Regulatory Analysis Form

(Completed by Promulgating Agency)

IRRC

Independent Regulatory Review Commission

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SECTION I: PROFILE

(1) Agency:
Department of Environmental Protection (Department)

(2) Agency Number:

Identification Number: 7-443

IRRC Number: 2819

(3) Short Title:
CHAPTER 92a. NPDES Permitting, Monitoring, and Compliance

(4) PA Code Cite:
25 Pa. Code § Chapter 92, et seq.
25 Pa. Code § Chapter 92a, et.seq. (proposed new chapter)

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):
Primary Contact: Michelle Tate, (717) 783-8727, Rachael Carson State Office Building, P.O. Box 2063, Harrisburg, PA 17105-2063. Fax: (717) 783-8926. mtate@state.pa.us
Secondary Contact: Randall (Duke) Adams, (717) 783-8727, Rachael Carson State Office Building, P.O. Box 2063, Harrisburg, PA 17105-2063. Fax: (717) 783-8926. ranadams@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:
EQB
P. O. Box 8477
Harrisburg, PA 17105-8477
Email: regcomments@state.pa.us
(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation;
  - ☐ Certification by the Governor
  - ☐ Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

This final form rulemaking deletes and reserves Chapter 92, and replaces it with a new Chapter 92a which is organized consistent with the companion federal regulation 40 CFR Part 122. A new permit fee

structure will cover the Commonwealth's share of the cost of the program. Certain permitting requirements are streamlined, and some treatment requirements for sewage treatment facilities are standardized.

(9) Include a schedule for review of the regulation including:

A. The date by which the agency must receive public comments: March 15, 2010

B. The date or dates on which public meetings or hearings will be held: None planned

C. The expected date of promulgation of the proposed regulation as a final-form regulation: Fall 2010

D. The expected effective date of the final-form regulation: December 2010

E. The date by which compliance with the final-form regulation will be required: December 2010

F. The date by which required permits, licenses or other approvals must be obtained: See below

No deadlines for implementation of new, comprehensive requirements are applicable. It is not unusual for wastewater treatment facilities to implement changes to meet changing circumstances or requirements. Chapter 92a and the NPDES permitting process provides for schedules of compliance as an integral part of the process for permittees to meet any new requirements, and that will not change. In the final form regulation, certain standardized sewage treatment requirements become applicable only when the facility proposes to expand to accommodate growth in population. The standardized treatment requirements already are widely attained by the regulated community, and any new requirements would be considered when planning the facility expansion in any case. The only requirements for existing facilities that are new in Chapter 92a are for CAAP (concentrated aquatic animal production; fish hatcheries) facilities, which will be required to have a BMP (Best Management Practice) plan for managing feed, and to report use of therapeutic drugs (fungicides, antibiotics) that may be present in the discharge. However, the requirement for CAAPs to have a feed/nutrient management plan already is widely recognized as good industry practice to control costs. Reporting of therapeutic drug use is an extension of the existing requirement for permittees to report all potential pollutants in their discharge. Any new requirement may be phased in, if required, on a facility-specific basis as part of the normal permitting process. There were no significant issues with these CAAP-related provisions during public notice, and they have been carried forward into the final-form rulemaking.

(10) Provide the schedule for continual review of the regulation.

A comprehensive external review of the NPDES regulation is performed periodically by EPA, but not on a set schedule. Internal reviews are suggested on an annual basis. These internal reviews may, or may

not, include a review of the regulation. Chapter 92a requires the Department to review the fee structure every three years to ensure the fees continue to cover program costs. The Department must submit this review, along with any changes in fees, to the EQB (Environmental Quality Board) for promulgation as a revision to these regulations.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

This final form rulemaking is advanced under the authority of sections 5(b)(1) and 402 of the Clean Streams Law (35 P.S. Sections 691.5(b)(1) and 691.402) which provides for the adoption of regulations necessary for the implementation of the Clean Streams Law and section 1920-A of the Administrative Code of 1929 (71 P.S. section 510-20) which authorizes the Board to promulgate rules and regulations that are necessary for the proper work of the Department. This final form rulemaking is also authorized under Section 402 of the Federal Water Pollution Control Act (33 U.S.C.A. Section 1342).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

This regulation or equivalent is required by both state and federal legislation. The federal Clean Water Act (Federal Water Pollution Control Act (33 U.S.C.A. Section 1342)) and the Pennsylvania Clean Streams Law (35 P.S. Sections 691.5(b)(1) and 691.402) require that regulations be established to control point sources of pollution to surface waters. The NPDES program is a delegated program, and continued federal approval of the program is required.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The National Pollutant Discharge Elimination System (NPDES) is the means by which pollution from point sources of treated sewage and industrial wastewater is controlled to protect the water quality of this Commonwealth's rivers and streams, in order to achieve the requirements of the federal Clean Water Act and the Pennsylvania Clean Streams Law. All of the citizens of this Commonwealth directly benefit from unpolluted streams and rivers as a source of drinking water and for recreational activities including swimming, fishing, and boating. Clean water is a basic building block for quality of life issues, and directly supports Pennsylvania's tourism industry. The permittees also benefit from the program, since discharges to surface water are expressly prohibited by both federal and state law unless authorized by an NPDES permit. An effective and up-to-date permitting program benefits the permittees by minimizing potential liability associated with their discharge of treated wastewater.

Two important components of the regulation are compelling:

1. Permit fees that cover the Commonwealth's cost of the program means that the taxpayer will no longer subsidize point source discharges. Instead, permittees will bear more of the fair cost of the permit and the discharge of treated wastewater. The artificially low fees that have been charged are increasingly inappropriate given the challenges of managing point source discharges and allocating the limited capacity of surface waters to accept treated wastewater.
2. This rulemaking also includes new provisions designed to keep the program current with changes at the federal level. Some of these provisions are needed to ensure continued federal approval of Pennsylvania's program by the U.S. Environmental Protection Agency (EPA).

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

Not applicable.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

There are approximately 5000 discharges of treated wastewater covered by individual NPDES permits and approximately 5000 discharges covered by general NPDES permits. Adverse effects primarily will take the form of higher permit fees for most permittees.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

There are approximately 5000 discharges of treated wastewater covered by individual NPDES permits and approximately 5000 discharges covered by general NPDES permits. Permittees are municipalities, industries, small business owners, homeowners, and Commonwealth and other government entities. By law, permittees may not discharge to surface waters unless they are permitted to do so, and the NPDES permit fulfills this requirement in Pennsylvania.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The permit fee structure is designed to return a total of approximately $5 million per year, which is the cost to the Commonwealth of the NPDES program. The new fees, substantial as they are compared to the present fees, will cover only 40% of the true cost of administering the program. The federal government will continue to cover the other 60%. This compares to the approximately $750,000 per year collected under the current fee structure, in place since 1980. Also, these fees are very competitive with what is charged by other states. As an example, for a 1 million gallon per day (MGD) sewage treatment facility, the annual fee will be $1,250 per year in Pennsylvania. It is $5,250 in Ohio, $7,500 in New York, $15,000 in Illinois, between $3,000 and $5,500 in Michigan, and between $3,850-4,350 in Virginia.

The cost of the program was compiled from the Commonwealth's share of the total cost of the staff complement that directly supports the NPDES program. Most permittees will pay higher fees compared to the current $500 per 5-year term of the NPDES permit.

Certain cost savings to the regulated community are expected as a result of the reorganization and streamlining of the regulation consistent with the companion federal regulation 40 CFR Part 122. By aligning the two regulations, it becomes clear where they are identical and where they differ. Where feasible, Chapter 92a reverts to federal terminology and definitions to minimize possible distortions and ambiguity. This will help the regulated community better understand the requirements of the program, and help prevent misunderstandings between the Department and the regulated community based on different interpretations of the language or intent of regulations. The more uniform requirements and expectations should result in fewer appeals of permit conditions, and an associated reduction in legal costs to the regulated community. However, no specific cost savings value is available because of the nature of the projected benefit.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Local governments will be affected primarily to the extent that they hold permits for publicly-owned treatment works (POTWs), and will be required to pay higher permit fees. However, permit fees are still a minor cost element compared to the cost of building and operating wastewater treatment facilities. As an example, a 500,000 gallon per day POTW would pay $500 per year under the fee structure, instead of the $500 every five years paid under the existing permit fee structure. Smaller facilities, that are more financially constrained and also have a lower potential environmental impact, will be assessed the lowest fees.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

Cost savings to the Department are expected as a result of the reorganization and streamlining of the regulation consistent with the companion federal regulation 40 CFR Part 122. By aligning the two regulations, it becomes clear where they are identical and where they differ. Where feasible, Chapter 92a reverts to federal terminology and definitions to minimize possible distortions and ambiguity. The cumulative effect of these improvements should reduce the resources that the Department expends clarifying requirements to the regulated community, and help prevent misunderstandings between the Department and the regulated community. Fewer appeals will reduce the burden on the Department and the Environmental Hearing Board. As a supplemental benefit, turnover in permit engineers should be less disruptive, since new staff should find it easier to understand the streamlined regulatory requirements. However, no specific cost savings value is available. The new fee structure will unburden the General Fund from the need to support the NPDES program, saving the Commonwealth the $4.25 million per year that is currently spent to run the program.

All fees are paid to the Department.

Current Fee Structure:

Individual Permits: The application fee for essentially all individual NPDES permits is $500 per 5-year permit term. There are no annual fees.
General NPDES Permits: The fee for most general NPDES permits is $100 per 5-year term.

Total fees collected are estimated as $750,000 per year.

Fee Structure:

Summary of NPDES Application Fees

Applications fees for individual NPDES permits for treated sewage are:

SRSTP	$100 for new; $100 for reissuance.
Small flow treatment facility	$250 for new; $250 for reissuance
Minor facility < 50,000 GPD	$500 for new; $250 for reissuance
Minor facility ≥ 50,000 GPD < 1 MGD	$1,000 for new; $500 for reissuance
Minor facility with CSO	$1,500 for new; $750 for reissuance
Major facility ≥ 1 MGD < 5 MGD	$2,500 for new; $1,250 for reissuance
Major facility ≥ 5 MGD	$5,000 for new; $2,500 for reissuance
Major facility with CSO	$10,000 for new; $5,000 for reissuance

Applications fees for individual NPDES permits for industrial waste are:

Minor facility not covered by an ELG	$1,000 for new; $500 for reissuance
Minor facility covered by an ELG	$3,000 for new; $1,500 for reissuance

Major facility < 250 MGD ..... $10,000 for new; $5,000 for reissuance
Major facility ≥ 250 MGD ..... $50,000 for new; $25,000 for reissuance
Mining activity..... .....$1,000 for new; $500 for reissuance
Stormwater ..... $2,000 for new; $1,000 for reissuance

Application fees for individual NPDES permits for other facilities or activities are:
CAFO .....$1,500 for new; $750 for reissuance
CAAP ..... $1,500 for new; $750 for reissuance
MS4..... ..... $5,000 for new; $2,500 for reissuance

Application fees for transfers of individual permits are:

SRSTP $50
Small flow treatment facility $100
Other domestic wastewater $200
Industrial waste $500

Application fees for amendments to individual permits are:
Amendment initiated by Department ..... No charge
Minor amendment $200
Major amendment ..... Same as reissuance permit fee

Summary of NPDES Annual Fees

Annual fees for individual NPDES permits for discharges of domestic sewage are:
SRSTP $0
Small flow treatment facility $0
Minor facility < 50,000 GPD $250
Minor facility ≥ 50,000 GPD < 1 MGD $500
Minor facility with CSO $750
Major facility ≥ 1 MGD <5 MGD $1,250
Major facility ≥ 5 MGD $2,500
Major facility with CSO $5,000

Annual fees for individual NPDES permits for discharges of industrial waste are:
Minor facility not covered by an ELG $500
Minor facility covered by an ELG $1,500
Major facility < 250 MGD $5,000
Major facility ≥ 250 MGD $25,000
Mining activity $0
Stormwater $1,000

Annual fees for individual NPDES permits for other facilities or activities are:
CAFO $0

CAAP $0
MS4 ..... $500

NOTES:

AEU	Animal Equivalent Unit
CAAP	Concentrated Aquatic Animal Production
CAFO	Concentrated Animal Feeding Operation.
CSO	Combined Sewer Overflow
GPD	Gallons per Day
MGD	Million Gallons per Day
MS4	Municipal Separate Storm Sewer System
SRSTP	Single-residence Sewage Treatment plant

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year 09-10	FY +1 Year 10-11	FY +2 Year 11-12	FY +3 Year 12-13	FY +4 Year 13-14	FY +5 Year 14-15
SAVINGS:	$	$	$	$	$	$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	2,125,000	4,335,000	4,422,000	4,510,000	4,600,000
Total Savings	0	0	0	0	0	0
COSTS:						
Regulated Community	750,000	2,875,000	5,100,000	5,202,000	5,306,000	5,412,000
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	$750,000	$2,875,000	$5,100,000	$5,202,000	$5,306,000	$5,412,000
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Environmental Program Mngt 161-10382	$36,868,000	$36,685,000	$37,664,000	$32,694,000
Environmental Protection Operations 160-10381	$89,847,000	$98,574,000	$98,544,000	$85,069,000

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

This proposed rulemaking had extensive internal and advisory committee input during its development. The original concept of a reorganized NPDES permitting regulation based on the companion federal regulation was developed by a regional NPDES Permits Chief, who brought his regional perspective to central office and produced the initial draft of Chapter 92a. The proposed revision was vetted by program counsel, and revised based on the input of the affected programs, including the Bureau of Watershed Management and the Bureau of Mining and Reclamation. The proposed regulation was presented and critiqued at an annual statewide Wastewater Operations training meeting, a statewide Water Quality Roundtable meeting of regional counsel, a statewide Water Quality Managers meeting, and several statewide NPDES permit chief meetings. We have incorporated revisions based on a USEPA legal review of Chapter 92. At the July and October 2008 meetings of the WRAC (Water Resources Advisory Committee), the proposed rulemaking was reviewed and additional revisions were performed as a result of comments. At the October 2008 meeting, the WRAC recommended the proposed regulation for advancement to the EQB. In June 2009, the Agricultural Advisory Board reviewed the section in the proposed regulation that addresses Concentrated Animal Feeding Operations (CAFOs) and Concentrated Aquatic Animal Production (CAAP) facilities. Several concerns related to fees for CAFOs were raised, and the fee structure was adjusted in response to these comments. The public comment period for the proposed rulemaking extended from February 13 to March 15, 2010. Based on comments received in the public notice of the proposed rulemaking, revisions were made to the proposed rulemaking to produce the final form rulemaking. The Department briefed the Agricultural Advisory Board at its April 21, 2010, meeting that the revisions did not affect the agricultural community. The WRAC was briefed on the proposed revisions at its April 14, 2010, meeting, and considered the revisions at its May 11, 2010, meeting. The WRAC approved the final-form rulemaking with several additional comments. Additional revisions were made to the final-form rulemaking in response to those comments.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

Alternatives analysis was most appropriate when devising the NPDES permit fee structure. The established policy is that the fee structure should cover the true cost to the Commonwealth of the

program, but the issue of how those costs should be distributed remained. Two main decisions were required:

1. How to distribute the fees amongst the various classes of point sources.

2. Whether to implement annual fees in addition to application fees, and how to distribute the total cost between annual fees and application fees.

In addition to internal deliberations, the Department investigated the NPDES permit fee structures of other states. While there was substantial variation in how states distribute fees, there was broad consensus that larger dischargers pay higher fees. In some cases, additional fee multipliers were assessed for discharges with a higher environmental impact, as measured by pollutant loading or compliance history. Industrial dischargers usually pay higher fees, but not markedly so in most cases. Industrial dischargers of toxic pollutants sometimes pay higher fees. All of the states investigated have annual fees associated with NPDES permits, and nearly all have application fees. There is no consensus as to the magnitude of the annual fee relative to the application fee.

While various combinations of these factors were considered, the following principles were determined to be most appropriate in terms of fairness to the regulated community, the resources expended by the Department, and the relative environmental impacts of different classes of facilities:

- Permit fees for industrial wastewater will be higher than fees for treated sewage. Permits for industrial wastewater are more variable and require greater resources to issue and maintain. Toxic and persistent pollutants are more often present in greater quantities in industrial discharges, with increased potential for adverse environmental impact relative to the conventional pollutants discharged in treated sewage.
- Permit fees will be higher for facilities with higher flows. Higher flows generally track with higher pollutant loadings and increased potential adverse environmental impact.
- Application fees for a new facility will be twice that for a reissued permit, reflecting the substantially greater resources required to issue an NPDES permit for a new facility. Setting application fees higher also better compensates the Department for processing applications for new permits that are submitted on a contingency basis, and that may or may not result in a facility being built.
- Annual fees will be implemented, and be designed to cover the ongoing costs associated with maintaining the permit coverage, including the cost of compliance inspections, sampling, and reports. Integrating annual fees into the process spreads the cost of the permit over the 5-year permit cycle, and this should help the permittee manage costs. It avoids penalizing facilities that may suspend or terminate permit coverage during the cycle.
- Annual fees and permit reissuance fees, which occur every five years, should be the same if practicable. Setting the annual fee to the same value as the permit reissuance fee means that permittees generally can count on a uniform fee every year when producing the annual budget.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Secondary Treatment Standard (STS) (92a.47)

The STS in Chapter 92a generally is not more stringent than federal requirements. Both 40 CFR 133 and Chapter 92a define the STS as treatment that will achieve a 30-day average discharge concentration of 25 mg/L $CBOD_5$ (Carbonaceous Biochemical Oxygen Demand, 5-day) and 30 mg/L TSS (Total Suspended Solids). So the basic requirements of the STS are no more stringent in Chapter 92a than federal requirements. However, not all of the exemptions and adjustments of the federal STS are provided for in Chapter 92a. Some exemptions and adjustments are retained indefinitely, but others are to be phased out as facilities are upgraded to expand their hydraulic capacity. This is consistent with the natural trend, whereas facilities are upgraded to more effective and modern designs when a facility expansion is required. The exemptions that are being phased out generally are no longer useful to the regulated community or the Department.

Concentrated aquatic animal production facilities (92a.50)

Concentrated aquatic animal production (CAAP) facilities are hatcheries or fish farms. Based on experience, the Department has determined that it is less effective to regulate CAAP discharge flows with strict, concentration-based limits for conventional pollutants ($CBOD_5$ and TSS), as is normally the case with most discharges. A Pollution Prevention-based approach is most effective in controlling the primary source of the pollutants in the discharge. The final form rulemaking requires that all CAAPs develop a Best Management Practice (BMP) plan with the primary goal of minimizing excess fish feed in the system. This has proven to be the best way to mitigate the environmental impact of these facilities, and has other benefits to the facility in terms of reductions in feed, maintenance, and treatment costs. BMP plans have become established as good practice within the CAAP industry in recent years.

CAAPs may use therapeutic drugs such as antibiotics and fungicides to control disease in the fish population. The final form rulemaking requires that CAAPs report the use of these drugs at established intervals, and places strong restrictions on the use of therapeutic drugs that may be carcinogenic. This is an extension of the Department's duty to evaluate and set appropriate effluent limits for any pollutant in effluent. The Department generally considers the use of these therapeutic drugs as safe and of low environmental concern, but tracking use rates will support investigation of any potential environmental impact of the drugs, or allegation of same.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

All states have a comparable NPDES regulation that regulates point source discharges and meets the requirements of the federal Clean Water Act. Pennsylvania's program additionally must meet the requirements of the Pennsylvania Clean Streams Law, but the federal and state requirements do not differ

appreciably in the major goals of and requirements for regulating point source discharges. The NPDES fee structure of other states was examined to assure that the fees are comparable, and that the new fee structure, with application and annual fees, is representative. This final form rulemaking would not put Pennsylvania at a competitive disadvantage, because it does not implement any new comprehensive requirements, and the fees are generally much less than what other states charge for the same service.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

Generally, no. Chapter 92a is part of a comprehensive approach to water resources management that comprises Chapters 91, 92a, 93, 94, 95, and 96. However, the final form rulemaking does not alter the relationship of Chapter 92a to the other chapters, nor does it impose any new requirements that would require changes to those chapters. Chapter 92a is the umbrella regulation under which NPDES requirements for other point sources (e.g. mining activities, oil and gas drilling activities, and construction stormwater) are implemented by Chapters 77, 87, 88, 89, 90, 102 and 105. However, the final form rulemaking does not impose any new requirements that would affect those chapters.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The only new requirements for permittees in these areas are those for CAAP (concentrated aquatic animal production; fish hatcheries) facilities. For CAAPs, a written BMP (Best Management Practice) plan is required to manage feed and nutrients to minimize excess feed that wastes resources and causes pollution without any benefit, and therapeutic drug use (e.g. fungicides, antibiotics) must be tracked and reported. However, the implementation of a BMP plan to manage feed costs and impacts is widely recognized as an appropriate industry practice. Other options that were considered, such as establishing strict mass and concentration-based requirements for discharges of pollutants from CAAPs, were rejected as unnecessary and potentially burdensome.

Facilities already are required to secure approval for any discharge of any therapeutic drug that may be detectable in the effluent, and Chapter 92a establishes a structure for doing so. The Department generally considers the use of these therapeutic drugs as safe and of low environmental concern, but tracking use rates will support investigation of any potential environmental impact of the drugs, or allegation of same.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

Application fees for discharges from small municipalities, farms, and businesses are much less than those for large discharges. Annual fees generally are waived for homeowners, farms, and small businesses.

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FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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Copy below is hereby approved as to form and legality.
Attorney General

By:
(Deputy Attorney General)

DATE OF APPROVAL

☐ Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-443

DATE OF ADOPTION July 13, 2010

BY John Hanger

TITLE JOHN HANGER
CHAIRPERSON

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form and legality
Executive or Independent Agencies

BY Andrew C. Clark

DATE OF APPROVAL

(Deputy General Counsel) JUL 14 2010
~~(Chief Counsel - Independent Agency)~~
~~(Strike inapplicable title)~~

☐ Check if applicable. No Attorney General Approval or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance

25 *Pa. Code,* Chapter 92a

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code Chapter 92a)

National Pollutant Discharge Elimination System (NPDES)
Permitting, Monitoring and Compliance

Order

The Environmental Quality Board (Board) by this order deletes and reserves 25 Pa. Code Chapter 92 (relating to National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance) and replaces it with a new Chapter, Chapter 92a of the same name. This final-form rulemaking describes the process the Department of Environmental Protection (the Department) will follow in issuing National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of wastewater and stormwater in order to conform to the requirements of the Federal Clean Water Act and the Pennsylvania Clean Streams Law. This final-form rulemaking represents an extensive reorganization of existing Chapter 92 such that it follows the organization of the corresponding Federal regulations set forth in 40 CFR Part 122. The final-form rulemaking also sets forth a new NPDES fee structure designed to cover the Commonwealth's share of administering the NPDES program. In addition, several new provisions incorporating recent requirements established under the Federal program have been added, and treatment requirements based on the secondary treatment standard for discharges of treated sewage have been established.

The Order was adopted by the Board at its meeting of July 13, 2010.

A. Effective Date

These final rules will go into effect upon publication in the *Pennsylvania Bulletin* as final.

B. Contact Persons

For further information contact Ronald Furlan, Environmental Program Manager, Division of Planning and Permits, P.O. Box 8774, Rachel Carson State Office Building, Harrisburg, PA 17105-8774 (717-787-8184) or William S. Cumings, Jr., Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464 (e-mail: wcumings@state.pa.us). Persons with a disability may use the Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department's web site at www.depweb.state.pa.us.

C. Statutory Authority

This final-form rulemaking is adopted under the authority of Sections 5(b)(1) and 402 of the Clean Streams Law (35 P.S. §§ 691.5(b)(1) and 691.402) which provide for the adoption of regulations necessary for the implementation of the Clean Streams Law and Section 1920-A of the Administrative Code of 1929 (71 P.S. §510-20) which authorizes the Board to promulgate rules and regulations necessary for the proper performance of the work of the Department.

D. Background and Purpose

Existing Chapter 92 sets forth requirements relating to the issuance of National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of treated wastewater and stormwater in accordance with the provisions of the Federal Clean Water Act. The existing regulations do not follow the organization of the comparable federal regulations set forth in 40 CFR Part 122. The primary purpose of this final-form rulemaking is to reorganize and replace existing Chapter 92 with a new Chapter 92a, which is organized in a manner more consistent with the organization of 40 CFR Part 122.

The final-form rulemaking includes provisions intended to update the Commonwealth's NPDES program to be consistent with changes at the federal level since Chapter 92 was amended in 1999. Treatment requirements based on the secondary treatment standard for discharges of treated sewage have been established, and a new NPDES permit fee structure is adopted.

The proposed rulemaking was adopted by the Environmental Quality Board (Board) at its November 17, 2009 meeting. The proposed rulemaking was published in the *Pennsylvania Bulletin* at 40 Pa. B. 847 (February 13, 2010). There was 30-day public comment period, which concluded on March 15, 2010. The Board received public comments on the proposed rulemaking from 42 commentators, including the Independent Regulatory Review Commission. The comments received on the proposed rulemaking are summarized in Section E of the Preamble and are more extensively addressed in a Comment and Response Document which is available from the Department.

The Board has considered all of the public comments received. The Department briefed the Agricultural Advisory Board at its April 21, 2010, meeting that the revisions did not affect the agricultural community. The WRAC was briefed on the proposed revisions at its April 14, 2010, meeting, and considered the revisions at its May 11, 2010, meeting. The WRAC approved the final-form rulemaking with several additional comments. Additional revisions were made to the final-form rulemaking in response to those comments. The WRAC has provided minutes of its meetings to document its consideration and approval of the final-form rulemaking.

E. Summary of Changes to Proposed Rulemaking

§ 92a.2 *Definitions*

The following definitions contained in the proposed rulemaking were deleted in the final-form rulemaking: "expanding facility or activity," immediate" and "permit-by-rule." The term "immediate" appears only once in the regulation (§ 92a.41(b)) and is explained in the context of that section.

The definition of "BMP – Best Management Practices" has been revised by deleting paragraphs (iii) and (iv) of the proposed definition which included measures designed to reduce erosion and runoff of soil and BMP measures developed under Title 25 to reduce pollutant loading to surface waters and replacing them with a new paragraph (iii) which provides that the term BMP "includes activities, facilities, measures, planning or procedures used to minimize accelerated erosion and sedimentation and manage stormwater to protect, maintain, reclaim, and restore the quality of waters and the existing and designated uses of waters within this Commonwealth before, during, and after earth disturbance activities." The new definition of BMP therefore focuses on practices relating to management of point sources of pollution.

The definition of "Minor amendment" was revised to provide that it includes an amendment to an NPDES permit to "allow for a change in ownership or operational control of a facility."

The definition of "Municipal separate storm sewer system" was transferred intact to the definition of "MS4 – Municipal Separate Storm Sewer System."

The definition of "Small municipal separate storm sewer system" was revised by deleting a cross reference to two paragraphs of the Federal definition of the same term.

The definition of "Stormwater discharge associated with construction activity" was revised consistent with a recent revision to this definition in Chapter 102, *Erosion and Sediment Control.* This revised definition eliminates any distinction between earth disturbances between 1 and 5 acres, and earth disturbances over 5 acres. Essentially, any potential discharge associated with an earth disturbance of 1 acre or more will meet the definition of a "Stormwater discharge associated with construction activity."

The definition of "Stormwater discharge associated with industrial activity" was revised by specifying the subparagraphs of the Federal definition at 40 CFR 122.26(b)(14) which are applicable. Subparagraph (x) of the federal definition which relates to construction activities was not incorporated into the definition.

The proposed definition of "TMDL – Total Maximum Daily Load" was replaced with a cross-reference to the definition of the same term in Chapter 96 (relating to water quality standards implementation).

§ 92a.3. *Incorporation of Federal regulations by reference.*

The existing regulation relating to incorporation of Federal regulations by reference, § 92.2 provides that appendices, future amendments and supplements thereto are incorporated by reference. That will remain the case. However, to ensure consistency with other regulations promulgated by the Board incorporating federal requirements, many of which do not specifically provide for the incorporation of future amendments to the federal regulations, the references to future amendments are being deleted in subsections (a) and (c) of the final-form rulemaking. The Board emphasizes that this does not mean future amendments to the listed regulations are not incorporated by reference – they are.

In addition, the language in subsections (a) and (c) relating to the applicability of a state or federal requirement in the event of a conflict between those requirements was slightly revised to make it clear that it would apply to one or more conflicts, not just more than one. The federal regulations at 40 CFR 132, relating to water quality guidance for the Great Lakes System, have been incorporated by reference in a new subsection (b)(7).

§ 92a.12. Treatment requirements.

Subsection (d) provides that a permittee of an affected facility, upon notice from the Department, is to take certain steps when there are new or changed water quality standards. These include steps necessary to plan, obtain a permit or other approval and construct facilities necessary to comply with the new water quality standards or treatment requirements. The proposed rulemaking has been amended in this final-form rulemaking by adding language requiring a permittee to undertake any other actions which may be necessary to comply with such requirements. The Board therefore clarifies that actions other than constructing new facilities may be appropriate.

Subsection (e) provides that a permittee is to submit either a report establishing that it is capable of meeting the new water quality standards or treatment requirements or a schedule of steps to comply with the new standards or requirements. Language has been added providing that the permittee is to provide information regarding "other actions that are necessary" to comply with the new standards or requirements where applicable.

§ 92a.21 Application for a permit.

Subsection (a) of the proposed rulemaking provided that specified subsections of 40 CFR 122.21 relating to applications for a permit are to be incorporated by reference, "except as required by the Department." The quoted phrase has been deleted from the final-form rulemaking because it was susceptible to misinterpretation, as indicated in the comments received regarding the proposed rulemaking.

Subsection (b) requires that persons desiring to discharge pollutants file applications for an individual permit. Under the proposed rule, persons proposing to discharge from a SRSTP or through the application of pesticides would have been covered by a permit-by-

rule and accordingly, would not have been required to file an application. As noted below, the authorization for the permits-by-rule have been deleted. Accordingly, the references to the permits-by-rule have been deleted from the final-form rulemaking.

§ 92a.23. NOI for coverage under an NPDES general permit.

Under the existing regulation, all dischargers who wish to be covered under a general permit are required to submit a Notice of Intent (NOI) to be covered under the general permit. This is so regardless of whether the coverage granted is based on an initial NOI or an NOI for a reissued general permit. Subsection (c) of the final-form rulemaking provides that a discharge may also be authorized under a general permit without the submission of an NOI for coverage or with a requirement that an NOI be submitted for initial coverage, but not for reissuance of coverage. This is intended to address those situations which may have been covered under a permit-by-rule. This change is consistent with the 40 CFR 122.28(b)(2)(v) which provides that states and EPA are authorized to allow persons to discharge under a general permit without submitting an NOI where the permitting authority finds that an NOI requirement would be inappropriate and provided that the discharge is not from a POTW, CSO, MS4, primary industrial facility or a stormwater discharge associated with a construction activity.

Under the existing regulation, the NOI must, among other things, demonstrate that the discharge from the point source, individually or cumulatively, will not result in a violation of an applicable water quality standard established under Chapter 93. The phrase in subsection (a) stating "result in" a violation has been replaced with "cause or contribute to" a violation to ensure consistency with comparable federal language.

Subsection (c) outlines the factors which the Department will consider in determining whether a NOI must be submitted for coverage under a general permit. The factors include the type of discharge, the potential for toxic and conventional pollutant in the discharge and the estimated number of discharges to be covered. Another factor, the cumulative impact of the discharges has been added in this final-form rulemaking.

Proposed §§ 92a.24 and 92a.25 relating to permits-by-rule for SRSTPs and application of pesticides.

The proposed rulemaking would have established criteria and requirements for coverage of discharges from single residence sewage treatment plants (SRSTPs) and the application of pesticides under a permit-by-rule. The proposed provisions relating to the permits-by-rule have been deleted in the final-form rulemaking. Because of the deletions, the remaining sections of Subchapter B have been renumbered.

§92a.24. New or increased discharges, or change of waste streams.

Subsection (a) of the proposed rulemaking, § 92.26(a), would have authorized certain activities which result in increases in the discharge of certain permitted pollutants which do not have the potential to exceed effluent limitations without prior approval of the

Department. Any change in the pollution profile of the effluent that may exceed effluent limitations or require new effluent limitations would have required prior approval of the Department.

This subsection was amended to delete the authorization for increases in the discharge of pollutants without prior notification to the Department. This authorization was deleted because it appeared to limit normal and usual variation in wastestreams, and normal increases in the pollutant load already provided for in the permit. The notification requirement has been amended to state that in addition to facility expansions or process modifications stated in the proposed rulemaking, production increases and any change in wastestream that may result in an increase of pollutants that may have the potential to exceed ELGs or violate effluent limitations or require new effluent limitations require prior approval from the Department. Such approval must be approved in writing before the permittee may commence the new or increased discharge or change in wastestream. The Board therefore clarifies that only changes that may exceed permit conditions or previous representations on permit applications need the prior approval of the Department.

Subsection (b), which relates to stormwater discharges associated with construction activity has been clarified to make it clear that the Department will determine if a permittee will be required to submit a permit application for any new or expanded disturbance area not identified in the permit before the permittee may initiate construction activity in the new or expanded disturbed area.

§ 92a.26. Application Fees

Section 92a.28 of the proposed rulemaking set forth proposed permit application fees. The fees remain unchanged in this final-form rulemaking. An editorial change has been made to subsection (a) specifying that all fees collected are to be deposited into the Clean Water Fund account. Minor editorial changes have also been made that move the provision for the fee for mining activities from subsection (d) to subsection (c). Since a discharge from a mining activity is an industrial waste discharge, it most properly belongs in subsection (c) and is subject to applicable industrial waste requirements.

Subsection (g) sets a maximum fee of $2,500 for a Notice of Intent (NOI) for coverage under a general permit. This subsection has been amended to include a provison that the maximum will not be applicable to the fees established in Chapter 102, which relates to erosion and sediment control.

A new subsection (i) has been added providing that any Federal or State agency which provides funding to the Department for implementation of the NPDES program may be exempt from the requirement to pay permit application fees. This would only apply where the Federal or State agency provides significant funding or staff to assist the Department in the administration of the NPDES program.

§ 92a.27. Sewage discharges.

Section 92a.29(a) of the proposed rulemaking outlined additional application requirements applicable to new and existing sewage dischargers. It also contained an exception from these requirements " . . . where aquatic communities are essentially excluded as documented by water quality data confirming the absence of the communities and confirming the lack of a trend of water quality improvement in the waterbody, and provided that the Department has determined that the primary cause of the exclusion is unrelated to any permitted discharge." The quoted language has been deleted from the final-form rulemaking.

§ 92a.32 Stormwater discharges.

This section outlines application requirements for different types of stormwater discharges. A new subsection (e) has been added to address application requirements for stormwater discharges associated with industrial activity.

§ 92a.34. Cooling water intake structures.

Section 92a.36 of the proposed rulemaking provided that the requirements applicable to cooling water intake structures for new facilities under section 316(b) of the Federal Act set forth in 40 CFR 125.80 – 89 would be incorporated by reference. Subsection (c) of the proposed rulemaking further provided that "[t]he Department will determine if a facility with a cooling water intake structure reflects the BTA for minimizing adverse environmental impacts based on a site specific evaluation." Subsection (c) has been deleted in the final-form rulemaking.

§ 92a.36. Department action on NPDES permit applications.

Subsection (b) of the proposed rulemaking provided for Department consideration of Local and County Comprehensive Plans and zoning ordinances in the review of permit applications. No new specific requirement would have been applicable to applicants, as this is the current policy of the Department. This subsection has been deleted in the final-form rulemaking, and the requirement will continue to be implemented through policy.

§ 92a.41. Conditions applicable to all permits.

This section generally incorporates all permit conditions applicable to NPDES permits as set forth in 40 CFR 122.41(a)-(m). Subsection (b) of the proposed rulemaking provided that "[t]he immediate notification requirements of § 91.33 (relating to incidents causing or threatening pollution) supersede the reporting requirements of 40 CFR 122.41(l)(6)." The quoted language has been deleted and the subsection has been revised to provide that the permittee must provide oral notification to the Department "as soon as possible but no later than 4 hours after the permittee becomes aware of the incident causing or threatening pollution" and provide a written submission within 5 days of becoming aware of the incident.

Subsection (c) of the proposal would have provided that a "discharger may not discharge floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits." This subsection has been revised to account for the difference in the characteristics of the listed materials and their interactions with receiving waters. Subsection (c) now provides that "[t]he discharger may not discharge floating materials, scum, sheen or substances that result in deposits in the receiving water. Except as provided for in the permit, the discharger may not discharge foam, oil, grease, or substances that produce an observable change in color, taste, odor, or turbidity of the receiving water."

§ 92a.47. Sewage permit.

This section outlines requirements for sewage permits involving discharges of treated sewage. Sewage discharges must meet certain requirements, but some requirements apply only to POTW (Publicly Owned Treatment Works) facilities, and certain exemptions and adjustments are provided for in this section. The requirement relating to weekly average discharge limitations for BOD_5 (Biochemical Oxygen Demand) and TSS (Total Suspended Solids) in subsection (a)(2) has been revised to apply only to POTW facilities. The requirement for tertiary treatment in certain water quality-limited scenarios at the former subsection (b) has been eliminated in full, and the remainder of the section renumbered. Several new subsections have been added: (f) Providing that POTW facilities that have relaxed limits for BOD_5 and TSS may retain those limits until a new or amended water quality management permit authorizing an increase in the design flow of the facility is issued; (g) Providing that POTW facilities with CSOs (Combined Sewer Overflows) that cannot meet the removal efficiency requirements of subsection (a)(3) for BOD_5 and TSS during wet weather may be held to a less stringent standard; (h) Providing that POTW facilities with CSOs that cannot meet the removal efficiency requirements of subsection (a)(3) for BOD_5 and TSS during dry weather may be held to a less stringent standard as long as certain conditions apply; and (i) Providing that POTW facilities that cannot meet the removal efficiency requirements of subsection (a)(3) for BOD_5 and TSS in separate sewers due to less concentrated influent may be held to a less stringent standard as long as certain conditions apply. These new subsections largely mirror exemptions and adjustments provided for in 40 CFR 133.103.

92a.48. Industrial waste permit.

This section outlines requirements for industrial water permits, incorporating much of existing § 92.2d. Proposed subsection (a)(4) would have required that industrial discharges of conventional pollutants be assigned technology-based limits of no greater than 50 mg/L of $CBOD_5$ and 60 mg/L of TSS. This provision has been deleted in the final-form rulemaking.

§ 92a.50. CAAP.

Subsection (a) of the proposed rulemaking would have provided that the antidegradation requirements of § 93.4c would apply to discharges from a CAAP into a

surface water classified as a High Quality Water or an Exceptional Value Water. This could give the impression that the requirements of § 93.4c apply only to special protection waters when they actually apply to discharges to all surface waters. To avoid any confusion, the language in proposed subsection (a) has been deleted in the final-form rulemaking.

Subsection (d) of the proposed rulemaking, renumbered subsection (c) in the final-form rulemaking, would have authorized the limited use of products or chemicals that contain any carcinogenic ingredients which would otherwise be prohibited provided certain conditions are met. Among the conditions outlined in the proposed rulemaking was that the permittee "[d]emonstrate through sampling or calculation that any carcinogen in the proposed chemical will not be detectable in the final effluent, using the most sensitive analytic method available." The phrase "most sensitive analytic method available" has been revised to provide for the use of an "EPA-approved analytic method for wastewater analysis with the lowest published detection limit" to eliminate guesswork as to what constitutes an appropriate analytic method.

§ 92a.51. Schedules of compliance.

Subsection (a) of the proposed rulemaking would have provided, in part, that a schedule of compliance is to require compliance with final enforceable effluent limitations as soon as practicable, but in no case longer than 3 years, unless the Environmental Hearing Board (EHB) or a court of competent jurisdiction issues an order for a longer time of compliance. The 3-year limitation has been changed to 5 years in the final-form rulemaking. In addition, the reference to the EHB has been deleted. Schedules of compliance may only be extended by a court of competent jurisdiction, as under existing § 92.55.

Subsection (b) provides that where the period of time for compliance exceeds 1 year, a schedule would be set forth in the permit specifying interim requirements and the dates for their achievement. A sentence has been added to the final-form rulemaking providing that the time between interim requirements may not exceed 1 year.

§ 92a.54. General permits

Subsection (a)(7) of the proposed rulemaking (as well as the existing regulation at § 92.81(a)(7)) provides that a general NPDES permit may be issued if discharges from point sources, among other things, "[i]ndividually and cumulatively do not have the potential to cause significant adverse environmental impact." This subsection has been clarified in the final-form rulemaking to address violations of water quality standards also. Accordingly, a general permit may be issued where point source discharges "[i]ndividually and cumulatively do not have the potential to cause or contribute to a violation of an applicable water quality standard established under Chapter 93 . . . or cause significant adverse environmental impact."

