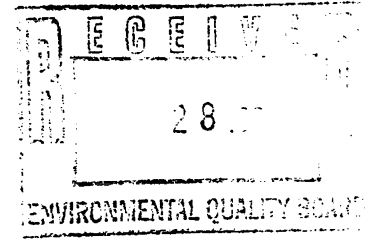


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Jonathan Price
1390 Forest Hill Road
Stevens, PA 17578 (Clay Township, Lancaster County)



Comments on Changes in Regulations on Water Quality

Chapter 92 – NPDES Permitting.

92.25 (3) Keep the chlorine cap to help protect aquatic life.

92.51(6) DEP must insist on all permittee's guarantee that they will comply with all water quality standards.

92.81 DEP should not allow toxics to be regulated by general permits.

Do not use general permits in high quality waters at all.

Require documentation that the permitted activity will not violate water quality standards.

Do not allow use of general permits in impaired waters.

Chapter 93 Water Quality Standards

93.4 Retain the protection that all waters in the Commonwealth are considered potential potable water sources.

Retain warm water fishes as the base level of protection for aquatic life in Pennsylvania streams.

93.5 (e) Replace the "mixing zone" section in Chapter 93.5 or expound it in Chapter 96. At any rate, if planning to do something else to the same effect, DEP must seek comment.

93.6 DEP should develop instream flow and habitat criteria, incorporating them into this chapter of regulation.

Chapter 96 Water Quality Standards Implementation

96.4 TMDLs as discussed and regulated in this chapter ignores non-point source problems. You really can't ignore them, you know. They exist. There is also no discussion of modeling in rain-induced pollution episodes. Get real. Also, the regs should be clear in that they apply to all waters, not just impaired waters, though those are most important. Also, let's see how DEP would address remediation of such non-point source, rain-induced or not, pollution.

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DEP:

DEP'S proposed toxics strategy
is too weak and will allow even
more toxic discharges into our
waters. I want these new
standards stopped!

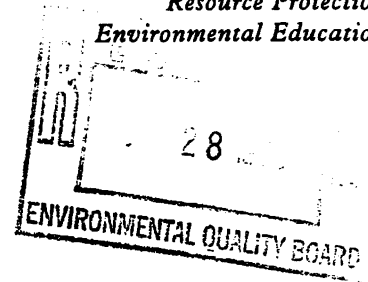
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October 28, 1998

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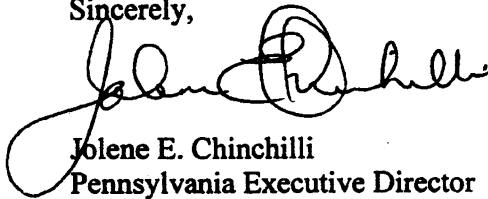
Re: Proposed Rulemaking – Chapters 92, 93 and 95 - 97

Members of the Board:

The Chesapeake Bay Foundation respectfully submits the attached comments regarding the proposed rulemaking addressing 25 Pa. Code Chapters 92, 93 and 95 – 97 as announced in 28 Pa. Bull. 4431 (August 29, 1998). If you have any questions please contact our staff scientist, Barbara Kooser at the number listed below. Thank you for your consideration.

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Sincerely,


Jolene E. Chinchilli
Pennsylvania Executive Director

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**Comments of the Chesapeake Bay Foundation
to the Pennsylvania Environmental Quality Board
on Proposed Amendments to Water Quality Regulations
25 PA Code Chapters 92, 93, 95 - 97
October 28, 1998**

DEPARTMENT OF ENVIRONMENTAL PROTECTION
REVIEW COMMISSION
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Introduction

The Chesapeake Bay Foundation (CBF) thanks the Environmental Quality Board (EQB) for the opportunity to comment on the Department of Environmental Protection (DEP) Regulatory Basics Initiative (RBI) on water quality (Proposed Rulemaking, 28 Pa. Bull. 4431 (August 29, 1998)). The Chesapeake Bay Foundation is the largest nonprofit conservation organization working to Save the Bay. Because the Susquehanna River supplies about half of the fresh water entering the Bay, what happens in Pennsylvania is important to the Bay. Protection of water quality in the Commonwealth's surface waters and groundwater is of great importance to Pennsylvania citizens, including the many thousands of CBF members who are residents here.

In 1996 CBF released a report analyzing Pennsylvania's efforts to control toxic chemicals in our waterways and found many shortcomings. The proposed changes to the water quality and permitting regulations not only fall short of implementing any of the improvements called for in our report, the changes actually roll back the current protection of our waterways from the effects of toxic chemicals.

Some general concerns were voiced in our oral testimony at the EQB hearing in Harrisburg on October 20, 1998. You will find copies of this testimony in Attachment A and those comments are incorporated herein by reference. We will concentrate on specific comments here in our written testimony.

Overall, there are some things in the proposal we support, in particular the retention of the technology standard of 0.5 mg/l for total residual chlorine and expansion of public participation to cover the permit application phase. However, there are a number of proposed changes that would weaken the current water quality protection program. Several overarching issues will be discussed first, with section-specific comments to follow.

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General Comments

The "Compelling Interest" Standard of the RBI

Like all facets of the Regulatory Basics Initiative, the proposed amendments to Chapters 92, 93, and 95-97 of Pennsylvania's water quality regulations result in part from the application of an unjustifiable standard that is inconsistent with Pennsylvania law and compromises Pennsylvania's sovereignty.

The first declared purpose of the RBI is "to assure that agency requirements are not more stringent than standards imposed by Federal law unless authorized by State law." The standard the Department has apparently adopted (with reference to Executive Order 1996-1) for fulfilling this objective is to ask whether "a compelling and articulable Pennsylvania interest" justifies the difference between the Pennsylvania and federal regulations. See 28 Pa. Bull. 2227 (May 9, 1998)(Final Surface Coal Mining Regulations)("compelling and articulable State interest"). That standard has been referenced throughout the RBI process, from the Secretary's initial August 4, 1995 memorandum (referring to a "compelling public interest") to subsequent proposed and final rulemakings (e.g., the surface mining regulations cited above and the proposed Residual Waste regulations at 28 Pa. Bull. 4073 (August 15, 1998)). The standard is also referenced in the instant proposed rulemaking at 28 Pa. Bull. 4446 (referring to "the modification of some requirements which are more stringent than Federal regulations without a compelling public interest").

This standard, however, is virtually impossible to satisfy. In judicial review of the validity of statutes, it takes a "compelling" government interest in order to justify the most extreme forms of government regulation, such as laws that include a suspect classification (e.g., race) or infringe upon a constitutionally-protected right such as free speech. See, e.g., L. Tribe, American Constitutional Law 1451-52 (2d ed. 1988); McCall v. Unemployment Compensation Board of Review, 717 A.2d 623 (Pa. Cmwlth. 1998)("denial of unemployment compensation benefits cannot be based on an individual's exercise of First Amendment rights absent a compelling state interest")(citing Frigm v. Unemployment Compensation Board of Review, 642 A.2d 629 (Pa. Cmwlth. 1994)).

There is no possible justification for holding environmental regulations to this kind of "strict scrutiny" standard. Rather, any review of the differences between Pennsylvania and federal regulations should not exceed the minimal, "rational basis" review that applies to the regulation of economic activity. Under that standard of review, a Pennsylvania regulation that is more stringent than its federal counterpart would be allowed to remain in effect if its greater stringency bore a rational relationship to any legitimate state interest. See, e.g., Ligonier Tavern, Inc. v. Workmen's Compensation Appeal Board (Walker), ___ Pa. ___, 714 A.2d 1008, 1011 (1998)(classification that does not impermissibly interfere with fundamental right or disadvantageously affect suspect class will be upheld as long as it bears rational relationship to any legitimate

state interest); Department of Environmental Resources v. Pennsylvania Power Co., 490 Pa. 399, 413, 416 A.2d 995, 1002-03 (applying rational basis review to Pennsylvania air quality regulations).

By running all of its environmental regulations through the "compelling and articulable interest" sieve, Pennsylvania is surrendering the lion's share of field of environmental protection to the federal government. Only when it is able to articulate the kind of compelling interest that would be required in order to justify the infringement of a fundamental constitutional right may this Commonwealth assert its sovereignty and leave in place a regulation that differs from its federal counterpart.

This RBI standard also runs counter to Pennsylvania law. The Pennsylvania regulations in place today, whether identical to or more stringent than their federal counterparts, enjoy a presumption of validity and reasonableness under Pennsylvania law. See, e.g., Pennsylvania Power, 490 Pa. at 413, 416 A.2d at 1003. It certainly is within the Commonwealth's prerogative to change its mind and to modify or eliminate standards that go beyond federal requirements. But if the presumption of validity and reasonableness is to be given effect, the burden of justification must be placed on those who seek to change the existing standards. Instead, the Department has shifted the burden by applying exactly the opposite presumption, a powerful presumption against the legitimacy of any duly-promulgated Pennsylvania regulation that includes a standard more stringent than federal law. This new presumption of illegitimacy, created by a mere policy, can be overcome only if the defenders of a more stringent Pennsylvania regulation can survive the RBI's version of "strict scrutiny" by carrying the ponderous burden of demonstrating the existence of a compelling and articulable Pennsylvania interest. Both the shifting and the weight of this burden are contrary to Pennsylvania law.

In addition, the standard imposed on rulemaking by this unilateral policy is inconsistent with the statutes upon which the Department and the Board rely as authority, in this case the Clean Streams Law and the Administrative Code. Neither of these statutes impose a "compelling interest" test on proposed or existing regulations but rather grant a broad authority for the Department and the Board to enact regulations that promote public health and safety without reference to federal minimum standards. The Department cannot circumvent the intent of those legislative enactments and impose a newer stricter standard by unilateral fiat.

In sum, one of the fundamental premises of the entire RBI process is flawed. Its "compelling and articulable interest" standard is contrary to the presumption of validity and reasonableness of regulations under Pennsylvania law, erroneously shifts the burden to those who would defend duly-promulgated regulations, is wholly inapplicable in the field of environmental regulation, and cedes a substantial piece of Pennsylvania's sovereignty to the federal government. To the extent that the changes proposed in the current regulation package result from the application of this standard, they should be

reconsidered, and the proper presumption of legitimacy of existing standards should be given effect.

Effective Date of Amendments

The "Effective Date" section of the proposed regulations states, "[t]hese proposed amendments will be effective upon publication in the *Pennsylvania Bulletin* as final rulemaking." 28 Pa. Bull. 4431. If the publication of the final rulemaking will precede submission of the amendments to EPA, this proposed effective date would violate the federal Clean Water Act and its implementing regulations. As a result, the proposed amendments must be revised to provide that they will take effect only upon receiving EPA approval.

With respect to water quality standards, Section 303(c)(3) of the Clean Water Act explicitly states that "[i]f the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standards for the applicable waters of that state." 33 U.S.C. § 1313(c)(3). In Alaska Clean Water Alliance v. EPA, 1997 WL 446499, *3 (W.D. Wash., July 8, 1997) the court found that section 303(c) means exactly what it says: water quality standards cannot become effective until they receive EPA approval. As to all of the proposed changes to Pennsylvania's water quality standards, the statute clearly establishes, and Alaska Clean Water Alliance confirms, that these proposed regulations must be approved by the EPA before becoming effective.

The federal regulations governing state NPDES permitting programs apply the same rule to revisions of approved state programs. Those regulations specifically provide that "[a] program revision shall become effective upon the approval of the Administrator." 40 C.F.R. § 123.62(b)(4). EPA approvals of revisions to state NPDES programs include an explicit authorization for the state to begin implementing the approved revisions. E.g., 59 Fed. Reg. 36436 (July 18, 1994) ("These permit regulation revisions may now be considered effective and may be implemented.") Once again, the clear language of the governing federal standard prohibits the amendments to the state regulations from taking effect until they receive approval from EPA.

In light of the above, we recommend that the effective date provision read as follows:

A. *Effective Date*

These proposed amendments will be effective upon approval by the United States Environmental Protection Agency.

Compliance History

Inconsistency with Section 609 of The Clean Streams Law

Section 609 of The Clean Streams Law (CSL) prohibits the Department from issuing, renewing, or amending a NPDES permit or any other permit required by the act "if it finds, after investigation and an opportunity for informal hearing that "the applicant or any related party currently is not in compliance with certain statutes or has shown, by past or continuing violations, a lack of ability or intention to comply with the law." 35 P.S. § 691.609(emphasis added). The "investigation" into the discharger's compliance history that must be completed before issuing a permit must include whether the discharger or any related party has engaged in "unlawful conduct" as defined in Section 611 of the CSL, 35 P.S. § 691.611. Under Section 611, unlawful conduct includes the violation of any rule or regulation administered by the Department, or any order, permit, or license issued by the Department, in any regulatory program. See 35 P.S. § 691.611.

The Environmental Hearing Board recently confirmed the importance and breadth of the CSL's compliance history investigation requirement in Belitskus v. DEP, EHB Docket No. 96-196-MR (Adjudication issued August 20, 1998). In that case, the Department argued that it could restrict its investigation to the discharger's compliance with NPDES permits, and perhaps only general NPDES permits, in determining whether to approve coverage under a general NPDES permit. The Board held that it could not give deference to the Department's interpretation because it was inconsistent with the statute. Relying on the plain language of the statute, the Board stated that Section 609 requires the Department to "consider the applicant's compliance history for any and all permits issued by the Department for any site in the state," including permits issued under other regulatory programs. Id.

Both the existing NPDES permit regulations and several of the proposed changes violate the plain language of Section 609. First, the regulations purport to authorize the Department to issue some kinds of permits without any investigation into the discharger's compliance history. Second, where the regulations do require a compliance history investigation, they impermissibly seek to limit that inquiry to the discharger's compliance only with NPDES permits -- the same limitation held in Belitskus to violate Section 609. These inconsistencies with the statute appear in three different areas covered by the NPDES regulations: (1) individual permits; (2) general permits; and (3) permits by rule.

Individual Permits, Sections 92.13(b) and 92.31

As to individual permits, Section 92.13(b)(1) currently allows the Department to reissue a permit if it determines the discharger is in compliance with "all existing NPDES permit terms, conditions, requirements, and schedules of compliance." 25 Pa Code §92.13(b)(1)(emphasis added). The proposed revisions to this subsection would leave in place the restriction of the compliance history inquiry to NPDES permits alone. As the EHB held in Belitskus, however, this limitation violates Section 609 of the CSL, which, by requiring an examination of unlawful conduct as defined in Section 611, explicitly requires a broad inquiry into the applicant's compliance history in all programs

administered by the Department. DEP therefore must eliminate the restriction of the compliance history inquiry to NPDES permits. We recommend that DEP do so by adding new subsections (b)(1) and (b)(2) and renumbering the existing subsections accordingly. We propose that the new subsections read as follows:

(1) Permittee and all partners, associates, officers, parent corporations, subsidiary corporations, contractors or subcontractors of the permittee have not engaged in unlawful conduct as defined in Section 611 of the State Act, 35 P.S. § 691.611 (relating to unlawful conduct), or that the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the Department.

(2) Permittee has not shown a lack of ability or intention to comply with the laws administered by the Department, as indicated by past or continuing violations.

The only section of the existing regulations under the subheading "APPROVAL OF APPLICATIONS" is Section 92.31, which is entitled "Effluent standards." The regulations do not contain a section on the initial issuance of permits that is comparable to Section 92.13 on "Reissuance of permits." To rectify this obvious shortcoming, we recommend that Section 92.31 be retitled "Issuance of permits," that the existing title be used as a subtitle for a new subsection (a) that would include the existing text (as amended), and that a new subsection (b) entitled "Compliance history review" be added that incorporates the same language proposed above for Section 92.13(b)(1).

The revised version of the regulation would appear as follows:

§ 92.31. Issuance of permits.

(a) Effluent standards. No permit shall be issued for discharge...

* * *

(8) Any more stringent limitation established pursuant to any law of this Commonwealth.

(b) Compliance history review. No permit shall be issued unless:

(1) The applicant and all partners, associates, officers, parent corporations, subsidiary corporations, contractors or subcontractors of the applicant have not engaged in unlawful conduct as defined in Section 611 of the State Act, 35 P.S. § 691.611 (relating to unlawful conduct), or the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the Department.

(2) The applicant has not shown a lack of ability or intention to comply with the laws administered by the Department, as indicated by past or continuing violations.

General Permits, Sections 92.81(d) & (e) and 92.83(b)(2)

The proposed amendments include two changes to the regulations governing general NPDES permits that are plainly inconsistent with the compliance history investigation requirements of Section 609 of the CSL. The first proposed change presents the issue addressed in Belitskus. The existing language of Section 92.83(b)(2) authorizes the Department to deny coverage under a general permit to a discharger that has "a significant history of noncompliance with a prior permit issued by the Department." 25 Pa. Code § 92.83(b)(2). The proposed amendment would insert the term "NPDES" between "prior" and "permit." For the reasons explained above with respect to individual permits, this restriction of the compliance history inquiry would be impermissible under Section 609 of the CSL. The Board should not change the language of this subsection.

A larger problem with the proposed changes concerning general permits is found in subsections (d) and (e) of §92.81, which would for the first time in Pennsylvania authorize the permitting of a discharge under a general NPDES permit without the submission of a notice of intent for coverage. Under subsection (d), the Department would be allowed to authorize certain discharges under general permits without requiring the submission of a notice of intent for coverage by the discharger. However, if a discharger does not submit a notice of intent before obtaining coverage under the permit, the Department has no way of knowing who is operating under the permit, and therefore cannot perform the compliance history "investigation" that Section 609 of the CSL requires prior to the issuance of any permit under the CSL. Because of Section 609's explicit compliance history investigation requirement, the Department simply cannot authorize coverage under a general permit without identifying each potentially permitted discharger and investigating its compliance history. That is to say, under Section 609, the Department may not authorize discharges under general permits without the submission of a notice of intent. As a result, the Board must delete proposed subsection (d) from Section 92.81.

Proposed subsection (e) of Section 92.81 is faulty as drafted but can be made consistent with Section 609 of the CSL. Subsection (e) envisions that the Department is aware of the identity of the discharger, and therefore does not present the same problem as subsection (d). If rewritten to include a requirement that the Department perform the mandated compliance history investigation, it would be consistent with Section 609. As a practical matter, however, the Department would have to receive information from the discharger in order to perform the required compliance history review. The Board either should delete subsection (e) or should rewrite the beginning of the first sentence to read:

The Department may, after completing a compliance history review in accordance with Section 609 of the State Act, notify . . .

Permits by Rule, Section 92.5a

The proposed amendments would authorize certain concentrated animal feeding operations to be covered by what appears to be another unprecedented development in Pennsylvania's NPDES program -- a NPDES "permit by rule." A permit by rule, however, suffers from the same defect as a general permit for which no notice of intent must be submitted. In either case, the Department cannot possibly perform the compliance history investigation mandated by Section 609 of the CSL because it cannot be sure who is operating under the permit. As explained above, the Department's inability to perform the required compliance history review in advance of permit coverage makes the proposed permit by rule unlawful under Section 609 of the CSL. DEP therefore must delete Section 92.5a from the proposed amendments.

Permit Applications

In order to fulfill its duties under Section 609 of the CSL, the Department must require every applicant for a NPDES permit to provide a broad range of information about its compliance history. In order to implement Section 609, we recommend that the Board add the following subsection (b)(5) to Section 92.21 of the regulations:

(5) A listing of each instance of unlawful conduct, as defined in Section 611 of The Clean Streams Law, 35 P.S. § 691.611, committed by the applicant or a partner, associate, officer, parent corporation, subsidiary corporation, contractor, or subcontractor of the applicant, along with a demonstration that the unlawful conduct has been or is being corrected to the satisfaction of the Department. The information concerning each instance of unlawful conduct that must be included in the application shall be identified on a form prepared by the Department and shall include, at a minimum, the date on which the unlawful conduct began, the duration of the unlawful conduct, and any notice of violation, order, civil penalty assessment, complaint for assessment of civil penalties, consent adjudication, consent order and agreement, consent decree, consent assessment of civil penalties, criminal proceeding, summary offense proceeding, or other enforcement action pertaining to the unlawful conduct.

This requirement also should apply to applications for coverage under general permits. We therefore recommend that this new section 92.21(b)(5) be added to the list of application requirements that appears at the end of the first sentence in Section 92.83(a)(1).

Section Specific Comments

Chapter 92, NPDES Permitting, Monitoring and Compliance Provisions

92.2 Incorporation of Federal regulations by reference

92.2(c): We support DEP not automatically incorporating any EPA variances to the NPDES program. Each new variance should be evaluated to its effect on Pennsylvania streams before being adopted.

92.2a Treatment Requirements

92.2a(c): We support protection of threatened and endangered species, and agree it should be stated here. Protection of these species and critical habitat are important to maintaining the biodiversity of the state. A similar statement should also be included in Chapter 93.

92.2b Pollution Prevention

92.2b(b): we agree with expanding the definition to include more examples of what is considered pollution prevention. However, some language from 97.14 was not included when DEP moved this section to chapter 92. The language which further defines practicable: "...practicable is not limited to that which is profitable or economical ." was left out, and we urge DEP to once again include this language. This sentence further clarifies what is meant by practicable, and it is an important distinction that is not clear in the proposed language.

92.2d Technology Based Standards

92.2d(3)(i): We support DEP keeping the 0.5 mg/l technology standard for total residual chlorine. Total residual chlorine is often used to disinfect treated sewage effluent, but just as it is deadly to the bacteria in the effluent, it can be toxic to aquatic life in the stream as well. We ask DEP to make available any regional or state-wide facility BAT numbers used under this section.

