

# PROPOSED RULEMAKING

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

### [25 PA. CODE CHS. 16, 92, 93, 95, 96 AND 97] Regulatory Basics Initiative (RBI) Amendments and Water Quality Standards

The Department of Environmental Protection (Department) is soliciting comments on changes it recommends be made to the proposed regulations relating to the Regulatory Basics Initiative (RBI) amendments to National Pollutant Discharge Elimination System, water quality standards, water quality standards implementation and industrial wastes. The draft final regulations were developed based on comments and other information received during the public comment period on the proposed amendments to Chapters 92, 93, 95 and 97 and proposed creation of Chapter 96, which were published as proposed rulemaking at 28 Pa.B. 4431 (August 29, 1998). In addition, the Department is seeking comments on the draft final amendments to Chapter 16, the Water Quality Toxics Management Strategy—Statement of Policy. Proposed changes to Chapter 16 were noticed at 28 Pa.B. 4289 (August 29, 1998) and available for public comment at the same time. The statement of policy contains water quality criteria for toxic substances and other information closely related to the regulations.

#### A. Contact Persons and Submitting Comments

Copies of the draft final regulations and statement of policy are available from the Bureau of Watershed Conservation at (717) 787-9637. Persons with a disability may use the AT & T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users) and request that the call be relayed. The draft final regulations are also available electronically through the DEP Web site (<http://www.dep.state.pa.us>), choose: "Public Participation Center."

Written comments should be addressed to Carol Young, Division of Assessment and Standards, Bureau of Watershed Conservation, 10th Floor, Rachel Carson State Office Building, 400 Market Street, P. O. Box 8555, Harrisburg, PA 17105-8555, (717) 787-9637. Comments may also be transmitted electronically to [Young.Carol@dep.state.pa.us](mailto:Young.Carol@dep.state.pa.us). If the sender does not receive an acknowledgement of electronic comments within 2 working days, the comments should be resubmitted to ensure receipt. Comments must be received by November 17, 1999. A subject heading of the proposal and a return name and address must be included in each letter or transmission. Comments will not be accepted by facsimile or voice mail.

#### B. Public Meetings/ Hearings

The Department will hold three informational meetings/public hearings for the purpose of discussing the regulations and statement of policy and accepting oral testimony at the following locations at 6:30 p.m.:

October 4, 1999  
Department of Environmental Protection  
Southwest Regional Office  
400 Waterfront Drive  
Pittsburgh, PA 15222

October 5, 1999  
Department of Environmental Protection  
Southcentral Regional Office  
909 Elmerton Avenue  
Harrisburg, PA 17110

October 7, 1999  
Department of Environmental Protection  
Southeast Regional Office  
Lee Park  
555 North Lane  
Conshohocken, PA 19428

#### C. Background of the Draft Final Regulations and Statement of Policy

In response to comments received during the official public comment period on the proposed rulemaking and following the Department's review of other related information, the Department has prepared a draft final regulation for public comment. While there is no legal requirement to provide an opportunity to comment on the Department's recommendations for final rulemaking, the Department believes further discussion would serve the public interest in this instance. Because of the close association of the toxics management statement of policy with the regulations, the statement of policy is being included in the same meetings, hearings and comment period.

The preamble to the proposed regulation asked for comment on whether or not the potable water supply use should continue to be a Statewide use, or whether it should be changed so that applicable water quality criteria are only applied at existing or planned potable water supply intakes. Based on public comments, no change is being made to the potable water supply use, and the current language is retained.

This regulatory package also constitutes the Triennial Review of Water Quality Standards mandated by EPA regulations at 40 CFR Part 131. Part of the review requires that states reexamine water body segments that do not meet the fishable or swimmable uses specified in section 101(a)(2) of the Federal Clean Water Act. The Department evaluated the two water bodies where the uses are not met: (1) the Harbor Basin and entrance channel to Outer Erie Harbor/Presque Isle Bay; and (2) several zones in the Delaware Estuary.

