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Environmental Quality Board
Post Office Box 8477
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Re: Proposed Chapter 92a Regulations

Ladies and Gentlemen:

I offer the following comments with regard to the proposed Chapter 92a Regulations. Given the large number of serious deficiencies in the proposed rules, it is imperative that the Department meet with informed stakeholders to correct and revise the rules and that they be re-published for additional comment (including a truthful and complete Preamble) following the correction process. In addition, the Department should undertake a realistic cost assessment of the proposed regulations for review by the IRRC and other responsible bodies.

Preamble Deficiency—Cost Implications

As discussed in the comments below, certain of the proposed rules will create enormous incremental compliance costs to the regulated community, POTWs and industrial discharges alike. **The statements in the Preamble that increased costs due to these regulations will be minimal is clearly erroneous**. The exact opposite is true.

As an example, the proposed "zero" discharge limits on floating solids and turbidity will, at a minimum, require the installation of micro screens, sand filters, or similar effluent filtration equipment at all facilities in the Commonwealth. Similarly, meeting a zero discharge standard for color will involve the addition of ozonation or other expensive color-removing technologies at hundreds of treatment plants. In many cases reverse osmosis—an extremely expensive treatment process to install and operate—is the only way to achieve the proposed comprehensive zero discharge standards. The costs of these treatment improvements will amount to hundreds of thousands, and in some cases millions, of dollars at every treatment plant in the state. The cumulative costs will undoubtedly exceed $100 million. This inevitable and easily foreseeable result is ignored in the cost analysis. Instead, unsupported statements are made throughout the Preamble that these changes are easily achievable with currently installed technologies and that there will be no costs associated with these radically changed discharge standards.

Additional sources of significant cost include costs to industrial facilities to meet more stringent "technology-based" standards for C-BOD and TSS; the costs, again in the millions of dollars per facility, of upgrading many POTWs to meet the so-called "tertiary treatment" standards (which are not related to environmental protection); the costs of small rural communities to increase treatment efficiency for lagoons and trickling filter plants to meet the new more stringent secondary treatment standards; and the costs to upgrade treatment plants in

certain combined systems to achieve higher levels of BOD and TSS removal than the federal Secondary Treatment Standards require (and for which these plants were designed). The lack of adequate public notice on this issue is of concern because it violates the public notice requirements of the Commonwealth Documents Law, a statute designed to protect the public from secretive changes in substantive law by non-elected officials. This is especially of concern when the changes result in tens of millions of dollars of public moneys being spent for no environmental benefit..

Other important omissions in the Preamble are mentioned in the comments below.

§ 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. It is assumed that this definition will not be interpreted to authorize the violation of the rules of mathematics.

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 § 92a.47(b)(1)), the definition should be clarified so that normal increases in flow into a POTW that do not require structural modifications of the treatment facility cannot be deemed to trigger the cited provisions. One way to address this issue is to refer to the Clean Streams Law permitting process under Chapter 91 (the WQM or "Part II" permits) as the criterion for determining if an expansion has taken place.

Immediate I appreciate a definition of the term, which has been subject to widely varying interpretations from DEP personnel over the years. The term is applicable primarily to the reporting requirement at § 91.33 (referenced at §92a.41(b)), pertaining primarily to spills and other unusual discharge 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 to make a report. Therefore, to provide for protection of the environment as a priority over recordkeeping and reporting, it is suggested that the time limit for "immediate" reports be increased to 8 hours.

Intersected Perennial Stream. There is no definition of this critically important term. See the comments under § 47(b)(1) below. I suggest, "a perennial stream to which the receiving waters of the discharge are tributary, and which does not contribute significant dilution, so that the waste receiving stream constitutes more than 50% of the combined flow of both waterways."

Minor Amendment. The term omits one of the provisions of the equivalent 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 the federal regulations themselves; DEP can only enforce state law.

Contrary to popular belief, there is no "delegation" of authority by EPA. Instead, 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, this is the opportune time to correct this misnomer and the on-going confusion by using the correct terminology and stating the correct definitions 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.