Subsection (c) of the proposed rulemaking (as well as existing § 92.81(c)) outlined two ways a permittee would be authorized to discharge under the general permit – (1) following a waiting period specified in the general permit or (2) upon receipt of notification of approval for coverage under the general permit from the Department. The final-form rulemaking authorizes a third way of authorizing a discharge -- immediately upon submission of the NOI. The manner in which a discharge may be authorized will be specified in the general permit.

§ 92a.61. Monitoring.

The monitoring provisions outlined in the proposed rulemaking are retained except for some minor clarifications. Subsection (b) of the proposed rulemaking provides that the Department may impose reasonable monitoring requirements, including monitoring of the intake and discharge flow of a facility or activity. This subsection has been slightly revised to make it clear that the provision addresses surface water intake and discharge waters, and that monitoring would not be limited to monitoring of the flow parameter.

Subsection (d) of the proposed rulemaking provides, in relevant part, that a discharge authorized by an NPDES permit that is "not a minor discharge" shall be monitored by the permittee for certain named parameters. This section was revised to make it clear that the discharge authorized by the NPDES permit is that issued to a facility which is not a minor facility rather than for a minor discharge.

§ 92a.62. Annual fees.

The annual fees established in this section remain unchanged from those set forth in the proposed rulemaking. Subsection (a) has been revised to make it clear that these fees are to be paid to the Clean Water Fund and that the categories of fees are based on annual average design flows. In addition, subsection (b) has been revised to make it clear that the annual fees are for discharges of treated sewage, not domestic sewage as was inadvertently stated in the proposed rulemaking.

As with permit fees established under § 92a.26, any Federal or State agency which provides funding to the Department for the implementation of the NPDES program may be exempt from the payment of annual fees.

§ 92a.75. Reissuance of expiring permits.

Subsection (b) of the proposed rulemaking would have authorized the administrative extension of a permit for a minor facility for a maximum of 5 years provided certain conditions were met; namely the permittee is in compliance with applicable requirements and no changes in Department regulations have occurred since the permit was issued which would affect the effluent limitations. This subsection has been deleted in the final-form rulemaking because it was found to be confusing and subject to misinterpretation.

§ 92a.84. Public participation.

Subsection (c) of the proposed rulemaking (and existing § 92.83(a)(3)) outlined mechanisms for approvals for coverage under a general permit. The mechanisms were: notice will be published in the *Pennsylvania Bulletin* of each NOI under an applicable general NPDES permit and of each approval of coverage, or notice will be published in the *Pennsylvania Bulletin* of each approval of coverage only. The final-form rulemaking authorizes a third mechanism; a NOI would not be required for coverage under a general permit. This is consistent with the requirements of 40 CFR 122.28(b)(2)(v) which authorizes discharges under a general permit without submitting an NOI under specified conditions.

§ 92a.85. Notice to other government agencies.

Subsection (a) was added to incorporate by reference 40 CFR 124.59 (relating to conditions requested by the corps of engineers and other government agencies).

§ 92a.87. Notice of reissuance of permits

The proposed rulemaking would have established a public notice process for administrative extensions of permits. This portion of the proposed rulemaking has been deleted since the provisions relating to administrative extensions in proposed section 92a.75(b) were deleted in the final-form rulemaking.

F. Summary of Comments and Responses Regarding the Proposed Rulemaking

The Board approved the proposed rulemaking with a 30-day comment period on November 17, 2009. A notice of proposed rulemaking was published in the *Pennsylvania Bulletin* at 40 Pa. B. 847 (February 13, 2010). Public comments were accepted from February 13 until March 15, 2010. The Department received comments from 42 commentators during the public comment period.

Detailed responses to all comments received are contained in the Comment and Response document. The major changes to the proposed rulemaking in response to comments received are summarized here:

- **Definitions** – A number of definitions were revised as suggested by commentators. In addition, the definition of BMP (Best management Practice) was revised to better align the definition with the definition of BMP in other chapters.
- **Fees** – A provision was added that requires that all fees collected be deposited to the Clean Water Fund. In addition:
    - The fee for "mining activity" was relocated within the fee tables to the section covering discharges of industrial wastewater.
    - An exception to the $2,500 maximum fee for coverage under a general permit was added for any general permit provided for in Chapter 102 (*Erosion and Sediment Control*). Certain fees for general permits in

Chapter 102 will be based on the amount of disturbed area rather than any set fee.

  - A provision was added allowing for the waiver of permit fees for any federal or state agency or commission that provides funding or staffing to the Department for implementation of the NPDES program.

- **Treatment requirements** – Certain treatment requirements that had been proposed were deleted from the final-form rulemaking. Specifically, the requirement for tertiary treatment as a minimum treatment requirement for discharges of treated sewage in certain water quality-limited situations was deleted. Minimum treatment requirements for conventional pollutants in industrial waste discharges were deleted. The incorporation of the secondary treatment standard for discharges of treated sewage was retained, but certain adjustments and exemptions from the requirements of the secondary treatment standard that are provided for in Federal regulations were reinstated in part.
- **Permit-by-Rule** – Provisions designed to provide for permit-by-rule coverage for application of pesticides, and also for certain small discharges of treated sewage, were deleted. These discharges will instead be covered under general permits.
- **New or increased discharges, or change of wastestream** – This section is designed to assure that permittees inform the Department of important changes to their facility or wastestream, and if necessary file for an amended or reissued permit. This section was revised to make it clear that only changes that could violate permit conditions, or that exceed previous representations on permit applications, need be reported.
- **Department action on permit applications** – A subsection that provided that the Department will consider local and county plans and zoning when making permitting decisions was deleted. The Department will still consider plans and ordinances under the existing guidance (DEP-ID: 012-022-001, *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure the Coordination*).
- **Conditions applicable to all permits** – A provision designed to control certain conditions (floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits) has been revised to make it clear that many of these conditions are acceptable to the extent that they are provided for in the permit. Even if not provided for in the permit, they are all acceptable to the extent that they do not result in an observable effect on the condition of the receiving water. In addition, certain oral and written reporting requirements relating to incidents causing or threatening pollution were clarified based on comments received.
- **Administrative extensions of permits** – New proposed language that applied to administrative extensions of permits was deleted, such that there will be no new provisions related to administrative extensions. Some commentators felt the new provision was confusing and subject to misinterpretation, and the Department agreed.

Comments were received that did not result in any revisions to the regulation are summarized:

- **Fees** – Many commentators noted that the proposed permit fee structure is excessive, unjustified, or otherwise poorly conceived. While the concern of the regulated community is understandable, these fees are required as part of a fundamental shift to a self-sustaining program. They are reasonable and compare favorably with fees assessed by neighboring and other states.
- **Sanitary sewer overflows (SSOs)** – Some commentators argued that these conditions, involving the overflow of raw, untreated or partially treated sewage into rivers and streams should be allowable under some conditions. However, an SSO is an inherently unacceptable condition and an immediate threat to public health.
- **Fecal coliform limits** – Some commentators argued against a maximum level of fecal coliforms in effluent. However, as a measure of effective disinfection of treated sewage, fecal coliforms must be controlled on an ongoing basis.
- **Confidentiality of information** – Some commentators suggested revisions to these provisions based on certain interpretations of applicable Federal or Commonwealth requirements. The existing provisions were determined to achieve a proper balance of the competing Federal and Commonwealth requirements.
- **Pollution prevention** – Two commentators took issue with the Pollution Prevention (P2) provisions in the rulemaking, but these provisions represent established Department policy. The Department is committed to integrate P2 into its everyday practices, and to encourage and assist permittees in implementing P2 practices wherever possible.
- **Applicability of Chapter 92a and other chapters containing NPDES requirements** – Some commentators believe that the requirements of Chapter 92a do not or should not apply to their facilities or activities, which are point sources. Other commentators believe that requirements in other chapters that contain NPDES-based requirements do not have the full force of the NPDES regulation, Chapter 92a. The language in the regulation properly clarifies these issues, and that clarification is both timely and appropriate.
- **New potable water supply (PWS) intakes** – Comments were received to the effect that a new PWS should not automatically be accommodated by adjusting upstream permit limits where necessary, but that any such adjustments should be limited to certain pollutants, or be justifiable based on a cost-benefit analysis. However, PWS is a protected use of the Commonwealth's rivers and streams, and must be protected as required by statute and regulation.
- **Cooling water intake structures (CWIS)** – Comments were received to the effect that the Department should not presume to require BTA (Best Technology Available) for CWIS before Federal regulations related to CWIS are promulgated. The Department acknowledges the uncertainty, but it may not ignore its ongoing obligation to make BTA determinations.
- **Variances** – Several commentators suggested that the Board should automatically incorporate by reference any new variances provided for in Federal regulation. The Department has always taken the position that any new Federal variances must be reviewed for appropriateness in this Commonwealth, and for compliance with the provisions of the Clean Streams Law.

- **Public notice** – Two commentators felt that public notice at the site of a new or reissued permit is inappropriate, and suggested a posting at the Department's offices, but posting at the site of the discharge is a fundamental component of public notice. Several commentators objected to the deletion of the requirement that the location of the first downstream PWS be included in public notice, but this provision has been deleted as per Homeland Security requirements. The Department will still include this information in a public notice to the extent that it is allowable, but it is not appropriate to retain it as a regulatory requirement.
- **Procedure for civil penalty assessments** – Two commentators proposed a major reworking of the procedure for civil penalty assessments, specifically in relation to the process of a penalty assessment hearing that would apply. Hearings related to civil penalty assessments are based on a well established, Department-wide process and the commentators did not advance a compelling rationale as to why it should be changed.

G. Benefits, Costs and Compliance

Benefits

Chapter 92a will help protect the environment, ensure the public's health and safety, and promote the long-term sustainability of the Commonwealth's natural resources by ensuring that the water quality of our rivers and streams is protected and enhanced. Chapter 92a implements the requirements of the Federal Clean Water Act and the Pennsylvania Clean Streams Law for point source discharges of treated wastewater to the rivers and streams of this Commonwealth.

The revision primarily is designed to improve the effectiveness and efficiency of the NPDES permits program. The major problem with the existing Chapter 92 is that it often uses different language than the companion Federal regulation 40 CFR Part 122 to describe requirements, and it is not often clear if Chapter 92 requirements are more stringent than Federal requirements. The primary goal of the proposed rulemaking was to rebuild the regulation, starting with the Federal program requirements, incorporating additional or more stringent requirements only where there was clearly a basis for them. Where feasible, Chapter 92a reverts to Federal terminology and definitions to minimize possible distortions or ambiguity. The Department expects that the reorganization of the NPDES regulation will have a substantive positive effect on Pennsylvania's NPDES program. Permittees and other members of the regulated community will find it easier to determine if Pennsylvania has additional requirements compared to Federal requirements. A supplemental benefit is that turnover in permit engineers and writers should be less disruptive, since new staff should find it easier to understand the streamlined regulatory requirements.

The final-form rulemaking also includes new provisions designed to keep the program current with recent changes at the Federal level. Some of these provisions are needed to ensure continued Federal approval of Pennsylvania's NPDES program by the U.S. Environmental Protection Agency (EPA).

Compliance Costs

No new requirements are proposed in this final-form rulemaking that would require general increases in personnel complement, skills, or certification. The new permit fees are the only broad-based new requirement that would increase costs for permittees, but the fees have been structured to assure that smaller facilities, that are more financially constrained and also have a lower potential environmental impact, are assessed the lowest fees. The new permit fees are relatively small on both a per gallon basis and a per customer basis, especially for larger facilities. The cost of securing and maintaining an NPDES permit to discharge treated wastewater to surface waters is small compared to the cost of operating these facilities. Moreover, these NPDES fees are very competitive with what is charged by other states. As an example, for a 1 million gallon per day (MGD) sewage treatment plant, the annual fee will be $1,250 per year ($3.42 per day) in Pennsylvania. The annual fee for the same facility is $5,250 in Ohio, $7,500 in New York, $15,000 in Illinois, between $3,000 and $5,500 in Michigan, and between $3,850 and $4,350 in Virginia.

The rule addresses wastewater treatment facilities, including industrial wastewater treatment facilities, publicly-owned treatment works (POTWs), and other facilities that treat sanitary wastewater. The treatment requirements of the NPDES regulation affect operational costs to some extent, but the final-form rulemaking does not include any new broad-based treatment requirements that would apply to most facilities. For most facilities, the compliance cost of the rule is limited to the revised application and annual fees. Current annual income from NPDES application fees is estimated at $750,000, with no annual fees, versus a cost of running the program estimated at $5 million. The new fee structure is designed to return annual income of approximately $5 million, such that the total additional cost to the regulated community will be approximately $4.25 million per year.

Compliance Assistance Plan

In cases where the receiving water is water quality-limited (impaired), wastewater treatment facilities may be required to upgrade their treatment capabilities. This would involve a significant compliance cost burden related to engineering, construction and operating costs for upgrading the wastewater treatment facility. The Department's Technical and Financial Assistance Program in conjunction with the Pennsylvania Infrastructure Investment Authority (PENNVEST) offers financial assistance to eligible public water systems. This assistance is in the form of a low-interest loan, with some augmenting grant funds for hardship cases. Eligibility is based upon factors such as public health impact, compliance necessity and project/operational affordability. Other potential sources of financial assistance for wastewater treatment facility upgrades are:

- The Water Supply and Wastewater Infrastructure Program (PennWorks), administered by the Pennsylvania Department of Community Development
- The Community Development and Block Grant Program, administered by the Department Pennsylvania Department of Community Development

- The Growing Greener New or Innovative Water/Wastewater Technology Grant program, administered by the Department

Paperwork Requirements
Most public or commercial permittees will be required to submit annual fees to the Department.

No new forms, reports, or other paperwork are required under this final-form rulemaking, except for certain new requirements for concentrated aquatic animal production (CAAP) facilities. CAAPs are fish hatcheries or fish farms. Under this rule, CAAPs would be required to have a written BMP (Best Management Practice) plan to manage feed and nutrients to minimize excess feed that wastes resources and causes pollution without any benefit. Also, therapeutic drug use (e.g. fungicides, antibiotics) must be tracked and reported. The implementation of a BMP plan to manage feed costs and impacts is widely recognized as an appropriate industry practice, and well run facilities already have them in place. Other options that were considered, such as establishing strict mass and concentration-based requirements for discharges of pollutants from CAAPs, were rejected as unnecessary and potentially burdensome. Facilities already are required to secure approval for any discharge of any therapeutic drug that may be detectable in the effluent. The Department generally considers the use of these therapeutic drugs as safe and of low environmental concern, but tracking use rates will support investigation of any potential environmental impact of the drugs, or allegation of same.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that achieve or move beyond compliance.

This regulation commits the Department to encouraging pollution prevention by providing assistance to the permittee and users of the permittee's facilities in the consideration of pollution prevention measures such as process changes, materials substitution, reduction in volume of water use, in-process recycling and reuse of water and general measures of "good housekeeping" within the plant of facility. Lower permit fees are assessed on facilities with lower average annual design flows, which effectively motivates dischargers to pursue point source discharge reductions by reducing the volume of wastewater that requires treatment. Section 92a.10 of the regulation incorporates the established hierarchy for Pollution Prevention, in descending order of

preference for environmental management of wastewater: (1) Process change, (2) Materials substitution, (3) Reuse, (4) Recycling, (5) Treatment, (6) Disposal.

I. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745(a)) on January 27, 2010, the Department submitted a copy of the proposed rulemaking, published at 40 Pa.B. 847 (February 13, 2010), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under Section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the official public comment period. In preparing this final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on _____, 2010 this final-form rulemaking were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2010 and approved the final-form rulemaking.

K. Findings of the Board

The Board finds that:

1. Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240)(45 P.S. §§1201 and 1202) and regulations promulgated thereunder at 1 *Pennsylvania Code* §§ 7.1 and 7.2.

2. A public comment period was provided as required by law, and all comments were considered.

3. These regulations do not enlarge the purpose of the proposal published at 40 *Pennsylvania Bulletin* 847 (February 13, 2010)

4. These regulations are necessary and appropriate for the administration and enforcement of the authorizing acts identified in Section C of this Order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code* Chapter 92a, are adopted to read as set forth in Annex A.

(b) Existing regulations at 25 *Pennsylvania Code* Chapter 92 are deleted and the sections reserved as set forth in Annex A.

(c) The Chairperson of the Board shall submit this Order and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form, as required by law.

(d) The Chairperson of the Board shall submit this Order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(e) The Chairperson of the Board shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(f) This Order shall take effect immediately.

By:

John Hanger
Chairman
Environmental Quality Board

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 92. (RESERVED)

(*Editor's Note*: As part of this proposed rulemaking, the EQB is proposing to rescind Chapter 92 which appears in 25 Pa. Code pages 92-1—92-54, serial pages (271955), (271956), (315447)—(315454), (324877), (324878), (315457)—(315462), (324879)—(324882), (271977), (271978), (336593), (336594), (271981)—(271984), (313603), (313606), (271989)—(271992), (313607), (313608), (343929)—(343932) and (271999)—(272008).)

Sec.

CHAPTER 92a. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING, MONITORING AND COMPLIANCE

Subchap.
Sec.

Subchapter A. DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

Sec.

§ 92a.1. Purpose and scope.

(a) *Purpose.* The regulatory provisions contained in this chapter implement the NPDES Program by the Department under the Federal Act.

(b) *Scope.* A person may not discharge pollutants from a point source into surface waters except as authorized under an NPDES permit.

§ 92a.2. Definitions.

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

AEU—Animal Equivalent Unit—One thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit, as defined in 3 Pa.C.S. § 503 (relating to definitions).

Administrator—The Administrator of the EPA or an authorized representative.

Agricultural operation—The management and use of farming resources for the production of crops, livestock or poultry as defined in 3 Pa.C.S. § 503.

Agricultural process wastewater—Wastewater from agricultural operations, including from spillage or overflow from livestock or poultry watering systems; washing, cleaning or flushing pens, milkhouses, barns, manure pits; direct contact swimming, washing or spray cooling of livestock or poultry; egg washing; or dust control.

Applicable effluent limitations or standards—State, interstate and Federal effluent limitations or standards to which a discharge is subject under the State and Federal Acts, including, but not limited to, water quality-based and technology-based effluent limitations, standards of performance, toxic effluent standards and prohibitions, BMPs and pretreatment standards.

Applicable water quality standards—Water quality standards to which a discharge is subject under the State and Federal Acts, and regulations promulgated thereunder.

Application—The Department's form for applying for approval to discharge pollutants to surface waters of this Commonwealth under a new NPDES permit, or reissuance of an existing NPDES permit, or the modification or transfer of an existing NPDES permit.

Aquaculture project—A defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants and animals.

Authority—A body politic and corporate created under 53 Pa.C.S. Chapter 56 (relating to municipal authorities act).

BAT—Best Available Technology Economically Achievable—

(i) The maximum degree of effluent reduction attainable through the application of the best treatment technology economically achievable within an industrial category or subcategory, or other category of discharger.

(ii) The term includes categorical ELGs promulgated by the EPA under section 304(b) of the Federal Act (33 U.S.C.A § 1314(b)).

BOD_5—Biochemical oxygen demand, 5-day—The 5-day measure of the pollutant parameter biochemical oxygen demand.

BMP—Best Management Practices—

(i) Schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce pollutant loading to surface waters of this Commonwealth.

(ii) The term includes treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

[~~(iii) The term includes riparian buffers, soil and slope stabilization measures, control of fertilization practices, and other actions and measures designed to reduce erosion and runoff of soil, sediment and pollutants from the land surface during precipitation events; or to reduce the contamination of groundwater with pollutants that may affect surface waters.~~]THE TERM INCLUDES ACTIVITIES, FACILITIES, MEASURES, PLANNING OR PROCEDURES USED TO MINIMIZE ACCELERATED EROSION AND SEDIMENTATION AND MANAGE STORMWATER TO PROTECT, MAINTAIN, RECLAIM, AND RESTORE THE QUALITY OF WATERS AND THE EXISTING AND DESIGNATED USES OF WATERS WITHIN THIS COMMONWEALTH BEFORE, DURING, AND AFTER EARTH DISTURBANCE ACTIVITIES.

[~~(iv) The term includes BMP measures developed under this title to reduce pollutant loading to surface waters.~~]

BTA—Best Technology Available—The combination of technologies and operational practices that achieves the most effective degree of impingement mortality and entrainment reduction applicable to the facility.

CAAP—Concentrated Aquatic Animal Production Facility—A hatchery, fish farm or other facility which meets the criteria in 40 CFR 122.24 (relating to concentrated aquatic animal production facilities (applicable to State NPDES programs, see 123.25)).

CAFO—Concentrated Animal Feeding Operation—A CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under 40 CFR 122.23(b)(4) (relating to concentrated animal feeding operations (applicable to State NPDES programs, see 123.25)).

CAO—Concentrated Animal Operation—An agricultural operation that meets the criteria established by the State Conservation Commission **[~~in regulations~~]** under the authority of 3 Pa.C.S. Chapter 5 (relating to nutrient management and odor management) in Chapter 83, Subchapter D (relating to nutrient management).

$CBOD_5$—Carbonaceous biochemical oxygen demand, 5-day—The 5 day measure of the pollutant parameter carbonaceous biochemical oxygen demand.

CSO—Combined Sewer Overflow—Any intermittent overflow or other untreated discharge from a municipal combined sewer system (including domestic, industrial and commercial wastewater and stormwater) prior to reaching the headworks of the sewage treatment facility which results from a flow in excess of the dry weather carrying capacity of the system.

Combined sewer system—A sewer system that has been designed to serve as both a sanitary sewer and a storm sewer.

Conventional pollutant—Biochemical oxygen demand, carbonaceous biochemical oxygen demand, suspended solids, pH, fecal coliform, oil or grease.

DMR—Discharge Monitoring Report—The Department or EPA supplied forms for reporting of self-monitoring results by the permittee.

Daily discharge—The discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably and accurately represents the calendar day for purposes of sampling:

(i) For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day.

(ii) For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

Discharge—An addition of any pollutant to surface waters of this Commonwealth from a point source.

Disturbed area—As defined in Chapter 102 (relating to erosion and sediment control).

Draft permit—A document prepared by the Department indicating the Department's tentative decision to issue or deny, modify, revoke or reissue a permit.

ELG—Effluent Limitations Guideline—A regulation published by the Administrator under section 304(b) of the Federal Act, or by the Department, to revise or adopt effluent limitations.

Earth disturbance activity—As defined in Chapter 102.

Effluent limitation or standard—A restriction established by the Department or the Administrator on quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into surface waters, including BMPs and schedules of compliance.

Entrainment—The incorporation of all life stages of fish and shellfish with intake flow entering and passing through a cooling water intake structure and into a cooling water intake system.

Existing discharge—A discharge that is not a new discharge or a new source.

[~~*Expanding facility or activity*—Any expansion, modification, process change, or other change to an existing facility or activity which will result in an increased discharge of wastewater flow, or an increased loading of pollutants.~~]

Facility or activity—Any NPDES point source or any other facility or activity including land or appurtenances thereto that is subject to regulation under the NPDES Program.

Federal Act—The Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387) also known as the Clean Water Act or CWA.

GPD—Gallons per day.

[~~*Immediate*—As soon as possible, but not to exceed 4 hours.~~]

Impingement—The entrapment of all life stages of fish and shellfish on the outer part of the intake structure or against a screening device during periods of intake water withdrawal

Indirect discharger—A discharger of nondomestic wastewater introducing pollutants into a POTW or other treatment works.

Industrial waste—

(i) A liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from manufacturing or industry, or from an establishment, and mine drainage, refuse, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations.

(ii) The term includes all of these substances whether or not generally characterized as waste.

Instantaneous maximum effluent limitation—The highest allowable discharge of a concentration or mass of a substance at any one time as measured by a grab sample.

Intermittent stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing water, which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges.

Interstate agency—An agency of two or more states established by or under an agreement or compact, or any other agency of two or more states, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

Large municipal separate storm sewer system—A municipal separate storm sewer system as defined in 40 CFR 122.26(b)(4) (relating to stormwater discharges (applicable to State NPDES programs, see 123.25)).

Livestock—

(i) Animals raised, stabled, fed or maintained on an agricultural operation with the purpose of generating income or providing work, recreation or transportation. Examples include: dairy cows, beef cattle, goats, sheep, swine and horses.

(ii) The term does not include aquatic species.

MGD—Million gallons per day.

MS4—Municipal Separate Storm Sewer System—**[~~A municipal separate storm sewer system~~.] A SEPARATE STORM SEWER (INCLUDING ROADS WITH DRAINAGE**

SYSTEMS, MUNICIPAL STREETS, CATCH BASINS, CURBS, GUTTERS, DITCHES, MANMADE CHANNELS OR STORM DRAINS) WHICH IS ALL OF THE FOLLOWING:

(I) OWNED OR OPERATED BY A STATE, CITY, TOWN, BOROUGH, COUNTY, DISTRICT, ASSOCIATION OR OTHER PUBLIC BODY (CREATED BY OR UNDER STATE LAW) HAVING JURISDICTION OVER DISPOSAL OF SEWAGE, INDUSTRIAL WASTES, STORMWATER OR OTHER WASTES, INCLUDING SPECIAL DISTRICTS UNDER STATE LAW SUCH AS A SEWER DISTRICT, FLOOD CONTROL DISTRICT OR DRAINAGE DISTRICT, OR SIMILAR ENTITY, OR A DESIGNATED AND APPROVED MANAGEMENT AGENCY UNDER SECTION 208 OF THE FEDERAL ACT (33 U.S.C.A. § 1288) THAT DISCHARGES TO SURFACE WATERS OF THIS COMMONWEALTH.

(II) DESIGNED OR USED FOR COLLECTING OR CONVEYING STORMWATER.

(III) NOT A COMBINED SEWER.

(IV) NOT PART OF A POTW.

Major amendment—Any amendment to an NPDES permit that is not a minor amendment.

Major facility—A POTW with a design flow of 1.0 MGD or more and any other facility classified as such by the Department in conjunction with the Administrator.

Manure—

(i) Animal excrement, including poultry litter, which is produced at an agricultural operation.

(ii) The term includes materials such as bedding and raw materials which are commingled with that excrement.

Medium municipal separate storm sewer system—A municipal separate storm sewer system as defined in 40 CFR 122.26(b)(7).

Mining activity—A surface or underground mining activity as defined in Chapter 77 or Chapter 86 (relating to noncoal mining; and surface and underground coal mining: general).

Minor amendment—An amendment to an NPDES permit to correct a typographical error, increase monitoring requirements, change interim compliance dates by no more than 120 days, **ALLOW FOR A CHANGE IN OWNERSHIP OR OPERATIONAL CONTROL OF A FACILITY,** delete an outfall, change a construction schedule for a discharger that is a new source, or to incorporate an approved pretreatment program into an existing permit.

Minor facility—A facility not identified as a major facility.

Monthly average discharge limitation—The highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during the calendar month divided by the number of daily discharges measured during the month.

~~[*Municipal separate storm sewer system*—A separate storm sewer (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains) which is all of the following:~~

~~—(i) Owned or operated by a state, city, town, borough, county, district, association or other public body (created by or under State law) having jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or a designated and approved management agency under section 208 of the Federal Act (33 U.S.C.A. § 1288) that discharges to surface waters of this Commonwealth.~~

~~—(ii) Designed or used for collecting or conveying stormwater.~~

~~—(iii) Not a combined sewer.~~

~~—(iv) Not part of a POTW.]~~

Municipality—A city, town, borough, county, township, school district, institution, authority or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes.

NOI—Notice Of Intent—A complete form submitted for NPDES general permit coverage which contains information required by the terms of the permit and by § 92a.54 (relating to general permits). An NOI is not an application.

NPDES—National Pollutant Discharge Elimination System.

NPDES form—An issued NPDES permit, the application, NOI or any DMR reporting form.

NPDES general permit or *general permit*—An NPDES permit that is issued for a clearly described category of point source discharges, when those discharges are substantially similar in nature and do not have the potential to cause significant adverse environmental impact.

NPDES permit—An authorization, license, or equivalent control document issued by the Administrator or the Department to implement the requirements of 40 CFR Parts 122—124 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System; state program requirements; and procedures for decision making) and the Federal Act.

New discharger—A building, structure, facility, activity or installation from which there is or may be a discharge of pollutants that did not commence the discharge at a particular site prior to August 13, 1979, which is not a new source, and which has never received a final effective NPDES permit for discharges at that site.

New source—A building, structure, facility, activity or installation from which there is or may be a discharge of pollutants, the construction of which commenced after promulgation of standards of performance under section 306 of the Federal Act (33 U.S.C.A. § 1316) which are applicable to the source.

No exposure—Where industrial materials and activities are protected by a storm-resistant shelter to prevent exposure to stormwater. Industrial materials and activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

Nonconventional pollutant—A pollutant which is not a conventional or toxic pollutant.

Nonpoint source—A pollutant source that is not a point source.

POTWs—Publicly Owned Treatment Works—

(i) A treatment works which is owned by a state or municipality.

(ii) The term includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature.

(iii) The term also includes sewers, pipes or other conveyances if they convey wastewater to a POTW treatment plant.

(iv) The term also means the municipality as defined in section 502(4) of the Federal Act (33 U.S.C.A. § 1362(4)), which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

Perennial stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing waters and capable, in the absence of pollution or other manmade stream disturbances, of supporting a benthic macroinvertebrate community which is composed of two or more recognizable taxonomic groups of organisms which are large enough to be seen by the unaided eye and can be retained by a United States Standard No. 30 sieve (28 meshs per inch, 0.595 mm openings) and live at least part of their life cycles within or upon available substrates in a body of water or water transport system.

[~~*Permit-by-rule*—An NPDES permit which a person is deemed to have for the operation of an SRSTP or for the application of pesticides upon compliance with the requirements of § 92a.24 or § 92a.25 (relating to permit-by-rule for SRSTPs; and permit-by-rule for application of pesticides), as applicable.~~]

Person—Any individual, public or private corporation, partnership, association, municipality or political subdivision of this Commonwealth, institution, authority, firm, trust, estate, receiver, guardian, personal representative, successor, joint venture, joint stock company, fiduciary;

department, agency or instrumentality of State, Federal or local government, or an agent or employee thereof; or any other legal entity.

Point source—Any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, CAAP, CAFO, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged.

Pollutant—Any contaminant or other alteration of the physical, chemical, biological or radiological integrity of surface water that causes or has the potential to cause pollution as defined in section 1 of the State Act (35 P. S. § 691.1).

Pollution prevention—Source reduction and other practices that reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water or other resources, without having significant cross-media impacts.

Privately owned treatment works—Any device or system used to treat wastewater that is not a POTW.

Process wastewater—Water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct or waste product.

SRSTP—Single Residence Sewage Treatment Plant—A system of piping, tanks or other facilities serving a single family residence located on a single family residential lot, that solely collects, treats, and disposes of direct or indirect sewage discharges from the residence into surface waters of this Commonwealth.

SSO—Sanitary Sewer Overflow—An overflow of wastewater, or other untreated discharge from a separate sanitary sewer system (which is not a combined sewer system), which results from a flow in excess of the carrying capacity of the system or from some other cause prior to reaching the headworks of the sewage treatment facility.

Schedule of compliance—A schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with effluent limitations, prohibitions, other limitations or standards.

Separate storm sewer—A conveyance or system of conveyances (including pipes, conduits, ditches and channels) primarily used for collecting and conveying stormwater runoff.

Setback—A specified distance from the top of the bank of surface waters, or potential conduits to surface waters, where manure and agricultural process wastewater may not be land applied. Examples of conduits to surface waters include, but are not limited to:

(i) Open tile line intake structures.

(ii) Sinkholes.

(iii) Agricultural wellheads.

Sewage—Any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals.

Significant biological treatment—The use of an aerobic or anaerobic biological treatment process in a treatment works to consistently achieve a 30-day average of at least 65% removal of BOD_5.

Small flow treatment facility—A treatment works designed to adequately treat sewage flows of not greater than 2,000 gallons per day for final disposal using a stream discharge or other methods approved by the Department.

Small municipal separate storm sewer system—A municipal separate storm sewer system as defined in 40 CFR 122.26(b)(16)[~~—(18)~~].

State Act—The Clean Streams Law (35 P. S. §§ 691.1—691.1001).

Stormwater—Runoff from precipitation, snow melt runoff and surface runoff and drainage.

Stormwater discharge associated with construction activity—The discharge or potential discharge of stormwater from construction activities **INTO WATERS OF THIS COMMONWEALTH**, including clearing and grubbing, grading and excavation activities involving[~~:~~

~~(i) Equal to or greater than~~] **ONE** (1) acre [~~and less than 5 acres~~] (0.4 [~~to 2~~] hectares) **OR MORE** of earth disturbance **ACTIVITY** [~~with a point source discharge to surface waters of this Commonwealth~~], or an earth disturbance **ACTIVITY** on any portion, part or during any stage of, a larger common plan of development or sale that involves ~~equal to or greater than~~ **ONE** (1) ~~to less than 5 acres~~ **ACRE** (0.4 [~~to 2~~] hectares) **OR MORE** of earth disturbance **ACTIVITY** [~~with a point source discharge to surface waters of this Commonwealth~~] over the life of the project[

~~(ii) Five acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project.~~].

Stormwater discharge associated with industrial activity—The discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant, and as defined in 40 CFR 122.26(b)(14) **(I)-(IX) AND (XI)**.

Surface waters—Perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps and estuaries, excluding water at facilities approved for wastewater

treatment such as wastewater treatment impoundments, cooling water ponds and constructed wetlands used as part of a wastewater treatment process.

TMDL—Total Maximum Daily Load—[~~The sum of individual waste load allocations for point sources, load allocations for nonpoint sources and natural quality and a margin of safety expressed in terms of mass per time, toxicity or other appropriate measures~~] **AS DEFINED IN CHAPTER 96 (RELATING TO WATER QUALITY STANDARDS IMPLEMENTATION).**

TSS—Total Suspended Solids—The pollutant parameter total suspended solids.

Toxic pollutant—Those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, may, on the basis of information available to the Administrator or the Department, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformations in these organisms or their offspring.

Treatment works—Any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement the State and Federal Acts, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from the treatment.

Vegetated buffer—A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing water runoff, enhancing water infiltration and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

WETT—Whole Effluent Toxicity Testing—

(i) A test, survey, study, protocol or assessment which includes the use of aquatic, bacterial, invertebrate or vertebrate species to measure acute or chronic toxicity, and any biological or chemical measure of bioaccumulation, bioconcentration or impact on established aquatic and biological communities.

(ii) The term includes any established, scientifically defensible method that is sufficiently sensitive to measure toxic effects.

WQBEL—Water Quality-based Effluent Limitation—An effluent limitation based on the need to attain or maintain the water quality criteria and to assure protection of designated and existing uses.

Water quality standards—The combination of water uses to be protected and the water quality criteria necessary to protect those uses.

Weekly average discharge limitation—The highest allowable average of daily discharges over a calendar week, calculated as the sum of all daily discharges measured during the calendar week divided by the number of daily discharges during that week.

Wetlands—Areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.

Whole effluent toxicity—The aggregate toxic effect of an effluent measured directly with a WETT.

§ 92a.3. Incorporation of Federal regulations by reference.

(a) The Federal NPDES regulations listed in subsection (b)[~~, including all appendices, future amendments and supplements thereto,~~] are incorporated by reference to the extent that these provisions are applicable and not contrary to the law of the Commonwealth. In the event of a conflict between **A** Federal [~~and~~] regulatory provision[**s**] **AND A REGULATION** of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent.

(b) The following Federal regulatory provisions in 40 CFR Parts 122, 124**, 125, and 132**[~~and 125 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System; procedures for decision making; and criteria and standards for the National Pollutant Discharge Elimination system)~~] are incorporated by reference:

(1) 122.2 (relating to definitions) unless the definitions in § 92a.2 (relating to definitions) are different.

(2) 123.25(c) (relating to requirements for permitting).

(3) 124.57(a) (relating to public notice).

(4) 125.1—125.3 (relating to criteria and standards for imposing technology-based treatment requirements under sections 301(b) and 402 of the act).

(5) 125.30—125.32 (relating to criteria and standards for determining fundamentally different factors under sections 301(b)(1)(A), 301(b)(2)(A) and (E) of the act).

(6) 125.70—125.73 (relating to criteria for determining alternative effluent limitations under section 316(a) of the act).

(7) 132 (RELATING TO WATER QUALITY GUIDANCE FOR THE GREAT LAKES SYSTEM).

(c) The Federal NPDES regulations listed in §§ 92a.4—92a.6, 92a.8, 92a.21, 92a.22, 92a.**[32]30**—92a.**[37]35**, 92a.41—92a.45, 92a.55, 92a.61, 92a.71—92a.74**, 92a.85** and 92a.92**[~~, including all appendices, future amendments and supplements thereto,~~]** are incorporated by reference to the extent that these provisions are applicable and not contrary to the law of the Commonwealth. In the event of a conflict between **A** Federal **[~~and~~]** regulatory provision**[s] AND A REGULATION** of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent.

§ 92a.4. Exclusions.

The provisions of 40 CFR 122.3(a)—(g) (relating to exclusions) are incorporated by reference.

§ 92a.5. Prohibitions.

(a) The provisions of 40 CFR 122.4 (relating to prohibitions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

(b) A permit may not be issued, modified or reissued for a sanitary sewer overflow.

§ 92a.6. Effect of a permit.

The provisions of 40 CFR 122.5 (relating to effect of a permit) are incorporated by reference.

§ 92a.7. Duration of permits and continuation of expiring permits.

(a) NPDES permits must have a fixed term not to exceed 5 years.

(b) The terms and conditions of an expiring permit are automatically continued when the following conditions are met:

(1) The permittee has submitted a timely application for reissuance of an existing permit in accordance with § 92a.75 (relating to reissuance of expiring permits).

(2) The Department is unable, through no fault of the permittee, to reissue or deny a permit before the expiration date of the previous permit.

(c) Permits continued under subsection (b) remain effective and enforceable against the discharger until the Department takes final action on the pending permit application.

§ 92a.8. **[~~Confidentially~~] CONFIDENTIALITY** of information.

(a) The provisions of 40 CFR 122.7 (b) (relating to **[~~confidentially~~]** **CONFIDENTIALITY** of information) are incorporated by reference.

(b) The Department may protect any information, other than effluent data, contained in NPDES forms, or other records, reports or plans pertaining to the NPDES permit program as confidential upon a showing by any person that the information is not a public record for the purposes of section 607 of the State Act (35 P. S. § 691.607). Documents that may be protected as confidential and are not public records are those that if made public would divulge an analysis of chemical and physical properties of coal (excepting information regarding the mineral or elemental content that is potentially toxic in the environment), and those that are confidential commercial information or methods or processes entitled to protection as trade secrets under State or Federal law. If, however, the information being considered for confidential treatment is contained in an NPDES form, the Department will forward the information to the Administrator for concurrence in any determination of confidentiality. If the Administrator does not concur that some or all of the information being considered for confidential treatment merits the protection and notifies the Department in writing, the Department will make available to the public that information determined by the Administrator in consultation with the EPA Office of General Counsel not entitled to protection in accordance with 40 CFR Part 2 (relating to public information).

(c) Information approved for confidential status, whether or not contained in an NPDES form, will be disclosed, upon request, to the Administrator, or an authorized representative, who shall maintain the disclosed information as confidential.

§ 92a.9. NPDES permit satisfies other permit requirements.

An NPDES permit issued for a discharge pursuant to this chapter is the Department permit for purposes of sections 202 and 307 of the State Act (35 P. S. §§ 691.202 and 691.307).

§ 92a.10. Pollution prevention.

(a) The Department will encourage pollution prevention by providing assistance to the permittee and users of the permittee's facilities in the consideration of pollution prevention measures such as process changes, materials substitution, reduction in volume of water use, in-process recycling and reuse of water and general measures of "good housekeeping" within the plant or facility.

(b) The Department will encourage consideration of the following measures, in descending order of preference, for environmental management of wastes:

(1) Process change.

(2) Materials substitution.

(3) Reuse.

(4) Recycling.

(5) Treatment.

(6) Disposal.

§ 92a.11. Other chapters applicable.

To the extent that Chapters 16, 77, 87—91, 93, 95, 96, 102 and 105 pertain to a discharge for which an NPDES permit is required, those chapters govern whenever their application produces a more stringent effluent limitation than would be produced by application of Federal requirements. Effluent limitations resulting from the application of those chapters must be expressed in an NPDES permit issued under this chapter.

§ 92a.12. Treatment requirements.

(a) Specific treatment requirements and effluent limitations for each discharge must be established based on the more stringent of the following:

(1) Requirements specified in Chapters 16, 77, 87—90, 93, 95, 96 and 102.