92.5a Concentrated animal feeding operations

CBF objects to this provision of the proposed rulemaking. CBF has provided extensive comments to the Department on its Proposed Strategy for Concentrated Animal Feeding Operations, which contemplates the changes proposed in this rulemaking. Those CAFO Strategy comments are attached hereto as Attachment B and incorporated herein by reference. In short, CBF believes that, for the reasons stated above (relating to compliance history) and for the other reasons stated in our CAFO Strategy comments, a permit by rule approach to regulating the activities of large livestock operations is inappropriate and/or impermissible. CBF also believes that wholesale reliance on Pennsylvania's nutrient management regulations (including the calculation of thresholds using exclusively "animal equivalent units" without reference to federally defined "animal units") is inappropriate and/or impermissible. As stated in our CAFO Strategy comments, CBF believes that, at the very least, large livestock

operations must be regulated by general permit and by individual permit for the largest operations.

92.6a Persons required to apply when a facility is owned by one person, but operated by another

When comparing this section and the definitions of owner and operator with what is stated in the preamble, the two do not seem to agree. The definition of operator is not specific enough to limit the meaning to one who has financial control over the operation. DEP needs to reconcile the definitions and this section with the explanation in the preamble.

92.8a Changes in treatment requirements

Subsection 92.8a(c) does not indicate the form in which the Department will "notify" dischargers of the more stringent effluent limits needed to protect the point of water withdrawal. Regardless of whether the Department sends some form of advance notification, it ultimately must modify the dischargers' permits to include the more stringent limits, and it makes sense to include a compliance schedule in those same modifications. The end of the first sentence and the second sentence should read as follows:

. . . water allocation permit from the Department, the Department will modify the NPDES permit of a discharger of total dissolved solids, nitrite-nitrate nitrogen, or fluoride to include the more stringent effluent limitations needed to protect the point of withdrawal. The permit modification shall include a schedule for achieving compliance with the more stringent effluent limitations, which shall be an enforceable condition of the NPDES permit.

The last sentence of the proposed subsection should be retained.

92.13 Reissuance of permits

This section (see 92.13(b)(1) & (2)) allows a facility to be in compliance with a compliance schedule and for DEP to be allowed to reissue a permit. We are concerned that a compliance schedule could be inappropriately extended beyond a reasonable time or that it would be extended through subsequent permit renewals. A clarification that the compliance schedule will not change, and will meet all applicable state and federal requirements for the length of the schedule needs to be added.

92.21 Applications

In the preamble, DEP specifically asks for input regarding public participation during the permitting process. WRAC specifically recommended additional public notice and comment be added at the time of permit application. We agree with the WRAC recommendation. In Attachment C is a copy of the recommendations from the Social

and Economic Justification workgroup of the Antidegradation Regulatory Negotiation committee. This report outlined some requirements that could be adopted by the department that would increase the ability of the public to become involved before the negotiations have worked out a draft permit, which is currently the first notice the public receives about a potential discharge. We urge DEP to give serious consideration to the process outlined in Attachment C.

92.21(c) (Additional information)

We support the inclusion of this new subsection, which appropriately recognizes the Department's broad authority to require permit applicants to submit data and provides notice of the specific kinds of additional information the Department is most likely to request.

92.21a Additional application requirements for classes of dischargers

Subsection 92.21a(e) describes additional requirements for sewage dischargers, and exempts some facilities from these requirements. However, these exceptions are unclear. For example, what is meant by "except where aquatic communities are essentially excluded"? We urge DEP to clarify these exceptions.

Subsection 92.21a(e)(1)(ii) requires sewage treatment plants with approved pretreatment programs to submit WETT results with their application. We urge DEP to require any sewage treatment plant that receives industrial waste, regardless if it has an approved pretreatment program, to submit the results of WETT with their application. Since most sewage treatment plants are not designed to treat and remove toxic chemicals often discharged with industrial waste, any plant to which industrial waste is discharged should be required to periodically monitor the amount of toxins passing through its system.

Subsection 92.21a(e)(3) states that the WETT submitted to DEP needs to have been conducted since the last permit reissuance or major permit modification, whichever occurred later. This means that the WETT could be up to 5 years old and would still fulfill the requirement. We urge DEP to require a more recent test, at the outset no older than 2 years before the permit application.

92.21a (CBF Proposal – Source Reduction Requirements)

The source reduction strategy that must be prepared by generators of residual wastes under 25 Pa. Code § 287.53 is a critical component of Pennsylvania's pollution prevention efforts. Even though the residual waste regulations have been in place for a number of years, the source reduction strategy requirements have never been instituted through the NPDES program. To alleviate this problem, the regulations governing NPDES permitting should be amended both to provide notice of the applicability of the

source reduction strategy requirement to certain wastewater treatment plants and to ensure compliance with that requirement.

As defined in 25 Pa. Code § 287.1, "residual waste" includes "solid, liquid, [and] semisolid . . . materials resulting from industrial, mining and agricultural operations," as well as wastewater treatment plant sludge. *Id.* Some wastewater dischargers are considered to be generators of residual waste (such as industrial waste treatment sludge) and therefore are required to prepare source reduction strategies in accordance with the requirements of 25 Pa. Code § 287.53. In addition, many NPDES permittees, including municipal sewage treatment plants that receive industrial, mining, or agricultural wastewaters, treat wastestreams that are classified as residual wastes. At least where some portion of the wastestream (e.g., treatment plant sludge) will be reused offsite, treatment of residual waste in an industrial wastewater treatment plant or sewage treatment plant constitutes "processing" of residual waste, as defined at 25 Pa. Code § 287.1.

Under the residual waste management program, applications for permits to process or dispose of residual waste must include copies of the source reduction strategy prepared by the generator for each residual waste to be processed or disposed of at the facility. See 25 Pa. Code § 287.133. Although wastewater treatment plants that treat residual waste are not required to get a separate processing permit under the residual waste program, they should be required to document the existence of a source reduction strategy for each residual waste they intend to treat by submitting copies of those source reduction strategies to the Department. As in the residual waste management program, the submission of these strategies should be incorporated into the permitting process by requiring dischargers that treat residual wastes to include copies of the source reduction strategies in their applications for NPDES permits.

Although this requirement could be incorporated into the new section on pollution prevention (§ 92.2b), it most logically fits into the new Section 92.21a, entitled "Additional application requirements for classes of dischargers." We recommend that the Board add the following subsection to proposed Section 92.21a, preferably as a new subsection (a):

(a) Facilities that generate or treat residual waste. Dischargers that generate or treat "residual waste," as defined in 25 Pa. Code § 287.1 (relating to definitions), at their wastewater treatment facilities shall submit a copy of the source reduction strategy required by 25 Pa. Code § 287.53 (relating to source reduction strategy) for each residual waste to be generated or treated at the facility.

(Other subsections would be redesignated accordingly.)

92.22 Application fees

As we have stated in previous comments to the water quality chapters, the application fee paid by dischargers needs to be high enough to cover the cost of processing the

application. A single family residence should pay some nominal fee to offset the processing of the application, and in some cases \$500 may not be enough to cover the cost of a complex industrial permit. DEP should institute a system based on the complexity of the permit, and collect enough money to cover the program costs.

92.31 Effluent standards or limitations

Subsection 92.31(a)(5) contains two typographical errors appearing in the second sentence of this subsection. At the bottom of page 4458, the brackets should appear around the first time the word "to" appears in the sentence and should be removed from the second time it appears ("necessary to implement"). In the third line at the top of page 4459, the brackets should not appear around "section 303(d)." In addition, we recommend that the phrase "and any regulations and guidelines issued pursuant thereto," which is proposed to be deleted, instead be retained but placed at the end of the subsection, where it would refer to section 303(d) of the Federal Act.

92.41 Monitoring

In subsection 92.41(a) the general authority for DEP to require monitoring is quite vague. We recommend the Department clarify its general authority to require dischargers to monitor surface waters by amending subsection (a) of Section 92.41 to read: "The Department may impose reasonable monitoring requirements on any discharge, including, where appropriate, monitoring of surface waters."

Proposed subsection 92.41(b) fails to take into consideration whether monitoring results previously submitted by the permittee, including the data submitted in the permit application, should have revealed the presence of the pollutants for which specific, numerical effluent limits have not be established in the permit. In addition, in most circumstances, this subsection will grant permittees too long to eliminate newly identified pollutants from their discharges. Finally, the phrase "pollutants which are not limited in the permit" should be changed to "pollutants for which specific, numerical effluent limits have not be established in the permit" because all pollutants are "limited" by the standard permit condition that incorporates the general water quality criteria codified at 25 Pa. Code § 93.6.

If the permittee should have detected and reported the pollutants in question at the time it submitted its application for issuance (or reissuance) of the permit, then the permittee is discharging those pollutants unlawfully without a permit. In such circumstances, the permittee should not automatically be given until the end of the permit term (a period of as long as 4 years), in order to eliminate the pollutant from the discharge or to seek a permit amendment. In fact, if the fault lies with the permittee, the permittee should be subject immediately to an enforcement action for the unpermitted discharge of the pollutant(s) in question, and the Department should modify the permit as quickly as possible to include the applicable effluent limits and a site-specific (and perhaps

parameter-by-parameter) schedule of compliance for meeting the limits or eliminating the pollutant(s) from the discharge.

Even if the permittee is not at fault, the rule proposed in this subsection would be unnecessarily rigid. Regardless of how much time is left in the permit's term, this subsection would grant the permittee until the end of the permit term either to eliminate the discharge of the pollutant or seek a permit amendment. This rule is unfair because two permittees who discover the presence of the same pollutant in their discharges on the same day might have compliance deadlines that differ by three years or more simply because of when their permits were issued. Moreover, automatically using the remaining permit term to define the compliance period is precisely the kind of inflexible rule that the Regulatory Basics Initiative is intended to eliminate. The remaining permit term should be retained as the outside limit on the compliance period, but the Department should have the discretion to establish a shorter period in a given case based on the particular circumstances presented.

We suggest that the first two sentences in the proposed subsection (b) be retained, and that the remainder of the subsection read as follows:

If the monitoring results indicate the presence of pollutants for which numerical effluent limits have not been established in the permit:

(i) The permittee shall separately identify each pollutant and its concentration on the monitoring report. For each pollutant, the permittee also shall explain on the monitoring report why the pollutant was not reported in the application(s) for issuance or reissuance of the permit, or on previous monitoring reports. If the permittee intends to eliminate the pollutant from the discharge, the monitoring report shall explain how the permittee will eliminate the pollutant from the discharge and the amount of time required to eliminate the pollutant.

(ii) The Department shall modify the permit as soon as practicable so that the permit includes, for each pollutant, all applicable effluent limitations and a schedule of compliance for meeting the effluent limitations or eliminating the pollutant from the discharge. In determining the schedule of compliance, the Department shall take into consideration the information presented in the monitoring report and whether the permittee should have reported the presence of the pollutant in any previous permit application or monitoring report.

92.51 Standard conditions in all permits

The preamble states that this subsection "provides a tie-in for dischargers to the general water quality criteria set forth at [25 Pa. Code] § 93.6." Those general criteria are a subset of Pennsylvania's water quality standards, and there is no principled reason for stopping with the § 93.6 criteria and failing to incorporate all applicable water quality standards into the permit. Also, because a central purpose of the NPDES permit

program is to ensure that all water quality standards are satisfied, there is every reason for incorporating all applicable water quality standards into each permit. Finally, incorporating the full range of water quality standards into this provision also has the virtue of making it much simpler and clearer. We suggest that the provision read as follows:

(6) That the discharge may not violate or result in the violation of any applicable water quality standard, as defined in 25 Pa. Code § 92.1 (relating to definitions).

If the Board decides not to incorporate all applicable water quality standards into the permit, this provision still must be modified so that it accurately reflects and fully incorporates the general water quality criteria set forth at 25 Pa. Code § 93.6.

The general water quality criteria set forth at 25 Pa. Code § 93.6 include a specific reference to "substances which produce . . . odors." Without mentioning or presenting any justification for the deletion, this proposed provision would delete the word "odors" from the list of substances otherwise copied directly from Section 93.6. The standard permit condition should faithfully follow the language of the general water quality criteria, and the word "odor" should be restored to its rightful place. This recommendation is incorporated into the proposed revision that appears below.

The general criteria in Section 93.6 contain no exception for substances for which effluent limitations have been established in an NPDES permit. Again without offering any justification, the proposed subsection purports to add such an exception by inserting the phrase "for which no effluent limitations are provided in the permit" into the language copied from Section 93.6. This proposed addition is inconsistent with the general water quality criteria themselves, and once again appears to be an impermissible attempt to amend the general criteria indirectly by limiting the scope of the most important mechanism through which those criteria may be implemented. The proposed provision also is inconsistent with the implementing condition in existing NPDES permits. For years, the Department has included a standard condition in NPDES permits that provides, without qualification: "All discharges of floating materials, oil, grease, scum and substances which produce tastes, odors, turbidity or settle to form deposits shall be controlled to levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life (93.6)(b)."

There is good reason for DEP's current approach, in which the permit condition applies the general water quality criteria to all parameters, including those for which effluent limitations appear in the permit. To take one example, if a particular effluent limitation in the permit were improperly set at a level that is too lenient to protect the stream, DEP's current, unqualified incorporation of the general criteria into the permit would provide a backstop that could be used to prevent harm from occurring even if the permittee were meeting the numerical limits for that parameter. If the permit condition incorporating the general criteria did not apply to parameters for which effluent limitations appear in the permit (as in the proposed provision), no backup protection would be available, and the

permittee would contend that the permit shield prohibits any enforcement action relating to its discharge of the parameter in question.

The following language is consistent with the Department's existing practice and tracks the language of the proposed subsection while fully incorporating the general water quality criteria of Section 93.6:

(6) That the discharger may not discharge substances including, but not limited to, floating materials, oil, grease, scum, foam, or sheen, or substances which produce color, taste, odor, or turbidity, or which settle to form deposits, in concentrations or amounts sufficient to be, or creating a danger of being, inimical to the water uses to be protected or to human, animal, plant or aquatic life.

92.57 Effluent limitations

In the preamble, it states that this section provides "...that NPDES permits may also include best management practices, pollution prevention measures or other limitations as may be necessary." However, the language in the subsection does not mention pollution prevention, just any other limitations as necessary. We urge DEP to make the subsection consistent with the preamble, and to add in the pollution prevention language. The last sentence should read:

... and may include instantaneous maximum limits, BMPs, pollution prevention measures, or any other limitations, as necessary.

Chapter 92, NPDES General Permit Provisions

The following paragraphs address CBF's extensive concerns with proposed changes to provisions governing NPDES general permits. These comments are in addition to comments above regarding investigation of the compliance history of permit applicants.

92.81(a)(5) (Toxic and hazardous pollutants)

The proposed amendments to § 92.81(a)(5) should not be adopted, and the existing restriction in § 92.81(a)(5) that prohibits the issuance of general permits for discharges that include toxic and hazardous pollutants should be retained. We strongly object to the proposed changes to Section 92.81(a)(5), which would for the first time authorize the issuance of general permits for discharges that include toxic or hazardous pollutants.

The preamble states, "Subsection (a)(5) requires that a point source not discharge toxic or hazardous pollutants." 28 Pa. Bull. 4438. That statement accurately describes the effect of the existing subsection (a)(5), which absolutely prohibits the issuance of a general permit for point sources that discharge any toxic or hazardous pollutant.

Existing Section 92.81(a)(5) provides that a general permit may not be issued unless the covered point sources

[d]o not discharge toxic or hazardous pollutants as defined in sections 307 and 311 of the Federal act (33 U.S.C. §§ 1317 and 1321) or any other substance which – because of its quantity; concentration; or physical, chemical or infectious characteristics – may cause or contribute to an increase in mortality or morbidity in either an individual or the total population, or pose a substantial present or future hazard to human health or the environment when discharged into the navigable waters.

25 Pa. Code § 92.81(a)(5).

According to ordinary rules of grammar, the final clause of the current version of this subsection (from “may cause or contribute to an increase in mortality” through the end of the subsection) is merely a continuation of “any other substance which,” and does not relate back to “toxic or hazardous pollutants as defined in section 307 and 311 of the Federal Act.” Standard principles of construction require that “words and phrases shall be construed according to rules of grammar.” 1 Pa. C.S. § 1903. Therefore, as stated in the preamble, the existing subsection (a)(5) absolutely prohibits point sources that discharge any toxic or hazardous pollutant from obtaining coverage under a general permit.

The proposed amendment would relax this absolute prohibition and would for the first time allow the issuance of general permits that authorize the discharge of toxic and hazardous pollutants. The preamble offers no justification for this dramatic change, and in fact barely acknowledges it. The preamble merely states that “[t]his provision is proposed to be revised to provide that effluent limitations for any toxic or hazardous substance may be established in the general permit.” 28 Pa. Bull. 4438.

This kind of fundamental change demands more than a brief description. The preamble acknowledges that the existing regulation provides that point sources “not discharge toxic or hazardous pollutants” if they are to be covered by a general permit. *Id.* The revised regulation clearly would allow the discharge of such pollutants pursuant to a general permit. No reason is given to support this proposed change. There are many good reasons, however, for opposing it.

A report released in 1996 by CBF's Pennsylvania office found many shortcomings in the Commonwealth's efforts to control toxic chemicals in our waterways. Reduction in the use of toxic chemicals and the discharge of toxic substances is critical to restoring the health of the Chesapeake Bay. Allowing the discharge of toxic and hazardous chemicals pursuant to general permits will exacerbate existing problems with toxic releases to waterways in a state that already ranks second in the nation in such releases (1996 Toxics Release Inventory Public Data Release, USEPA).

General permits by design get very little oversight by the Department. They are appropriate for certain classes of discharges that present routine situations for which routine procedures are appropriate. But once toxic and hazardous pollutants enter the picture, the intensity and specificity of the scrutiny must be increased, and the only way to ensure that there is sufficient scrutiny at both the permitting and implementation stages is to require that discharges that include such pollutants be covered by individual NPDES permits.

The proposed amendment would allow the discharge of additional toxics into Pennsylvania's waterways with minimal oversight and without any provision for monitoring the cumulative effect of these discharges. This is a questionable proposal for which no compelling justification has been offered and for which none is apparent. We strongly oppose the proposed amendment to subsection (a)(5) and strongly recommend that the Board retain the existing, absolute prohibition against issuance of general permits for point sources that discharge toxic or hazardous pollutants.

92.81(a)(8) (High quality waters)

The proposed amendment to § 92.81(a)(8), which would allow discharges pursuant to general permits into high quality waters, is inconsistent with the antidegradation program and fails to give high quality waters the required special protection.

Currently, general permits cannot be used in waters classified as exceptional value or high quality under Chapter 93. 25 Pa. Code § 92.81(a)(8). The proposed amendments would relax this restriction by limiting it to exceptional value waters. This proposed opening of all high quality watersheds to general NPDES permits is both unworkable and misguided.

The proposal is unworkable because under DEP's special protection program, one who proposes to discharge pollutants into high quality waters must demonstrate either that the discharge will cause no measurable change in water quality, or that the discharge "is justified as a result of necessary economic or social development which is of significant public value." 25 Pa. Code § 95.1(b)(1). It simply is impossible to make either of these determinations on a statewide basis, given the enormous differences among the many high quality streams across the Commonwealth. Statewide general permits therefore cannot satisfy the requirements of the antidegradation program, and the Board must leave in place the existing prohibition against their use in any special protection watershed.

Even if the antidegradation program posed no obstacle, allowing the use of general permits in high quality watersheds would be a bad idea. If they are truly to be given "special" consideration, high quality streams deserve at least the particularized scrutiny that attends the review of applications for individual NPDES permits, along with the additional (special) modules required for proposed discharges into high quality streams.

Finally, like several other changes proposed by these amendments, this proposal to allow the use of general permits in high quality watersheds contains no details about how the Department would implement this new authority. For example, the proposed change would simply delete a prohibition on the use of general permits for discharges into high quality waters when they were issued. The proposed amendments would not require that the Department make a determination that a new or renewed general permit is appropriate for use in high quality waters. Nor would they require the Department to go back and make such a determination for general permits currently in existence, which did not contemplate coverage of discharges into high quality waters. The proposal also does not address tracking the use of general permits in high quality watersheds or placing other limitations on their use, such as the number of such permits per watershed, that may be necessary to protect the "special" attributes and status of these waters. The devil truly is in the details, and without those details, it is imprudent to allow the use of general permits in special watersheds.

For all of these reasons, CBF strongly opposes the proposal to allow the use of general NPDES permits in high quality watersheds.

92.81(a)(9) (CBF proposal – additional controls in impaired waters)

Pennsylvania is embarking on the prolonged task of preparing and implementing TMDLs for impaired waters. The proposed regulations in the new Chapter 96 are one part of that process. In order to avoid working at cross purposes with the program to restore impaired waters, it is important to place restrictions on the use of general NPDES permits in surface waters that do not satisfy applicable water quality standards. The current regulations place no extra limitations on the use of general NPDES permits in impaired waters. The Department devotes few resources to reviewing notices of intent for coverage under general permits or overseeing and inspecting operations authorized under such permits. Because of this minimal scrutiny at both the coverage and implementation stages, the use of general permits in impaired watersheds can contribute to further degradation.

