ADVANCED NOTICE OF FINAL RULEMAKING (ANFR)

CHAPTER 302
ADMINISTRATION OF THE WATER AND WASTEWATER SYSTEMS OPERATORS' CERTIFICATION PROGRAM

COMMENT/RESPONSE DOCUMENT

April 27, 2010

This document presents comments submitted in regard to the Advanced Notice of Final Rulemaking (ANFR) on Chapter 302, The Administration of the Water and Wastewater Systems Operators' Certification Program and the Department of Environmental Protection (Department) responses to those comments. The proposed draft-final rulemaking was published in the *Pa. Bulletin* on January 23, 2010. See 40 Pa.B. 560. Comments were accepted until February 26, 2010.

ANFR COMMENTATOR LIST

ID	Name/Address
1.	Max G. Gill, Executive Director State College Borough Water Authority 1201 W. Branch Road State College, PA 16801 max@scbwa.org
2.	Mike Sienkiewicz 320 Parker Street Carlisle, PA 17013 sienk@pa.net
3.	Penny McCoy, Executive Director PA Rural Water Association 138 West Bishop Street Bellefonte, PA 16823 pmccoy@prwa.com
4.	Graham Orton, Director of Operations Water and Wastewater Department Buckingham Township P.O. Box 413 Buckingham, PA 18912 gorton@buckinghampa.org
5.	Marykay Steinman EPWPCOA Contract Administrator 244 Mountain Top Road Reinholds, PA 17569 epwpcoa@ptd.net
6.	James Radtke, President Central PA Water Quality Association aquadynm@epix.net
7.	Ralph G. Watters, General Manager Derry Township Municipal Authority 670 Clearwater Road Hershey, PA 17033-2453 rwatters@dtma.com
8.	Randall G. Hurst 3629 N. 6th Street Harrisburg, PA 17110 rghurst@mette.com

ID	Name/Address
9.	Scott Schalles, Analyst IRRC sschalles@irrc.state.pa.us
10.	Mary Gaiski, PHC Executive Vice President PA Manufactured Housing Association P.O. Box 248 315 Limeklin Road New Cumberland, PA 17070 mary@pmha.org
11.	Kathy Pape, Chair PA American Water 800 West Hershey Park Drive P.O. Box 888 Hershey, PA 17033-0888 Kathy.pape@amwater.com
12.	Alison Shuler, President PA Water Environment Association P.O. Box 3367 Gettysburg, PA 17325 pwea@pwea.org
13.	Michael Sedon, President WPWPCA 14 Franconia Dr. Greensburg,Pa 15601 sedonm@twp.cranberry.pa.us

GENERAL COMMENTS

1. **Comment**
   We strongly support the adoption of the final regulations as drafted. We also appreciate and acknowledge the Department of Environmental Protection (DEP) for their outreach efforts and collaboration with advisory committees and the statewide water and wastewater related associations on the drafting of this regulation and fee schedule. (3, 11, 13)
   Response
   Thank you. The Department appreciates the support and acknowledgement of our efforts. The Department strongly feels the regulatory language is much better as a result of the time spent with industry associations and representatives of the regulated community.

2. **Comment**
   We would like to express concern with the temporary suspension of some services as a result of the DEP budget cuts and furloughs. The sooner these regulations are approved as final and DEP can start charging fees; the sooner DEP can resume these suspended services. (3, 11, 13)
   Response
   The Department is making every effort to expedite the finalization of these regulations so that key components of the program can resume.

3. **Comment**
   I want to commend DEP for what has been a very long process to get where you are today. I was able to thoroughly review the comments and responses you sent and quickly go over the draft and it appears that DEP has really listened and tried to do the best possible within the constraints of the EPA funding and reasonableness. A general thing that is of a concern to all operators and owners is the recent cessation of supporting certificate upgrades, tests and wastewater training. It seems all you are trying to do with these regulation upgrades is being crippled by the current administration's reduction of funding to DEP. Hopefully that will change soon, and not after all this goes into effect and the fees generate more funding – that will take many months if not years. I passed an upgrade test but can't apply for the certificate and I have three operators on hold wishing to take upgrade tests. (4)
   Response
   Thank you. The Department is doing everything that can be done to expedite the resumption of services for this program.

4. **Comment**
   We still believe a more detailed description of each section of the regulation and why the language is needed would be beneficial. The references to supporting documentation presented to the Environmental Quality Board might not always be available to the public. However, this regulatory package will be available via its publication in the *Pennsylvania Bulletin.* (9)
   Response
   As stated previously in the response to Comment # 1 of the Comment Response Document circulated as part of the ANFR, these regulations are designed to ensure ongoing compliance with federal requirements established in the 1996 Amendments to the Federal Safe Drinking Water Act and provisions established in the Drinking Water and Wastewater Systems Operators Certification Act (Act). Specifically, these regulations address seven of the nine required

elements EPA established in their guidelines that must be included in the Operator Certification Program:

1. Legal authority to implement the program.
2. Classification of all systems, facilities and operators:
    a. Based on indicators of potential health risk with standards for certification and certificate renewal for each classification.
    b. Provisions for owners to place systems under the direct supervision of a certified operator(s) with a valid certificate equal to or greater than the classification of the system.
    c. Provisions for insuring all process control decisions are made by a certified operator.
    d. Designation of a certified operator to be available for each operating shift.
3. Operator Qualifications
    a. Take and pass an examination. Exam questions must be validated.
    b. Have a high school diploma or GED, or relevant training and experience.
    c. On-the-job experience
    d. Grandparenting
4. Enforcement
    a. Appropriate enforcement capabilities such as orders, compliance agreements and penalties.
    b. Revocation or suspension of a license for misconduct including "fraud, falsification of application or operating records, gross negligence in operation, incompetence, and/or failure to use reasonable care or judgment in the performance of duties.
5. Certification Renewal
    a. Training requirements for renewal
    b. Fixed cycle for renewal not to exceed three years
    c. Recertification if individual fails to renew within 2 years of certificate expiration
6. Resources Needed to Implement the Program
7. Process for Recertification

They also address the additional requirements established by the state legislature to:

1. Apply all the federal requirements to wastewater systems.
2. Require the submittal and review of a Criminal History Record as part of the certification process.
3. Require every certified operator to complete security training.

Both Acts also expanded the universe of operators who needed to get certified to include the operators of non-transient non-community drinking water systems and satellite wastewater collection systems with pump stations. Table 1 from the Comment Response Document is a summary of the requirements and a link to the respective chapter where each requirement is addressed.

Table 1. Requirements vs Chapter 302 Regulations

Chapter Reference	Legal Authority	Class-ifications	Qualifi-cations	Enforce-ment	Renewal	Resources	Re-cert.	State Req.
102	x	x	x					
103	x	x						
104			x					x
201			x					
202						x		
301			x		x		x	
302, 303, 304, 305			x				x	
306, 307					x			
308, 309				x				
Subchapter D			x					x
Subchapter E				x				
Subchapter F			x					
Subchapter G			x					
Subchapter H			x		x			x
Subchapter I		x						
Subchapter J		x	x					
Subchapter K			x					
Subchapter L		x		x				

The following is a summary of each subchapter and the changes made in response to comments received.

Subchapter A – This subchapter defines the universe of the regulated community impacted by these regulations, establishes definitions and clarifies the standards that must be met for certification. This subchapter was re-structured to split the universe of the regulated community between drinking water and wastewater systems and to highlight the standards of certification. A number of definitions were added or edited for the following terms:

Activated Sludge
Administrative Hearing
Board Guidelines
Certificate Program
Conventional Filtration
Direct Filtration
Environmental Quality Board
Groundwater
Permitted Average Daily Discharge Flow
Political Subdivision
Programmable Logic Controls (PLC)
Satellite Collection System
Site Specific
Ultraviolet Disinfection
Board Designated Agent
Board Secretary
Contact Hour
Department
Environmental Hearing Board
Fee
Membrane Filtration
Person
Post-presentation Credits
Recertification
Single Entity Collection System
SCADA System
Upgrade

Subchapter B – This subchapter prescribes what a complete application should include for certification, recertification, upgrade, renewal and reciprocity along with how to obtain the appropriate Department approved application forms. In addition, this subchapter discusses Operator Certification Program Fees. Revisions to this subchapter were made to clarify how to obtain appropriate Department approved application forms from the Board Secretary or through the Department's web site and to refine how the fees will be applied.

Subchapter C – This subchapter covers the procedures the State Board for Certification of Water and Wastewater Systems Operators (Certification Board) will follow in implementing its powers and duties as defined in the Act. These include the issuance of certificates for certification or recertification, upgrade**,** reciprocity, renewal, and extensions. Also, this subchapter prescribes the actions the Board can take to suspend, revoke, modify or reinstate an operator's certificate upon petition by the Department or review Department training decisions. Revisions to this subchapter were made to provide more definitive time frames for these procedures.

Subchapter D – This subchapter identifies and explains the requirements for submission of a Criminal History Record (CHR), the investigation and review procedures the Board must adhere to, the prescribed actions the Board can take as a result of a CHR, and the time frame for action by the Certification Board. Changes in this section further clarified the requirements and responsibilities of the applicant, the Department and the Certification Board.

Subchapter E – This subchapter prescribes the general requirements for Administrative Hearings. These hearings will be conducted by the Certification Board in accordance with these procedures whenever the Department petitions the Certification Board to suspend, modify or revoke an operator's license. There were no substantive changes to this Subchapter.