(2) The applicable treatment requirements and effluent limitations to which a discharge is subject under this chapter and the Federal Act.

(3) The treatment requirements and effluent limitations of this title.

(b) When interstate or international agencies under an interstate compact or international agreement establish applicable effluent limitations or standards for dischargers of this Commonwealth to surface waters that are more stringent than those required by this title, the more stringent standards and limitations apply.

(c) If the Department has confirmed the presence or critical habitat of endangered or threatened species under Federal or State law or regulation, the Department will limit discharges to these waters to ensure protection of these species and critical habitat.

(d) New or changed water quality standards or treatment requirements may result from revisions to Chapters 16, 77, 87—90, 92a, 93, 95, 96 or 102, or other plans or determinations approved by the Department. Upon notice from the Department, a permittee of an affected facility shall promptly take the steps necessary to plan, obtain a permit or other approval, and construct facilities **OR UNDERTAKE OTHER ACTIONS** that are **[~~required~~] NECESSARY** to comply with the new water quality standards or treatment requirements.

(e) Within 180 days of the receipt of the notice, the permittee shall submit to the Department either a report establishing that its existing facilities are capable of meeting the new water quality standards or treatment requirements, or a schedule setting forth the nature and date of completion of steps that are necessary to plan, obtain a permit or other approval, and construct facilities **OR**

UNDERTAKE OTHER ACTIONS THAT ARE NECESSARY to comply with the new water quality standards or treatment requirements. The permittee shall comply with the schedule approved by the Department.

(f) Whenever a point of projected withdrawal for a new potable water supply not previously considered is identified by the Department, the Department will notify a discharger if more stringent effluent limitations are needed to protect the point of withdrawal. The discharger shall meet the more stringent effluent limitations in accordance with a schedule approved by the Department. The Department will issue orders directing dischargers to achieve compliance or will impose permit modifications with compliance schedules, when necessary.

Subchapter B. PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

Sec.

§ 92a.21. Application for a permit.

(a) The provisions of 40 CFR 122.21(b), (g)(1)—(7), (9)—(13), (h), (i), (j), (k), (l), (m)(1) and (6), (p), (q) and (r) (relating to application for a permit (applicable to State programs, see 123.25)) are incorporated by reference**[~~, except as required by the Department~~]**.

(b) *Duty to apply.* Persons wishing to discharge pollutants shall file a complete application for an individual permit at least 180 days before the date on which it is desired to commence the discharge of pollutants or within another period of time that the Department determines is sufficient to ensure compliance with the Federal Act and the State Act, including applicable water quality standards and effluent limitations or standards. **[~~Persons are not required to submit an application for an individual permit for SRSTPs or for the application of pesticides that are subject to permit-by-rule, provided the requirements of §§ 92a.24 and 92a.25 (relating to permit-by-rule for SRSTPs; and permit-by-rule for application of pesticides) are met.~~]**

(c) *Application forms.* Applicants for permits shall submit applications on Department permit application forms. At a minimum, the following are required to be submitted by applicants for a permit, except as otherwise specified:

(1) One original and two copies of the complete application. The Department may require additional copies, if needed to complete the review process

(2) The applicable permit application fee and other fees as set forth in § 92a.**[~~28~~]26** (relating to application fees).

(3) If required by the application, proof that a written notice of an application has been submitted to the municipality and county in which the activity is or will be located at least 30 days before the Department may take action on the application. This notice must satisfy the notification requirements of section 1905-A of The Administrative Code of 1929 (71 P. S. § 510-5) and the Pennsylvania Municipalities Planning Code (53 P. S. §§ 10101—11107) if required.

(4) If required by the application, proof that public notice of the application has been published in a newspaper of general circulation in the locality in which the activity is or will be located once a week during a consecutive 4-week period.

(5) A description of the activities conducted by the applicant that require an NPDES permit; name, mailing address and location of the facility; up to four standard industrial codes (SIC) or North American Industry Classification System (NAICS) code that best reflect the principal products or services provided by the facility; the operator's name, address, telephone number, ownership status and entity status; a listing of all Department and EPA environmental quality permits for the facility; a topographic or other map extending 1 mile beyond the boundaries of the facility or activity; and a brief description of the nature of the business.

(6) Documentation that the applicant is in compliance with all existing Department permits, regulations, orders and schedules of compliance, or that any noncompliance with an existing permit has been resolved by an appropriate compliance action or by the terms and conditions of the permit (including a compliance schedule set forth in the permit) consistent with § 92a.51 (relating to schedules of compliance) and other applicable Department regulations.

(d) *Additional information.* The Department may require other information or data needed to assess the discharges from the facility and any impact on receiving waters, and to determine whether to issue an NPDES permit, or what conditions or effluent limitations (including water quality based effluent limitations) to place in the permit. The additional information may include, but is not limited to:

(1) The results of an effluent assessment (or estimate for new dischargers or new sources), including a list of the mass and concentration of pollutants found (or estimated to be for new discharges or new sources) in the wastewater discharge, under Department protocols.

(2) Information and data relating to the biological, physical and chemical characteristics of waters and habitat immediately upstream and downstream of the proposed discharge, performed under a Department-approved protocol.

(3) The results of a waterbody assessment, under Department protocols, setting forth the impact (or potential impact) of the discharges on surface waters of this Commonwealth.

(4) The results of whole effluent toxicity testing, an instream cause/effect survey, or other tests or surveys as needed to determine the impact of a discharge on a waterbody performed under a Department-approved protocol.

(e) *Addresses.* The Department will publish at least annually a list of addresses to which applications and their accompanying papers shall be submitted.

(f) *Supporting documentation.* A person required to file an application shall also file additional modules, forms and applications, and supply data as specified by the Department. Additional modules, forms, applications and data are considered a part of the application.

§ 92a.22. Signatories to permit applications and reports.

The provisions of 40 CFR 122.22 (relating to signatories to permit applications and reports (applicable to State programs, see 123.25)) are incorporated by reference.

§ 92a.23. NOI for coverage under an NPDES general permit.

(a) **EXCEPT AS PROVIDED FOR IN SUBSECTION (C), [~~Eligible~~] ELIGIBLE** dischargers, who wish to be covered by a general permit, shall file a complete NOI as instructed in the NOI. At a minimum, the NOI must identify each point source for which coverage under the general permit is requested; demonstrate that each point source meets the eligibility requirements for inclusion in the general permit; demonstrate that the discharge from the point sources, individually or cumulatively, will not **[~~result in~~] CAUSE OR CONTRIBUTE TO** a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) and include other information the Department may require. By signing the NOI, the discharger agrees to accept all conditions and limitations imposed by the general permit.

(b) If the NOI is acceptable, the Department will process the NOI in accordance with § 92a.54 (relating to general permits).

(c) General permits for POTWs, CSOs, CAFOs, **MS4S,** primary industrial facilities, and stormwater discharges associated with industrial activities must require that an NOI be submitted for each **ISSUANCE AND** reissuance of coverage under the general permit. A general permit for any other category of discharges may be designed to allow discharges to **[~~continue to~~]** be authorized to discharge without submitting a NOI for **[~~each reissuance of~~]** coverage under the general permit. **ALTERNATIVELY, SUCH A GENERAL PERMIT MAY REQUIRE AN INITIAL NOI FOR ISSUANCE OF COVERAGE, BUT NO SUBSEQUENT NOI FOR REISSUANCE OF COVERAGE.** The Department will consider the following in deciding whether an NOI must be submitted for **[~~each reissuance of~~]** coverage under the general permit: the type of discharge; the potential for toxic and conventional pollutants in the discharge; **[~~and~~]** the estimated number of discharges to be covered by the permit **AND THE CUMULATIVE IMPACT OF THE DISCHARGES**. The public notice of the general permit will provide the reasons for not requiring the NOI.

[~~§ 92a.24. Permit-by-rule for SRSTPs.~~

~~(a) *Coverage.* A person is deemed to have an NPDES permit authorizing discharge from an SRSTP provided the following requirements are met:~~

~~(1) The person has obtained coverage under the water quality management general permit for small flow treatment facilities under Chapter 91 (relating to water quality provisions).~~

~~(2) The SRSTP is designed to adequately treat sewage flows of not greater than 1,000 GPD.~~

~~(3) The discharge is not to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards).~~

~~(4) The person maintains and operates the SRSTP in compliance with the standards and requirements of the Department contained in approvals issued under Chapter 71 (relating to administration of sewage facilities planning program) and the water quality management general permit issued under Chapter 91.~~

~~(b) *Administration of permit-by-rule for SRSTPs.*~~

~~(1) *Requiring an individual or general permit.* The Department may revoke or suspend coverage under a permit-by-rule, and require that NPDES permit coverage be obtained under an individual or general NPDES permit, when the permittee has violated one or more provisions of this title or otherwise is ineligible for coverage under the water quality management general permit for small flow treatment facilities. Upon notification by the Department that coverage under an individual or general NPDES permit is required, the permittee shall submit a complete application or NOI, in conformance with this chapter,~~

~~within 90 days of receipt of the notification. Failure to submit the required application or NOI within 90 days automatically terminates coverage under the permit-by-rule.~~

~~(2) *Termination of coverage under permit-by-rule for SRSTPs.* When an individual permit or approval for coverage under a general NPDES permit is issued for an SRSTP, coverage under the permit-by-rule for SRSTPs is automatically terminated.~~

~~§ 92a.25. Permit-by-rule for application of pesticides.~~

~~(a) *Coverage.* A person is deemed to have an NPDES permit authorizing application of a pesticide provided the following requirements are met:~~

~~(1) The pesticide is registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C.A. §§ 136—136y), and applied consistent with all applicable requirements of FIFRA.~~

~~(2) The pesticide application meets at least one of the following conditions:~~

~~(i) The pesticide is applied directly to surface water to control pests. An example is an aquatic pesticide applied to surface water to control mosquito larvae or aquatic weeds.~~

~~(ii) The pesticide is applied over or near surface waters to control pests, where a portion of the pesticide will unavoidably be deposited to surface waters in order to target the pests effectively. An example is a pesticide applied over surface water to control insects, or to a field or forest canopy near surface water to control insects or terrestrial vegetation.~~

~~(3) The discharge of the pesticide is not associated with any facility or activity related to the manufacture, storage or disposal of the pesticide.~~

~~(b) *Administration of permit-by-rule for application of pesticides.*~~

~~(1) *Requiring an individual or general permit.* The Department may revoke or suspend coverage under a permit-by-rule, and require that permit coverage be obtained under an individual or general NPDES permit, when the permittee has violated one or more provisions of this title or otherwise is ineligible for coverage under the permit-by-rule. Upon notification by the Department that coverage under an individual or general NPDES permit is required, the permittee shall submit a complete application or NOI, in conformance with this chapter, within 90 days of receipt of the notification. Failure to submit the required application or NOI within 90 days automatically terminates coverage under the permit-by-rule.~~

~~(2) *Termination of coverage under permit-by-rule for application of pesticides.* When an individual permit or approval for coverage under a general NPDES permit is issued for a pesticide application, coverage under the permit-by-rule for pesticide application is automatically terminated.~~]

§ 92a.[~~26~~]24. New or increased discharges, or change of waste streams.

(a) *Sewage discharges and industrial waste discharges.* [~~Facility expansions or process modifications, which may result in increases of permitted pollutants that do not have the potential to exceed ELGs or violate effluent limitations specified in the permit, may be initiated by the permittee without the approval of the Department, but shall be reported by submission to the Department of notice of the increased discharges within 60 days.~~] Facility expansions, **PRODUCTION INCREASES,** [~~or~~] process modifications, **OR ANY CHANGE OF WASTESTREAM**, [~~which~~] **THAT** may result in [~~increases~~] **AN INCREASE** of pollutants that have the potential to exceed ELGs or violate effluent limitations specified in the permit, or [~~which~~] **THAT** may result in a new discharge, or a discharge of new or increased pollutants for which no effluent limitation has been issued, must be approved in writing by the Department before [~~commencing~~] **THE PERMITTEE MAY COMMENCE** the new or increased discharge, or change of wastestream. The Department will determine if a permittee will be required to submit a new permit application and obtain a new or amended permit before commencing the new or increased discharge, or change of wastestream.

(b) *Stormwater discharges associated with construction activity.* The permittee shall notify the Department before initiating any new or expanded disturbed area not identified in the permit application. The Department will determine if a permittee will be required to submit a new permit application and obtain a new or amended permit before [~~initiating~~] the **PERMITTEE MAY INITIATE CONSTRUCTION ACTIVITY IN THE** new or expanded disturbed area.

§ 92a.[~~27~~]25. Incomplete applications or incomplete NOIs.

The Department will not process an application or NOI that is incomplete or otherwise deficient. An application for an NPDES individual permit is complete when the Department receives an application form and supplemental information completed in accordance with this chapter and the instructions with the application. An NOI to be covered by an NPDES general permit issued by the Department is complete when the Department receives an NOI setting forth the information specified in the NOI and by the terms of the general permit.

§ 92a.[~~28~~]26. Application fees.

(a) The application fee is payable to the [~~Commonwealth~~] **CLEAN WATER FUND** according to the fee schedule set forth in this section. All flows listed in this section are **ANNUAL AVERAGE** design flows.

(b) Applications fees for individual NPDES permits for discharges of treated sewage are:

SRSTP	$100 for new; $100 for reissuance
Small flow treatment facility	$250 for new; $250 for reissuance
Minor facility < 50,000 GPD	$500 for new; $250 for reissuance
Minor facility >= 50,000 GPD < 1 MGD	$1,000 for new; $500 for reissuance
Minor facility with CSO	$1,500 for new; $750 for reissuance

Major facility >= 1 MGD < 5 MGD	$2,500 for new; $1,250 for reissuance
Major facility >= 5 MGD	$5,000 for new; $2,500 for reissuance
Major facility with CSO	$10,000 for new; $5,000 for reissuance

(c) Applications fees for individual NPDES permits for discharges of industrial waste are:

Minor facility not covered by an ELG	$1,000 for new; $500 for reissuance
Minor facility covered by an ELG	$3,000 for new; $1,500 for reissuance
Major facility < 250 MGD	$10,000 for new; $5,000 for reissuance
Major facility >= 250 MGD	$50,000 for new; $25,000 for reissuance
MINING ACTIVITY	**$1,000 FOR NEW; $500 FOR REISSUANCE**
Stormwater	$2,000 for new; $1,000 for reissuance

(d) Application fees for individual NPDES permits for other facilities or activities are:

CAFO	$1,500 for new; $750 for reissuance
CAAP	$1,500 for new; $750 for reissuance
MS4	$5,000 for new; $2,500 for reissuance
[~~Mining activity~~ ~~$1,000 for new; $500 for reissuance~~]	

(e) Application fees for transfers of individual permits are:

SRSTP	$50
Small flow treatment facility	$100
Other domestic wastewater	$200
Industrial waste	$500

(f) Application fees for amendments to individual permits are:

Amendment initiated by Department	No charge
Minor amendment	$200
Major amendment	Same as reissuance permit fee

(g) NOI fees for coverage under a general permit under § 92a.23 (relating to NOI for coverage under an NPDES general permit) will be established in the general permit**[~~, and~~]. NOI FEES** may not exceed $2,500**, EXCEPT AS PROVIDED IN CHAPTER 102 (RELATING TO EROSION AND SEDIMENT CONTROL)**. An eligible person shall submit to the Department the applicable NOI fee before the Department approves coverage under the general permit for that person.

(h) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the EQB. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and contain recommendations to increase fees to eliminate the disparity, including recommendations for regulatory amendments to increase program fees.

(I) ANY FEDERAL OR STATE AGENCY OR INDEPENDENT STATE COMMISSION THAT PROVIDES FUNDING TO THE DEPARTMENT FOR THE IMPLEMENTATION OF THE NPDES PROGRAM THROUGH TERMS AND CONDITIONS OF A MUTUAL AGREEMENT MAY BE EXEMPT FROM THE FEES IN THIS SECTION.

§ 92a.[~~29~~]27. Sewage discharges.

(a) The following additional application requirements apply to new and existing sewage dischargers (including POTWs and privately owned treatment works), as applicable[~~except where aquatic communities are essentially excluded as documented by water quality data confirming the absence of the communities and confirming the lack of a trend of water quality improvement in the waterbody, and provided that the Department has determined that the primary cause of the exclusion is unrelated to any permitted discharge~~]:

(1) The following sewage dischargers shall provide the results of whole effluent toxicity testing to the Department:

(i) Sewage dischargers with design influent flows equal to or greater than 1.0 million gallons per day.

(ii) Sewage dischargers with approved pretreatment programs or who are required to develop a pretreatment program.

(2) In addition to the sewage dischargers in paragraph (1), the Department may require other sewage dischargers to submit the results of toxicity tests with their permit applications, based on consideration of the following factors:

(i) The variability of the pollutants or pollutant parameters in the sewage effluent (based on chemical-specific information, the type of treatment facility and types of industrial contributors).

(ii) The dilution of the effluent in the receiving water (ratio of effluent flow to receiving stream flow).

(iii) Existing controls on point or nonpoint sources, including calculations of TMDLs for the waterbody segment, and the relative contribution of the sewage discharger.

(iv) Receiving surface water characteristics, including possible or known water quality impairment, and whether the sewage discharges to an estuary, one of the Great Lakes or a surface water that is classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards).

(v) Other considerations including, but not limited to, the history of toxic impact and compliance problems at the sewage discharge facility, which the Department determines could cause or contribute to adverse water quality impacts.

(3) For sewage dischargers required under paragraph (1) or (2) to conduct toxicity testing, the EPA's methods or other protocols approved by the Department, which are scientifically defensible and sufficiently sensitive to detect aquatic toxicity and approved by the Department, shall be used. The testing shall have been performed since the last NPDES permit reissuance, or when requested by the Department, whichever occurred later.

(b) CSO dischargers shall submit the following information:

(1) The results of an evaluation determining the frequency, extent and cause of the CSO discharge, including identifying the points of inflow into combined systems.

(2) An evaluation of the water quality impacts of the CSO discharge on receiving waters.

(3) A description of the nine minimum controls (NMCs) described in the EPA publication entitled "Combined Sewer Overflows—Guidance for Nine Minimum Controls" (EPA publication number 832-B-95-003 (September 1995) as amended or updated) used at the facility to minimize or eliminate the CSO discharge impact on receiving water quality.

(4) A long-term control plan (LTCP) to minimize or eliminate the CSO discharge with an implementation schedule.

(5) An update on the progress made with the implementation of the LTCP and future activities with schedules to comply with water quality standards.

§ 92a.[~~30~~]28. Industrial waste discharges.

(a) *Existing industrial discharges.* Dischargers of industrial waste from sources other than new sources or new discharges subject to subsection (b), nonprocess wastewater discharges subject to subsection (c), and stormwater discharges associated with industrial activity subject to § 92a.[~~34~~]32 (relating to stormwater discharges), shall submit the applicable information required to be submitted under 40 CFR 122.21(g)(1)—(7) and (g)(9)—(13) (relating to application for a permit (applicable to State programs, see 123.25)).

(b) *New sources and new discharges.* Except for new discharges of industrial facilities that discharge nonprocess wastewater subject to subsection (c) and new discharges of stormwater associated with industrial activity subject to § 92a.[~~34~~]32, new discharges and new sources

applying for NPDES permits shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(k).

(c) *Nonprocess industrial waste discharges.* Except for stormwater discharges associated with industrial activity subject to § 92a.[~~34~~]32, industrial waste dischargers applying for NPDES permits that discharge only nonprocess wastewater not regulated by an effluent limitation guideline or new source performance standard shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(h).

§ 92a.[~~31~~]29. CAFO.

(a) Except as provided in subsections (b)—(d), each CAFO shall have applied for an NPDES permit on the following schedule, and shall have obtained a permit:

(1) By May 18, 2001, for any CAFO in existence on November 18, 2000, with greater than 1,000 AEUs.

(2) By February 28, 2002, for any other CAFO in existence on November 18, 2000.

(3) Prior to beginning operation, for any new or expanded CAFO that began operation after November 18, 2000, and before October 22, 2005.

(b) A poultry operation that is a CAFO, which is in existence on October 22, 2005, and that is not using liquid manure handling systems, shall apply for an NPDES permit no later than the following, and shall obtain a permit:

(1) By April 24, 2006, for operations with 500 or more AEUs.

(2) By January 22, 2007, for all other operations.

(c) After October 22, 2005, a new operation, and an existing operation that will become a CAFO due to changes in operations such as additional animals or loss of land suitable for manure application, shall do the following:

(1) Apply for an NPDES permit at least 180 days before the operation commences or changes.

(2) Obtain an NPDES permit prior to commencing operations or making changes, as applicable.

(d) Other operations not described in subsections (a)—(c) that will become newly regulated as a CAFO for the first time due to the changes in the definition of a CAFO in § 92a.2 (relating to definitions) shall apply for a permit by April 24, 2006, and obtain a permit.

(e) The NPDES permit application requirements include, but are not limited to, the following:

(1) A nutrient management plan meeting the requirements of Chapter 83, Subchapter D (relating to nutrient management) and approved by the county conservation district or the State Conservation Commission. The plan must include:

(i) Manure application setbacks for the CAFO of at least 100 feet, or vegetated buffers at least 35 feet in width.

(ii) A statement that manure that is stockpiled for 15 consecutive days or longer shall be under cover or otherwise stored to prevent discharge to surface water during a storm event up to and including the appropriate design storm for that type of operation pursuant to § 91.36(a)(1) and (5) (relating to pollution control and prevention at agricultural operations).

(2) An erosion and sediment control plan meeting the requirements of Chapter 102 (relating to erosion and sediment control).

(3) When required under § 91.36(a), a water quality management permit, permit application, approval or engineer's certification, as required.

(4) A preparedness, prevention and contingency plan for pollutants related to the CAFO operation.

(5) A water quality management permit application as required by this chapter and Chapter 91 (relating to general provisions), when treatment facilities that would include a treated wastewater discharge are proposed.

(6) Measures to be taken to prevent discharge to surface water from storage of raw materials such as feed and supplies. These measures may be included in the nutrient management plan.

§ 92a.[~~32~~]30. CAAP.

The provisions of 40 CFR 122.24 (relating to concentrated aquatic animal production facilities) are incorporated by reference.

§ 92a.[~~33~~]31. Aquaculture projects.

The provisions of 40 CFR 122.25, 125.10 and 125.11 (relating to aquaculture projects (applicable to State NPDES programs, see 123.25); and criteria for issuance of permits to aquaculture projects) are incorporated by reference.

§ 92a.[~~34~~]32. Stormwater discharges.

(a) The provisions of 40 CFR 122.26(a), (b), (c)(1), (d), (e)(1), (3)—(9) and (f)—(g) (relating to stormwater discharges (applicable to State NPDES programs, see 123.25)) and 122.30—122.37 are incorporated by reference.

(b) *No exposure stormwater discharges.* Discharges composed entirely of stormwater are not stormwater discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to stormwater and the discharger satisfies the conditions in 40 CFR 122.26(g). A facility or activity with no stormwater discharges associated with industrial activity may qualify for a conditional exclusion from a permit, provided that the facility or activity does not discharge to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards). To qualify for the conditional exclusion from a permit, the responsible person shall complete, sign and submit to the Department a "No Exposure Certification" at least once every 5 years in lieu of a permit application.

(c) *Municipal separate storm sewer systems.* The operator of a discharge from a large, medium or small municipal separate storm sewer shall submit in its application the information required to be submitted under 40 CFR Part 122 (relating to EPA administered programs: the National Pollutant Discharge Elimination System). Permits for discharges from municipal separate storm sewer systems are not eligible for a "no exposure" conditional exclusion from a permit under subsection (b).

(d) *Stormwater discharges associated with construction activity.* Applicants for individual NPDES permits for the discharge of stormwater associated with construction activity shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(g)(7) (relating to application for a permit (applicable to State programs, see 123.25)) and 122.26(c)(1). In addition, stormwater dischargers shall submit information required in Chapter 102 (relating to erosion and sediment control) as appropriate. Permits for stormwater discharges associated with construction activity are not eligible for a "no exposure" conditional exclusion from a permit under subsection (b).

(E) *STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY.* APPLICANTS FOR INDIVIDUAL NPDES PERMITS FOR THE DISCHARGE OF STORMWATER ASSOCIATED WITH INDUSTRIAL ACTIVITY SHALL SUBMIT THE INFORMATION REQUIRED TO BE SUBMITTED, AS APPLICABLE, UNDER 40 CFR 122.21(G)(7) AND 122.26(C)(1).

§ 92a.[~~35~~]33. Silviculture activities.

The provisions of 40 CFR 122.27 (relating to silvicultural activities (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

§ 92a.[~~36~~]34. Cooling water intake structures.

(a) The provisions of 40 CFR 125.80—125.89 (relating to requirements applicable to cooling water intake structures for new facilities under section 316(b) of the Federal Act) are incorporated by reference.

(b) The location, design, construction and capacity of cooling water intake structures, in connection with a point source, must reflect the BTA for minimizing adverse environmental

impacts in accordance with the State Act and section 316(b) of the Federal Act (33 U.S.C.A § 1326(b)).

~~[(c) The Department will determine if a facility with a cooling water intake structure reflects the BTA for minimizing adverse environmental impacts based on a site-specific evaluation.]~~

§ 92a.[~~37~~]35. New sources and new discharges.

The provisions of 40 CFR 122.29 (relating to new sources and new dischargers) are incorporated by reference.

§ 92a.[~~38~~]36. Department action on NPDES permit applications.

[~~(a)~~] The Department will not issue an NPDES permit unless the application is complete and the documentation submitted meets the requirements of this chapter. The applicant, through the application and its supporting documentation, shall demonstrate that the application is consistent with:

(1) Plans approved by the Department under the Pennsylvania Sewage Facilities Act (35 P. S. §§ 750.1—750.20), wastewater facility capabilities, service areas, selected alternatives and any adverse effects on the environment of reasonably foreseeable future development within the area of the project resulting from construction of the wastewater facility.

(2) Other applicable [~~statutes~~]**ENVIRONMENTAL LAWS** and regulations administered by the Commonwealth, Federal environmental statutes and regulations, and if applicable, river basin commission requirements created by interstate compact.

(3) Standards established for the wastewater facilities through permits to implement the requirements of 40 CFR Parts 122, 123, 124 (relating to EPA administered permit programs the National Pollutant Discharge Elimination System; State program requirements; and [~~procedured~~] **PROCEDURES** for decision making) and the Federal Act.

~~[(b) The Department will consider local and county comprehensive plans and zoning ordinances developed pursuant to the Pennsylvania Municipalities Planning Code (53 P. S. § 10101—70105) when evaluating NPDES permit applications, provided that the plans are not preempted by State law. The Department may use the plans and ordinances as a basis to support actions on applications, including determining appropriate permit conditions and limitations, and whether or not to issue an NPDES permit.]~~

Subchapter C. PERMITS AND PERMIT CONDITIONS

Sec.

§ 92a.41. Conditions applicable to all permits.

(a) Unless indicated otherwise in this section, NPDES permits must include the permit conditions specified in 40 CFR 122.41(a)—(m) (relating to conditions applicable to all permits applicable to State programs, see 123.25) including the following:

(1) Duty to comply.

(2) Duty to reapply.

(3) Need to halt or reduce activity not a defense.

(4) Duty to mitigate.

(5) Proper operation and maintenance.

(6) Permit actions.

(7) Property rights.

(8) Duty to provide information.

(9) Inspection and entry.

(10) Monitoring and records.

(11) Signature requirements.

(12) Reporting requirements.

(13) Bypass.

(b) The **PERMITTEE SHALL COMPLY WITH THE** immediate **ORAL** notification requirements of § 91.33 (relating to incidents causing or threatening pollution) **[~~supersede the reporting requirements of 40 CFR 122.41 (l)(6)~~]**. **ORAL NOTIFICATION IS REQUIRED AS SOON AS POSSIBLE, BUT NO LATER THAN 4 HOURS AFTER THE PERMITTEE BECOMES AWARE OF THE INCIDENT CAUSING OR THREATENING POLLUTION. A WRITTEN SUBMISSION SHALL ALSO BE PROVIDED WITHIN 5 DAYS OF THE TIME THE PERMITTEE BECOMES AWARE OF THE INCIDENT CAUSING OR THREATENING POLLUTION. THE WRITTEN SUBMISSION SHALL CONFORM TO THE REQUIREMENTS OF 40 CFR 122.41(L)(6).**

(c) The discharger may not discharge floating materials, **[~~oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits.~~]** **SCUM, SHEEN, OR SUBSTANCES THAT RESULT IN DEPOSITS IN THE RECEIVING WATER. EXCEPT AS PROVIDED FOR IN THE PERMIT, THE DISCHARGER MAY NOT DISCHARGE FOAM, OIL, GREASE, OR SUBSTANCES THAT PRODUCE AN OBSERVABLE CHANGE IN THE COLOR, TASTE, ODOR, OR TURBIDITY OF THE RECEIVING WATER.**

§ 92a.42. Additional conditions applicable to specific categories of NPDES permits.

The provisions of 40 CFR 122.42 (relating to additional conditions applicable to specific categories of NPDES permits (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

§ 92a.43. Establishing permit conditions.

The provisions of 40 CFR 122.43 (relating to establishing permit conditions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

§ 92a.44. Establishing limitations, standards, and other permit conditions.

The provisions of 40 CFR 122.44 (relating to establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

§ 92a.45. Calculating NPDES permit conditions.

The provisions of 40 CFR 122.45 (relating to calculating NPDES permit conditions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

§ 92a.46. Site-specific permit conditions.

The Department may establish and include in an NPDES permit, any permit condition, as needed on a case-by-case basis, to assure protection of surface waters. These conditions may include a requirement to identify and implement the following:

(1) BMPs reasonably necessary to achieve effluent limitations or standards or to carry out the purpose and intent of the Federal Act.

(2) Toxic reduction activities, effluent limitations based on WETT, and other measures that eliminate, or substantially reduce releases of pollutants at their source.

§ 92a.47. Sewage permit.

(a) Sewage, except that discharged from a CSO that is in compliance with subsection **([~~d~~]B)**, **OR AS PROVIDED FOR IN SUBSECTIONS (F)—(I),** shall be given a minimum of secondary treatment. Secondary treatment for sewage is that treatment that includes significant biological treatment and accomplishes the following:

(1) Monthly average discharge limitation for BOD_5 and TSS may not exceed 30 milligrams per liter. If $CBOD_5$ is specified instead of BOD_5 the limitation may not exceed 25 milligrams per liter.

(2) Weekly average discharge limitation for BOD_5 and TSS may not exceed 45 milligrams per liter **FOR POTW FACILITIES**. If $CBOD_5$ is specified instead of BOD_5 the limitation may not exceed 40 milligrams per liter.

(3) On a concentration basis, the monthly average percent removal of BOD_5 or $CBOD_5$, and TSS, must be at least 85% for POTW facilities.

(4) From May through September, a monthly average discharge limitation for fecal coliform of 200/100 mL as a geometric mean and an instantaneous maximum effluent limitation not greater than 1,000/100 mL

(5) From October through April, a monthly average discharge limitation for fecal coliform of 2000/100 mL as a geometric mean and an instantaneous maximum effluent limitation not greater than 10,000/100 mL.

(6) Provision for the disposal or beneficial use of sludge in accordance with applicable Department regulations.

(7) Compliance with § 95.2(1)—(3) (relating to quality standards and oil-bearing wastewaters).

(8) Compliance with § 92a.48 (b) (relating to industrial waste permit) if chlorine is used.

~~[(b) Sewage, except that discharged from a CSO that is in compliance with subsection (d), or that discharged from a small flow treatment facility, shall be given a minimum of tertiary treatment if either of the following apply:~~

~~(1) The discharge from a new source, new discharger, or expanding facility or activity is to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards), or to a surface water or location for which the first intersected perennial stream is classified as a High Quality Water or an Exceptional Value Water.~~

~~(2) The discharge from a facility or activity affects surface waters of this Commonwealth not achieving water quality standards, with the impairment attributed at least partially to point source discharges of treated sewage.~~

~~(c) Tertiary treatment for sewage is that treatment that meets all of the requirements of secondary treatment, and also accomplishes the following:~~

~~(1) Monthly average discharge limitation for $CBOD_5$ and TSS may not exceed 10 milligrams per liter.~~

~~(2) Monthly average discharge limitation for total nitrogen may not exceed 8 milligrams per liter.~~

~~(3) Monthly average discharge limitation for ammonia nitrogen may not exceed 3 milligrams per liter.~~

~~(4) Monthly average discharge limitation for total phosphorus may not exceed 1 milligram per liter.~~

~~(5) Dissolved oxygen must be 6 milligrams per liter or greater at all times.~~

~~(6) Seasonal modifiers may not be applied for tertiary treatment.~~]

([~~d~~]B) Dischargers of sewage from a CSO shall implement, as approved by the Department, nine minimum controls (NMCs) and a long-term control plan (LTCP) to minimize or eliminate the CSO discharge impact on the water quality of the receiving surface water.

([~~e~~]C) Discharges from an SSO are prohibited.

([~~f~~]D) When pollutants contributed by indirect dischargers result in interference or pass through, and a violation is likely to recur, a permittee shall develop and implement specific local limits for indirect dischargers and other users, as appropriate, that together with appropriate sewerage facility or operational changes, are necessary to ensure renewed or continued compliance with the plant's NPDES permit or sludge use or disposal practices.

([g]E) POTWs that serve indirect dischargers shall give notice to the Department in accordance with 40 CFR 122.42(b) (relating to additional conditions applicable to specific categories of NPDES permits (applicable to State NPDES programs, see 123.25)).

(F) POTWS WITH EFFLUENT LIMITS THAT ARE LESS STRINGENT THAN THOSE SPECIFIED IN SUBSECTIONS (A)(1) AND (A)(2) IN EFFECT ON (effective date of regulation) SHALL MEET THE REQUIREMENTS OF SUBSECTIONS A(1) AND A(2) WHEN A NEW OR AMENDED WATER QUALITY MANAGEMENT PERMIT AUTHORIZING AN INCREASE IN THE DESIGN FLOW OF THE FACILITY IS ISSUED UNDER THE PROVISONS OF CHAPTER 91 (RELATING TO GENERAL PROVISONS).

(G) POTWS SUBJECT TO THIS SECTION MAY NOT BE CAPABLE OF MEETING THE PERCENTAGE REMOVAL REQUIREMENTS ESTABLISHED UNDER SUBSECTION A(3) DURING WET WEATHER, WHERE THE TREATMENT WORKS RECEIVE FLOWS FROM COMBINED SEWERS (*I.E.*, SEWERS WHICH ARE DESIGNED TO TRANSPORT BOTH STORM WATER AND SANITARY SEWAGE). FOR SUCH TREATMENT WORKS, THE DECISION MUST BE MADE ON A CASE-BY-CASE BASIS AS TO WHETHER ANY ATTAINABLE PERCENTAGE REMOVAL LEVEL CAN BE DEFINED, AND IF SO, WHAT THE LEVEL SHOULD BE.

(H) POTWS SUBJECT TO THIS SECTION MAY NOT BE CAPABLE OF MEETING THE PERCENTAGE REMOVAL REQUIREMENTS ESTABLISHED UNDER SUBSECTION A(3) DURING DRY WEATHER, WHERE THE TREATMENT WORKS RECEIVE FLOWS FROM COMBINED SEWERS. THE DEPARTMENT MAY SUBSTITUTE LESS STRINGENT REMOVAL REQUIREMENTS THAN THAT SPECIFIED IN SUBSECTION A(3) FOR ANY POTW WITH LESS CONCENTRATED INFLUENT WASTEWATER FOR COMBINED SEWERS DURING DRY WEATHER. THE DEPARTMENT MAY SUBSTITUTE EITHER A LOWER PERCENT REMOVAL REQUIREMENT OR A MASS LOADING LIMIT FOR THE PERCENT REMOVAL REQUIREMENTS SPECIFIED IN SUBSECTION A(3) PROVIDED THAT THE PERMITTEE SATISFACTORILY DEMONSTRATES ALL OF THE FOLLOWING:

(1) THE TREATMENT WORKS IS CONSISTENTLY MEETING, OR WILL CONSISTENTLY MEET, ITS PERMIT EFFLUENT CONCENTRATION LIMITS, BUT THE PERCENT REMOVAL REQUIREMENTS CANNOT BE MET DUE TO LESS CONCENTRATED INFLUENT WASTEWATER.

(2) TO MEET THE PERCENT REMOVAL REQUIREMENTS, THE TREATMENT WORKS WOULD HAVE TO ACHIEVE SIGNIFICANTLY MORE STRINGENT EFFLUENT CONCENTRATIONS THAN WOULD OTHERWISE BE REQUIRED BY THE CONCENTRATION-BASED STANDARDS.

(3) THE LESS CONCENTRATED INFLUENT WASTEWATER DOES NOT RESULT FROM EITHER EXCESSIVE INFILTRATION OR CLEAR WATER INDIRECT DISCHARGERS DURING DRY WEATHER PERIODS. THE DETERMINATION OF WHETHER THE LESS CONCENTRATED WASTEWATER RESULTS FROM EXCESSIVE INFILTRATION IS DISCUSSED IN 40 CFR 35.2005(B)(28) (RELATING TO DEFINITIONS), PLUS THE ADDITIONAL CRITERION THAT EITHER 40 GALLONS PER CAPITA PER DAY OR 1500 GALLONS PER INCH DIAMETER PER

MILE OF SEWER MAY BE USED AS THE THRESHOLD VALUE FOR THAT PORTION OF THE DRY WEATHER BASE FLOW ATTRIBUTED TO INFILTRATION. IF THE LESS CONCENTRATED INFLUENT WASTEWATER IS THE RESULT OF CLEAR WATER INDIRECT DISCHARGERS, THEN THE TREATMENT WORKS MUST CONTROL SUCH DISCHARGES PURSUANT TO 40 CFR PART 403.

(I) THE DEPARTMENT MAY SUBSTITUTE LESS STRINGENT REMOVAL REQUIREMENTS THAN THAT SPECIFIED IN SUBSECTION A(3) FOR ANY POTW WITH LESS CONCENTRATED INFLUENT WASTEWATER FOR SEPARATE SEWERS, PROVIDED THAT THE PERMITTEE SATISFACTORILY DEMONSTRATES ALL OF THE FOLLOWING:

(1) THE TREATMENT WORKS IS CONSISTENTLY MEETING, OR WILL CONSISTENTLY MEET, ITS PERMIT EFFLUENT CONCENTRATION LIMITS BUT ITS PERCENT REMOVAL REQUIREMENTS CANNOT BE MET DUE TO LESS CONCENTRATED INFLUENT WASTEWATER.

(2) TO MEET THE PERCENT REMOVAL REQUIREMENTS, THE TREATMENT WORKS WOULD HAVE TO ACHIEVE SIGNIFICANTLY MORE STRINGENT LIMITATIONS THAN WOULD OTHERWISE BE REQUIRED BY THE CONCENTRATION-BASED STANDARDS.

(3) THE LESS CONCENTRATED INFLUENT WASTEWATER IS NOT THE RESULT OF EXCESSIVE INFLOW/INFILTRATION. THE DETERMINATION OF WHETHER THE LESS CONCENTRATED WASTEWATER IS THE RESULT OF EXCESSIVE INFLOW/INFILTRATION WILL BE BASED ON THE DEFINITION OF EXCESSIVE INFLOW/INFILTRATION IN 40 CFR 35.2005 (B)(16), PLUS THE ADDITIONAL CRITERION THAT INFLOW IS NONEXCESSIVE IF THE TOTAL FLOW TO THE POTW (I.E., WASTEWATER PLUS INFLOW PLUS INFILTRATION) IS LESS THAN 275 GALLONS PER CAPITA PER DAY.

§ 92a.48. Industrial waste permit.

(a) Industrial waste regulated by this chapter must meet the following requirements:

(1) EPA-promulgated effluent limitation guidelines established under section 304(b) of the Federal Act (33 U.S.C.A. § 1314(b)).

(2) Compliance with § 95.2 (relating to quality standards and oil-bearing wastewater standards).

(3) For those industrial categories for which no effluent limitations have been established under paragraph (1), Department-developed technology-based limitations established in accordance with 40 CFR 125.3 (relating to technology-based treatment requirements in permits).

[~~(4) For facilities discharging conventional pollutants in industrial waste, the monthly average discharge limitation for BOD_5 and TSS may not exceed 60 milligrams per liter. If~~

~~$CBOD_5$ is specified instead of BOD_5, the limitation may not exceed 50 milligrams per liter. More stringent limits may apply based on the requirements of § 92a.12 (relating to treatment requirements).]~~

(b) For facilities or activities using chlorination, the following apply:

(1) If the EPA adopts a National categorical ELG promulgating limits for Total Residual Chlorine (TRC) or free available chlorine for a specific industry or activity under section 301 or 304(b) of the Federal Act (33 U.S.C.A. §§ 1311 and 1314(b)), that ELG constitutes BAT for the industry or activity. If the EPA has not promulgated a National ELG for TRC or free available chlorine for an industry or activity, the Department may develop a facility-specific BAT effluent limitation for TRC. Factors, which will be considered in developing a facility-specific BAT effluent limitation, include the following:

(i) The age of equipment and facilities involved.

