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Sent: Friday, March 12, 2010 11:29 AM
To: EP, RegComments
Cc: Mike Witherell; Hann, Esq., Steve; John Brosious; Jennifer Case
Subject: Comments on DEP Proposed Rulemaking 25 PA Code Ch 92a
Attachments: Ch 92a Final Comments 3-12-10.doc; Ch 92a Comment SummaryPage3-12-10.doc

Attached are our comments on the subject rulemaking and a one-page summary of those comments for EQB members.

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March 12, 2010

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Environmental Quality Board
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[Sent via electronic mail to RegComments@state.pa.us]

The Pennsylvania Municipal Authorities Association (PMAA) represents over 740 municipal authorities across the Commonwealth providing drinking water and sewage treatment management to more than six million Pennsylvania citizens.

The comments attached are submitted in regard to the proposed regulation 25 PA Code, Chapter 92a, relating to National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance, that was published in the February13, 2010 PA Bulletin.

Also attached is a one-page summary of these comments for Board members.

Thank you for the opportunity to provide comments.

Peter T. Slack

Governmental Relations Associate

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION

DETAILED COMMENTS ON PROPOSED RULEMAKING

25 PA CODE CHAPTER 92a

1. Difficulty in Understanding the Basis for the Proposed Rulemaking

Other than observing that certain federal regulations have been incorporated by reference in Annex A, it is impossible to determine the extent to which the proposed regulation language actually mirrors federal requirements without actually having the specific federal regulation language at hand for comparison. The preamble offers little insight to assist anyone in this regard. The Department should have at least identified which federal regulation sections correspond to specific non-incorporated federal provisions that are contained in Annex A and how to access those federal regulations. The preamble does not contain a cross-walk table to show which sections of Chapter 92a correspond to which sections of the existing Chapter 92 regulations, making it very difficult to document the reconfiguration of these regulations. The role of EPA in reviewing and approving these changes has not been mentioned. All of these items should be addressed in the preamble to the final rulemaking.

2. Definitions - There are several new definitions in 92a.2, most of which are helpful in understanding the regulations. Some, however, are problematic and should be reconsidered and revised:

> ***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.*
>
> As used in reference to the proposed tertiary treatment standard in 92a.47(b), this definition is far too broad. It does not account for the magnitude and environmental impact of a facility change.
>
> It also could prevent municipal sewage treatment facilities from requesting and obtaining capacity re-rating for the purposes of the Department's Chapter 94 municipal wasteload management regulations.
>
> ***Immediate***—*As soon as possible, but not to exceed 4 hours.*
>
> This term apparently only relates to the provisions in 92a.41(b) that requires all permits to include a condition requiring: *(b The immediate notification requirements of § 91.33 (relating to incidents causing or threatening pollution) supersede the reporting requirements of 40 CFR 122.41 (l)(6).*
>
> Four (4) hours seems like an extremely short time to require notification of the Department for such a wide variety of potential incidents. The Department should reconsider how best to define "immediate" and to actually incorporate it into 92a.41(b) so as to avoid any mis-use of this term for other purposes.
>
> ***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.

This term apparently only is used in 92a.47(a) which defines "secondary treatment" for sewage dischargers. No explanation has been provided as to why this term needs its own definition, and the consequences of creating this definition are not evident.

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.*

This term is also defined in regulation Chapter 96, along with LA and WLA. For clarity, we suggest the Department either include all three definitions in 92a or simply refer to Chapter 96.

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.*

"Treatment works" is a term commonly used in the water quality management profession and is found in several places in 92a, but it is unclear as to why it merits any definition, let alone something as detailed and full of such qualifying language (see underlined wording). We suggest deleting it or at least removing the underlined qualifying language.

It should also be noted that the phrase "*used for ultimate disposal of residues resulting from the treatment*" could include landfills, abandoned mines, farm fields and sale commercial product. Is it the Department's intent to include such activities ?