Treatment Works. It appears that the definition is intended to include purely internal water recycle/reuse facilities that do not discharge wastewater. Is it the intent of the Department to begin to regulate such private facilities under the NPDES program? If not, why is the term defined in this way?

Application for a Permit § 92a.21(c)(4) What is the justification for requiring four consecutive weeks of public notice for all permit applications? This is only required by statute for industrial waste permits. (35 P.S. § 691.307(b).)

I am aware that the Department does not enforce the requirement for POTW permits to be recorded in the Recorder of Deeds office (35 P.S. § 691.202), and that this requirement is

likewise ignored by most municipalities. However, 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.

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, especially now that DEP has abandoned the "money back guarantee" program that had made permit issuance more prompt in past years. A discharger intending to institute some sort of change in process must notify DEP and wait for the Department to approve the request. To further confuse the matter, DEP will decide at some point 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 and finality to the process. I suggest that:

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

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), as set forth in the facility's WQM permit. IN addition, as discussed under § 61 below, the application fees are charged in addition to the annual fees, so that permittees pay twice in application years. If, as the Preamble states, the fees are to cover the costs of the permitting program, then paying the same fee twice makes no sense.

§ 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 create an absolute ban ("an unqualified prohibition . . . is appropriate") on all discharges of, among other things, "floating substances," "sheen," "oil, grease," and "color, taste, and turbidity."[1] **The proposed change is a major one—from a flexible narrative standard to a harsh numerical one (zero).** This is a major change in water quality standards and deserves thoughtful consideration by the agency, not an off-hand remark that it will cost nothing to meet.

Virtually all discharges from municipal and industrial treatment plants have some measurable 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. Minor foaming, which is also prohibited (see footnote) is also common. This is true because it is nearly impossible using standard treatment technologies to achieve zero discharge of these parameters. Special tertiary treatment trains would be necessary to meet zero discharge standards. These include a variety of ultrafiltration and oxidation technologies, which are not only expensive to install, but to operate as well. These substances, in the amounts in which they normally occur, have no environmental impact. The proposed zero discharge limits will have no environmental benefit.

The result of an absolute ban will be to put **every POTW and industrial discharge in the Commonwealth in immediate noncompliance**. This is totally unacceptable. The statement in the Preamble, "an unqualified prohibition on most of these listed conditions is appropriate" is completely false; there is no environmental reason for total prohibition, and such prohibition would create an incredibly difficult compliance situation for every treatment plant in the Commonwealth. As noted above, the cost of installation of the necessary equipment to achieve compliance with this proposed rule would be enormous, amounting to tens, if not hundreds, of millions of dollars across the State.

To add insult to injury, the proposed drastic rule change provides no time to come into compliance. Design and installation of the necessary equipment for over 1000 treatment plants in the Commonwealth will take years. Immediate compliance upon promulgation of the final rule is quite literally impossible.

If the Department is really concerned about the "inimical to the uses to be protected" language, which has not been of concern to either the regulated community or the Department's enforcement staff for the past 15 years (and is the language that ties these parameters to environmental protection), then the solution is to come up with clearer language, not to ban all discharges outright. I 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, oils, foam, or floating materials are discharged the Department has the authority to take appropriate action.

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[1] Apparently DEP recognizes that foam in minor amounts might be discharged and does not prohibit it here; however, although discussed in the Preamble, the distinction between foam and floating materials is not expressed in the regulation itself. Thus, the proposed rule effectively imposes a zero discharge limit on foam, too.

Finally, I would 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 (including DEP field enforcement staff) knows which standard to apply.

§ 92a.47 (a) Secondary treatment Requirement—"Significant Biological Treatment" The proposed rule adds a significant new requirement that is not reflected in the Federal regulations. This is the obscure reference to "significant biological treatment." The term is not a recognized term in wastewater treatment process design and is clearly an invention of the Department (in contrast to the Preamble statement that the new rules use EPA terminology to "minimize . . . distortions or ambiguity"). What is the origin of the proposed definition? What documents or technical papers were consulted to derive the term? How did the Department determine that this requirement should be added to amend the Federal secondary treatment requirements? What scientific studies were conducted to determine that this added requirement is justified or required by the Clean Water Act or the Clean Streams Law?

