

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-521 (IRRC #3177)

### Safe Drinking Water; General Update and Fees

October 25, 2017

We submit for your consideration the following comments on the proposed rulemaking published in the August 26, 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 (Board) to respond to all comments received from us or any other source.

- 1. New annual fees and proposed amendments to permit fees. – Consistency with statute; Legislative intent; Economic or fiscal impacts; Protection of the public health, safety and welfare; Clarity; Reasonableness of requirements; Implementation procedures.**

#### *Safe Drinking Water Act (SDWA)*

The purpose of the SDWA is to ensure the provision of safe drinking water to the public, and the SDWA states, in part:

**Fees to be established.** – [The Board] shall establish fees for permit applications, laboratory certification and other services. Such fees shall bear a reasonable relationship to the actual cost of providing a service. 35 P.S. § 721.4(c).

#### *Preamble*

Relating to fees, the Preamble states the Board is amending “existing permit fees” and adding “new annual fees to supplement Commonwealth costs and fill the funding gap (\$7.5 million).” Under the subheading *Part II – New annual fees and proposed amendments to permit fees*, the Board explains why the Department of Environmental Protection (Department) needs more revenues, including:

The proposed fees in this proposed rulemaking are necessary to ensure adequate funding for the Department to carry out its responsibilities under the SDWA and the Federal Safe Drinking Water Act. This Commonwealth is ranked third in the United States, with 8,521 [public water systems (PWSs)] across this Commonwealth. The Department is responsible for regulating all PWSs and

ensuring that safe and potable drinking water is continuously supplied to the 10.7 million customers they serve.

The Department's appropriations from the General Fund have decreased in recent years while the cost of staff salaries and benefits, as well as other operation costs, have increased. The result has been an overall decrease in staffing for the Safe Drinking Water Program [(Program)] of 25 [percent] since 2009. As discussed in more detail as follows, these staff reductions have led to a steady decline in the Department's performance of services necessary to ensure compliance with SDWA requirements. Based on the current funding level of \$19.7 million, approximately \$7.5 million in additional funding is necessary to increase staffing to provide necessary services.

Additionally, the Preamble includes numerous issues raised by the Board's Technical Assistance Center for Small Drinking Water Systems (TAC). For example, in describing the new Section 109.1402 (relating to annual fees) and other options considered, the Preamble states:

The TAC recommended that the Department also evaluate a surcharge rate factor based on gallons produced for each permitted facility to determine the annual fee for community [and] bottled, vended, retail and bulk hauling [(BVRB)] water systems. The TAC also claimed that bottled and vended water fees do not seem equitable in relationship to the cost of the product and asked why the fee is not based on the gallons produced. The Department does not currently have sufficient data to determine the gallons produced as this is not a required data field.

*Comments received during the Board's public comment period*

The United States Environmental Protection Agency (EPA) commented on "Annual Fees and Increased Permitting Fees," stating, in part:

EPA has no objections. EPA commends the Department for taking actions to address program challenges. EPA is hopeful that the revenue generated from the annual fees and the increased permit fees will provide the necessary resources to restore adequate staffing levels and ultimately improve program implementation performance.

In addition to EPA, several individuals commented in support of the proposed fees.

Public comments opposing the proposed fees include:

- The fees being proposed are arbitrary, capricious and not commensurate with the service provided;
- Permit fees should be based on the services provided, independent of the system size;
- The fees for medium and large water systems do not accurately reflect the actual cost of the service being provided. Medium and large water systems could be paying anywhere from 162 to 837 percent more than the actual cost of the service provided. Large and medium water system fees will be used to subsidize small water system fees;