The swimmable use designation was deleted from the Harbor Basin and entrance channel demarcated by United States Coast Guard buoys and channel markers on Outer Erie Harbor/Presque Isle Bay because boat and shipping traffic pose a serious safety hazard in this area. This decision was based on a Use Attainability study in 1985. Because the same conditions exist today, no change to the designated use for Outer Erie Harbor/Presque Isle Bay is proposed.

The Department cooperated with the Delaware River Basin Commission (DRBC), EPA and other DRBC signatory states on a comprehensive Use Attainability study in the lower Delaware River and Delaware Estuary. This study resulted in appropriate recommendations relating to the swimmable use, which DRBC included in water use classifications and water quality criteria for portions of the tidal Delaware River in May 1991. Criteria for enterococcus and changes in application to the fecal coliform criteria in this area reflect the use. The changes were incorporated into §§ 93.9e and 93.9g (Drainage

Lists E and G) in 1994. The primary water contact use remains excluded from the designated uses for river miles 108.4 to 81.8 because of continuing significant impacts from combined sewer overflows.

A change is made in the "Water Uses Protected" column of § 93.9p for a portion of Tunungwant Creek to correct an error. A transcription error was made in the *Pennsylvania Code* following notice of the EQB's final regulation at the November 15, 1988 meeting in 19 Pa.B. 968 (March 11, 1989). The final rulemaking deleted the exception to the water contact sports (WC) use for Tunungwant Creek, but the change was not made to the *Pennsylvania Code*. The deletion of the designated use "WC" is amended to reflect the EQB action.

The draft final regulation and statement of policy contain changes in the following areas:

*Chapter 16:* In response to public comments that believed the proposal would be a lessening of water quality protection, 75 aquatic life criteria that had been proposed to be replaced with "guidance values," are proposed to be reinstated as criteria in Table 1. The Department proposes to delete discussion of the methodology and guidance values in the draft final changes to the statement of policy.

Several changes to water quality criteria are proposed to be made to update the criteria to reflect recent data and the EPA's criteria recommendations. To respond to the EPA's concern and provide consistency among the criteria, all water quality criteria are proposed to be rounded to two significant figures. Other language changes are proposed to be made to provide clarity and consistency, as pointed out in various comments.

*Chapter 92:* The most significant amendments to Chapter 92 (relating to the National Pollutant Discharge Elimination System permitting program) include changes to the pollution prevention provisions, monitoring requirements and the general NPDES provisions. The pollution prevention provisions have been rewritten to place the responsibility for encouraging pollution prevention on the Department rather than on the permittee. Proposed language that would have required a permittee to identify unregulated pollutants in its discharge and explain how the discharge of these pollutants would be eliminated or a permit amendment would be sought, has been deleted from the proposed amendments. Provisions that would have established effluent limits in general NPDES permits for any toxic or hazardous substance and authorized the use of these general permits in High Quality waters have been deleted and the original language reinstated.

*Chapter 93:* Warm water fishes (WWF) is proposed to be reinstated in the regulation as the base level of aquatic life use protection. This change was done in response to comments that pointed out that, under the proposal, unlisted waters would have no default protection until assessed.

To respond to comments, the criterion for phenolics (Phen—5 ug/l) is proposed to be reinstated as it currently exists in § 93.7, Table 3, and is proposed to be applied with total dissolved solids (TDS1), nitrite plus nitrate (N), and fluoride (F) under new § 96.3(d).

In § 93.9o of the drainage list of streams, the site-specific color criterion for the Main Stem of Codorus Creek in York County is proposed to be removed because the justification for a separate criterion of 50 platinum cobalt units is unclear. There is no perceptible difference instream between the two criteria (50 and 75 platinum cobalt units) and the EPA supports the change as appro-

priate for all State waters. The color level in the applicable stream exceeds both the site-specific and the State-wide criteria, so there is no lowering of existing quality involved in the proposed change. The Statewide color criterion (75 platinum cobalt units) would apply to the stream and, when it is achieved, will enhance the water quality.