(ii) The engineering aspects of the application of various types of control techniques and alternatives to the use of chlorine or reductions in the volume of chlorine used during the disinfection process.

(iii) The cost of achieving the effluent reduction.

(iv) Nonwater quality environmental impacts (including energy requirements).

(v) Other factors the Department deems appropriate.

(2) For facilities where the EPA has not promulgated a National ELG setting forth limits for TRC or free available chlorine for an industry or activity, and the Department has not developed a facility-specific BAT effluent limitation for TRC under the factors in paragraph (1), an effluent limitation for TRC of 0.5 milligrams per liter (30-day average) constitutes BAT.

(3) Facilities using chlorination that discharge to an Exceptional Value Water, or to a High Quality Water where economic or social justification under § 93.4c(b)(1)(iii) (relating to implementation of antidegradation requirements) has not been demonstrated under applicable State or Federal law or regulations, shall discontinue chlorination or dechlorinate their effluents prior to discharge into the waters.

§ 92a.49. CAFO.

NPDES permits for each CAFO must include, but are not limited to, conditions requiring the following:

(1) Compliance with the Nutrient Management Plan, the Preparedness, Prevention and Contingency Plan and the Erosion and Sediment Control Plan.

(2) A separate NPDES permit for stormwater discharges associated with a construction activity meeting the requirements of Chapter 102 (relating to erosion and sediment control) when applicable.

(3) Compliance with 3 Pa.C.S. Chapter 23 (relating to the Domestic Animal Law).

(4) Compliance with § 91.36 (relating to pollution control and prevention at agricultural operations).

(5) Recordkeeping and reporting requirements as described in the permit.

(6) When applicable, effluent limitations and other conditions as required under § 92a.12 (relating to treatment requirements) to meet water quality standards, for treated wastewater discharges.

(7) Measures necessary to prevent the discharge to surface water from storage of raw materials such as feed and supplies, which are not otherwise included in the nutrient management plan.

§ 92a.50. CAAP.

(a) **[~~For discharges from a CAAP into a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards), the requirements of § 93.4c (relating to implementation of antidegradation requirements) apply.~~**

~~(b)~~] Each discharger shall prepare and implement a BMP plan that addresses:

(1) Solids and excess feed management and removal.

(2) Proper facility operation and maintenance.

(3) Nonnative species loss prevention.

(4) Facility personnel training.

(5) Removal, handling and disposal/utilization of bio-residual solids (sludge).

(**[e]B**) Permittees shall report any investigational/therapeutic drugs usage as follows:

(1) For investigational/new drugs, the permittee shall provide the Department with an oral notification within 7 days of initiating application of the drug, and a New Drug Usage Report shall be filed monthly.

(2) Changes in or increases in usage rates shall be reported to the Department through both oral notification and written report on the Drug Usage Report Form, quarterly.

([~~d~~]C) Products or chemicals that contain any carcinogenic ingredients are prohibited, except that limited use of those chemicals may be permitted provided that the permittee shall:

(1) Thoroughly investigate the use of alternative chemicals.

(2) Demonstrate that no suitable alternatives are available.

(3) Demonstrate through sampling or calculation that any carcinogen in the proposed chemical will not be detectable in the final effluent, using the [~~most sensitive~~] EPA-APPROVED analytic method [~~available~~] FOR WASTEWATER ANALYSIS WITH THE LOWEST PUBLISHED DETECTION LIMITS.

§ 92a.51. Schedules of compliance.

(a) With respect to an existing discharge that is not in compliance with the water quality standards and effluent limitations or standards in § 92a.44 or § 92a.12 (relating to establishing limitations, standards and other permit conditions; and treatment requirements), the applicant shall be required in the permit to take specific steps to remedy a violation of the standards and limitations in accordance with a legally applicable schedule of compliance, in the shortest, reasonable period of time, the period to be consistent with the Federal Act. Any schedule of compliance specified in the permit must require compliance with final enforceable effluent limitations as soon as practicable, but in no case longer than [~~3~~]5 years, unless [~~the EHB or any other~~]A court of competent jurisdiction issues an order allowing a longer time for compliance.

(b) If the period of time for compliance specified in subsection (a) exceeds 1 year, a schedule of compliance will be specified in the permit that will set forth interim requirements and the dates for their achievement. If the time necessary for completion of the interim requirement such as the construction of a treatment facility is more than 1 year and is not readily divided into stages for completion, interim dates will be specified for the submission of reports of progress towards completion of the interim requirement. THE TIME BETWEEN INTERIM DATES MAY NOT EXCEED 1 YEAR. For each NPDES permit schedule of compliance, interim dates and the final date for compliance must, to the extent practicable, fall on the last day of the months of March, June, September and December.

(c) Either before or up to 14 days following each interim date and the final date of compliance, the permittee shall provide the Department with written notice of the permittee's compliance or noncompliance with the interim or final requirement.

§ 92a.52. Variances.

Any new or amended Federal regulation enacted after November 18, 2000, which creates a variance to existing NPDES permitting requirements is not incorporated by reference.

§ 92a.53. Documentation of permit conditions.

The Department will prepare a fact sheet on the derivation of the effluent limitations or other conditions and the reasons for the conditions of the draft or final permit, or both. The fact sheet will include:

(1) A brief description of the type of facility or activity being permitted.

(2) The type and quantity of wastewater or pollutants evaluated in the permit.

(3) Documentation that the applicable effluent limitations and standards including a citation of same are considered in development of the draft permit.

(4) Documentation that applicable water quality standards will not be violated.

(5) A brief summary of the basis for the draft permit limitations and conditions including references to applicable statutory or regulatory provisions.

§ 92a.54. General permits.

(a) *Coverage and purpose.* The Department may issue a general permit, in lieu of issuing individual permits, for a clearly and specifically described category of point source discharges, if the point sources meet the following conditions:

(1) Involve the same, or substantially similar, types of operations.

(2) Discharge the same types of wastes.

(3) Require the same effluent limitations or operating conditions, or both.

(4) Require the same or similar monitoring.

(5) Do not discharge toxic or hazardous pollutants as defined in sections 307 and 311 of the Federal Act (33 U.S.C.A. §§ 1317 and 1321) or any other substance that—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 surface waters.

(6) Are more appropriately controlled under a general permit than under individual permits, in the opinion of the Department.

(7) Individually and cumulatively do not have the potential to **CAUSE OR CONTRIBUTE TO A VIOLATION OF AN APPLICABLE WATER QUALITY STANDARD ESTABLISHED UNDER CHAPTER 93 (RELATING TO WATER QUALITY STANDARDS) OR** cause significant adverse environmental impact.

(8) Do not discharge to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards).

(b) *Administration of general permits.* General permits may be issued, amended, suspended, revoked, reissued or terminated under this chapter. Issuance of a general permit does not exempt a person from compliance with this title. General permits have a fixed term not to exceed 5 years.

(c) *Department specification.* The Department may specify in the general permit that an eligible person who has submitted a timely and complete NOI is authorized to discharge in accordance with the terms of the permit under one of the following:

(1) IMMEDIATELY UPON SUBMISSION OF THE NOI.

([1]2) After a waiting period following receipt of the NOI by the Department as specified in the general permit.

([2]3) Upon receipt of notification of approval of coverage under a general permit from the Department.

(d) *Department notification.* The Department will, as applicable, notify a discharger that it is or is not covered by a general permit. A discharger so notified may request an individual permit.

(e) *Denial of coverage.* The Department will deny coverage under a general permit when one or more of the following conditions exist:

(1) The discharge, individually or in combination with other similar discharges, is or has the potential to be a contributor of pollution, as defined in the State Act, which is more appropriately controlled under an individual permit.

(2) The discharger is not, or will not be, in compliance with any one or more of the conditions of the general permit.

(3) The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, schedule of compliance or order issued by the Department.

(4) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source.

(5) Categorical point source effluent limitations are promulgated by the EPA for those point sources covered by the general permit.

(6) The discharge is not, or will not, result in compliance with an applicable effluent limitation or water quality standard.

(7) Other point sources at the facility require issuance of an individual permit, and issuance of both an individual and a general permit for the facility would constitute an undue administrative burden on the Department.

(8) The Department determines that the action is necessary for any other reason to ensure compliance with the Federal Act, the State Act or this title.

(9) The discharge would be to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93.

(f) *Requiring an individual permit.* The Department may revoke or terminate coverage under a general permit, and require the point source discharger to apply for and obtain an individual permit for any of the reasons in subsection (e). An interested person may petition the Department to take action under this subsection. Upon notification by the Department under this subsection that an individual permit is required for a point source, the discharger shall submit a complete NPDES application, in conformance with this chapter, within 90 days of receipt of the notification, unless the discharger is already in possession of a valid individual permit. Failure to submit the application within 90 days will result in automatic termination of coverage of the applicable point sources under the general permit. Timely submission of a complete application will result in continuation of coverage of the applicable point sources under the general permit, until the Department takes final action on the pending individual permit application.

(g) *Action of the Department.* Action of the Department denying coverage under a general permit under subsection (e), or requiring an individual permit under subsection (f), is not a final action of the Department until the discharger submits and the Department takes final action on an individual permit application.

(h) *Termination of general permit.* When an individual permit is issued for a point source that is covered under a general permit, the applicability of the general permit to that point source is automatically terminated on the effective date of the individual permit.

(i) *Coverage under general permit.* A point source excluded from a general permit solely because it already has an individual permit may submit an NOI under § 92a.23 (relating to NOI for coverage under an NPDES general permit). If the NOI is acceptable, the Department will revoke the individual permit and notify the source that it is covered under the general permit.

§ 92a.55. Disposal of pollutants into wells, into POTW or by land application.

The provisions of 40 CFR 122.50 (relating to disposal of pollutants into wells, into publicly owned treatment works or by land application) are incorporated by reference.

Subchapter D. MONITORING AND ANNUAL FEES

Sec.

92a.62. Annual fees.

§ 92a.61. Monitoring.

(a) The provisions of 40 CFR 122.48 (relating to requirements for recording and reporting of monitoring results (applicable to State programs, see 123.25)) are incorporated by reference.

(b) The Department may impose reasonable monitoring requirements on any discharge, including monitoring of the **SURFACE WATER** intake and discharge **[~~flow~~]** of a facility or activity, other operational parameters that may affect effluent quality, and of surface waters adjacent to or associated with the intake or discharge flow of a facility or activity. The Department may require submission of data related to the monitoring.

(c) Each person who discharges pollutants may be required to monitor and report all toxic, conventional, nonconventional and other pollutants in its discharge, at least once a year, and on a more frequent basis if required by a permit condition. The monitoring requirements will be specified in the permit.

(d) Except for stormwater discharges subject to the requirements of subsection (h), a discharge authorized by an NPDES permit **FOR A FACILITY** that is not a minor **[~~discharge~~] FACILITY** or contains toxic pollutants for which an effluent standard has been established by the Administrator under section 307(a) of the Federal Act (33 U.S.C.A. § 1317(a)) shall be monitored by the permittee for at least the following:

(1) Flow (in GPD **OR** MGD).

(2) Pollutants (either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) that are subject to abatement under the terms and conditions of the permit.

(3) Pollutants that the Department finds, on the basis of information available to it, could have an impact on the quality of this Commonwealth's waters or the quality of waters in other states.

(4) Pollutants specified by the Administrator in regulations issued under the Federal Act as subject to monitoring.

(5) Pollutants in addition to those in paragraphs (2)—(4) that the Administrator requests in writing to be monitored.

(e) Each effluent flow or pollutant required to be monitored under subsections (c) and (d) shall be monitored at intervals sufficiently frequent to yield data that reasonably characterize the nature of the discharge of the monitored effluent flow or pollutant. Variable effluent flows and pollutant levels shall be monitored at more frequent intervals than relatively constant effluent flows and pollutant levels that may be monitored at less frequent intervals.

(f) The permittee shall maintain records of the information resulting from any monitoring activities required of it in its NPDES permit as follows:

(1) Records of monitoring activities and results must include for all samples:

(i) The date, exact place and time of sampling.

(ii) The dates analyses were performed.

(iii) Who performed the analyses.

(iv) The analytical techniques/methods used.

(v) The results of the analyses.

(2) The permittee shall also be required to retain for a minimum of 3 years any records of monitoring activities and results including all original strip chart recordings for continuous monitoring instrumentation and calibration and maintenance records. This period of retention may be extended during the course of any unresolved litigation regarding the discharge of pollutants by the permittee or when requested by the Department or the Administrator.

(g) The permittee shall periodically report, at a frequency of at least once per year, using a format or process established by the Department, results obtained by a permittee pursuant to monitoring requirements. In addition to these results, the Department may require submission of other information regarding monitoring results it determines to be necessary.

(h) Requirements to report monitoring results from stormwater discharges associated with industrial activity, except those subject to an effluent limitation guideline or an NPDES general permit, will be established in a case-by-case basis with a frequency dependent on the nature and effect of the discharge.

(i) The monitoring requirements under this section must be consistent with any National monitoring, recording and reporting requirements specified by the Administrator in regulations issued under the Federal Act.

(j) The Department may require that the permittee perform additional sampling for limited periods for the purpose of TMDL development, or for other reasons that the Department determines are appropriate.

§ 92a.62. Annual fees.

(a) Permittees shall pay an annual fee to the **[~~Commonwealth~~]** **CLEAN WATER FUND**. The annual fee must be for the amount indicated in the following schedule and is due on each anniversary of the effective date of the permit. All flows listed in this section are **ANNUAL AVERAGE** design flows.

(b) Annual fees for individual NPDES permits for discharges of **[~~domestic~~]** **TREATED** sewage are:

SRSTP	$0
Small flow treatment facility	$0
Minor facility < 50,000 GPD	$250
Minor facility >= 50,000 GPD < 1 MGD	$500
Minor facility with CSO	$750
Major facility >= 1 MGD <5 MGD	$1,250
Major facility >= 5 MGD	$2,500
Major facility with CSO	$5,000

(c) Annual fees for individual NPDES permits for discharges of industrial waste are:

Minor facility not covered by an ELG	$500
Minor facility covered by an ELG	$1,500
Major facility < 250 MGD	$5,000
Major facility >= 250 MGD	$25,000
MINING ACTIVITY	**$0**
Stormwater	$1,000

(d) Annual fees for individual NPDES permits for other facilities or activities are:

CAFO	$0
CAAP	$0
MS4	$500
[~~Mining activity~~ $0]	

(e) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the EQB. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and contain recommendations to increase fees to eliminate the disparity, including recommendations for regulatory amendments to increase program fees.

(F) ANY FEDERAL OR STATE AGENCY OR INDEPENDENT STATE COMMISSION THAT PROVIDES FUNDING TO THE DEPARTMENT FOR THE IMPLEMENTATION OF THE NPDES PROGRAM THROUGH TERMS AND CONDITIONS OF A MUTUAL AGREEMENT MAY BE EXEMPT FROM THE FEES IN THIS SECTION.

Subchapter E. TRANSFER, MODIFICATION, REVOCATION AND REISSUANCE, TERMINATION OF PERMITS, REISSUANCE OF EXPIRING PERMITS AND CESSATION OF DISCHARGE

Sec.

§ 92a.71. Transfer of permits.

(a) The provisions of 40 CFR 122.61 (relating to transfer of permits (applicable to State programs, see 123.25)) are incorporated by reference.

(b) A new permittee shall be in compliance with existing Department issued permits, regulations, orders and schedules of compliance, or demonstrate that any noncompliance with the existing permits has been resolved by an appropriate compliance action or by the terms and conditions of the permit (including a compliance schedule set forth in the permit), consistent with § 92a.51 (relating to schedules of compliance) and other appropriate Department regulations.

§ 92a.72. Modification or revocation and reissuance of permits.

The provisions of 40 CFR 122.62 (relating to modification or revocation and reissuance of permits (applicable to State programs, see 123.25)) are incorporated by reference.

§ 92a.73. Minor modification of permits.

The provisions of 40 CFR 122.63 (relating to minor modification of permits) are incorporated by reference.

§ 92a.74. Termination of permits.

The provisions of 40 CFR 122.64 (relating to termination of permits (applicable to State programs, see 123.25)) are incorporated by reference.

§ 92a.75. Reissuance of expiring permits.

(a) A permittee who wishes to continue to discharge after the expiration date of its NPDES permit shall submit an application for reissuance of the permit at least 180 days prior to the expiration of the permit unless permission has been granted for a later date by the Department. The application fees specified in § 92a.[~~28~~]26 (relating to application fees) apply.

(b) Upon completing review of the application, the Department may [~~administratively extend a permit for a minor facility for a maximum of 5 years if, based on up-to-date information on the permittee's waste treatment practices and the nature, contents and frequency of the permittee's discharge, the Department determines that:~~

~~(1) The permittee is in compliance with existing Department-issued permits, regulations, orders and schedules of compliance, or that any noncompliance with an existing permit has been resolved by an appropriate compliance action.~~

~~(2) No changes in Department regulations have occurred since the permit was issued or reissued that would affect the effluent limitations or other terms and conditions of the existing permit.~~

~~(c) Alternatively, the Department may~~] reissue a permit if, based on up-to-date information on the permittee's waste**WATER** treatment practices and the nature, contents and frequency of the permittee's discharge, the Department determines that:

(1) The permittee is in compliance with all existing Department-issued permits, regulations, orders and schedules of compliance, or that any noncompliance with an existing permit has been resolved by an appropriate compliance action.

(2) The discharge is, or will be under a compliance schedule issued under § 92a.51 (relating to schedules of compliance) and other applicable regulations, consistent with the applicable water quality standards, effluent limitations or standards and other legally applicable requirements established under this title, including revisions or modifications of the standards, limitations and requirements that may have occurred during the term of the existing permit.

§ 92a.76. Cessation of discharge.

If a permittee intends to cease operations or cease a discharge for which a permit has been issued under this chapter, the permittee shall notify the Department in writing of its intent at least 90 days prior to the cessation of operations or the cessation of the discharge, unless permission has been granted for a later date by the Department. The 90-day notice is not required to cease mining activities and related discharges that are terminated in accordance with procedures for mine reclamation and bond release established in §§ 86.170—86.175 (relating to release of bonds) or §§ 77.241—77.243 (relating to release of bonds).

Subchapter F. PUBLIC PARTICIPATION

Sec.

92a.81. Public access to information.

92a.82. Public notice of permit application and draft permits.

92a.83. Public notice of public hearing.

92a.84. Public notice of general permits.

92a.85. Notice to other government agencies.

92a.86. Notice of issuance or final action on a permit.

92a.87. Notice of reissuance of permits.

92a.88. Notice of appeal.

§ 92a.81. Public access to information.

(a) NPDES forms and public comments will be available to the public for inspection and copying.

(b) Information relating to NPDES permits, not determined to be confidential under § 92a.8 (relating to confidentiality of information), may be inspected at the Department office processing the information. Copying facilities and services will be available for a reasonable fee, or other arrangements for copying may be made with the Department office.

§ 92a.82. Public notice of permit applications and draft permits.

(a) Public notice of every complete application for an NPDES permit will be published in the *Pennsylvania Bulletin*. The contents of public notice of applications for NPDES permits will include at least the following:

(1) The name and address, including county and municipality, of each applicant.

(2) The permit number and type of permit applied for.

(3) The stream name of the waterway to which each discharge is proposed.

(4) The address of the State or interstate agency premises at which interested persons may obtain further information, request a copy of the NPDES forms and related documents.

(b) A public notice of every new draft individual permit, or major amendment to an individual permit, will be published in the *Pennsylvania Bulletin*. This public notice will also be posted by the applicant near the entrance to the premises of the applicant, and at the facility or location where the discharge exists, if the facility or location is remote from the premises of the applicant. The contents of public notice for draft NPDES permits will include at least the following in addition to those specified in subsection (a):

(1) A brief description of each applicant's activities or operations that result in the discharge described in the application.

(2) The name and existing use protection classification of the receiving surface water under § 93.3 (relating to protected water uses) to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether the discharge is a new or an existing discharge.

(3) A statement of the tentative determination to issue or deny an NPDES permit for the discharge described in the application. If there is a tentative determination to issue a permit, the determination will include proposed effluent limitations for those effluents proposed to be limited, a proposed schedule of compliance including interim dates and requirements for meeting the proposed effluent limitations and a brief description of any proposed special conditions that will have a significant impact upon the discharge described in the application.

(4) The rate or frequency of the proposed discharge; if the discharge is continuous, the average daily flow in GPD or MGD.

(5) A brief description of the procedures for making final determinations, including the 30-day comment period required by subsection (d) and any other means by which interested persons may influence or comment upon those determinations.

(c) The provisions of 40 CFR 124.57(a) (relating to public notice) shall be followed when there is a Section 316(a) request for a thermal discharge.

(d) There will be a 30-day period following publication of notice under subsection (b) during which written comments may be submitted by interested persons before the Department makes its final determinations. Written comments submitted during the 30-day comment period will be retained by the Department and considered in making the final determinations. The period for comment may be extended at the discretion of the Department for one additional 15-day period. The Department will provide an opportunity for the applicant, any affected State, any affected interstate agency, the Administrator or any interested agency, person or group of persons to request or petition for a public hearing with respect to the application. The request or petition for public hearing filed within the 30-day period allowed for filing of written comments must indicate the interest of the party filing the request and the reasons why a hearing is warranted. A hearing will be held if there is a significant public interest, including the filing of requests or petitions for the hearing. Instances of doubt should be resolved in favor of holding the hearing. Any hearing brought under this subsection will be held in the geographical area of the proposed discharge or other appropriate area and may, as appropriate, consider related groups of permit applications.

(e) The Department will prepare and send to any person, upon request, following public notice of draft permit, a fact sheet with respect to the draft permit described in the public notice. The contents of the fact sheet will include at least the information contained in § 92a.53 (relating to documentation of permit conditions).

§ 92a.83. Public notice of public hearing.

Notice of a public hearing will be published in the *Pennsylvania Bulletin*, and in at least one newspaper of general circulation within the geographical area of the discharge and will be sent to all persons or government agencies that received a copy of the fact sheet for the draft permit. All of the notices of a public hearing will be published at least 30 days before the hearing. Notice of a public hearing will include at least the following:

(1) The name, address and phone number of the agency holding the public hearing.

(2) The name and address of each applicant whose application will be considered at the hearing.

(3) The name of the waterway to which each discharge is proposed and a short description of the location of each discharge on the waterway.

(4) A brief reference to the public notice published in the *Pennsylvania Bulletin* for each application, including identification number and date of issuance.

(5) Information regarding the time and location for the hearing.

(6) The purpose of the hearing.

(7) A concise statement of the issues raised by the persons requesting the hearing.

(8) The address and phone number of the premises at which interested persons may obtain further information, request a copy of each fact sheet prepared under 92a.53 (relating to documentation of permit conditions), and inspect and copy NPDES forms and related documents.

(9) A brief description of the nature of the hearing, including the rules and procedures to be followed.

§ 92a.84. Public notice of general permits.

(a) Public notice of every proposed general permit will be published in the *Pennsylvania Bulletin*. The contents of the public notice will include at least the following:

(1) The name, address and phone number of the agency issuing the public notice.

(2) A clear and specific description of the category of point source discharges eligible for coverage under the proposed general permit.

(3) A brief description of the reasons for the Department's determination that the category of point source discharges is eligible for coverage under a general permit in accordance with these standards.

(4) A brief description of the terms and conditions of the proposed general permit, including applicable effluent limitations, BMPs and special conditions.

(5) A brief description of the procedures for making the final determinations, and other means by which interested persons may influence or comment on those determinations.

(6) The address and phone number of the Commonwealth agency at which interested persons may obtain further information and a copy of the proposed general permit.

(7) The NOI fee for coverage under the general permit.

(b) There will be a 30-day period following publication of notice during which written comments may be submitted by interested persons before the Department makes its final determinations. Written comments submitted during the 30-day comment period will be retained by the Department and considered in making the final determinations. The period for comment may be extended at the discretion of the Department for one additional 15-day period. The Department will provide an opportunity for any interested person or group of persons, any affected State, any affected interstate agency, the Administrator or any interested agency, to request or petition for a public hearing with respect to the proposed general permit. The request or petition for public hearing, which must be filed within the 30-day period allowed for filing of written comments, shall indicate the interest of the party filing the request and the reasons why a hearing is warranted. A hearing will be held if there is a significant public interest, including the filing of requests or petitions for the hearing.

(c) Upon issuance of a general permit, the Department will place a notice in the *Pennsylvania Bulletin* of the availability of the general permit. The notice of availability will indicate **[~~whether it will provide~~]** one of the following:

(1) A NOI IS NOT REQUIRED FOR COVERAGE UNDER THE GENERAL PERMIT.

([~~1~~]2) Notice **WILL BE PUBLISHED** in the *Pennsylvania Bulletin* of each NOI under an applicable general permit, and of each approval for coverage under a general permit.

([~~2~~]3) Notice **WILL BE PUBLISHED IN THE *PENNSYLVANIA BULLETIN*** of every approval of coverage only.

§ 92a.85. Notice to other government agencies.

(A) THE PROVISIONS OF 40 CFR 124.59 (RELATING TO CONDITONS REQUESTED BY THE CORPS OF ENGINEERS AND OTHER GOVERNMENT AGENCIES (APPLICABLE TO STATE PROGRAMS, SEE 123.25)) ARE INCORPORATED BY REFERENCE.

(B) The Department will do the following:

(1) Provide a subscription to the *Pennsylvania Bulletin* for any other states whose waters may be affected by the issuance of an NPDES permit, to any interstate agency having water quality control authority over water that may be affected by the issuance of an NPDES permit, and to all Pennsylvania District Engineers of the Army Corps of Engineers.

(2) At the time of issuance of public notice under § 92a.82 (relating to public notice of permit application and draft permits), transmit to any other states, whose waters may be affected by the issuance of an NPDES permit, a copy of fact sheets prepared under § 92a.53 (relating to documentation of permit conditions). Upon request, the Department will provide the states with a copy of the application and a copy of the draft permit. Each affected state will be afforded an opportunity to submit written recommendations to the Department and the Administrator. The Department will consider these comments during preparation of the permit decision. If the Department decides not to incorporate any written recommendations thus received, it will provide a written explanation of its reasons for deciding not to accept any of the written recommendations.

(3) At the time of issuance of public notice under § 92a.82, transmit to any interstate agency having water quality control authority over waters that may be affected by the issuance of a permit a copy of fact sheets prepared under § 92a.53. Upon request, the Department will provide the interstate agency with a copy of the application and a copy of the draft permit. The interstate agency must have the same opportunity to submit recommendations and to receive explanations in paragraph (2).

§ 92a.86. Notice of issuance or final action on a permit.

Following the 30-day comment period described in § 92a.82(d) (relating to public notice of permit applications and draft permits), and any public hearing, on the permit application and draft permit, the Department will take action on the permit. Comments received during the comment period will be addressed and documented by the Department, and made available for public review. Final action will be published in the *Pennsylvania Bulletin.*

§ 92a.87. Notice of reissuance of permits.

Notice of reissuance of permits will be accomplished as specified in §§ 92a.81—92a.83, 92a.85 and 92a.86 for any draft individual permit. [~~Notice of administrative extensions will be accomplished under § 92a.82(a) (relating to public notice of permit applications and draft permits).~~]

§ 92a.88. Notice of appeal.

When the determination of the Department to issue or deny an NPDES permit is appealed to the EHB, notice of the appeal, and notice of the hearing date, if any, will be published in the *Pennsylvania Bulletin.* In addition, notice of the Department's final action, arrived at either through settlement or as the result of a decision of the EHB, will be published in the *Pennsylvania Bulletin.*

Subchapter G. PERMIT COORDINATION WITH THE ADMINISTRATOR

Sec.

§ 92a.91. NPDES forms.

The Department will transmit to the Administrator complete copies of all NPDES forms, draft and final permits and other documentation or information as agreed to by the Department and the Administrator. If the Administrator requests additional information, the Department may require the applicant to provide this additional information requested by the Administrator.

§ 92a.92. Decision on variances.

The provisions of 40 CFR 124.62(a)(3), (e)(1) and (f) (relating to decision on variances) are incorporated by reference.

§ 92a.93. Administrator's right to object to the issuance or modification of certain permits.

The Administrator has a right to review or object to issuance of certain permits. The scope of EPA review and the procedures for its exercise are described in a Memorandum of Agreement that was incorporated in the Program Description submitted to the EPA by the Department. A copy of the Memorandum of Agreement is on file with the Department and with the Administrator of EPA Region III.

§ 92a.94. Reports of violations.

The Department will prepare a quarterly report listing permittees who have violated final or interim requirements in their NPDES permits, stating the nature of the violation, describing any enforcement action that is proposed or has been taken, and giving a brief description, if appropriate, of any circumstances that explain the violation. A copy of the report will be forwarded on the last day of the months of February, May, August and November to the Administrator.

Subchapter H. CIVIL PENALTIES FOR VIOLATIONS OF NPDES PERMITS

Sec.

92a.102. Method of seeking civil penalty.

92a.103. Procedure for civil penalty assessments.

92a.104. Disbursement of funds pending resolution of appeal.

§ 92a.101. Applicability.

Sections 92a.102—92a.104 (relating to method of seeking civil penalty; procedure for civil penalty assessments; and disbursement of funds pending resolution of appeal) apply to civil penalty assessments by the Department under section 605(a) of the State Act (35 P. S. § 691.605(a)).

§ 92a.102. Method of seeking civil penalty.

The Department may do either one of the following:

(1) File a complaint for civil penalties before the EHB.

(2) Assess a civil penalty, after hearing under § 92a.103 (relating to procedure for civil penalty assessments).

§ 92a.103. Procedure for civil penalty assessments.

(a) The Department, if it assesses a civil penalty for a State Act violation, will serve a copy of the proposed civil penalty assessment on the alleged violator. Service will be by registered or certified mail, or by personal service. If the mail is tendered at the address in the permit, or at an address where the person is located, and delivery is refused, or mail is not collected, the requirements of this section will be deemed to have been complied with upon the tender.

(b) The person who has been served with a proposed assessment in accordance with subsection (a) has 30 days to request that the Department hold an informal hearing on the proposed assessment by serving the Department by registered or certified mail with the request. If no timely request for an informal hearing is submitted, the failure to submit a timely request will operate as a waiver of the opportunity for a hearing, and the proposed assessment will become a final assessment of the Department upon the expiration of the 30-day period unless the Department determines to hold a hearing on the proposed assessment under the procedures in subsection (c).

(c) If a timely request for hearing on the proposed assessment is received by the Department, the Department will assign a representative to hold an informal hearing regarding the assessment. The informal hearing will not be governed by requirements for formal adjudicatory hearings. The Department will establish a hearing date and notify the person requesting the hearing in accordance with the service procedures in subsection (a) and post notice of the time and place of the hearing at the Department office where the hearing is to be held at least 5 days prior to the hearing. The person requesting the hearing has the right to attend and participate in the hearing and to be represented by counsel. The Department will consider the relevant information

presented and either affirm, raise, lower or vacate the proposed assessment. The Department representative's decision will constitute the Department's final assessment.

(d) The person subject to a final assessment by the Department may contest the penalty assessment by filing a timely appeal with the EHB.

§ 92a.104. Disbursement of funds pending resolution of appeal.

(a) If the person subject to a final assessment fails to file a timely appeal to the EHB as provided in the Environmental Hearing Board Act (35 P. S. §§ 7511—7516), the penalty assessed is due and payable upon expiration of the time allowed to file an appeal. If the person fails to pay, the amount will be collected in the manner provided under section 605 of the State Act (35 P. S. § 691.605). The Department may preclude persons who fail to pay in full from obtaining or renewing any Department permits.

(b) If the final decision in the administrative and judicial review process results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the amount specified in the final decision to the Department within 30 days after the order is mailed to the person. If the person fails to pay the amount specified in the final decision, the amount will be collected in the manner provided by law. The Department may preclude persons who fail to pay in full from obtaining any new or reissued Department permits.

(c) Upon completion of the administrative and judicial review process, any funds collected under this subchapter will be deposited into the Clean Water Fund.

FEE REPORT FORM

Department of Environmental Protection
Agency

May 2010
Date

Thomas Starosta
Contact Person

(717) 787-4317
Phone Number

Program: Chapter 92a, ***NPDES Permitting, Monitoring, and Compliance***

NPDES Permit Fees

FEE COLLECTIONS:
Currently, the Department collects approximately $750,000 per year in NPDES permit fees based on approximately 10,000 permits. The new proposed fee structure is designed to recover close to $5 million per year.

Fees (Estimated)

	Prior Year	Current Year Projected	Future Year Projected	Future Year Projected	Future Year Projected	Future Year Projected
	FY-09	FY-10	FY-11	FY-12	FY-13	FY-14
Application Fee	**$550,000**	**$575,000**	**$ 690,000**	**$ 908,000**	**$ 926,000**	**$ 944,000**
Annual Fee	**$ 0**	**$ 0**	**$1,775,000**	**$3,374,000**	**$3,441,000**	**$3,511,000**
NOI Fee	**$ 96,000**	**$100,000**	**$ 200,000**[1]	**$ 400,000**[1]	**$ 408,000**	**$ 416,000**
Other[2]	**$ 72,000**	**$ 75,000**	**$ 210,000**	**$ 418,000**	**$ 427,000**	**$ 435,000**
TOTAL	**$718,000**	**$750,000**	**$2,875,000**	**$5,100,000**	**$5,202,000**	**$5,306,000**

[1] Anticipated increase in fees for general permits
[2] Permit amendments and transfers

FEE TITLE AND RATE:

Current NPDES Permit Fees:
Individual Permits: The application fee for essentially all individual NPDES permits is $500 per 5-year permit term. There are no annual fees.
General NPDES Permits: The fee for most general NPDES permits is $100 per 5-year term.

Proposed NPDES Permit Fees:
(Attached as Tables 1 and 2)

FUND FEE IS DEPOSITED INTO: The Clean Water Fund

FEE OBJECTIVE: The objective of the fee structure is to recover all of the costs to the Commonwealth of administering the NPDES program. The proposed fee structure will cover only the Commonwealth's share of the cost of administering the NPDES permit program (about 40% of the total cost, with the other 60% covered by federal grant).

FEE RELATED ACTIVITIES AND COSTS:

1. Issue NPDES Permits

Activities: Environmental engineers and engineering specialists write the NPDES permits, a demanding process that overlaps with all aspects of locating, planning, and operating wastewater treatment facilities. Based on the information provided on the applications, permitting staff evaluate federal and Commonwealth technology-based treatment requirements, and calculate water quality-based treatment requirements based on the nature of the receiving water. The treatment requirements serve as the specifications that the facility will be designed or redesigned to achieve. NPDES permits are highly structured and complex documents that cover many aspects of the operation and performance of treatment facilities. Ultimately, the NPDES permit, together with the Water Quality management permit issued under Chapter 91, assures that the facility is properly designed and operated to achieve water quality standards in the streams and rivers of this Commonwealth.

The duties of the permit writer are primarily technical, but also includes site visits, meetings with the applicant or permittee, coordination with compliance personnel and field staff, preparation of public notice, and coordination of public hearing. NPDES permits are issued by the DEP regional offices. Staff engineers in central office provide technical and policy support.

Level of effort: Approximately 56 full-time staff maintaining 5000 individual permits and 5000 general permits. According to the federal database ICIS,

Pennsylvania ranks in the top three in the number of NPDES permits issued.

Cost: $1,900,000

2. Compliance and Monitoring

Activities: Compliance Specialists initiate and track enforcement actions. They write NOVs (Notice of Violation), COAs (Consent Order Agreements), and legal documents in support of enforcement actions; enter enforcement action data in computer systems; meet with permittees; and serve as legal liaison between technical staff and regional counsel. Site visits may be required to ground truth resolutions or agreements. Water Quality Specialists are field staff that perform site inspections with the NPDES permit in hand. They verify compliance with permit conditions, which may include sampling of the effluent and affected surface waters, and review DMRs as required for facilities that need attention. These functions are performed almost exclusively at the regional offices.

Level of effort: Approximately 75 full-time staff.
Cost: $2,600,000

3. Administrative and Training

Activities: Department administrative staff support all aspects of permitting, monitoring, and compliance at the regional offices. Central office staff provide internal training on specialized topics (e.g. water quality modeling).

Level of effort: 12 full-time staff
Cost: $408,000

4. Other

Activities: Certain other specialized activities that directly support the NPDES permitting program are performed out of central office. These include Clean Water Act 316(a) (thermal variances) and 316(b) (design standards for cooling water intake structures) support and water quality standards support. NPDES Information Analysis staff track permit information, maintain the database, and provide required permit information to EPA. Regional biologists support site-specific field and habitat assessment studies.

Level of Effort: 11 full-time staff
Cost: $374,000

ANALYSIS:

The Department's policy is that the program fee structure should support the Commonwealth's cost of running the program. With that goal, two decisions were required:

1. How to distribute the fees amongst the various classes of point sources.

2. Whether to implement annual fees in addition to application fees, and how to distribute the total cost between annual fees and application fees.

In addition to internal deliberations, the Department investigated the NPDES permit fee structures of other states. While there was substantial variation in how states distribute fees, there was broad consensus that larger dischargers pay higher fees. In some cases, additional fee multipliers were assessed for discharges with a higher environmental impact, as measured by pollutant loading or compliance history. Industrial dischargers usually pay greater fees, but not markedly so in most cases. Industrial dischargers of toxic pollutants sometimes pay higher fees. All of the states investigated have annual fees associated with NPDES permits, and most have application fees. There is no consensus as to the magnitude of the annual fee relative to the application fee.

While various combinations of these factors were considered, the following principles were determined to be most appropriate in terms of fairness to the regulated community, the resources expended by the Department, and the relative environmental impacts of different classes of facilities:

- Permit fees for industrial wastewater will be higher than fees for treated sewage. Permits for industrial wastewater are more variable and require greater resources to issue and maintain. Toxic and persistent pollutants are more often present in greater quantities in industrial discharges, with increased potential for adverse environmental impact relative to the conventional pollutants discharged in treated sewage.
- Permit fees will be higher for facilities with higher flows. Higher flows generally track with higher pollutant loadings and increased potential adverse environmental impact.
- Application fees for a new facility will be twice that for a reissued permit, reflecting the substantially greater resources required to issue an NPDES permit for a new facility. Setting application fees higher also better compensates the Department for processing applications for new permits that are submitted on a contingency basis, and that may or may not result in a facility being built.
- Annual fees will be implemented, and be designed to cover the ongoing costs associated with maintaining the permit coverage, including the cost of compliance inspections, sampling, and reports. Integrating annual fees into the process spreads the cost of the permit over the 5-year permit cycle, and this should help the permittee manage costs. It avoids penalizing facilities that may suspend or terminate permit coverage during the cycle.
- Annual fees and permit reissuance fees, which occur every five years, should be the same if practicable. Setting the annual fee to the same value as the permit reissuance fee means that permittees generally can count on a uniform fee every year when producing the annual budget.

RECOMMENDATION AND COMMENT:

The proposed rulemaking provides for a general review of the permit fee structure every three years, to assure that the fees continue to cover the cost of maintaining the program.