3. Exclusions [from NPDES permit requirements] 92a.4 - as noted in the preamble, *Current exclusions in § 92.4(a)(4) regarding oil and gas activities and conditions relating to indirect discharges in § 92.4(a)(6) will be deleted from the exclusion provisions since they are not included in the Federal exclusion regulation.*

It appears that this could have some significant impact on certain entities, but no explanation for this change is provided, nor is there any explanation provided as to the practical effect of the change on the affected entities or the Department. This should be addressed in the final rulemaking proposal.

4. Prohibitions [of certain discharges] 92a.5 - as noted in the preamble, *Existing § 92.73 outlines situations where an NPDES permit may not be issued. All but one of the prohibitions are identical to or closely parallel the Federal prohibitions set forth in 40 CFR 122.4. The prohibition which has no Federal counterpart relates to sanitary sewer overflows, § 92.73(8). This provision provides that no permit may be issued for a sanitary sewer overflow, except as provided for in the Federal regulations. This provision has been transferred to § 92a.5(b), except that the qualifier providing for exceptions as provided for in Federal regulations has been deleted.*

It is unclear as to why this particular language has been dropped, since it was in the existing regulations and apparently nothing has changed with the federal regulations. There must have been some reason why it was put in the existing regulation, so why take it out now?

5. Treatment Requirements 92a.12 - the preamble states that *Existing §92.8a(c) provides, in part, that whenever a point of projected withdrawal for a new potable water supply not previously considered is identified by "an update to the State Water plan or a river basin commission plan, or by the application for a water allocation permit from the Department," the Department will notify a discharger of total dissolved solids, nitrite-nitrate nitrogen and fluoride of more stringent effluent limitation needed to protect the point of withdrawal. The quoted language is deleted and replaced with simply "the Department."*

By deleting reference to the specific pollutant parameters mentioned, the regulation could now be applied to any parameter . This is a significant change and it is not clear what the consequences will be for dischargers, water suppliers and the Department. We suggest a re-examination of the proposed change and clarification in the final rulemaking proposal.

6. New or increased discharges, or change of waste streams 92a.26 - the preamble states that *The appropriate action of a permittee whose wastewater or process change will result in a change in the pollution profile of the treated effluent is clarified. Increases in discharges of permitted pollutants that have no potential to exceed effluent limitations may be initiated without prior approval of the Department, but must be reported within 60 days... Under the existing regulation, a new application is required automatically under some conditions. The revised language in proposed subsection (a) allows more flexibility, and limits the burden on both the permittee and the Department by requiring a new application only for the reasons specified in this section.*

While the actual change seems more flexible, the new requirement to report situations that have no potential to exceed effluent limitations within 60 days is certainly not more flexible. Even more importantly, there is no indication as to when the 60 day period commences. Is it after the change has occurred, before, somewhere in between?

7. Application fees 92a.28- the preamble notes that *The Commonwealth has long subsidized the costs of administering the NPDES program and the associated regulation of point source discharges of treated wastewater, but this is no longer financially feasible or environmentally appropriate. 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). The proposed fees are still only a minor cost element compared to the cost of operating a sewage or industrial wastewater treatment facility. 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. The sliding-scale fee structure assures that smaller facilities, which may be more financially constrained and also have a lower potential environmental impact, are assessed the lowest fees.*

First, Pennsylvania's Clean Streams Law states that:

> ***SECTION 6. APPLICATION AND PERMIT FEES***
>
> *The department is hereby 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.*

"Reasonable" is not defined, but the law has always intended that fees be used to help offset the cost of permit application review and permit issuance. We simply disagree with the approach of passing on the full cost to the Commonwealth for administering the NPDES permitting program through huge increases in application fees, which do not seem to fit the notion of a "reasonable filing fee".

Second, the Department's Fee Report Form** 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.

** None of this Fee Report information, or information on how to obtain it, appears in the preamble.

The Department's Fee Report Form does not clearly establish how the actual proposed application fee schedule was developed. It is not clear if these fees represent only the cost to review permits or if other costs are included.