A complete prohibition against the use of general NPDES permits in impaired watersheds is unnecessary, but limitations on the use of general permits in such watersheds is imperative. If the kind(s) of pollutants that would be discharged by the proposed activity may cause or contribute to the kind of impairment that resulted in the designation of the stream or stream segment as impaired, then the discharger should be prohibited from using a general NPDES permit and should be required to obtain an individual permit. We recommend that this limitation be added to Section 92.81(a) as a new subsection (9):

(9) Do not discharge to waters identified as impaired on the most recent lists submitted by the Department to the Environmental Protection Agency pursuant to Sections 303(d) or 305(b) of the Federal Act (33 U.S.C. §§ 1313(d) and 1315(b)),

if the discharge would contain any pollutants that may cause or contribute to the kind of impairment that resulted in the designation of the waters as impaired.

92.81(b) Administration of general permits

As currently codified, this subsection states that general NPDES permits "shall comply with §§ 92.31, 92.41, 92.51, 92.57, and 92.59, and other applicable provisions of this title. The proposed amendments, however, would delete § 92.59 from this list. With the minor amendments proposed in this package, Section 92.59, titled "Documentation for Permit Conditions," states:

When an NPDES permit applies the effluent standards and limitations described in §92.31 (relating to effluent standards or limitations), the department will prepare documentation demonstrating that the permit will not violate applicable water standards. When an issued NPDES permit applies any more stringent effluent limitation based upon applicable water quality standards, a waste load allocation shall be prepared to insure that the discharge authorized by the permit is consistent with applicable water quality standards.

The preamble merely states that "[m]inor editorial changes are proposed" to section 92.81(b), and it offers no explanation why DEP is proposing to delete the requirement that the Department prepare documentation demonstrating that general permits will not violate water quality standards. This failure to offer any justification for the proposed deletion makes it difficult to provide meaningful comment on the proposal.

The Department routinely prepares "Prevention Reports" to satisfy the requirement in Section 92.59 that it prepare documentation demonstrating that individual NPDES permits "will not violate applicable water quality standards." This same requirement has applied for years to general permits. There is no apparent reason why the preparation of such documentation is less important for general permits than individual ones. Indeed, some of the other proposed changes to the general permit program, particularly those that would allow the use of general permits in high quality watersheds and the discharge of toxic and hazardous pollutants, make it even more important that the Department ensure that water quality standards are protected. We therefore recommend that the reference to Section 92.59 be retained in Section 92.81(b).

92.81(d) When notice of intent not required

DEP should not authorize the issuance of general permits that do not require submission of notices of intent for coverage. The Clean Water Act is a comprehensive statute intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by reducing and eventually eliminating the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). The Clean Streams Law similarly declares as its objective "not only to prevent further pollution of the waters of the Commonwealth but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." 35 P.S. § 691.4(3). Authorizing

coverage under NPDES general permits without requiring submission of a notice of intent would inhibit achievement of these goals by hampering the administration of the NPDES program.

The current general permit system does not require intensive DEP effort in the review of notices of intent for coverage under general permits and monitoring of the discharges covered under general permits. The current system does have the virtue, however, of keeping track of every discharger who is operating under a general permit. This basic information allows the Department and others to identify the dischargers covered by a general permit, to locate and monitor their operations and discharge points, to track the coverages issued for particular watersheds, and to at some time identify and evaluate possible areas of cumulative impacts. Without this basic information about who is using a permit and where they are using it, essential attributes of a rational regulatory system, including the ability to determine whether the system is achieving its objectives, would be frustrated.

The current system also allows an objective party to evaluate whether the discharge qualifies for coverage under a general permit and whether it will satisfy applicable effluent limitations and other standards. If the dischargers themselves were entrusted with these determinations without so much as having to identify themselves to the Department, there would be no oversight of either the issuance of general permit coverage or the operation pursuant to the general permit. This inability to oversee and monitor the use and effects of the general permit would make achieving the goals of protecting and restoring Pennsylvania's streams even more difficult. We therefore recommend that for this additional reason, the Board should delete Section 92.81(d) from the proposed amendments.

In addition, the proposed § 92.81(d), which would allow the Department to issue a general permit without submission of a notice of intent, violates the standards set by the federal NPDES regulations. The preamble to the proposed regulations states that "new subsection (d) [in §92.81] would authorize the Department to allow a discharge under an NPDES general permit in certain instances without the submission of a notice of intent. . . . This regulatory provision is based on language in the federal regulations at 40 C.F.R. 122.28(b)(2)(v)." 28 Pa. Bull. 4439. Proposed subsection (d) in § 92.81 states in relevant part that "[d]ischarges ... may, at the discretion of the Department, be authorized to discharge under a general permit without submitting a notice of intent ~~when the Department finds that an NOI requirement would be inappropriate.~~" The cited federal NPDES regulations do allow for the approval of coverage under general permits without submission of a notice of intent, but they impose restrictions not found in Pennsylvania's proposed regulation. Unlike the proposed Section 92.81(d), the federal regulations specify certain factors that must be considered when determining whether a notice of intent should not be required. The federal regulations state:

In making such a finding the director shall consider: the type of discharge, the expected nature of the discharge; the potential for toxic and conventional

pollutants in the discharges; the expected volume of the discharges; other means of identifying discharges covered by the permit; and the estimated number of discharges to be covered by the permit. The Director shall provide in the public notice of the general permit the reasons for not requiring a notice of intent.

40 C.F.R. § 122.28(b)(2)(v)(emphasis added).

The federal regulations that establish the standards for state NPDES permitting programs require that “[a]ll State Programs under this part must have legal authority to implement each of the [listed] provisions [including § 122.28] and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements.” 40 C.F.R. § 123.25 (emphasis added). The proposed Pennsylvania regulation does not satisfy this standard because it does not list a single factor the Department must consider in determining “whether an NOI requirement would be inappropriate” or even suggest a list of appropriate factors. This unguided discretion is quite different from the inquiry required by § 122.28 of the federal regulations, which must include the factors enumerated in that regulation. Because the proposed Pennsylvania regulation does not require the Department to consider (at least) the same list of factors as its federal counterpart, administration of the Pennsylvania NPDES program would not be “in conformance with” 40 C.F.R. § 122.28 if the proposed amendment were adopted and implemented. As proposed, the amendment therefore does not satisfy the requirements of 40 C.F.R. § 123.25 and cannot be approved by EPA.

We have presented two arguments above, for deleting Section 92.81(d) from the proposed regulations. If DEP nevertheless decides to keep Section 92.81(d) in the regulations, it must amend this subsection to include a requirement that the Department consider, at a minimum, the list of factors mandated by the federal regulations. It could do so by adding the following two sentences at the end of the subsection, which are taken virtually verbatim from 40 C.F.R. § 122.28 (b)(2)(v) :

In making such a finding, the Department shall consider, at a minimum: the type of discharge; the expected nature of the discharge; the potential for toxic and conventional pollutants in the discharges; the expected volume of the discharges; other means of identifying discharges covered by the permit; and the estimated number of discharges to be covered by the permit. The Department shall provide in the public notice of the general permit the reasons for not requiring a notice of intent.

Chapter 93, Water Quality Standards

93.1 Definitions

Natural quality: In order to make it very clear that human activity applies to both historical and current activities, we suggest the following change. “The water quality

conditions that exist or that would reasonable be expected to exist in the absence of past and current human related activity."

93.4 State wide water uses

This section states "These uses shall be protected...", and is part of the antidegradation requirement of the water quality standards. Although the state is promulgating the antidegradation regulations in a separate rulemaking, this language should not only protect the uses, but maintain them as well. We suggest the language be changed to:

These uses shall be maintained and protected

Table 2, State wide water uses

DEP proposes to delete warm water fishes as a state wide water use, stating that aquatic life uses are listed in 93.9 for each stream. We are concerned about streams that for one reason or another do not get on the list in 93.9. Although aquatic life as a category remains in the table, since no specific use is listed it is confusing as to what would apply. With over 83,000 miles of streams in the state, it is unlikely that the list will always be 100% accurate. By leaving the designation of warm water fishes, It adds no additional requirement or tasks to what DEP currently does. It makes sense to retain the warm water fishes as a state wide water use.

We encourage DEP to retain potable water supply as a state wide water use. According to Bureau of Water Supply Management, surface water is the source for community drinking water systems for over 8 million Pennsylvanians. In other words, over 76% of the people served by community water systems use drinking water derived from surface water sources.(handout to the Water Resources Advisory Committee to DEP, 5-13-98). We urge DEP to retain potable water supply as a state wide water use to help protect the sources of drinking water for future communities as they already protect current community supplies.

Table 3, Specific Water Quality Criteria

DEP is proposing to drop listing of criteria from River Basin Commissions in the table of specific water quality criteria. We urge DEP to retain these listings. In the current regulations, it is clearly marked which criteria come from the River Basin Commissions, and it is very valuable to have in one place all the water quality requirements that apply to state streams. In this age of making more information easily available, the removal of the River Basin Commission requirements is taking a step backwards. DEP already is required to consider these requirements when developing permit limits, so it seems appropriate for DEP to retain a consolidated listing of water quality standards including those from River Basin Commissions.

Table 5

This table, which contains groups of specific water quality criteria based upon water uses to be protected, is proposed to be deleted. Although this information can be gleaned out of information found elsewhere, the table makes it very easy to see and understand how the different water uses differ in regards to dissolved oxygen and temperature. We urge DEP to retain this table particularly since it makes it easy to understand the differences between the water uses listed.

93.7 Specific water quality criteria

DEP proposes to add subsection 93.7(c) on using ambient water quality as criteria. This would simply lead to continuing degradation of water quality. We would prefer DEP adopt a policy where the effluent limits would be equal to water quality standards when ambient water quality exceeds the standards. This type of policy would be protective of the stream, especially when the ambient water quality is based on limited sampling or if the stream quality changes over the life of the permit. However, the proposed notification requirement is better than the current procedure. EPA objected to the current procedure during the last triennial review. If DEP does not adopt our recommendation, then we make the following suggestions to strengthen the proposed requirements. DEP should require regular upstream sampling as part of the facility's regular monitoring program in order to get adequate data on which to base the next permit limit if a limit is based on ambient quality. In addition, the PA Bulletin notice should be separate from the draft permit notice, so as to make it more visible. Any newspaper notice required by the facility should also include this information.

93.8 Development of site-specific water quality criteria for the protection of aquatic life

Subsection 93.8(c), limiting which criteria are eligible for development of site specific criteria, is proposed to be deleted. The reason given is so to conform to changes in section 93.7(c), which is the procedure for using ambient water quality as criteria. Although the use of ambient water quality as criteria is a form of site specific criteria, it is not the only type. By complying with other requirements, dischargers can apply for site specific criteria. By deleting 93.8(c), it appears to open up this section to the use of narrative criteria as well as for chemical specific criteria. According to the Water Quality Standards Handbook (2nd edition, p. 3-24) "EPA considers that the narrative criteria apply to all designated uses at all flows and are necessary to meet the statutory requirements of section 303(c)(2)(A) of the CWA." General narrative criteria should apply all the time, therefore we oppose the deletion of this section

Chapter 96, Water Quality Standards Implementation

96.1 Definitions

There are some definitions included in this section which never are used in the chapter, such as nonpoint source remediation plan and precipitation induced point source discharge. However, both of these terms point to fundamental deficiencies in the substantive provisions of Chapter 96: 1) the failure to provide mechanisms for enforcing load allocations; and 2) the failure to include appropriate modeling assumptions and design flow criteria for situations in which nonpoint source or other precipitation induced discharges contribute substantially to pollution loads. The better solution therefore may be to incorporate these two terms into provisions that address these two shortcomings of the regulations.

We also recommend that a definition of the term "margin of safety" be added to Section 96.1. The definition should explain the process through which a margin of safety will be determined and what factors the Department must (or should) consider in establishing a margin of safety

In addition, the definition of Natural Quality should be modified to include our comments found under Chapter 93.1.

96.3 Water quality protection levels

Several sections of the regulations require that water quality attributes be "maintained and protected." E.g., 25 Pa. Code § 95.1(b). We recommend that this same formulation be used in Section 96.3(a) by adding the words "maintained and" before the word "protected."

In subsection 96.3(c) DEP specifies that

. . . water quality criteria in Chapter 93, including the criteria in §§ 93.6, 93.7, and 93.8a(b) . . . shall be achieved in all surface waters at least 99% of the time, unless otherwise specified in this chapter.

It is unclear, even for numeric criteria, how the "99% of the time" standard is to be measured and applied. Are 99% of daily maximum values supposed to satisfy the criterion, 99% of all samples no matter what the frequency of sampling, or some other standard? This subsection should explain how compliance with the "99% of the time" standard is to be determined. Presumably, that same explanation will apply to the subsequent uses of the standard in Chapter 96.

It is even less clear how the "99% of the time" standard would be applied to the general, narrative water quality criteria set forth in Section 93.6. For example, Section 93.6(b) includes a list of substances that are "to be controlled," including "floating materials, oil, grease, [and] scum." 25 Pa. Code § 93.6(b). The "99% of the time" standard appears to imply that dischargers would not have to control the release of such substances 1% of the time. A similar problem arises when trying to apply the "99% of the time" standard to the general criterion described in Section 93.6(a). The "99% of the time"

standard seems to be derived from statistics and workable only for numerical criteria. CBF therefore recommends that Section 93.6 be deleted from the list of sections in subsection 96.3(c) that are subject to the "99% of the time" standard, and that the following sentence be added at the end of subsection 96.3(c):

The water quality criteria set forth in § 93.6 shall be achieved at all times in all surface waters.

In addition to not understanding what is meant by the "99% of the time" protection level, it is unclear how this protection level relates to the EPA frequency for criteria. Aquatic life criteria were developed recognizing that infrequent excursions of the criteria could be allowed, if the stream then has adequate time to recover and function normally for a period of time before another excursion occurs (TSD for Water Quality-based Toxics Control, 1991, p. D-4). The frequency stated in the TSD recommends generally that exceedances should occur only once every three years.

In the proposal, 96.3(c) states that:

water quality criteria ... shall be achieved in all surface waters at least 99% of the time, unless otherwise specified in this Chapter.

For example, for a daily average criteria, the stream would be in compliance with the criteria 361 days out of 365 days in a year. Over a three year period this translates to 1084 days of 1095 day. However, the federal standards would require the criteria to be met 1094 days out of 1095. This number is equal to a 99.91% protection level. What is the justification for this discrepancy with the federal guidance?

96.3(d) (Taste and odor)

DEP proposes dropping the requirement for meeting taste and odor values for phenol, which previously applied at water supply intake points. Although taste and odor levels of phenols do not pose a threat to human health, they are nonetheless a nuisance for public water suppliers. Right now, the water suppliers are protected from these nuisance levels of phenols because of the current criteria. This protection is important because over 76% of the community water systems currently use surface water as a source for their drinking water. By dropping the taste and odor criteria for phenol, dischargers will be allowed higher discharge limits (the criteria will go from 20 ug/l to protect aquatic life, to 20,000 ug/l to protect human health). This action could have an economic impact on the citizens of the Commonwealth when their water suppliers have to remove phenol from the water before distributing it. We note that the drinking water section of DEP is developing an assessment procedure that will assist water suppliers in protecting their source water at the same time the Bureau of Watershed Conservation is proposing to weaken protection based on taste and odor criteria. Just as we encouraged DEP to retain the state-wide potable water supply as a state-wide use, we also encourage DEP to retain the taste and odor criteria.

96.3(d) (Mixing Zones)

The proposal preamble states that §96.3(d):

reflects existing § 93.5(e), but deletes the phenolics requirement because the phenolics criteria are being deleted from Table 3.

28 Pa. Bull. 4444. The preamble does not mention at all, however, the deletion of another significant provision of §93.5(e)(1), namely the entire last sentence, which reads:

Criteria necessary to protect other designated uses shall be met at the point of wastewater discharge.

It may be just an oversight or a typographical error, and that correcting the problem is a simple matter of placing the same sentence at the end of new Section 96.3(d). Otherwise, one would expect DEP to have offered a justification for the deletion of the sentence, or at least to have mentioned its deletion in the preamble when the Board pointed out the deletion of the phenolics requirement.

Recognizing that there is a chance that the deletion of this sentence was not a matter of mere oversight, we take the opportunity to address the topic of mixing zones that the sentence brings to the fore.

Existing Section 93.5(e), entitled "Application of potable water supply use criteria," provides that certain instream water quality criteria that have been established for protection of potable water supplies must be met at the point of water withdrawal. In other words, a mixing zone is allowed for the identified parameters, and its length is defined by the nearest existing or projected point of potable water supply withdrawal downstream from the discharge. That downstream compliance or modeling point is established as a limited exception to the general rule, set forth in the last sentence of subsection (e)(1), that "[c]riteria necessary to protect other designated uses [i.e., all designated uses other than potable water supply] shall be met at the point of wastewater discharge." 25 Pa. Code § 93.5(e)(1)(emphasis added). In other words, no mixing zone is allowed for the criteria applicable to all other designated uses.

That implication makes the last sentence of Section 93.5(e)(1) very important. It certainly should not be deleted without some justification being offered, much less without even being mentioned in the preamble. While requiring consideration of associated costs, the courts have recognized the environmental benefits that would be realized through the elimination or limitation of mixing zones. See American Iron & Steel v. EPA, 115 F.3d 979, 997 (D.C. Cir. 1997). In light of these recognized environmental benefits, DEP should offer some justification for its proposed deletion of a provision that broadly prohibits the use of mixing zones.

Pennsylvania often asserts that its water quality standards and NPDES permitting programs do not authorize "mixing zones." But the Department comes very close to using this exact term in the January 9, 1995 Technical Reference document for the PENTOXSD model. In Section 1.3 of that guidance document, entitled "Criteria Compliance Times," the Department begins by explaining that because the model does not assume that all discharges completely mix with the stream, it is necessary to establish mixing characteristics and a point for determining compliance with water quality criteria. The Department goes on to explain that it "allows an area of mixing downstream of the discharge" that is measured by different maximum downstream travel times depending on the nature of the particular criterion (e.g, 15 minutes for acute aquatic life criteria, 12 hours for chronic aquatic life criteria). "Area of mixing" and "mixing zone" are essentially ways of expressing the same concept -- an area downstream of a discharge at the edge of which compliance with an instream criterion is measured.

No matter what label is used, this concept is one of the fundamental issues that must be addressed when writing NPDES permits. Because of its importance, the uncertainties that the Department acknowledges in its PENTOXSD guidance, and the many judgments that must be made in determining appropriate mixing zones or criteria compliance times, the issue should be treated as a fundamental policy issue and resolved through notice and rulemaking. If mixing zones are going to be used, they should be authorized and specified in the regulations

EPA's regulations governing water quality standards provide that the "[s]tates may at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones. . . . Such policies are subject to EPA review." 40 C.F.R. § 131.13. We recommend that DEP use this opportunity to address the issue of mixing zones and any related modeling issues concerning the development of water quality based effluent limitations. Until the completion of such rulemaking, DEP should include, at the end of the new Section 96.3(d), the sentence that now appears at the end of Section 93.5(e)(1): "Criteria necessary to protect other designated uses shall be met at the point of wastewater discharge," and implement it.

96.3(e) (Determinations of ambient water quality)

The proposed language states that either water quality samples or an evaluation of the physical surroundings of the surface water can be used to determine if ambient water quality is less than the criterion. We oppose the use of an evaluation of only the physical surroundings be used without any supporting water quality data for criteria in 93.7 and 93.8a(b). Since this is considered a type of site-specific water quality criterion, as described in section 93.8, the specifications in that section, in particular 93.8(b) should apply. The language should be modified to read:

... based on observations at one or more reference stations, and an evaluation .

In addition, we strongly oppose the inclusion of 93.6, general criteria, in this section. According to the Water Quality Standards Handbook (2nd edition), "EPA considers that the narrative criteria apply to all designated uses at all flows and are necessary to meet the statutory requirements of section 303(c)(2)(A) of the CWA." Therefore, there should not be allowed site-specific criteria for the general narrative criteria.

96.3(g) (Wetland functions and values)

We strongly support the protection of wetland functions and values in this section. It goes on to state that these functions and values will be protected under Chapter 105. However, a number of other regulatory chapters also help to protect the functions and values of wetlands as well. Since it would be too difficult to enumerate every chapter that helps to protect wetland functions and values, we recommend just deleting the reference to Chapter 105. This subsection should be modified to read:

(g) Functions and values of wetlands shall be protected.

96.4 TMDLs

Section 96.4 identifies two different kinds of TMDLs that will be used in setting water quality based effluent limitations for point source discharges. The first, described in subsection (a), is the "standard" TMDL prepared for impaired waters. The second, described in subsection (b), would apply to certain waters currently designated as being in attainment with water quality standards. This distinction is not clear throughout this section, making the entire section confusing and unclear. With the requirement of TMDLs to be developed for impaired waters, the association of TMDLs with impaired waters already exists. We suggest giving the TMDL process for nonimpaired waters a different name, or add clarifying language that any calculation of water quality based effluent limits are included in this section.

In addition, these two categories (96.4(a) and (b)) do not appear to cover the entire universe of situations in which water quality based effluent limits must be calculated. As proposed, subsection (b) would apply only if "[o]ne or more point sources are or would be the primary cause of violation of the applicable water quality protection level." It is entirely possible, however, that a proposed point source discharge (meeting technology based requirements) into a water body that is currently in attainment would cause a modeled violation of a water quality protection level where the primary cause(s) of the loading of the pollutant (and thus of the modeled violations) are nonpoint sources. It does not appear that Section 96.4 provides how TMDLs, WLAs, LAs, will be determined in that situation, leaving it unclear how water quality based effluent limits will be calculated.