Table 1. Summary of NPDES Application Fees

Applications fees for individual NPDES permits for treated sewage are:

SRSTP	$100 for new; $100 for reissuance.
Small flow treatment facility	$250 for new; $250 for reissuance
Minor facility < 50,000 GPD	$500 for new; $250 for reissuance
Minor facility ≥ 50,000 GPD < 1 MGD	$1,000 for new; $500 for reissuance
Minor facility with CSO	$1,500 for new; $750 for reissuance
Major facility ≥ 1 MGD < 5 MGD	$2,500 for new; $1,250 for reissuance
Major facility ≥ 5 MGD	$5,000 for new; $2,500 for reissuance
Major facility with CSO	$10,000 for new; $5,000 for reissuance

Applications fees for individual NPDES permits for industrial waste are:

Minor facility not covered by an ELG	$1,000 for new; $500 for reissuance
Minor facility covered by an ELG	$3,000 for new; $1,500 for reissuance
Major facility < 250 MGD	$10,000 for new; $5,000 for reissuance
Major facility ≥ 250 MGD	$50,000 for new; $25,000 for reissuance
Mining activity	$1,000 for new; $500 for reissuance
Stormwater	$2,000 for new; $1,000 for reissuance

Application fees for individual NPDES permits for other facilities or activities are:

CAFO	$1,500 for new; $750 for reissuance
CAAP	$1,500 for new; $750 for reissuance
MS4	$5,000 for new; $2,500 for reissuance

Application fees for transfers of individual permits are:

SRSTP	$50
Small flow treatment facility	$100
Other domestic wastewater	$200
Industrial waste	$500

Application fees for amendments to individual permits are:

Amendment initiated by Department	No charge
Minor amendment	$200
Major amendment	Same as reissuance permit fee

Table 2. Summary of NPDES Annual Fees

Annual fees for individual NPDES permits for discharges of domestic sewage are:

SRSTP	$0
Small flow treatment facility	$0
Minor facility < 50,000 GPD	$250
Minor facility ≥ 50,000 GPD < 1 MGD	$500
Minor facility with CSO	$750
Major facility ≥ 1 MGD <5 MGD	$1,250
Major facility ≥ 5 MGD	$2,500
Major facility with CSO	$5,000

Annual fees for individual NPDES permits for discharges of industrial waste are:

Minor facility not covered by an ELG	$500
Minor facility covered by an ELG	$1,500
Major facility < 250 MGD	$5,000
Major facility ≥ 250 MGD	$25,000
Mining activity	$0
Stormwater	$1,000

Annual fees for individual NPDES permits for other facilities or activities are:

CAFO	$0
CAAP	$0
MS4	$500

NOTES:

AEU	Animal Equivalent Unit
CAAP	Concentrated Aquatic Animal Production
CAFO	Concentrated Animal Feeding Operation.
CSO	Combined Sewer Overflow
GPD	Gallons per Day
MGD	Million Gallons per Day
MS4	Municipal Separate Storm Sewer System
SRSTP	Single-residence Sewage Treatment plant

25 Pa Code Chapter 92a

National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring, and Compliance

Comment and Response Document

This document presents comments submitted in regard to the Environmental Quality Board's (EQB) proposed rulemaking, Chapter 92a, *National Pollutant Discharge Elimination System Permitting, Monitoring, and Compliance*, and the Department of Environmental Protection (Department) responses to those comments. The EQB approved publication of the proposed rulemaking at its meeting on November 17, 2009. The proposed rulemaking was published in the *Pa. Bulletin* on February 13, 2010 (40 Pa. Bull. 837). Public comments were accepted until the comment period closed on March 15, 2010.

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The applicable commentators are listed in parentheses following each comment.

GENERAL COMMENTS

PURPOSE AND REORGANIZATION OF THE REGULATION

1. Comment

Although the intent is to reorganize the Chapter consistent with the equivalent Federal regulation (40 CFR Part 122), it is difficult to understand how the proposed regulation mirrors federal regulation. There is no cross-walk table, and it is not clear which federal regulations are not incorporated by reference. There should be more information in the preamble to the final rulemaking. (11) (16) (27)

Department Response

Some materials are not routinely included in the rulemaking package in order to keep the rulemaking package manageable, but are available upon request. This includes the cross-walk table, which is presented at the end of this document. Any provision contained in 40 CFR Part 122 that is not specifically called out in Chapter 92a is not incorporated by reference. The Preamble to the final rulemaking has been updated as required based on comments received.

2. Comment

The role of EPA in approving these regulations is not described. EPA must approve these regulations as per 40 CFR § 123.62. (30) (32) (34)

Department Response

The preamble states that EPA must approve the final regulation as meeting the requirements of the Federal Clean Water Act. EPA has reviewed the proposed regulation and has submitted comments during the public comment period. These comments are contained herein.

3. Comment

The Department is already overwhelmed and environmental regulations are becoming more stringent. Benefits from streamlining the regulation may only be realized after the 5-year cycle has passed. During this critical period of budget and staffing cuts, the impacts of this proposed regulation to the Department and its customers must be carefully considered. (27)

Department Response

There may be some temporary disruption involved in the promulgation of any new or completely revised regulation, and these factors have been carefully considered. But the Department believes that this streamlined regulation will assist both the Department and the regulated community going forward, even if the impact is not immediate.

4. Comment

We agree with some commentators that several descriptions of proposed changes are missing from the Preamble. For the final-form regulation's Preamble, the EQB should describe each section of the final-form regulation. (42)

Department Response

The Preamble has been substantially modified and expanded to address the issues that have been raised in public comment, and this comment and response document addresses every issue raised. Describing each section of the final regulation, even those which are not substantively changed, and those which do not contain any different or more stringent requirements, would set a standard that is not appropriate for the rulemaking process.

NPDES PERMIT FEES

5. Comment

The proposed NPDES permit fees are excessive and burdensome. They would shift the financial burden from the Commonwealth to municipalities and local authorities, and/or increase the cost to industries, at a time when the economy is struggling. The Independent Regulatory Review Commission (IRRC) noted that several commentators supported this comment. (1) (2) (3) (4) (7) (15) (19) (26) (29) (30) (32) (34) (35) (40) (42)

Department Response

The Department understands and recognizes the financial impact of fee increases on permittees, especially in challenging economic times. The new fee structure is advanced as part of a broader shift in policy in the Commonwealth to move towards self-sustaining programs, and to charge fees to cover the cost of operating those essential programs. Up until now, the taxpayers in this Commonwealth have subsidized the NPDES program heavily, but this is not fair to the taxpayer. The regulated community that benefits from the privilege of using the resources of the Commonwealth should cover more of the cost to sustain that privilege. The new fees, substantial as they are compared to the present fees, will cover only 40% of the true cost of the administering the program. The federal government still will cover the other 60%. Also, these fees are very competitive with what is charged by other states. As an example, for a 1 million gallon per day (MGD) sewage treatment plant, the annual fee will be $1,250 per year ($3.42 per day) in Pennsylvania. It is $5,250 in Ohio, $7,500 in New York, $15,000 in Illinois, between $3,000 and $5,500 in Michigan, and between $3,850 and $4,350 in Virginia.

6. Comment

The proposed NPDES permit fees increases can have a detrimental effect on customers who are already seeing rate increases due to mandated improvements in the treatment process. It is imperative to reduce costs in times like this with many business and residential customers struggling to pay utility bills. (14)

Department Response

See the response to the previous comment. The Department regrets the additional financial burden that will be placed on the regulated community, although these fees are still a small part of the cost of operating a wastewater treatment facility.

7. Comment

These increased costs would be borne by the ratepayers in addition to the costs necessary to comply with the Chesapeake Bay Strategy. Furthermore, communities in the Chesapeake Bay watershed face the prospect of a TMDL from the U.S. Environmental Protection Agency. Municipalities and authorities in the region have already been hit hard by Chesapeake Bay related costs and the proposed increased fees would be an added burden. (41)

Department Response

See the response to the previous comments. The ability of the Chesapeake Bay to assimilate nutrients has been exceeded, which has resulted in the need for more stringent limits for nutrients. This is part of a larger trend, whereas the ability of Pennsylvania's rivers and streams to accept pollutants is reaching its limit in many areas. More pollutants are having to be removed through expensive treatment, and less pollutants are able to be discharged. This trend is ongoing and unavoidable, because rivers and streams are of a constant size and the mass burden of pollutants continues to increase. As costs for treatment and point source discharges to rivers and stream increases, other options involving source reduction and

nondischarge alternatives begin to become more feasible. We can only recognize the challenge and prepare for it.

8. Comment

The citizens of the Commonwealth are the primary beneficiaries of the NPDES program, so the program should continue to be funded by general tax fund revenues. (11) (15) (16) (27) (40)

Department Response

The Department disagrees. The citizens of the Commonwealth generally benefit from point source discharges of treated wastewater, but not all do, and not all in the same measure. Nondischarge alternatives are becoming increasingly feasible for treated sewage, and the taxpayer should not subsidize industrial operations. The regulated community that benefits from the privilege of using the resources of the Commonwealth should cover the cost to sustain that privilege. The new fees, substantial as they are compared to the present fees, will still be heavily subsidized by the federal government.

9. Comment

The Department has no legal authority to impose fees for permits other than that provided for in Section 6 of the Clean Streams Law, which allows for "reasonable filing fees." This might include application fees, but not annual fees. The Department cannot reasonably charge for compliance inspections and other ongoing activities that are not related to permit application review and issuance. Provide the legal citation and basis for the fees. The IRRC noted that several commentators supported this comment. (4) (5) (9) (11) (15) (16) (22) (27) (30) (32) (34) (42)

Department Response

Section 6 of the Clean Streams Law provides authority for the Department to charge fees for applications filed and for permits issued. More specifically, the Department is ". . . . authorized to charge and collect from persons and municipalities in accordance with its rules and regulations, reasonable filing fees for applications filed and for permits issued." 35 P.S. § 691.6. (emphasis added). Clearly, the Department is authorized to assess fees for permits issued as well as for permit applications, not just applications as some commentators asserted. The annual fees are fees relating to permits which have been issued.

Moreover, Section 1920-A(b). of the Administrative Code authorizes the Environmental Quality Board to ". . . formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department'"

The Department believes that the fees are reasonable and prudent. The fees are significantly lower than those of some neighboring states. See response to comment 5

10. Comment

Are these permit fees related to the cost of providing service, or are they a consequence of budgetary cutbacks to the Department? (36) (40)

Department Response

These fees are related to the cost of providing service. The Fee Report Form (attached) details how the fees were developed, and what costs they are designed to cover.

11. Comment

The preamble does not explain how the proposed fees are related to services rendered by the Department to permittees. The Fee Report Form or other detailed cost information is unavailable or does not clearly establish how the fees were developed. If the fees are not related to services rendered, but instead are intended to cover the Department's general expenses, they are taxes instead of fees. The IRRC noted that several commentators supported this comment. (4) (5) (9) (11) (16) (22) (27) (40) (42)

Department Response

These fees are related to the cost of providing service. The Fee Report Form (attached) details how the fees were developed, and what costs they are designed to cover. The Fee Report Form is not routinely included in the rulemaking package in order to keep the rulemaking package manageable, but is available upon request.

12. Comment

The Department's Fee Report Form (which was not included in the Preamble, nor instructions on how to obtain it) shows that some 56 full-time regional and central office staff are engaged in NPDES permit review and issuance. It also mentions that some 5,000 individual NPDES permits and 5,000 general permit coverages are issued annually. The Wastewater Program Performance Measures portion of the Department's website actually states that: "In 2007, regional staff issued 769 new or renewed individual NPDES Permits for industrial and sewage facilities; 773 new or renewed authorizations for coverage under General NPDES Permits; 457 WQM permits for new or modified industrial waste and sewage collection and treatment facilities; and 183 authorizations for coverage under WQM General Permits. These totals include amendments to permits and transfers of permits from one operator to another." The Department's analysis to support the proposed application fee schedule does not seem to reflect its own reported data. (11) (27)

Department Response

The Fee Report Form states that the Department maintains about 5,000 individual NPDES permits and 5,000 general permits. Those permits are reissued once every 5 years, so the 2007 numbers that the commentator cites generally are consistent with the overall population of permits. (Multiply the 2007 website numbers for NPDES permits by five, and correct for new permits issued since 2007.)

13. Comment

The proposal provides for a review of the NPDES fee structure every three years. Can we assume that NPDES fees will increase every three years? If so, by what percent? (3)

Department Response

An internal review of the fees would be required every three years to assure that the fee structure produces enough income to cover the cost to the Commonwealth of administering the NPDES program. There is no set percentage increase, as any proposed change to fees would be the result of an analysis comparing fee income to the cost to the Commonwealth. The Department's staff complement and the duties that they perform are a matter of public record, as are the data and analyses performed to support any new or increased fees applicable to the regulated community.

14. Comment

Doubling the fees for a major facility based solely on the existence of a CSO (Combined Sewer Overflow) is tantamount to a CSO penalty. Imposing additional fees on ALCOSAN

will divert limited funds away from improving the CSOs and complying with a consent decree worked out in extensive discussions with DEP and EPA. (35)

Department Response

The intent is not to penalize facilities with CSOs, but they do require more effort and cost on the part of the Department to issue and maintain those permits. A major facility with a CSO would pay an annual fee of $5,000 in Pennsylvania. That annual fee would be $5,200 to $62,000 in Ohio, and $15,000 to $37,500 in New York. NPDES permit fees are unrelated to other costs that may be necessary to support the commentator's operation.

15. Comment

DELCORA is a CSO community. The new application fee will be $5,000 and an annual fee of $5,000. This equates to $25,000-30,000 per permit cycle as opposed to the current $500 fee. This is a significant change. (28)

Department Response

The change is significant but justified. Facilities with CSOs require more effort and cost on the part of the Department to issue and maintain those permits. A major facility with a CSO would pay an annual fee of $5,000 in Pennsylvania. That annual fee would be $5,200 to $62,000 in Ohio, and $15,000 to $37,500 in New York. The total cost for a 5-year permit term is commensurately higher in those states.

16. Comment

Any fee restructuring should be phased in, or coordinated with restructuring of user fees. (19) (36)

Department Response

The rulemaking process provides adequate notice (1+ year) of fee increases.

17. Comment

The effect of the proposed fee structure is, or may be, to charge permittees twice in the final year of the permit, one annual fee and one fee for permit reissuance. (4) (9) (11) (16) (27)

Department Response

The permittee pays only the reissuance fee in the final year of the permit. It is paid when the permittee submits their permit application for a reissued permit.

18. Comment

Greater fees should not be charged for larger facilities, because fewer large facilities are less costly to regulate as compared to many smaller facilities. The fee structure would reduce the incentive to consolidate or regionalize facilities and discharges. (15)

Department Response

Larger facilities should be charged higher fees because they do require more effort and cost on the part of the Department to issue and maintain those permits compared to smaller facilities. They also have a greater environmental impact, and consume more of the available resource (the capacity of Pennsylvania's rivers and streams to assimilate pollutants). When viewed on a MGD basis or on a per day basis, the fees are very modest and can easily and affordably be spread over a customer base. Based on an examination of permit fees in other states, other states also charge higher fees for larger facilities. The Department agrees, however, that it would be inappropriate to reduce the incentive to consolidate or regionalize facilities and discharges. The permit fee structure will not reduce this incentive, because fees for one larger facility will still generally be less expensive than fees for several smaller

facilities. As an example, the annual fee for a 6-MGD sewage treatment plant is $2,500. The annual fee for six 1-MGD facilities would be six times $1,250 or $7,500.

19. Comment

Regarding the proposed annual fees, the 98 enforcement staff listed in the Fee Report Form can only do so many inspections, report reviews, facility sampling and evaluations, etc., so in reality only a portion of the permitted NPDES dischargers get this personalized attention on an annual basis. Therefore, the vast majority of permitted discharges will see no direct, beneficial return from their annual fee. (11) (16) (27)

Department Response

The Department agrees that not all facilities will be inspected each year, but this does not mean that some or many facilities will see no direct benefit. Facilities are inspected at an established frequency, with larger facilities generally meriting more frequent inspections that require greater effort. Larger facilities also will pay greater fees to cover the proportionately higher frequency of inspections, and the greater effort required. This is as it should be. The Department proposes fees to cover the Commonwealth's share of the cost of all 98 enforcement staff, no more and no less.

20. Comment

Why should a permittee whose permit has been administratively extended have to pay any sort of annual fee? (11) (27)

Department Response

The provisions of proposed Section 92a.75(b) relating to administrative extensions have been deleted from the final rule. Accordingly, there are no administrative extensions to which the fees may be applied.

21. Comment

ARIPPA suggests that the proposed regulations and/or preamble clearly confirm that Application/Reissuance fees are paid only at time of initial application and every five years thereafter. ARIPPA is opposed to any proposal that would require such fees to be paid annually. (40)

Department Response

Application/reissuance fees are paid every 5 years. Annual fees are paid in each of the intervening 4 years.

22. Comment

With such a dramatic change to the fee structure, we suggest that the 3-year review cycle incorporate stakeholders, including industry, to help provide oversight and ensure transparency of services and costs. (13)

Department Response

This is already the policy of the Department, through the Water Resources Advisory Committee and other advisory groups. The Fee Report Form provides the basis for the fees, and describes what costs and services that the fee structure is intended to cover. The rulemaking process provides for public notice and transparency.

23. Comment

Our township opposes the proposed MS4 fee increases, since this will only take funds away from implementation, and/or the program is ineffectual. (23) (29)

Department Response

The Department understands the challenges that municipalities, especially smaller municipalities, face in trying to implement the Municipal Separate Storm Sewer System (MS4) program. With adequate and stable funding provided by the fee structure, the Department will be able to better assist municipalities meet their obligations through stable and qualified staffing in the MS4 program.

24. Comment

We support the proposed fee structure, as it will properly internalize the costs of administering the NPDES program, and institute fees commensurate with the volume of wastewater discharge. The IRRC noted that the commentator submitted this comment. (20) (42)

Department Response

The Board appreciates the comment.

25. Comment

Increasing the fees to do business in the Commonwealth is counter-productive to further business development and unwarranted, in light of the significant contributions already made to the Commonwealth from the coal industry. (26)

Department Response

The Department recognizes the significant contributions of the coal industry in this Commonwealth. Many industries make significant contributions in Pennsylvania. In a self-sustaining program, everybody should pay their fair share. The NPDES permit fees are still only a minor cost element and generally lower than other states charge, so there is no disincentive to industry. For example, a major industrial facility will pay an annual fee of $5,000 in Pennsylvania. The same facility would pay an annual fee of between $6,000 and $16,400 in Ohio, between $30,000 and $50,000 both in New York and Illinois, $8,700 in Michigan, and $4,800 in Virginia. Note that mining activities in Pennsylvania will still only pay a small application fee, and no annual fee, because the Department plans to incorporate the cost of the NPDES program as it applies to mining activities into the mining permit.

26. Comment

First, to support any such fee increase, DEP should come forward with complete program cost information, explaining the amount of time and resources required for review of individual permit applications, including the steps considered to control those costs. Generalized numbers are not sufficient to justify a significant permit fee increase, or to demonstrate that the proposed fee increases and additions are "reasonable." Second, the regulated community that bears such program costs will reasonably expect the program will perform in a responsive manner, delivering timely actions on applications. Very simply, almost half of the funds that DEP needs to run the state NPDES program are now going to be coming from private, not public monies. Regulated dischargers are already doing most of the work and paying substantive quantities of money to administer and run their NPDES programs. The initial perception of these fee increases is that PA is simply trying to make up for a budgetary shortfall, and these fee increases will have no impact or improvement on the environment, nor any improvement on permit review and approval. So the regulated industries are asking for efficiencies and appropriate performance from DEP for these significant fee increases. (33)

Department Response

The Fee Report Form (attached) provides the details of the costs and services that the fee structure is intended to cover. These costs and services are all directly related to the implementation of the NPDES program. The change in policy towards a self-sustaining program is part of a Commonwealth-wide effort to relieve the taxpayer of inappropriate or unnecessary financial burdens. Funding to the Department is not being increased, but instead the regulated community is paying more of the true cost of the service instead of funding being provided through the Commonwealth's General Fund. Regarding improved service, the Department acknowledges the challenge of providing adequate service with the limited resources allocated, and we plan to do better when provided with stable and adequate financing to support a stable and qualified staff. The fee structure, however, is not designed to support any increase in staff, so we do not anticipate an immediate improvement in service, but more of a gradual improvement in service as the program benefits from stable support. Stable support for the program will help improve efficiency, and efforts are underway to improve the efficiency of the permit writing process, and also the Discharge Monitoring Report (DMR) review function. Regarding the proportion of funding that comes from public and private sources, it is not clear why any financing should come from public sources for industrial facilities. Industries generally cover their own costs of doing business, and this is as it should be.

27. Comment

The fee structure has no rational basis, and should be based on the CPI or COLA indices. ARIPPA suggests that the Department should be required to submit any fees or increases to fees to an independent time/labor review body that would equitably and openly determine the fairness of such charges. (40)

Department Response

All of the applicable requirements for a fee increase have been achieved and documented. The fees increases have no relationship to the CPI or COLA indices, but instead are the result of a change in policy towards a self-sustaining program as part of a Commonwealth-wide effort to relieve the taxpayer of inappropriate and unnecessary financial burdens. The commentator may review the basis for the fees in the Fee Report Form (attached). Since the fees cover only salaries of staff that directly support the program, it is unclear how there would be any question as to the fairness of the fees.

28. Comment

Will we be charged fees as a major facility, or as a facility subject to an ELG (Effluent Limitation Guideline)? (3)

Department Response

A facility that is classified as a major industrial facility would pay the fee for a major industrial facility as long as the facility continues to be classified as a major facility. Only minor facilities are classified based on whether an ELG applies or not.

29. Comment

If we pay one fee for our discharge of treated wastewater, would we have to pay another fee for our stormwater discharge? (3)

Department Response

Facilities that pay one fee for their discharge of treated wastewater would not pay a separate fee for their stormwater discharge. The proposed fee for stormwater discharges would apply only to facilities that have an individual NPDES permit covering one or more stormwater discharges, with no discharge of treated wastewater. (This would be an unusual situation,

since most standalone stormwater discharges would be covered under a general NPDES permit, rather than an individual NPDES permit.)

30. Comment

Sections 92a.28 and 92a.62 have been revised such that agencies of the Commonwealth would no longer be exempt from NPDES permit fees. PennDOT requests a specific exclusion for agencies of the Commonwealth from the need to pay NPDES permit fees (language is suggested). Other programs have such exemptions. The IRRC noted this comment. (18) (42)

Department Response

Accepted in part. There is no existing provision in Chapter 92 or Chapter 91, *General Provisions,* that provides an exclusion from NPDES permit fees for agencies of the Commonwealth. (Chapter 91 does provide an exclusion for agencies of the Commonwealth from Water Quality Management permit fees, which are separate and distinct from NPDES fees.) At this time, and as a matter of policy, the Department does not charge NPDES fees to agencies of the Commonwealth, and the proposed Chapter 92a does not change that policy. However, note that there is a change to the regulation at § 92a.26 and § 92a.62 in response to this comment, that provides for a possible NPDES fee exemption for any federal or state agency or independent state commission that provides funding to the Department for the implementation of the NPDES program. Such agencies or commissions should not have to pay for the same service twice.

31. Comment

The Department has long been subsidized as a part of the administration cost burden, paid through normal budgetary channels for the 'administration' of this program. Exactly what are PADEP staff supposed to do with the 'normal' salary they are paid daily other then monitor or administer the programs they were hired to monitor and administrate? The public can't be expected to make rational decisions on environmental activity if the expense is diverted away from the cost of same. These proposed regulations appear therefore to be "a sleight of hand" effort to disguise the true cost of questionable regulatory administrative/ bureaucratic activity though hiding its economic impact from the normal budgeting process external to the legislature decision making, whereby the public will be 'given' what is good for them even if it has no impact what so ever on their lives other then expanded expense. What is the need to require more funds acquired through administrative fiat vice legislative action [*sic*] when the follow on 'Compliance Costs' require no new personnel, skills, or certification? ARIPPA must question exactly where $5 million is spent by PADEP currently monitoring this program. (40)

Department Response

An NPDES permit, produced to meet the requirements of applicable state and federal statutes and regulations, is required for any discharge of pollutants to rivers and streams. The NPDES program at the Department currently is funded primarily through taxpayer dollars, both federal and state. The new fee structure is part of a policy change where the regulated community that benefits from the privilege of using the resources of the Commonwealth covers more of the cost to sustain that privilege. The new fees, substantial as they are compared to the present fees, will cover only 40% of the true cost of the administering the program. The federal government still will cover the other 60%. Every dollar collected in fees is to be targeted towards the salaries of the staff that directly support the NPDES program. See the Fee Report Form (attached) for details. Some of the remaining points that the commentator makes are unclear.

32. Comment

We are unable to understand the relevance of this language in the Preamble: *The artificially low fees that have been charged have been increasingly at odds with the Department's emphasis on Pollution Prevention and nondischarge alternatives. The proposed fee structure will better align the revenue stream with the true cost of point source discharges to surface waters, from both management and environmental standpoints.* (16)

Department Response

The relevance relates to the fact that the NPDES program, which regulates point source discharges of treated wastewater to surface waters, is not the only option for effective management of waste produced by people and industry. It is in fact one of the less appropriate options. It would be far better to produce less waste to begin with, if feasible. The principles of Pollution Prevention target source reduction in order to reduce the overall burden and cost of waste disposal. Municipalities and industries that manage Pollution Prevention well have reaped the benefits in terms of reduced costs. For waste that must be disposed, nondischarge alternatives potentially can be a more sustainable option long-term. By subsidizing the NPDES point source disposal option with taxpayer dollars, the cost/benefit comparison between the various options (source reduction, nondischarge alternatives, and point source disposal) are distorted because one option is artificially subsidized. The NPDES program, originally designed to gradually phase out point source discharges to rivers and streams, has generally had the opposite effect. The point source discharge option is the less expensive option partially because it is the subsidized option. However, since the rivers and streams of Pennsylvania are reaching their capacity to assimilate pollutants in many areas, the cost of the point source option is likely to continue to increase. The other options will gradually become more cost-effective going forward.

33. Comment

We recommend that the EQB provide with the final-form regulation the fully detailed calculation of each fee to establish that the fees are reasonable. (42)

Department Response

The Fee Report Form (attached) provides the information required to support the increased fees. It also contains a discussion of the manner in which the fees were distributed amongst the various categories of the regulated community. The information provided establishes that the total amount of funding required (about $5 million per year) is the same as the target fee income, such that the overall fee structure has been established as reasonable. However, the commentator appears to request the specific basis for each fee. The Department does not have the systems in place to track effort by the hour or by the facility, so we have generally relied upon our experience to estimate the relative cost impact of the various categories of facilities or activities. In addition, the NPDES fee structures of other comparable states were examined and used to help develop the new fee structure. Although there is considerable variation in some factors, there also is general agreement in others, especially that larger facilities cost more to permit and manage than smaller facilities. Given that detailed, hourly data are not available, the only other option would be to charge all facilities and activities equally, and that would not be reasonable.

GENERAL – TREATMENT STANDARDS

34. Comment

There were no publications or scientific studies referenced to provide the technical, water quality basis for these changes related to stricter controls for fats, oil and grease, turbidity,

color, fecal coliform, seasonal multipliers, secondary treatment, tertiary treatment, and industrial waste discharges. (24)

Department Response

The Department relies primarily on real-world experience, and how that experience relates to the goals and requirements of the program, when proposing new or changed regulations. An additional consideration is minimizing cost to both the regulated community and the Commonwealth. For treatment requirements, it is important to consider the feasibility and cost of the requirements, and the Department relies on published studies to the extent that they are helpful in evaluating feasibility and cost. Since the only treatment requirements contained in the final-form regulation already are routinely achieved by the regulated community, no additional studies or projections are required.

SECONDARY TREATMENT STANDARD

35. Comment

Contrary to what is stated in the preamble, requiring all sewage treatment plants to meet the Secondary Treatment Standard (STS) will be costly and unnecessary, with little or no environmental benefit. The Department has arbitrarily decided to drop key "variance" provisions to EPA's Secondary Treatment regulation, 40 CFR Part 133 that allow for modification of effluent requirements based on: a) systems with combined sewers; b) systems with certain industrial waste loadings; c) systems using waste stabilization ponds; d) systems with less concentrated influent wastewater; and (e) treatment equivalent to secondary treatment. There is inadequate documentation of the basis for this requirement, and/or no legal, technical or economic analysis has been performed. The exemptions and adjustments provided for in 40 CFR Part 133 related to relaxed limits for BOD and TSS continue to be necessary and appropriate. (4) (5) (9) (11) (12) (16) (22) (27) (30) (32) (33) (34) (36) (42)

Department Response

Accepted in large part. The Department has determined that these provisions for adjustment of BOD and TSS limits have extremely limited applicability in this Commonwealth, and we note that the commentators have not claimed that any individual facility requires these adjustments to meet their effluent limits routinely. However, the final regulation at § 92a.47 has been modified to provide that, for any facility or activity that currently has relaxed limits for BOD or TSS, the effluent limits will remain in effect until such time as the permittee proposes an hydraulic expansion of their facility. At that time, the expanded facility should be designed to meet the normal limits for BOD and TSS. This is already the trend in wastewater treatment plant design for new and expanded facilities. In addition, the federal provisions that provide for exemptions from the requirement for 85% efficiency in removal of BOD and TSS for CSO systems and separate sanitary sewer systems have been added in full to the final regulation.

36. Comment

The exemptions and adjustments provided for in 40 CFR Part 133 related to relaxed limits for BOD and TSS continue to be appropriate for the following reasons:

- Eliminating them creates a disincentive for POTWs to accept industrial wastewater, which will result in industries having to build their own expensive treatment, and the Department having to permit more facilities.
- POTWs accepting industrial wastewater normally meet secondary limits, but are at higher risk of an upset, and the adjusted limits provide a margin of safety from liability. (21)

Department Response
See the response to the previous comment.

37. Comment
What is the basis and purpose for the requirement to include "significant biological treatment" as part of the STS? Under some conditions, some treatment facilities could find it hard to meet 65% removal through biological treatment. Technology exists to meet secondary limits without the biological component, allowing sewage systems to treat and discharge SSOs and possibly avoid construction of storage and added conveyance. A requirement based upon "significant biological treatment" should not be imposed. (4) (5) (9) (30) (32) (34) (35) (42)
Department Response
This definition is as per 40 CFR 133.101(k), which is the federal definition of significant biological treatment as it applies to treatment equivalent to secondary treatment. It applies only to BOD, not nutrients or any other pollutant. The requirement in Chapter 92a is only that the secondary treatment standard would include significant biological treatment, and would not invalidate any existing provisions in permits related to bypass. Permits will remain unaffected. Bypassed flow would by definition not receive the full treatment normally provided for wastewater flow. Significant biological treatment is something that all POTWs already have, and which has a proven track record with regard to the ability to treat sewage and to control pathogens. The Department is concerned that certain new proposed treatment systems, which are primarily or exclusively physical treatment systems, are unproven with regard to the ability to adequately treat sewage, and will not approve these systems for use in this Commonwealth until their safety and reliability are demonstrated. Particular concerns are the deactivation of pathogens, especially disinfection-resistant pathogens such as *Cryptosporidium* and *Giardia*, and the ability to control ammonia toxicity. We consider these treatment systems unproven in regard to their ability to protect public health until their efficacy has been demonstrated. The requirement for 65% removal of BOD via biological treatment applies only to the BOD entering and exiting the biological treatment system, so the facility is not penalized for any BOD that may be removed during primary or physical treatment of sewage.

38. Comment
The proposed requirement for fecal coliform includes instantaneous maximum requirements. This is more stringent than the way that these limits previously have been applied, and is inconsistent with epidemiological data that indicate that harm from exposure is a statistical phenomenon, the standard for fecal coliform bacteria during the swimming season has for decades been set as a geometric mean (200/100 mL), with a statistical maximum (no more than 10% of samples over 1,000/100 mL). EPA has declared that geometric means are the most appropriate standard to be applied except for bathing beaches. There is inadequate documentation of the basis for this requirement. This is not a cost issue, it is a compliance and an environmental protection issue. In order to meet the stricter standard, many POTWs will increase the use of chlorine, which has more of an adverse effect on the receiving stream than a few thousand bacteria. Increasing chlorine use will conflict with other provisions of our permit, which require that chlorine dosage be optimized and does not impact the water quality of the stream. The existing 10% qualifier should be retained. (4) (5) (9) (27) (42)
Department Response

There are several issues to consider regarding fecal coliforms, but for sewage treatment plants, the main purpose of fecal coliform limits is to maintain and verify the integrity of the disinfection system, and its ability to control human pathogens. While fecal coliforms in the environment can have many sources (birds, mammals, and certain plant materials), fecal coliforms in treated sewage primarily are from humans. If they are present in quantity in effluent, you must assume that pathogens may be present in quantity. Excess fecal coliforms in the environment generally is less significant from a public health perspective than excess fecal coliforms in human sewage. Any breakdown in the treatment and disinfection process in a POTW has the potential for immediate and serious public health consequences.

The Department has to be able to independently verify that permittees are in compliance with any given permit condition, and our experience with the 10% qualifier has been poor in this regard. Unlike virtually any other sample result, no judgment can be made based on a given sample result. Permittees have taken to collecting excess samples to dilute the mathematical effect of one or more samples indicating a breakdown in disinfection. No comments were received indicating that the proposed maximum values of 1,000/100 mL and 10,000/100 mL were unreasonable or inappropriate – the only relevant comments were from commentators who opposed to any maximum limit at all. However, the Department has determined that we need an absolute maximum for this pollutant, just as for virtually all other pollutants. It is perhaps more important for fecal coliforms than it is for other pollutants, since any failure of the disinfection system can have immediate and serious adverse effects on human health. The Department is not currently aware of any facility that would have difficulty meeting the maximum limits for fecal coliforms.

The 10% qualifier may be appropriate for an instream standard, where nonpoint sources complicate the issue, and other sources not associated with human pathogens contribute, but it is not appropriate for treatment works where the permittee should have, and has every opportunity to have, reasonable control of the disinfection process. The maximum limits for fecal coliforms have been designed to achieve the instream standard, and the Department can defend this limit as protective of public health and all applicable water quality standards.

There is no conflict with existing provisions of permits that require that chlorine use for disinfection be minimized. By definition, sufficient chlorine must be used to ensure the effectiveness of the disinfection process, and the practice and principles of breakpoint chlorination are well established. It is possible that some permittees that currently do not manage their disinfection processes well may have to increase their attention to and control of the process, but this is fully appropriate. The issue is not excess chlorine versus "a few thousand bacteria," it is meeting minimum requirements to ensure the protection of public health and the attainment of water quality standards.

39. Comment

The proposed requirement for fecal coliform is more stringent than current requirements, and no rationale is presented for the limits. While § 92a.47 (5) may represent a good approach for wintertime limits, no rationale has been provided, and there is no leeway provided from the instantaneous maximum limits. (11) (16) (27)

Department Response
See the response to the previous comment.

40. Comment
The proposed requirement for fecal coliform includes instantaneous maximum requirements. The proposed regulation has arbitrarily tightened the regulations without basis or justification. It will cause the immediate need for expenditures in capital improvements to our disinfection facilities, when implementation has not been shown to improve water quality. Elimination of the 10% qualifier will result in needless increases in chlorine usage, and noncompliance with the chlorine minimization requirements of our permit. The existing 10% qualifier should be retained. (8)

Department Response
See the response to previous comments regarding this issue. There is no conflict with existing provisions of permits that require that chlorine use for disinfection be minimized. By definition, sufficient chlorine must be used to ensure the effectiveness of the disinfection process, and the practice and principles of breakpoint chlorination are well established. An examination of the records for the commentator's facility indicates that these limits are being achieved routinely, so it is not clear what improvements or capital expenditures may be required.

41. Comment
The allowance for no more than 10% of the samples over 1000/100 mL has been eliminated with no reason given. Excessive levels of chlorination would be required because of the potential for random interferences such as turbidity or normal variability in bacteriological testing. The current regulation is appropriate because there is an inherent operational control issue caused by the 24-72 hours time lag between the time of sampling and when the result is known when a dosage correction could be made. Excessive disinfection with chlorine can result in additional production and discharge of toxic disinfection byproducts such as trihalomethanes which would not be in the best interests improving receiving stream water quality. (21)

Department Response
See the response to previous comments regarding this issue. In addition, the Department does not agree that very high concentrations (>1,000.100 mL) of fecal coliforms would often be the result of harmless artifacts, contamination of the sample, or normal variability in testing procedures. These are disease-related indicator organisms, and they must be controlled at all times to protect public health. There is no conflict with existing provisions of permits that require that chlorine use for disinfection be minimized. By definition, sufficient chlorine must be used to ensure the effectiveness of the disinfection process. The practice and principles of breakpoint chlorination are well established and are designed to properly balance effective disinfection with minimal production of trihalomethanes and other disinfection byproducts.

42. Comment
EPA has declared that the use of instantaneous maximum or daily limits for pathogens is inappropriate except for bathing beaches. This is a significant change from the current regulatory approach and the preamble has absolutely no discussion of the underlying rationale or the cost of compliance associated with this new restriction. It should not be finalized. (30) (32) (34)

Department Response

The EPA statement that the commentator cites refers to fecal coliforms in rivers and streams, not in treated wastewater effluent. The underlying rationale is not applicable to effluent, but the fact that EPA does recommend maximum limits for bathing beaches, where a single high fecal coliform result at a bathing beach or ocean shore area can close the beach, illustrates the need to ensure the integrity of the disinfection process at all times. The 10% qualifier may be appropriate for an instream water quality standard away from bathing beaches, where nonpoint sources complicate the issue, and other sources not associated with human pathogens contribute, but it is not appropriate for treatment works where the permittee should have, and has every opportunity to have, reasonable control of the disinfection process. The maximum limits for fecal coliforms have been designed to achieve the instream standard, and the Department can defend this limit as protective of public health and all applicable water quality standards. The Department does not project any cost impact, since these limits are routinely achieved by a wide margin in well operated treatment and disinfection systems. It is possible that some permittees that currently do not manage their disinfection processes well may have to increase their attention to and control of the process, but this is fully appropriate.

43. Comment

We suspect that one key reason that the Department proposes to standardize the STS stems from a 2002 Environmental Hearing Board (EHB) ruling against the department for refusing to grant one of the adjustments to secondary treatment effluent standards [*Municipal Authority of Union Township vs. DEP*, EHB Docket No. 2001-043-L, 2/4/02]. If so, the proposed standardization is inconsistent with the EHB decision, and/or does not justify removing these variance provisions entirely. (11) (27) (30) (32) (33) (34) (42)

Department Response

The Department considered the *Municipal Authority of Union Township vs. DEP* decision when incorporating the Secondary Treatment Standard in this rulemaking. The standardization proposal is fully consistent with the *Municipal Authority of Union Township vs. DEP* proceedings and rulings, partially because the EHB specifically highlighted the rulemaking process as the appropriate route to take if the Department proposed to eliminate the effluent limit adjustments in question. Furthermore, the Department believes that this approach is consistent with the provisions of 40 CFR 133.105(f), which state:

(f) Permit adjustments. Any permit adjustment made pursuant to this part may not be any less stringent than the limitations required pursuant to Sec. 133.105(a)-(e). Furthermore, permitting authorities shall require more stringent limitations when adjusting permits if: (1) For existing facilities the permitting authority determines that the 30- day average and 7-day average BOD5 and SS effluent values that could be achievable through proper operation and maintenance of the treatment works, based on an analysis of the past performance of the treatment works, would enable the treatment works to achieve more stringent limitations...

44. Comment

A new STS provision has been added regarding TRC (Total Residual Chlorine), and it is unclear why an industrial waste requirement (0.5 mg/L) is to be imposed on discharges of treated sewage. (11) (16) (27) (42)

Department Response

This is an existing requirement at existing 92.2d, and applies whenever chlorination is used for either discharges of treated sewage or industrial wastewater. No change to this requirement has been proposed as part of this rulemaking. The requirement is not an industrial waste requirement, but is merely listed in that section for organizational purposes.

45. Comment

Do the proposed STS limits supersede DRBC requirements? In particular, will the winter disinfection limits be relaxed from 200/100 mL to 2,000/100 mL? Also, it is not clear how the proposed STS limits will be applied to streams that already have TMDLs. (39)

Department Response

The more stringent of the Delaware River Basin Commission (DRBC) requirements and the Department's requirements will apply as an effluent limit, so the 200/100 mL limit would continue to apply during the cooler months for facilities that discharge to surface waters subject to DRBC requirements. The effluent limits associated with the proposed Secondary Treatment Standard (STS) are technology-based limits and would have no effect on water quality-based effluent limits specified in a TMDL. Those water quality-based effluent limits would remain fully applicable, and the more stringent of the technology-based limit and the water quality-based effluent limit would apply in the permit.

46. Comment

Does the 85% monthly average percent removal requirement for BOD and TSS for POTW facilities supersede numeric permit limits for these pollutants? Also, while it appears that the STS will not apply to CSOs, it remains unclear whether they would apply to internal bypasses effectuated during periods of high flow (e.g. internal bypasses in order to maximize flow through the plant or to protect the plant). Does the significant biological treatment requirement apply to such internal bypasses? (4)

Department Response

The 85% monthly average percent removal requirement for BOD and TSS for POTW facilities does not supersede numeric permit limits for these pollutants. The STS as described in this final rulemaking applies to final effluent limits only, but does not limit other requirements that may apply to internal bypasses.

47. Comment

The EQB should better explain the need to amend existing requirements. The EQB should include a full evaluation of the costs imposed by the amendments and explain why the costs imposed are justified. (42)

Department Response

The need to amend the regulation to standardize treatment requirements, and in particular the incorporation of the Secondary Treatment Standard, is that the Department and permittees will stop wasting time and resources on evaluating and applying provisions that permittees do not need and do not add value. The Department has broad experience in this matter, and is motivated to improve the efficiency of the permit process and reduce costs. This is particularly important from the perspective of the regulated community now that permittees will be paying more of the cost of the NPDES program. The Department is urged, on one hand, to improve the speed and efficiency of the process, but attempts to do so are opposed based almost entirely on inapplicable or specious assertions. The only treatment requirements proposed in this final rulemaking already are routinely achieved by all well operated sewage treatment facilities. The fact that some facilities have had treatment upsets or irregularities in the past is not relevant -- the Department is responsible to assure that

effluent limits protect public health. There are no treatment requirements in this final rulemaking that will increase the cost to the regulated community at large.

