taken without some type of test well. The Department should be encouraging, not limiting, the installation of test wells and performance of hydrologic evaluations that gather better background geologic and water quality data as a predicate to production well design and aquifer testing.
- As highlighted throughout the preamble to the proposed rulemaking, the Department's drinking water staff is already stretched very thin, finding it difficult to address the minimum requirements for Safe Drinking Water Act primacy in terms of inspections and permit oversight to assure drinking water quality. In that context, a question must be raised as to whether and why it is necessary to establish a new approval requirement under which all public water systems must stop and wait for agency staff to review aquifer test plans before proceeding with the tests required for a full construction permit application. The Department has provided guidance concerning aquifer testing protocols which allows system operators and their hydrogeologic consultants to design appropriate test plans. The Department currently reviews such plans on an informal basis, and often provides comments. But by mandating formal agency approval before proceeding (basically, making this another permit requirement), this rule could create a new bottleneck in the process

of obtaining required sources of water to meet water system quantity and quality demands.

- The fact is that aquifer test plans are currently reviewed by other agencies, sometimes in much greater detail than the Department can accord. For example, over two-thirds of the Commonwealth, the Susquehanna River Basin Commission already requires submission of aquifer test plans for groundwater withdrawals involving 100,000 gallons per day or greater from one or a combination of wells. There should be no need to duplicate those other agencies' aquifer plan review efforts.

Considering the above points, we would suggest that the Department reconsider the concept of mandating "approval" of an aquifer test plan before proceeding with a test. The current arrangement for informal review seems to be working.

At the very least, we would recommend that §10.503(a)(1) be modified to make clear that this is not a "pre-drilling plan" but rather a plan that would precede conduct of a formal aquifer test.

Finally, we seek clarification on whether the turbidity limits cited will apply only to surface water or GUDI sources, or if they will also apply to non-GUDI groundwater sources.

3. Clarification on whether §109.602 will be applied to bottled, vended, retail, and bulk water hauling (BVRB) systems.

A requirement for alarms and shutdown capabilities is generally more suited for community water systems, and needs to be clarified for how it would apply to a BVRB facility. The language in the proposed rule appears to be written for a community water system (CWS) with surface water or groundwater under the direct influence of surface water (GUDI) sources, but there is not a specific exclusion for noncommunity water system (NCWS)/BVRB systems.

4. Testing of source water, and required public notification, in § 109.1303 should remain consistent with Federal standards and other states that regulate bottled water

A. DEP should retain the current provision in § 109.1303 that allows for 5 successive *E. coli* tests prior to triggering corrective actions and public notification

IBWA's primary comment regarding the substantive elements of the proposed rule is that DEP should retain (and not delete) the current provision of § 109.1303 that allows for a water system, upon receiving an initial *E. coli* positive test, to conduct 5 successive tests of the same source water within 24 hours to determine if the original test result was a true positive or a false positive test result, and that any subsequent action should be based on the findings of those 5 successive tests. If all 5 successive tests are negative for *E. coli*, then the initial finding should be viewed as a false result and no further corrective actions or public notifications are necessary. However, if any one of the 5 successive tests from the same source are positive, then the test result should be viewed as a true positive and the water system should be required to proceed to

corrective actions and, as appropriate, to public notification. This has been the longstanding practice in Pennsylvania based on regulations promulgated by the U.S. Environmental Protection Agency (EPA), which have also been adopted by a number of other states. The 5 successive *E. coli* tests of the same source water within 24 hours is recognized by the EPA to ensure consumers will be adequately protected. We know of no real world circumstance that would call for a change to DEP's regulations in this regard, nor did DEP provide any in the preamble to the proposed rule. As the old adage goes, "If it ain't broke, don't fix it."

IBWA believes that government regulations should be grounded in good science. It is well established that testing methods for *E. coli* can provide false-positive results. EPA has stated that it "recognizes that false positive results may occasionally occur with most microbial methods (i.e., a non-target microbe is identified by the method as a target microbe). For example, the false-positive rate for *E. coli* is 7.2% for the E*Colite Test, 2.5% for the ColiBlue24 Test, and 4.3% for the membrane filter test using MI Agar."[1] This is why the EPA allows for five subsequent samples to be tested to confirm or nullify a fecal indicator-positive routine source water sample.[2] EPA has emphasized that "this limited level of confirmation would not undermine public health protection."[3] EPA also concluded that "two fecal indicator-positive source water samples at a site provides strong evidence that the source water has been fecally contaminated."[4] Pennsylvania has long provided bottled water manufacturers the opportunity to conduct additional testing on five subsequent samples from the same source within 24 hours, which is consistent with the approach taken in many other states. [6]

Accordingly, due to the possibility of false positives at the source and the associated potential for unnecessary corrective actions or public notifications, Pennsylvania should not delete the source water monitoring provisions in § 109.1303 that require 5 additional samples following the initial positive sample before requiring corrective action. As noted, EPA has determined this approach provides for adequate public health protection.

