



Senate Environmental Resources and Energy Committee

Senator Mary Jo White
Chairman

Patrick Henderson, Executive Director

Room 169 • State Capitol Building
Mailing address: Senate Box 203021 • Harrisburg, PA 17120-3021
Phone: 717-787-9684 • FAX: 717-787-6088 • energy@pasen.gov

April 19, 2010

John Hanger, Chairman
Environmental Quality Board
15th Floor Rachel Carson Building
Harrisburg, PA 17105

Re: Regulation # 7-446 Wastewater Treatment Requirements

Dear Chairman Hanger:

We are writing to urge the Department of Environmental Protection (DEP) to utilize an Advance Notice of Final Rulemaking (ANFR) for the above-entitled proposed regulation.

Since the proposed rulemaking was published for public comment, there has been significant public interest in this regulation. While we believe that the vast majority of commentators, including the regulated industry that is affected by the proposed new standards, support clean water, there are clearly differences of opinion as to the appropriateness of the specific standards contained in this rulemaking. The regulation was discussed at length at the April 14, 2010 Water Resources Advisory Committee (WRAC). While WRAC supported proceeding to final rulemaking provided DEP makes several revisions to the final rule, numerous members also voiced support for utilizing the ANFR process.

The Department's characterization of the public comments received to date is also confusing. For example, in the draft Order presented to WRAC, DEP states that it received "4,221 separate sets of comments" on the proposed rulemaking, with over 90% of those comments supporting the proposed regulation. The Department does not distinguish what it means by "sets" of comments. Indeed, just on February 18th DEP submitted to the standing committees and the Independent Regulatory Review Commission two form letters signed by nearly 660 commentators (nearly 16% of comments received) strongly opposing the proposed rulemaking. It is clear that advocacy groups on all sides of this particular issue utilized mass email and form mail efforts to try and influence the direction of the rulemaking. We are reminded of when the U.S. Court of Appeals agreed with the U.S. Environmental Protection Agency's (EPA) decision not to give proportional weight to a mass mail campaign in which commentators *opposed* more stringent water quality standards. The Court's direction – that "*an agency rule-making is not a democratic process by which the majority of commentators prevail by the sheer weight of numbers*" – may not be legally binding upon the Department, but it is certainly sound advice.

To the extent that the Department, as stated in the draft Order, "*cannot simply discount this tremendous degree of public direction*" in support of the proposed regulation, it is imperative to note that the final rulemaking differs substantially from the original proposal upon which commentators based their input. Simply put, the Department should not utilize the fact that a significant majority of commentators expressed support for a particular rulemaking, and then assume that such support is transferred to a final rulemaking which has been


significantly re-written. We are not advocating specific changes to the regulation at this time, but rather believe a limited, additional public comment period will permit the Department to gauge the public's response to the proposed revisions, without affecting DEP's desired goal of finalizing the rulemaking effective January 2011.

Last September, the Department published an ANFR to solicit public input on proposed revisions to the Control of NOx Emissions from Glass Melting Furnaces rulemaking. As stated in the *Pennsylvania Bulletin*, in that situation the Department stated its belief that "*further discussion would serve the public interest.*" We believe that is true in this instance, and therefore respectfully urge your favorable consideration for our request to solicit input on the revised Wastewater Treatment Requirements rule through an Advanced Notice of Final Rulemaking.

Thank you for your consideration of this request.

Sincerely,


Mary Jo White, Chair
Senate Environmental Resources
& Energy Committee


Raphael J. Musto, Democratic Chair
Senate Environmental Resources
& Energy Committee


Scott Hutchinson, Republican Chair
House Environmental Resources
& Energy Committee