Subchapter F – This subchapter discusses the examination requirements. This includes general provisions for developing and administering valid certification examinations (using psychometric principles and recognized industry standards) to measure an applicant's knowledge, skills and abilities to make process control decisions. Additionally, this subsection discusses the roles and responsibilities for the Department, the Certification Board and approved

examination providers in the preparation and administration of these examinations. Eligibility requirements that an applicant must comply with in order to take an examination are also defined. Revisions to this subchapter were made to limit the situations where an operator must re-take an examination.

Subchapter G – This subchapter discusses the minimum education, examination, and experience requirements; defines the methodology for determining qualifying experience and creates an accelerated certification option for systems having to upgrade the system for various reasons that will require the available operators to also upgrade their license. Provisions for accelerated certification were modified in response to comments to clarify that operators who meet the requirements for accelerated certification do not have to meet additional experience requirements.

Subchapter H – This subchapter establishes standards for the training approval program, establishes the continuing education requirements for certificate renewal and defines the system security training requirements. Significant revisions were made to Section 302.804 in response to comments to add criteria to define when the Department would require additional training. The Department would also be required to notify the operators needing to take this additional training in writing.

Subchapter I – This subchapter deals with the classification and subclassification of water and wastewater systems. Revisions to Sections 302.901and 302.902 identified what conditions or circumstances the Department would consider when defining a change in classification and/or subclassification of a water or wastewater system. These include an increase in capacity that changes the class of the system, the addition or loss of a treatment technology, other federal or state regulatory changes in the definition of a treatment technology used at a system and the issuance of a permit changing the class or subclassification of a system.

Subchapter J – This subchapter outlines the certification classes and subclassifications for water and wastewater operators. Also, operator-in-training status, grandparented operators and laboratory supervisor certification are discussed. Section 302.1006 was revised to ensure consistency with Chapter 252, Laboratory Accreditation regulations.

Subchapter K – This subchapter applies to a professional engineer registered under the Engineer, Land Surveyor and Geologist Registration Law (63 P. S. **§§** 148 – 158.2) who has been successfully examined in civil, environmental or sanitary engineering and is a certified operator, or an applicant for operator certification. Also, provisions for issuance of initial certification and experience requirements for professional engineers are discussed.

Subchapter L – This subchapter defines the duties owners and operators may perform, identifies who can make process control decisions, lists the components of a process control plan, defines Standard Operating Procedures and its contents, characterizes the number of operators required at a system and defines the role of the operator in responsible charge. In addition, this subchapter defines the conditions under which an owner can choose to use a circuit rider or a Programmable Logic Controls (PLCs) and supervisory control and data acquisition system (SCADA) to ensure process control decisions are made properly by a certified operator.

Significant changes were made to this Subchapter to refine the duties of operators and owners to address concerns of commentators about the level of operator liability, define criteria under which the Department would require a process control plan, to further refine who can make process control decisions at a system and to eliminate the need for an operator to submit written reports to the owner when the operator suspects conditions exist that are, or may, result in a violation. The operator would still be required to report such conditions to the owner, orally or otherwise. Required compliance was clarified to only include those federal or state law or rules and regulations promulgated thereto or permit conditions and requirements applicable to the operation of water or wastewater systems. The final section in this Subchapter was added to provide that fines and penalties for violations of certain sections of the Act will only be assessed after an order of the Department has been violated.

5. **Comment**
We still believe that inclusion of more specific cross-references would benefit the regulated community in complying with this rulemaking. Several sections of the proposed regulation refer to "other" Department rules, regulations or guidelines and "applicable Federal and State laws" or similar language, including Sections 302.301(g), 302.304(a), 302.306(a), 302.306(b), 302.307(a), 302.1101(a), 302.1201(a) and 302.1202 (a)(l). To facilitate compliance and improve clarity, these phrases should be replaced with cross-references to the specific laws and regulations that apply. (9)
Response
The Department responded to this concern before in Comment # 3 of the Comment Response Document circulated as part of the ANFR. The revised language further refines these sections to require compliance with only those state and federal laws and the associated rules and regulations promulgated in response to these laws that are related to the operation of a drinking water or wastewater treatment system. In order to effectively operate a water or wastewater system, any operator should have a very good understanding of the applicable rules and regulations governing that system.

SPECIFIC REGULATORY LANGUAGE

Subchapter A. General Provisions

302.101 -DEFINITIONS

6. **Comment**
Client ID – We believe the term “client ID” should be defined. (9)
Response
Definition added.

7. **Comment**
Contact Hour - The EQB did not explain what amount of time constitutes a “contact hour.” (9)
Response
As stated previously in the response to Comment # 20 of the Comment Response Document circulated as part of the ANFR a contact hour is defined in “*Training Provider Manual for the*

Pennsylvania Water and Wastewater System Operator Training Program", Document Number 383-2300-002." This can not be defined in regulation because the length of a "contact hour" is dependent upon the type of training or continuing education experience. For example, one contact hour is equal to one hour of training for an approved course; however, a half day at an industry approved conference is also equal to one "contact hour". All these specifics can not be detailed in the regulation and are better described in guidance.

8. Comment

Fees - This definition is deleted from the Annex, but the Comment Response Document does not reflect this fact. (9)

Response

The intention was to eliminate the limitation on who would be charged a fee. This has been corrected.

9. Comment

Upgrade **–** This definition was not corrected on the first draft of the regulation. An upgrade is only required when the increased flow or new technology results in a requirement that the certification class or subclass be changed. Suggested definition: "The certification process an existing certified operator follows to change his classification to a higher one or to add a new subclassification to allow him to make process control decisions in a facility in which the classification has increased or the subclassification has changed, or for an operator in training to become certified, as set forth in section 302.303." (5, 6, 8, 12)

Response

An operator is allowed to "upgrade" his or her license regardless of whether or not the system where he or she is working also requires an "upgrade" in classification. Tying the upgrade of a license to changes in treatment or capacity of a system would prevent operators from upgrading their license on their own initiative.

10. Comment

Single Entity Collection System – The definition seems paradoxical or at least difficult to understand. The word "only" in the definition seems to preclude the system also including a treatment system. (7)

Response

This is correct. This terminology is used in reference to the class and subclassification of collection systems and the corresponding level of certification needed to operate only the collection aspects of wastewater treatment and handling. The exclusion of the treatment system in the definition is intentional.

302.103 - SCOPE

11. Comment

The "exemption" provisions of subsection (c) are incomplete; leaving a class of systems that is not mentioned in this section at all. Specifically: water systems that are not public water systems are not required to have certified operators. The exemption, however, refers only to "a water treatment device that serves a single private residence." In fact, however, water treatment devices

that serve several private residences are exempt because they are not public water systems. Commentator #5 also suggested a revision to separate water & wastewater and take out devices. (5, 6, 12)

Response

This section has been revised to more clearly identify the types of systems that must comply with the requirements of this regulation.

12. Comment

Suggest changing "…the available operator…" to "…an available operator…" in Section 302.104(a). (7)

Response

This wording has been changed as suggested.

Subchapter B. General Requirements for Applications for Certification Actions

302.201 – FORM OF APPLICATION

13. Comment

The Comment Response Document provides a good description of how work experience can be verified. We believe the description should be included in the regulation under Section 302.201(b)(2)(ii) and Section 302.201(e)(3)(ii). (9)

Response

As stated previously in the response to Comment # 37 of the Comment Response Document circulated as part of the ANFR, the Department feels the method of verification should be left to the discretion of the operator and the direct supervisor and not mandated by regulation. If the operator can not prove this to the satisfaction of the supervisor, then the supervisor shouldn't sign off on this verification. In that case, the operator is going to have to demonstrate that he or she has a high school diploma or GED in order to get certified.

302.202 – OPERATOR CERTIFICATION PROGRAM FEES

14. Comment

The Comment Response Document does not provide a specific statutory citation to the Certification Act for each of the fees. In addition, our second concern has not been addressed. The second concern was; what is the EQB's statutory authority for a fee structure that is intended to cover the cost of the water and wastewater program not covered by federal funding? (9)

Response

The Department disagrees with this comment. As stated previously in the response to Comment # 40 of the Comment Response Document circulated as part of the ANFR, the fees set forth in section 302.202 are authorized under Sections 1004(b)(6) and 1004(b)(3) of the Act. Section 1004(b)(6) authorizes the Department to "…establish and collect such fees for attendance at department-sponsored training or continuing education…and for approval of training and continuing education conducted by others as may be reasonable and appropriate to recover the cost of providing such services." Section 1004(c)(3) of the Act provides that the Environmental

Quality Board has the power and duty to "establish fees for examinations and applications for certification, recertification and renewal of certification as may be appropriate to recover the cost of providing such services." The proposed fees are equitable and relate to training and certification activities regulated under the Act. The fees were developed with input from the Certification Program Advisory Committee (CPAC), The Small Systems Technical Assistance Center Advisory Board (TAC), the Certification Board, the Water Utility Council and other members of the regulated community through a series of public meetings held in December 2008. The services provided under the Act are for the benefit of owners, training providers and examination providers as well as for operators. Accordingly, consensus was that everyone who provided services under the Act should share equitably in recovering the costs for providing those services.

15. Comment

We understand the rationale for the use of the word "should", but it is still non-regulatory language that cannot be enforced. (9)

Response

This information helps the Department process an application for certification action. However, it does not prevent the application from being processed. In discussing the wording for this section with CPAC and the Certification Board, it was deliberately left as "should". If this language was revised as suggested, the amount of staff time required to send the application back as incomplete is more than the time required to look up the information in the data management system used for the administration of the program. Members of CPAC and the Certification Board were also concerned about the delay this would cause the operator in obtaining certification. Under 302.202(c), the form completed by the owner also includes the PWSID or NPDES permit number. Having this information on the check helps staff process the payment more efficiently, but does not prevent this processing. Sending the paperwork back as incomplete just adds more time to the process.