Finally, for the past 100 + years, the Commonwealth's day-to-day water pollution control regulatory program has been substantially supported by general fund revenues. The citizens of PA are the primary beneficiaries of this program and there is no reason why this program should not continue to be substantially supported by general fund revenues.

8. Sewage Discharges [additional application requirements] 92a.29 - the preamble does not address this section; however we note that a new subsection (b)(5) would require CSO dischargers to include an update on progress made with long-term control plan implementation. We suggest at least mentioning this in the final rulemaking proposal.

9. Department Action on NPDES Permit Applications 92a.38 - as noted in the preamble, ... *the Department would now consider Local and County Comprehensive Plans and zoning ordinances when reviewing permit applications, which is not specifically provided for in the existing Chapter 92. This proposed provision is designed to better assure an integrated approach to water resources management. No new specific requirement applies to applicants, but applicants should be motivated to consider how their proposed discharge fits with all applicable plans and ordinances before submitting an application to the Department.*

The preamble does not mention that this provision has been part of the Department's longstanding policy on ensuring consistency with local land use planning and zoning for most kinds of permits. It is unclear as to how this provision relates to an "integrated approach to water resources management".

10. Conditions applicable to all permits 92a.41- the preamble states that *Existing § 92.51(6) provides "that the discharger may not discharge floating materials, oil, grease, scum, foam, sheen and substances which produce color, taste, turbidity, or settle to form deposits in concentrations or amounts sufficient to be, or creating a danger of being, inimical to the water uses to be protected or to human, animal, plant, or aquatic life." This language paraphrases the requirements of the general water quality criteria in § 93.6 (relating to general water quality criteria). The qualifier that refers to "amounts sufficient to be inimical to the water uses." is thought to be too cryptic and nebulous to be useful, with the result that even*

substantial visual or odiferous indicators of problems with effluent quality may be overlooked during an inspection. An unqualified prohibition on most of these listed conditions is appropriate, but minor, transient foaming in effluent is not necessarily an indication of problems with the treatment process. The revised provision prohibits all of these conditions except for foam. "Floating materials" refers to floating solid materials, and foaming would still be considered an unacceptable condition if the foaming is visually objectionable, or persists for any distance away from the immediate vicinity of the discharge. The language of § 92.51(6) is proposed to be clarified in subsection (c).

Removing the qualifying language *"amounts sufficient to be inimical to the water uses."* because it is *thought to be too cryptic and nebulous to be useful* puts the Department in the position of not being able to decide on the significance of such discharge situations. Under this revision, there would be no allowable discharge of color or taste, for example. Color has a water quality criterion in Chapter 93 and effluent limits can be derived for that parameter. "Taste" is a common characteristic of almost all discharges. This revision should be seriously reconsidered.

While we understand the basis for not including foam in the revised regulation, Department field staff will still occasionally encounter foaming conditions downstream of some discharges and, absent any mention of foam in the regulation, will likely be at a disadvantage in viewing situations consistently. Therefore, if the underlined preamble language is what is intended, then perhaps some clarification needs to be provided in the regulation itself.

11. Sewage Permit 92a.47 - In various sections of the preamble, the Department has portrayed these changes as having minimal impact on the regulated community. For example:

> *Superficially, Chapter 92a is not substantially different from Chapter 92 in most areas, but the Board expects that the reorganization of the NPDES regulation will have a substantive positive effect on Pennsylvania's NPDES program...*
>
> *... No new requirements are proposed in this proposed rulemaking that would require general increases in personnel complement, skills or certification....*
>
> *...the proposed rulemaking does not include any new broad-based treatment requirements that would apply to most facilities. The compliance costs of the proposed rulemaking for most facilities is limited to the revised application and annual fees.*

To the contrary, these revisions could pose major technical and economic challenges, and could create major compliance and enforcement problems, for many public and privately-owned sewage treatment systems across the state, as discussed below.