This subsection also only requires regulation of point sources, which make up only a small portion of the causes of degradation to Pennsylvania waters. The language included in 93.4(d) states that point sources will be controlled through their NPDES permit. However, there is no mechanism for enforcing the load allocation portions of TMDLs, or for taking into account the failure of nonpoint sources to achieve the overall load allocation assigned to them as part of a TMDL.

This is a grave oversight for this proposal. DEP is required, under a Memorandum of Understanding with the USEPA to develop nonpoint based TMDLs for impaired waters within the next year. The MOU also requires the completion the nonmining TMDLs within 10 years, and developing TMDLs for any newly listed impaired water with 3 years of its listing. DEP will be developing a greatly increasing number of TMDLs for impaired waters in the near future. DEP needs to address nonpoint sources in this regulatory proposal, and include in the final rulemaking a process it will follow in its TMDL development for addressing nonpoint sources of pollution, including modeling and implementation provisions for nonpoint reductions.

96.4(e)(3)

As stated under the definitions in 96.1, "margin of safety" should be defined and explained.

96.4(e)(4)

If increases in pollutant loadings "may be reasonably expected" over the next ten years, it would be unreasonable for the Department not to take them into consideration. We therefore recommend that the word "May" at the beginning of this subsection be changed to "Shall".

96.4(g) Effluent trading

Effluent trading programs and similar market-based regulation approaches are controversial at both the theoretical and practical levels. By itself, the controversial nature of such programs demands that any effluent trading program be authorized only after the rules and procedures governing the trading regime are spelled out in detail, subject to thorough public review and comment, and codified in regulations; Several existing air quality trading programs have been established in this manner. E.g., 25 Pa. Code §§ 123.101-123.120 (nitrogen oxides allowance trading program); id. §§ 127.206-127.211 (registry and transfer of emission reduction credits).

The principal problem with the effluent trading program proposed in section 96.4(g) is that there is no program to consider. The trading program that would be authorized is little more than a concept. The details of the program are left to the Department to fill in later through a process that calls for public notice and opportunity to comment, but does

not require formal rulemaking. It is this aspect of the proposed regulation, set forth in subsection (3), that is inappropriate and must be changed.

Before detailing its objection to subsection (g)(3), however, we emphasize our support for the first two subsections of section 96.4(g). If an effluent trading regime is established, it should require, as a prerequisite to any trades occurring within an affected watershed, that the two conditions described in those subsections are satisfied: First, that all pollutant sources discharging to the affected waterbody are in compliance with technology-based requirements; and second, that all portions of the waterbody have achieved the specified water quality protection levels. Any trading program should include both of those elements.

Subsection (g)(3) would grant the Department very broad discretion to devise and implement an effluent trading program. As mentioned above, subsection (3) appears to allow the Department, after taking comments from the public, to decide upon the details of the trading regime unilaterally, without any independent review by the EQB or any other entity. Only a few conditions are placed on this broad grant of authority.

Whether the procedure envisioned by subsection (g)(3) is the adoption of a policy or something less formal, the problem is the same: Effluent trading is too important and too controversial to be left to a unilateral determination of the Department. The critical issues that must be decided in developing a trading program are precisely the kinds that should be resolved through notice and comment rulemaking, in which the Department has considerable influence.

We recommend that subsection (g)(3) be revised to read:

(3) The Board adopts final regulations prescribing the rules and procedures of the effluent trading program.

We have been following the issue of effluent trading on the national and regional level for a number of years, and would be happy to give DEP input on what should be included in an effluent trading program.

96.4(h) (Modeling)

This section only applies:

when it is determined that continuous point sources are the primary cause of the violation of the water quality protection levels.

Neither §96.4(h) nor any other provision of Chapter 96 provides any guidance as to what kind of modeling or design flow conditions to use when continuous point sources are not the primary cause of the violation. The regulations also do not explain what standards will be applied in the decision of what is a primary cause.

Steady state modeling and low flow design conditions set forth in this section are inappropriate where nonpoint sources are the primary cause of a violation of water quality protection levels. A model is needed that takes into account precipitation – induced pollutant discharge, both when it is a “primary cause” and when it just contributes to the impairment of the stream. In the MOU with EPA, the Basins model is suggested for use. We encourage DEP to investigate the use of this or other models that can merge both point and nonpoint sources of pollution.

In addition we urge DEP to consider using a design flow of Q1,10 for the acute aquatic life criteria. When questioned, DEP claims to have looked at flows for over 250 gauging stations and that there was little difference between using the Q7,10 and Q1,10 flows. What was the range of these differences? . Did DEP use one aggregation of all the data for the calculations? One would expect not to see as large of differences in large rivers or if all the streams were aggregated together, but that may not be the case for smaller streams, where the difference in Q7,10 and Q1,10 would be expected to be greater. We urge DEP to examine this again, and to look at its effect particularly in smaller streams.

This section also includes a reference to an “alternative method . . . approved by the Department under subsection (g).” This reference is confusing. The effluent trading that would take place under subsection (g) would take place AFTER the models and design flow conditions addressed subsection (h) have been applied in the determination of TMDLs, Waste Load Allocations (WLSs), and Load Allocations (LAs). Subsection (g) does not provide alternative modeling or design flow conditions but rather a mechanism for reallocating the loads that are allocated initially by DEP using appropriate modeling and design flow conditions. We therefore recommend that the above referenced phrase be deleted.

§96.7(a) Public participation (TMDL lists)

The experience with Pennsylvania’s 1998 TMDL list proves that a 30-day comment period is wholly inadequate. The draft 1998 list had 48 pages of condensed tables of stream segments and even more pages of appendices. Just locating and identifying all of the listed stream segments is a considerable, time-consuming endeavor. CBF recommends that the comment period on the draft and final TMDL lists be set at a minimum of sixty days.

§96.7(b) Public participation (draft and final TMDLs)

Thirty days also is inadequate for reviewing and commenting on particular TMDLs. Just receiving notice and being scheduled for an appointment to review the relevant files can consume most of a 30-day comment period, which would leave inadequate time to analyze the draft TMDL and supporting technical documents and to prepare comments.

October 28, 1998

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CBF therefore recommends that this comment period likewise be increased to a minimum of sixty days.

This concludes our written comments.

Attachment A

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Testimony of the Pennsylvania Office
Of the Chesapeake Bay Foundation
To the Environmental Quality Board
On the Proposed Changes to Water Quality
25 PA Code Chapters 92, 93, 95-97
October 20, 1998



CHESAPEAKE BAY FOUNDATION

*Resource Protection
Environmental Education*

**Testimony of the Pennsylvania Office
of the Chesapeake Bay Foundation
to the Environmental Quality Board
On the Proposed Changes to Water Quality
25 PA Code Chapters 92, 93, 95 – 97
October 20, 1998**

On behalf of the Chesapeake Bay Foundation (CBF), I would like to thank the Environmental Quality Board for the opportunity to discuss the Department of Environmental Protection (DEP) Regulatory Basics Initiative on water quality. The Chesapeake Bay Foundation is the largest nonprofit conservation organization working to Save the Bay. Because the Susquehanna River supplies about half of the fresh water entering the Bay, what happens in Pennsylvania is important to the Bay. For years CBF has championed the concept of toxics use reduction as the approach needed to help Save the Bay. In fact, CBF has set a goal of 50% reduction in the use of toxic chemicals in order to help restore the Bay to health. In 1996 CBF released a report analyzing Pennsylvania's efforts to control toxic chemicals in our waterways and found many shortcomings. The proposed changes to the water quality and permitting regulations not only fall short of implementing any of the improvements called for in our report, the changes actually roll back the current protection of our waterways from the effects of toxic chemicals.

There are a number of items contained in the state's proposed changes that would decrease the protection we currently have for our streams. I would like to discuss some of them briefly now. More details on these and other issues will be contained in our written comments.

The proposed regulations would roll back current water quality protection.

1. By allowing toxic chemicals to be discharged under general permits.

General permits by design get very little oversight by the Department. Allowing toxic chemicals to be discharged under general permits could allow the discharge of toxic chemicals into our waterways with practically no oversight and no way to look at the cumulative effect of these discharges. There is no mention in the proposal if or how DEP would put restrictions on the amount of toxic chemicals that could be discharged under a general permit. As currently proposed, we oppose the inclusion of toxic chemicals in general permits.

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2. By deleting the requirement to document that general permits will not violate water quality standards.

Currently, all permits issued, including general permits, need to have documentation showing that the discharge will not violate water quality standards. With no explanation, this requirement is proposed to be deleted for general permits in the State's proposal. This is particularly troublesome when taken with the other actions proposed regarding toxics. Due to the lack of oversight on general permits, it is very important that DEP demonstrate that these permits will not cause water quality violations, and this requirement should be retained.

3. By not addressing the issue of mixing zones.

The Environmental Protection Agency gives states the authority to allow an area below a discharge to have pollutant concentrations above water quality criteria (i.e. mixing zones). The mixing zones must be consistent with the Clean Water Act and are subject to approval by EPA Regional Administrator (p. 5-1, Water Quality Standards Handbook, 2nd edition).

Pennsylvania regulations do not contain any mention of mixing zones. In fact, section 93.5(e)(1) gives what could be considered a substantial mixing zone for specific chemicals related to potable water supplies. The current regulation then states "Criteria necessary to protect other designated uses shall be met at the point of wastewater discharge." This can be interpreted to mean no mixing zone is allowed for other designated uses. This sentence is deleted in the current proposal.

As stated, this requirement is not implemented by the state. The State currently gives extensive mixing zones to all dischargers. Through the use of the PENTOXSD model, DEP gives dischargers a 15 minute travel time downstream to meet acute aquatic life criteria and a 12 hour travel time downstream to meet chronic aquatic life criteria.

Although mixing zones may be appropriate in some circumstances, they are particularly inappropriate for chemicals that are persistent or bioaccumulate in the environment, such as many toxic pollutants.

This proposal not only remains silent on mixing zones, but deletes without any explanation the one sentence that can be construed to apply to mixing zones. The state should either leave the requirement of meeting instream criteria at the point of discharge and implement it, or craft regulatory language to cover its current policy and have appropriate public participation and federal review.

Inadequate regulation of impaired waters

1. By completely omitting nonpoint sources from regulation.

The state is required to identify impaired waters, and to develop a total maximum daily load (TMDL) to bring the water quality back to meet water quality standards. All sources of pollutants may be examined, both point sources such as industries and sewage treatment plants and nonpoint sources such as agricultural or urban runoff. The state's proposal includes nonpoint source pollution in the calculation of the TMDL, but it is completely silent on how it proposes to control nonpoint source pollution.

This is a very crucial point, because according to the 1998 305(b) Report of Water Quality Assessment, the second leading source of impairment in waters in the state is agriculture – a nonpoint source of pollution. In addition, due to an agreement with the EPA, the state is required to write TMDLs this year dealing with nonpoint source impaired waters. The silence on the topic of controlling nonpoint sources is a serious and critical omission. The State needs to include an approach to controlling nonpoint source pollution in this regulatory package.

2. By allowing the use of general permits in impaired waters.

As stated previously, general permits by their nature receive little oversight. Currently, there are no restrictions on their use in impaired waters. Depending on the cause of the impairment, use of general permits in impaired waters could contribute to the problem. DEP should add a condition on the use of general permits prohibiting their use in impaired waters if the discharge could add to the impairment of the stream.

Broadening the general permit program

1. By allowing toxics to be discharged under general permits.

As mentioned above, without specific restrictions, toxic pollutants cannot be adequately regulated through general permits due to the lack of oversight. We oppose deletion of the current prohibition.

2. By allowing the use of general permits in high quality waters.

Currently, general permits cannot be used in exceptional value or high quality waters. The proposal changes the status quo by allowing the use of general permits in high quality waters. Once again, DEP is silent on how this will be implemented. Will they track the use of the general permits? Will they limit the number that can be used? There is no mention of any controls on the use of these permits in high quality waters.

In addition, there is no explanation of how DEP would allow the use of general permits in high quality waters and still meet the requirement that discharges will not cause a measurable change in water quality. Nor is there an explanation of how, through the general permit process, it could be determined that the use of the general permit would be justified under a social and economic test. Due to the generality of the proposal, and lack of detail on how the change will meet the current requirements for high quality waters, we oppose the changes allowing the use of general permits in high quality waters.

3. By deleting the documentation requirement for general permits.

As discussed above, we oppose the deletion of the requirement that the Department provide documentation showing the discharge will not cause a violation of water quality standards.

Effluent trading given blanket approval by only listing minimal requirements.

The approach taken by this proposal regarding effluent trading is minimal – the only two requirements listed are that standards be met instream and that procedures be made public. In this case, a minimalist approach is not appropriate. The issue of effluent

trading is very controversial, there are many different types of trades, and EPA, after working on the issue for a number of years, has not finalized their guidance. DEP is moving ahead with effluent trading before any of the details about how it will be implemented are given and before enough information about a program is available to even raise questions. Before any effluent trading program is approved, the details need to be seen and discussed openly and publicly. In this case, the only way to determine if a program is protective is to see the details. In fact, the details of an effluent trading program should be proposed in regulation. We oppose the blanket approval proposed in these regulations.

This concludes the oral testimony. Once again we thank the Environmental Quality Board for the opportunity to comment on this regulatory package, and we will submit more detailed written testimony.

Attachment B

Comments of the Chesapeake Bay Foundation to the
Pennsylvania Department of Environmental Protection on its
Proposed Strategy for Concentrated Animal Feeding Operations
October 13, 1998



CHESAPEAKE BAY FOUNDATION

*Resource Protection
Environmental Education*

Comments of the Chesapeake Bay Foundation to the Pennsylvania Department of Environmental Protection on its Proposed Strategy for Concentrated Animal Feeding Operations October 13, 1998

Introduction

The Chesapeake Bay Foundation (CBF) appreciates the opportunity to provide comments on the proposed strategy for preventing water quality impacts of concentrated animal feeding operations (the "strategy"). Reducing agricultural pollution to surface and groundwater is critical to improved water quality in Pennsylvania and the Bay. At the same time, CBF views agriculture, including sustainable dairy, pork and poultry production, as a preferred land use. Well-managed farms are an asset to the community and the environment and are much preferable to poorly planned development and associated impermeable surfaces and runoff. In recent years, many farmers have made considerable strides in the areas of nutrient management, soil conservation and integrated pest management.

The growing trend toward large animal confinement operations, however, challenges us to rethink our traditional approaches to the problems of agricultural pollution. CBF commends the Department for recognizing these changes in agriculture and responding with a proposal that attempts to address the water quality impacts arising from animal feeding operations ("AFOs")¹ and attempts to meet state and federal environmental requirements for AFOs.

AFOs present a range of environmental concerns. Chief among these is the potential for large AFOs, particularly new or expanding AFOs, to increase nutrient pollution in Pennsylvania at a time when accelerated nutrient reductions are needed in the Susquehanna and Potomac watersheds. Excess nitrogen and phosphorus cause severe water quality problems in the Chesapeake Bay and degrade many local watersheds. In a synthesis of water quality data in 13 major subwatersheds in the Chesapeake Bay watershed, the U.S. Geological Survey found that the largest median concentrations of total phosphorus and total nitrogen were found in the lower Susquehanna Basin. (Langland, 1995).

Pennsylvania, along with Maryland, Virginia and the District of Columbia pledged to reduce nutrient loads to the Bay by 40% by the year 2000. Achieving this goal has proven especially difficult with respect to nitrogen. DEP's Nutrient Reduction Strategy for the Susquehanna and Potomac targets agriculture to achieve the lion's share of

¹ To avoid confusion with the federally defined term "concentrated animal feeding operation" or "CAFO" this document will use the term "animal feeding operation" or "AFO" to refer to concentrated animal feeding operations that should be subject to the standards addressed in the strategy.

reductions, but these reductions have been elusive. Most alarming is the fact that considerably fewer Act 6 nutrient management plans have been developed than are anticipated by the Nutrient Reduction Strategy. The strategy estimates that 7,771,000 pounds of nitrogen will be reduced over a four-year period through the implementation of 4,178 nutrient management plans (Department of Environmental Protection, 1996). As of this June, only 170 plans had been approved, with only three months remaining before the deadline for plan submittal.

Pennsylvania simply cannot afford to have this serious problem of nutrient pollution worsened by inadequately regulated and poorly managed AFOs. Thus, DEP's permitting strategy must support and indeed strengthen Pennsylvania's efforts to meet its nutrient reduction commitment that is so critical to the health of the Bay and the Susquehanna watershed. Toward this end, CBF makes the following recommendations on the proposed strategy, organized in the following sections:

Scope of Permit Requirements

Terms and Conditions of Permits

Enforcement and Compliance

Public Participation

Supplementary Efforts

Scope of Permit Requirements

Water quality permits, both NPDES discharge permits and Water Quality Management Part II permits, are the essential, defining elements of DEP's strategy. As authorized and mandated by state and federal law, these permits must be designed to ensure that waters of the Commonwealth are protected and that there be no discharge from the manure storage facilities or the manure spreading activities of large AFOs.

DEP should not limit the terms of its strategy based on narrow interpretations of evolving federal law or less protective programs in other states. Pennsylvania's unique geography and geology complicate its problems with AFO pollution. Pennsylvania's topography is quite varied, and some AFOs are locating in areas with very hilly terrain which, coupled with the region's plentiful rainfall, increase potential for runoff. In other areas where limestone geology predominates and where many residents are on private wells, nitrate contamination is already a serious concern. As mentioned above, Pennsylvania is struggling to meet its commitment to reduce nitrogen levels, particularly in the Susquehanna River, a condition that could be made worse by many large AFOs avoiding regulation and improved management by staying just under the 1,000 animal unit threshold. Finally, Pennsylvania has a large and widely dispersed rural population and there are comparatively few areas where AFOs can locate without affecting nearby residents. Thus, we believe DEP would be justified in establishing more protective

requirements for AFOs, including lower thresholds for permits, more protective calculations of animal units, and more rigorous nutrient management requirements.

At the outset, CBF recognizes that permit and other requirements will have to be structured differently to deal with existing operations and new or expanding operations. In general, new or expanding operations should be required to meet the highest standards before commencing operations and throughout their operational lifespans. Existing operations will be able to meet or implement many of the requirements of the strategy, but others will have to be phased in over a reasonable period of time. The strategy should specifically address the differing time frames for compliance applicable to existing and new or expanding operations. Where appropriate, we have noted such differing compliance capabilities in our discussion below. At the latest, all AFOs subject to requirements described in this strategy should be in full compliance with all standards within 10 years.

Individual Permits, General Permits and Permits by Rule

CBF strongly supports the strategy's requirement of individual permits for AFOs with more than 1000 animal units. This is an essential element of the strategy as it allows DEP to address site specific and operational conditions that vary widely among AFOs. At the same time, we do not support the use of permit-by-rule for qualifying AFOs having 301-1,000 animal units, given that operations within this category can generate huge quantities of waste. For example, a swine breeding operation with 800 animal equivalent units produces over 4 million gallons of waste per year which contains about 100,000 pounds of nitrogen (adapted from: Pennsylvania State University per State Conservation Commission correspondence dated May 28, 1998 – Attachment 1).

In addition, it appears that the Clean Streams Law prohibits the Department from permitting AFOs under a permit by rule. Section 609 of the CSL, 35 P.S. § 691.609, prohibits the Department from issuing a NPDES permit, a Part II permit, or any other permit under the CSL without first completing an "investigation" into the discharger's compliance history, including whether the discharger or any related party (partner, associate, officer, parent corporation, subsidiary, contractor or subcontractor) has engaged in "unlawful conduct" under Section 611 of the CSL. Under Section 611, 35 P.S. § 691.611, such unlawful conduct includes the violation of any rule or regulation administered by the Department, or any order, permit or license issued by the Department in any regulatory program.² The strategy proposes that certain AFOs be covered by an NPDES "permit by rule." Under this proposal, however, the Department would be entirely unable to perform the compliance history investigation required by CSL Section 609 because it will not even know who is operating under such a permit by

² The Environmental Hearing Board recently confirmed the importance and breadth of the CSL's compliance history investigation requirement in Belitskus v DEP, EHB Docket No. 96-196-MR (Adjudication issued August 20, 1998). Relying on the plain language of the CSL, the Board stated that Section 609 requires DEP to "consider the applicant's history for any and all permits issued by the Department for any site in the state" including permits issued under other regulatory programs.

rule authorization. The Department's inability to perform the required compliance review prior to permit coverage makes the proposed permit by rule unlawful under Section 609 of the CSL.

The Department could permit certain AFOs using a general permit, so long as that permit required that an appropriate "notice of intent" (NOI) be submitted to the Department in advance of coverage by the permit. However, a general permit without a requirement to register use of the permit in advance (or an individual permit issued without a requirement to submit information sufficient to assess the applicant's compliance history) would also run afoul of the requirements of CSL Section 609. The Department simply cannot authorize coverage under an individual permit, a general permit or a permit by rule without identifying each potentially permitted operator and investigating its compliance history in advance of any activity being initiated under the permit. The strategy and the proposed permit documents should be revised accordingly.³

CBF has recommended that all operations with more than 500 animal units warrant individual NPDES permits due to the volume of waste production. At the very least, all operations with 301-1,000 animal units must be required to obtain approval under a general permit, which has been adopted with appropriate registration requirements and after ample opportunity has been provided for public input. General permits for AFOs in this category will also allow DEP to have more effective oversight of these facilities.