*Chapter 95:* Section 97.15, quality standards, and § 97.63, oil bearing wastes (which was proposed to be moved to § 92.2d), are proposed to be moved to § 95.2 to continue to address situations that may be beyond the scope of NPDES permit coverage.

*Chapter 96:* Several comments addressed issues with the development of total maximum daily loads (TMDLs). Definitions for terms that do not appear in the chapter are proposed to be deleted and clarifying amendments are proposed to be made to some of the definitions. A new definition for "WQBEL" or "water quality based effluent limitation" is proposed to be added because the regulatory basis for development of effluent limitations is also proposed to be clarified in the chapter. Sections 96.3 and 96.4 (relating to water quality protection requirements; and TMDLs and WQBELs) are proposed to be amended and reorganized in response to the comments.

JAMES M. SEIF,  
Secretary

[Pa.B. Doc. No. 99-1578. Filed for public inspection September 17, 1999, 9:00 a.m.]

## DEPARTMENT OF REVENUE

[61 PA. CODE CH. 160]

### Utility Gross Receipts Tax

The Department of Revenue (Department), under the authority contained in section 6 of The Fiscal Code (72 P. S. § 6), proposes amendments to Chapter 160 (relating to utilities gross receipts tax), by deleting § 160.11 (relating to railroad gross receipts tax credit) and adding §§ 160.21—160.33 to read as set forth in Annex A.

#### *Purpose of Proposed Amendments*

In section 1 of Act 138-1996 the General Assembly declares in part, "Because of advances in electric generation technology and Federal initiatives to encourage greater competition in the wholesale electric market, it is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable service is available at levels of reliability that are currently enjoyed by the citizens and businesses of this Commonwealth."

The Department is proposing these amendments to clarify the changes to the utility gross receipts tax brought about by utility deregulation (Act 138-1996) codified in 15 Pa.C.S. (relating to corporations and unincorporated associations) and 66 Pa.C.S. (relating to public utilities). These proposed amendments will also provide guidance and clarity to out-of-State businesses and the emerging industry.

#### *Explanation of Regulatory Requirements*

Section 160.11 (relating to railroad gross receipts tax credit) sets forth the Department's interpretation of sec-

tion 1101.2 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 8101.2). Section 13 of Act 21-1995 repealed section 1101.2 of the TRC; therefore, the Department is proposing to delete § 160.11 in its entirety.

#### *General Provisions*

Section 160.21 (relating to scope) provides that §§ 160.23—160.33 reflect changes made to the utilities gross receipts tax through the effect of electric industry restructuring occasioned by Act 138-1996. Section 160.22 (relating to definitions) defines numerous terms used throughout the chapter. Section 160.23 (relating to tax on gross receipts) describes the companies subject to tax, what “doing business” shall include and what gross receipts are subject to tax.

#### *Tax on the Use of Electricity*

Section 160.31 (relating to tax on the use of electricity) explains in subsection (a) when tax on the use of electricity under 66 Pa.C.S. §§ 2806(g)(3)(iii) or 2809(c)(2) shall be imposed; subsection (b) explains what actions the Department is authorized to take if an electricity supplier has not properly reported and remitted the tax imposed upon gross receipts; subsection (c) explains the indemnification or reimbursement process; subsection (d) details the presumptions utilized in applying payments or determining refund priorities; and subsection (e) provides that the liability for unpaid gross receipts tax will not be extinguished by payment of a tax on the use of electricity.

#### *Licensing*

Subsection (a) of § 160.41 (relating to electric generation supplier license procedures) describes provisions relating to the license application; subsection (b) provides that by May 1, 1998, and every year thereafter, the Pennsylvania Public Utility Commission (Commission) shall provide the Department with a list of licensed electric generation suppliers with their accompanying State tax numbers, similar identification numbers and any other information the Department will require. By the immediately succeeding July 30, the Department will review the tax records of the licensees and determine whether a licensed electric generation supplier has a tax liability of failure to otherwise comply.