92a.47(a) Revised Secondary Treatment Standard (STS): It appears that 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.

First, we are concerned with the apparent lack of information in the preamble to support these changes. While the preamble contains statements, such as " *The STS is 40 years old, and represents a bare bones standard of treatment for sewage treatment facilities. Any competent sewage treatment operation can readily achieve the STS.",* there is no indication that the Department has actually conducted a detailed legal, technical and economical analysis of these changes.

While the STS may have first been promulgated in the early 1970s, it has been reviewed and modified several times since then (the most recent being 1989). It is a national standard that has held up to scrutiny for many years. These are national standards and there were good reasons for EPA to allow for such variances in the STS. The Department's only justification for removing them is that they "*are outdated and have been misinterpreted in some cases.*" It is not clear what "outdated" refers to, and just because there have been some misinterpretations does not mean these should be deleted.

We suspect that one key reason for making this change stems from a 2002 Environmental Hearing Board ruling against the Department for refusing to grant one of the abovementioned modifications to secondary treatment effluent requirements [Municipal Authority of Union Township vs. DEP, EHB Docket No. 2001-043-L, 2/4/02]. If so, this does not justify removing these variance provisions entirely from this regulation.

Second, the Department has arbitrarily changed the effluent standards relating to "effective disinfection" to read:

> *(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.*

In subsection (4), dropping the qualifying phrase "*in more than 10% of the samples tested*" means that this provision is more stringent than current requirements and increases the potential for violations to occur, regardless of their significance. No rationale has been presented for this change.

While new subsection (5) may represent a good approach for wintertime limits, no rationale has been presented for the numbers. As with language in (4), there is no leeway provided from the instantaneous maximum.

Third, we also note that a new STS provision has been added for Total Residual Chlorine (TRC) to read

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

It is unclear as to why an industrial waste requirement (e.g. 0.5 mg/l) is to be imposed on sewage discharges, but no rationale has been provided.

92a.47(b) and (c) New Tertiary Treatment Standards - the Department has arbitrarily created a set of "tertiary treatment" effluent requirements for some discharge situations to impaired or anti-degradation waters, in either of the following circumstances:

> *(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.

"Tertiary treatment" for sewage would have to meet all of the requirements of secondary treatment, plus 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.

First, it is unclear why dischargers covered under (b)(1) and (2) should be subjected to these tertiary treatment standards. The Department already has a comprehensive "special protection waters" regulation and policy guidance on how to address discharges to HQ and EV streams on a case-by-case basis, which presumably would require stricter effluent limits than "tertiary treatment". Why is that existing approach not adequate to address such situations?

Aside from this question, the intent of the proposed wording is unclear regarding "the first intersected perennial stream". One interpretation could be that it pertains to plants that discharge to a higher order (larger) stream with a lower WQ designation that intersects with the first downstream perennial stream designated as HQ or EV. In other words, a major discharger on a large river designated as Warm Water Fishery would be required to meet **Tertiary Treatment Standards** because the first intersected perennial stream downstream of the discharge is HQ or EV. This makes no sense.

Second, regarding (b)(2), the Department has many existing regulations and policies that determine how to establish effluent limits to protect or improve impaired waters, that will impose limits stricter than "secondary treatment" in many cases. What is missing from this process that justifies imposing an arbitrary level of treatment that may or may not address the impairment problem?

Third, the provisions in (b)(2) regarding new or expanding discharges to impaired waters are potentially quite onerous and subject to widely varying interpretation and implementation by Department staff.due to:

- the proposed definition of "expanding facility or activity" (see related comments on definitions)
- the lack of definition as to what constitutes "impairment"
- the lack of definition as to what is meant by "affects"
- the lack of definition of what is meant by "at least partially due to point source discharges of sewage"

Fourth, it should be noted that the "tertiary treatment" effluent requirements would, in some respects, be even more stringent than what is being required of significant sewage dischargers in the Chesapeake Bay watershed. Such Bay watershed dischargers must meet annualized "cap loads" (lbs/yr) for total nitrogen and total phosphorus, based on achieving a level of 6 mg/l N and 0.8 mg/l P at design flow. That approach inherently allows for seasonal variations in N and P effluent concentrations (not an uncommon phenomenon) above or below those numbers. The proposed limits allow for no seasonal variability.