In general, new or expanding AFOs should be required to obtain the appropriate permits prior to commencing operations. Existing AFOs otherwise subject to the permit requirements should be required to apply for, obtain and come into compliance with the terms of the appropriate permits within a reasonable time and not more than 10 years.

Determination of "Potential to Discharge" for AFOs with 301-1,000 Animal Units

In an attempt to track federal guidance for identifying CAFOs with 301-1000 AU, the strategy considers "any operation within this size category that must comply with the requirements of the state Nutrient Management Act as having a potential to discharge to surface water." Under the strategy, only operations meeting these criteria must comply with the permit-by-rule provisions of the strategy.

As stated above, CBF believes, based on the nature of the industry, state topography and other conditions in Pennsylvania, that all operations with 301-1000 AU should obtain coverage under a general permit at the very least. In any event, high animal density, the factor used to identify operations subject to the Nutrient Management Act, may be one good indicator of *potential* nutrient-related pollution problems, but it is not a sufficient indicator of "potential to discharge" on its own. For example, animal density

³ This inconsistency with the CSL is also reflected in certain proposed changes to the Department's water quality regulatory programs (Chapter 92), including provisions specifically addressing AFO permitting. CBF will provide similar comments with respect to that proposal at the appropriate time.

does not account for other relevant factors such as the adequacy of the animal facility and manure handling systems or site specific factors such as topography, water tables and precipitation.

If DEP does not require all AFOs with 301-1000 AU to obtain coverage under a general permit, DEP should proactively determine which facilities with 301-1,000 animal units have potential to discharge or are actually discharging pollutants to waterways. The strategy should identify specific site conditions and management practices that could be evaluated by staff conducting inspections of these facilities. Although needing refinement, examples of such conditions appeared in the February 1998 draft of DEP's strategy (*Instructions for Completing NPDES Permit Application for Operating New Concentrated Animal Feeding Operations Over 1,000 AEUs*).

Given that DEP staff would likely focus inspections on existing AFOs over 1,000 animal units during the first three years of the program, CBF recommends that the Department follow a "two-phase" approach to evaluating AFOs between 301-1,000 animal units. For the first three years, required compliance with the Nutrient Management Act could be used as an initial indicator for "potential to discharge." At the end of three years, DEP would initiate an inspection program of operations in this size category to evaluate potential to discharge based on conditions described in the strategy. These inspections would be used in combination with or instead of the Nutrient Management Act threshold as the other indicator. Once again, the simpler and more protective approach would be to simply require at least general permit coverage for all facilities with 301-1000 Animal Units.

Calculation of Animal Units

The strategy proposes to use "Animal Equivalent Units" (AEUs) as calculated in Pennsylvania's nutrient management program instead of the federal "Animal Unit" (AU) definition. DEP's proposal suggests that using this measure will be more protective, but this characterization is inaccurate. For some types of livestock operations, the federal measure is more protective. This difference is especially pronounced with respect to poultry facilities and swine finishing facilities. For example, under the federal measure 2500 head of feeder pigs is the equivalent of a 1000 AU operation, but under the state measure a facility could house nearly 6900 feeder pigs before reaching the 1000 AEU threshold.

We understand that the Department is considering alternatives to the animal unit formula proposed in the strategy and that the final formula will be as or more inclusive than the federal standard. We believe a more inclusive formula is justified in Pennsylvania as compared to many other states, particularly those in the Midwest.

Existing AFOs with Inadequate Manure Storage Facilities

The strategy states that DEP will assess the integrity of existing manure storage facilities of existing AFOs over 1,000 animal units. The strategy should clarify how DEP

will address AFOs of all sizes that have inadequate or faulty manure storage systems. CBF believes all such operations should be required to take immediate action to abate pollution and improve their manure storage facilities. In addition, the strategy states that existing AFOs would not be required to obtain a Part II permit unless they expand or replace the manure storage facility. DEP should require a Part II permit for AFOs over 1,000 animal units that expand animal feeding operations, even if they do not expand storage facilities. The Part II permit will help to ensure that the storage is adequate for the increased manure production and in fact meets standards required of new AFOs.

Standards for New and Existing Operations

CBF believes that all AFOs (both new and existing) must ultimately achieve roughly equivalent levels of environmental protection. Proposed AFOs (new or expanding) should be required to meet these standards immediately while existing AFOs should be given a timetable during which to implement those measures requiring a significant financial investment. Two such restrictions relate to manure storage and phosphorus management.

Elsewhere in our comments we recommend that DEP and other agencies develop and promote innovative manure storage systems that greatly reduce air emissions of ammonia and other pollutants. Until those innovations are readily available, DEP should require new AFOs over 1,000 Animal Units to use available technologies to minimize air emissions from storage systems from the very beginning. Two such technologies are temporary covers for manure storages and systems to burn off gases produced by manure storages. Where technically and economically feasible, existing AFOs over 1,000 Animal Units should be required to retrofit manure storage systems to reduce emissions over a reasonable period of time, perhaps five to ten years depending on the magnitude of costs involved.

Similarly, proposed new AFOs should be prohibited from applying manure at rates that exceed phosphorus needs of the crops on soils already high in phosphorus. This restriction should be phased in for existing AFOs over a longer time period. CBF recognizes the challenge phosphorus management poses to many Pennsylvania farmers, and solutions must be fair and feasible. But the federal government and other states, such as Maryland, are now moving forward in developing standards to address excess soil phosphorus on existing farms. These efforts recognize that the problem of excess soil phosphorus will only worsen with time and solutions will become more difficult for producers. Thus, it is necessary and reasonable for new large AFOs to prevent excess nitrogen *and* phosphorus applications from the outset.

Finally, DEP should review the entire strategy to determine other requirements that should apply immediately to new large AFOs and be phased in for existing operations. For example, new large AFOs should be required to construct manure systems with at

least nine months manure storage capacity. Moreover, all new large AFOs should be prohibited from spreading manure outside of the growing season.

Terms and Conditions of Permits

Regulating Manure Spreading Operations

Considerable attention has rightly been focused on the manure storage elements of large AFOs and much of the Department's proposed strategy, including terms of both the NPDES and Part II permits, addresses the design, construction and operation of manure storage facilities. We address the Department's proposals with respect to these issues below. However, CBF believes that adequately addressing manure application to cropland is of at least equal importance and, in many ways, a far greater environmental challenge. Although sound design and operation of manure storage is critical, DEP's permit program must also ensure that waste from large AFOs is not polluting surface or ground waters once emptied from storage facilities and applied to cropland. Fortunately, DEP has the authority and, in some cases, a mandate to regulate land application of manure to protect water quality.

Under the federal Clean Water Act, "concentrated animal feeding operations" ("CAFOs") are point sources subject to permit requirements of the NPDES program and land application of manure from CAFOs is within the regulatory authority of the NPDES program. For example, while in some ways novel, the case of Concerned Area Residents for the Environment V. Southview Farms, 34 F.3d 114 (2d Cir. 1994) cert. denied 115 S.Ct. 1973 (1995), was on solid ground in finding that excessive land application of manure from a CAFO in circumstances leading to pollution of surface waters was a violation of the Clean Water Act. Implicit in that holding is the recognition that land application of manure from a CAFO can be regulated under Clean Water Act authority wherever and however that manure is applied.

Under Pennsylvania law the Department is also empowered to implement a program to protect the waters of the commonwealth from the danger of pollution from large AFOs and associated land application of manure.

Section 691.402 of the Clean Streams Law states that

[w]henver the department finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the department may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted

In addition, the Clean Streams Law regulates the management, treatment and disposal of sewage, which is defined as including any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals. Therefore, animal manure is considered sewage under the Act and must be handled and treated as required thereunder. Article II of the Act applies to sewage pollution. Section 691.207 of that article states that

[a]ll plans, designs, and relevant data . . . for the erection, construction, and location of any treatment works . . . shall be submitted to the department for its approval before the same are constructed or erected or acquired.

That section further states that

[a]ny such construction or erection which has not been approved by the department by written permit . . . is hereby also declared to be a nuisance and abatable as herein provided.

The clear intent here is to give the Department the opportunity to ensure that the proposed facilities will adequately handle and treat the waste and prevent pollution of waters of the Commonwealth (consistent with the applicant's discharge permit). Clearly, the Department has no authority to exempt treatment for the treatment and disposal of animal waste from the Part II permitting requirements of the CSL. And, in assessing the ability of an AFO to handle its waste in a manner that will protect the waters of the Commonwealth, it is equally obvious that the time, place and manner of the land application of manure is an essential element of the AFO's "treatment works." If done properly, land application can remove nutrients and other contaminants from wastewater. On the other hand, the misapplication of manure can result in the pollution of surface and ground waters of the Commonwealth.

It makes no difference whether the land application at issue is on land under the ownership or control of the AFO or not. Either way it is an essential element of the treatment and disposal of sewage under the CSL, and the Department must review locations and designs.

There is ample precedent for DEP to address details of land application of liquid sewage wastes in the context of a Part II permit. Small municipal and private sewage treatment plants sometimes land apply treated sewage to complete secondary treatment of wastewater during appropriate times of year when the plants may be unable to treat discharges to a level that adequately protects water quality in the usual receiving stream. Such facilities must obtain a Part II permit authorizing the construction and operation of a spray irrigation system. Terms of such permits may typically address groundwater monitoring requirements, discharge monitoring and reporting requirements, hydraulic loading limitations as well as effluent quality limitations, and restrictions on application on frozen soil or during or after heavy precipitation. See e.g., Water Quality Management Permit No. 4356, Amendment 1,

Delaware County Prison, Thornbury Twp., Delaware Co., (WWTP with Spray Irrigation – Interim Spray System).

In short, Part II permits must address land application practices. The Department appears ready to undertake this responsibility by basing permits on provisions of the Nutrient Management Act. In the following sections we provide comment on that proposal.

Revise and Clarify Nutrient Management Plan Requirements

A nutrient management plan is a critical element of an operation's Part II permit and compliance with a plan is a condition of an NPDES permit. But the nutrient management requirements that would apply to proposed AFO's over 1,000 Animal Units are confusing, particularly in how the strategy distinguishes among lands that must be covered by an Act 6 nutrient management plan, a nutrient balance sheet or simply a signed agreement. For example, the strategy states on page 6 (under 2. *Proposed Concentrated Animal Feeding Operations over 1,000 Animal Equivalent Units*) "The required elements are as follows: (1) A Nutrient management Plan, including a Contingency Plan for emergency planning and response to manure spills and related discharges, that has been submitted for approval to the county conservation district." (additional requirements are also listed) This suggests that all permittees must develop a standard Act 6 nutrient management plan for their operations. However, the draft NPDES Permit, Part C - Special Permit Requirements states that "The permittee shall develop, implement and maintain an adequate Nutrient Management Plan for all land to be used for manure spreading that is owned or leased by the permittee *and is subject to the Pennsylvania Nutrient Management Act and 25 PA Code Chapter 83, Sections 83.261 to 83.381, of the Department Rules and Regulations* [emphasis added]. This suggests that the permittee must develop and implement a nutrient management plan only if the permittee is also a CAO (only lands owned or under the management control of a CAO are "subject" to the Nutrient Management Act).

Even more confusing is the strategy's description of nutrient management requirements for leased lands. Section C requires that "leased" lands that are not covered by a nutrient management plan must be covered by a nutrient balance sheet. But this contradicts Act 6 in that if an AFO is required to have a nutrient management plan, all leased lands would have to be covered by the plan. It is also unclear how certain lease arrangements would be addressed, such as the case of an AFO operator who leases land to another farmer yet spread manure from the AFO on this land.

CBF believes that all land that receives manure from an AFO, regardless of who manages, owns or leases that land, should ultimately be covered by a complete nutrient management plan or plans, and these plans should be in the AFO's file. Regulatory efforts that rely upon farm operators to comply with published but poorly enforced standards, such as DEP's Manure Management Manual Program, have been largely a

failure in Pennsylvania (Chesapeake Bay Foundation, "Improving Water Quality Through Effective Implementation of Pennsylvania's Manure Management Program" – Attachment 2). Only an implemented, site specific nutrient management plan (containing the additional conditions described below) in combination with an approved erosion and sediment control plan will ensure that manure generated from an AFO will not degrade water quality and will meet the no discharge standard of the effluent guidelines.

DEP should revise these sections to more clearly and specifically describe nutrient management requirements to be followed under different land management and manure application arrangements. These arrangements include:

- lands owned and managed by the AFO;
- lands leased by the AFO from another landowner;
- lands leased from the AFO to another individual;
- lands unrelated to the AFO but receiving manure from the AFO.

For the purpose of clarity, we suggest that a flow chart or graphic accompany the text describing the nutrient management requirements.

Nutrient Management Plans as a Condition of the Permits

As reaffirmed by the draft *Unified National Strategy for Animal Feeding Operations* (USDA-EPA, 1998) nutrient management plans will be the cornerstone of any effective permitting program for large animal operations. Thus, the strategy should clearly state that a nutrient management plan is a condition of the Water Quality Part II Permit, and compliance with the plan, including all record-keeping and reporting activities, is a condition of the NPDES permit.

Close Gaps in Nutrient Management Regulations

To prevent nutrient pollution from AFOs over 1,000 Animal Units, DEP must take the critical step of closing the gaps in the state's nutrient management requirements upon which much of the operational requirements of the NPDES permits are based. The nutrient management regulations were designed to apply to "Concentrated Animal Operations" or "CAOs". Unlike the federal definition of CAFOs, CAOs vary widely in size and management and include what many would consider "small" farms. In fact, the Nutrient Management Advisory Board made many compromises in the regulatory process so as to avoid requirements that create an undue burden on these small operations. An unintended outcome, however, is that many aspects of these regulations are totally inappropriate for operations whose size qualifies them as CAFOs.

We recognize that DEP intends to incorporate as many aspects of the nutrient management program as possible to avoid duplication and inconsistency. Nevertheless, DEP must address those inadequate standards in the nutrient management regulations that citizens, local governments and many industry representatives themselves agree are not appropriate for large, modern animal confinement operations that strive to be "state of the art." Toward this end, DEP should establish special conditions applying to AFOs over 1,000 Animal Units that go beyond existing nutrient management requirements. In the near future, these special conditions can be incorporated into the rewrite of the Manure Management Manual.

We recommend that DEP establish the following special conditions for nutrient management plans for AFOs over 1,000 Animal Units. Recommendations followed by "(NEDPP)" are consistent with the "Comprehensive Environmental Framework for Pork Production Operations," developed in 1997 by the National Environmental Dialogue on Pork Production (1997 -Attachment 3). The Dialogue was comprised of federal officials, regulatory agencies from six states and five pork producers.

Prevent phosphorus saturation in the soil: Pennsylvania's nutrient management regulations limit only nitrogen applications. One consequence of nitrogen-based plans is that excess phosphorus will be applied to the soil under typical cropping patterns. The traditional view held that as long as a farmer practiced proper soil conservation, phosphorus would be held in place on the field. But research conducted by USDA and others clearly identify the environmental risks associated with long term applications of excess phosphorus (Sharpley, 1998 – Attachment 4). We now know, for example, that considerable losses of *dissolved* phosphorus can occur from soils saturated with phosphorus, regardless of soil conservation measures. This form of phosphorus is readily available to algae in receiving waters and can fuel excessive algae growth.

Phosphorus-based nutrient management plans pose a considerable challenge to farms that have been applying manure for decades. It is a long-term problem that will require long term solutions. At the same time, it is completely unjustified to encourage *new* AFOs to saturate cropland with excess phosphorus.

Thus, DEP, in conjunction with Penn State and other agencies should establish a reasonable set of conditions governing phosphorus use in nutrient management plans for new AFOs. These conditions must ensure that new AFOs do not apply manure to soils at rates that concentrate soil phosphorus at excessive levels. Nutrient management plans for existing AFOs should also address phosphorus but allow for greater flexibility. Attachment 5 (Lemunyon, "The Concept and Need for a Phosphorus Assessment Tool, 1993) describes the concept of a phosphorus index. An index considers a range of conditions affecting phosphorus losses from fields and provides a broader decision-making mechanism than simply a soil test.

Test soil regularly: AFOs should be required to test soils for nutrient levels at least every two years instead of six years as required in Act 6 plans. (NEDPP)

Analyze manure: AFOs should be required to test manure for nutrient levels. Act 6 plans allow operators to estimate the nutrient content of manure based on average values despite the fact that actual manure content can vary as much as 100% from book values. According to Penn State's Agronomy Guide, "Analyzing a sample of well-mixed manure is essential for good manure nutrient management." DEP, in cooperation with other agencies, should develop approved manure sampling procedures and sampling schedules. At a minimum, samples should be taken from the manure storage system during agitation. Sampling frequency can be decreased after baseline average values have been established over the course of several years.

Citizens around the country are also justifiably concerned about metal concentrations in manure and their effect on soil quality. DEP should establish standards for metals of concern, such as copper and arsenic, similar to those established for Exceptional Quality sludge (Stehouwer, "Land Application of Sewage Sludge in Pennsylvania" – Attachment 6). Alternatively, DEP could initiate a study to evaluate metals concentrations in manure from typical livestock and poultry AFOs before establishing standards.

Spread liquid manure during the growing season only: Operators of new AFOs should be prohibited from spreading liquid manure during late fall and winter months. During these months, much of the nitrogen from applied manure will be lost through volatilization, runoff and leaching. Crops' uptake of nitrogen from manure applied during these months is minimal; with regard to nitrogen, winter manure spreading amounts to little more than manure disposal and does not fulfill the no discharge requirement. DEP could consider providing limited waivers allowing AFOs to apply manure in the fall if they can demonstrate that the manure nitrogen will be utilized by a growing cover crop, such as rye grass. If this cover crop is incorporated into the soil in the spring, the sequestered nutrients contained in the crop must be included in the nutrient management plan.

Minimize volatilization of ammonia: According to "Ammonia and the Chesapeake Bay Airshed" (Chesapeake Bay Program-Scientific and Technical Advisory Committee, 1997 - Attachment 7), air deposition of nitrogen oxides and ammonia accounts for approximately 27% of the nitrogen load reaching the Chesapeake Bay. The same report estimates that over 90% of the ammonia in the Chesapeake Bay watershed originates from agriculture, including sources in Pennsylvania.

A dramatic illustration of the problem has occurred in Sampson County, North Carolina. Ammonium concentrations in rainfall in this Southeastern Coastal

Plain county have increased from approximately 0.1 mg/l in the late 1970's to nearly 0.4 mg/l by 1995. Researchers are confident this increase is directly due to the expansion of the hog industry in that region during this same time period (Aneja, "Atmospheric Nitrogen Compounds: Emissions, Transport, Transformation, Deposition, and Assessment," 1998 – Attachment 8).

Closer to home, the USGS conducted a study of atmospheric deposition of ammonia from a manure storage facility in Adams County, Pennsylvania. Not surprisingly, the study found that "In all the wetfall samplings, the greatest concentrations of ammonia were in samples collected near the lagoon, whereas lesser concentrations were collected at the most distant points from the lagoon." In this way the lagoon serves as a "point source for ammonia." Moreover, the study indicates that nitrogen concentrations in the stream increased due to ammonia deposited atmospherically from the lagoon (Langland, "Atmospheric Deposition of Ammonia from Open Air Manure Storage Lagoons in South-Central Pennsylvania," 1992 – Attachment 9). Clearly, atmospheric deposition of ammonia is a water quality concern for Pennsylvania.

DEP's strategy must minimize the contribution of ammonia from AFOs. To do so the strategy must go beyond the nutrient management regulations, which contain no restrictions on ammonia losses. For example, the nutrient management regulations contain no requirement for manure incorporation and set no upper limit for nitrogen lost through volatilization. Surface application of manure without incorporation results in enormous losses of nitrogen. For example, if 100 lb. of nitrogen contained in poultry manure is applied in the spring but not incorporated into the soil, only 15 pounds of nitrogen remains for uptake by the crop - an 85% loss of nitrogen. AFOs should be prevented from "using" volatilization as a means of maximizing manure application on cropland. Injection or immediate incorporation of manure will limit nutrient losses as well as odor-related nuisances.

Spray irrigation of manure should be prohibited for new AFOs: With regard to air quality, spray irrigation represents the worst option for manure application; large amounts of nitrogen are lost from the manure through volatilization. According to "Atmospheric Disposal of Manure Nitrogen" (Department of Environmental Resources, 1990), "The rate at which ammonia is desorbed will be proportional to the contact surface area between the manure and air. Thus, some of the highest volatilization losses documented have occurred with sprinkler irrigation systems where liquid manures are dispersed as droplets into the air." DEP must embrace the goal of minimizing the impact new animal production has on Pennsylvania's air and water quality and prohibit spray irrigation for new AFOs.

Erosion Control Plans

Proposed language covering Erosion and Sediment Control (E&S) Plans are confusing. The *Draft NPDES Permit for CAFO - Part C - Special Permit Requirements, 4* states:

In addition, an erosion and sedimentation control plan for any non-construction related earth disturbance including plowing and tilling operations on all land to be used for manure spreading must be prepared and implemented in compliance with Title 25, Chapter 102.