Subsection (c) provides the procedures that shall be followed if the Department determines that an applicant or licensed electric generation supplier has a tax liability or failure to otherwise comply. Subsection (d) provides that the Commission may request the State tax information necessary to ascertain compliance with the requirements for licensure or to institute licensure revocation proceedings.

#### *Affected Parties*

Electric generation suppliers doing business in this Commonwealth will be affected by the proposed amendments.

#### *Fiscal Impact*

The Department has determined that the proposed amendments will have no fiscal impact on the Commonwealth.

#### *Paperwork*

The proposed amendments will not generate additional paperwork for the public or the Commonwealth.

#### *Effectiveness/Sunset Date*

The proposed amendments will become effective upon final publication in the *Pennsylvania Bulletin*. The pro-

posed amendments are scheduled for review within 5 years of final publication. No sunset date has been assigned.

#### *Contact Person*

Interested persons are invited to submit in writing any comments, suggestions or objections regarding the proposed amendments to Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061, within 30 days after the date of the publication of this notice in the *Pennsylvania Bulletin*.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of these proposed amendments on September 2, 1999, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees on Finance. In addition to submitting the proposal, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, “Regulatory Review and Promulgation.” A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees’ review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections raised, prior to final publication of the amendments, by the Department, the General Assembly and the Governor.

ROBERT A. JUDGE, Sr.,  
*Secretary*

**Fiscal Note:** 15-410. No fiscal impact; (8) recommends adoption.

### **Annex A**

#### **TITLE 61. REVENUE**

#### **PART I. DEPARTMENT OF REVENUE**

#### **Subpart B. GENERAL FUND REVENUES**

#### **ARTICLE VI. CORPORATION TAXES**

#### **CHAPTER 160. UTILITIES GROSS RECEIPTS TAX**

*(Editor’s Note: The Department is proposing to delete § 160.11 as it appears at Pennsylvania Code page 160-1 (serial page (115389)).*

#### **§ 160.11. (Reserved).**

#### **GENERAL PROVISIONS**

#### **§ 160.21. Scope.**

This chapter reflects changes made to the utilities gross receipts tax through the effect of electric industry restructuring occasioned by 66 Pa.C.S. Chapter 28 (relating to Electricity Generation Customer Choice and Competition Act).

#### **§ 160.22. Definitions.**

The following words and terms when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

*Commission*—The Pennsylvania Public Utility Commission.

*Electricity supplier*—An “electric generation supplier” or “electricity supplier” as defined in 66 Pa.C.S. § 2803 (relating to definitions).

*Failure to otherwise comply*—The term includes the failure to register with the Department for all applicable taxes imposed by the TRC, the failure to file required tax returns or reports within the time period and in the manner provided by law, the failure to provide complete information to the Department within 45 days of request, the failure to reasonably report and pay tax liabilities, which shall generally be construed as reporting or paying less than 75% of the settled or resettled tax liability without reasonable justification.

*Related services*—The services that accompany the delivery of electricity in this Commonwealth to a retail electric customer that would have been deemed to be sales of electric energy prior to January 1, 1997, whether bundled, unbundled or separately billed.

*Resale*—The sale of electricity and related services to a purchaser that does not use or consume the electricity or related services, but resells the electricity or related services in the ordinary course of its business.

*Retail electric customer*—An end-use customer or consumer of electricity that also meets the definition of a "retail electric customer" contained in 66 Pa.C.S. § 2803.

*Sales of electric energy*—"Sales of electric energy" as defined by 66 Pa.C.S. § 2810(j) (relating to revenue-neutral reconciliation). The term also includes: customer charges, capacity charges, demand charges, stand-by charges or usage fees for electric energy and related services to the end-use customer.