16. Comment

The Comment Response Document explains the derivation of the $10,000 limit, but does not specifically address whether the EQB has any explicit statutory authority for that limit. (9)

Response

Under section 4(c) of the Act, the Environmental Quality Board has the duty and the power to adopt such rules and regulations of the Department as it deems necessary. As provided in Section 4(c)(2), among the powers included is the power and duty to "establish fees for examinations and applications for certification, recertification and renewal of certification as may be reasonable and appropriate to recover the cost of providing such services." The Act does not establish an upper limit, but so long as it is reasonable, it is legally defensible. In the Department's view, the $10,000 limit is reasonable.

17. Comment

The references to Section 302.202(b) are incorrect. The correct reference is Section 302.202(d). (9)

Response

These references were corrected in the version of the draft regulations circulated as part of the ANFR.

18. Comment

Explain post-presentation credit application. (1)

Response

The operator can submit an application for "post-presentation credit" to get credit for pre-certification or continuing education training the operator successfully completed that was not previously pre-approved by the Department. In the early stages of the program, there were a limited number of approved courses available for operators. This process provided operators with another alternative to meet the requirements for certification and certificate renewal. There are now over 2000 different approved courses. As a result, the Department has seen a significant drop in the number of post-presentation credit applications. The review and approval of these post-presentation applications is very staff intensive. The intent behind this fee is to recover the costs for the processing of these applications and to discourage the use of this alternative.

19. Comment

Why are online courses more expensive? (1)

Response

The purpose of these fees is to recover Department staff time devoted to the development of these courses. The staff time to create a web based training (WBT) course is much higher than the time needed to create a classroom based course due to the nature of the medium. With WBT, the course author has to be considerate of the fact that they are not present in a classroom setting to answer questions. Therefore, a WBT course must cover a multitude of possible situations and questions for the participant. The authoring process also involves writing descriptions of desired graphics and animations, and writing scripts for audio narration and possible video. Once a WBT script is authored the course must be developed in the proper software. In addition, graphics, animations, and audio must be created. Once the electronic version is created, the course must be reviewed and tested by subject matter experts to ensure the course is accurate and displays as intended. Once a web-based course is created, the cost of course delivery is minimal. As a result, WBT is a very cost-effective solution for delivery of training content that does not change. On the other hand, the classroom format is also an essential tool for Department staff to deliver content that must be either delivered quickly, changes with time or serves a "one-time" need for information exchange where it is more cost-effective to devote staff time to course delivery.

20. Comment

What services are provided for the annual service fee for systems? (1)

Response

These fees support the implementation and administration of the Operator Certification Program; including the processing of applications for certification, certificate upgrade and renewal, the development and administration of the certification examinations, the approval of training courses for pre-certification and continuing education and compliance assistance. The goal behind the delivery of these services is to protect the environment and the public's health and safety by ensuring that certified operators with the appropriate knowledge, skills and abilities make appropriate process control decisions during the operation of water and wastewater treatment systems, water distribution systems and wastewater collection systems. The fees were developed with input from CPAC, TAC, the Certification Board, the Water Utility Council and

other members of the regulated community through a series of public meetings held in December 2008. The services provided under the Act are for the benefit of owners, training providers and examination providers as well as for operators. Accordingly, consensus was that everyone provided services under the Act should share equitably in recovering the costs for providing those services.

Subchapter C. Board Procedures and Actions

302.301 – BOARD PROCEDURES FOR CERTIFICATION ACTION

21. Comment

We believe that including or referencing appeals rights in the regulation would benefit the regulatory community. We note that such references have been included in other parts of the rulemaking. (See §302.308(d)) (9)

Response

The Department addressed this issue in the response to Comment # 56 of the Comment Response Document circulated as part of the ANFR. In addition, this section outlines the process for the review of applications for certification. Section 302.308(f) provides for the appeal of a final action of the Certification Board regarding the suspension, revocation or modification of a certificate to the Environmental Hearing Board.

302.306 - CERTIFICATE RENEWAL

22. Comment

We are unable to find a response to our concern pertaining to a possible conflict with §302.306 (d) and (h). Subsection (d) states that: "A certified operator who fails to complete the continuing education requirements within the 3 year cycle shall apply for recertification." However, Subsection (h) allows a certified operator whose certification has expired not to apply for recertification but to renew their certificate within 24 months following the expiration date of the certificate, provided that the operator completed the continuing education requirements. The EQB needs to rectify the inconsistency between these two subsections. Similar language is also found in Subsection (i). (9)

Response

There is no conflict between the three subsections. Subsection (d) establishes the requirement that all continuing education must be completed within the operator's three year cycle. Subsection (h) allows the operator up to two years after expiration to renew a certificate, provided the continuing education requirements were met within the three year renewal cycle. If either condition is not met, the operator can not renew and must apply for re-certification. Subsection (i) requires the Board Secretary to provide a list of those operators who have applied for certificate renewal that have not met the continuing education requirements.

23. Comment

The concept for the carry-forward of continuing education credits is simple: operators should be encouraged to take continuing education that benefits them and adds to their practical

knowledge. Taking training merely for the purpose of "counting beans" makes no sense. In addition, employers will generally not pay to take courses that are in excess of the minimum required training hours. Therefore, the schedule of useful training will not always meet the three year cycle established by the regulations and operators will sometimes forego taking useful training, especially when it occurs near the end of the cycle (sufficient credits having already been obtained for that cycle). This has already been demonstrated to be the case during the implementation of the Department's Guidelines. *My comments are intended to increase professionalism by allowing operators to take useful training whenever it is offered.*

Accordingly, the Department should provide a rule that encourages constructive and useful training, which will improve the professionalism of operators. It can do this by allowing operators to take ADDITIONAL training and "roll over" or carry forward the excess credits into the next training cycle. Obviously, as also discussed in my prior comments, there should be some reasonable limit on the number of credits that can be rolled over. In my prior comments I suggested a maximum of ten hours to be carried forward into the next cycle so that some continuing education would be required during any of the three year cycles. I repeat that suggestion here, modified slightly to allow for the different number of required credits for different operators.

In response to prior comments on this matter, DEP admitted that there is no restriction on credit carry-forward by EPA and that this is an acceptable practice, in use in other states (*Comment Response Document* Comment #64). However, the Department noted that it does not CURRENTLY have the technical capabilities to implement such a program, apparently due to lack of qualified computer programmers. This current technical incapacity does not mean that the program should be permanently prohibited from ever implementing a carry-forward program. Provision should be made for the time when DEP can develop a more professionally administered program. Accordingly, Section 306(d) should say, "Continuing education must be successfully completed during the certified operator's three year certification period. Carry-forward credits from a prior certification period may be applied as provided in section 802(d). Section 802(d) should say, "If the Department's continuing education tracking program is capable of allowing carry-forward of training credits, then operators will be allowed to carry forward a maximum of one-third of the required contact hours (in excess of the number required by section 302.803 into the next renewal cycle. For instance, if the required number of hours is 30, the operator may obtain 40 hours of training during one cycle and carry 10 hours forward into the next training cycle." (5, 6, 8, 12)

Response

At CPAC, TAC and the Certification Board's request, Department staff went back to the US Environmental Protection Agency (EPA) to confirm the Department's interpretation of the federal guidelines. The Department has learned that the guidelines have been interpreted differently across EPA regions. Some regions allowed states to include "banking" of continuing education credits as an option, while other regions did not. The current position of EPA Region 3 is to allow states to include "banking". However, the majority of the states across the nation do not allow for "banking", including all of the states in EPA Region 3 (Maryland, Virginia, Delaware and West Virginia).

Since "banking" is now a possible option, the Department has done a preliminary review on what it would take to administer this component of the program. To complete the necessary revisions to the data management system it will take a minimum of 22 weeks of dedicated staff time to do the necessary programming at an estimated cost of $82,500. Additionally, there would be ongoing maintenance and programming update costs to maintain the system. Depending on progress made, these fees could then be reduced with the next review of the fee structure by the Environmental Quality Board. As with many projects, these costs may likely be higher due to unanticipated problems that come up as the programming is completed.. However, considering the number of high-priority projects currently in the queue for the Bureau of Information Technology and the current budget climate, implementing this project is unlikely within the next several years. To implement a banking structure now would require the tracking of these hours to be done by hand. Accordingly, additional staff resources would be needed. To cover these additional staff costs and the costs for the preliminary revisions to the data management system, the renewal fees would need to be increased from $60 to $75 for at least one three year renewal cycle.

There are a number of additional issues and questions that would have to be answered before this service could be provided as follows:

1. Is there consensus among the regulated community to allow "banking"? The Department has heard differing opinions as to whether this is a good idea or not. Before devoting the necessary additional resources to making this change in the program, the Department needs to be reassured that the regulated community is willing to pay for the increase in program costs needed to provide this service. As stated above, the Department estimates the renewal fee for operators would have to increase from $60 to $75 to pay the costs of creating the capability to provide this service.
2. Is there enough of a demand for "banking"?
3. CPAC, TAC and the Certification Board recommend limiting the number of hours that could be "banked". The commentator recommends one-third of the total number of hours. Is this an acceptable definition of "limited", or should the number of hours be more or less?
4. Should the number of hours "banked" also be limited to certain types of training, or should all Department-approved training be eligible?
5. Should the time frame of when the training is taken for "banking" be limited? For example, should this be limited to training taken in only the last year of an operator's cycle?
6. Should the "banking" option be limited based on the type of certification? For example, should grandparented operators be allowed to "bank" credits; and, if so, how much? What about bi-operable operators? Should they be allowed to "bank" training for either of their licenses, or both licenses?