This sentence suggests that E&S plans are required for all lands on which manure from an AFO is applied. This requirement, however, appears to be contradicted by another document in the strategy. The *Instructions for Completing and Submitting an NPDES Application for New CAFOs, page 2* states

b. An E&S Plan is also required for plowing and tilling operations in compliance with 25 PA Code Chapter 102 requirements for all land (including land under lease or agreement for exclusive use by the permittee) to be used for manure spreading *if the spreading involves any earth disturbance activities*. [emphasis added]

This inconsistency should be resolved and we recommend that the revised language clearly state that compliance with Chapter 102 is required regardless of whether the manure spreading operations themselves involve any earth disturbance. All cropland in Pennsylvania that is plowed or tilled needs to be in compliance with Chapter 102. Proper erosion controls are essential on all cropland on which manure from an AFO is applied, regardless of who owns or leases the land and regardless of who applies the manure. Thus, DEP should require that the permittee submit documentation demonstrating compliance with Chapter 102 for all land that is in the nutrient management plan or under agreement for manure application.

Manure Storage Systems - Design and Construction Standards for Part II Permits

CBF supports the requirement that manure storage systems for new large AFOs will be covered by Part II permits. The proposed Part II permit includes many provisions that we believe will help to ensure that environmental problems that have occurred in other states related to poor manure storage design will not occur in Pennsylvania. Especially important is the plan for DEP to inspect annually all AFOs over 1,000 animal units and to assess the adequacy of existing manure storages at existing AFOs. The strategy's requirements of liners, monitoring, and adherence to NRCS standards and specifications will also enhance environmental performance of manure storage systems. However, the strategy should address a number of remaining issues related to manure storage.

Setbacks: As part of its strategy, DEP should establish criteria to determine appropriate setbacks for animal facilities and manure storages from

environmentally sensitive areas including streams, wetlands, wells, sinkholes and tile drainage lines. These criteria must address site specific differences of each AFO proposal while meeting minimum setbacks applying to all such facilities. CBF supports the strategy's prohibition of locating manure storage facilities within a hundred-year floodplain. However, we oppose the siting of any new animal facility or manure storage system in a wetland, regardless of whether a Chapter 105 could be obtained. On page 1 in *Application for Water Quality Management Part II Permit for Concentrated Animal Feeding Operations, Manure Storage Facilities*, DEP should revise the sentence in question to read "Manure storage facilities may not be located within a 100-year floodplain nor in any wetland." This change would delete "...without an encroachment permit."

The setbacks contained in the nutrient management regulations will be grossly inadequate for AFOs over 1,000 Animal Units. For example, the nutrient management regulations only require setback distances between manure storage facilities and surface waters of 100 or 200 feet depending on slope. The regulations only require a setback distance of 100 feet between manure storage facilities and public drinking water wells.

In fact, the setbacks contained in these regulations are substantially less protective than even those recommended by the National Environmental Dialogue on Pork Production. The Dialogue's report states that "Any new manure and wastewater facility at a new or expanded pork production operation should be located no less than 500 feet from the facility to any surface water...and no less than 1000 feet from the facility to any publicly-owned drinking water well..." (Attachment 3 page 16). CBF believes that in many circumstances even the NEDPP's recommendations for setbacks will be inadequate.

Adequate Manure Storage Volume: NRCS standards only require that a new manure storage facility be sized so as to be consistent with the nutrient management plan developed for that operation. For a variety of reasons (especially cost), many operations choose to construct manure storage systems that provide for only 3 to 6 month storage. Thus, these operations then must spread some manure in late fall or winter, a practice allowed for in the nutrient management regulations.

Consistent with our recommendation to require AFOs over 1,000 Animal Units to spread manure only during the growing season, all new manure storage systems should be sized to allow for at least nine months storage or greater. As an added measure of protection, DEP should strongly encourage yearlong storage where feasible for new AFOs during the permitting process. Existing AFOs would not be required to expand manure storage capacity immediately unless an operation significantly expands production.

Manure Overflow Controls: The *Instructions for Completing and Submitting an NPDES Application* state that a "Detailed site layout plan including provisions made for any overflows of the manure storage facilities" must be included. CBF supports this requirement but is concerned that there is insufficient guidance available to the applicant to comply fully. For example, neither NRCS specifications nor Act 6 nutrient management plans require secondary containment systems or similar measures as part of an approved ag waste management system. We believe the strategy should clearly identify what options are available and are to be used by operators to control manure overflows, such as secondary containment systems and vegetated filter areas. The strategy should also identify procedures to be used to calculate what percentage of the total volume of the storage system is to be controlled.

An excellent example of a secondary containment system can be seen at Red Knob Farm in Wakefield, Pennsylvania. Staff from NRCS and the Lancaster County Conservation District helped design and install a series of detention basins that can capture runoff from either the manure storage or cropland irrigation in the event either system fails. While not every AFO site is conducive to such a containment system, AFOs should be expected to achieve a similar level of protection where the manure storage facility is located near a waterbody.

Manure Storage Systems - Operation and Oversight

Monitoring Wells: CBF supports the proposed monitoring requirements, including sampling frequency, physical and chemical parameters, and baseline documentation. We believe that the monitoring program should be most intensive in the first two years of operation after which time the operator and DEP can initially assess the performance of the manure storage facility. Unfortunately, problems can occur throughout the service life of these systems. Thus, all AFOs with over 1,000 animal units should be required to implement a less intensive monitoring program during the entire period the storage is to be used, perhaps semi-annually or annually.

Operation and Maintenance Certification: The NRCS manure storage survey mentioned in the following section strongly suggests that the management of manure storage and handling systems is a far greater concern than the adequacy of manure storage specifications and standards. This spring a local hog producer polluted a small tributary to the Yellow Breeches Creek by *twice* dumping manure from a manure spreader when his equipment became stuck in mud. This case clearly illustrates how management is often the weak link in what otherwise may be a well-designed manure management systems.

Thus, the strategy should go beyond the requirement, contained in the *Application for Water Quality Management Part II Permit* that the design engineer prepare a detailed operation and maintenance manual for the facilities

and provide initial training. While this requirement is a good first step toward addressing the problem, the strategy should require that all individuals responsible for operating manure storage systems on AFOs attend a comprehensive O/M training course and receive certification at its completion. "Refresher" courses should be required to inform operators of new developments in waste management. This course should include training on proper management of the storage facility as well as proper manure application. The NPDES permit should require compliance with the O/M plan as a condition of the permit. These courses could be administered by Penn State Cooperative Extension, NRCS, engineering firms or a combination thereof. New employees replacing certified operators should receive the same training. CBF also supports NEDPP's recommendation that contractors also be so certified.

Liner Integrity Inspections: CBF supports the requirement contained in the Part II Permit that an engineer inspect manure storage facilities every five years. Because the integrity of synthetic liners are typically guaranteed for only 15 or 20 years, DEP should consider requiring a more comprehensive evaluation of each liner at the end of its warranted service life. The same section of the Part II Permit should indicate that DEP shall conduct a final inspection of all newly constructed manure storage facilities before the operation commences.

Records and Reporting:

Facility Self-Inspections: In the draft NPDES permit accompanying the strategy, it appears that DEP will require the completion and submission of a self-inspection report only in the case of a discharge. If this is the case (i.e. self-inspection reports will not be used for routine facility inspections by the operator), the O/M plan for each AFO should include a "facilities monitoring checklist" to be completed by the operator at least bi-weekly and immediately following a major storm event. These checklists should be submitted monthly or annually to DEP. This checklist would assess conditions including freeboard, leak detection, liner condition, etc.

Manure and other Nutrient Application Records: The Nutrient Management Act requires records to be kept for all applications of nutrient sources, including manure. These application records should be reported quarterly or annually, include all lands upon which manure from the AFO is applied, and be available to the public.

Enforcement and Compliance

Describe Inspection Procedures in Greater Detail

Inspections will be especially valuable in documenting and promoting sound management of manure storage systems and improving citizen confidence. CBF believes the establishment of an effective inspection program is the single most

important step DEP can take toward reducing polluted runoff from agricultural operations. USDA-NRCS completed a study of Pennsylvania manure storages in 1991 (Thompson) and found that a large percentage of manure storages were not being operated as designed. For example, the report states that almost one fourth of the operations surveyed overfilled the manure storage facilities. Another disturbing finding was that a majority of the operations did not have nutrient management plans and less than half of those producers who had plans were actually following them.

We believe an effective inspection program for AFOs, combined with self-reporting, would help to prevent these kinds of problems. Such a program would also advance DEP's pollution prevention and compliance assistance goals. We were pleased therefore to see the latest draft of the strategy clearly indicate that DEP will make annual inspections of AFOs with more than 1000 animal units. We believe the strategy should describe the planned inspection program in greater detail. It should clearly state that both new and existing AFOs will be inspected, that these inspections will address manure storage and application activities and that inspection reports will be readily available to the public. The strategy should also describe what specific features of the storage system and manure application activities will be evaluated by DEP and how. This level of detail will ensure that all parties involved - agencies, AFO operators and citizens - understand how this critical component of DEP's strategy is to be conducted.

Wet Weather Inspections

Clearly, DEP's inspection program for AFOs will need to be implemented differently than the department's programs for other categories of point sources. One key difference is that the observable integrity of many components of an AFO's manure handling system is most evident during or immediately following periods of rainfall. Thus, we recommend that DEP commit to conducting a substantial fraction of their inspections of AFOs during or immediately following periods of rainfall. This "wet weather" inspection program will better enable DEP staff and the AFO operator to identify and address potential sources of runoff. Moreover, the readiness of DEP to conduct field visits during these periods will improve the department's ability to respond to citizen complaints that often coincide with major storm events.

Registration of Existing AFOs

CBF applauds and strongly supports DEP's proposed registry of AFOs with 301-1,000 AUs. Such a registry would provide much needed information, the lack of which has plagued past and current programs designed to address agricultural activities. Experience with previous regulatory programs for agriculture, however, suggests that many operators will not willingly provide this information and that many conservation districts will refuse to actively seek such information on behalf of DEP. The small number of nutrient management plans that have been submitted under Act 6 requirements, a small fraction of the number expected, only reinforces our concern that a registry based upon "self selection" alone will fail miserably.

To ensure that the registry is fair and effective, the strategy should include a detailed plan describing how information about individual AFOs between 301-1,000 Animal Units is to be obtained and updated. This data gathering plan should include an MOU to be signed by DEP, the State Conservation Commission and the Department of Agriculture describing how each agency will assist in obtaining and sharing information on AFOs. Our previous recommendation for DEP to inspect AFOs to determine potential to discharge should be a prominent component of this plan. It should also describe penalties for operators who fail to provide the required information.

Response to Citizens

There has been considerable confusion and frustration on the part of citizens concerning how Pennsylvania agencies respond to reports of suspected violations. The issue of greatest concern is that DEP relies heavily on conservation districts to investigate complaints and yet many districts are uncomfortable with this role given their more traditional role of providing service to the agricultural community. There appears to be very different responses among DEP regional offices and among county conservation districts.

The strategy should specifically describe how various kinds of legitimate citizen complaints will be addressed. DEP should take the lead responsibility for responding to all reports of suspected violations at AFOs with over 301 animal units. DEP should maintain records of how all reports of suspected violations are resolved, including those addressed by conservation districts. Finally, CBF believes that it is inappropriate to rely upon Pennsylvania Farm Bureau representatives to investigate pollution-related complaints on AFOs over 301 animal units.

Public Participation

Review of Nutrient Management Plans

When a new AFO is proposed in a community, the facility's nutrient management plan typically becomes a topic of much debate and scrutiny. The strategy states that "Nutrient management plans are approved at public meetings of local conservation districts where public input can be received." Unfortunately, this procedure has not provided for meaningful public participation according to input we have received from citizens. In one case, citizens were not allowed to review the nutrient management plan until just two days prior to the conservation district board meeting, despite numerous requests made by citizens in the preceding weeks. In another case, the district board gave authority to a district technician to approve the plan, thus eliminating any opportunity for public participation. We understand that the State Conservation Commission has provided guidance to conservation districts to improve this situation.

DEP should take the additional step of requiring that a nutrient management plan submitted as part of an AFO permit application must meet certain standards for public participation. At a minimum, these standards should include the following provisions:

- Each proposed nutrient management plan for AFOs must be approved by the board of directors of a conservation district.
- Citizens should be able to review a proposed nutrient management plan at least 10 days prior to the district board meeting.
- Approved nutrient management plans must be available to the public as part of the NPDES permitting process.

Supplementary Efforts

DEP has limited the scope of its strategy to issues of water quality as addressed by the Clean Water Act and Clean Streams Law. The fact remains, however, that other important environmental issues concerning AFOs need to be addressed concurrent with DEP's water quality permitting activities. As mentioned earlier in our comments, DEP's strategy must support and strengthen Pennsylvania's broader goal of reducing and capping nutrient pollution in the Susquehanna and Potomac basins. Other aspects of environmental protection and human health and safety must not be compromised. Toward this end we recommend three important efforts DEP can initiate while finalizing its strategy.

Watershed Planning and Protection

As stated in the strategy, DEP does not have the authority or responsibility "to determine if these operations are an appropriate land development activity for any local community." However, DEP should address and prevent environmental problems arising from multiple AFOs developing in a limited geographic area. This is not a concern voiced by environmentalists alone. Again our concerns are reflected in the recommendations of the National Environmental Dialogue for Pork Production. Their report describes the importance of "making location and permitting decisions in a watershed context, rather than solely on a case by case basis. This is because the concentration of pork production, in a particular watershed, can overwhelm that watershed's capacity to absorb and buffer nutrients, pathogens, or other potential pollutants generated by pork production operations." (Attachment 3, Page 7). Moreover, the Draft Unified National Strategy for Animal Feeding Operations (USDA-EPA, 1998) encourages states to develop watershed general permits to address cumulative water quality impacts of multiple AFOs in specific watersheds.

We urge the Department to embrace this watershed protection approach that representatives of the pork industry itself have endorsed as you review individual applications to construct AFOs. This approach would help reduce the risk of nutrient contamination in small watersheds and address some of the concerns of communities where AFOs locate.

One tool available for this purpose is the Cumulative Risk Index Analysis developed by EPA Region 6. This tool evaluates a wide range of conditions and estimates

environmental risk posed by an individual AFOs in a given watershed. This tool, if adapted to this region, may help DEP make more informed decisions about the impact of existing and proposed AFOs in specific watersheds. The Cumulative Risk Index Analysis can be obtained at the following website:
www.epa.gov.earth1r6/6en/xp/cria.pdf.

Nutrient Budgets

Nutrient budgets are a new tool used to document nutrient flows to and from agricultural operations that can help Pennsylvania producers and agencies evaluate the impact of new and existing AFOs on nutrient loads in watersheds. Nutrient budgets are fairly straightforward to create and manage. Producers keep records of all nutrient inputs to their facilities (feed, fertilizer, purchased livestock, etc.) and all nutrient outputs from their operation (sold agricultural products, exported manure, etc.). The "balance" between inputs and outputs is the degree to which an operation is conserving nutrients (i.e. preventing nutrient enrichment in a particular watershed) or "losing" nutrients to the surrounding environment. Nutrient budgets are a central feature in the Netherlands' program regulating manure production and distribution. In contrast, nutrient management plans focus primarily on the manure management and crop production. As such, nutrient management plans provide a rather limited picture of how an operation is contributing to the overall nutrient load in a watershed. Nutrient budgets also help producers identify sources of nutrient loss from their operations, the first step toward improving environmental performance.

Because nutrient budgets have been largely untested in Pennsylvania, we suggest that DEP's strategy recommend a pilot program to evaluate the use of nutrient budgets. Given that such a program is largely outside the scope of a permitting program, the strategy should identify other cooperating entities. DEP's Chesapeake Bay Program may be an appropriate lead agency for this effort. We have enclosed information on nutrient budgets developed by the Institute for Agriculture and Trade Policy (Muller, "IATP's Nutrient Management Yardstick" – Attachment10).

Air Pollution

Compared to water quality, relatively little attention has been paid to the impact livestock and poultry confinement operations have on air quality. As discussed in our subsection "*Minimize volatilization of ammonia*," we describe the problems of ammonia emissions from animal operations and the impact of ammonia on water quality.

At the same time, the anticipation or existence of odors and airborne contaminants often generates considerable local opposition to proposed and existing facilities. Some industry representatives dismiss these concerns as illegitimate complaints by suburban residents unsympathetic to the realities of farming. This view denigrates the very real issues of quality of life that are at stake which others in the agricultural community recognize, as evidenced by Lancaster Farming's editorial "The War of the Noses" (Attachment 11). This view also ignores growing evidence that some operations may

indeed pose risks to the health of neighboring residents. We have enclosed several documents about human health risk for your information (Melvin, "Understanding the Impacts of Large-Scale Swine Production – Proceedings from an Interdisciplinary Scientific Workshop – Attachment 12; Personal Correspondence from Kendall M. Thu to Mary Ann Fischer, Oct. 22, 1997 – Attachment 13; Homes, "Viability of Bioaerosols Produced from a Swine Facility," – Attachment 14).

In short, the livestock and poultry industry must improve the air quality performance of their facilities for economic, environmental and health reasons. In previous sections we have recommended several short-term actions to reduce AFOs' impact on air quality, including prohibiting manure irrigation and limiting nitrogen volatilization from cropland. We also urge DEP to outline a strategy in which the Department and other agencies work with the livestock and poultry industry to develop "new generation" manure storage, handling, treatment and application technologies that eliminate or substantially reduce air pollution. In particular, DEP should establish a timetable for phasing out open-air manure storage systems for large animal confinement facilities within the next decade. Finally, DEP should begin developing the regulatory framework necessary to combine air and water quality protection regulations in to one permitting system.

Conclusion

We commend the Department for proposing a strategy to address the water quality impacts of concentrated animal feeding operations. The nature and scope of these facilities present entirely new challenges to federal, state and local regulatory programs, which traditionally treated most agricultural operations equally. Concentrated animal feeding operations justifiably require a higher degree of regulation to protect human health and environmental quality.

While the proposed strategy contains many important regulatory reforms, our comments identify a number of areas where the strategy needs to be strengthened. Thank you for the opportunity to provide these comments.

References

- Department of Environmental Protection. 1996. Pennsylvania's Chesapeake Bay Nutrient Reduction Strategy. Report 3900-BK-DEP1656.
- Elliot, H.A., R.C. Brandt, K.S. Martin. 1990. Atmospheric Disposal of Manure Nitrogen. Pennsylvania Bay Education Office, Technical Note #8.
- Langland, Michael J., Patricia L. Leitman, Scott Hoffman. 1995. Synthesis of Nutrient and Sediment Data for Watersheds within the Chesapeake Bay Drainage Basin. U.S. Geological Survey, Report 95-4233.
- Thompson, Robert J., William J. Bowers. 1991. The Pennsylvania Manure Storage Study. Natural Resources Conservation Service.
- U.S. Department of Agriculture and U.S. Environmental Protection Agency. 1998. Draft Unified National Strategy for Animal Feeding Operations.

October 28, 1998
Page 36

Attachment C

Report of the SEJ Workgroup
July 31, 1996

To: Special Protection Waters
Full Regulatory Negotiation Group

From: Jolene Chinchilli

Date: July 31, 1996

REPORT OF SEJ WORKGROUP

After reviewing available information on the current Special Protection Waters SEJ process and similar processes for other programs, and identifying the issues and concerns of the stakeholders about the current SEJ process, the SEJ workgroup determined that we would focus our discussions on public participation and decision criteria. The group agreed that many of the problems associated with the current SEJ process were related to the timing and adequacy of public participation and the perceived bias and interpretation of the decision criteria.

The workgroup addressed the following issues: Improved and expanded public participation, revision of decision criteria, sequence of alternatives analysis and SEJ determination and the language of the HQW definition related to SEJ.

RECOMMENDATIONS FOR PUBLIC PARTICIPATION

1. Act 537 (sewage facility) planning:

* During development of a 537 plan. Where a discharge to a High Quality Water is to be evaluated during the development of alternatives for wastewater management, a municipality shall provide public notice highlighting the HQ issue and soliciting public comment and participation in the planning process.

* When a municipality adopts a proposed plan. Public participation is currently required at this time under Section 71.31(b) & (c). The workgroup recommends that language be added to this section requiring that the municipality again highlight the HQ issue during the public participation process, demonstrate that it provided for informed public participation during the planning process and provide that comments on the proposed plan be submitted to DEP as well as the municipality.

* Prior to DEP approval of the plan. DEP has 120 days to act on a plan submitted by a municipality. There is currently no formal public participation at this point in the process. The workgroup recommends that public comment be solicited and considered by the DEP during this time.

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* After DEP approval of the plan. Currently, DEP approval of 537 plans may be appealed to the Environmental Hearing Board. The workgroup recommends retaining this provision.

2. All permits:

* At permit application. The workgroup recommends that public participation be included at this stage and should include the following elements (similar to the mining program):

- a) 4 newspaper notices (1/week for 4 weeks) provided by the applicant highlighting the fact that the permit proposes a discharge to a HQ water. The notice solicits comments and provides opportunity to request a public hearing.
- b) application to be made available and updated by the applicant at an accessible public place in the area of the project.
- c) DEP publishes notice of application in PA Bulletin.
- d) DEP notifies by letter the appropriate parties including the following: municipality, water suppliers, planning agencies, PFBC, FWS, Historical and Museum Commission.

* At draft permit stage.

