

# Comments of the Independent Regulatory Review Commission



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

### Water Quality Standard for Manganese and Implementation

October 26, 2020

We submit for your consideration the following comments on the proposed rulemaking published in the July 25, 2020 *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 Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

**1. Whether the regulation is consistent with the intent of the General Assembly; Comments, objections or recommendations of a committee; Possible conflict with or duplication of statutes or existing regulations.**

This proposed rulemaking deletes manganese and the existing criterion of 1.0 mg/L from Table 3 of Section 93.7 (relating to specific water quality criteria) and adds manganese and the criterion of 0.3 mg/L to Table 5 of Section 93.8c (relating to human health and aquatic life criteria for toxic substances). Table 3 identifies a specific water use and was established for the protection of potable water supply use. Table 5 identifies organisms to be protected by the criterion, such as human health and aquatic life.

The rulemaking also proposes two alternatives for point of compliance for the manganese water quality standard. The first alternative, as required by Act 40 of 2017 (Act 40), moves the point of compliance to the point of all existing or planned surface potable water supply withdrawals. The specific language of Act 40 that forms the basis for part of this rulemaking reads as follows:

*The board shall promulgate regulations under the act of June 22, 1937 (P.L. 1987, No. 394) known as the "Clean Streams Law (CSL)," or other laws of this Commonwealth that require that the water quality criteria for manganese established under 25 Pa. Code Chapter 93 (relating to water quality standards) shall be met, consistent with the exception in 25 Pa. Code Section 96.3 (d) (relating to water quality protection requirements). Within ninety days of the effective date of this subsection, the board shall promulgate proposed regulations. (See Section 1920-A (j) of the Administrative Code of 1929 (71 P.S. Section 510-20(j)).*

The second alternative is to maintain the existing point of compliance in all surface waters, which is the point of discharge. In addition to Act 40, the EQB has cited the other environmental laws as part of its statutory authority for this proposed rulemaking. These laws include the Clean Streams Law (CSL) (35 P.S. § 691.1 et seq.), the Pennsylvania Safe Drinking Water Act (35 P.S. § 721.1 et seq.) and the Federal Clean Water Act (CWA) (33 U.S.C.A. § 1251 et seq.). The Board states that these statutes, and the regulations promulgated under those statutes, require the Department to protect the waterways of the Commonwealth.

The EQB is seeking comment on both alternatives.

The House Environmental Resources and Energy Committee (House Committee) submitted a letter stating that the proposed regulation and the inclusion of two possible points of compliance for manganese is contrary to Act 40 and the intention of the General Assembly. According to the Committee, the intent of Act 40 was to move the point of compliance for manganese from the point of discharge to the point of potable water withdrawal. Commentators from the industrial and mining sectors have expressed the same concern. Other commentators, including water supply companies and environmental organizations are opposed to Act 40 and moving the point of compliance for manganese downstream.

While a goal of the RRA is the reaching of consensus among interested parties, this Commission must first and foremost determine whether the agency has the statutory authority to promulgate a specific regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based. In making that determination, the RRA directs this Commission to consider, among other things, written comments submitted by a committee.

We recognize that the other environmental laws cited above require the Department of Environmental Protection (DEP) to protect the waterways of the Commonwealth and also the health, safety and welfare of its citizens. Commentators have argued that the requirement of Act 40 and this proposal conflict with the other environmental laws. However, the mandate of Act 40 is clear and does not provide discretion to the EQB. Given the language of Act 40, the comments submitted by the Committee, and the requirements of the RRA, we ask the EQB to explain why this rulemaking and the inclusion of two possible points of compliance is consistent with the intent of the Act 40 and the General Assembly.

## **2. Compliance with the provisions of the RRA or the regulations of IRRC in promulgating the regulation.**

The House Committee, Senate Environmental Resources and Energy Committee (Senate Committee) and some commentators representing the industrial sector believe it is inappropriate for a proposed regulation to offer two alternatives for the regulation of manganese. The House Committee states, in part, “. . . proposing two different alternatives within the same regulatory package is not the process that the Regulatory Review Act envisions or authorizes.” They contend this approach does not provide the interested parties with a clear picture of what the final regulation will require of the regulated community, and therefore, it is not possible to provide appropriate comments.

