



October 26, 2020

Sent Via Email

Independent Regulatory Review Commission
333 Market Street, 14th Floor
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irrc@irrc.state.pa.us

Re: Environmental Quality Board Regulation #7-553 (IRRC #3260)

Dear Commissioners:

On behalf of Citizens for Pennsylvania's Future ("PennFuture") and its members, please accept these comments on the Environmental Quality Board ("EQB") Regulation #7-553 (IRRC #3260). We have reviewed the comments of both the Pennsylvania Senate and House Committees on Environmental Resources and Energy ("EREC"). We write to address some points made in those letters and to encourage the Independent Regulatory Review Commission ("IRRC") to approve the more stringent water quality standard for manganese of 0.3 mg/L and to maintain the existing point of compliance for this more stringent standard at the point of discharge. We oppose the proposed alternative that would move the point of compliance to the point of surface withdrawal for drinking water supplies.

We are also aware of the IRRC's comments to the EQB dated today that seeks answers and/or clarification on five questions. To the extent that we are able to given the timing of the current IRRC comment deadline, we have included information that may respond to those questions in this comment letter.

PennFuture has a significant interest in the proposed manganese water quality standard. A main focus of PennFuture's work is to improve and protect water resources and water quality across Pennsylvania. On February 26, 2018, PennFuture provided comment and information to the Pennsylvania Department of Environmental Protection ("DEP") regarding the "Water Quality Standard for Manganese Advance Notice of Proposed Rulemaking" (48 Pa. Bull. 605) in which we expressed support for a more stringent manganese limitation that would protect additional protected water uses. On September 25, 2020, PennFuture also provided comments to EQB on the "Water Quality Standard for Manganese and Implementation" proposed rulemaking (50 Pa. Bull. 3724), supporting the more stringent manganese limitation at the existing point of compliance at the point of discharge, and opposing the alternative change in the point of compliance. We incorporate those comments by reference here.

First, the proposed 0.3 mg/L manganese standard and the exiting point of compliance are consistent with the Pennsylvania Clean Streams Law ("CSL") and the federal Clean Water Act

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(“CWA”). The CWA requires DEP to set water quality standards that are protective of human health. *See* 33 U.S.C. § 1313(c)(2)(A). The Senate EREC argues that the proposed standard is “overly protective” and the House EREC claims DEP based the standard on “hand-selected, outdated studies.” The IRRC similarly appears to question the scientific support and reasonableness of the proposed standard. However, DEP conducted a robust review of the scientific literature examining the health effects of manganese, reviewing over 60 studies on human health alone, and concluded that the existing standard of 1.0 mg/L was not protective of human health. Indeed, the U.S. Environmental Protection Agency (“EPA”) Region 3 “is supportive of [DEP’s] effort” to develop a manganese water quality standards criterion for the protection of human health which follows EPA’s applicable methodology.¹ Manganese has been identified as a nervous system toxin and the negative health effects of manganese exposure include impacts on children’s neurodevelopment. The toxic impacts of manganese cannot be ignored, despite the Senate EREC’s attempt to do so by emphasizing the false equivalence that “our bodies need manganese.” Both the CSL and CWA also require the consideration of aquatic life and other uses, such as recreation and agriculture. *See* 5 P.S. §§ 691.1, .5(a); 33 U.S.C. § 1313(c)(2)(A). Studies show that manganese is also harmful to aquatic life and livestock grazing. Thus, unlike the existing standard, the proposed standard of 0.3 mg/L for manganese properly protects not only human health, but also aquatic life and other water uses, consistent with the CWA and CSL.

Second, moving the point of compliance from the point of discharge to the point of potable surface water withdrawals would violate the CSL and CWA by failing to protect human health, aquatic life, and other uses, and allowing the discharge of a toxic pollutant into the waterway in unsafe amounts. The House EREC claims that “no federal or state law” would have been violated if DEP had promulgated regulations moving the point of compliance for the existing manganese standard as directed by Act 40. That is not the case. The proposed alternative point of compliance would leave the water between dischargers and water supply intakes devoid of protections from the toxic effects of manganese. Any aquatic life and other uses in the intervening waters would be endangered and subjected to harmful levels of manganese. It violates the CSL and CWA to allow the discharge of toxic substances in toxic amounts. *See* 25 Pa. Code § 93.8a(a); 33 U.S.C. § 1251(a)(3). As discussed above, failure to establish a water quality standard, which includes an appropriate point of compliance, protective of human health, aquatic life, and other beneficial uses such as recreation and agriculture violates the CSL and CWA.