As a result of this analysis, the Department proposes to move forward with the regulations without this option. Over the next several months, the Department will work with CPAC, the Certification Board and other representatives of the regulated community including approved training providers and certified operators to resolve the issues identified above. The Department will then come back to the Environmental Quality Board with the results and proposed revisions to the regulations, should the conclusion be to include "banking" as an option. This will be done

as soon as possible, but no later than three years from now when the Department is required to submit the first review of the proposed fee structure.

24. Comment

Course credit carry-forward already exists. PSATS has a program that they would probably be happy to share with DEP – in fact they are administrating the SEO program for DEP. (4)

Response

The program referenced here is actually administered by the Department, not PSATS. There are two reasons why this model will not work for the Operator Certification Program. First, it is a very limited Access Database that the Department is in the process of completely re-designing because it no longer meets the needs of the SEO Program. In contrast, the database system used to track the continuing education credits for the Operator Certification Program is part of the Department-wide database management system used to track all permitting and licensing transactions called eFACTS. This program is designed to meet all Department permitting needs, not just the licensing needs of the Operator Certification Program. As a result it is much more complex and extremely difficult to develop or modify, once programmed. Second, the SEO program tracks the requirements for 982 active sewage enforcement officers. One staff person devotes half of their time to administer this program; due, in large part to the limitations of the data management system and the need to track these carry-forward credits. There are approximately 10,400 certified operators in the state. Providing the same level of staff oversight provided in the SEO program for this many individuals is simply not feasible.

Subchapter D. CRIMINAL HISTORY RECORDS

302.403 - REVIEW OF CHR BY THE BOARD

25. Comment

Section 302.403(e) (Review of CHR's by the Board) - The Comment Response Document explains the timing involved with the preliminary review. We recommend that it be included in the regulation.

(9)

Response

This language was added to the regulation.

Subchapter F. PREPARATION AND ADMINISTRATION OF CERTIFICATION EXAMINATIONS

302.603 – EXAMINATION ELIGIBILITY

26. Comment

The current examination process has been shown not to work, creates additional work for DEP, and does not compensate the Department for the associated labor, raising the costs for the rest of us. Specifically, the current system allows operators to take the exam without charge any number of times, and only charges once they pass it and apply for certification. As a result, I have been

told that some applicants take the exam merely as a free training aid. Operators and owners are being asked to fund the cost of examinations for people who are not capable of passing it or who are using the exam as free education. Proposed Section 603 perpetuates this costly and absurd system. Since the Department has told us how desperate for money it is and even proposes charging substantial fees for doing nothing at all, it seems only reasonable to charge fees for exams, which require DEP staff time. I suggest deleting paragraph (d) and providing in paragraph (a) that the applicant pay the examination fee for every exam he sits for. (6, 8, 12)

Response

The Department disagrees with this comment for three reasons. First, the modifications the Certification Board and the Department made to the examination process in 2004 have proven to be extremely successful. For the same amount of Department staff time, the number of examination sessions delivered per year has more than doubled. In addition, this process has allowed operators to register for an examination up to a few days before the examination session is scheduled when necessary. The previous process established a registration deadline of 75 days before an examination session, no exceptions. If the change in policy advocated by this commentator is implemented, this flexibility will be lost. Second, Section 603(d) requires operators who have attended five examination sessions without applying for certification to pay for those sessions before attending a sixth examination session. Statistics for examinations delivered before July 2009 show that for all but four of the technology examinations less than 2% of the examinees have passed the examination in less than four tries. Finally, it takes the same amount of time to process a check for one examination session as it does a check for five examination sessions. The amount of the check is irrelevant. Therefore, to implement the policy suggested by this commentator, the amount of staff time collecting the examination session fee will increase by a factor of five, resulting in the need to hire additional staff. This additional cost would have to be passed on to the operator, thus making costs for the operator to get certified that much higher. The Department recognizes there may be a few examinees that may never pay the examination fee because they quit trying to pass the examination after five tries. Based on this analysis, the increased cost to charge the examination fee for every session to recover these fees will exceed the amount of money that would be collected.

27. Comment

a. Paragraph 603(e)(2) requires an operator to re-take the certification exam if she obtains 29 hours of training (instead of 30) during the compliance period. This is excessive, pointless and punitive. It would result in trained, experienced operators losing certification for months while waiting for the next exam, as well as the added expense (assuming that they don't just decide to not renew their certification, thus losing even more certified operators). I understand that DEP may already have been implementing this practice under the informal "guidelines," but there is no need to codify it. Furthermore, and most importantly, such a draconian requirement is NOT required by the EPA guidelines. DEP staff has admitted that they cannot point to any federal requirement to this effect.

Obviously, if an operator obtains no or very little training, their certification should lapse. But some reasonable accommodation should be made for operators who are close to having the necessary training credits. Instead of rescission, suspension of certification until the credits are obtained can be added as a provision under §§ 306 and 308. A time limit to do so would also be appropriate (and this would automatically limit the number of hours that the operator could be

deficient). This would "punish" the operator sufficiently without causing the loss of even more trained, certified operators.

Suggested language is provided below: that the regulations provide that if credits are not obtained, certification will be suspended and the operator will have 90 days to obtain the necessary credits (which, of course, would not count toward the next compliance period's requirements). If the credits are not obtained, then the certification will be rescinded and the operator would have to apply for recertification, including re-taking the exam. Since this rule would not allow operators who had not obtained necessary training to continue to be certified, it does not conflict with the EPA guidelines.

b. Secondly, paragraph (e)(2) does not provide for the extensions discussed in §307. If an extension is granted for extraordinary circumstances, then the requirement to re-take the exam should also be waived. Otherwise, §307 would be pointless.

c. Paragraph (e)(3) requires re-taking the examination after "suspension or modification" of certification. Again, the only apparent reason for this is to inconvenience and punish operators, not to further the purposes of professional certification. Certainly, there is nothing in the Act or in the EPA program requirements that require this. (Again, I note that DEP staff has admitted that this is NOT an EPA requirement.) While re-taking the certification exam may be appropriate in certain instances, a blanket requirement applicable to ALL suspensions has no rational purpose.

Even worse, certificates can be **modified** for a variety or reasons. Since modification would never be used for malfeasance, there does not seen to be any reason to require re-testing as a result of certification modification. For instance, an Upgrade is a modification. The regulation as written requires an operator to take the certification exam again simply because the Board agreed that he was eligible for an Upgrade. This is clearly not a reasonable requirement.

d. Recommend the following:

(1) Paragraph 603(e)(2) should be deleted.

(2) Insert a new paragraph "(c)" under Section 308: "Certification will be suspended by the Board if an operator does not attain the continuing education credits as set forth in Section 803 and has not received an extension as provided by Section 307. A suspension under this paragraph will be referred by the Board Secretary to the Board for revocation if the necessary continuing education credits are not obtained within ninety days of the expiration of the certification. If the necessary training credits are obtained and all other requirements for renewal are met, the Certificate will then be renewed by action of the Board. The 3 year renewal period will commence from the date of the expiration of the original certification. Training credits obtained to meet this section do not count toward the required training for the new compliance period. An operator subject to revocation under this paragraph may apply for recertification.

(3) As discussed in comment (c) above, paragraph 603(e)(3) should address valid issues of operator competence. It should say, "The Board takes action to suspend certification pursuant to

§ 302.308(b)(1) or (4) (related to suspension for negligence, incompetence or failure to use reasonable care and professional judgment in performing the duties of a certified operator). A certified operator whose license is revoked by action of the Board under this paragraph may not apply for recertification."(5, 6, 8, 12)

Response

(a) A number of business processes were put in place by the Board and the Department to help operators meet the continuing education requirements within the three year time frame. Program staff does everything possible to ensure an operator does not lose their certification due to a small shortage in the amount of continuing education completed. Since the continuing education requirements were put in place, the 10,400 operators have completed over 14,500 three year renewal cycles. Of that, 1885 had no continuing education credits and 638, or 4%, had a few credits. In essence, these revisions would create a component to the program that would require Department staff resources to serve less than 4% of the certified operators in the state, assuming all 4% want to remain working as a certified operator. In addition, since 2005, when the first three year renewal cycles where continuing education credit became a requirement; the Board has denied only 176 applications for renewal based on a lack of continuing education. Of that, 69 operators had completed some of the needed training where another 90 days might have made a difference.

(b) The whole purpose for an extension is to avoid the loss of an operator's license, thus requiring the operator to re-take the examination. In approving a request for an extension, the Board is also waiving the requirement to re-take the examination; provided the operator complies with the requirements established in Section 307. Section 603(e)(3) has been deleted.

(c) The Board has the responsibility to determine when a license should be modified, suspended or revoked. In making this determination, it also has the responsibility for defining the conditions for re-instatement should it decide to modify or suspend a license. Licenses that are revoked can not be re-instated. Upon further review, the Department determined Section 603(e)(3) takes the discretionary ability away from the Board to define these conditions. Therefore, this provision is deleted.