*State tax information*—The information maintained by the Department that is necessary for the administration of 66 Pa.C.S. §§ 2806 and 2809 (relating to implementation, pilot programs and performance-based rates; and requirements for electric generation suppliers) providing for the grant, renewal, or transfer of an electric generation supplier license.

*Tax liability*—A tax, estimated tax, interest, penalty, fee, addition, cost or other charge authorized to be imposed and collected by the Department in the administration of the TRC and 66 Pa.C.S. Chapter 28 (relating to the Electricity Generation Customer Choice and Competition Act), which has not been paid within the time period and in the manner provided by law or the failure to indemnify an electric distribution company for the tax on the use of electricity remitted to the Department under 66 Pa.C.S. §§ 2808 and 2809 (relating to competitive transition charge).

*Tax imposed upon gross receipts*—The tax imposed under section 1101 of the TRC (72 P.S. § 8101) and 66 Pa.C.S. § 2810.

### § 160.23. Tax on gross receipts.

(a) *Companies subject to tax.* Electric light companies, waterpower companies, hydroelectric companies, electric distribution companies, electric generation suppliers, electric cooperatives and municipalities to the extent provided in section 1101 of the TRC (72 P.S. § 8101(b)), 15 Pa.C.S., Chapter 74 (relating to electric cooperatives) and 66 Pa.C.S. § 2810 (relating to revenue-neutral reconciliation) and doing business in this Commonwealth shall be subject to the tax imposed upon gross receipts.

(b) *Doing business.* As used in subsection (a) doing business includes the phrases "doing business in this Commonwealth" and "engaged in electric light and power business, waterpower business and hydroelectric business in this Commonwealth," as these terms are used in section 1101(b) of the TRC (72 P.S. § 8101(b)) and 66 Pa.C.S. § 2810(j). It also includes the direct or indirect

engaging in, transacting or conducting of activity in this Commonwealth for the purpose of establishing or maintaining a market for the sales of electric energy and includes obtaining a license or certification from the Commission to supply electric energy.

(c) *Taxable gross receipts.* The tax is imposed upon the taxpayer's gross receipts derived from sales of electric energy to retail electric customers in this Commonwealth, but does not include gross receipts from sales for resale to persons subject to the tax imposed upon gross receipts, or gross receipts from sales that are otherwise exempt under section 1101 of the TRC (72 P.S. § 8101). Retail sales of generation shall be deemed to occur at the meter of the retail consumer.

## TAX ON THE USE OF ELECTRICITY

### § 160.31. Tax on the use of electricity.

(a) *Tax imposed.* A tax on the use of electricity under 66 Pa.C.S. §§ 2806(g)(3)(iii) or 2809(c)(2) (relating to implementation, pilot programs and performance-based rates; and requirements for electric generation suppliers) shall be imposed upon an electric distribution company, provided sales of electric energy are made to a retail customer of the electric distribution company by an electricity supplier that has failed to properly report and remit the tax imposed on gross receipts.

(b) *Failure of electricity supplier to report and pay tax on gross receipts.* Upon ascertaining that an electricity supplier has not properly reported and remitted the tax imposed upon gross receipts, the Department is authorized under section 1102 of TRC (72 P.S. § 8102) to:

(1) Estimate, settle or resettle the tax on gross receipts of the electricity supplier to include the proper tax, interest and penalty and at the same time, settle or resettle under paragraph (2).

(2) Settle or resettle and collect within 30 days of notice any unpaid tax, but not any interest or penalty imposed on the electricity supplier on the use of electricity from the electric distribution company with respect to retail customers it served. The tax shall be calculated by multiplying the kilowatt hours distributed on behalf of the electricity supplier for which no gross receipts tax has been remitted, by the electric distribution company's shopping credit provided to customers and filed with the Commission for electricity supply during the tax period. In the event that the actual gross receipts of the electricity supplier for which no gross receipts were received are known and available, the tax shall consist of these gross receipts multiplied by the applicable tax rate.