EPA Region 3 seems to recognize this inherent problem with changing the point of compliance, as stated by a majority of the 950 commenters, that Pennsylvania must still regulate water quality to ensure that all designated uses and environmental, wildlife, and human health are protected.² It seems that EPA would be unlikely to approve the proposed alternative – dictated by Act 40 – that changes the point of compliance to downstream water withdrawal operators and leaves potentially vast swaths of waters of the Commonwealth susceptible to toxic manganese pollution.

¹ EPA Region 3 Comments (Sept. 17, 2020), *available at* http://www.irrc.state.pa.us/docs/3260/COMMENTS_PUBLIC/3260%2009-17-20%20EPA%20REGION%203.pdf.

² *See id.*

Third, changing the point of compliance to the point of portable surface water withdrawals would undermine the central purposes of the CSL and CWA, and threaten the foundation of Pennsylvania's water protection system. The proposed change in compliance point would eliminate the long-standing obligation the CSL and CWA place on dischargers to limit the pollution they release into our waters for manganese dischargers. The Senate EREC complains of significant compliance costs for the coal mining industry, however it is the dischargers that should bear the cost of treating the pollution they produce. The alternative compliance point would shift the burden and cost of pollution control from the discharger to the public, establishing a dangerous precedent and running counter to the central premise of our water protection laws. It is unfathomable as to why the Senate EREC would want to place the burden of paying for the cleanup of pollution on the public who needs clean drinking water, and not on the industry that is responsible for polluting the water in the first place; they have offered no valid or legally acceptable reason why the long-standing protections for the Commonwealth's waters should be overthrown. In its own letter, the IRRC appears to adopt the same concern for the potential cost to industry, repeatedly suggesting that EQB should work more with the regulated community and involve the mining and aggregate advisory boards, despite the unanimous support of the technical advisory boards to date for the more stringent standard and discharger point of compliance. This posture prioritizes the bottom-line for industry polluters over the interests of the public and water suppliers who would be forced to bear the costs as a result. It also overlooks the vast majority of commenters – including from the water supplier industry – expressing support for the proposed more stringent standard and the existing point of compliance, in favor of comments by the regulated industries and their supporters.

Fourth, the House EREC letter spends significant time chastising DEP for its failure to comply with Act 40 and its alleged disregard of Act 40's statutory directive in proposing this more stringent manganese standard with a compliance point at the point of discharge. However, the provision of Act 40 which directs EQB to promulgate regulations moving the point of compliance for manganese water quality criteria to the point of potable water supply intake violates Article III of the Pennsylvania Constitution. Article III, Section 3 of the Pennsylvania Constitution, commonly referred to as the single subject rule, requires that provisions within a bill enacted by the General Assembly must be germane to a single unifying subject with a common nexus. *See* Pa. Const. art. III, § 3; *Commonwealth v. Neiman*, 84 A.3d 603, 612 (Pa. 2013); *Leach v. Commonwealth*, 118 A.3d 1271, 1282-83 (Pa. Commw. Ct. 2015). Here, Act 40 contains a hodgepodge of many unrelated amendments to various provisions of the Administrative Code with wide-ranging subject matters. There is no unifying subject or common nexus. Therefore, in addition to violating the CSL and CWA, Act 40's provision requiring EQB to move the point of compliance for manganese violates the Pennsylvania Constitution.

The House and Senate ERECs both allege concern that the proposed regulation includes two alternative points of compliance, arguing that the alternatives hinder industry's ability to analyze the impact of the proposed legislation. In this unique situation wherein Act 40 directs EQB to promulgate a regulation contrary to law, EQB's proposed alternative approach is appropriate. The proposed regulation provided a thorough and clear explanation of both alternatives, thereby allowing the public to fully analyze the potential impacts of both

alternatives and provide meaningful, informed comments. Any argument that industry will be ambushed by the final regulation as a result of this proposed alternative approach is disingenuous at best.

In conclusion, IRRC should approve the “Water Quality Standard for Manganese and Implementation” regulation with the proposed 0.3 mg/L manganese criterion and the maintenance of the existing point of compliance at the point of discharge. IRRC should not approve any manganese water quality standard or regulation that changes the point of compliance for meeting those regulations away from the point of discharge into waters of the Commonwealth. Thank you for your consideration of these comments.

Sincerely,



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