(d) The recommended changes to Section 308 diminish the discretionary ability of the Board to grant, or not grant, an extension depending on a given situation. Based on the numbers cited above, the Department feels that the additional program costs to implement this provision do not justify adding this additional level of bureaucracy to the program. A more effective use of staff time is to implement the current more proactive approach to help operators avoid this situation in the first place. As stated above, Section 603(e)(3) is deleted.

Subchapter G. Education, Examination and Experience Requirements

302.702 -- EXAMINATION REQUIREMENTS

28. Comment

The Comment Response Document relative to this section explains how scores are set. This should be included in the regulation. (9)

Response

Sections 302.601(a) and 302.702(c) was modified as suggested.

302.703 - EXPERIENCE REQUIREMENTS

29. Comment

College course credits for certification are too narrowly defined. Section 702(c) provides that college credits only apply for "water or wastewater" courses. Many useful classes are not titled that way and people taking them would not even submit them for review since the regulation is so specific. Many colleges have classes in related areas such as chemistry and math, and in vo-tech classes such as pump maintenance and electrical systems, that are not specifically "water" or "wastewater" classes, but which help prepare operators for their professional duties. It would be more appropriate to give credit for "classes related to operations or useful knowledge and duties of an operator." This would give applicants the incentive to submit them for approval and in doing so, to discuss how each class was appropriate for issuing credit. Commentator #5 further suggested revision to 702(c), last sentence "…completion of one college credit in water or wastewater related classes from an accredited college or university." (5, 6, 8, 12)

Response

Section 703(c) was modified as suggested by Commentator #5.

30. Comment

The regulation has been amended to reference the fact that courses will be approved in accordance with its guidelines. We recommend a more specific reference to the guidelines that need to be followed. (9)

Response

The entire training approval process is outlined in the Department guidelines, "*Training Provider Manual for the Water and Wastewater System Operator Training Program", 383-2300-002*. All training approved by the Department is listed in the Department's Earthwise Academy. The applicant can also contact the Department for the same list.

Subchapter H. CONTINUING EDUCATION AND TRAINING

302.804 - SYSTEM SECURITY TRAINING REQUIREMENTS

31. Comment

If other providers of security training can charge a fee, what is the cost of that fee and what is the overall fiscal impact to the regulated community? (9)

Response

The operator will pay the fees identified in Section 302.202 if he or she takes the Department's course. However, other approved training providers may also be delivering the course, or something similar if approved by the Department. In that case, the fee charged will be determined by the training provider. The operator can then choose which provider to take the course from and in what format.

32. Comment

In response to the questions posed in our comments, the EQB has responded that requirements have been developed. However, the regulation has not been amended. What are those requirements? What guidelines should be followed? We ask the EQB to respond to all of the questions raised in our comments and to consider placing the requirements in regulation. (9)

Response

As stated previously in the response to Comment # 103 of the Comment Response Document circulated as part of the ANFR, the Department has developed a five hour classroom and web-based course for this purpose. The Department chose not to put this level of detail in regulation because it prevents a training provider from developing either a shorter or longer course that covers the same material. Instead, these courses must meet criteria defined in the Department's training approval guidance document, "*Training Provider Manual for the Water and Wastewater System Operator Training Program,* Document number *383-2300-002*. The operator can either take the course from the Department or another training provider approved by the Department to deliver the same, or a similar course

33. Comment

Similar to our concern above, no language was added to the regulation. What guidance documents should be followed? (9)

Response

As stated previously in the response to Comment # 104 of the Comment Response Document circulated as part of the ANFR; the operator will demonstrate that he or she has the necessary knowledge, skills and abilities through successful completion of the course. The assessment methods used in the Department's course were created in accordance with the Department's training approval guidance document, "*Training Provider Manual for the Water and Wastewater System Operator Training Program,* Document number *383-2300-002*. Courses developed by another training provider must also follow these criteria in order to be approved.

34. Comment

Are all operators who are certified prior to this new regulation exempt? (1)

Response
Every certified operator must successfully complete a Department-approved system security training course. There are no exemptions. All certified operators must meet the system security training requirement in their first complete renewal period following the adoption of the new regulations, thus giving everyone three years to complete this requirement.

35. Comment
Section 302.804(g), newly added to the second draft, is vague with regard to when DEP can require additional security training. Specifically, with regard to (2) and (3): what are "security issues"? The liability needs to be defined in some way, so that operators know what is expected of them and DEP knows when requiring the additional training is appropriate.

Secondly, if there are "security issues" at a system, what criteria will DEP use to determine that particular operators are in need of training? That is, if the SCADA system is hacked, would the solids handling operator need to be re-trained? There must be some criteria in the regulation that DEP and the operators can turn to.

Additional issues of ambiguity include: How will the Department notify the operator? How long will the operator have to respond to the notice? Will the operator be afforded the right to challenge the basis of DEP's decision? If the operator disagrees that there are "security issues" or that additional training is necessary, who will hear the case?

These issues of substantive and procedural due process can be addressed by the use of orders. Suggest the following revisions to § 804(g): "(g) The Department may issue an order under section 1004(b)(1.1) of the Act to one or more certified operators requiring them to attend and successfully complete an additional Department-approved system security course(s) when one or more of the following occur:

(1) (*As drafted.*)

(2) The Department identifies deficiencies in security measures or practices at a system, identifies the operators responsible for implementing these measures or practices, and identifies the additional security training necessary for these operators to address these deficiencies.

(3) The Department identifies security breaches or deficiencies caused by one or more operators for which additional training would be beneficial.

(4) A new or updated security course becomes available and is determined by the Department to be beneficial for certified operators. (5, 6, 8, 12)
Response
In most cases where the Department might exercise this option, it will be to establish additional security training requirements for a number of operators or for all operators. Section 804(g) requires the Department to provide written notification. Requiring this written notification to be in the form of an order is excessive. However, to address the concerns of the commentator, additional language as to the content of the written notification was included. In addition, as

provided in Section 4 (a) (10) of the Act, decisions of the Department relative to training can be reviewed by the Board upon request. Language to this affect was added to Section 801.

Subchapter J. Operator Classes and Subclassifications

302.1003. CERTIFICATION CLASSES AND SUBCLASSIFICATIONS OF WASTEWATER SYSTEM OPERATORS

36. Comment

The classification of an E-4 license is confusing in terms of the satellite collection system and single entity collection system. The suggested change is to provide clarity by adding" including satellite collection systems and single entity systems" to Section 302.1003(c). (5, 12)

Response

The Act and language in Section 302.902(a) defines Class E as applying to "satellite collection systems". In order to allow operators of collection systems where the treatment plant and the collection system are owned by the same entity, subclassification 4, "single entity collection system" was added by regulation at the request of the regulated community. This subclassification is defined as such in Section 302.902(b)(4). Section 302.1003(c) combines the two into one stand alone license applying to all collection systems, regardless of ownership. Further clarification is not needed.

302.1005. GRANDPARENTED OPERATORS.

37. Comment

Section 1005(d)(3) refers to "violations attributed to the operator that threaten the public health, the environment, and public safety." DEP agreed to remove this sort of vague language from many other provisions of the regulations, and should do the same here. Suggest deletion of Section 1005(d)(3). (5, 6, 8, 12)

Response

The only way a certificate becomes invalid for this reason is if the Board takes an action to modify, suspend or revoke the certificate after an administrative hearing in response to a petition of the Department. This section was modified accordingly.

38. Comment

It is unclear to the commenter what will happen under the proposed regulations when a grandparented certificate expires when the certificate is held by an operator whose sole duties relate to a Single Entity Wastewater Collection System. Upon renewal, following adoption of the proposed regulations, will the operator continue to be issued a special grandparented certificate or will they be issued an E4 certificate pursuant to Section 302.1003? The present wording of Section 302.1003(c) appears to require that such an operator must go through the initial certification process as described in Section 302.104. If on the other hand the Department intends to issue an E4 certificate to such operators, language should be added to the beginning of Section 302.1003(c) to carve out an exception, such as: "Except as provided in Section 302.1005 (relating to grandparented operators), the Class E wastewater classification…" (7)

Response
Section 302.1005(c) requires a grandparented operator to go through the renewal process, not the initial certification process described in Section 302.104. As long as none of the conditions in Section 1005(d) apply, a grandparented operator will be issued a new grandparented certificate for the system where the operator is working, provided the operator completed all the requirements for certificate renewal including the completion of continuing education credits. The only time a grandparented operator will be issued an E4 certificate pursuant to Section 302.1003 is if the operator meets the standards described in 302.104 and applies for re-certification. This can happen in one of two ways; either the grandparented operator chooses to get certified with an E4 license on a voluntary basis or one of the conditions in Section 1005(d) apply and his grandparented certificate is no longer valid.

302.1006. LABORATORY SUPERVISOR CERTIFICATION

39. Comment
We ask the EQB to provide more detailed responses to the concerns raised relative to Section 302.1006. We raise two issues. First, several commentators have noted that certifications for laboratory supervisors are already addressed in 25 Pa. Code Chapter 252. What is the need for including this section in the proposed regulation? In addition, because there are two different provisions concerning this issue, commentators are concerned that the provisions contained in the proposed rulemaking are unclear. For example, will laboratory supervisors now have to become certified operators? If so, will existing laboratory supervisors be grandparented as certified? The EQB needs to justify the need for the existence of these provisions in two entirely different Chapters.