(3) Resettle the tax on the use of electricity of the electric distribution company to eliminate any gross receipts upon which tax has been also paid by the electricity supplier, when both the electricity supplier and the electric distribution company have made payment to the Department with respect to estimates, settlements or resettlements issued under paragraphs (1) and (2)

(c) *Indemnification of electric distribution company that has paid use tax.* Upon payment to the Department of the tax on the use of electricity, the electric distribution company may collect or seek indemnification or reimbursement from the electricity supplier or from the end-user of the electricity in this Commonwealth.

(1) When collecting or seeking indemnification or reimbursement, the electric distribution company shall provide the following information to the party from whom the collection is made or from whom indemnification or reimbursement is sought:

(i) The tax, interest and penalties due.

(ii) Notice that the party may appeal the collection or request for indemnification or reimbursement by filing a petition with the Board of Appeals not later than 30 days after the date on which the collection was made or the request for indemnification or reimbursement was mailed by the electric distribution company.

(iii) The mailing address of the Board of Appeals where parties may appeal requests for indemnification or reimbursements.

(2) The indemnification or reimbursement shall be due within 30 days of the mailing date of the request for indemnification or reimbursement.

(d) *Duplicate payments.* In applying payments or determining refund priorities, the following presumptions shall apply:

(1) When both the electricity supplier and the electric distribution company have provided payment to the Department from estimates, settlements or resettlements issued under subsection (b)(1) and (2), the Department will first apply payment from the electricity supplier to satisfy the unpaid liability.

(2) Within 30 days of receipt of indemnification or reimbursement by an electric distribution company from the electricity supplier and the retail electric customer, the electric distribution company shall issue a refund or credit in the retail electric customer's next monthly bill.

(3) Within 30 days of receipt or notice of a refund or credit of tax on the use of electricity, that was reimbursed by a retail customer, the electric distribution company shall issue a refund or credit in the retail customer's next monthly bill.

(e) *Effect on unpaid gross receipts tax.* The liability for unpaid gross receipts tax, interest, or penalty of the electricity supplier is not extinguished by payment of a tax on the use of electricity.

#### LICENSING

##### § 160.41. Electric generation supplier license procedures.

(a) *License application.* Upon request from the Commission, the Department will confirm that an applicant has no tax liabilities not subject to appeal under section 202 of the TRC (72 P. S. § 7202), section 1101 of the TRC

(72 P. S. § 8101) and 66 Pa.C.S. § 2810 (relating to revenue-neutral reconciliation) or failure to otherwise comply. If the applicant has a tax liability or failure to otherwise comply, the Department will follow the procedures set forth in subsection (c).

(b) *Licensed electric generation suppliers.* By May 1, 1998, and every year thereafter, the Commission shall provide the Department with a list of licensed electric generation suppliers with their accompanying State tax numbers, similar identification numbers and any other information the Department will require. By July 30, 1998, the Department will review the tax records of the licensees and determine whether a licensed electric generation supplier has a tax liability or failure to otherwise comply.

(c) *Procedures.*

(1) If the Department determines that an applicant or licensed electric generation supplier has a tax liability or failure to otherwise comply, the Department will notify the entity of the tax liability or the failure to otherwise comply.

(2) The entity shall have 45 days from the mailing date of the notice to fully remit the unpaid tax liability or correct the failure to otherwise comply.

(3) If the entity fails to fully remit the unpaid tax liability or correct the failure to otherwise comply within 45 days, the Department will forward a notice to the Commission with a recommendation that the Commission deny the application for electric generation supplier licensure, or institute license revocation proceedings, as applicable.

(d) *State tax information.* The Commission may request the State tax information necessary to ascertain compliance with the requirements for licensure or to institute licensure revocation proceedings. It shall be available for inspection or disclosure upon written request by the Chairperson of the Commission or by the authorized representative of the Chairperson of the Commission designated in the written request as the individual who is to inspect or receive State tax information on behalf of the Commission.

[Pa.B. Doc. No. 99-1579. Filed for public inspection September 17, 1999, 9:00 a.m.]