What is the purpose of this new rule? No discussion of it appears (as is required) in the Preamble In fact the Preamble contains the 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 in a public notice, it is quite another to include false and misleading statements.

The apparent purpose of this change is to ban the use of efficient and useful non-biological (or minimally biological) treatment technologies such as ballasted sedimentation and chemical treatment, which have been installed in other states, with EPA and state approval, and are successfully protecting water quality there. If the Department believes that these technologies are not acceptable, it should engage in open and honest discussion with the professional community on the issue, based on scientific and technical principles. This proposal is the implementation of uninformed prejudice, it is not environmental protection..

§ 92a.47 (a) Secondary treatment Requirement The proposed rule conflicts with the applicable Federal rules in 40 CFR Part 133. In the Preamble, this is off-handedly dismissed without documentation or explanation (and, as noted above, with the false statement that the rules are not different from the federal standards). The federal Secondary Treatment Standards are based on a thorough review and assessment of various treatment technologies by professionals; limited and well defined exceptions are provided as a result of these extensive evaluations. Merely stating, without a hint of basis, that these rules are "outdated and have been misinterpreted," does not make them inapplicable or technically deficient. On what basis does the Department state that lagoons and trickling filters no longer require special consideration because of their unique operating characteristics? 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 without a single reference to any source of information hardly qualifies as a sound basis for expensive rule changes of this magnitude.

The Preamble states, "any competent sewage treatment operation can readily achieve the [proposed secondary treatment standards]." On what basis is this statement made? The regulatory provisions at 40 CFR § 133.105(d) provide that the proposed reduction in treatment limit must be made after evaluation of a representative sample of the affected facilities. Was such a study completed? How many lagoons were evaluated? How many trickling filter plants? Were other sources of information reviewed? If so, what were they? 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 using lagoons and trickling filters will be economically hard hit by a requirement to upgrade treatment facilities to achieve new levels of treatment not necessary to protect receiving streams.** In addition, a number of CSO communities that cannot achieve 85% BOD removal at certain times because of the weak character of the influent during wet weather will be required to design and install facilities that can achieve treatment of these weak waste streams. Since the issue is NOT discharge concentrations, but internal operating data, there is ZERO benefit to the environment from these expensive upgrades.

The regulations are not at all clear, but it appears also to be the intent to abrogate the Part 133 provision to provide for mass balance limits adjustment for POTWs that treat significant quantities of certain industrial wastes. (40 CFR § 133.103(b).) Again, this rule is based on sound policy, as articulated by EPA, and saves some municipalities tens of thousands of dollars each year in treatment costs while not posing any threat to the environment. Changing the rule to impose such substantial costs (if that is the intent of this ambiguous rulemaking) should be supported by some discussion and technical or policy considerations. These are totally absent from the Preamble.

The cost of the unnecessary modifications to meet the changed limits could run into the millions of dollars in scores of Pennsylvania municipalities, in many cases those least able to afford it. **The Preamble does not include (as it is required to) the economic assessment of the impact to Pennsylvania municipalities of these radical new rules.**

§ 92a.47 (a) 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. Certainly operating data show that the current standards are compatible with installed secondary treatment facilities, while instantaneous maximum limits could cause violations with no water quality impairment or effect on human health. 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 have

not choice but to 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 for Expanded facilities

See the comment above regarding the definition of "expanding facility or activity."

The Preamble states that requiring some facilities to construct additional so-called "tertiary treatment" facilities (see technical discussion below), while allowing other facilities to retain existing secondary treatment will "reduce possible disparities in treatment requirements among multiple point sources." **The proposed rule will produce exactly the opposite result.** Existing dischargers will not be required to implement "tertiary treatment" as long as there is no expansion. However, if one plant on a HQ stream expands, it must also modify the treatment process to meet the so-called "tertiary treatment" requirements. Thus, while some plants on a water body will have secondary treatment, others on the same water body will be required to construct "tertiary treatment" facilities. This will create enormous "disparity in treatment requirements among multiple point sources."