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[1] National Primary Drinking Water Regulations: Ground Water Rule, 65 Fed. Reg. 30194, 30230 (proposed May 10, 2000) (hereinafter "Proposed Ground Water Rule").

[2] *See* 40 C.F.R. § 141.402(a)(3).

[3] Proposed Ground Water Rule, 65 Fed Reg. at 30230.

[4] *Id.*

[6] States that mirror EPA's system of permitting 5 repeat samples following a single positive source water sample include the following: California (22 Cal. Code Regs. § 64430 (adopting 40 C.F.R. § 141.402)), Connecticut (Conn. Agencies Regs. § 19-13-B102), Florida (Fla. Admin. Code R. 62-550.828 (adopting 40 C.F.R. §§ 141.400-141.405)), Illinois (Ill. Admin. Code tit. 35 § 611.802), Massachusetts (310 Mass Code Regs.§ 22.26(4)), Maryland (Md. Code Regs. § 26.04.01.11-2(D)(8)), New Hampshire (N.H. Code Amin. R. Env-Dw 717.11), New York (N.Y. Comp. Codes R. & Regs. tit 10 § 5-1.52, Table 6), Oregon (Or. Admin. R. 333-061-0032(8)(d)), and Texas (30 Tex. Admin. Code § 290.109(d)(4)(iv)).

B. DEP should also take this occasion to clarify in the regulations that no public notification should be required where the water system has in place an adequate treatment program

As DEP has opened up § 109.1303 for public comment, IBWA urges DEP to make one important clarification with respect to public notification. Even if a water source has a confirmed finding of *E. coli* – and corrective actions are being taken – DEP should not require public notification (or, in the case of bottled water, a product recall) – if the water system has in place a treatment program that employs a 4-log reduction for viruses and can demonstrate that to the DEP. In that circumstance, there is no safety risk to the consumer, and we believe there is no public gain (and considerable economic harm) by requiring a product recall. We emphasize that corrective actions would still be required, just not public notification or recall if the bottled water already distributed had been treated in a way to preclude any virus contamination, and the bottler can demonstrate that to the DEP. IBWA made the same request to the U.S. Food and Drug Administration (FDA) in the spring of 2017. We ask that DEP consult with the FDA on this point so there can be consistent state and Federal expectations regarding what triggers a recall of bottled water products.

5. The following comments are provided on specific sections of the proposed rule:

a. §109.1

We request clarification on how bottled water manufacturers and bulk water sources are classified.

b. §109.301(1)

The rule discusses turbidity monitoring requirements for systems using surface water or GUDI sources. Can we assume the following does not pertain to permitted bulk spring sources (with PWS #s) that are ground water (non-GUDI) sources? (a) <0.30 NTU in at least 95% of measurements per month, and (b) <1.0 NTU at all times?

c. §109.602

We request clarification on if the revised public water system design standards apply to bottled water facilities.

d. §109.701 (referred to in §109.1008)

With regard to increased reporting and recordkeeping requirements for turbidity, required reporting of THM and disinfection byproducts, and special reporting for filters that exhibit turbidity above designated levels. Does the 1 hour reporting requirement apply to bottled water facilities?

e. §109.1402(a)(4) (see also our comments under Item #1 above)

Regarding the proposed annual fee for bottled water systems ($2,500 per year). The due date under §109.1401(c)(1) depends on "population

served" by the system. The proposed rule contains no explanation as to how the population served by a bottled water system is to be determined.

f. §109.1406

The proposed permitting fees for bottled water systems vary between $100 to $10,000, depending on population served. The current permitting fees range from $125 to $1,750. Such a large increase in fees seems unreasonable. Once again, the process for determining population served by a bottled water system is unclear. The fee also does not seem proportional to staff time involved. Adding the same equipment at a large plant would result in a fee 20 times greater than adding the same equipment at a small plant. Minor construction permit amendments at bottled water facilities = $1,000 (but a major amendment at a small plant is < $1,000). We request clarification on major versus minor amendments.

If we may provide any further information to assist the Department, please do not hesitate to contact us.

Respectfully submitted,

Robert R. Hirst

INTERNATIONAL BOTTLED WATER ASSOCIATION

Robert R. Hirst
Vice President – Education, Science, and Technical Relations

Ph: (703) 647-4611

EM: bhirst@bottledwater.org

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