A recent study of the cost for the 184 significant municipal Bay dischargers to achieve their annual "cap loads" indicates that would take some $1.4 billion in capital upgrades. The Department has provided no estimate of the number of dischargers potentially subject to these tertiary treatment standards, nor has the Department provided any estimate of capital or operational costs to comply with these standards.

Finally, if this regulation were to be finalized, it would have a negative impact on the ability of dischargers to pursue nutrient reduction credit trading, as currently being encouraged by the Department for the Bay watershed dischargers. Many point source dischargers would simply not be able to purchase credits to comply with these requirements.

12. Annual fees 92a.62- the preamble states that *The proposed* [permit and annual] *fees are still only a minor cost element compared to the cost of operating a sewage or industrial wastewater treatment facility. 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.*

Pennsylvania's Clean Streams Law states that:

> ***SECTION 6. APPLICATION AND PERMIT FEES***
>
> *The department is hereby 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.*

This is the only provision in the law authorizing the Department to impose fees for sewage, industrial wastewater and (possibly) stormwater permitting. It does not appear that such fees are authorized to help offset the cost of monitoring, compliance evaluation, administration and training and enforcement activities associated with the NPDES program.

The preamble also states that:

> *The annual fees are designed to cover the lesser ongoing costs associated with maintaining the permit coverage, including the cost of compliance inspections, sampling and reports.*

Table 1 (attached) shows the total number of permitted dischargers (9,342) regulated by DEP in 2008, along with information on inspection and enforcement activities. The Department's Fee Report Form describes the efforts of some 75 compliance and water quality specialists, 12 administrative and training staff and 11 other specialty staff provide support primarily for monitoring, compliance evaluation and enforcement activities associated with NPDES permits.

Even if annual fees to cover these activities could be legally justified under the Clean Streams Law, these 98 staff can only do so many inspection, report reviews, facility sampling and evaluations, etc, so in reality only a portion of permitted NPDES dischargers get this kind of personalized, detailed attention on an annual basis. So, for the Department to imply that the entire universe of NPDES dischargers receives such level of attention is a fundamentally flawed reasoning. In other words, many of the 9,342 permitted dischargers will see no direct, beneficial return from their annual fees submitted to the Department.

As 92a.28 and 92a.62 are written, it appears that NPDES dischargers will need to pay:

An initial permit application fee

Five annual fees (at each yearly anniversary of permit issuance)

A permit renewal fee (6 months prior to expiration)

The resulting cost would be equivalent to eight (8) times the annual fee.

Finally, why should a permittee whose permit has simply been administratively extended under these regulations have to pay any sort of annual fee to the Department?

13. Reissuance of Expiring Permits 92a.75 – While similar to the current (92.13) regulation language, the Department is proposing to allow for administratively extending permits for minor facilities for a maximum of five years after completing its review of the permit renewal application, and if there are no other concerns about the discharge. Under such circumstances, why not simply renew the permit? What benefit is there to either the Department or permittee for administratively extending the permit?

14. Public notice of permit applications and draft permits 92a.82 - the preamble states that these requirements are being reorganized for clarity. We note, however, that one important component of draft permit public notice has disappeared from the existing regulation 92.61(a) with no explanation, specifically:

(6) The location of the nearest downstream potable water supply considered in establishing proposed effluent limitations under this title, or a finding that no potable water supply will be affected by the proposed discharge.

This provision should be retained in the final rulemaking.