TERTIARY TREATMENT STANDARD

Department Response: The proposed amendments included, at § 92a.47, a proposal that a Tertiary Treatment Standard (TTS) would apply to all new or expanding discharges of treated sewage to impaired waters where the impairment has been attributed to discharges of treated sewage, or to surface water designated as a High Quality or an Exceptional Value (antidegradation) water. In all cases for point sources, the more stringent of the applicable technology-based effluent limit and the water quality-based effluent limit (WQBEL) is applied. For discharges to impaired or antidegradation waters, the WQBEL is expected to be the governing factor in determining the appropriate effluent limits. However, technology-based requirements should be developed and applied independent of water quality-based requirements. The TTS, as a more stringent technology-based treatment standard, would have complemented the more stringent WQBELs that apply in water quality-limited surface water segments. The TTS was proposed to address several recurring issues:

- In order to reduce possible disparities in treatment requirements amongst multiple point sources.

- An adequate WQBEL may not be available when it is needed (for example, a sewage treatment plant is proposed for expansion, but the TMDL has not yet been scheduled or completed). Applying a more stringent technology-based standard will minimize possible distortions in the planning and design process that may be introduced when the WQBEL is inadequate or unavailable. The facility may be grossly under-designed, necessitating a costly overhaul of the facility. Applying the TTS in scenarios where advanced treatment clearly will be required will minimize this risk, without increasing the risk that the facility may be over-designed.

- The relationship between the source and an impairment may be reliable, but it may not be effectively tied to any one or more pollutants. An impairment initially attributed to nutrient enrichment may, upon further study or with more data, subsequently be attributed to organic enrichment. Or an impairment that really is due to nutrient enrichment, and that is mitigated with effective nutrient controls, may simply be replaced by an impairment that is attributable to organic enrichment. By assuring a balanced approach to all likely pollutants of concern, vulnerabilities in the WQBEL process can be minimized without undue burden on the permittee.

Many comments were received on the TTS, nearly all of them opposing it based on perceptions or predictions of how the proposed TTS could be applied inappropriately or have unintended effects. At least one facility would have to modify operations in order to comply with the TTS. Based on some of these comments, it became evident that there would be some immediate cost implications for some facilities, which was inconsistent with both the intent of the TTS and the content of the Preamble.

For each of the comments received and listed below, the Department's response is the same – we appreciate your comments and, based largely on these comments, it is evident that additional work is required to support any new treatment standard for sewage facilities. In addition, the Department believes that there is increased attention to technology-based limits at the Federal level, and these developments may be pertinent. Based on these considerations, the TTS has been removed in its entirety from the proposed § 92a.47. The Department still believes that a more stringent technology-based treatment standard is appropriate for the water quality-limited situations targeted by the TTS, and plans to pursue the issue unless developments at the Federal level obviate the issues that the TTS was intended to address.

48. Comment

This new requirement for advanced treatment is arbitrary and will be costly and create a pathway to advanced treatment for virtually all dischargers of treated sewage. There is inadequate documentation of the basis for this requirement. It is unnecessary, since the Department already has a comprehensive regulation designed to protect High Quality and Exceptional Value waters. (4) (5) (8) (9) (11) (16) (21) (22) (26) (27) (30) (32) (33) (34) (35) (36)

49. Comment

The proposed limits for Total Nitrogen will require our plant to denitrify year-round. The proposed limit for TSS is a major reduction from the existing permit limit. (14) (31)

50. Comment

The standard should not apply to facilities that increase hydraulic capacity to better manage wet weather issues. (22)

51. Comment

The applicability of the standard regarding impaired waters is unclear or ambiguous, and should refer to the Integrated List of Waters. It may result in unnecessary treatment for pollutants not contributing to the impairment. We are concerned about some definitions and terminology. (4) (5) (8) (9) (11) (16) (27) (33)

52. Comment

The standard could be interpreted to apply to downstream intersections of High Quality or Exceptional Value waters. (5) (9) (11) (22) (27)

53. Comment

The standard will increase treatment disparities, rather then reduce them. (9)

54. Comment

Some aspects of the proposed standard are more stringent than the treatment requirements for nutrients applicable to facilities in the Chesapeake bay watershed. The standard will constrain nutrient trading in the Chesapeake Bay watershed. (11) (16) (21) (27) (33) (42)

55. Comment

DELCORA currently is borderline for some of the proposed tertiary limits, and Delaware may declare a reach of the Delaware River as impaired for dissolved oxygen. The focus should be on nonpoint sources instead, as they are the main contributors of nutrients. (28)

56. Comment

By way of the proposed 60-day notification rule in proposed § 92a.26, will a facility expansion that still meets ELG or permit limit requirements now be told by the Department at some date after they have commenced the increased discharge, which is pre-authorized under proposed § 92a.26, that they will now have to go back and meet the proposed tertiary treatment standards? (33)

57. Comment

While the preamble states that the new standard would only apply to new or expanding facilities, this is not the actual wording in the regulation. In order to meet the 8 mg/L requirement for Total Nitrogen, it is very possible that any fixed-film WWTP would have to convert to activated sludge. (39)

BOD_5 and TSS TREATMENT STANDARD FOR INDUSTRIAL DISCHARGES

NOTE: These comments refer to the proposal to set a minimum treatment standard for industrial discharges of Biochemical Oxygen Demand (BOD or BOD_5) and Total Suspended Solids (TSS).

Department Response: The proposed amendments included, at § 92a.48, a proposal to establish minimum treatment standards for BOD and TSS. These new treatment requirements were intended to address certain cases in this Commonwealth where existing technology-based limits for these parameters were inadequate or outdated.

A number of comments were received, all of them either opposed to the requirements or asking that exceptions be made for certain situations. Commentators generally were opposed to the proposal based on principle rather then any potential impact to their facility. For each of the comments received and listed below, the Department's response is the same – we appreciate your comments. The Department strives to balance the need for protecting the water quality in rivers and streams with the reasonable use of this Commonwealth's natural resources by permittees, and regulatory rulemaking is one way to pursue this balance. Based on trends in recent years and several of the comments, it appears that, although this proposed treatment standard would have limited impact on permittees and facilities in this Commonwealth, it also would have limited value. In addition, the exemptions requested are appropriate, and provision for these exceptions would have been required. Considering these factors, the proposed treatment requirements for BOD and TSS for industrial discharges have been deleted from § 92a.48. We do not anticipate revisiting this issue, as the need for these treatment requirements is no longer evident. For those few facilities that may still have inappropriately permissive effluent limits, the issue will be addressed through the WQBEL process, as suggested by one commentator.

58. Comment

While we have no objection to the proposed maximum level of 60 mg/L for BOD_5, we object to the proposed standard for TSS of 60 mg/L as a monthly average. This is a significant reduction in our current permitted limit of 100 mg/L. We presume that there would be no change to the daily maximum or instantaneous limits for TSS in our current permit. (3)

59. Comment

The proposed limit for TSS will be a problem for closed-cycle cooling systems, where most of the TSS originates in the surface water, and is concentrated in the cooling system. The proposal should be modified to specify the requirements as net values, the difference between intake and discharge concentrations. (13)

60. Comment

Contrary to what is stated in the preamble, the "technology-based" effluent limit requiring all industrial dischargers to meet 60 mg/L for BOD_5 and TSS is onerous and will be costly. There is inadequate documentation of the basis for this requirement. ELGs are established based on industry-specific factors, and a "one-size fits all" approach is not appropriate. (5) (9) (12) (33)

61. Comment

Even though it may be true that few, if any, facilities in Pennsylvania would exceed these limits at the present time, once the economy recovers, the existing treatment facilities may not be able to meet these requirements. (5) (9) (12)

62 Comment

One PA pharmaceutical company has estimated multi-million dollar upgrades would be necessary to achieve the proposed level of treatment. The Clean Streams Law requires the Department to consider the immediate and long-range economic impacts of this proposed regulation. (33)

63. Comment

The proposed limit for $CBOD_5$ could be a problem for stormwater runoff of propylene glycol-based deicing fluids at our airport. Even when the fluids are well managed, we can occasionally exceed 50 mg/L $CBOD_5$. We request that you consider this as an exception, and allow for occasional exceedences. (19)

64. Comment

The Department already has mechanisms in place to protect the water quality of receiving water bodies via Chapter 93. Department water quality engineers model each discharge with the WQM 7.0 model to determine if additional water quality based effluent limitations for BOD5 are required to protect water quality during each permit renewal cycle. This modeling method has proven very effective in protecting in-stream water quality across the Commonwealth. If the basis of promulgating additional technology based effluent limits for industrial dischargers is violation of water quality standards on receiving water bodies, the Department needs to re-evaluate the dischargers that are causing water quality violations instead of blanketing all industrial point source categories with an unjustified technology based standard. (33)

65. Comment

Where the Federal Effluent Limitation Guideline already specifies a concentration-based ELG for TSS/BOD, that Federal limit should prevail. (37)

INADEQUATE PUBLIC PARTICIPATION AND NOTICE

Department Response: Several commentators submitted the comment that the public participation process was inadequate, and suggested additional public participation. The EQB appreciates the importance of the public participation process. Notice of proposed rulemaking was published in the *Pennsylvania Bulletin* in accordance with the requirements of the Commonwealth Documents Law. Section 1 of that law requires that the EQB give public notice of its intention to promulgate or amend any regulation and that such notice include (1) the text of the proposed regulation prepared in such a manner as to indicate the words to be added or deleted from the presently effective text thereof, if any, (2) a statement of the statutory authority for the proposed regulation, (3) a brief explanation of the proposed regulation, (4) a request for written comments by any interested person and (5) any other statement required by law. 45 P.S. § 1201. The proposed regulation confirms to these requirements in all respects.

The Department has met all the obligations of the Regulatory Review Act and the public participation process to make the proposed rulemaking readily available to the public for comment. In addition to presenting the rulemaking package to the EQB on November 17, 2009 and publication of the proposed rulemaking in the *Pennsylvania Bulletin* on February 13, 2010; DEP staff presented the language of the proposed rulemaking to the Water Resources Advisory Committee on July 22, 2008 and October 8, 2008, and to the Agricultural Advisory Board on June 17, 2009. The language presented at those public meetings and the minutes of those meetings are always made available at DEP's web site: www.depweb.state.pa.us; Link: Public Participation. Throughout the advisory committee process DEP was receptive to the concerns of the committees and incorporated changes per those discussions.

The EQB has received comments from over 40 commentators on the proposed rulemaking and has chosen not to withdraw the regulation or extend the public comment period for this rulemaking. Supplemental or contingency processes, such as advance notice of rulemaking or public hearings, are not justified for this rulemaking. All comments related to public participation have been included herein.

66. Comment

There was insufficient public participation in development of the regulation, and we are not aware of any stakeholder input. (24)

67. Comment

The comment period is too short and should be extended, and/or the regulation should be re-proposed, and/or a public hearing should be provided. (4) (5) (9) (21) (22) (24) (27) (30) (32) (34) (36)

68. Comment

The advance notice of rulemaking process should be invoked. (21)

69. Comment

The lack of adequate public notice on several issues violates the public notice requirements of the Commonwealth Documents Law. This is especially of concern for changes that could result in increased expenditures of public money. (5) (9)

70. Comment

We request that the Board withdraw this flawed regulation, and only proceed if the new regulation is developed with the input of the regulated community, and/or if the new regulation is negotiated with the regulated community. (5) (9) (22) (24)

MISSING FEDERAL PROVISONS

71. Comment

The following provisions should be incorporated by reference:

1. 40 CFR 122.21(c)(2) – *Time to Apply for Permits under Section 405(f) of the CWA*
   All Treatment Works treating domestic sewage (TWTDS) whose sewage sludge use or disposal practices are regulated by 40 CFR Part 503 must submit a permit application. This is one of the requirements for a State program listed in 40 CFR 123.25(a)(4) and should be incorporated into Chapter 92a.
2. 40 CFR 124.56 – *Fact Sheets*
   This regulation lists additional requirements that should be in a fact sheet. This is one of the requirements for a State program listed in 40 CFR 123.25(a)(32) and should be incorporated into Chapter 92a.

3. 40 CFR 124.59 – *Comments from government agencies*
   This regulation addresses comment which may be received from the Corps of Engineers, US Fish and Wildlife Services, or other government agency. Chapter 92a should incorporate this regulation.

4. 40 CFR Part 129 – *Toxic Pollutant Effluent Standards*
   This is one of the requirements for a State program listed in 40 CFR 123.25(a)(37). If these regulations are identified in another Pennsylvania regulation (Chapter 16 or 93, perhaps), then Chapter 92a should make reference to where these regulations are located. If not, Chapter 92a should incorporate these Federal regulations.

5. 40 CFR Part 132 – *Water Quality Guidance for the Great Lakes System*
   This is one of the requirements for a State program listed in 40 CFR 123.25(a)(38). If these regulations are identified in another Pennsylvania regulation (Chapter 93, perhaps), then Chapter 92a should make reference to where these regulations are located. If not, Chapter 92a should incorporate these Federal regulations. (25)

Department Response

The Department must have the legal authority to apply all of the provisions that have been cited by the commentator, and also must administer its NPDES program consistent with the minimum requirements of each, but that is not equivalent to incorporating them directly. The Department may have more stringent requirements, and may elect not to apply variances and exceptions provided for in Federal regulations.

40 CFR 122.21(c)(2) – *Time to Apply for Permits under Section 405(f) of the CWA*
As per § 92a.47(a)(6), permittees of facilities that treat sewage are required to comply with applicable Department regulations with regard to the disposal or beneficial reuse of sewage sludge (biosolids). These regulations are contained in Chapter 271, Subchapter J which

relates to the beneficial use of sewage sludge by land application. These requirements are based on federal requirements outlined in 40 CFR Part 503 and the Department believes that they meet or exceed the requirements of 40 CFR 122.21(c)(2).

40 CFR 124.56 – *Fact Sheets*
The Department believes that § 92a.53 (3)—(5) effectively covers the requirements of 40 CFR 124.56 and 40 CFR 124.8. All relevant determinations and calculations must be included in the fact sheet.

40 CFR 124.59 – *Comments from government agencies.*
Accepted. 40 CFR 124.59 has been incorporated by reference in § 92a.85.

40 CFR Part 129 – *Toxic Pollutant Effluent Standards.*
Standards relating to toxic pollutant effluents are set forth in Chapters 93 and 96 as well as in the Statement of Policy relating to Water Quality Toxics Management Strategy in Chapter 16. The approach to addressing these standards in Chapter 92a is the same as that in existing Chapter 92 which was reviewed and approved by EPA in its review of the 2000 amendments to Chapter 92.

40 CFR Part 132 – *Water Quality Guidance for the Great Lakes System*
Accepted. 40 CFR Part 132 has been incorporated by reference in § 92a.3 (b).

POTW PERMITS NOT RECORDED

72. Comment
The Department does not enforce the requirement in Section 202 of the Clean Streams Law that any permit to discharge treated wastewater from a POTW be recorded in the county office of the recorder of deeds. Failure to comply with the statute may put municipalities at risk, and the regulations should serve to remind permittees of their legal obligations by including a reminder of this statutory requirement. (9)

Department Response
The Department has exercised its enforcement discretion with respect to this provision of the Clean Streams Law.

COMMENTS RELATED TO SPECIFIC REGULATORY SECTIONS

92a.2 PURPOSE AND SCOPE

73. Comment
The language here states that the provisions of this Chapter implement NPDES. This could give the impression that all of the Commonwealth's NPDES regulations are in Chapter 92a. It is understood that part of the NPDES program is implemented by other parts of 25 PA Code such as Chapter 102. We would suggest adding a reference here to other Chapters that include NPDES implementation. (25)

Department Response
The Department disagrees. As the commenter notes, it is understood that the NPDES program is implemented by other parts of Title 25 of the Pennsylvania Code. Where appropriate, the final rule includes cross-references to other Chapters of Title 25, but adding the language as suggested by the commenter could limit its applicability to any future changes to Title 25 which might affect the scope of these regulations. Note that § 92a.11

identifies other chapters in Title 25 which currently have requirements that could pertain to the NPDES program, and it is § 92a.11 that is intended to address the issue that the commentator identifies.

92a.2 DEFINITIONS

74. Comment

CAFO – Federal regulations define a Medium CAFO in 40 CFR 122.23(b)(6). The definition of a CAFO in 40 CFR 122.23(b)(2) includes Medium. If all Medium CAFOs defined in 122.23(b)(6) would not be captured by CAFOs with greater than 300 AEUs, then the Chapter 92a CAFO definition should also incorporate 122.23(b)(6). (25)

Department Response

The Board has not proposed any substantive changes to the existing provisions in Chapter 92 relating to CAFO discharges. Currently, Department staff and EPA Region III staff are actively engaged in discussions regarding the components of the Commonwealth's CAFO program. The definition of medium CAFOs, as well as other issues, are a part of this discussion. If appropriate, all necessary revisions to the CAFO program will be included in comprehensive regulatory changes to the CAFO program. CAFO program changes would require additional review, through the Agricultural Advisory Board and other mechanisms, which were not engaged in this current revision to Chapter 92a to the extent required to amend the existing, EPA-approved CAFO program in this Commonwealth.

75. Comment

CAO – should "and" be inserted before "in Chapter 83"? (25)

Department Response

The definition has been revised to clarify the issue.

76. Comment

Daily Discharge – Suggest that this definition at subparagraph (ii) be modified to reflect the fact that averaging of pH values requires a log conversion. pH values themselves cannot be averaged. (5) (9) (22)

Department Response

This definition is contained in existing § 92.1, and no change has been proposed. Averaging of pH values does require a log conversion, but this definition does not preclude the use of log conversions to calculate an average. In all cases, the Department would reasonably expect that the mathematically correct procedure would be applied, which is not necessarily the sum of all measurements divided by the number of observations.

77. Comment

Expanding facility or activity – This definition is far too broad, and could have unintended impacts regarding hydraulic re-rating of facilities to comply with Chapter 94, *Municipal Wasteload Management*. Suggest that this definition be modified to reflect the fact that normal increases in flow or loading, as a result of planned and previously approved sewage or industrial loadings, would not cause a facility to be classified as an expanding facility. (4) (5) (9) (11) (16) (22) (27) (32) (34)

Department Response

This definition has been deleted from the final regulation because the term is not used.

78. Comment

Immediate – Four hours may be too short a time period for staff to report spills to the Department, for instance, when facility staff are shorthanded on weekends. The staff should remain focused on responding to and terminating any spill or other release to the environment instead of recordkeeping and reporting. This time limit should be 8 hours instead, or otherwise reconsidered and incorporated into § 92a.41 directly to avoid the misuse of the term elsewhere. (4) (5) (9) (11) (16) (27)

Department Response

The comment is accepted to the extent that the applicable requirements have been incorporated into § 92a.41(b) and the definition has been deleted. The 4-hour time limit has been retained. Eight hours is a full work shift, and cannot reasonably be advanced as representative of immediate notification, even under the most adverse conditions. The 4-hour time limit is advanced with full consideration of likely distractions, and the possible need for information gathering and immediate remedial actions. A longer time period allowance would needlessly delay a comprehensive response, and possibly endanger public health.

79. Comment

Immediate –It should be clear that the 4-hour time period begins at the point at which the owner becomes aware or reasonably should have known of the situation. (22) (30) (32) (34)

Department Response

This definition has been deleted from the proposed final regulation because the applicable requirements have been incorporated into § 92a.41(b). However, the comment has been accepted and has been incorporated into § 92a.41(b).

80. Comment

Immediate – In our review of the regulation, we found the term "immediate" used only in Subsection 92a.41(b). Therefore, we recommend incorporating this time limitation into that section rather than defining "immediate" in Section 92a.2. In addition, the EQB should explain how the time limit is reasonable. (42)

Department Response

The comment is accepted to the extent that the applicable requirements have been incorporated into § 92a.41(b) and the definition has been deleted. The 4-hour time limit is advanced to allow time for facility personnel to gather any needed information, and if practicable to take immediate actions that may mitigate the problem at the source. Conversely, a longer time period allowance would needlessly delay a comprehensive response, and possibly endanger public health.

81. Comment

MS4—Municipal Separate Storm Sewer System – There is no definition here – only a repeat of "A municipal separate storm sewer system". Suggest referencing the MS4 definition in 40 CFR 122.26(b)(18).

Department Response

Accepted. The definition of MS4 has been consolidated under this acronym.

82. Comment

Minor Amendment – The term omits one of the provisions of the EPA regulation (40 CFR § 122.63), which should be included. This is: to change ownership or operational

control when no other change is necessary and a written agreement containing the date for the transfer of responsibility is provided. (See § 122.63(d).) If this provision is excluded, then otherwise minor changes (such as the change in operating responsibility from a municipality to an authority) would require the entire major permit amendment process to be followed, unnecessarily increasing costs for both the permittee and the Department. This restrictive definition conflicts with proposed § 92a.73, incorporating the EPA regulations for minor permit modification. (4) (5) (9) (25)

Department Response

Accepted. The provision to process a change in ownership or operational control of a facility as a minor amendment has been reinstated.

83. Comment

Minor Amendment – With regards to changing an interim compliance date by no more to 120 days, the definition should specify that this could be considered a minor amendment so long as the ultimate/final compliance date does not change. [See 40 CFR 122.63(c)] (25)

Department Response

This is not required because 40 CFR 122.63 is incorporated by reference, such that a proposed change to the final compliance date may not be processed as a minor amendment.

84. Comment

Minor Amendment – This is not a definition of a minor amendment; it is simply a short, specific list of items that would be considered minor changes to a permit. Further, the list of items constituting a minor amendment does not include everything that could possibly be a minor amendment item and it does not allow for professional judgment on the part of the permit writer. (Revised language is suggested)

The IRRC took note of this comment, and recommended that the EQB review whether this definition is appropriate. (4) (33) (42)

Department Response

As per 40 CFR § 122.63, only certain minor changes to an existing permit may qualify as a minor amendment. There is no allowance for professional judgment on the part of the permit writer or anyone else. The list contained in the definition of "minor amendment" essentially replicates this list, so the definition is fully appropriate.

85. Comment

Minor Discharge – This is no longer included in the definitions, but is still mentioned in 92a.61(d). This term should be defined. (25)

Department Response

"Minor discharge" has been changed to "minor facility," an accurate and defined term, in 92a.61(d), such that no new definition of "minor discharge" is required.

86 Comment

NPDES and NPDES Permit – An NPDES permit is not issued by DEP "to implement the requirements of 40 CFR parts 122–124" as is stated in the definition of NPDES permit; it is issued pursuant to the state Clean Streams Law. This is the reason that the federal regulations are incorporated by reference; the Commonwealth has no authority to enforce federal regulations. The Commonwealth's program is accepted as equivalent to one issued

by EPA under the Federal Act pursuant to the provisions of section 402(b) and (c) of that statute. This problem should be corrected. (5) (9)

Department Response

NPDES permits are issued to implement the requirements of 40 CFR 122-124, and also to satisfy the requirements of the Commonwealth's Clean Streams Law. Other states (e.g. Ohio) refer to their discharge permits as NPDES permits. These definitions are appropriate as is.

87. Comment

NPDES form – This definition should include "a draft permit." (20)

Department Response

A draft permit is an NPDES permit which is an NPDES form. There is no discernible advantage to adding the term to the definition.

88. Comment

New source – This definition should include subparagraph (b) of the Federal definition at 40 CFR 122.2, or explain why it is omitted. (20) (42)

Department Response

Subparagraph (b) of the Federal definition at 40 CFR 122.2 does not appear to be useful, as it defines a highly specific situation that is unlikely to apply. It is unclear when you would start to apply the 120-day time period, and how you would decide whether to apply the standard since you cannot see into the future to see if and when it would be promulgated. Also, it is not practical to promulgate a standard that has been proposed within the previous 120 days, as the rulemaking process takes longer than that even under optimum conditions.

89. Comment

New source – Since an activity that results in a discharge of pollution might not involve any construction, construction should not be the sole triggering event, and the Board should revise the definition to capture such activities (language is suggested). (20)

Department Response

One major goal of the proposed rulemaking is to standardize definitions and terminology between Chapter 92a and the equivalent terms in the companion Federal regulation at 40 CFR Part 122. Although there may be merit to the comment, the Board chooses to maintain consistency with the Federal terminology in this case.

90. Comment

POTW – The provision at subparagraph (iii) should be clarified to ensure that the conveyance facilities must also be owned by a municipality. The easiest way to do this is to add "and is owned by a municipality" at the end of the sentence. Otherwise, the subparagraph could be interpreted to mean that private sewers or sewage hauling vehicles are part of the POTW. Alternatively, sewers, pipes, and other conveyances that are part of the municipality rather than the POTW should not be included as part of the definition of a POTW. (4) (5) (9) (22)

Department Response

As per subparagraph (i), the treatment works must be publicly owned, so there should be no possible confusion. This definition is based on the Federal definition at 40 CFR 403.3, and the Board chooses to maintain consistency with the Federal terminology in this case.

91. Comment

Person – This definition should be modified to delete the words "of this Commonwealth" from the item "municipality or political subdivision of this Commonwealth." It is conceivable that a municipality or political subdivision in a bordering state would seek a permit to discharge into Pennsylvania surface waters (an example of where this has occurred in the past is provided). (20)

Department Response

The definition is identical to the existing definition of "person" in Section 92.1 which was reviewed and approved by EPA following the 2000 amendments to Chapter 92. No change to this definition has been proposed. The Department is not concerned that a potential permittee may advance the argument that they do not meet the definition of "person" based on their state of residence, or lack thereof.

92. Comment

Pollutant – This definition is different than the definition in 40 CFR 122.2. According to the provision in 92a.3.(b)(1), the State definition will take precedence if there are differences. PADEP needs to document that the definition in Chapter 92a would cover all pollutants as defined in 122.2. (25)

Department Response

The definition is identical to the definition of "pollutant" in existing Section 92.1 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. No change to this definition has been proposed.

93. Comment

Schedule of compliance – The phrase "in an NPDES permit" must be added after "schedule of remedial measures" to be consistent with Federal law and the proposed 92a.51. See this definition in 40 CFR 122.2. (20) (42)

Department Response

Except for the correction of two minor typographical errors, the definition is identical to the definition of "schedule of compliance" in existing Section 92.1, which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. Section 92a.51 clearly states that a schedule of compliance is to be included in a permit.

94. Comment

Significant biological treatment – The usefulness and consequences of this definition are not apparent. (4) (11) (16) (27)

Department Response

This definition has been added because the term in used in 92a.47(a). Further discussion of the basis and usefulness of the term is provided in the response to comment 37.

95. Comment

Stormwater discharge associated with industrial activity – The reference to 40 CFR 122.26(b)(14) would also include 122.26(b)(14)(x) which also is covered under the 92a.2 definition for *Stormwater discharge associated with construction activity* in paragraph (ii). Perhaps the reference to 122.26(b)(14) in this definition of industrial stormwater should explicitly exclude subsection (x), since § 92a.2 includes a separate definition for construction stormwater discharges. (25)

Department Response

Accepted.

96. Comment

Surface waters – This definition must match the breadth of the definition of "Waters of the Commonwealth" in the Clean Streams Law. The definition should include "any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs...", etc. (20)

Department Response

The definition is identical to the definition of "surface waters" in existing Section 92.1 which was reviewed and approved by EPA in its review of the 2000 amendments to Chapter 92. No change in the definition has been proposed.

97. Comment

Surface waters – This definition must match the definition of "Waters of the United States" in Federal regulations, in that the exclusion for wastewater applies only to manmade bodies of water. Add the following sentence at the end of the definition: "This exclusion applies only to manmade bodies of water that neither were originally created in surface waters nor resulted from the impoundment of surface waters." (25)

Department Response

See the response to the previous comment.

98. Comment

TMDL –You should either add definitions for wasteload allocation (WLA) and load allocation (LA), or just refer to Chapter 96. (11) (16) (27)

Department Response

Accepted.

99. Comment

Treatment Works – It appears that the definition is intended to include purely internal water recycle/reuse facilities that do not discharge to surface waters. Is that right? If not, why is the term defined this way? (9)

Department Response

This definition is as per Section 212 of the Federal Clean Water Act, and is used consistent with the overall goal of using Federal requirements and definitions where possible. Chapter 92a regulates only facilities or activities that require an NPDES permit, and there is no intent expressed or implied to regulate new types of facilities under Chapter 92a.

100. Comment

Treatment Works – This is a common term, but it is unclear why such a detailed and qualified definition is appropriate. We suggest deleting it or removing much of the qualifying language. (Specific revisions are suggested.) In addition, the phrase "used for ultimate disposal of residues resulting from the treatment" could be interpreted to include landfills, abandoned mines, farm fields, and the sale of commercial product. Is it the Department's intent to include such activities? (11) (16) (27)

Department Response

This definition is as per Section 212 of the Federal Clean Water Act, and is used consistent with the overall goal of using Federal requirements and definitions where possible. Chapter 92a regulates only facilities or activities that require an NPDES permit, and there is no intent expressed or implied to regulate new types of facilities under Chapter 92a.

101. Comment

You need a definition for "intersected perennial stream." (9)

Department Response

This term has been deleted from the final regulation and so no definition is needed.

92a.3 INCORPORATION OF FEDERAL REGULATIONS BY REFERENCE

102. Comment

Subsections 92a.3(a) and (c) should be revised to eliminate the ambiguity they create over which regulatory provisions govern.

The IRRC took note of this comment, and recommends that the EQB explain the need for the phrases and how they may be interpreted. (4) (20)

Department Response

The Department does not agree that there is any ambiguity with respect to the subsections. The language of subsection 92a.3(a) and 92a.3(c) is almost identical to that of existing Section 92.2(a) which provides, in relevant part, that " . . . the Federal NPDES regulations in subsection (b), including all appendices, future amendments and supplements thereto, are incorporated by reference to the extent that these provisions are applicable and not contrary to Pennsylvania law. In the event of any conflict among Federal and Pennsylvania regulatory provisions, the provision expressly set out in this chapter shall be utilized unless the Federal provision is more stringent." The Department has received no indications from the regulated community that there is any ambiguity with respect to this provision.

103. Comment

Proposed §§ 92a.3(a) and 92a.3(c) purport to incorporate by reference future amendments to federal regulations. We believe that DEP does not have such authority. Section 5(a) of the Clean Streams Law requires that the Department, in adopting regulations, consider certain delineated factors. Such action would not occur if the Department delegates its future rulemaking authority to EPA. To our knowledge, EPA has not approved Pennsylvania to incorporate future federal regulations by reference. (30) (32) (34)

Department Response

Regulations implementing the NPDES requirements are promulgated by the Environmental Quality Board under the authority of Section 510 of the Administrative Code as well as the Clean Streams Law. Section 5(a) of the Clean Streams Law is not a section authorizing the promulgation of regulations – rather it is a section outlining factors which should be considered, as applicable.

The Board and the Department have incorporated various Federal regulations by reference on numerous occasions. Incorporation by reference, including future amendment so regulations so incorporated, is authorized by the Statutory Construction Act (the Act), (1 Pa.C.S. §§ 1501 – 1991). Section 1501(a)(1)(ii) of the Act provides that it shall apply to, *inter alia,* "[e]very document codified in the *Pennsylvania Bulletin* except legislative, judicial and home rule charter documents." Section 1937 of the Act provides that:

> A reference to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly

includes only the statute or regulation as in force on the effective date of the statute to which such reference is made.

With respect to a comment regarding delegation of "future rulemaking authority to EPA," the public will always have the opportunity to provide comments to EPA on any proposed regulations. More importantly, the Federal regulations establish minimum requirements which the Department must follow in its administration of the NPDES program.

Finally, EPA has in fact approved the incorporation of future regulations by reference. Existing section 92.2(a) specifically provides that "the Federal regulations . . . including all Appendices, future amendments and supplements thereto, are incorporated by reference . . . ." EPA approved this regulation during its review of the 2000 amendments to Chapter 92.

It should be noted that language in the proposal providing for the automatic incorporation of future amendments to the regulations incorporated in this rulemaking was deleted from the final rule, but not in response to these comments. Rather, the language was deleted to ensure consistency with other regulations of the Department which provide for the incorporation of federal regulations to avoid any implication that the inclusion of references concerning incorporation of future amendments to federal regulations in one regulation and the absence of such language in another regulation precludes the incorporation of future amendments to those regulations where there is no such reference.

104. Comment

Subsections (a) and (b) incorporate by reference the federal NPDES regulations, "including all appendices, future amendments and supplements thereto...." While the Department of Environmental Protection (Department) may impose requirements already mandated by the federal government, the incorporation by reference of future, and consequently unknown, requirements may be an improper delegation of the agency's statutory authority. Further, new obligations may be imposed without members of the regulated community and other parties having the opportunity for public comment as provided for in the Commonwealth Documents Law and the Regulatory Review Act. Additionally, section 1.6 of the PA Code and Bulletin *Style Manual* provides:

> *A rule adopting a code, standard or regulation by reference does not include subsequent amendments, rescissions or editions. If an agency wishes to incorporate subsequent amendments, rescissions or editions, the agency must explicitly do so by amendment of its existing rules or by rescinding its existing rules and promulgating new rules. [Emphasis added.]*

Therefore, the Department should delete the phrase "future amendments and supplements thereto" in reference to incorporating the federal regulations. (42)

Department Response

The Department disagrees. See the response to the previous comment.

105. Comment

The reference in 92a.3(b)(2) should be to § 123.25(a), not 123.25(c). There is no subsection (c) to § 123.25. (30) (32) (34)

Department Response

40 CFR 123.25(c) exists and is the correct reference.

92a.4 EXCLUSIONS

106. Comment

It appears that deleting the exclusions in existing § 92.4(a)(4) could have an impact on certain facilities, but no information is provided regarding the impact on those facilities, or the overall practical effect of this change. This should be addressed in the final rulemaking proposal. (11) (16) (27)

Department Response

This exception was deleted consistent with the overall goal of reverting to Federal requirements and terminology wherever possible. There is no apparent basis for this exception, nor any apparent need, as the activity does not describe a discharge to surface water. The commentator has not identified any specific concern, so there is no issue that remains to be addressed in the final rulemaking.

92a.5 PROHIBITONS

107. Comment

Why delete the phrase allowing for exceptions, as provided for in Federal regulations, for the rule that sanitary sewer overflows may not be permitted? It is in the existing regulation, and nothing has changed. (11) (16) (27) (33)

Department Response

This provision has been confusing, because Federal regulations do not provide for SSOs (sanitary sewer overflows), and never have made such provision.

108. Comment

The existing regulation at 25 Pa. Code § 92.73(8) provides that a permit will not be issued, modified, renewed or reissued for a sanitary sewer overflow ("SSO") "except as provided for in the federal regulations." The new regulation at §92a.5 would delete this exception, essentially prohibiting the permitting of any SSO regardless if the federal regulations would allow such discharge. In essence, this new provision requires the design of a collection system to withstand any and all storms, regardless of intensity. It presumes that DEP has adopted such a design requirement for collection systems when it has not. Surely, municipalities cannot reasonably be expected to design their sewer systems (and treatment plants) to handle all flows associated with such catastrophic events. The existing regulation should be maintained. (30) (32) (34)

Department Response

This provision has been confusing, because Federal regulations do not provide for SSOs, and never have made such provision. An SSO is an inherently unacceptable condition involving the overflow of raw, untreated or partially treated sewage to rivers and streams. An SSO presents an immediate and unacceptable threat to public health. The fact that an SSO is an unacceptable condition, and may not be provided for in a permit, is not the same as pretending that they never occur. Under certain extraordinary conditions, even a well designed and operated treatment system may be overwhelmed, resulting in an SSO. Properly designed treatment systems minimize the threat of an SSO, but generally cannot eliminate it entirely. The Department uses its enforcement discretion when evaluating whether an SSO has resulted from preventable conditions in the design or operation of a treatment system, or unavoidable conditions that the permittee has no control over.

109. Comment

In the proposed language for 92a.5(b), the Department states, "A permit may not be issued, modified, or reissued for a sanitary sewer overflow." This language is a distinct change from current PA DEP regulation 92.73(8), which states that a permit will not be issued, modified, or reissued "for a sanitary sewer overflow, except as provided for in the Federal regulations." The Chamber is concerned that this change in language in the proposed rule, specifically the deletion of "as provided for in the Federal regulations" ignores or disallows the language as contained in 40 CFR 122.41(m)(4)(i)(A)-(C), which provides exception to a treatment system bypass if a bypass is (a) unavoidable to prevent severe property damage or personal injury, (b) there were no feasible alternatives, and (c) the NPDES authority was notified. The Chamber is also concerned that the proposed language of 92a.5(b) also disallows any EPA regulation or policy on bypass or blending, such as EPA's proposed November 2003 wet weather blending policy. The Chamber requests that the proposed 92a.5 language be modified to specifically allow these Federal regulations and policies.

The IRRC took note of this comment, as well as related comments, and recommends that the EQB explain why the phrase "except as provided in federal regulations" is no longer needed. (33) (42)

Department Response

See the response to the previous comment: Federal regulations do not provide for SSOs, and never have made such provision. The Federal provisions that the commentator refers to (at 40 CFR 122.41(m)(4)(i)(A)-(C)) provide for bypassing of certain parts of a treatment system, such as a treatment reactor, under certain conditions. This is a reasonable permit condition that does not in itself present any threat to public health, and one that the Department incorporates into NPDES permits as per § 92a.41(a)(13). This will not change. The Federal bypass provision at 122.41 will continue to be provided for in essentially all permits for discharges of treated sewage. While it is acceptable, under the appropriate conditions, to bypass a treatment reactor, it is never acceptable to discharge untreated or partially treated sewage to surface waters. It is primarily because of confusion on this issue, and the distinction between bypassing treatment systems and discharging raw sewage, that the Board clarifies the regulatory requirements.

There is no "blending" policy from EPA or the Department. EPA's 2003 "blending" proposal has already been supplanted by the proposed "Peak Wet Weather" policy, which is substantially different from the 2003 "blending" proposal. Should such a policy be issued by EPA, the Department would evaluate the policy and take appropriate actions to revise regulations and guidance if appropriate. The Board cannot reasonably provide for any such policy before it has been evaluated to ensure that it is appropriate and conforms to the requirements of the Clean Streams Law.

92a.7 DURATION OF PERMITS AND CONTINUATION OF EXPIRING PERMITS

110. Comment

This section should include language similar to 40 CFR 122.46(b) that states a permit cannot be extended by modification beyond the maximum duration (5 years). Also, an expired permit cannot be amended or modified, and this should be made clear in 92a.7. (25)

Department Response

Section 92a.7 in its present form accomplishes both of these requirements, as no permit term may exceed 5 years under any conditions, and any expired permit must be reissued. There is

no provision for any other course of action. Except for a minor clarification, the language is identical to that of existing section 92.9 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

92a.8 CONFIDENTIALITY OF INFORMATION

111. Comment

The section is inconsistent with both the counterpart provision of the Federal NPDES regulations and Section 607 of the Clean Streams Law. In order to meet Federal requirements, revise § 92a.8(a) and (b) to provide that the name and address of any permit applicant or permittee, permit applications and permits, and any information required by any NPDES application form, may not be claimed as protected as confidential information. Based on the only narrow exclusion provided for in Section 607 of the Clean Streams Law, which provides that only information related to the chemical and physical analysis of coal may be protected as confidential, the Board must delete the last clause in the second sentence of § 92a.8(b).

The IRRC took note of this comment and recommends that the EQB provide an explanation and clarification in the regulation regarding what state or federal law, in addition to the Clean Streams Law, will be considered in regard to confidentiality of information. (20) (42)

Department Response

These subsections were drafted so as to address conflicting state and federal requirements relating to the treatment of confidential information. The Department is not authorized to make public information that was submitted to EPA which the EPA Office of General Counsel has determined to be confidential. Sections 92a.8(b) and 92a.8(c) are almost identical to the language of existing sections 92.63(b) and 92.63(c), which were reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

112. Comment

This section should also reference 40 CFR 122.7(c) which states, "Information required by NPDES application forms ... may not be claimed confidential." (25)

Department Response

Sections 92a.8(b) and 92a.8(c) are almost identical to the language of existing sections 92.63(b) and 92.63(c) which were reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. See the response to the previous comment.

113. Comment

It appears that if the Administrator (EPA) decides that given information is not eligible for protection, it will be made available to the public immediately. FirstEnergy asks that a permittee be given the right to appeal. (37)

Department Response

Appeals of the determinations of the Administrator are to be in accordance with Federal law. The Board does not have the authority to prescribe procedures for appeals of actions of the Administrator.