Second, if the EQB can justify the need for provisions in both Chapters, then there appears to be contradictory language between them, which the EQB should explain. For example, Subsection 252.302(h)(3) states: Until 12 months after a certificate under the Water and Wastewater Systems Operators' Certification Act for laboratory supervisor in the appropriate water or wastewater subclassification becomes available from the Department, 2 years of experience performing testing or analysis of environmental samples using the methods and procedures currently in use by the environmental laboratory may be substituted for a laboratory supervisory certificate. However, proposed Subsection 302.1006(e) simply requires applicants to have the above-mentioned two-year experience. Why are these two subsections different? In addition, Subsection 302.1006(f) requires that: An applicant for laboratory supervisor's certification for drinking water or wastewater systems shall hold a valid operator's certificate and demonstrate the knowledge, skills and abilities needed to be a laboratory supervisor by obtaining a passing score on either the Part II Laboratory Supervisor for Water Systems or Part II Laboratory Supervisor for Wastewater Systems examination. However, Chapter 252 does not appear to require such a test. What is the need for this addition? (9)

Response
Chapter 252 defines the qualifications needed to become a laboratory supervisor. One of many options identified in Chapter 252 to meet the requirements for a laboratory supervisor for a drinking water or wastewater treatment system with its own laboratory is to have a certified operator for the system also serve as a laboratory supervisor. An operator wanting to serve as the laboratory supervisor for a water or wastewater system who does not meet any of the other

criteria for laboratory supervisor as defined in Chapter 252, must be certified with the appropriate class and subclassifications for the system where the operator is working before obtaining the laboratory supervisor subclassification. Section 302.1006 describes the standards for obtaining this subclassification and includes the successful completion of an examination and two years experience in the testing and analysis of environmental samples for water or wastewater treatment. Chapter 252 also defines the conditions for grandparenting. By referencing the qualifications to become a laboratory supervisor and these conditions for grandparenting, the Chapter 302 regulations can focus solely on the requirements for operator certification as a laboratory supervisor.

The Chapter 302 regulations need to be finalized and the appropriate examinations developed before the Certification Board has the ability to offer the laboratory supervisor subclassification. Chapter 252 allows current certified operators to serve as a laboratory supervisor until these two conditions are met. As soon as the Chapter 302 regulations are published in the *Pennsylvania Bulletin* as final and the examinations are developed, the Certification Board will offer this subclassification. At that point Chapter 252 requires existing certified operators, who have been serving as the laboratory supervisor for a water or wastewater system and do not meet the other qualifications identified in Chapter 252, to meet the standards for laboratory supervisor certification defined in 302.1006 if they wish to continue serving as a laboratory supervisor for a water or wastewater system. They will have 12 months to pass the examination and become certified in this subclassification. The two years of experience in the testing and analysis of environmental samples for water or wastewater treatment the operator already completed will suffice to meet the experience requirements defined in Section 302.1006. If the certified operator is unsuccessful in obtaining this subclassification within the 12 month period, the water or wastewater system must find another laboratory supervisor until such time the certified operator is successful. The additional examination is required because the examinations the operator already took to get certified do not cover the necessary knowledge, skills and abilities (KSAs) needed to serve as a laboratory supervisor. The operator must demonstrate he or she has these KSAs through the passing of the laboratory supervisor examination to continue as the laboratory supervisor for a laboratory connected to a water or wastewater treatment system.

Subchapter L. System Operation

302.1201 – DUTIES OF OPERATORS

40. Comment

The *Comment Response Document* prepared in response to comments submitted regarding section 1201(b) (responses #120 & #121) states that the "duties" of operators stated in §1201(b) are merely examples of tasks that operators MAY perform and are not intended to actually impose any duties on operators. (In which case, there clearly is no need to include the list in regulations at all.) However, §308(b)(4) of the regulations has now been revised to refer specifically to the "duties" section as a cause of action to revoke or suspend certification. Thus, it appears that the second draft of the regulations changes the import of §1201(b) and now intends to impose the itemized "duties" in §1201(b) as affirmative legal obligations of all operators. This is unacceptable for several reasons. For one thing, duties of operators are assigned by the owner

and it is very rare for all of the listed duties to be assigned to any one operator. Moreover, as discussed below, certain of the listed duties are not normally duties of certified operators at all.

a. In addition to the concerns above, the attempt to micromanage system operation by trying to list all of the operators' duties is misguided. At least one of the "duties" is more properly that of an owner (e.g., "providing for" source water protection) than the operator. Another (controlling the discharge flow from a wastewater treatment plant) is not even possible for most plants; discharge flows are rarely under the direct control of the operators since they result from collection system flows. The Department's guesses as to what duties certified operators might have are clearly erroneous; section 1201(b) should be deleted as both erroneous and irrelevant.

b. In the alternative, assuming that the list will be retained (and in such a case I request that the need for it be explained in the response to comments), it needs to be made clear *in the regulations* that the list is NOT mandatory, but merely illustrative. Accordingly, the introductory sentence to §1201(b) should say, "Examples of available operator tasks which may be assigned by the owner include the following; none of the following tasks shall be considered a duty of an available operator unless assigned by the owner in writing."

c. In addition, the newly added reference in §308(b)(4) to §1201(b) must be deleted so that it cannot be interpreted as mandating the "examples." I suggest that it say, "Incompetence or failure to use reasonable care and professional judgment in performing the owner-assigned duties of a certified operator."
(5, 6, 8, 12)

Response

The list of duties in 1201(b) was developed in concert with a number of certified operators and members of CPAC and the Certification Board and has been in place since the program guidelines were finalized in 2002. Using the word "MAY" in 1201(b) is the appropriate regulatory language to mean the list is intended as illustrative, not all inclusive. By referencing this section in 308(b)(4), the same context is carried over and the added detail requested by commentators in the original public comment period provided.

The owner's responsibility is to designate an available operator(s) and ensure all process control decisions regarding the operation of the system are made by that available operator(s). How this is accomplished is up to the available operator, not the system owner. For this reason, adding the wording suggested by the commentator to reflect these duties are assigned by an owner is not appropriate, unless that owner is also certified and has designated themselves as an available operator for the system. In addition, it was agreed early on that these regulations should not attempt to define the owner/employee relationship. Adding similar language as suggested by these commentators was discussed with a number of representatives of the regulated community including representatives of the organizations making this comment early in the regulatory process and discarded. The operator is the one responsible for operating the system. The operator is the one responsible for performing the necessary duties to ensure the system is in compliance with appropriate rules, regulations and permit conditions.

41. Comment

Section 1201(c) requires further editing to make it reasonable and acceptable under the Act. Specifically, the list of required contents of the report seems unnecessary since 99% of reports will be oral (and in that regard, item (1) should say "the name of the operator making the report," not "filing" it).

Thus, subparagraphs (1) through (6) should be deleted as unnecessary. However, if the list is to remain, items (4) and (5) ("cause" and "threat to public health" are not required by the statute and (as noted in detail in my comments on the first draft of the regulation, to which no response was provided) the requested information is not available to operators in many cases. It is not reasonable to invent a new requirement that operators must make extensive investigations of "causes" and of "the severity of the threat to public health and the environment" for every required report of system conditions. (5, 6, 8, 12)

Response

As stated previously in the response to Comment # 124 through 127 of the Comment Response Document circulated as part of the ANFR, the sole reason this requirement was established in statute was to provide the operator with some level of protection should a violation occur where the Department intends to implement some form of enforcement action. Therefore, in order for the operator to make the decision as to whether the situation warrants making a report or not, the operator should have some reasonable understanding of the potential or actual cause of the violation and an estimate of the severity of the threat. These reports were never intended for every "required report of system conditions" as stated by the commentator. Section 1201(c)(1) was revised as suggested to change "filing" to "making".

42. Comment

Section 302.1201(d) remains of great concern for the reasons stated in my (and others') comments on the first draft, which did not receive a response from the Department. These concerns deserve a response and I repeat them here. Given the vague language and the inequitable provisions, substantive due process violations are of great concern. In particular:

a. What is meant by "consequences" of a process control decision? This could be used to extend liability to more remote violations, such as fish kills, equipment malfunction, and other things not directly related to the process control decision itself. The word "consequences" has a legal meaning and DEP should have reviewed this language with counsel before adopting it.

b. Why is the exception to liability only applied when the intervening act is by someone under the operator's "direct supervision"? This can only mean that the operator will be held personally liable for civil penalties when people NOT under her supervision are negligent! What is the basis for holding someone responsible for the actions of people not under their control? This provision is so draconian and unreasonable that it may be of Constitutional concern.

c. Why is the exception limited to "negligence" and "deliberate action with malice" of the third party? Again, these are "legal" words and should have been reviewed by counsel before being used. Who is responsible for determining if the intervening act was negligent? How does one establish "malice"? For instance, if the other operator deliberately did not follow instructions because he believed the available operator to be wrong, this would not be "malice" or

"negligence," and the available operator would be personally liable for a deliberate, but mistaken, action taken in direct defiance of his decision. If substantial personal liability is to be imposed, especially in light of the strict liability provisions of the Act, it must be clearly defined. Again, this is a substantive due process issue that cannot continue to be ignored.

d. There is an internal reference error. The paragraph refers to the duty of the owner to "respond to a report as required in subsection (c)." However, the owner's duty to respond to the report is found in § 1202(a)(4). More importantly, however, is the ambiguity of this exception. What is an appropriate "response" by an owner? If the owner responds inappropriately, or assigns another operator to respond, who then makes errors, is the operator who made the process control decision still liable? What criteria will DEP use in deciding these questions of liability and exception of liability?

