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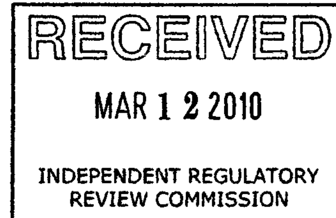

Re: Proposed Chapter 92a Regulations

Gentlemen:

The Eastern Pennsylvania Water Pollution Control Operators Association (EPWPCOA) is a non-profit association with over 1,400 members who are actively involved in protecting the water environment through their profession. Members are operators and supervisory staff at water and wastewater treatment facilities in Eastern Pennsylvania as well as others in the industry.

The EPWCOA has reviewed the draft Chapter 92a regulations and offer the following comments:

We suggest that the comment period be extended so that the regulated community has adequate notice of the extent and potential costs of these proposed regulations and a reasonable opportunity to provide comments.

§ 92a.2 Definitions

Daily Discharge, subparagraph. (ii) Note that averaging pH requires a log conversion. pH values themselves cannot be averaged to produce a valid result.

Expanding facility or activity. Given the normal variation in flows, and the normal incremental increase in sewage flows as service areas grow and change, this definition could be interpreted to apply to normal increases in discharge when no change to the facility has occurred at all. Since the consequence of being deemed to be an "expanding facility" can be dramatic and result in millions of dollars of costs (see proposed section 92a.47(b)(1)), the definition should be clarified so that normal increases in flow into a POTW cannot be deemed to trigger the cited provisions.

Immediate The definition of the term has been subject to widely varying interpretations from DEP personnel. The term is applicable primarily to the reporting requirement at § 91.33 (referenced at §92a.41(b)), pertaining primarily to spills and other unusual events. However, 4 hours may be difficult to accomplish during times when staff is limited, such as holidays and weekends. During those times, the staff's primary and most urgent responsibility will be to take appropriate action to contain and control any such release,

not to contact a distant DEP office. Therefore, to provide for protection of the environment as a priority over recordkeeping, it is suggested that the time limit be increased to 8 hours.

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. It must also be noted that this restrictive definition conflicts with proposed § 92a.73, incorporating the EPA regulations for minor permit modification.

NPDES and NPDES Permit. The majority of states with primacy over the NPDES program refer to state-issued permits as State Pollution Discharge Elimination System—SPDES—permits, to distinguish permits issued under authority of state law from those issued by EPA under authority of the Clean Water Act. The definitions of NPDES and NPDES Permit in the revised regulations reflect the confusion, both within DEP and the regulated community, of the use of the same term for two fundamentally different concepts. 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 SPDES 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. With the extensive revision of the permitting regulations, it is the opportune time to correct this misnomer and the on-going confusion by using the correct terminology and stating the correct definition of the terms.

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.

Application for a Permit § 92a.21 What is the justification for requiring four consecutive weeks of public notice for a permit application (§ 21(c)(4))?

New or Increased Discharges. § 92a.26. See the comment above regarding the definition of **Expanding facility or activity.**

§ 92a.26(a) Permitting procedure There is no time limit on the approval process. A discharger intending to institute some sort of change in process must notify DEP and wait, perhaps forever, for the Department to approve the request. To further confuse the matter, DEP will decide whether to require a new permit application or some other form

of documentation, again without any time constraint. There must be some form of accountability. we suggest that:

(1) If the discharger chooses, it can submit a permit application for the new or changed discharge, thereby coming into the permit approval process with the concomitant requirement for DEP to take some action; and
(2) If the discharger does not submit an application, but notifies DEP of the new or changed discharge pursuant to this part, DEP must make a decision within 120 days to (a) require the submission of a permit application or (b) approve the change on the basis of the information submitted and either amend the current permit or notify the permittee that the current permit will remain in effect.

§ 92a.26(b) A similar provision should be used in the subsection regarding stormwater discharges associated with construction activities.