114. Comment

Subsections (a) and (b) appear to be inconsistent regarding what information can be considered confidential. For example, a request for confidentiality of a permit or permit application must be denied under Subsection (a), but it appears that under Subsection (b) it

may be possible for the Department to grant confidentiality for that same information. The EQB should reconcile these subsections. (42)

Department Response

See the response to comment 111.

92a.10 POLLUTION PREVENTION

115. Comment

The proposed regulations would give process changes and materials substitution a higher priority than reuse, recycling, treatment or disposal in the hierarchy of pollution prevention to be encouraged by PADEP. PADEP should not dictate the implementation of process changes or materials substitutions for a mining operation, in lieu of other pollution prevention techniques, because such changes may lead to fundamental process changes which may be impractical. Rather, the regulation should be restored to its existing form. In reviewing EPA's 2010-2014 Pollution Prevention Program (P2) Strategic Plan, the term "encourage" is used throughout the document. At the very least, the proposed regulations should be revised to indicate that PADEP may only "encourage," but not mandate, process changes and materials substitution. (26)

Department Response

Section 92a.10 cites the Pollution Prevention hierarchy, which has been established based on the consensus of the critical community and is not reasonably debatable. It is appropriate to consider Pollution Prevention measures in this order in all applications. This does not mean that action must be taken in this order in all applications. The only revision between existing § 92.2b and proposed § 92a.10 is the addition of Pollution Prevention (P2) source reduction measures (process change and materials substitution) to the top of the hierarchy, where they belong. The commentator's concern appears to be unfounded, since § 92a.10 is unchanged from § 92.2b in that it provides only for the Department to encourage P2 measures, exactly as proposed by the commentator.

116. Comment

The Preamble states that:

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance.

The first sentence in this section represents factual information supported by statute, the remaining language in the section is untrue, offensive to industry, and appears to outline a perceived management license the Department does not possess. Accordingly, ARIPPA suggests this language be struck. (40)

Department Response

The Department disagrees. The language that the commentator takes issue with is established Department policy. The Department is committed to integrate P2 into its everyday practices, and to encourage and assist permittees in implementing P2 practices, wherever possible. Industries and facilities that manage P2 well have reaped the benefits.

92a.11 OTHER CHAPTERS APPLICABLE

117. Comment

Mining operations in PA are currently subject to 25 Pa. Code Chapters 87-89. PCA interprets the Proposed Rulemaking as an attempt to include the effluent limitations from the mining program into Chapter 92a, such that the more stringent limit derived using either the general NPDES permit program regulations in Chapter 92a or Chapters 78-79 must be applied. If Chapter 92a is adopted as written, PADEP could impose more stringent technology-based treatment requirements into mining permits to override the limits currently in Chapters 87-89, if such technology-based limits were developed using best professional judgment or through another means. It also opens the door to the direct imposition of more stringent water-quality-based limits in mining permits. The effluent limitations from the mining program in Chapters 87-89 were set at sufficient levels to protect receiving waters. The Pennsylvania Coal Association opposes the inclusion of Section 92a.11 in the final regulations. (26)

Department Response

Mining operations and activities in this Commonwealth, to they extent that they involve facilities or activities that require NPDES permits, have always been fully subject to the requirements of Chapter 92 (and now, Chapter 92a). Chapter 92 has been, and Chapter 92a will be, the approved NPDES program -- Chapters 87-89 draw their authority to regulate and issue NPDES permits for mining activities through the Commonwealth's NPDES regulations. Applicable technology-based or water quality-based effluent limits will always be the more stringent of those contained in any applicable chapter in Title 25, including Chapter 92a. However, as a matter of policy and organization, treatment requirements specific to mining facilities or activities are contained in Chapters 87-89, because that is the purpose of those chapters. Section 92a.11 merely lists and clarifies the relationship between the various chapters, and does not add any new or more stringent requirements. This clarification is timely and appropriate.

118. Comment

This section is confusing and leaves the permittee with the dilemma of figuring out which other chapters may be applicable, and then figuring out whether they are more stringent. The commentator recognizes that similar language is contained in existing Chapter 92, but feels that this should be fixed. (4)

Department Response

There are many different types of point source discharges, and permits for these discharges are based on the underlying water quality standards that must be achieved. A sensible organization of regulatory requirements into different chapters is the only practical option in order to give the permittee, and Department staff, the best opportunity to understand and comply with regulatory requirements. In general, the organization of chapters is designed to organize requirements specific to different classes of NPDES discharges (e.g., mining discharges as opposed to sewage discharges), to avoid confusion regarding requirements that are applicable only for certain classes of NPDES discharges.

92a.12 TREATMENT REQUIREMENTS

119. Comment

Subsection (d) indicates that new or changed water quality standards or treatment requirements may result from revisions to regulations, or other plans or determinations

approved by the Department. This provision provides no guidance regarding what constitutes "other plans or determinations approved by the Department," and appears to provide no restraint on the Department's discretion to make changes. This language should be removed. (4)

Department Response

This provision is essentially the same as that provided for in existing § 92.8a(a), and the Board does not propose any substantive revision to this existing provision. The Department is required to use appropriate professional judgment and discretion as part of its mission.

120. Comment

We support the retention of the provision at § 92a.12(c), which is the Department's affirmation of its intent to protect threatened and endangered species and critical habitat. (10)

Department Response

The Board appreciates the comment.

121. Comment

Regarding when dischargers may be required to meet more stringent effluent limits to accommodate a new drinking water withdrawal, by deleting reference to the specific pollutants (total dissolved solids, nitrite-nitrate nitrogen, fluoride) in existing § 92.8a(c), the proposed provision at § 92a.12 (f) could now be applied to any pollutant. The existing list of specific parameters should be retained, and/or this is a significant change and the consequences are unclear. (11) (16) (18) (27)

Department Response

The specific list of pollutants (total dissolved solids, nitrite-nitrate nitrogen, fluoride) has been deleted since it never has been true that effluent limits for these pollutants are the only ones that can be affected by the establishment of a new PWS (potable water supply). Effluent limits for these 4 pollutants (in addition to sulfate and chloride) are the most likely ones to be affected by the establishment of a new PWS, but the establishment of a new PWS could possibly affect upstream effluent limits for any pollutant controlled under a THH (threshold human health) water quality criterion. This issue is clarified in § 92a.12 (f), but it is not expected to not have a practical effect. It is uncommon for a new PWS to affect upstream permit conditions in any case. The Department generally assures that no such measures are required, because effluent limits are designed to achieve the PWS protected use.

122. Comment

The Department should assure that a new potable water supply (PWS) is not sited close enough to an existing discharge to be affected by it. Alternatively, subsection 92a.12(f) should be clarified regarding a point of projected withdrawal for a new potable water supply. The clarification should include applicability, distance from the discharge to the intake, cost-benefit analysis and implementation timing. (4) (13)

Department Response

PWS is a protected use for surface waters in Chapter 93, meaning that it would have priority as compared to the availability of surface waters for assimilation of pollutants, which is not a protected use. No cost/benefit analysis would be applicable. The process involved in establishing a new proposed PWS would allow sufficient time to coordinate the two activities (permitting and constructing the new PWS, and adjusting upstream permit limits, if necessary).

123. Comment

How would § 92a.12 (f) be applied to an existing PennDOT roadway located adjacent to a new potable water supply? Would PennDOT or the water supplier be responsible for constructing post-construction BMPs if deemed necessary? (18)

Department Response

The Department should not speculate regarding theoretical scenarios, but the PWS would not be responsible for any measures required to render the surface water fit as a source of raw fresh water. The Department generally assures that no such measures are required, because effluent limits are designed to achieve the PWS protected use. Under certain conditions involving toxic pollutants, some adjustments to upstream permit limits may be required. It is not expected that any such adjustments involving conventional pollutants such as suspended solids would be required.

124. Comment

References to Chapters 16, 77, 88, 90, 92a, and 102 have been added to § 92a.12(d) addressing new or changed water quality standards and treatment requirements. PennDOT is concerned with including a reference to Chapter 102 in this subsection. This could open the door to applying certain standards, i.e. post-construction controls, to PennDOT's existing roadways. This could be extremely costly. Federal regulations at 40 CFR 122.34(b)(5)(i) do not authorize post-construction controls absent a qualifying project, which is a new development or redevelopment project. The reference to Chapter 102 should be deleted.

The IRRC took note of this comment, and recommends that the EQB explain how it will apply this provision and why it is reasonable to include Chapter 102 in Subsection (d). (18) (42)

Department Response

The reference to Chapter 102 in this section is appropriate for purposes of identifying the applicable water quality standards and treatment requirements for discharges associated with construction activities, and the reference identifies the existing relationship between Chapter 92a and other chapters that may contain applicable NPDES-based treatment requirements. Further, by including an express reference to Chapter 102 in this and other sections of 92a, the definition of "road maintenance activities" in Chapter 102 and the associated permit exemptions for example, are expressly recognized in Chapter 92a. The Department believes this provides clarity to the regulated community, including PennDOT.

Chapter 92 has been, and Chapter 92a will be, the regulation that implements the federally-delegated NPDES program in the Commonwealth. The reference to Chapter 102 in this section does not expand the scope of the applicability of the post construction requirements. It is not the Department's intent to retroactively apply new PCSM requirements to previously completed projects. However, in cases where environmental degradation, pollution or impairment, occurs after completion of a project, additional BMPs may be necessary. Further, Chapter 102 references and relies on the NPDES provisions in Chapter 92 for that portion of projects regulated under Chapter 102 that require an NPDES permit. To the extent that NPDES-based requirements and exemptions are detailed in Chapter 102, the reference to Chapter 102 again provides clarity and signals that these Chapters should be read and applied together. The reference in

92a.12(d) to Chapter 102 does not convert the additional, non-NPDES specific requirements to water quality standards and treatment requirements if that is not their function in Chapter 102. The Department does not agree that the reference to Chapter 102 should be deleted and further cautions that the removal of this reference could prove problematic for PennDOT and others in the regulated community, as there would be no express statement in regulation that the standards in Chapter 102 for NPDES regulated stormwater discharges associated with construction activities may be met by following the requirements of Chapter 102. This revision to Chapter 92a does not signal any shift in the way the Department will continue to implement the requirements of the NPDES program.

125. Comment

Sections 92a.12(d)-(f) appear to give PADEP the authority to effectively revise the mining regulations in Chapters 87-89 by adopting new treatment requirements under Chapter 92a. This proposed regulation appears to unnecessarily broaden the authority of PADEP under the mining program and to eliminate the necessity for PADEP to reopen a permit to insert updated requirements. In addition, the 180-day limit is simply not enough time as compliance may take much longer. (26)

Department Response

Should new or revised treatment requirements that apply to mining facilities or activities be promulgated in Chapter 92a, these treatment requirements would be applicable to mining facilities or activities. There is no possible broadening of authority involved, since the Department already has the required authority. However, as a matter of policy and organization, treatment requirements specific to mining facilities or activities are contained in Chapters 87-89, because that is the purpose of those chapters. Any new treatment requirements would require a reissued or amended permit that would be subject to public notice. The 180-day time period does not require compliance within 180 days, but only that the permittee will propose a schedule of compliance within 180 days. All of these requirements are currently in-force based on existing Chapter 92 requirements, and § 92a.12 is not substantively different from existing § 92.8a.

126. Comment

In § 92a.12(c), the identification of threatened or endangered species or critical habitat does not require any public notice. FirstEnergy believes that the imposition of limitations on discharges to these waters should be restricted to times of permit applications or renewals. Imposition of discharge limits to protect endangered species without adequate warning may require costly equipment and process modifications without the benefit of a cost benefit analysis. (37)

Department Response

Section 92a.12(c) is not substantively different from existing 92.2a(c), so the Board has not proposed any change to the existing requirement, and no new or more stringent requirements will apply. Section 92a.12(c) does not create any shortcut to the imposition of new treatment requirements or effluent limitations, as any amended or reissued permit would still require public notice. If a permittee cannot comply with the new treatment requirements or effluent limitations immediately, the normal procedure to establish a schedule of compliance will apply. However, there is no basis for the contention that the existing NPDES permit should be allowed to expire before needed actions can be implemented, and no cost benefit analysis

would apply. There will always be adequate notice of new treatment requirements or effluent limitations, as the process employed to implement new requirements is well established.

92a.21 APPLICATION FOR A PERMIT

127. Comment

What is the justification for requiring four consecutive weeks of public notice for a permit application at § 92a.21(c)(4)? This is only required by statute for industrial waste permits. (5) (9)

Department Response

The provision at § 92a.21(c)(4) does not require four consecutive weeks of public notice for all NPDES permit applications. It requires that the applicant present proof that the four consecutive weeks of public notice was performed only if four consecutive weeks of public notice is required by the application. The application will specify this requirement, if applicable, which may be based on a statutory requirement. The requirement, if applicable, would be designed to achieve reasonable assurance that the public is aware of, and has an opportunity to participate in, any decision related to the issuance or reissuance of an NPDES permit.

128. Comment

Subsection 92a.21(a) provides that certain Federal regulations "are incorporated by reference, except as required by the Department." The phrase "except as required by the Department" is broad and infers the Department may unilaterally change the requirements of the federal regulation outside the regulatory review process. This would allow changes without notice and review by the public, regulated community, legislature or the Commission. We recommend deleting the phrase "except as required by the Department." (20) (42)

Department Response

Accepted. This phrase was intended to allow the Department to require additional information to support a permit application when appropriate, but this is provided for in subsection (d).

129. Comment

Paragraph (a) incorporates certain sections of Federal regulations, "except" as required by Department application. That could imply that an application requirement can override a regulatory requirement. The Department application can require additional information. Please revise the language accordingly. Paragraph (c)(5) requires the applicant to submit a topographic map, but does not include what is to required to be contained on the map. See 40 CFR 122.21(f)(7) for topographic map requirements. (25)

Department Response

See the response to the previous comment. With respect to the topographic map requirement of subsection (c)(5), the Department believes that subsection (c)(5) satisfies the requirements of 40 CFR 122.21(f)(7) considering that permit application forms require the specific annotations and information listed in 40 CFR 122.21(f)(7), and more. The Department must have the legal authority to implement 122.21(f)(7), and it does have such legal authority as described at § 92a.21(d). The language of subsection (c)(5) is identical to that of existing § 92.21(b)(4), which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

130. Comment

Additional information that may be requested by the Department to support a permit application may require advance planning and budgeting. FirstEnergy requests confirmation that the same procedure of negotiating a reasonable compliance schedule for changes in water quality standards, effluent limitations, or other standards and treatment requirements be applicable to the category of additional information. (37)

Department Response

When the Department requests additional information to support a permit application, and that information is readily available, that information should be provided promptly. When the Department requests additional information to support a permit application, and that information involves studies that have not yet been performed, or data that has not yet been collected, sufficient time will be provided for the studies or data collection. If a long-term effort is required, the studies or data collection may be incorporated into the current permit, in order to support a subsequent reissuance of the permit. In this case, the normal public notice and participation process will apply.

92a.23 NOI FOR COVERAGE UNDER A GENERAL PERMIT

131. Comment

In Paragraph (c), MS4 dischargers should also be included in the list of dischargers that must have an NOI. [See 40 CFR 122.28(b)(2)(v)] (25)

Department Response

Accepted.

92a.24 PERMIT-BY-RULE FOR SRSTPs

132. Comment

A permit-by-rule cannot qualify as an NPDES permit, because it is not a final agency action that is subject to review and cannot satisfy all of the procedural requirements of 40 CFR Part 124. The permit-by-rule in this section must be replaced with a general permit, or requirement for an individual permit. Otherwise, the EQB should explain how these sections are consistent with the federal definition of "permit." (20) (42)

Department Response

This section has been deleted for the final rulemaking. However, section 92a.23(c) (relating to NOI for coverage under an NPDES general permit) and other sections have been revised to provide that some categories of discharges meeting certain requirements may be authorized without the submission of a Notice of Intent for coverage under a general permit in the same manner as that provided for under 40 CFR 122.28(b)(v).

133. Comment

NPDES permits have a 5 yr limitation [40 CFR 122.46(a)]. A permit-by-rule cannot obviate this requirement. The Department needs a record in support of the permit, and the regulatory process to promulgate this permit needs to follow the same public process as for individual or general permits, including a fact sheet for the draft permit. The decision not to require an NOI would have to meet the requirements of 40 CFR 122.28(b)(2)(v). (25)

Department Response

See the response to the previous comment.

92a.25 PERMIT-BY-RULE FOR APPLICATION OF PESTICIDES

134. Comment

A permit-by-rule cannot qualify as an NPDES permit, because it is not a final agency action that is subject to review and cannot satisfy all of the procedural requirements of 40 CFR Part 124. The permit-by-rule in this section must be replaced with a general permit, or requirement for an individual permit. (20)

Department Response

See the response to comment 132.

135. Comment

EPA is developing a general permit for application of pesticides "directly to waters of the United States," and "application to control pests that are present over waters, including near such waters", which are currently excluded under 40 CFR 122.3(h). EPA expects to issue a draft general permit for those pesticide discharges in May of this year. Under the court's mandate, these pesticide discharges will be subject to an NPDES requirement beginning in April 2011. The State's regulations should clarify that these particular discharges of pesticides will require a permit as of April 9, 2011. Until then, any permit issued by the Department would not be deemed to be a CWA permit. Once CWA coverage of these discharges goes into effect, if the Commonwealth pursues the use of a permit-by-rule for covering the regulated discharges, the same concerns as stated previously for 92a.24 apply. (25)

Department Response

See the response to comment 132. The approach that the Department takes with regard to authorizing the discharge of pesticides will depend on the form of the EPA general permit.

92a.26 NEW OR INCREASED DISCHARGES

136. Comment

There should be a time limit on the approval process described at § 92a.26(a) and (b). Otherwise, the permittee may have to wait for an indeterminate period of time. We suggest a time limit on the Department's timeframe for response. The permittee should be able to submit a new application upfront if it chooses. The IRRC noted that several commentators supported this comment. (4) (5) (9) (22) (40) (42)

Department Response

The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. The permittee always has the option to submit a new permit application, and the Department will require this if appropriate. But it may not always be clear to the permittee whether a change in facility or wastestream is substantial enough to justify the full cost and effort of a new permit application. The purpose of this section is to provide a mechanism whereas a permittee can check with the Department as to whether a new application is required, and also to ensure that substantial changes to facilities or wastestreams that have not been considered by the Department in previous applications are evaluated before they are implemented. This section has been revised to address the concerns that have been identified, and all time period requirements have been eliminated. If a permittee has a concern regarding the Department's response time, the permittee has the option to submit a new application to invoke the formal permit amendment or reissuance process.

137. Comment

It should be clear that normal increases in flow and loading, those that do not require a physical modification of the facility, are not captured under this section. (4) (9)

Department Response

Accepted. This section has been revised to address this concern.

138. Comment

This section should be amended to require a Pennsylvania Natural Diversity Inventory screening when new loadings are being considered for approval. If a potential conflict with threatened or endangered species is identified, coordination and consultation with the appropriate State or Federal natural resource agencies is required. (10)

Department Response

The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. A proposed change to a facility or wastestream that is substantial enough to affect the results of a Pennsylvania Natural Diversity Inventory screening would be substantial enough to require new effluent limits, which in turn would require a major amendment or reissuance of a permit. At that point, a Pennsylvania Natural Diversity Inventory screening would be triggered by the presence of the threatened or endangered species.

139. Comment

Dischargers should not be required to report situations that have no potential to exceed effluent limits, and it is not clear when the 60-day time period allowed for the report begins. The regulation should specifically state what action starts the 60-day time period. (4) (11) (16) (27) (42)

Department Response

Accepted. This section has been revised to address these concerns.

140. Comment

Does § 92a.26 (b) only apply to facilities or activities projects requiring a permit? PennDOT would want this interpretation. (18)

Department Response

Yes.

141. Comment

This section should be modified to include changes other than facility expansions or modifications, because other changes can result in new or increased discharges of pollutants. For example, an addition of a second or third work shift at a facility or a new chemical is used. Alternatively, the Board should at least provide definitions of "facility expansions" and "process modifications." The term "new discharge" should be defined to minimize the potential for confusion. The phrase "for which no effluent limitation has been issued" could be confusing, so we suggest it be reworded.

The IRRC took note of this comment and recommends that the EQB review subsection (a) to determine if other factors beyond facility expansions or modifications should be considered in determining whether the Department should be notified of increases of permitted pollutants. (20) (42)

Department Response

Accepted in large part. This section has been revised to include changes other than facility expansions or modifications. Any change to the facility or wastestream that has the potential to exceed permit limits, or involves a new discharge, or pollutants in type or quantity that have not previously been evaluated will first have to be evaluated by the Department. However, it is not clear what might be confusing about the phrase "for which no effluent limitation has been issued."

142. Comment

Subsection 92a.26(a) would allow the Department to determine if a new or revised permit is needed, and approve certain changes in writing without the issuance of a revised permit. One problem is that there are no criteria specified as to how the Department may make this determination. Another problem is that such a change can only be approved through a new or revised permit. Therefore, this subsection should be revised to require the submission of a permit application and issuance or revision of an NPDES permit, subject to the standards governing such actions in the proposed § 92a.38. (20)

Department Response

The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. The determination as to whether a change is substantial enough to require an amended or reissued permit is inherently a site-specific determination, and it is well within the duties and discretion of the Department to determine if changes in the facility or wastestream will require an amended or reissued permit. If an amended or reissued permit is required, the normal requirements will apply as for any amended or reissued permit.

143. Comment

The proposed regulations do not clearly indicate how the Department plans to handle pollutants that exist in the permitted discharge which currently lack effluent limits, but are now identified again as a result of the proposed facility expansion or process change. If the Department requires a new application based on a new or increased wastestream, the proposed regulations do not clearly indicate whether this scenario will be considered a "NEW NPDES PERMIT APPLICATION" or a "REISSUANCE OF AN EXISTING PERMIT" as it relates to fees. (40)

Department Response

If the current permit is determined to be inadequate, any such permit action would by definition be either a major amendment to a permit or a reissued permit. Both actions are clearly identified in the fee tables.

144. Comment

The EQB should explain how it will review the notification after the increased discharge begins. If the notification can result in more stringent requirements, the EQB should explain how the owner of a facility can have a facility expansion or process modification reviewed for its implications prior to the investment so that the owner has the opportunity to explore alternatives. (42)

Department Response

This section has been revised to address this concern. The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased

loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. The permittee may not implement any change in facility or wastestream without prior review or approval of the Department, unless the permittee is certain that the action will not violate permit conditions, or exceed any representations that the permittee has made to the Department in previous permit applications. Any major expansion or investment by the permittee generally will require an amended or reissued permit, such that the permittee will have adequate opportunity to evaluate the implications of the proposed major expansion or investment, and explore alternatives. This section is intended to clarify the issue of when changes in a facility or wastestream may require an amended or reissued permit, and does not describe any new or more stringent requirements than currently exist.

92a.28 APPLICATION FEES

145. Comment

It should be clear that the fees are based on annual average design flow, rather than some other design flow. (5) (9)

Department Response

Accepted.

146. Comment

Here and in § 92a.62, "mining activity" should be changed to "mining activity other then discharge of mine drainage" to clarify that discharges of treated mine wastewater are discharges of industrial waste that are subject to the fee schedule in subsection (c). Otherwise, you have a conflict with the definition of "industrial waste," which includes mine drainage. (20) (42)

Department Response

The term "mining activity" as applied in Chapter 92a, includes all surface and underground mining activities identified in Chapters 77 and 86, and is intended to encompass discharges of treated mine drainage. As the commentator points out, there is potential confusion based on the definition of "industrial waste," and "mining activity" has been moved to the industrial waste section in the fee tables to minimize this potential for confusion.

147. Comment

The proposed regulations do not clearly indicate whether "Mining activity" includes discharges associated with any coal or noncoal mining activity. ARIPPA would like the proposed regulations to clarify that "Mining activity" under individual NPDES Permits does not require any or, any additional, fee (there is no annual NPDES fee for mining activity). ARIPPA suggests that the reference to a major facility <250 MGD be modified to be >1 MGD or >250 MGD...this would make the criteria consistent with the definition of "*Major facility*" as proposed in the regulations. (40)

Department Response

Based on the definition of "mining activity," the term encompasses discharges associated with coal and noncoal mining activity. There is no applicable annual fee. The suggested change to the fee tables would not be correct in all instances, so it is not accepted.

92a.29 SEWAGE DISCHARGES

148. Comment

A new requirement for any discharge of treated sewage with a CSO (combined sewer overflow) is proposed at § 92a.29(b)(5). Such facilities would have to provide an update on progress made with implementation of their LTCP (Long-Term Control Plan). We suggest at least mentioning this in the final rulemaking. (11) (16) (27)

Department Response

The comment is noted. The need for an update on progress implementing the LTCP is implicit in the language of this section (renumbered as § 92a.27 in the final rule, see subsection (b)(5)). No change has been made to the language.

149. Comment

Paragraph (a) is exempt where aquatic communities are essentially excluded. There is no exemption of this type found in 40 CFR 122.21(j)(5). The Board should remove this exemption. (25)

Department Response

Accepted.

150. Comment

NPDES permits now require a weekly sample currently formerly biweekly and monthly obviously this proposal represents a doubling of sampling/analysis/ administration/ reporting with virtually no new benefits. Also current TSS maximum for any 'instantaneous' sample is 50 mg/L, not 45mg/L. POTW may be due to availability of water and restroom facilities to >45 people per day during outage periods. This designation is not in current NPDES permit, but this '% removal' requirement is new. The regulations do not clearly indicate if it will be applicable to facilities with daily staffing <45 people, but 'outage' potential greater then same. (40)

Department Response

Accepted in part. The requirement for weekly effluent limits for BOD and TSS has been changed to apply to POTW facilities only. The percent removal requirements already apply only to POTW facilities, so it is not a concern for industrial facilities.

92a.34 STORMWATER DISCHARGES

151. Comment

We support the appropriate prohibition of the "no exposure" conditional permit exclusion for discharges of stormwater associated with industrial activity that discharge to High Quality or Exceptional Value Waters. (20)

Department Response

The Board appreciates the comment.

152. Comment

Recommend that this section also contain language for stormwater associated with industrial activities. See current Chapter 92 § 92.21a.(d). (25)

Department Response

Accepted.

153. Comment

We interpret this section to mean that stormwater associated with industrial or mining activities, which qualifies for "no exposure" status (i.e., there is no exposure of industrial or mining materials and activities to stormwater) would be regulated if the stormwater discharges to an Exceptional Value (EV) or High Quality (HQ) stream, but would not be

regulated if the stormwater discharges to any other surface water. This section is overly stringent and should be deleted. If stormwater does not contact industrial activities or materials, there is no need to regulate it and nothing that can be done on the part of an operator to prevent pollution of the stormwater or the receiving stream. If stormwater does not contact industrial activities or materials, there is no need to regulate it. (26) (38)

Department Response

The commentator's interpretation is correct, but stormwater, even stormwater that has not been exposed to industrial activities or materials, has the potential to have degrading effects on HQ and EV streams. Stormwater that is allowed to runoff in quantities that exceed the natural flow and velocity conveyance capacity of the receiving stream will have degrading effects by scouring and destabilizing the natural channel. Excessive suspended solids in runoff can have degrading effects via sedimentation in the stream. It is not true that there is nothing that the permittee can do to prevent pollution of the stormwater or the receiving stream, as stormwater systems can be designed to minimize excess runoff and erosion, and to maintain the natural hydrograph of the receiving stream.

92a.36 COOLING WATER INTAKE STRUCTURES

154. Comment

The Chamber believes that until such time when EPA issues their new draft Phase II 316(b) rule, the Department should not presume that they can or should determine if a facility with a cooling water intake structure reflects the BTA for minimizing adverse environmental impacts, even with a site-specific evaluation. BTA has not been defined for the (pending) new rule yet, and as such, DEP should wait until EPA moves forward with the new draft Federal regulation. Pre-emptive State requirements such as the proposed section 92a.36 may conflict with what is ultimately deemed to be BTA and disallow portions of the Federal rule. (33)

Department Response

The Department acknowledges the uncertainty, but it may not ignore its ongoing obligation to make BTA determinations. Although EPA suspended the Phase II Rule, the provision in 40 CFR 125.90(b) was retained, which directs permitting authorities to use best professional judgment to develop controls for minimizing adverse environmental impact associated with cooling water intake structures. The Department is required by Section 316(b) of the Clean Water Act, 40 CFR 125.90(b) and 72 FR 37107 – 37109 (July 9, 2007) to make BTA determinations using best professional judgment. If and when EPA moves forward with a new Federal Regulation, DEP will reevaluate and incorporate all relevant developments into its policies and practices. The Department is motivated to avoid scenarios whereas permittees are required to make major and costly modifications to intake structures, and then subsequently the modifications are determined to be insufficient or overkill with respect to future BTA determinations. Also, note that subsection (c) in the proposed rulemaking, which had referred to the need to perform a site-specific determination at each facility, has been deleted for the final rule.

155. Comment

The Department should clarify whether it intends to require current permittees to install treatment for reducing impingement and entrainment prior to the issuance of the revised Federal language for the 316(b) rule for existing facilities. (37)

Department Response

Although the uncertainty at the Federal level has complicated the issue, 316(b) requirements have been applicable since the Clean Water Act was promulgated. The Department has already taken steps to reduce impingement and entrainment at some facilities, while other facilities are still collecting data to assist in the BTA determination and to help identify remedial options if appropriate. These efforts will not stop because of the current uncertainty at the Federal level, as dealing with uncertainty is common in the course of the Department's duties. It is reasonable to expect that developments at the Federal level will affect how the Department implements the 316(b) rule at some point.

156. Comment

The IRRC notes that commentators believe that until BTA is clearly defined in the new federal rule, the EQB should not move forward with this section. In light of the public comments, the EQB should explain how the public was provided with the opportunity to provide effective comments and how this provision will be reasonably implemented. (42)

Department Response

See the two previous responses with regard to this section. No commentator has suggested that the section be deleted -- that would not be an option as it would not meet minimum requirements for an EPA-approved NPDES program. Subsection (a) incorporates by reference the essential Federal regulations, and subsection (b) refers to a statutory requirement of the Clean Water Act. The public has been provided with the opportunity to provide effective comments regarding the regulation, and the public will be provided with an opportunity to provide effective comments during the public comment period of any draft permit affected by the 316(b) rule.

92a.38 DEPARTMENT ACTION ON NPDES PERMIT APPLICATIONS

157. Comment

Based on § 92a.38(b), the Department would now consider Local and County Comprehensive Plans and zoning ordinances when reviewing applications. The preamble should mention that this already is longstanding Department policy. It is unclear how this relates to "an integrated approach to water resources management." (11) (16) (27)

Department Response

Subsection (b) has been deleted based on a determination that consideration of local and county comprehensive plans should continue to be implemented through established policy (DEP-ID: 012-022-001, *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure the Coordination*).

158. Comment

Subsection 92a.38(b) should be modified to refer to "plans and ordinances" consistently. (18)

Department Response

See the response to the previous comment.

159. Comment

PennDOT requests the addition of a public health or safety exception to permit requirements. Other programs have such exceptions. (18)

Department Response

These requirements are established primarily to comply with Federal and State law. Pennsylvania's NPDES regulations must be consistent with the Federal requirements. The Department agrees that there are projects that may be necessary to ensure public health, safety or the environment that may be undertaken by PennDOT. That is why in the revisions to Chapter 102 the Department has provided alternative calculation and design methodologies for certain post construction performance standards when a project is necessary to protect public health and safety. Should a situation arise where a threat to public health or safety somehow conflicts with the requirements of § 92a.38, the Department and the permittee would have to work together to satisfy the minimum requirements of § 92a.38 and address the threat to public health or safety.

160. Comment

Based on § 92a.38(b), the Department would now consider Local and County Comprehensive Plans and zoning ordinances when reviewing applications. Plans and zoning ordinances should not be used by DEP as grounds for denying the reissuance of a permit for facilities that already are in existence. This provision should apply only to new facilities, or changes to facilities that may affect compliance with the plan or zoning. (26) (33) (37) (42)

Department Response

Subsection (b) has been deleted based on a determination that consideration of local and county comprehensive plans should continue to be implemented through established policy (DEP-ID: 012-022-001, *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure the Coordination*)

161. Comment

Paragraph (a)(2) requires an application to be consistent with "other applicable statutes and regulations administered by the Commonwealth," and "if applicable, river basin commission requirements created by interstate compact." There are two concerns with these phrases. First, the scope of these provisions cannot be determined. Who determines what is "applicable"? The phrases quoted above do not provide the reader with the information needed to comply with the regulation. We recommend either deleting these phrases or amending them to provide specific compliance requirements. Second, because the scope of the above quoted phrases cannot be determined, we recommend that the EQB explain its authority to enforce "other applicable statutes and regulations administered by the Commonwealth." Also, the EQB should explain its authority over "river basin commission requirements created by interstate compact." (42)

Department Response

The term "applicable" refers to other environmental laws of the Commonwealth. The purpose of this subsection is to ensure that an application for an NPDES permit is consistent with applicable environmental laws and regulations of the Commonwealth. The term is not limited to laws and regulations administered by the Department because some environmental laws are administered by other departments as well as local government units. This section does not establish any authority over river basin commission requirements. Rather, it is intended to ensure that NPDES applications ensure consistency with those requirements.

92a.41 CONDITONS APPLICABLE TO ALL PERMITS

162. Comment

The provision at § 92a.41(c) purports to prohibit completely some substances or properties that are inevitably a component of treated wastewater (e.g. color or turbidity), and may contradict other provisions in the permit (e.g., numeric permit limits for color or turbidity). This provision would place all permittees in immediate noncompliance, with no reasonable options. Very high costs would be incurred trying to comply with this inappropriate prohibition. This change should be reevaluated, and/or permit requirements should be more site-specific to address these concerns, and/or the qualifying language "amounts sufficient to be inimical to the water uses" reinserted, and/or the qualifying language should apply only to color, turbidity, and settleable solids. (4) (5) (6) (9) (11) (14) (16) (22) (24) (26) (27) (30) (32) (33) (34) (35) (38)

Department Response

Accepted. Section 92a.41(c) has been modified to provide that the only conditions that are prohibited are floating solids, scum, sheen, or substances that result in deposits in the receiving water. The other conditions are all allowable to the extent that they are provided for in the permit, or to the extent that they do not result in an observable change in the condition of the receiving water. This change will address the original concern, while not placing the permittee in an unreasonable situation.

The issue has been that enforcement staff in the field have no way to determine if these conditions are "inimical to the water uses to be protected" or not, and permit conditions must be enforceable. The revised language would place the burden of determining the extent to which these conditions are consistent with water quality standards back where it belongs -- with the permit writer. The permit writer establishes all other water quality-based permit conditions, and this should be no exception.

Generally, these conditions should not be observed unless provided for in the permit, but the Department retains and reserves enforcement discretion should minor or transient instances of these conditions be observed during facility inspections.

163. Comment

We believe the commentators have outlined a significant change from existing regulation of water quality. While we agree that the phrase "inimical to the water uses" is vague and should be made clearer, we question the effect and basis for the proposed language which imposes a ban on all of these parameters in discharges. Based on the comments and the Preamble, it does not appear that the proposed language was developed to address specific violations or damage occurring to the environment. To the contrary, via NPDES permit, the Department has for many years allowed Glatfelter to meet a different standard than what is proposed in Subsection (c) for color. Therefore, we request a detailed explanation of why Subsection (c), as proposed, is reasonable, feasible and necessary. In addition, we request an explanation of the direct and indirect costs imposed on permit holders to meet Subsection (c) and how many permits would be either invalidated or would not be renewable under Subsection (c). (42)

Department Response

Accepted. See the response to the previous comment. Based on the revised provision, no cost impact to the regulated community is anticipated, and no permits will be invalidated or otherwise rendered unsustainable.

164. Comment

Regarding § 92a.41(b), a state requirement cannot "supersede" a Federal requirement, it can only satisfy it by being as stringent as, or in this case, more stringent than the Federal

requirement. Compliance with § 91.33 cannot fully satisfy 40 CFR 122.41(l)(6) because some conditions are not provided for (an unanticipated bypass or an upset that violates an effluent limit, or a violation of a maximum daily limit), and no written report is required in § 91.33. (Revised language is suggested.) (20)

Department Response

Accepted in part. Subsection (a) has been revised to eliminate any confusion over the term "supersede." Compliance with § 91.33 does not have to fully satisfy the requirements of 40 CFR 122.41(l)(6) because 40 CFR 122.41(a)—(m) is incorporated by reference, and its requirements are fully applicable. However, subsection (a) was further revised to clarify the notification requirements, and to distinguish between oral and written notification requirements.

92a.48 INDUSTRIAL WASTE PERMIT

165. Comment

The provision at § 92a.48(a)(3) should be amended to provide for Department-developed technology-based limitations for the case where a Federal ELG has been issued for an industrial category, but it does not encompass a particular pollutant of concern. (Revised language is suggested.) (20)

Department Response

The proposed change is unnecessary, as the Department can develop technology-based limits for any pollutant that does not already have a applicable technology-based limit, or for any pollutant for which new information requires a reevaluation of the existing applicable technology-based limit. This reevaluation may or may not be performed as per 40 CFR 125.3.

92a.50 CAAPs

166. Comment

Subsection (a) gives the impression that the requirements of § 93.4c apply only for discharges to High Quality or Exceptional Value Waters. In fact, the existing use protection provisions of § 93.4c(a) apply for all discharges from a CAAP. (20) (25)

Department Response

Accepted. This subsection has been deleted to avoid the confusion.

167. Comment

Paragraph (d)(3) requires the use of "the most sensitive analytic method available." It is not clear how to meet this standard. Furthermore, it could require the use of expensive or elaborate equipment that may not be available or even developed yet. The regulation should clearly state what reasonable methods are acceptable. (42)

Department Response

Accepted. Revised language provides for the use of the EPA-approved method for wastewater analysis with the lowest published detection limits. The Department reserves its discretion to approve alternate analytical methods based on consideration of cost or availability.

92a.51 SCHEDULES OF COMPLIANCE

168. Comment

In § 92a.51(a), requiring compliance "as soon as practicable" is not consistent with the Federal requirement, which specifies "as soon as possible." The outside deadline of three years generally will be longer than the outside deadline in the Federal regulation of "the applicable statutory deadline under the Clean Water Act." The Environmental Hearing Board (EHB) is not a court, but a reviewing body, so the phrase that refers to any "other" court of competent jurisdiction should be modified, and the EHB has no power to issue an order that would be beyond the authority of the Department. Therefore, the EHB cannot establish a compliance period longer than DEP could establish on its own. The simplest fix is to incorporate by reference 40 CFR 122.47(a)(1), but otherwise these problems must be corrected. (20)

Department Response

The phrase "as soon as practicable" is identical to that which appears in existing section 92.55(a) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. The Environmental Hearing Board will not be authorized to issue orders allowing a longer time for compliance. Accordingly, the reference to the EHB has been deleted.

169. Comment

In paragraph (a), recommend replacing the phrase "the period to be consistent with" with "but not later than the applicable statutory deadline under". This more accurately reflects the language in 40 CFR 122.47(a)(1). (25)

Department Response

The phrase at issue, " the period not to be inconsistent with", is identical to the language in existing section 92.55(a) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

170. Comment

Federal 40 CFR 122.47(a)(3)(i) requires that the time between interim dates may not exceed one year. The following should be added to paragraph (b) after the first sentence, "The time between interim dates shall not exceed 1 year." (20) (25)

Department Response

Accepted. The language proposed by the commentator has been slightly modified, and relocated as the third sentence in subsection (b).

171. Comment

Federal 40 CFR 122.47(a)(4)(c) requires that the notification requirement specified in § 92a.51(c) be written into the permit. (20)

Department Response

This provision requires that the permittee provide notification of compliance or noncompliance within 14 days following the interim date. Permit writers rely on this provision to include this requirement as a permit condition. It does not add value to reiterate in regulation that this requirement will be a permit condition. Section 92a.51 (c) is identical to existing section 92.55 (c) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

172. Comment

Existing § 92.55 provides that "if a deadline specified in section 301 of the Federal Act has passed, any schedule of compliance specified in the permit shall require compliance with final enforceable effluent limits as soon as practicable, but in no case longer than 3

years . . . ." The new regulation would apply the three-year limitation to all schedules of compliance, regardless if the deadline specified in section 301 of the Federal Act has passed. This effectively forces communities to achieve compliance with any new mandate within three years, regardless of the actual capability to do so. DEP should not restrict the use of schedules of compliance to three years. The rule does not explain the basis for this new mandate or demonstrate that, in general, a 3-year schedule is sufficient for a discharger to design, finance and construct facilities. If the three year deadline were to be maintained, many facilities would be forced to reduce the planning phase which would result in the needless expenditure of funds. Moreover, compliance schedules inherently require DEP timely action in responding to plans and issuing construction and discharge permits. Particularly with DEP's reduction in staff to review Act 537 plans, issue construction permits and issue discharge permits, the three year time frame is unreasonable. It should not be maintained. (4) (30) (32) (34)

Department Response

The 3-year time frame for schedules of compliance set forth in the proposal is not a new requirement. However, the time frame for schedules of compliance has been revised under the final rule. Subsection (a) provides that schedules of compliance may now be for up to five years. This is consistent with the 5-year terms for permits issued.