- The proposed fees should be rejected because the budgets of water systems cannot afford more fees. Smaller communities struggle to keep their water rates reasonable and the proposed fees would increase water permit costs by 300 percent. Increased regulatory fees will impair water systems' ability to restore and rebuild the water system infrastructure;
- The proposed fees are too much of a drastic change for public water systems and their ratepayers. Fees should be phased in to allow water systems to budget for the new expenses;
- The \$49-per-hour rate and its component of indirect costs which were used to calculate the fees are questionable;
- It is questionable as to whether it is the right time to increase program requirements beyond minimum requirements when program resources are low, requiring the proposed large fee increases;
- It is unclear how the fee will be assessed. Assessing the fee by population is impractical because the water systems charge by customer accounts, not population. The fee schedule appears to bear no cost relationship to bottled water operations;
- Fees should not be based on population served or public water supply identification number. The fees are misleading because the proposed fees apply to each public water supply identification number. Some water systems have multiple water supply identification numbers and would be required to pay fees above and beyond the cost estimate of \$40,000 presented in the proposed rulemaking;
- Bottled water operators do not serve a specific population; and
- The proposed fees impose disproportionate costs for new construction and sources versus modifications to existing systems.

While acknowledging the intent of the SDWA and the Board's mandate to provide safe drinking water, we raise several concerns with the proposed fees as they relate to the criteria in the RRA.

#### *Program administration*

The current state of the Program, which is the cumulative result of numerous decisions made over many years, is cause for serious concern regarding protection of the public health, safety and welfare. The Department finds itself experiencing difficulty in meeting the directives of the SDWA to the point that it needs \$7.5 million in additional revenues from water systems and suppliers to ensure compliance. As noted above, SDWA not only envisions, but *directs* the Board to establish fees to cover services. However, the Board states in the Preamble that permit fees have not been increased since originally adopted in 1984. As to the cost of other services, the Board does not explain whether any consideration was given to implementing or increasing fees over the years in order to avoid reaching this current state. Given that the statutory directive to establish fees for services has been in place since 1984, we question the Department's decision to cut services rather than gradually increase fees as appropriations from the General Fund decreased in recent years. We ask the Board to explain why the statutory directive to establish fees to cover services was not used to sustain the Program. We also ask the Board to explain

how the Program's budget will be monitored in the future to ensure that revenues are in place to meet SDWA requirements before a budget shortfall exposes the public to the risk of unsafe drinking water.

### *Assessment of fees*

Public comments opposing the proposed fees, and even those supporting them, challenge the Board's methodology for assessing the fees. The commenters question whether fees based on parameters including population served, public water system identification number and system construction, bear a reasonable relationship to the actual cost of the services provided by the Department. Commenters raise valid questions relating to whether the statutory requirement for fees to bear a reasonable relationship to the actual cost of providing services has been satisfactorily addressed.

The Board notes in the Preamble that the TAC suggested using gallons produced as the basis for determining the annual fee for community and BVRB water systems. In the Preamble, the Board dismisses this recommendation stating, "The Department does not currently have sufficient data to determine the gallons produced as this is not a required data field." We find this explanation to be inadequate in the context of fundamental information needed to appropriately consider options for imposing \$7.5 million in fees. Regarding the lack of data, we note that a commenter suggests that the Department revise all current reporting forms, including the Annual Water Supply Report Form.

We recommend that the Board reevaluate the basis of the fees in the final-form regulation, including consideration of the recommendation from the TAC. We ask the Board to explain in the Preamble of the final regulation how the chosen method of assessment of fees bears a reasonable relationship to the actual cost of providing each service, and to explain why the TAC recommendation is not in the public interest if it is not adopted.

We will review the Board's response to our concerns related to program administration and assessment of fees as part of our determination of whether the final regulation is in the public interest.

## **2. Regulatory Analysis Form (RAF) – Economic or fiscal impacts; Reasonableness of requirements; Less costly or less intrusive alternative method of achieving goal if regulation impacts small businesses.**

### *Question #11*

The Board notes in response to RAF Question #11 that several areas of the proposed regulation are more stringent than federal requirements, and commenters take issue with the increased regulation relative to lack of staff and increased fees. The PA State Association of Township Supervisors questions whether the enhancements above the federal requirements are "to justify the new fee schedule." The National Federation of Independent Business (NFIB) questions "whether now is the right time to suggest increasing the complexity of the program beyond the requirements of federal law" with program resources currently at a premium. NFIB suggests

proposing federal minimum requirements for the Program until Program resources and funding can be brought into alignment. We ask the Board to explain the reasonableness of expanding regulatory requirements which would result in increased demands on the Department's staff and funding during a time when both staff and funding are decreasing.