§ 92a.28 Fees not clearly defined. The fees are based on "design flow," which is not defined. Since POTWs are assigned two different "design flows" by the Department, and some straddle the 1 MGD or 5 MGD criteria, this regulation should clarify that the fee is based on the Annual Average Design Flow (not the maximum monthly design flow).

§ 92a.41(b) Permit Conditions—notification requirements. See comment above regarding definition of "immediate."

§ 92a.41(c) Permit Conditions—absolute ban on floating material, FO&G, and other discharges. As noted in the Preamble, the revision of this regulatory requirement is intended to eliminate the so-called "cryptic and nebulous" provision linking the criteria to water quality. The result is to create an absolute ban on all discharges of, among other things, "floating substances," "sheen," and "color, taste, and turbidity." Virtually all discharges from municipal and industrial treatment plants have some degree of turbidity or floating substances (*e.g.*, pinfloc). That is, a laboratory measurement will be greater than zero. Most have measurable (in the laboratory) amounts of grease or oil (although few will generate a sheen), and many will have some measurable (in the laboratory) color. The result of an absolute ban, without regard to environmental impact, will be to put every POTW and industrial discharge in the Commonwealth in instant and irreversible noncompliance. This is unacceptable and irrational.

If the Department is concerned about the "inimical to uses to be protected" language, which has not, to my knowledge, been of concern to either the regulated community or the Department's enforcement staff, then the solution is to come up with clearer language, not to ban all discharges outright. we would suggest that the current language has not been of concern, is useful in that it allows minuscule amounts of normally occurring pollutants, with no environmental impact, to be discharged, and is sufficiently clear that if excessive amounts of color, turbidity, or floating materials are discharged the Department has the authority to take appropriate action.

Finally, we note that the proposal conflicts with other regulations, which set discharge standards or water quality standards for color, turbidity, suspended solids, and

oil and grease. The regulations should not be internally inconsistent so that no one knows which standard to apply.

§ 92a.47 (a) Secondary treatment Requirement The proposed rule adds a significant new requirement that is not reflected in the Federal regulations. This is the almost obscure reference to "significant biological treatment." What is "significant biological treatment"? How does one determine that a treatment system has this new and undefined treatment technology? And what is the purpose of this new rule. No discussion of it appears (as is required) in the Preamble In fact the Preamble contains a glaringly false statement, "the basic requirements of the [secondary treatment standards] would be unchanged [from the Federal rule]." It is one thing to omit important information, it is quite another to include false and misleading statements in a public notice.

§ 92a.47 (b) Secondary treatment Requirement The proposed rule conflicts with the applicable Federal rules in Part 133. In the Preamble, this is off-handedly dismissed without documentation or explanation. The federal Secondary Treatment requirements are based on a review and assessment of various treatment technologies. Merely stating, without a hint of basis, that these rules are "outdated and have been misinterpreted," does not make them inapplicable. On what basis does the Department state that lagoons and trickling filters no longer exist or require special consideration? On what basis does the Department conclude that adjustment of the 85% removal rate for certain combined systems is no longer necessary? How many POTW systems in Pennsylvania were evaluated to come to this conclusion? Who conducted these evaluations? What published studies were reviewed? The Commonwealth Documents Law requires that the basis for regulations be stated in the public notice. Idle speculation by anonymous clerical staff without a single reference to any scientific basis hardly qualifies as a sound basis.

The Preamble states, "any competent sewage treatment operation can readily achieve the [proposed secondary treatment standards]." On what basis is this statement made? What studies were relied on to make it? How many such studies were reviewed? Who in the Department made this conclusion, and what are his or her credentials for doing so?

The proposed rule could affect dozens of treatment plants, with no environmental benefit whatsoever. Particularly, small rural communities will be economically hard hit by a requirement to upgrade treatment facilities to achieve new levels of treatment not necessary to protect receiving streams. The preamble does not include (as it is required to) the economic assessment of the impact of this radical new rule.