- a) DEP's PA Bulletin notice should highlight that the discharge is to a HQ water and explicitly solicit input on antidegradation issues (alternatives, SEJ).
- b) Add requirement for applicant to provide 2 newspaper notices (on consecutive weeks) stating that draft permit (including fact sheet and other information pertinent to antidegradation issues) is available at a locally accessible site.
- c) DEP sends copy of notice to all who commented on permit application.

The workgroup recommends that these public participation requirements be in regulation.

RECOMMENDATIONS FOR SEJ REVIEW CRITERIA

The workgroup agreed that the "Social or Economic Benefits Analysis Checklist for Proposed Discharges to HQ Waters" found at A-7-2 of the current DEP Special Protection Waters Handbook is a good framework. It was also agreed that rather than providing a simple yes/no/NA response as in the current checklist, the applicant should provide more detailed narrative responses as well as documentation where appropriate. The group also agreed that the nature of the SEJ analysis will always be somewhat subjective, but there should be an explanation and record of the Department's analysis and decision for public review.

The revised checklist is attached to this report.

The workgroup recommends that a reference to the review criteria be in regulation, Chapter X.X, but that details be in policy.

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To whom it may concern:

I oppose the new proposed water quality standards and toxics strategy. We need you to strengthen the standards that protect our water, not weaken them. DEP's proposed toxics strategy is too weak and will allow even more toxic to be discharged into our water. So please stop these new standards.

Sharon E. Gutz
43 E. High St.
Nazareth Pa 18064
(610) 759-8052

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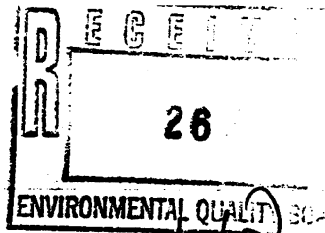
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DEPARTMENT OF ENVIRONMENTAL PROTECTION

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INDEPENDENT COMMISSION
REVIEW COMMISSION

To The chairman of The Environmental Quality Board,

I am truly alarmed that the DEP is allowing the standards that protect our water supply to be weakened. DEP's new proposed regulations are rolling back the standards protecting ~~our~~ our streams and rivers. The DEP's new water quality standards will make it easier to discharge toxins into our water, eliminating or weakening standards for 70 toxic chemicals as well as allowing quick "general permits" for toxic releases. In addition, DEP wants to allow quick "general permits" to be used in high quality watersheds and give "general permits" to companies that have NOT complied with other permits.

Please help to strengthen the standards that protect our water. The DEP's proposed toxics strategy is far too weak and I would like these new standards stopped!!

Thank-you,
Randy Cohen
168 Yew Rd
Cheltenham, PA 19012

Please Respond.

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Prepared By	initials	Date
Approved By		

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Phoebe Wilcox
528 4th Ave
Bethlehem, PA 18018

Environmental Quality Board
PO Box 8477
Harrisburg, PA
17105

ORIGINAL: 1975
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To Whom it may concern:

I strongly oppose the new proposed Water Quality Standards & Toxics Strategy. Please strengthen ~~rather~~ the standards that protect our water, rather than weakening them. It is absolutely heart-breaking to see what we do to our environment in the name of money. I beg you to help stop these new standards from being enacted. Thank you. Please write.

Sincerely,

Phoebe Wilcox

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I OPPOSE THE NEW PROPOSED WATER

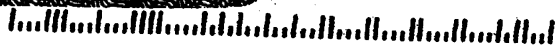
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QUALITY STANDARDS

AND TOXICS STRATEGY

Mr. AND Mrs. ALBERT SUTTON



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REVIEW COMMISSION

EQB,

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As a human being, I oppose
the proposed Water Quality
Standards and Toxics Management
Strategy - we cannot afford
to weaken our standards for
discharging toxic chemicals.
This decision to oppose is one of
Common sense. Thank you for
your precious time.

Sincerely,
J. Ruth
Josh Rutkowski

P.S. Please do what you can!!!

J. Ruth
12/12/75
Quaker

DEAR MEMBERS OF THE ENVIRONMENTAL QUALITY BOARD,
I AM WRITING TO VOICE MY OPPOSITION TO
THE NEW PROPOSED WATER QUALITY STANDARDS
& TOXICS STRATEGY. NOW IS THE TIME TO
STRENGTHEN THESE STANDARDS, NOT TO WEAKEN
THEM. THE DEP'S PROPOSED TOXICS STRATEGY
WILL ALLOW EVEN MORE TOXIC DISCHARGES
INTO OUR WATER. I BELIEVE THESE NEW
STANDARDS SHOULD BE STOPPED, & FAR MORE
STRINGENT STANDARDS SHOULD BE ADOPTED.

THANK YOU FOR YOUR CONSIDERATION,

Carol Woy

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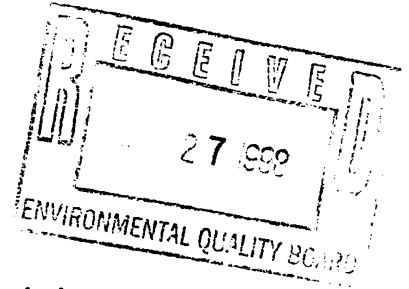
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REVIEW COMMISSION

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PROPERTY



OVERNIGHT MAIL

Electric Generation Association
301 APC Building
800 North Third Street
Harrisburg, PA 17102
October 26, 1998

Environmental Quality Board
15th Floor, Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101-2301

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ENVIRONMENTAL QUALITY BOARD
OCT 27 1998

**RE: *Comments on Proposed Amendments
Chapters 92, 93, & 96 Water Quality Regulations
Regulatory Basics Initiative***

Dear Environmental Quality Board:

The Electric Generation Association (EGA) appreciates the opportunity to provide comments in response to the Environmental Quality Board's proposal to amend the Water Quality regulations, as published on August 29, 1998 in 28 *Pennsylvania Bulletin* 4431 (*attached is a one page summary of our comments*).

EGA is the trade association of seven electric generating companies that provide electric power to the mid-Atlantic region. Our member companies are:

- Allegheny Power
- Duquesne Light Company
- FirstEnergy Corp
- GPU Generation, Inc.
- PECO Energy Company
- PP&L, Inc.
- UGI Utilities, Inc.

Together, these companies generate approximately ninety-four percent of Pennsylvania's electric power needs.

In general, EGA supports the efforts of the Department to update and streamline the Commonwealth's Water Quality regulations. Our comments will focus on those issues of specific interest to our organization. The comments are segregated by chapter and are as follows:

Chapter 92:

- The EGA would like to comment on the definition of "Natural Quality", contained in 92.1. The intent is clear that this relates to conditions that have not been influenced by human activity. However, many Pennsylvania streams have had historical Acid Mine Drainage problems going back in some cases over 100 years. There also has been limited corrective action to mitigate a large percentage of those problems. In situations where the prospects of any improvements on an AMD impacted stream are negligible over a permit discharge period, consideration should be given in recognizing that this is a background condition that is analogous to a natural occurring condition.
- The EGA is concerned with the required BAT limit of .5 mg/l for total residual chlorine contained in 92.2(d)(3). This limit is more restrictive than the default BAT limit of 1.2 mg/l, recently established by the Department for small sewage treatment plants with flows below 10,000 gpd. The EGA hopes that the Departments intention is to continue to consider the special case of small sewage treatment plants in their 'facility specific' evaluations that use the 1.2 mg/l limit for Best Professional Judgement.
- The EGA supports 92.13(a) and its restriction on only opening permit issues directly related to the scope of the requested permit modification.
- The EGA would like to comment on 92.21(b)(3), suggesting that the PaDEP limit newspaper publication requirements to major modifications only. Permit renewals for facilities that have not substantively changed their operations/discharges should not be required to publish special notices in the local papers

Chapter 93:

- Chapter 93.3 Table -1, continues to include the statewide potable water use, and in addition, adds fish consumption as a statewide use. The EGA is concerned with the compound effect of too many safety factors, and their relationship to the overall risk. The December 1997 changes to Chapter 93 related to the Great Lakes Initiative added the ability to have site-specific human health criteria. This enables a discharger to account for the lack of a potable water withdrawal on their stream segment. This was a change that the EGA strongly supports, since it enables the use of risk assessment in the application of human health discharge limits. However the addition of fish consumption as a statewide use creates an additional factor in obtaining a site-specific standard for human health criteria. A factor that needlessly complicates an already complicated process.

These two statewide designated uses add additional levels of conservatism to a process that already contains a number of conservative safety factors, such as criteria calculation methodology, and the low flow conditions used to calculate permit limits. In addition the Department must recognize the future impact of lower human health criteria resulting from the EPA proposed increase in the fish consumption value and use of bioaccumulation factors, which adds further conservatism and environmental protection to the process. These changes are contained in EPA's "Draft Water Quality Criteria Methodology Revisions," found in the August 14, 1998 Federal Register.

Chapter 96:

- The EGA is concerned that Section 96.4(h) as proposed will result in extremely conservative and unrealistic TMDLs that are likely to impose severe economic hardship in certain watersheds where they are developed and implemented. This section specifies that "steady state modeling at the design flow conditions listed in Table 1 shall be used to develop TMDLs, WLAs and LAs when it is determined that continuous point sources are the primary cause of a violation of the water quality protection levels specified in section 96.3, unless an alternate method is approved by the Department under subsection (g)" (pollution trading). Steady state modeling is unrealistic because it applies one design flow condition that occurs less than one percent of the time to model a dynamic system whose flows are continually changing. The mass of a constituent is calculated by multiplying the volume of water to the concentration of chemical of concern. By contrast a dynamic or probabilistic model assumes that both volume and concentration change over time. Clearly, no river system maintains a steady state flow condition, therefore a dynamic model which incorporates changing flow conditions and calculates the probability of the worst case conditions occurring simultaneously is more predictive of actual conditions.

EGA understands that a steady state model is much easier and less expensive to apply than a dynamic model. However, we do not believe accuracy should be compromised merely for the sake of minimizing complexity and administrative costs. The Department is obligated to develop the most realistic and accurate TMDLs possible in light of the potential economic burden the TMDL program will have on the Commonwealth's regulated community. We therefore strongly urge the Department not to restrict TMDL development to steady state modeling but to use a dynamic approach in accordance with EPA's Technical Support Document for Water Quality-Based Toxics Control (TSD).

Environmental Quality Board
October 26, 1998
Page 4

The EGA appreciates this opportunity to provide comments on these important regulatory changes, and respectfully request your consideration of them.

Sincerely,



William B. Thomas
Chairperson
EGA Water Quality Subcommittee

cc: I.R.R.C.

**ELECTRIC GENERATION ASSOCIATION
CHAPTER 92, 93 & 96
COMMENT SUMMARY**

Chapter 92:

1. The EGA believes that background water quality conditions resulting from long term Acid Mine Drainage (AMD), should be analogous to "Natural Background" conditions when there is no near term prospects of correcting the AMD.
2. The EGA believes the .5 mg/l Total Residual Chlorine limit should not apply to small sewage treatment plants below 10,000 gpd. The current 1.2 mg/l limit or Best Professional Judgement limits should continue to apply.
3. The EGA supports the limitation on what issues can be addressed during a permit modification.
4. The EGA believes that a newspaper notice should only be required for major permit modifications.

Chapter 93:

1. The EGA believes the addition of a statewide designated use for "Fish Consumption," adds unnecessary conservatism to an already conservative criteria process, that will be even more conservative when EPA modifies the human health criteria methodology. This will also complicate the ability to receive the new site-specific human health standard, which was added in the December 1997 final rulemaking.

Chapter 96:

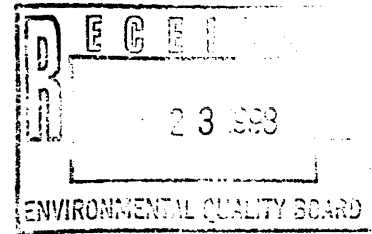
1. The EGA believes that basing TMDL's on unrealistic steady-state models at low flow conditions is inappropriate. Although a dynamic model is complex and costly to administer, it provides the most accurate representation of a watershed's condition, and should therefore be the basis for TMDL calculations.

NOV 18 1998
RENEWAL COMMISSION

Alice Water Protection Association

R. D. #5, Box 111-A
Mount Pleasant, PA 15666

October 18, 1998



Environmental Quality Board
P. O. Box 8477
Harrisburg, PA 17105

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Dear Board Members:

We are opposed to any weakening of Pennsylvania's water quality standards or toxic management strategies that would allow more degradation of the waters. The proposed changes are nothing more than political payoffs to corporate campaign contributors at the public's expense.

Chestnut Ridge had been a protected watershed providing high quality water to local wells, springs and streams ultimately flowing to the Youghiogheny River. Under Dep.'s management entire villages have lost the use of private water supplies due to degradation. Water supplies that had served homes with little or no treatment now require treatment systems costing upwards of \$8,000 for installation plus maintenance.

Ground waters are becoming increasingly polluted at the source and no longer have the dilution potential they had. These are not conditions in some far off isolated region of the world. These are conditions across Pennsylvania. DEP wants to change to standards that would allow more degradation.

Industry does not foot the bill for tough environmental standards. The costs are passed on to the end user--the consumer. Remember the old adage, "an ounce of prevention is worth a pound of cure". A current dollar invested in prevention of water pollution is worth an inestimable amount of future savings in health costs alone. Must all life be destroyed before we realize the consequences of greed?

A critical decision affecting the health and welfare of Pennsylvania's citizens rests with

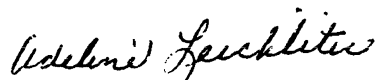
you, the board members. If you are not familiar with degradation problems, we suggest you personally visit citizens in affected areas before you cast your vote.

Your stewardship of the state's life-sustaining water resources reflects on each of you either as a credit to a responsible individual or as a disgrace to an irresponsible political pawn.

Yours truly,



Patricia A. Paul
Co-Exec. Dir



Adeline Leichter
Co-Exec. Dir.

ccs: E. Brezina
Clean Water Action
Sen. Kukovich



**SIERRA
CLUB**
BERKS GROUP

Reply to: 30 Pine Street
Kutztown, PA 19530

October 23, 1998

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Jewett
Sandusky
Legal

Environmental Quality Board
P. O. Box 8477
Harrisburg, PA 17105-8477

re: Proposed amendments to Chapters 92, 93 and 95-97, as set forth in
PA Bulletin, vol. 28, no. 35, August 29, 1998

Dear Environmental Quality Board:

The Berks Group of the Sierra Club opposes any weakening of water quality protection. The proposed regulatory changes have this effect by allowing increased discharges of toxic chemicals into waterways, neglecting non-point source pollution in impaired waters and extending the use of general permits for the discharge of toxic chemicals and high-quality watersheds. The current regulations should be retained in these matters.

We concur with the position of the Pennsylvania Sierra Club on the proposed changes to water quality regulations. In addition, we wish to comment on two areas in which water quality standards should be improved in the present review.

First, we understand that Chapter 93.5(e) currently prohibits mixing zones, although DEP routinely sanctions them. The revised regulations maintain the prohibition of mixing zones in Chapter 96. We approve of this and expect DEP to enforce the no mixing zone policy.

Second, we urge the EQB to use this opportunity to add instream flow and habitat considerations to the water quality standards. In Berks County problems have repeatedly arisen over withdrawals, discharges and obliteration of stream segments by filling. The flow of streams and the habitat sustained by natural flows needs much stronger regulatory protection.

Sincerely,

Phila Back
Phila Back
Chairwoman

NOV 5 9 15 AM '98
ENVIRONMENTAL QUALITY BOARD
COMMISSION

93 NOV -6 AM 9:12

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REVENUE COMMISSION

ORIGINAL: 1975
No copies per FEW

To whom it may concern,

Please Strengthen the standards
that protect our water, not
weaken them! The Dep's proposed
toxic strategy is to weaken!
Please protect us! I would
love a response!

Don Masterpaul
230 S. Whitfield St
Nazareth PA / 18064
610 614 1996

HAWAII via our SAN FRANCISCO CONTAINER SERVICE

WESTERN CARLOADING

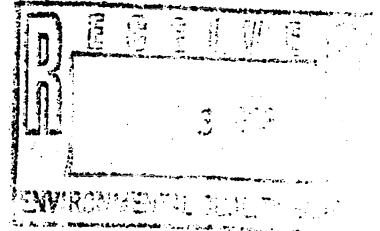
THE NON STOP SERVICE TO CALIFORNIA

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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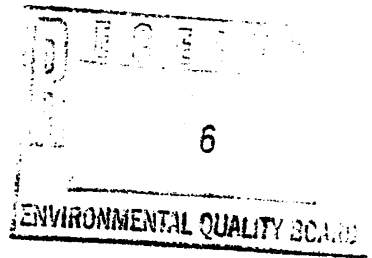


Environmental Quality Board:

*Please be aware the proposed H₂O
quality standards & toxics strategy is
weak! No more toxic waste
in our water supply -*

*Jim + Tammy Snee
Nazareth, PA 18064*

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Legal



To Environmental
Quality Board

I strongly urge you to protect
our water and not weaken the
standards. DEP's proposed
toxic strategy is much too
weak. The new standards
are simply not adequate.
I would like to know that
the water we drink is safe
not only now, but in the
future for my children
and my children's children.

Sincerely,

Cynthia Heller

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98 NOV -6 AM 9:15
STATE OF OHIO
DEPARTMENT OF ENVIRONMENT
REVIEW COMMISSION

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98 NOV -6 AM 9:12

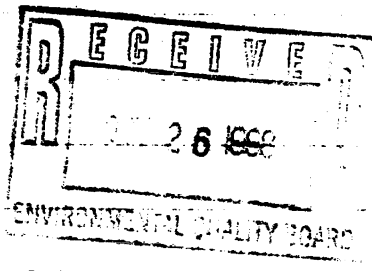
INDEPENDENT REGULATORY
REVIEW COMMISSION

ORIGINAL: 1975
No copies per FEW

TO: Environmental Quality Board
We OPPOSE The New Proposed
Water Quality Standards and
TOXICS Strategy.

Please Strengthen the
Standards that Protect Our
Water, Not Weaken them.
Please Respond..

Sincerely,
Deb & Bob Sherman
243 South St.
Nazareth, Pa 18064



Dear Sir/Madam:

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Sandusky
Legal

I oppose the new proposed water quality standards & toxics strategy. I urge you to strengthen standards that protect our water. The DEP's proposed strategy is too weak & will allow for more toxic discharges.

Sincerely,
Ava Marie Garcia

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FEDERAL COMMISSION

SEP 6 9 15 AM '75

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98 NOV 10 PM 3:59

INDEPENDENT REGULATORY
REVIEW COMMISSION

no return address

DEP - I oppose the New Water
Quality Standards & TOXICS strategy.
I would like these standards
Stopped.

Thank you,

Rae Brown

RECEIVED PA DEP
DIV OF WQ ASSESS & STDS
04:14 PM 82 10086

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REVIEW COMMISSION

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Environmental Quality Board
PO Box 8477
Harrisburg PA 17105

Please do not permit
DEP to allow more
toxic discharges into
our water. I do not
want my grand-children's
health put in jeopardy.
We need higher water
standards.

Loumary L. Mace

28

ENVIRONMENTAL QUALITY BOARD

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98 NOV -6 AM 9:12

INDEPENDENT REGULATORY
REVIEW COMMISSION

ORIGINAL: 1975
No copies per FEW

Dear Sirs:

*Please keep our Waters Clean!
EPA + DEP Stop these new
Standards. You must keep other
people garbage out of P.A. We
have B.C.S. here & may trucks
coming & going*

*H.M. Toth Sr.
May 1975 Pa
18064*

**Summary of Testimony
Water Quality Amendments
October 22, 1998**

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Jewett
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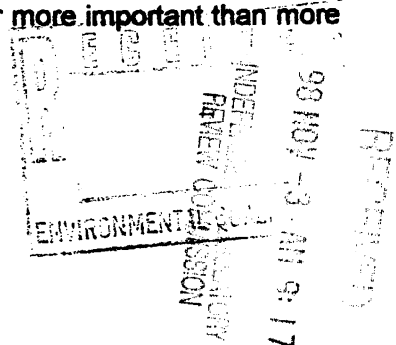
The petition I turned in at the Water Quality Hearing contained 109 signatures of people objecting to the Water Quality Amendments you are proposing. I personally obtained 90% of the signatures from co-workers. Each and every person that signed my petition were totally unaware of these amendments. This is not due to ignorance, but due to the fact that there is not adequate public notification. When I returned to work today, every person that I saw who signed, asked me how it went. So you see, there IS public interest, and you **MUST** seek it in more effective ways. Another 5% were obtained by my uncle, Charles Jacobson, whom is 80 years young. I explained to him in one of my emails how I am busy fighting sludge being spread on farms in the township where I live, and sludging in general. He was appalled and asked for more information, which I mailed to him. He has since helped me enormously by writing letters to Senators, Legislators, etc. The last paragraph in this letter are his words on his feelings on the amendments. The remaining 5% were obtained by my brother, Robert McIlhane from his co-workers. I must note, these signatures were all obtained in only 3 days. We want to live in Pennsylvania, we want to work in Pennsylvania, but we do not want to live in a toilet or a dump!! **WE WANT CLEAN WATER!!**

We believe strongly that these proposals will greatly weaken the already too weak regulations for Water Quality, Residual Waste, and Municipal Waste. Furthermore, we believe that the present environmental regulations should be made much tighter, not "streamlined" to encourage trash as Pennsylvania's number one business under the guise of recycling. The EQB, DEP, and PA government have a duty to preserve a safe and healthy quality of life for every person in PA.