92a.52 VARIANCES

173. Comment

The Pennsylvania Coal Association believes that PADEP should automatically incorporate any federal variances adopted after November 2000 into the Proposed Rulemaking and fails to see the rationale for the exclusion. (26)

Department Response

The language of this section is verbatim from the language of existing section 92.2 (c), and no new or more stringent requirements are proposed. The Department will consider variance requests on a case-by-case basis. Historically, the Department has granted very few variances. Variances granted have related only to fundamentally different factors and thermal discharges, which are specifically incorporated into sections 92a.3 (b)(5) and 92a.3 (b)(6) respectively.

174. Comment

Proposed §92a.52 provides that any new or amended federal regulation enacted after November 18, 2000 which creates a variance to existing NPDES permitting requirements is not incorporated by reference. The proposal fails to provide adequate notice of the underlying standard, or any discussion of this proposed amendment. Nowhere does the proposal identify the genesis of the November 18, 2000 date nor the federal amendments that occurred afterward that it is purposely omitting. (30) (32) (34)

Department Response

See the response to the previous comment. This is an existing provision, and the date was set based on the effective date of the last revision to Chapter 92.

175. Comment

Proposed §92a.52 creates a potential conflict with the language of § 92a.3 regarding incorporation of Federal regulations by reference. Proposed § 92a.52 should be deleted because its intent is included in § 92a.3(c), or it is contrary to the expressed intent not to be more stringent than Federal requirements, or otherwise explain why this section is needed. (4) (37) (42)

Department Response
See the response to comment 173. This is an existing provision, included to ensure that any future variance provided for in Federal regulations receives adequate review before it is adopted in this Commonwealth.

176. Comment
The Chamber does not support this exclusion of incorporating a Federal regulation by reference. This language creates a potential conflict with the language of 92a.3 that states that Federal NPDES regulations including appendices, future amendments and supplements are incorporated by reference. A variance would very likely be part of those regulations and not easily separated. In response to WRAC comments, the Department indicated that they included this language to allow them to evaluate each new Federal exclusion on a case-by-case basis. This intention is completely missed in the proposed regulation and accompanying preamble. Instead, the proposed language draws a hard line in the sand. The Chamber recommends that DEP change the language to read: "For any new or amended Federal regulation enacted after November 18, 2000 which creates a variance to existing NPDES permitting requirements, the Department will review any new variances to determine that they are appropriate for the Commonwealth under the provisions of the Clean Streams Law." (33)
Department Response
See the response to comment 173. This is an existing provision, designed to ensure that any future variance provided for in Federal regulations receives adequate review before it is adopted in this Commonwealth. The Department does not agree with the commentator's interpretation that this section precludes the Department from acting on any new Federal variance. This provision means that any such variance is not incorporated into regulation automatically. The net effect of the present language and the proposed language would be the same: the Department will review any new variance for appropriateness in this Commonwealth before it may be applied. If determined to be appropriate, it would be implemented, and also incorporated into a future rulemaking.

92a.53 DOCUMENTATION OF PERMIT CONDITONS

177. Comment
The Pennsylvania Coal Association supports the obligation of PADEP under this section to produce complete fact sheets for all permits. (26)
Department Response
The Board appreciates the comment.

178. Comment
Section 92a.53 does not address the provisions of §124.8(b)(5) and (6) or the requirements for fact sheets set forth in 40 C.F.R. § 124.56. The DEP regulation should be amended to be consistent with the minimum requirements set forth in the federal regulations. (30) (32) (34)
Department Response
The Department believes that § 92a.53 (3)—(5) effectively covers the requirements of 40 CFR 124.56 and 40 CFR 124.8. All relevant determinations and calculations must be included in the fact sheet.

92a.54 GENERAL PERMIT

179. Comment

The provision at § 92a.54(a) should be amended to prohibit the use of general permits in waters that support threatened and endangered species and critical habitat. The IRRC took note of this comment and recommends that the EQB explain whether this protection is needed. (10) (42)

Department Response

As per § 92a.54(a)(7), general permits must inherently be of low environmental concern and impact, such that the potential of a general permit to have adverse effects is low. This standard may not be sufficient to ensure a nondegrading discharge, such that general permits cannot reasonably be applied in High Quality (HQ) and Exceptional Value (EV) waters, but a discharge covered under a general permit should be of minimal concern to aquatic species, whether endangered or not. In addition, while surface waters are formally classified as HQ and EV, such that it is clear where they start and where they end, this is not necessarily true of waters that may support threatened or endangered species. The determination as to whether a discharge, whether covered under a general permit or an individual permit, can affect threatened or endangered species is necessarily a site-specific determination. Based on this rationale, a flat prohibition on the use of general permits under the conditions proposed is neither necessary nor practical.

180. Comment

We support the continued and appropriate prohibition of general permits for facilities or activities that discharge to High Quality or Exceptional Value Waters. (20)

Department Response

The Board appreciates the comment.

181. Comment

Subsection e(1) does not describe what it means by "more appropriately controlled under a general permit." What criteria will apply, and who will make that determination? Also, subsection (g) states that the denial of a general permit is not a final action. Since only final actions can be appealed, the applicant is forced to apply for an expensive and time-consuming individual permit. This proposed regulation attempts to do an end run around long-standing legal right of applicants to appeal Department actions and is a violation of due process protections. (4)

Department Response

These provisions are existing at § 92.83 (b)(1) and (d), and the Board does not propose any revision to these existing requirements. Section 92a.54 (e) clarifies the conditions under which the Department would require an individual permit. A site-specific evaluation would necessarily be required, so it is not practical to list all of the situations that may prompt the Department to require an individual permit. As per the requirements of 40 CFR 123.25(a)(11) and 122.28(b)3, the Department must have the authority to require an individual permit instead of a general permit.

182. Comment

Paragraph (e)(3) states:

> *The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, schedule of compliance or order issued by the Department.*

This provision is not clear. For example, if a person was cited for past violations, there would be a record of that event and an ability to appeal the result. However, this provision penalizes

the person for "lack of ability or intention to comply." How will this provision be enforced and how can an action taken under it be appealed? The EQB should explain the intent of this provision, its reasonableness and how it would be enforced. (42)

Department Response

This provision is identical to existing § 92.83(b)(3), so no new or more stringent requirements are proposed, nor has the Department encountered any of the potential issues described by the commentator. This provision is consistent with the Federal provision at 40 CFR 122.28 (b)(3), which allows the Director (Department) the discretion to require an individual permit. As per the requirements of 40 CFR 123.25(a)(11), the Department must have the legal authority to require an individual permit instead of a general permit. Section 92a.54 (e) clarifies the conditions under which the Department would exercise this option.

This provision would apply to a permittee who has demonstrated one or more instances of noncompliance with requirements described in a regulation, permit, schedule of compliance, or order of the Department. In some cases, it may be evident that the permittee cannot comply before the noncompliance manifests. For example, the permittee may not have a suitable facility or equipment, or may engage in business practices or agreements that preclude compliance. In this case, the Department would be able to require that the permittee apply for an individual permit. Since any such situation would require an individual evaluation, it is not practical to list all of the situations that may prompt the Department to require an individual permit. As per subsection (g), the permittee may appeal to the Environmental Hearing Board after the Department takes final action on the individual permit application.

92a.61 MONITORING

183. Comment

The provision at § 92a.61(b) may modify or be inconsistent with the requirements of Chapter 94, *Municipal Wasteload Management*, or the way that those requirements have been implemented, as regards the monitoring of influent flow to sewage treatment plants. If so, we object to this change. (4) (5) (9) (24)

Department Response

In § 92a.61(b), the term "intake" refers only to intake flow from surface waters, and does not include influent, which refers only to untreated wastewater. There is no effect on the requirements of Chapter 94 or the way that those requirements have been implemented. To preclude any possible confusion, the term has been changed to "surface water intake." Note that this provision primarily is intended to allow for monitoring of pollutants rather then flow, but under some conditions flow monitoring of intake surface waters may be appropriate.

184. Comment

We support § 92a.61(e) as a well conceived change to the Department's usual policy of establishing the frequency of effluent flow monitoring based solely on the design flow of the facility. (5) (9)

Department Response

The Board appreciates the comment. The provisions of § 92a.61(e) are contained in existing § 92.41(d), such that no change is proposed regarding requirements for the monitoring frequency of effluent flow.

185. Comment

Subsection 92a.61(j) includes a provision that provides that DEP can require a permittee to perform additional sampling for purposes of TMDL development. PennDOT requests that this provision be deleted, or an explanation provided as to how this might apply to stormwater runoff associated with construction activities generally, and PennDOT projects specifically. (18)

Department Response

This paragraph is a clarification of an existing requirement which gives the Department the authority to require any reasonable monitoring and additional sampling related to the development and implementation of TMDLs. For the purposes of TMDL development and implementation related to stormwater runoff, monitoring and/or sampling requirements would likely relate to runoff rate and volume which would/could be utilized in modeling applications to determine the volume and rate reductions required to implement a successful stormwater TMDL. The Department does not agree this provision should be deleted.

186. Comment

Section 92a.61(d)(4), (5) and (i) would require monitoring for pollutants specified by EPA in regulations issued under the Clean Water Act as subject to monitoring and any pollutants that the Administrator requests in writing to be monitored. It is inappropriate to require a permittee to comply with a request by EPA, particularly if such request is unreasonable or otherwise not supportable. Monitoring changes constitute changes to the NPDES requirements, subject to notice and comment. These provisions should be deleted as, among other things, they violate applicable due process procedures. (30) (32) (34)

Department Response

These requirements are contained in existing § 92.41(c) and (h), and the Board does not propose any change to these existing requirements. Requests from the Administrator (EPA) for monitoring or data would be made under the provisions of Federal regulations, and would be both reasonable and supportable on that basis. Any new monitoring requirements proposed to be incorporated into an NPDES permit would be subject to public notice and comment.

187. Comment

The proposed new § 92a.61(b) appears to expand on the definition of "reasonable" monitoring inappropriately. For example, the new language tying additional monitoring to that which "may" have an effect on effluent quality could affect almost any minor process change or maintenance activity. Also, § 92a.61(j) allows the Department to impose sampling "for other reasons that the Department determines are appropriate." This language is vague and potentially overbroad and will lead to monitoring for monitoring sake. (4)

Department Response

The Department considers that it is fully appropriate that any aspect of a facility's operation that may affect effluent quality is subject to reasonable monitoring requirements. The primary purpose of the NPDES permit is to assure that the facility operates within appropriate limits, especially in regard to effluent quality. The issue of what may constitute "reasonable" monitoring has been clarified to some extent, but is not fundamentally different than in existing § 92.41. The permittee may question or appeal monitoring requirements or any other permit condition as unreasonable. Regarding Section 92a.61(j), this subsection

provides only for additional sampling for limited periods that may be required for TMDL development and similar water quality analyses, as well as for other appropriate reasons. Any new long-term or permanent monitoring requirement would be subject to the normal permitting process.

92a.75 REISSUANCE OF EXPIRING PERMITS

188. Comment

The Department proposes to allow administrative extensions for minor facilities under some conditions, after completing review of the application. Why not simply reissue the permit? What is the advantage of the administrative extension, given that the application has already been reviewed? (11) (27)

Department Response

Subsection (b) has been deleted because it was confusing and subject to misinterpretation.

189. Comment

The reference to "other applicable regulations" in § 92a.75(c)(2) is unnecessary and confusing. It appears that a schedule of compliance can only be issued under § 92a.51, so the Board should eliminate this phrase. (20)

Department Response

The language is identical to that of existing section 92.13(b)(2) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. Schedules of compliance could possibly be issued to achieve the requirements of other chapters that contain additional NPDES requirements for certain point sources (e.g., mining activities, or construction activities). In this case, the schedule of compliance would have to comply with the requirements of § 92a.51, but may contain other applicable requirements.

190. Comment

Subsection 92a.75(b) appears to conflict with the provisions of § 92a.7 regarding administrative extensions. (4) (24) (26) (30) (32) (34)

Department Response

Accepted. Subsection (b) has been deleted because it was confusing and subject to misinterpretation.

191. Comment

Paragraph (a) allows the Department to grant a later date for submission of a permit renewal application. The regulation is not clear that such date cannot be later than the permit expiration date, as required in 40 CFR 122.21(d). Please clarify the regulation. (25)

Department Response

The language of subsection (a) is identical to that of existing section 92.13(a) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. The Department agrees that a permit may not be reissued after it has already expired, but no clarification is required in this case. Since no permit term may exceed 5 years, the Department is unable to grant permission for an extension of time beyond the 5-year term.

192. Comment

Paragraph (b) allows for administrative extensions for minor facilities. It is unclear if this is intended to limit extensions only to minor facilities. If a permit for a major facility is not

reissued prior to the expiration date, is an expired major permit no longer in effect, making it a discharge without a permit? Declaring that permits cannot be extended, whether applicable to minor or major facilities, would not be appropriate and would put facilities in noncompliance given DEP's backlog. Please clarify. (25) (30) (32) (34)

Department Response

Accepted. Subsection (b) has been deleted because it was confusing and subject to misinterpretation.

92a.82 PUBLIC NOTICE OF PERMIT APPLICATIONS AND DRAFT PERMITS

193. Comment

One important component of public notice of draft permits has been deleted, that of the need to identify the location of the first downstream potable water supply. It should be reinserted for the final rulemaking. (11) (16) (25) (27) (42)

Department Response

This provision has been deleted as per Homeland Security requirements. The Department will still include this information in public notice to the extent that it is allowable under Federal regulations issued by the Department of Homeland Security, but it is not appropriate to retain it as a regulatory requirement.

194. Comment

Subsection 92a.82(b) would require that public notice of a draft permit or permit application be posted at the site of the existing or proposed discharge under some conditions. This is impractical for mining operations which often are in remote locations, and could be a safety hazard to the public. We believe that it would be a better option to have the permits on file at the DEP District Mining Office, where the public can safety access and view the documents. (17) (26)

Department Response

One of the primary components of public notice is to post notice of the proposed discharge at the site of the proposed discharge. The permit may be filed at the District Mining Office, but 92.82(b) refers to a public notice posting, not the actual permit, and documents in files do not help the public become aware of proposed new or reissued permits. Also, this requirement applies to the applicant making a posting -- the Department posts notice in the *Pennsylvania Bulletin*. If the main premises of a mining company are outside the limits of this Commonwealth, there would be no effective posting by the applicant at all if there is none at the site. All industrial facilities perform such posting, often at remote sites. Since the requirement is that the posting be made near the entrance to the premises, there is no authorization for the public to enter any industrial site for the purpose of seeking notice of a proposed discharge..

195. Comment

Paragraph (b) as currently written gives the misleading impression that public notice of draft individual permits are only required for new facilities and does not include reissued permit draft documents. To clarify the regulation, the paragraph should begin "A public notice of every newly developed draft individual permit for a new or reissued permit, ...". (25)

Department Response

The suggested change is not necessary. The definition of "draft permit" in section 92a.2 clearly indicates that it applies to reissued permits. Therein a "draft permit" is defined as "[a] document prepared by the Department indicating the Department's tentative decision to issue or deny, modify, revoke, or reissue a permit."

196. Comment

Paragraph (b) did not carryover the requirements of existing Chapter 92.61(a)(9) pertaining to the antidegradation classification of the receiving water for new or increased dischargers. This requirement should be considered. (25)

Department Response

The Department disagrees. Section 92a.82(b)(2) provides that public notice of a draft permit is to include, among other things, " [t]he name and existing use protection classification of the receiving surface water under § 93.3 (relating to protected water uses) to which each discharge is made . . . ." High Quality and Exceptional Value Waters are among the existing use classifications to be included.

197. Comment

Section 92a.82(e) would provide for the fact sheet to be sent to any person who requests it. Consistent with 40 C.F.R. § 124.8, the fact sheet is required to be provided to the permittee without a request. Only after the permittee receives the requisite fact sheet should the thirty-day clock for the permittee to comment upon a permit commence. (30) (32) (34)

Department Response

The fact sheet is part of the permit, and is automatically sent to the permittee as part of the permit. No request by the permittee is required.

198. Comment

Consistent with the federal minimum requirements of 40 C.F.R. § 123.25(a)(31), Pennsylvania regulations should provide that a response to permit comments be provided meeting the standards set forth in §124.17(a) and (c). (30) (32) (34)

Department Response

The requirements of §124.17(a) and (c) are effectively covered by § 92a.81(a), 92a.82 (b)(5), (d), 92a.84(a)(5), (b), and 92a.86.

92a.85 NOTICE TO OTHER GOVERNMENT AGENCIES

199. Comment

Existing Chapter 92.65(4) and (5) are not included. Please include or explain why these sections are not required. (25)

Department Response

Existing § 92.65 (4) and (5) were considered unnecessary and largely redundant to the requirements of § 92a.85(1)—(3), and 92a.82(e). The Department is motivated to reduce administrative burden that may not add value, is not a Federal requirement, and may increase costs to the regulated community.

92a.103 PROCEDURE FOR CIVIL PENALTY ASSESSMENTS

200. Comment

The provisions at § 92a.103 inappropriately allows the for civil penalties under some conditions, because the civil penalties may be assessed without a public hearing, which is required under Section 605 of the Clean Streams Law. Allowing the opportunity for a hearing is not adequate, because the Law specifies that the hearing must be performed. (5) (9)

Department Response

The process outlined in section 92a.103 is identical to that set forth in existing section 92.93 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

Section 605 of the Clean Streams Law, 35 P.S. § 691.605, provides that the "department, after hearing, may assess a civil penalty upon a person or municipality for . . . " a violation of the Clean Streams Law. The regulation complies with the requirements of this language in the sense that it provides an opportunity for a hearing on the proposed assessment. Insofar as due process is concerned, the minimum constitutional due process requirement is that there be an opportunity for a hearing, as articulated in numerous Federal and State cases.

Under current practice, proposed assessments include a statement indicating that the permittee may request a pre-assessment hearing. The permittees are thus notified of their rights to a pre-assessment hearing and are provided an opportunity to request such a hearing. If a hearing is requested, it will be held. Any waiver of a hearing is based on a voluntary, knowing decision of the permittee not to contest the assessment or to request a hearing.

Since its adoption in 2000, this process has worked well for both the permittees and the Department.

201. Comment

Section 92a.103 should be modified to ensure unbiased public hearings. This should be accomplished by requiring that the hearing officer be selected from a region other than the one that regulates the permittee's facility. The hearing officer should not be from the water quality organization. Persons subject to a hearing under this section may be represented by counsel and will have the opportunity if requested to examine and cross examine the Department's witnesses, to offer and examine witnesses, and to have their witnesses cross examined, all under oath. The hearing officer's conclusions and recommendations will be set forth in writing and served upon the person and the Department. All matters of record at the hearing will be admissible before any tribunal before which an appeal of the matter is brought. (5) (9)

Department Response

Section 92a.103 is identical to existing § 92.93, so the Board has not proposed any change to existing requirements regarding the procedure for civil penalty assessments. The Department has established internal procedures ensuring that hearings regarding civil penalty assessments are unbiased. The process ensures that officials presiding over the hearing ~~are~~ have not previously been involved in the matter. This process is outlined in a guidance document issued by the Department, *Civil Penalty Assessment Informal Hearing Procedure* (DEP-ID: 362-4180-006). The Department does not believe that the strict formality that the commentator proposes would be an improvement to the process.

Typographical Errors and Stylistic Suggestions.

- Change "for" to "that authorizes" in 92a.5(b) (20)
- Change "Confidentially" to Confidentiality" in 92a.8 title. (20) (37)
- Change "previous" to "existing" in 92a.7(b)(2) to be consistent. (20)
- Change "discharges" to "dischargers" in 92a.37 title (20)

- Change 92a.54(e)(6) to read: "The discharge is not in compliance with, or will not result in compliance with, an applicable effluent limitation or water quality standard." (20)
- Change "processing" to "possessing" in 92a.81(b) (20)

Attachment A
Cross-walk Table

Subchapter A. DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

92a.1.	Purpose and scope.	92.3
92a.2.	Definitions.	92.1*
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92a.4.	Exclusions.	92.4*
92a.5.	Prohibitions.	92.2, 92.73*
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92a.10.	Pollution prevention.	92.2b*
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Subchapter B. PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

92a.21.	Application for a permit.	92.2, 92.21
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92a.23.	NOI for coverage under an NPDES general permit.	92.83*
92a.24.	Permit-by-Rule for SRSTPs.	New
92a.25.	Permit-by-Rule for application of pesticides.	New
92a.26.	New or increased discharges, or change of wastestream.	92.7*
92a.27.	Incomplete applications or incomplete NOIs.	92.25
92a.28.	Application fees.	92.22*
92a.29.	Sewage discharges.	92.21a*
92a.30.	Industrial waste discharges.	92.21a*
92a.31.	CAFO.	92.5a
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92a.33.	Aquaculture projects.	92.2
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92a.35.	Silviculture activities.	92.2
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92a.37.	New sources and new discharges.	92.2
92a.38.	Department action on NPDES permit applications.	New

Subchapter C. PERMITS AND PERMIT CONDITIONS

92a.41.	Conditions applicable to all permits.	92.2, 92.51*
92a.42.	Additional conditions applicable to specific categories of NPDES permits.	92.2, 92.53*
92a.43.	Establishing permit conditions.	92.2
92a.44.	Establishing limitations, standards, and other permit conditions.	92.2, 92.31*
92a.45.	Calculating NPDES permit conditions.	92.2, 92.57*
92a.46.	Site specific permit conditions.	92.52a
92a.47.	Sewage permit.	92.2c*
92a.48.	Industrial waste permit.	92.2d*
92a.49.	CAFO.	92.5a
92a.50.	CAAP.	New
92a.51.	Schedules of compliance.	92.55*
92a.52.	Variances.	92.2
92a.53.	Documentation of permit conditions.	92.59*
92a.54.	General permits.	92.81, 92.83
92a.55.	Disposal of pollutants into wells, into POTW or by land application.	92.2

Subchapter D. MONITORING AND ANNUAL FEES

92a.61.	Monitoring.	92.2, 92.41
92a.62.	Annual fees.	New

Subchapter E. TRANSFER, MODIFICATION, REVOCATION AND REISSUANCE, TERMINATION OF PERMITS, REISSUANCE OF EXPIRING PERMITS AND CESSATION OF DISCHARGE

92a.71.	Transfer of permits.	92.2, 92.71a*
92a.72.	Modification or revocation and reissuance of permits.	92.2, 92.13a*
92a.73.	Minor modification of permits.	92.2
92a.74.	Termination of permits.	92.2

92a.75.	Reissuance of expiring permits.	92.13*
92a.76.	Cessation of discharge.	92.72a*

Subchapter F. PUBLIC PARTICIPATION

92a.81.	Public access to information.	92.63
92a.82.	Public notice of permit application and draft permits.	92.61*
92a.83.	Public notice of public hearing.	92.61*
92a.84.	Public notice of general permits.	92.82
92a.85.	Notice to other government agencies.	92.65*
92a.86.	Notice of issuance or final action on a permit.	New
92a.87.	Notice of reissuance of permits.	92.67*
92a.88.	Notice of appeal.	92.61

Subchapter G. PERMIT COORDINATION WITH THE ADMINISTRATOR

92a.91.	NPDES forms.	92.75, 92.77*, 92.78*
92a.92.	Decision on variances.	New
92a.93.	Administrator's right to object to issuance or modification of certain permits.	92.15
92a.94.	Reports of violations.	92.79

Subchapter H. CIVIL PENALTIES FOR VIOLATIONS OF NPDES PERMITS

92a.101.	Applicability.	92.91
92a.102.	Method of seeking civil penalty.	92.92
92a.103.	Procedure for civil penalty assessments.	92.93
92a.104.	Disbursement of funds pending resolution of appeal.	92.94

* Substantive changes are proposed.

Attachment B
Fee Report Form (Excerpts)

Chapter 92a, *NPDES Permitting, Monitoring, and Compliance*

FEE TITLE AND RATE:

Current NPDES Permit Fees:
Individual Permits: The application fee for essentially all individual NPDES permits is $500 per 5-year permit term. There are no annual fees.
General NPDES Permits: The fee for most general NPDES permits is $100 per 5-year term.

Proposed NPDES Permit Fees:
(Attached as Tables 1 and 2)

FUND FEE IS DEPOSITED INTO: The Clean Water Fund

FEE OBJECTIVE: The objective of the fee structure is to recover all of the costs to the Commonwealth of administering the NPDES program. The proposed fee structure will cover only the Commonwealth's share of the cost of administering the NPDES permit program (about 40% of the total cost, with the other 60% covered by federal grant).

FEE RELATED ACTIVITIES AND COSTS:

1. Issue NPDES Permits

Activities: Environmental engineers and engineering specialists write the NPDES permits, a demanding process that overlaps with all aspects of locating, planning, and operating wastewater treatment facilities. Based on the information provided on the applications, permitting staff evaluate federal and Commonwealth technology-based treatment requirements, and calculate water quality-based treatment requirements based on the nature of the receiving water. The treatment requirements serve as the specifications that the facility will be designed or redesigned to achieve. NPDES permits are highly structured and complex documents that cover many aspects of the operation and performance of treatment facilities. Ultimately, the NPDES permit, together with the Water Quality management permit issued under Chapter 91, assures that the facility is properly designed and operated to achieve water quality standards in the streams and rivers of this Commonwealth.

The duties of the permit writer are primarily technical, but also includes site visits, meetings with the applicant or permittee, coordination with compliance personnel and field staff,

preparation of public notice, and coordination of public hearing. NPDES permits are issued by the regions. Staff engineers in central office provide technical and policy support.

Level of effort: Approximately 56 full-time staff maintaining 5000 individual permits and 5000 general permits. According to the federal database ICIS, Pennsylvania is second or third among states in the number of NPDES permits issued.

Cost: $1,900,000

2. Compliance and Monitoring

Activities: Compliance Specialists initiate and track enforcement actions. They write NOVs (Notice of Violation), COAs (Consent Order Agreements), and legal documents in support of enforcement actions; enter enforcement action data in computer systems; meet with permittees; and serve as legal liaison between technical staff and regional counsel. Site visits may be required to ground truth resolutions or agreements. Water Quality Specialists are field staff that perform site inspections with the NPDES permit in hand. They verify compliance with permit conditions, which may include sampling of the effluent and affected surface waters, and review DMRs as required for facilities that need attention. These functions are performed almost exclusively at the regions.

Level of effort: Approximately 75 full-time staff.
Cost: $2,600,000

3. Administrative and Training

Activities: Department administrative staff support all aspects of permitting, monitoring, and compliance at the regions. Central office staff provide internal training on specialized topics (e.g. water quality modeling).

Level of effort: 12 full-time staff
Cost: $408,000

4. Other

Activities: Certain other specialized activities that directly support the NPDES permitting program are performed out of central office. These include Clean Water Act 316(a) (thermal variances) and 316(b) (design standards for cooling water intake structures) support and water quality standards support. NPDES Information Analysis staff track permit information, maintain the database, and provide required permit information to EPA. Regional biologists support site-specific field and habitat assessment studies.

Level of Effort: 11 full-time staff
Cost: $374,000

ANALYSIS:

The Department's policy is that the program fee structure should support the Commonwealth's cost of running the program. With that goal, two decisions are required:

1. How to distribute the fees amongst the various classes of point sources.

2. Whether to implement annual fees in addition to application fees, and how to distribute the total cost between annual fees and application fees.

In addition to internal deliberations, the Department investigated the NPDES permit fee structures of other states. While there was substantial variation in how states distribute fees, there was broad consensus that larger dischargers pay higher fees. In some cases, additional fee multipliers were assessed for discharges with a higher environmental impact, as measured by pollutant loading or compliance history. Industrial dischargers usually pay greater fees, but not markedly so in most cases. Industrial dischargers of toxic pollutants sometimes pay higher fees. All of the states investigated have annual fees associated with NPDES permits, and most have application fees. There is no consensus as to the magnitude of the annual fee relative to the application fee.

While various combinations of these factors were considered, the following principles were determined to be most appropriate in terms of fairness to the regulated community, the resources expended by the Department, and the relative environmental impacts of different classes of facilities:

- Permit fees for industrial wastewater will be higher than fees for treated sewage. Permits for industrial wastewater are more variable and require greater resources to issue and maintain. Toxic and persistent pollutants are more often present in greater quantities in industrial discharges, with increased potential for adverse environmental impact relative to the conventional pollutants discharged in treated sewage.
- Permit fees will be higher for facilities with higher flows. Higher flows generally track with higher pollutant loadings and increased potential adverse environmental impact.
- Application fees for a new facility will be twice that for a reissued permit, reflecting the substantially greater resources required to issue an NPDES permit for a new facility. Setting application fees higher also better compensates the Department for processing applications for new permits that are submitted on a contingency basis, and that may or may not result in a facility being built.
- Annual fees will be implemented, and be designed to cover the ongoing costs associated with maintaining the permit coverage, including the cost of compliance inspections, sampling, and reports. Integrating annual fees into the process spreads the cost of the permit over the 5-year permit cycle, and this should help the permittee manage costs. It avoids penalizing facilities that may suspend or terminate permit coverage during the cycle.
- Annual fees and permit reissuance fees, which occur every five years, should be the same if practicable. Setting the annual fee to the same value as the permit reissuance fee means that permittees generally can count on a uniform fee every year when producing the annual budget.

RECOMMENDATION AND COMMENT:

The proposed rulemaking provides for a general review of the permit fee structure every three years, to assure that the fees continue to cover the cost of maintaining the program.

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION
POLICY OFFICE

July 16, 2010

Mr. Kim Kaufman, Executive Director
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17120

Re: Final-Form Rulemaking – National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance (#7-443)
Final-Form Rulemaking – Outdoor Wood-Fired Boilers (#7-444)
Final-Form Rulemaking – Water Quality Standards Implementation (#7-451)

Dear Mr. Kaufman:

Pursuant to Section 5.1(a) of the Regulatory Review Act, please find enclosed copies of three final-form rulemakings for review and comment by the Independent Regulatory Review Commission (IRRC). The Environmental Quality Board (EQB) approved these final-form rulemakings at its July 13, 2010, meeting.

The first final rulemaking, **NPDES Permitting, Monitoring and Compliance,** deletes and reserves 25 *Pa Code,* Chapter 92, *National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance* and creates a new Chapter 92a of the same name in order to reorganize and align the Commonwealth's regulations with that of their companion Federal regulations set forth at 40 CFR Part 122. The proposed Chapter 92a implements the requirements of the federal Clean Water Act and the Pennsylvania Clean Streams Law for point source discharges of treated wastewater to the rivers and streams of this Commonwealth. By aligning the regulations with their federal counterpart, the Department believes the regulations will be clearer, which will help the regulated community to better understand where federal and state requirements are identical and where they differentiate. The regulated community impacted by this final-form rulemaking comprises all of the point source dischargers of treated wastewater and stormwater in this Commonwealth, including approximately 5,000 individual permits for discharges of treated sewage and industrial wastewater and approximately 5,000 discharges that are permitted under general permits. In addition, NPDES permits covering discharges associated with stormwater discharges, construction activities, and mining activities are also covered under this rulemaking.

The final-form rulemaking includes a new NPDES permit fee structure that is designed to cover the Department's cost in administering the NPDES program. The existing $500 permit application fee is replaced by a sliding scale of fees based primarily on the size of the point source discharge. The fee structure is designed to produce $5 million annually, which is the Commonwealth's share of the total estimated annual cost of administering the program, compared to $750,000 that is collected per year under the existing fee structure. In addition to the reorganization of the chapter and amendments to the fee structure, the rulemaking includes

new provisions to update the program in order to be consistent with recent changes at the federal level, including provisions related to Stormwater Phase II Final Rule requirements (MS4s and small construction activities). The rulemaking also establishes treatment requirements based upon secondary treatment standards for discharges of treated sewage. The rulemaking, once finalized, will be submitted to EPA for approval.

The Board approved the proposed rulemaking on November 17, 2009. The proposal was published in the February 13, 2010, issue of the *PA Bulletin,* which commenced a 30-day public that ended on March 15, 2010. Forty-two commentators submitted comments to the Board on the rulemaking. Based on comments received, several new proposed treatment requirements were deleted in the final form rulemaking. The requirement for tertiary treatment in water quality-limited segments was deleted, as well as certain minimum treatment requirements for conventional pollutants (Biochemical Oxygen Demand and Total Suspended Solids) applicable to industrial dischargers. Certain federally-based exemptions and adjustments to the Secondary Treatment Standard for discharges of treated sewage were reinstated or extended. In addition, provisions for Permit-by-Rule for applications of pesticides and single-residence sewage treatment plants were deleted in the final rulemaking, as these discharges will be covered under a general permit. Commentators also expressed opposition to the new NPDES permit fee structure in the rulemaking; however, no adjustments were made to the fee structure at final rulemaking.

The Department worked closely with WRAC to develop the final-form rulemaking. On April 14, 2010, the Department briefed WRAC on the public comments received on the proposal and the proposed revisions to the rulemaking. On May 11, 2010, WRAC approved the final-form rulemaking with comments. The Department made revisions to the rulemaking in response to the comments by WRAC. On April 21, 2010, the Department briefed the Agricultural Advisory Board on the rulemaking.

The second final-form rulemaking, **Outdoor Wood-Fired Boilers,** adds requirements in 25 *Pa Code* Chapter 123 for the operation of outdoor wood-fired boilers (OWBs), also commonly referred to as outdoor wood-fired furnaces, outdoor wood-burning appliances, or outdoor hydronic heaters. The final-form rulemaking will affect manufacturers, suppliers, distributors, sellers, receivers, and lessors, lessees, owners and operators of OWBs. Unlike indoor woodstoves that are regulated by the EPA, no Federal standards exist for OWBs. The majority of OWB models are not equipped with air pollution controls and therefore generate air pollution in far greater quantities than indoor woodstoves, even when they are operated according to manufacturer's specifications. The emissions are intensified if the OWB is improperly fired or used to burn waste. Air pollution generated from the OWBs not only effect human health, but are also a source of many odor and nuisance complaints.

In lieu of Federal standards, the EPA initiated a voluntary program that encourages manufacturers of OWBs to improve air quality through developing and distributing cleaner-burning, more efficient OWBs. Phase 1 of the program was in place from January 2007 through October 15, 2008, and included EPA certification of OWB models that demonstrated they were 70% cleaner-burning than unqualified models by meeting the EPA's air emissions level of 0.6 pounds of PM/mmBtu heat input. Phase 2 of the program was recently announced and includes

EPA certification of OWBs that meet a particulate matter emission limit of 0.32 pounds per million Btu output. In comparison, most older model OWBs emit about 2.0 pounds of particulate matter per million Btu (PM/mmBtu) heat input.

The proposed rulemaking was adopted by the EQB at its September 15, 2009, meeting, and was published in the October 17, 2009, edition of the *PA Bulletin,* commencing a 119-day public comment period that closed on February 12, 2010. Five public hearings were conducted by the Board during the comment period in Harrisburg, Wilkes-Barre, Cranberry Township, Williamsport and Coudersport. The Board received comments from over 2,000 commentators during the public comment period. After serious consideration of all the comments received, including those from the Independent Regulatory Review Commission and members of the PA General Assembly, the final-form regulation was amended to be a prospective regulation, whereby all retrofit requirements for existing and operational OWBs were eliminated from the rulemaking. The final rulemaking maintains the proposed requirement that only Phase 2 OWBs may be installed in the Commonwealth after the effective date of the regulation, but also incorporates a new sell through provision until May 31, 2011, for existing in-stock non-Phase 2 OWBs. A 150 feet setback requirement and stack height specifications for all non-Phase 2 OWBs purchased during the sell-through period is now included in the final-form rulemaking. Other significant changes in the final-form rulemaking include revisions to stack height and setback requirements for new Phase 2 OWB installations in order to be consistent with industry recommendations and the elimination of all written notice and recordkeeping requirements. As required in the proposed rulemaking, all OWBs operating within this Commonwealth can burn only those allowed fuels specified in the rulemaking, including clean wood.

The additional particulate matter emission reductions that will occur as a result of the final rulemaking are reasonably necessary as part of this Commonwealth's efforts to attain and maintain the 1997 and 2006 health-based 24-hour National Ambient Air Quality Standard for fine particulates. The final form regulation, if adopted by the Board, will be submitted to the U.S. Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

The Department consulted with the Air Quality Technical Advisory Committee (AQTAC) during the development of the final-form rulemaking, as well as the Small Business Compliance Advisory Committee, the Agricultural Advisory Board and the Citizens Advisory Council. AQTAC unanimously concurred with the Department's recommendation to seek Board approval of the rulemaking but identified several concerns with the rulemaking, which are identified in the Executive Summary of the rulemaking package.

The third final rulemaking, **Water Quality Standards Implementation,** codifies into regulation the Department's existing policy and guidance for nutrient credit trading as it relates to nutrient and sedimentation pollution in the Chesapeake Bay. In 2005, new water quality standards under the Federal Clean Water Act were announced to address nutrient and sediment pollution in the Chesapeake Bay. To meet these new requirements under federal law, EPA and the affected states developed a maximum nutrient load (or "cap load") for each major tributary to the Chesapeake Bay. As a result, approximately 200 municipal sewage treatment plants and others

discharging nutrients to Pennsylvania's Bay tributaries must cap those discharges or they will be in violation of the downstream water quality standards, under both state and federal law. As a compliance alternative to meet cap loads, the Department developed a Nutrient Credit Trading Policy (guidance document number 392-0900-001: "Final Trading of Nutrient and Sediment Regulation Credits – Policy and Guidelines"). The policy, which is now being codified into regulations through this rulemaking, provides guidance to facilities who voluntarily choose to work with other facilties and/or nonpooint sources to reduce nitrogen, phosphorus and sediment discharges into tribuatries of the Chesapeake Bay. The regulations provide eligibilty requirements and a methodology for calculating credits, including baseline and threshold requirements to generate credits, and includes provisions for Departmental verification and certification of credits, and the use of credits and offsets generated from activities located within the Chesapeake Bay watershed to meet NPDES permit requirements related to the Chesapeake Bay. The regulations also include a section on the use of credits and offsets to meet permit limits in other areas of the Commonwealth other than those areas identified for the restoration, protection and maintenance of the water quality of the Chesapeake Bay. Although no federal regualtions on water quality trading exist, the Department worked closely on the trading policy with EPA, who is supportive of the framework the Department has developed to implement the program.

The Board approved the proposed rulemaking for public comment on November 17, 2009, and it was published in the February 13, 2010, issue of the *PA Bulletin,* commencing a 30-day public comment period that ended on March 15, 2010. Ten commentators provided comments to the Board on the rulemaking. In response to public comments received, the Department made several changes at final rulemaking including clarifying and distinguishing the processes applicable to credits and offsets, adding a provision for stormwater best management practices, establishing a 10% credit reserve ratio, adding a farmland preservation provision, adding duration, renewal and revocation procedures, and adding certainty wherever feasible to further strengthen the rulemaking.

The Department has undertaken an intensive stakeholder process to solicit public input on the rulemaking, including consultation with EPA, the Department's Chesapeake Bay Advisory Committee, the Water Resources Advisory Committee (WRAC), and the Agrinultrual Advisory Board. On May 11, 2010, WRAC reviewed and endorsed the final-form rulemaking.

The Department will provide assistance as necessary to facilitate the Commission's review of these final-form rulemakings under Section 5.1(e) of the Regulatory Review Act. Please contact me at the number above if you have any questions or need additional information.

Sincerely,

Michele L. Tate

Michele L. Tate
Regulatory Coordinator

Enclosures

0120-FM-PY0011 8/2006

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF POLICY

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER: 7- 443

SUBJECT: National Pollutant Discharge Elimination System (NPDES) Permitting, monitoring and compliance

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Regulation with Notice of Proposed Rulemaking Omitted
- ☐ 120-day Emergency Certification of the Attorney General
- ☐ 120-day Emergency Certification of the Governor
- ☐ Delivery of Tolled Regulation
  a. ☐ With Revisions b. ☐ Without Revisions

RECEIVED
IRRC
2010 JUL 16 P 3:56

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
7-16-10	D Newton	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Rep. Camille George
7-16-10	D. Newton	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
7-16-10	D. Costello	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Senator Mary Jo White
7-16-10	A. Rybarczyk	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
7/16/10	K Coppir	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)