TABLE 1

Number of NPDES and WQM Facilities Regulated by DEP (as of August 2008)*

Permit / Facility Type**	Number of Facilities Regulated by DEP	Number of DEP Field Inspections 2007 @
IP - Industrial Waste	1,110	887
IP - Industrial Storm Water	112	
IP - Municipal (POTW) Sewage***	1,079	1,771
IP - Non-municipal Sewage	1,591	1,550
IP - Single Residence Sewage Treatment Plants	586	
GP - PAG-03 Storm Water Associated with Industrial Activity	2,274	233
GP - PAG-04 Single Residence Sewage Treatment Plants	1,978	
GP - PAG-05 Petroleum Product Contaminated Groundwater Remediation Systems	326	12
GP - PAG-06 Wet Weather Overflow Discharges from Combined Sewer Systems	36	
GP - PAG-10 Discharges from Hydrostatic Testing of Tanks and Pipelines	97	
WQM - Municipal Spray Irrigation of Sewage Effluent	27	
WQM - Non-municipal Spray Irrigation of Sewage Effluent	126	
Total	9,342	4,453

* As of August 2008

** IP = individual NPDES permit GP= NPDES general permit

WQM= water quality management permit

***111 POTW's have combined sewer overflows (CSOs)

@ The Department's website also mentions that in 2007, there were 1,002 "informal" enforcement actions (in which a facility is given notice that they are in violation) and 188 "formal " actions (in which compliance is ordered or mandated, often including penalties). Informal actions usually occur prior to formal actions to give facilities opportunities to correct the violations.

Source: DEP Website Wastewater Program Performance Measures

http://www.portal.state.pa.us/portal/server.pt?open=514&objID=553807&mode=2#WFP

March 12, 2010

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION

SUMMARY OF COMMENTS ON PROPOSED RULEMAKING
25 PA CODE CHAPTER 92a

1. Downplaying of Potential Major Impacts of the Proposed Rulemaking

In various sections of the preamble, the Department has portrayed these changes as having minimal impact on the regulated community. To the contrary, certain provisions of the proposed regulation (particularly section 92a.47 Sewage Permit) could pose major technical and economic challenges, and could create major compliance and enforcement problems, for many public and privately-owned sewage treatment systems across the state. For example:

- 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.
- The Department has also arbitrarily created a set of "tertiary treatment" effluent requirements for some situations that would be, in some respects, even more stringent than what is being required of significant sewage dischargers in the Chesapeake Bay watershed. Imposing these requirements could also hamper the Department's efforts to implement a Bay nutrient reduction trading program.
- It is unclear as to why a "tertiary treatment" standard is even needed, given the fact that the Department has comprehensive requirements for developing effluent limitations stricter than "secondary treatment" in order to prevent impairment of receiving streams.

The preamble discussion of these changes is generally superficial and there is no indication in the preamble that the Department has actually conducted a detailed legal, technical and economical analysis of these potential consequences in order to support these proposed changes.

2. The Proposed Fee Schedules Appear to be Contrary to State Law and Fundamentally Flawed

Pennsylvania's Clean Streams Law simply states that:

> *SECTION 6. APPLICATION AND PERMIT FEES*
> *The department is hereby 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.*

This is the only provision in the law authorizing the Department to impose fees for sewage, industrial wastewater and (possibly) stormwater permitting. "Reasonable" is not defined, but the law has always intended that they be used to help offset, not cover the entire cost, of permit application review and permit issuance. The Law does not appear to authorize imposition of annual fees to help offset the cost of monitoring, compliance evaluation, administration and training and enforcement activities associated with the NPDES program.

In addition, the Department has not presented evidence that the majority of permittees will receive any benefits in return for paying these annual fees.

3. Several of the Proposed Provisions (Including Some Definitions) are Unclear or Otherwise Potentially Problematic for the Department and/or Regulated Entities

These are addressed in our detailed comments.

4. We suggest that the Department go through an Advanced Notice of Final Rulemaking process before finalizing this regulation update.