#### *Question #15*

Question #15 on the RAF asks the Board to identify the types and number of persons, businesses, small businesses and organizations which will be affected by the regulation, and state how they are affected. Because the Department defines *bottled water system*, *bulk water hauling system*, *retail water facility* and *vended water system* as "public water systems," several members of the bottled water industry raise questions as to how certain proposed changes for public water systems would apply to BVRB water systems. Comments from this industry include the following:

- Section 109.602 (relating to acceptable design): International Bottled Water Association (IBWA) states that the proposed language appears to be written for a community water system, and it's unclear how it would apply to BVRB water systems. PA Rural Water Association (PRWA) and National Association of Water Companies (NAWC) believe that Subparagraph (i)(2)(iv) may be too far reaching and cost-prohibitive.
- Section 109.706 (relating to system map): Nestle comments that the focus of these requirements is on systems that distribute water via pipes, but the proposed language expands the requirements to any "public water supplier." Nestle questions how would this apply to BVRB systems.

Similarly, the Hospital and Healthsystem Association of PA (HAP) comments that it appears that a health care facility may be classified in such a way that requires the facility to obtain a public water supply permit, conduct routine water quality sampling, and provide notification to the community when the system does not meet certain operational criteria. HAP states that this places an undue regulatory burden upon hospitals, and requests an exemption from certain sections of the regulations. We ask the Board to ensure that the final-form RAF and regulation make clear who is required to comply with the regulation and how the final-form regulation affects the various segments of the regulated community.

#### *Question #27*

As noted in Comment #1, the Board anticipates that the regulated community will pay approximately \$7.5 million in additional costs and fees through this regulation. The Board responds to RAF #15 that there are approximately 5,780 PWSs that can be considered small businesses, and 924 of these are community water systems (CWSs). Question #27 asks the Board to explain whether regulatory methods were considered that will minimize any adverse impact on small businesses related to compliance or reporting standards, schedules or deadlines, performance standards, and exemptions. The Board responded no to each of these. We ask the Board to consider regulatory methods to minimize adverse impacts on small businesses or explain the reasonableness of not considering alternatives.

### **3. Determining whether the regulation is in the public interest.**

Throughout the Preamble, the Board notes that it is seeking further comment on various proposed changes. Specifically, the Board seeks comment on:

- Sections 109.301 (relating to general monitoring requirements) “on this proposed amendment, the inclusion of the additional information previously provided regarding retention of the emergency designation of interconnections and whether deferred implementation is needed”;
- Section 109.303 (relating to sampling requirements) “on whether additional regulatory language is needed for clarity”;
- Section 109.511 (relating to general permits) “on the types of modifications or activities that may be appropriate for a general permit”;
- Section 109.708 (relating to system service and auxiliary power) on actual costs, facilities considered primary components of a water system, the pros and cons of portable versus fixed generators, and alternatives for system service requirements; and
- Section 109.1402 (relating to annual fees) on proposed annual fees and the method of developing them.

Several commenters responded to the Board’s request related to these concerns. For example, regarding Section 109.303, PRWA stated that “there needs to be more thought and discussion to address a variety of situations that water suppliers face,” and Aqua states that “the proposed language is vague and will create more questions.” Comments related to fees outline concerns with the economic impact on budgets and rate-paying customers, as well as cross subsidies and whether fees could be phased in. Commenters state that the Board’s analysis of costs does not properly reflect the costs to their water systems and that the basis of the fees is not consistent with their current billing. In the Preamble the Board states that the TAC “asserted that the public water supply community needs adequate time to review and evaluate the proposed fees.” We strongly encourage the Department to organize additional stakeholder meetings with representatives from all segments of the regulated community in order to develop final-form regulations that are clear, reasonable and have the least adverse economic impact while protecting the public health, safety and welfare. We ask the Board to address the reasonableness, economic impact and implementation of changes made to these sections of the final-form regulation in the revised Preamble.

Further, if significant revisions to the regulation are being considered as a result of this input, the regulated community and other interested parties should be afforded an opportunity to review and comment on the text of the regulation through publication of an Advanced Notice of Final Rulemaking (ANFR). An ANFR would provide the opportunity to review and reach consensus on remaining issues before submittal of a final-form regulation.