§ 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 the "attribution" determined? Since there is already a mechanism in place to evaluate and report impaired waters, the rule (if it is to be adopted) 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 the Department's unusual version of 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). The strange statement in the Preamble that a TMDL might not be available to support discharge limits discloses the fundamental error with the proposed approach: if there is no water quality-based reason to reduce discharge limits, then why are the discharge limits being reduced? Just for fun??

The idea of implementing a new "technology-based" limit a step below secondary treatment might not be objectionable if there is a good reason for doing so. **The Department has not even attempted to make a case for this major new regulatory requirement.** "Just do it" is not sufficient when tens of millions of local dollars are on the line.

§ 92a.47 (b)(1) Intersecting SP waters. The rule requires the installation of so-called "tertiary treatment" when "the first intersected perennial stream" is a special protection water. Read literally, if one discharges to the Susquehanna River, and five miles downstream a small unnamed HQ tributary discharges on the other side of the River, tertiary treatment would be required. This is ludicrous.

I assume the intent of this section was to apply the requirement to install "tertiary treatment" even when the discharge is to a ditch or small WWF stream, when that water body quickly intersects an SP stream such that it effectively is a discharge to that stream. Setting aside the absurdity of requiring the Department's odd version of "tertiary treatment" for all such discharges, I have provided a suggested definition of "intersected perennial stream" elsewhere in these comments to address this concern.

§ 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 be told 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.[2] In fact, the concept of technology-based effluent limits does not work with the concept of tertiary treatment, which is more properly applied to meet specific effluent limit goals. So, if these standards did not come from the professional community, where did they come from? Again, no discussion of this important new rule appears in the Preamble as the law requires.

In fact, of course, the proposed standards are NOT tertiary treatment, they are merely "more" treatment. The confusion created by using an established engineering term to describe something that is only remotely related to it is part of the problem of understanding the proposed rule. Perhaps the intent and purpose of the proposal would be clearer if a more accurate term were used—"enhanced treatment" or something of the sort. This would distinguish the proposed "technology-based" standard from "real" tertiary treatment as defined by process design professionals.

§ 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

[2] See, e.g., *Manual Of Practice 8*, WEF and Chapter 12 of *Wastewater Design and Engineering*, Metcalf & Eddy.

basis. The 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. Unsupported and undocumented accusations of the kind contained in the Preamble (which belittle EPA's thoughtful, technically competent, and thorough process of developing TBELs under the provisions of the Clean Water Act, while proposing alternate limits snatched from thin air), and development of onerous new standards without any published technical basis are not an acceptable way of governing, especially when the financial impact on Pennsylvania industry could be substantial.

§ 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 be limited to new installations; retrofitting of existing treatment plants with influent flow meters when effluent flow meters already exist, or *vice versa*, is not required by the regulation. 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, however, the rule 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 and effect 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. The introduction of science into the art of discharge regulation is a welcome change. It would be nice to see it used elsewhere in the proposed regulations, too.

§ 92a.61 Annual Fees. The Preamble contained no discussion of the basis of the proposed annual fees. Since the ONLY fees authorized to be assessed by the Clean Streams Law are "filing fees for applications filed and for permits issued" (35 P.S. § 691.6), 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.[3] If there is no relationship between services rendered with respect to permit applications and permit issuance and the fees to be assessed, please explain how these fees differ from taxes.

[3] The only financial information provided was the entire annual budget of the program, which of course is entirely inadequate to answer the question of compliance with the statutory provision.

That is, if the purpose of the fees is to raise revenue to cover general DEP expenses to administer the NPDES permitting program, which is what the Preamble states, **under what legal theory are these not taxes**? Please provide a citation of the statute authorizing the Department to charge fees other than filing fees for performing its statutory governmental duties, and the legal analysis prepared by DEP counsel in support of the proposed regulation.