If I had not received a letter in the mail dated July 7, 1997, I would never be involved, I would never have been at the hearing. I trusted our Federal and State Government to protect us. That letter informed me that sewage sludge is going to be applied to a farm adjacent to my house. Never in my life had I heard of such an atrocious thing. My husband and I both said "oh no they won't." Never in my life did I imagine that I would have to fight for my right to live in a healthy environment. That letter opened my eyes to the extent of which our beautiful state is being polluted legally with the help of agencies our tax dollars pay to protect us.

I am incensed with the steps your department seems so ready to take to reduce the water quality of Pennsylvania. We already have more pollution and poisoned water than we should have. The idea that relaxing the standards and regulations can in any way be good for the people of this state is ridiculous. We have had more than our share of fish kills and incidents of poisoned well water. We certainly do not need more. I would hate to think that the decisions you are contemplating are business and money driven. We are being assaulted from all sides with garbage from out of state and the practice of spreading sewage sludge. We cannot afford to have the government we depend on make it easier for business and industry to indiscriminately dump their waste chemicals and pollution wherever they wish as long as it adds to their bottom line. Please, in the name of decency and honesty, do not make any changes that will most certainly reduce our water quality. The health and welfare of the people is far more important than more wealth for business. Do the right thing.

Judith A. Fasching
440 Creek Lane
Lenhartsville, PA 19534
(610) 562-0172
fasching@fast.net





Pennsylvania Coal Association

212 North Third Street • Suite 102 • Harrisburg, PA 17101

(717) 233-7909
(717) 236-5901
(800) COAL NOW (PA Only)

GEORGE ELLIS
President

MICHAEL G. YOUNG
Director of Regulatory Affairs

RECEIVED
DEPARTMENT OF ENVIRONMENTAL PROTECTION
RENEW COMMISSION

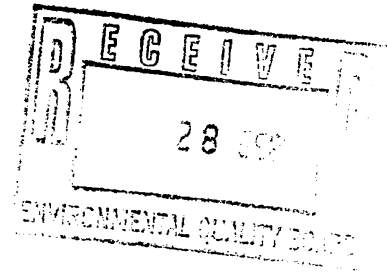
October 28, 1998

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Environmental Quality Board
P.O. Box 8477
Rachel Carson State Office Building
Harrisburg, PA 17105-8477



Re: Notice of Proposed Rulemaking: Water Quality Regulations, 25 Pa. Code Chapters 92, 93, 95-97, Pennsylvania Bulletin August 29, 1998

Members of the Board:

Thank you for giving the Pennsylvania Coal Association (PCA) an opportunity to submit written comments on above-referenced Notice of Proposed Rulemaking (the "Draft Rules"). PCA represents 39 bituminous coal producers and more than 80 associate members, including power generators, engineers, consultants and other entities which may be subject to the Department of Environmental Protection's water quality regulations. PCA submits the following written comments in response to the above-referenced Notice of Proposed Rulemaking.

General Comments

In numerous aspects, the Draft Rules represent a welcome shift from the command and control approach taken in the past. PCA hopes that these changes will allow greater flexibility, will protect water quality without unreasonable restrictions on economic activity and will encourage greater cooperation in addressing longstanding, challenging water quality problems.

Specific Comments

92.1: Definitions. This section should add a definition and should revise several others.

Stream definitions should be added as follows: "Perennial Stream: a stream or part of a stream that flows continuously during all of the calendar year as a result of groundwater discharge or surface runoff. The term does not include *intermittent stream* or *ephemeral stream*." "Intermittent stream: (a) a stream or reach of a stream that drains a watershed of at least one square mile, or (b) A stream or reach of a stream that is below the water table for at least some part of the year, and obtains its flow from both surface runoff and groundwater discharge." These definitions are contained in 30 CFR §701.5, and their application in this chapter will be consistent with Executive Order 1 of 1996, the Regulatory Basics Initiative (RBI) in that they will help reduce the inconsistency and

confusion which has arisen from the application of different definitions in the mining program, and then applying or seeking to apply those definitions to other regulatory programs.

"Best Management Practices": The definition should be revised to be consistent with the definition at 40 CFR §122.1.

The addition of a definition for "surface waters" as a substitute for "navigable waters" adds confusion by adding yet another term, without any clear reason (since the term appears in neither the Clean Streams Law or the Clean Water Act). The definition is overbroad without a clear reason or justification. The reference to seeps, intermittent streams and springs does not seem necessary to the intent of the program.

"Toxic pollutant": The EPA's Section 307 list should be used to eliminate confusion and to adhere to the intent of RBI. Alternatively, this definition should be revised as follows: "Those pollutants . . . through food chains, **[may] present a demonstrated risk, based on information generally accepted within the scientific community, [cause] of death . . .**" The definition as written is too broad. There is no limit placed on the source or type of information, so long as it is available to the Department, and characterizing any substance which "may" cause death, disease, etc. in any organism could be construed to include virtually any substance and is an invitation to speculation, conjecture and the application of "junk" science.

92.2. Incorporation of federal regulations by reference: PCA supports this provision. A clause should be added at the end, consistent with the intent of RBI: **"However, whenever possible under Pennsylvania law, ambiguous provisions and definitions shall be construed so that they are no more stringent than corresponding federal provisions."** Furthermore, this provision should expressly state the intent to conform state standards to less stringent federal standards, unless a compelling or unique state interest supports the more stringent standard.

92.11. Duration of standards for certain new sources: PCA is opposed to the substitution of "requirements" for "standards of performance." The new language is not necessary to effect the purpose of 40 CFR §129.29(d) and, in fact, imposes more stringent standards than the federal provision.

92.21. Applications: Subsection (c) presents great potential for abuse. The Department's ability to require production of additional information should be qualified by providing that such information may be "reasonably available to, or efficiently and economically obtained by" the Applicant.

92.41. Monitoring: In addition to providing for annual monitoring and more frequent monitoring as specified in the permit, subsection (b) allows DEP to *require* more frequent monitoring simply because it requests it. There is then a self-reporting clause for *all* pollutants not limited in the permit. Monitoring costs may be substantial and should not be imposed arbitrarily. Here, the corresponding federal regulation, 40 CFR

§122.41(i)(2), does not require a provision for additional monitoring . More frequent monitoring and reporting requirements should be clearly spelled out in the permit.

92.63. Public access to information. Subsection (b) should be further revised as follows: "The Department . . . physical properties of coal (excepting information regarding the mineral or elemental content which is potentially toxic in the environment and **which is therefore required by law to be made available to the public**) . . ." The vagueness and breadth of the present language could allow the exception to swallow the rule.

92.72a. Cessation of discharge. This section should be revised or deleted. The Department should recognize that various circumstances could justify a different notification period, depending on the type and source of the discharge, the programmatic requirements and the reason for discontinuation. For example, a company could be required to disclose a facility closing well in advance, which could cause competitive or labor problems. PCA suggests that the definition should require notification within 90 days *after* a discharge or operations cease, unless an earlier notification is required to allow DEP to coordinate actions in response to the termination. In that case, the earlier notification should be spelled out in the terms of the permit, or in program guidance where an entire program areas requires earlier notification.

92.81. PCA supports this streamlining of the general permit process.

92.93. Procedure for civil penalty assessments. Subsection (a) should allow a "good cause" exception for mail which is not collected -- i.e., if the permittee can demonstrate good cause for not collecting the mail, it should not be bound. Furthermore, nothing in this section requires the Department to expressly inform the permittee of its right to request an informal hearing and the procedure for so doing. This is a minimal due process requirement, and there is no reason for not including it in the regulations. Additionally, there should be a provision that a notice of "final" assessment, including notice of the right to appeal the EHB, in a manner which provides a reasonable likelihood of personal service.

Subsection (c) is inadequate in requiring that the Department "post" notice of the hearing at least 5 days in advance. Where will this be posted? In the *Pennsylvania Bulletin*? On the Internet? At the courthouse? By mail? The permittee's rights are at stake and due process requires that there be a reasonable certainty of actual notice and the opportunity to be heard.

Since this is an informal conference, subsection (d) should specify that the Department's representative will provide written notice of a determination, and that the appeal period commences with the person's receipt of the written notice. *See* 25 Pa. Code §1021.52 (a)(2). Furthermore, the Draft Rules should clarify whether the hearing before the EHB will be *de novo*.

93.4. Statewide water uses. PCA supports the streamlining of this section by eliminating the redundant and unnecessary statewide warm water fishes use. Additionally, PCA strongly recommends that "potable water supply" be deleted as a statewide water use. Other human health and fish consumption/recreation standards are more than adequate to protect existing uses.

Where there is an actual or potential potable water supply intake, drinking water standards may be imposed. But the imposition of drinking water standards to all waters statewide is not realistic or necessary. Furthermore, such reduction may limit flexibility in addressing issues such as excessive treatment costs for manganese in order to meet secondary drinking water standards. This drastically increases water treatment costs without providing a demonstrable environmental benefit, since the aquatic life and human health criteria would permit a higher concentration of manganese without adverse consequences.

93.5. PCA supports the streamlining by deletion and reorganization of the provisions of this section. In particular, the deletion of the requirement in subsection (e)(1) that "Criteria necessary to protect other designated uses shall be met at the point of wastewater discharge," clarifies present policy of allowing mixing zones.

93.7 The manganese standard, at least for coal mining operations, should be revised to permit concentrations to the maximum extent permitted by federal water quality standards. A substantial body of independent scientific research indicates that higher concentrations of manganese do not pose a risk to human health or aquatic life, and demonstrate that manganese is not a very good surrogate for demonstrating the removal of other pollutants from mine discharges. DEP should have flexibility in addressing manganese treatment in the context of the operator's treatment responsibilities, the quality of the receiving stream and the opportunity to more efficiently treat manganese elsewhere within the affected stream, where the discharge does not present a risk of harm to aquatic life, human health or the uses met by the receiving stream.

95.4-95.5. PCA opposes the deletion of these sections without an explanation or a replacement which serves the intent of the existing sections.. There does not appear to be an explanation in the Notice of Proposed Rulemaking which provides a rationale or basis for these deletions. Other provisions of Chapter 95 appear to be relocated, not deleted, as set forth in the preamble -- which is silent on 95.4 and 95.5.

96.4, TMDLs: Subsection (b)(1) should be clarified to read "As a result of a watershed assessment or other evaluation **performed by the Department or at its direction . . .**"

Subsection (e)(4) should be changed to read that the Department "May consider any **[increases] changes** in pollutant loading that may be reasonably expected over a ten-year period. This will allow planned, proposed or anticipated water quality improvements to be taken into account, to the extent allowed by law and regulations,

along with increased discharges. This may also encourage cooperation and water quality planning among dischargers.

Subsection (f)(1) should be revised to read "WLAs and LAs assigned or allocated to individual sources of **specific pollutants** shall be . . ." The focus of TMDLs should clearly remain on the specific pollutants which impair the use achievement of the surface water in question.

Subsection (f)(2) should be revised to provide that "WLAs and/or LAs for significant [**pollutant**] sources of **specific pollutants** shall be made more stringent if the cumulative loading of **those specific pollutants**, determined after the application of paragraph (1) exceeds the TMDL." This allows LAs to be adjusted, as well as WLAs and again focuses on the TMDL for specific pollutants.

Subsection (g) is a welcome approach, but PCA is concerned that the Department may render it impractical by these regulations before it has an opportunity to develop. Specifically, (g)(2)'s requirement that "water protection levels specified in §96.3 are achieved in all portions of the surface water under consideration" will make it difficult or impossible to trade effluent units in some circumstances where it would be highly desirable. That is because §96.3 requires the protection of *designated* uses. Thus, where an impaired stream segment is not meeting designated uses, no trading may be allowed to further the impairment, even if there would be a net environmental benefit to the overall stream quality or the watershed. This is in accordance with the the Clean Water Act's conveyance of "broad authority to develop long-range, area wide programs to alleviate and eliminate existing pollution." *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992), *citing* 33 USC §1288(b)(2)

There should be some flexibility here. DEP should allow, at a minimum, for the approval of watershed improvement plans, experimental or pilot projects or coordinated efforts to remediate difficult treatment problems -- even where a segment of the water under consideration may fail to meet all of the criteria in §96.3. This may be developed through the notice and comment procedure provided in (g)(3).

Subsection (h) should be revised to provide that "Steady state modeling . . . determined that continuous point source[s] **discharges of specific pollutants . . .**" Again, this is in accordance with the purpose of the TMDL program.

Subsection (i.) should be revised to read that "The Department will revise WLAs and LAs [**because of**] **when necessary to address changes in pollutant loadings. . .**" The regulations should also clarify that revised WLAs will be imposed in the permit renewal.

Subsection (j) should apply to any modeling technique or method of developing TMDLs, LAs and WLAs instead of "mathematical" modeling.

Subsection (l) inappropriately intrudes on the EHB's authority, pursuant to the Environmental Hearing Board Act, to adopt regulations and rules governing practice before the Board. Because the issues at hand would be subject to *de novo* review by the EHB, the EQB may not promulgate regulations allocating the burden of proof on those issues.

96.7. Public participation. The public comment period should be a minimum of 60 days. Draft lists and TMDLs are intensely technical and detailed, and details concerning listed waters are usually not readily available. A 30-day comment period has been demonstrated to be woefully inadequate both in Pennsylvania and in other states -- particularly since the 30 days commences with the publication in the *Pennsylvania Bulletin* of a notice of *availability* of the lists and draft notices, rather than publication of the actual list. The effective comment period is therefore almost always less than 300 days.

Thank you again for considering these comments. We do wish to receive the final-form regulations when they are available.

Pennsylvania Coal Association

BY:



Michael G. Young
Director of Regulatory Affairs

**One-Page Summary of Comments by Pennsylvania Coal Association
To Proposed Rulemaking, 25 Pa. Code Chapters 92,93, 95-97**

- Definitions of "perennial" and "intermittent" streams should be added. Definitions of "best management practices" and "toxic pollutant" should be revised to correspond to federal definitions.
- The incorporation of federal regulations is supported, but express reference to the intent of the Regulatory Basics Initiative (RBI), clarifying the intent of the incorporation, is needed.
- PCA opposes the substitution of "requirements" for "standards of performance in §92.11 as unnecessary and inconsistent with federal regulations.
- The Department's ability to require the production of additional information on applications under §92.21 and additional monitoring under §92.41 should be qualified and limited.
- The qualification of the exemption from public disclosure of the physical and chemical properties of coal in §92.63 has been unnecessarily drained of its vitality and should be limited.
- The provisions requiring 180 days notice of cessation of operations or discharge under §92.72a is unnecessary and could cause problems.
- The general streamlining of permits under §92.81 is supported.
- Substantial revisions to the procedures for civil penalty assessments are necessary to provide fundamental due process protection and to clarify the procedure.
- PCA supports the deletion of warm water fishes and potable water supply from §93.4 as unnecessary statewide water uses.
- PCA supports the deletion and reorganization of the provisions of §93.5.
- Maximum flexibility for the discharge of manganese is required under §93.7, due to the unnecessary burdens imposed by excessive manganese treatment.
- PCA questions the deletion of §§95.4 and 95.5 without explanation or replacement of their purposes and functions.
- Revisions to §96.4 are necessary to track the intent of the federal TMDL program, to clarify the application of TMDLs, to facilitate watershed improvement through effluent trading and to return the determination of burdens of proof to the EHB.

21 OCT 92

Mr. Edward Brezina

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Legal

Stop the new weaker DEP regulations that are being proposed
Don't allow general permits for toxic release of waste. We
need clean water. Protect our streams, dump the waste
somewhere else. Better yet clean up the toxic waste. We
need stronger DEP regulations not weaker ones!

Donald McFadden

I would like a reply to this letter

Thank you

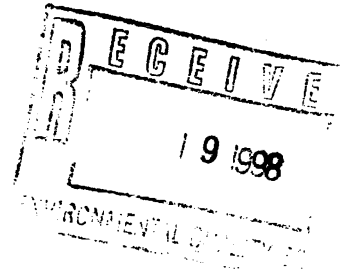
INDUSTRIAL REGULATION
FEDERAL COMMISSION

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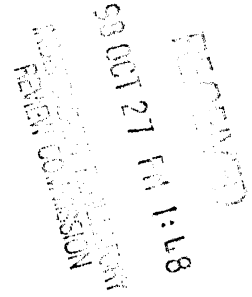
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Sandusky
Legal

79 Bryn Mawr Ave.
Lansdowne, PA 19050
October 14, 1998



Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105

Dear EQB:



I would like to make it clear as a voting Pennsylvanian, that I am **against** the proposed **lowering** of Water Quality Standards.

Thank you for your time.

Sincerely,

A handwritten signature in cursive script that reads "Laurence Buxbaum".

Laurence Buxbaum, MD-PhD

Policy

Hartman, Shirley

From: Lauderbach, Cindy
Sent: Friday, October 23, 1998 8:16 AM
To: Hartman, Shirley
Subject: FW: Hearings on Proposed Changes to Water Regulations

Shirley -- here's another one to forward -- Cindy

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MIZNER
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Jewett
Sandusky
Legal

From: KUJACKO(SMTP:KUJACKO@aol.com)
Sent: Thursday, October 22, 1998 11:39 PM
To: SEIF JAMES
Subject: Hearings on Proposed Changes to Water Regulations

Dear Secretary Seif:

I wish to express my concern regarding the Department of Environmental Protection's proposed changes to Pennsylvania's water regulations. My primary concern is not with the changes per se, but with the agency's cavalier attitude toward making sure that the public is well informed about them. This is a matter which will have a tremendous impact on the quality of life in the state and therefore the citizens have a need to have access to the proposed changes and time to asses what effect they will have. Your agency, however, does not appear to think that communicating with the public on such fundamental issues as the quality of drinking water is important. According to an article published on October 21 in the York Daily Record, unnamed officials from your department stated that they did not run ads detailing how to acquire a copy of the changes and where comments on them could be made in

all of the state's newspapers because this would waste taxpayers money. This is a terrible decision since it is exactly the responsibility of the DEP to keep the citizenry informed of changes in environmental policy which will affect it in a such a major way. Therefore, I urge you to extend the deadline for public comment on the new rules, which ends on October 28, for a period sufficient for the department to correct its mistake by publicizing statewide the changes to the state's water regulations and any new hearings which may come from the extension.

Sincerely,

Joshua Sakolsky
119 West Jackson Street
York, PA 17403
717-843-0732

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98 NOV 10 PM 1:00
INDEPENDENT REGULATORY
RENEW COMMISSION

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98 NOV 10 PM 3:59

INDEPENDENT TRANSPORTATION
REVIEW COMMISSION

Tell the people in Harrisburg
that DEP proposed topics Strategy
is too weak and will allow even
more topic discharges into our
water.

Thank You
From a Nazareth
resident.

Nazareth, Pa.

Robin Mease
158 S. New St.
Nazareth, PA 18064

RECEIVED PA DEP
DIV OF W Q ASSESS & STDS
98 OCT 26 PM 2:19

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98 NOV 10 PM 3:59

INDEPENDENT TECHNOLOGY
REVIEW COMMISSION

ORIGINAL: 1975

MIZNER

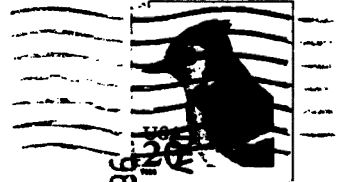
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Sandusky
Legal

I oppose the proposed
Water Quality Standards +
Toxics Mgmt. Strategy.

We cannot afford to weaken
our standards for discharging
toxic chemicals.

Patricia Schaefer
252 Belchwood Dr.
Rosemont, PA 19010

M.C. Escher: Puddle, 1952
Pfütze - Flaque d'eau
Woodcut printed from three blocks, 24 x 32 cm
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RECEIVED PA DEP
OFF. OF ENVIRONMENTAL
ASSESSMENT & STDS
98 OCT 28 PM 4:18

Edward Breanna DEP

Po Box 8555

Harrisburg, PA 17105

Dear E.Q.B.

NO RE address

Please strengthen the standards that protect our water, not weaken them. We want standards strengthened so that toxic waste cannot be discharged into our water.

ORIGINAL: 1975
MIZNER
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Jewett
Sandusky
Legal

Concerned Citizen
Matt Shay

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98 NOV 10 PM 3:54

INDEPENDENT REGULATORY
REVIEW COMMISSION

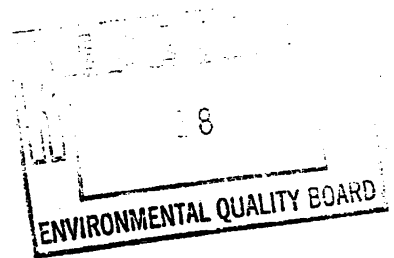
ORIGINAL: 1975
MIZNER
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To whom it may concern,

To even consider lowering the standards for toxic chemicals is inconceivable to me. As a person who spends so much time fishing and hunting, this proposed change threatens my most cherished past time. As I witnessed streams and rivers so polluted not a fish could survive, and finally, after years of hard work fish can live in these same waterways. Now, so somebody can make a few extra dollars, we are going let this all go to waste. Toxic chemicals have no place in one of the most beautiful states in the country. Please don't let this happen. So many people rely on the out-door recreation the waterways of Pennsylvania provide. I would appreciate a response in writing.

Sincerely,

John Marg
John Marg
157 Cedarbrook Rd.
Ardmore, PA 19003



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96 NOV 13 PM 1:01
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REVIEW COMMISSION