**4. Section 109.202. State MCLs, MRDLs and treatment technique requirements. – Economic or fiscal impacts; Reasonableness of requirements; Acceptable data.**

The Board proposes to reduce acceptable turbidity levels in Clause (c)(1)(i)(A), making the maximum level more stringent than federal standards. Several water suppliers comment that EPA does not require measuring filter turbidity to two significant digits. The Board notes in the Preamble that the TAC had submitted the same comment to the Board. We ask the Board to explain the reasonableness and economic impact of making this requirement more stringent than federal standards.

This comment also applies to Section 109.701(a) (relating to reporting and recordkeeping).

**5. Section 109.301. General monitoring requirements. – Economic or fiscal impacts; Protection of the public health, safety and welfare; Clarity, feasibility and reasonableness of the regulation; Reasonableness of requirements, implementation procedures and timetables for compliance.**

Paragraph (11)(ii) adds the requirement that “at a minimum, all entry points shall provide water to the public on an annual basis to ensure all sources and entry points are included in routine compliance monitoring.” Several water providers raise concerns related to this provision. PRWA and NAWC state that some water utilities cannot collect one entry point sample and have all raw water sources represented. Aqua asserts that requiring annual operation is not feasible in that it eliminates the water supplier’s ability to balance capital investment as well as provide the best water quality. Aqua further states that this approach would force systems to abandon reserve or backup sources and thus increase risk to respond to extreme events. Comments from water providers and from the TAC recommend delayed implementation. We ask the Board to address in the final Preamble the economic impact and feasibility of requiring all entry points to provide water to the public, as well as the implementation schedule.

Further, EPA suggests that the Board annotate “all entry points” as including those served by back-up sources within this section, as well as in Section 109.717 (relating to comprehensive monitoring plan). We ask the Board to define the term *entry points* in the final regulation.

**6. Section 109.503. Public water system construction permits. – Economic or fiscal impacts; Clarity and lack of ambiguity; Reasonableness of requirements.**

Commenters state that the requirements under Paragraph (a)(1) are confusing because they refer to a “pre-drilling plan,” which suggests that something must be submitted to and approved by the Department before any well is drilled. However, the provision also requires the submission of preliminary results of source water assessments which cannot be taken without some type of test well. We ask the Board to clarify the requirements of this provision in the final regulation.

Related to the pre-drilling plan, Nestle and IBWA ask “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.” Considering the Department’s stated difficulty in addressing the minimum

requirements for SDWA primacy noted in the Preamble, we ask the Board to explain the reasonableness of this requirement.

**7. Section 109.606. Chemicals, materials and equipment. – Economic or fiscal impacts; Protection of the public health, safety and welfare; Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables for compliance.**

Philadelphia Water Department (PWD) comments that the term *equipment* and the expanded certification requirements in this provision are unclear. PWD states that potentially requiring every pump or piece of equipment on a treatment facility to be certified will be very costly, and it is uncertain what public health risk this proposed change is designed to address. NAWC comments similarly that the current wording in the regulation is overly broad. The Board should define *equipment*, clarify its intent regarding certification, and explain the reasonableness of the expanded certification, including addressing economic impacts.

**8. Section 109.1303. Triggered monitoring requirements for groundwater sources. – Economic or fiscal impacts; Protection of the public health, safety and welfare; Reasonableness of requirements.**

IBWA and Niagara Bottling oppose the Board's proposed deletion of the existing opportunity to collect five additional source water samples from the same source within 24 hours of being notified of the *E. coli*-positive sample to confirm if there is a problem. They state that this is an essential step to address the legitimate potential for false positives for this testing, and has been a long-standing practice in Pennsylvania based on regulations promulgated by the EPA. If the deletion is maintained in the final-form regulation, we ask the Board to address the reasonableness and economic impacts of eliminating the opportunity for further testing to prevent false positives.

**9. Miscellaneous clarity.**

EPA suggests that the Board define the term *back-up sources* in Section 109.1 (relating to definitions) and incorporate language to clarify how the proposed revisions apply to interconnections. We agree and ask the Board to clarify this term, as well as how interconnections will be affected in the final regulation.