§ 92a.47 (b) Secondary treatment Requirement—fecal coliform. Because bacteria analytical methods produce varying results, and because epidemiological data 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), with a statistical maximum (no more than 10% of samples over 1,000/100 ml). The proposed rule would change this to an "instantaneous maximum" of 1000/100 ml. As is a recurring theme with this section, no scientific justification for this change is mentioned in the Preamble. If the current standard has resulted in human health effects, please

provide the studies that demonstrate it. As already mentioned, there does not seem to be a scientific basis for this change. Certainly operating data show that the current standards are compatible with installed secondary treatment facilities, while instantaneous maximum limits would cause frequent violations with no water quality impairment or effect on human health. This is not a cost issue, it is a compliance issue. In order to meet the stricter standard, many POTWs will increase the use of chlorine, which has more of an effect on the receiving stream than a few thousand bacteria. The ultimate result of this unwise rule is environmental degradation, not improvement.

§ 92a.47 (b) Tertiary treatment Requirement The applicability of the proposed new standard is unclear. Of special concern is the language that tertiary treatment may be required when waters do not achieve water quality standards "attributed at least partially to point source discharges of treated sewage." How is "attribution" determined? Since there is already a mechanism in place to evaluate and report impaired waters, the rule should use the existing program, e.g., ". . . not achieving water quality standards, as stated on the Integrated List of Waters, and when at least one cause of impairment is listed on the Integrated List as being one or more point source discharges of sewage." This will provide an appropriate and reviewable standard to apply to determine when a stream might actually benefit from the enormously expensive requirement to convert a treatment plant to tertiary treatment.

Moreover, the rule makes little sense from an environmental protection standpoint. If a stream is determined to be impaired by, e.g., nutrients, what purpose is served by requiring the lower C-BOD and TSS limits? Similarly, if a stream is impaired by high C-BOD discharges, what environmental benefit is derived by requiring strict limits on ammonia, total nitrogen, or phosphorus? The rule has nothing to do with environmental protection. If limits are required, they should be based on water quality standards, not arbitrary limits developed using secret information (see comment below).

§ 92a.47 (c) Tertiary treatment Standards. No information was provided in the Preamble to document how the values in this section were arrived at, the qualifications of the person making the judgment, or the validity of the suggested numbers. It is requested that if potentially dozens of treatment plants will be required to expend tens of millions of dollars to meet a standard, we should at least know where it came from. What publications or scientific studies were reviewed? Who chose these values, and what credentials do they have to make these selections?

Why are ALL parameters defined as being required to be met in tertiary treatment? The standard definition that engineers use does not state that tertiary treatment requires meeting specific effluent limits for C-BOD, TSS, ammonia-nitrogen, total nitrogen and phosphorus. So, if these standards did not come from the professional community, where did they come from?

§ 92a.48(a)(4) Industrial Waste Standards. No discussion is provided in the Preamble (as required by the Commonwealth Documents law) to explain the source of the proposed

BOD, CBOD and TSS limitations for industrial wastes. Since the proposed standards are more stringent than some ELGs, the Department should articulate the scientific basis for deciding that available technology for all industrial waste treatment systems has the ability to meet these standards. It is irresponsible to impose arbitrary limits without any scientific or technological basis. Unsupported statements that existing ELGs are obsolete should be supported with some reviewable published materials. If these statements are personal opinions of DEP personnel, then the qualifications of these people to make such statements should be revealed. Secret, anonymous accusations of the kind contained in the Preamble are not an acceptable way of governing, especially when the financial impact on Pennsylvania industry could be enormous.

§ 92a.61(b) Monitoring Flow Chapter 94, specifically § 94.13(a), provides that POTWs must install flow monitoring equipment, but that regulation was affirmed by both DEP and EQB at the time of promulgation to mean that such equipment is not required to include retrofitting existing treatment plants with influent flow meters when effluent flow meters already exist, or *vice versa*. It is presumed that the purpose of new section 61(b) is NOT to reverse this existing regulation. That is, this comment is submitted specifically to elicit a response that the Department does not intend by the referenced section to reverse its existing Chapter 94 regulations and provide that treatment plants with existing flow meters can be required to install new meters, either at the influent or effluent ends of the facility.

