

The Operator Certification Act—Identified Concerns for Municipalities and Request for Action

The Pennsylvania Water Environment Association's Government Affairs Committee has reviewed the Operator Certification Act (Act 11 of 2002) in light of concerns expressed by members. The concern is that the statute allows DEP to impose substantial monetary penalties on individual certified operators for permit violations and other problems at treatment plants without requiring that there was any negligence or fault on the part of the operator. Applying this concept, called "strict liability," to a professional licensing statute is unique in Pennsylvania, and, as far as we can tell, in the United States. No other regulated profession (engineers, physicians, accountants, nurses, and others) is subject to such an unusual, unjust, and frightening threat. It is also important to report that we investigated the issue and discovered that neither municipal nor private insurance covers any situation involving state enforcement action, nor is any such policy even available in the marketplace.

The fact that operators can be held personally responsible for things completely outside of their control, such as power failures, toxic dumping, or equipment breakdowns is causing many operators to reconsider whether they should retain their certification. At a time when the number of certified operators is dwindling and it is more and more difficult to attract new employees, some municipalities are becoming concerned that this draconian provision of the law will add to their difficulties in hiring and retaining certified water and wastewater plant operators.

In conversations with DEP and with the Operator Certification Board, a second, unrelated, topic was raised. The Board believes (and in fact passed a resolution so stating) that the statute was intended to allow DEP to impose penalties only if the operator both violated his duties and violated a direct DEP Order related to his duties. However, the wording of this section is ambiguous and open to alternative interpretation by DEP enforcement personnel. DEP has not adopted any policy statement or regulations that would clarify its position on the matter. Therefore, we are suggesting that the wording of the statute be clarified to make this provision clear and in line with the understanding of the Certification Board.

Attached to this notice is the text of Section 14(c) of the statute as it stands now, and our suggested corrective amendment. The Government Affairs Committee asks that you bring this important issue to the attention of your local state representatives and ask that they sponsor a bill to correct the statute.

The full citation is: 63 P.S. § 1001, Act of February 21, 2002, P.L. 134, No. 11. The section in question is § 1014(c). (Note that there is an existing error of reference in the section which we have also corrected.)

Current Text

1014

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(c) In addition to a proceeding under any other remedy available at law or in equity, the department may assess a civil penalty upon any person who violates any applicable provision of section 13 or any operator who violates section 5(d) or 6(d) and any order issued by the department under section 4(b)(2) [*should say 4(b)(1.1)*]. A penalty may be assessed whether or not the violation was willful or negligent. When the department assesses a civil penalty, it shall inform the person of the amount of the penalty. The amount must be commensurate with the type, severity and frequency of the violation and its measurable impact on the environment or public health. The owner or operator so assessed shall have thirty days to pay the penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, the person shall, within the thirty-day period, file an appeal with the Environmental Hearing Board. Failure to appeal within thirty days of the assessment shall result in a waiver of all legal rights to contest the violation or the amount of the penalty. The maximum civil penalty which may be assessed is one thousand dollars (\$1,000) per day for each violation. For the purpose of this section, each day that a violation continues shall be construed to constitute a separate violation.

Recommended Revision

(c) In addition to a proceeding under any other remedy available at law or in equity, the department may assess a civil penalty upon any person who violates any applicable provision of section 13 or any operator who violates section 5(d) or 6(d) and ***in either case also violates an*** ~~any~~ order issued by the department under section ***4(b)(1.1)*** ~~4(b)(2)~~. A penalty may be assessed ***only if*** ~~whether or not~~ the violation was willful or negligent. When the department assesses a civil penalty, it shall inform the person of the amount of the penalty. The amount must be commensurate with the type, severity and frequency of the violation and its measurable impact on the environment or public health. The owner or operator so assessed shall have thirty days to pay the penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, the person shall, within the thirty-day period, file an appeal with the Environmental Hearing Board. Failure to appeal within thirty days of the assessment shall result in a waiver of all legal rights to contest the violation or the amount of the penalty. The maximum civil penalty which may be assessed is one thousand dollars (\$1,000) per day for each violation. For the purpose of this section, each day that a violation continues shall be construed to constitute a separate violation.