In the Preamble to the final-form regulation, we ask the EQB to explain why it included two alternative points of compliance in a single regulatory package. We also ask the EQB to explain why this approach is in compliance with the RRA and the regulations of IRRC. Specifically, the EQB should explain why this proposal meets the RRA definition of a “proposed regulation” which reads as follows:

*A document intended for promulgation as a regulation which an agency submits to the commission and the committees and for which the agency gives notice of proposed rulemaking and holds a public comment period pursuant to the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law.*

### **3. Whether the regulation is supported by acceptable data; Reasonableness; Need.**

The proposed lowering of the manganese standard from 1.0 mg/L to .3 mg/L has generated significant comment from the regulated community. The House and Senate Committees also commented on this issue. Commentators that support the lower standard believe it is appropriate and backed by the science cited and reviewed by the EQB in support of the rulemaking. Commentators opposed to the lower standard do not believe the regulation of manganese at this level is needed to protect human health and is not backed by the most recent scientific data.

We ask the EQB to review and consider the scientific data and studies provided by the commentators that are opposed to the lower standard. In the Preamble to the final-form regulation, the EQB should clearly state and justify why the lower standard is needed and why the science on which the rulemaking is ultimately based is the most appropriate for the Commonwealth.

We also ask the EQB to explain why it is reasonable to impose a manganese standard that is lower than other states and why it is reasonable to regulate manganese in a manner different than the Environmental Protection Agency.

Finally, we acknowledge the process used by the EQB to promulgate this rulemaking. This process included the issuance of an Advanced Notice of Proposed rulemaking, consultation with the DEP’s Water Recourses Advisory Committee, the Agricultural Advisory Board and the Small Water Systems Technical Assistance Center Advisory Board. The EQB also held three public hearings to solicit additional input. We believe other advisory boards of DEP could provide valuable input on this rulemaking. Since the representatives of the coal and aggregate industry have submitted comments questioning the science, need and cost associated with this proposal, we suggest that the final-form regulation be presented to the Mining Reclamation Advisory Board and the Aggregate Advisory Board for input. We believe these Boards could provide valuable input that could lead to a final regulation that is in the best interest of all citizens of the Commonwealth.

#### **4. Direct and indirect costs to the Commonwealth, its political subdivisions and to the private sector.**

The Regulatory Analysis Form (RAF) and the Preamble submitted with this proposal do not provide specific estimates of the costs or savings that may be experienced by the regulated community, local governments and state government. Potential cost of the rulemaking is an issue raised by commentators. For example, some believe that moving the point of compliance will shift costs from dischargers to public water suppliers and those costs would be passed on to consumers. Others believe that the lower standard for manganese will be impossible for some dischargers, including those involved in remining and abandoned mine reclamation projects, to meet because of increased cost.

The Senate Committee also raised the issue of cost. They question how the lower standard will affect the remediation of legacy acid mine drainage sites, bond forfeiture sites and note the potential increased costs for state and local agencies related to public highway construction.

The EQB's response regarding cost does not provide this Commission with sufficient information to determine if the regulation is in the public interest. After the language of the rulemaking is finalized, the EQB should work with the regulated community and the advisory boards noted above to determine actual costs or savings that could be realized and this information should be included in the RAF and Preamble.

#### **5. Implementation procedures.**

In response to Question #29 of the RAF, the EQB indicates that the effective date of the final-form regulation will be upon publication in the *Pennsylvania Bulletin* for CSL permit and approval actions, or as approved by the United States Environmental Protection Agency (EPA) for purposes of CWA permits. A commentator does not believe the lower manganese standard will be approved by EPA because it is not based on sound science and it is not consistent with the manner in which EPA regulates manganese. If EPA does not approve the lower standard, how will the Department proceed with the implementation of this rulemaking? We ask EQB to explain this in the Preamble to the final-form rulemaking.