If the intent IS to reverse the Chapter 94 regulation, the intent is objectionable. Many POTWs have influent lines configured in such a way that the installation of influent flow meters is physically impossible, or extremely expensive. Since effluent flow meters effectively perform the purpose of monitoring the rate and quantity of discharge to the environment, abandoning them and requiring the installation of influent flow meters serves no useful purpose.

§ 92a.61(e) Discharge Monitoring It is hoped that the purpose of this proposed section is to overturn a long-standing informal policy of the Department to establish effluent monitoring frequency based solely on the design discharge flow of the facility. The proposal to base the frequency of monitoring on the variability of the discharge is much more scientific and acceptable than the arbitrary (and unpromulgated) "rule" heretofore religiously followed by permit writers in violation of the Commonwealth Documents Law. The introduction of science into the art of discharge regulation is welcome.

§ 92a.61 Annual Fees. The Preamble contained no discussion of the basis of the proposed annual fees. Please provide an analysis of how the amounts were calculated, the services rendered by the Department which the fees are intended to pay for, and how these services vary by the design flow of the treatment plant. If there is no relationship between services rendered and fees to be assessed, please explain how these fees differ from taxes. That is, if the purpose of the fees is to raise revenue to cover general DEP expenses, under what legal theory are these not taxes? Please provide a citation of the

statute authorizing the Department to charge fees for performing its statutory duties, and the legal analysis prepared by DEP counsel in support of the proposed regulation.

§ 92a.103 Procedure for Civil Penalties. The proposed procedure conflicts with the plain language of the Clean Streams Law, which states, ". . . the department, *after hearing*, may assess a civil penalty . . . ." [emphasis added.] Merely providing the "opportunity" for a hearing, which a person may "waive" by not "requesting" it via certified mail, is contrary to the clear easily understood requirements of the statute. A hearing must be held, whether or not the person to be penalized attends or "requests" it.

In the conduct of the hearing, the Department should be cognizant of substantive due process issues and ensure that the constitutional rights of the person to be penalized are honored. This includes ensuring that the hearing officer is unbiased and not interested in the matter at hand. Accordingly, the regulations should so provide. For instance, "The Department will select a hearing officer from a regional office other than the one by which the person is regulated and from a bureau other than water quality to ensure an unbiased hearing. The Department or the person to be assessed may request that a transcript of the hearing be made by stenographic recording, at its own cost. 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."

Given the many problems, including failure to comply with the notice provisions of the Commonwealth Documents Law, and the potential economic impact to the tune of tens of millions of dollars for public and private treatment works, these regulations should be withdrawn and a properly documented, scientifically and technically sound, proposal resubmitted for comment.

It would be helpful if the Department abandoned its recent policy of excluding stakeholders and other professionals from the rule development process, and recommenced what had been a successful program a few years ago—regulatory negotiation.

Sincerely,

Pat Mandes
EPWPCOA President

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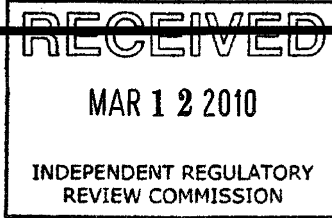

From: epwpcoa [epwpcoa@ptd.net]
Sent: Wednesday, March 10, 2010 8:53 AM
To: EP, RegComments
Cc: 'epwpcoa'
Subject: Proposed Chapter 92a regulations
Attachments: EPWPCOA Chapter 92a Letter March 2010.pdf

Attached please find comments from the Eastern Pennsylvania Water Pollution Control Operators Association, Inc concerning the Proposed Chapter 92a Regulations.

Sincerely,

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