e. The prior subsections of Section 1201 codify the various duties of operators as set forth in Section 1013(e) of the Act—meeting legal requirements and making reports to the owners. The only purpose of § 1201(d) is to codify the provision that only certified operators may make process control decisions. This does not require that additional responsibilities be added. The provisions at section 308(b) provide appropriate penalties for operators who are incompetent, negligent, or fail to use reasonable care and professional judgment in undertaking their duties. Adding the new vague provisions at section 1201(d) does nothing but muddy the waters as explained above.

f. Finally, I note that this section does not acknowledge the underlying responsibility of owners as established by the Act. In particular, owners' duties include "requiring, supervising and directing certified operators to take such action so that the water and wastewater system is in compliance with all applicable laws, rules, regulations and permits." (§ 1013(f)(2).) This statutory provision contradicts the claims in response number 122 in the *Comment Response Document*. That response, attempting to explain the proposed requirements in Section 1201(d), states that "only in some cases, such as when the owner has not provided the necessary resources to the operator to adequately complete the duties of an operator, will the owner have the final accountability." That statement is fundamentally and legally wrong and of the greatest concern to me and other operators. Owners establish ALL OF the duties of their employees and set policies for operation and maintenance of the facilities. Owners hold the permits and are legally responsible for compliance. Owners not only control resources, but information, working hours, the number of certified operators on staff, the areas of the system where employees are authorized to work, and many other aspects of facility operation. Accordingly, owners have always been the entities that are "finally accountable" for compliance. As noted, this fundamental concept is reflected in the Act, which acknowledges that the owners are ultimately responsible for "supervising" and "directing" their employee certified operators. The mere fact that operators make process control decisions does not create universal liability for compliance with all of the regulations and permits that Response #122 states. *Respondeat superior* has been the legal framework for environmental compliance for over forty years. To try to change long-standing legal principles through rulemaking is not only unacceptable, it is legally problematic. The Department should not be making new law through these regulations. The purpose of the regulations is to codify the requirements of the statute. The Act provides that certified operators will make all process control decisions and that owners are responsible for directing the activities

of the operators. Nowhere in the Act does it state that owners are relieved of their liability under the statutes and permits and that that all compliance liability will henceforth fall on the operators. As "explained" by Comment 122, the proposed regulation reflects an intent to impose unlimited and unforeseeable strict liability on certified operators that previously was placed almost exclusively on permittees and owners. Once the regulated community understands the scope and extent of this radically new source of liability, there is likely to be statewide loss of hundreds of certified operators. In addition to clarifying and correcting the language in this section, DEP must provide an on-the-record statement that repudiates the intent to radically change existing interpretations of law as set forth in response # 122 in the first *Comment Response Document.*

g. Suggest the following text for section 1201(d): "Available operators are responsible for making process control decisions as directed by the owner. Available operators are responsible for the results of process control decisions that are erroneous or which directly result in noncompliance with applicable rules and regulations or permit conditions. In determining if an available operator was negligent in making a process control decision, the Department will consider other relevant factors, including, but not limited to: available resources; whether the owner responded appropriately to reports by available operators; the presence of intervening factors including decisions by other operators; and professional standards applicable to the process control decision that was made."(5, 6, 8, 12)

Response

The Department responded to this issue in Comment # 128 of the Comment Response Document circulated as part of the ANFR. This is re-iterated as follows in response to the commentators specific paragrpraphs:

(a) The Department disagrees with the commentators' assertion that the available operator being responsible for process control decisions is responsible for those decisions and the "consequences" of that decision could be used to extend liability to more remote violations. That is not the intent of the language. Rather, the word "consequence" is to be used in a common sense manner to indicate that the available operator is responsible for process control decisions that are in violation of the act. It should be noted that any term used in a regulation has a legal meaning and is to be applied in the context of applicable law.

In any event, there are certain procedures which must be followed in any action affecting an operator's certification. A number of protections have been established for both the operators and the owners of water and wastewater systems, including provisions requiring the Department to petition the Certification Board before the operator's license can be modified, suspended or revoked. The Certification Board must follow the administrative procedure process applicable to all Commonwealth agencies in response to a petition of the Department. Moreover, the Department must issue an order and that order must have been violated before the Department can assess any fines or penalties. Accordingly, there is adequate due process protection for the available operator in cases where the Department investigates the "consequences" of a process control decision.

(b, c and e) The comments are incorrect. The available operator is only responsible for the process control decisions he or she makes and the consequences of those decisions. They are also responsible for the actions of only those uncertified or inappropriately certified operators under their direct supervision. This section adds further protection for the available operator by

not holding the operator responsible for actions of these individuals when those actions are negligent or done with malice.

(d) The reference is correct. The reference is designed to differentiate these reports from any number of reports filed by an operator in any given day. This is another reason why the content of the report as defined in paragraph (c) is needed. In order for the owner to have the information needed to make a reasonable decision as to how to respond, some level of detail as defined in paragraph (c) is needed. The questions posed by the commentators are hypothetical and must necessarily be addressed on a case-by-case basis.

(f) See response for Comment 40. The owner's responsibility is to designate an available operator(s) and ensure all process control decisions regarding the operation of the system are made by that available operator(s). How these decisions are made and implemented is up to the available operator, not the system owner. For this reason, adding the wording suggested by the commentator to reflect these duties are assigned by an owner is not possible, unless that owner is also certified and has been designated as an available operator for the system. In addition, it was agreed early on that these regulations should not attempt to define the owner/employee relationship. Adding similar language as suggested by these commentators was discussed with a number of representatives of the regulated community including representatives of the organizations making this comment early in the regulatory process and discarded.

(g) The substance of this comment was already provided for in Section 1201(a) in response to similar comments submitted during the public comment period that ended in September 2009. Further revisions as suggested are not necessary.

302.1202 - DUTIES OF OWNERS

43. Comment

Subpart (b) empowers DEP to request specific reports on the same information (duplication) which is already on the Department computers. Subpart (c) trumps (b) and makes it unnecessary because (c) requires system to report any changes in operator status. Requiring (b) is another requirement that just adds more senseless "busy work" on an already overstressed operation… (2, 10)

Response

One of the duties of the owner is to designate which certified operator(s) are authorized to make process control decisions for his or her system and to identify those operators to the Department. In addition, the statute requires the Department to maintain a list of these certified operators. The mechanism the Department has chosen to ensure compliance with these two requirements is the "Available Operators Report" as described in paragraph (b). Paragraph (c) recognizes this information can change over time and should be updated on a regular basis. The Department revised the regulatory language in this subsection to state that the information be provided only upon written request from the Department to minimize the amount of work and possible duplication of effort. This report serves as a means for insuring the Department's records are correct and that reports submitted under paragraph (c) have been received and properly documented. This report is the only mechanism the Department has to check the quality of the data on file and ensure these records are correct.

302.1203 - PROCESS CONTROL DECISIONS

44. Comment

We raised four questions about Section 302.1203(c). The EQB provided an answer to the first question, but not the remaining three questions. This subsection states that the Department may require a water or wastewater system to have a process control plan that includes 15 pieces of information. Under what circumstances would a process control plan be required? How would the system be notified of this requirement? Would the plan require approval by the Department? These questions should be addressed in the final-form regulation. (9)

Response

As stated previously in the response to Comment # 136 of the Comment Response Document circulated as part of the ANFR, the circumstances under which a process control plan may be required are outlined in Section 302.1203(d) and (e). Subsection (f) was added to ensure the owner is notified in writing when a process control plan is required. The regulation does not require the Department to approve the plan.

302.1204 – STANDARD OPERATING PROCEDURES

45. Comment

What is the EQB's response to the second concern raised in our comments? (Second concern was under Section 302.1204(d), the use of standard operating procedures (SOPs) is optional. However, this subsection makes operators in responsible charge accountable for violations when SOPs are followed. Why would an operator in responsible charge develop formal SOPs, as this would lead to additional liability?) (9)

Response

Development of formal SOPs does not necessarily create any additional liability. SOPs are to cover the proper procedures to be followed when making and implementing the process control decisions needed in the daily operation and maintenance of the system. The operator in responsible charge is responsible for the development and approval of standard operating procedures, if the operator and system owner agree to use them. Standard operating procedures are not intended as a substitute for a certified operator. The operator in responsible charge would be held "liable" for violations incurred during operation of the system if the standard operating procedures developed by the operator in responsible charge or decisions made by that person contradict, or result in the violation of, any federal or state law, rules and regulations or permit conditions related to the operation of the system.

302.1205 - NUMBER OF REQUIRED CERTIFIED OPERATORS

46. Comment

Is there a reference where we can determine the required number of certified operators? (1)

Response

The owner is responsible for insuring all process control decisions are made by an available operator. Since each system is different, it is not possible to prescribe a specific number of certified operators to be required for each system. Instead, four ways an owner can comply with this requirement have been defined: (1) Hire one or more certified operators to cover all shifts of system operation; (2) Designate an operator in responsible charge who develops SOPs for use by non-certified or other certified operators working at the system; (3) Hire a circuit rider for the system; (4) Install a PLC or SCADA system to be used in combination with an available operator. The Act also gives the Department the authority to order the system owner to hire additional operators if necessary to ensure all process control decisions are made by a certified operator.

302.1206 – OPERATOR IN RESPONSIBLE CHARGE

47. Comment

Placing liability for ALL violations that occur when an SOP is in use will simply make it impossible for POTWs to develop SOPs, since there is no limit to the violations for which the Operator in Responsible Charge could be liable (power failure, toxic influent, etc.). If there is to be liability at all, it should be limited to violations that occur because the SOP itself was deficient in some way. Recommend adding the following to the end of the proposed sentence in (e), "provided that the violation occurred as a direct result of an error in the SOP as drafted."