Setting aside the unanswered question of the legality of the annual fees, the result is to charge TWICE the annual fee every five years—one fee for permit renewal under § 92a.27 and an identical fee for that year's "service" under § 92a.61 Thus, the statement in the Preamble that the result will be a "uniform annual fee" is erroneous.

§ 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 and easily understood requirements of the statute. A hearing must be held, whether or not the person to be penalized "requests" it or even attends.

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 so 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."

It is obvious that the Department's attempt to extensively modify long-standing and well-crafted Federal regulations is hampered by a lack of technical and scientific expertise. Given the many problems in this first rough draft, including failure to comply with the notice provisions of the Commonwealth Documents Law and the potential economic impact to the tune of hundreds of millions of dollars for public and private treatment works, these regulations should be withdrawn and the Department should engage with informed stakeholders, who have always been willing to provide their expertise and advice *gratis.* I urge the Department to recommence what had been a successful program a few years ago—regulatory negotiation.

Very Truly Yours

Randall G. Hurst

ONE PAGE SUMMARY OF COMMENTS
Randall G. Hurst

There are too many technical and legal errors in the proposed regulations to even list on one page. However, there are several important matters that I hope the Board will seriously consider, which apply to many of my individual comments:

1. The Board should understand that t**his is the most radical rule change the Department has proposed in over a decade.** The proposed regulations constitute sweeping and universal changes to long-standing Federal discharge requirements. They radically re-write the standards under which municipal and industrial treatment facilities operate. The Secondary Treatment regulations (40 CFR Part 133) have been gutted and a "one size fits all" approach has been substituted for the thoughtful, technically accurate, and flexible EPA rules. The Federal Effluent Limits Guidelines are to be generally ignored and arbitrary BOD and TSS limits instituted in their place. New terms with no Federal counterpart are invented and ambiguity is rampant, inviting confusion and litigation to figure out what these new rules mean. Compliance costs will be enormous, noncompliance rates will increase, and, in spite of all of this, there will be NO change in environmental protection (the existing rules are working just fine). These changes are related not to environmental protection, but to simplifying DEP's regulatory program by imposing arbitrary new standards across the board, eliminating the well-researched EPA standards that have served us well for over 40 years. Statements in the Preamble that the rules are merely a recodification of existing rules and propose no substantive changes are false.

2. Most important, in light of the magnitude of the changes, is the almost complete lack of documentation, in the Preamble or any other place, regarding the basis for making these new rules The ONLY "justification" for these substantive changes is the unsupported statement that the federal standards have mysteriously become "outdated." Not a single study, scholarly paper, magazine article, or letter to the editor is cited in support of this astounding statement. If municipalities are to spend millions, and hundreds of industries are to be shut down, the Department should at least tell us why.

3. Arbitrary new zero discharge standards will be imposed on every municipal and industrial wastewater facility in the state. No timetable is provided to meet these radical new standards, **which cannot be met using installed technology**. DEP's comment on all of this? "an unqualified prohibition on most of these listed conditions is appropriate." Since environmental protection is not the issue, what is this statement based on?

4. Even worse, the prohibitions and other changes (e.g., the strange and arbitrary "tertiary treatment standards") will cumulative cost hundreds of millions of dollars to address. Meeting a zero discharge standard for turbidity, oil and grease, or color, will require installation of state-of-the art equipment costing hundreds of thousands of dollars to construct and more each year to operate at every treatment plant in the state. DEP's comment? "the proposed rulemaking does not include any new broad-based treatment requirements . . . . The compliance costs of the proposed rulemaking for most facilities is [*sic*] limited to the revised application and annual fees." Nothing could be further from the truth! *The attempt at concealment of the enormous cost of the most radical and far-reaching treatment requirements in forty years is inexcusable and an affront to the Board and the regulated community, not to mention a violation of the law..*

From: Hurst, Randy [rghurst@mette.com]
Sent: Thursday, March 11, 2010 2:52 PM
To: EP, RegComments
Subject: Comments on proposed Chapter 92a
Attachments: Chapter 92a Comments.pdf

Please find my comments on the referenced rulemaking attached.

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