In addition, there is no provision regarding what happens when an Operator in Responsible Charge (ORC) is no longer in that position. The ORC's liability for SOPs should end when his status as an ORC ends; either through leaving employment or having the owner rescind the appointment (whether or not someone else is appointed as the ORC in his place). The provision in §1206(a) that the employer will notify DEP when the ORC changes should also state that when that notice occurs, that person's liability for use of SOPs developed by her will then end. (5, 6, 8, 12)

Response

Paragraph (e) has been revised to clarify that the current operator in responsible charge is the one held accountable for the SOPs.

48. Comment

Section 302.1206(e) doesn't seem to make sense; shouldn't you add "violations of" between the existing and new language. (4)

Response

Yes, this is correct. The wording has been added as suggested.

302.1207 – OPERATION OF MULTIPLE TREATMENT SYSTEMS

49. Comment

Section 302.1207 (Operation of Multiple Treatment Systems) – The purpose of this section appears to be the regulation of the operation of multiple systems which have differing owners as opposed to one or more systems owned by the same municipality or authority. If that is true, it is

suggested that the first sentence of Section 302.1207(a) be amended to make that clearer, such as by saying "…an available operator may make process control decisions at multiple systems which have differing owners." (7)

Response

The two sentences in subsection (a) have now been separated to address this concern. This allows certified operators to be designated as the available operator for more than one system, regardless of ownership. The rest of the Section then goes on to further clarify those requirements specific to circuit riders as defined.

50. Comment

Section 302.1207(a) (Operation of Multiple Treatment Systems) - The introduction to this section refers to more than one "system." However, the concept of circuit riders properly applies to more than one "owner" (as noted in the Definition of Circuit Rider). That is, one authority may own two treatment plants and the operators work at both. Although there are two "systems," this is not a circuit rider situation. The discussion in § 1207 should be consistent with the definition of Circuit Rider. Suggested revision should clarify item 1 so that it reads more than one system of different owners. (5, 6)

Response

The two sentences in (a) have now been separated to address this concern. This allows certified operators to be designated as the available operator for more than one system, regardless of ownership. The rest of the Section then goes on to further clarify those requirements specific to circuit riders as defined.

51. Comment

The "work plan" to be developed for each system, that a circuit rider services, has merit. However, the time required to conduct operational activities at any system may vary from day to day, depending on conditions and operational necessities. Therefore, the requirement to state the number of hours to be spent at each system per week is simply not possible for many, if not most, systems. Because the work plan is to be provided to DEP, and because it must be revised in writing ((g) and (h)), it appears that the Department would require the circuit rider to meet the hourly requirements as stated in the work plan and then revise the plan every time those requirements changed, which could be every week. The requirement is not only unnecessary, it may be impossible in many cases. Paragraph 1207(d)(4)) should be deleted from the final rule. As an alternative, the provisions should be made more flexible by allowing for reporting of the "estimated" number of hours. Suggested revision to clarify (d)(4): The number of estimated hours per week the circuit rider works at each system, with the method(s) of documentation to be used for each visit. (5, 6)

Response

The language in Section 1207(d)(4) was revised as suggested.

52. Comment

Many circuit riders and owners have a contract that defines the services and hours. Thereby, the requirement is unnecessary. *The suggested revision to clarify item (d) is:*

"A circuit rider shall develop and submit a general work plan (unless specified in a contract) to the owner of each system that includes:"

Response
A Revision to 1207(d) was made to allow for an existing contract with the same information to suffice for a workplan. If the contract covers the same content, there is no need to also develop a general workplan.

302.1208 PROGRAMMABLE LOGIC CONTROLS (PLC'S) AND SUPERVISORY CONTROL AND DATA ACQUISITION SYSTEMS (SCADA)

53. Comment
The provisions of this section are far from clear, create a host of compliance questions, and as drafted are simply absurd. Commentator #5 further noted that most of these systems are designed by professional engineers, programmed by computer specialists, and control parameters of operation established through the DEP permitting process. System operators are not consulted by manufacturers about how to program the controls of the equipment that they manufacture. It is impossible to require that individual operators will be responsible for the design of treatment equipment and for the equipment operational parameters. There are a large number of practical questions surrounding this provision as drafted, and the literal impossibility of meeting the requirements as drafted. Operators by definition are not SCADA designers or experts nor should they be required to have liability for such systems.

a. What is meant by "have an available operator to interface with the PLC or SCADA system"? The term "interface" is ambiguous. Different systems have different kinds of "interfaces." Some allow operator input and control; others merely show system conditions as measured by the equipment. Must the available operator be able to reprogram the system? Or does "interface" merely mean observe and understand the displays or printouts?

b. Is the rule intended to mean that an available operator be on site or able to remotely view (and adjust) the system status at all times? If so, the usefulness of these automated systems would be greatly diminished. Many such systems are used in small satellite treatment plants or pumping stations that are not manned at all, or are visited only briefly from time to time, using remote readouts to ensure proper operation. Would it not be acceptable for these systems to be operated by non-certified operators under the supervision of an available operator or in response to system instructions (*e.g.*, the system itself, in response to various inputs and its programmed logic, could trigger a message directing an operator to refill a chemical feed tank or energize a backup pump), or using SOPs developed by the manufacturer?

c. Moreover, I do not understand what is meant by "approve the operational strategy." Use of the term "strategy" could imply generalized operational goals and methods, rather than specific system operational responses. What is the difference between an "operational strategy" and a "process control decision"? Must the "operational strategy" be documented in some way so that compliance with this regulatory provision can be demonstrated? If so, the definition of this undefined term becomes very important for compliance purposes. It will also implicate the terms and conditions of future construction contracts if contractors and manufacturers have to allow local operators to participate in programming their treatment systems.

d. This also raises the question of WHEN and HOW the available operator would make this approval. It is a fact that system operators are never consulted by manufacturers (who are usually in different states or different countries) about how to program the controls of the equipment that they manufacture. It is absurd to attempt to require that individual operators will be responsible for the design of treatment equipment and the operational parameters established by manufacturers and process design engineers. Even if the operators were given the opportunity to review and approve manufacturers' designs, would the available operator who "signed off" on the strategy then be held legally responsible for all "consequences" of the system operation under § 1201(d) forever? The requirement is not only ridiculous, it is literally impossible for anyone to comply with it.

e. Since the "available operator" is not just any certified operator, but is assigned by the owner (§ 1202(a)(3)), does this rule mean that the manufacturer and consulting engineer may not approve the operational strategy using certified operators in their employ?

f. If the available operator, who originally approved the operational strategy, leaves that employment, must the owner have another available operator review the strategy and approve it? What would happen if the new operator disagreed with the operational strategy and refused to approve it? Would the system then be forced to turn off the PLC or SCADA system?

g. Essentially, the proposed rule would mean that the sale and use of SCADA and PLC systems would be prohibited in Pennsylvania. Because of the large number of practical questions surrounding this provision as drafted, and the literal impossibility of meeting the requirements as drafted, I suggest that the following language be used at paragraph 1208(b): "The system owner shall provide for routine observation or reading (which may include remote reading) of a SCADA or PLC system by an available operator." (5, 6, 8, 12)

Response

Due to the number of concerns raised by these commentators, the suggested language in Section 1208(b) was shared with a number of certified operators who had been involved in the drafting of these regulations. They did not agree with the wording, "the system owner shall provide for routine observation or reading (which may include remote reading) of a SCADA or PLC system by an available operator" as suggested by the commentator, but did agree the existing language could be confusing and cause concern. As a result, Section 1208(b) was rewritten as follows to more accurately reflect what should happen when a SCADA system or PLC is put in use: "The available operator shall monitor SCADA systems and PLC's that are used for process control, and have the ability to adjust, or to direct the adjustment of, these systems when necessary in order to maintain compliance with federal or state law or rules and regulations promulgated thereto or permit conditions and requirements applicable to the operation of water or wastewater systems."

302.1209. ASSESSMENT OF FINES AND PENALTIES.

54. Comment

The new liability provision in §1209 does not track the statute as interpreted by DEP. There are several problems that require correction:

a. Civil Penalties are assessed under Section 14(c) of the statute, Section 4(b)(1.1), which is referenced in the draft regulation, is the section pertaining to issuing orders, not penalties.

b. As interpreted by DEP over the past 3 years (and as reflected in Response #128, item (4) in the *Comment Response Document* regarding the first draft), the proper interpretation of section 14(c) of the statute (with which I agree) is that civil liability will arise only when (1) the person has violated the applicable section of the statute (section 13 for owners and operators, section 5(d) or 6(d) for non-certified operators), AND (2) the person has also violated an order issued by the Department under section 4(b)(1.1) of the statute. Violation of other sorts of orders, or violations of orders without a separate violation of the provisions of the Act, is not a basis for civil penalties.

c. Accordingly, §1209 should read, "A civil penalty assessed under Section 14(c) of the Act will be assessed only when (1) the person has violated a provision of the applicable section of the Act (section 13 for owners and operators, section 5(d) or 6(d) for non-certified operators), and (2) the person has also violated an order issued by the Department under section 4(b)(1.1) of the Act." (5, 6, 8, 12)

Response

The language has been changed to reflect this suggested language. The section now provides that "A civil penalty for noncompliance with section 5(d), 6(d) or 13 of the Act will be assessed only upon a person's failure to comply with an order of the Department issued under Section 4(b)(1.1) of the Act.