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March 15, 2010

Via E-Mail

Honorable John Hanger, Chairperson
Pennsylvania Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Pennsylvania Periphyton Coalition
Comments on Proposed Changes to 25 Pa. Code Chs. 92 and 92a
NPDES Permitting, Monitoring and Compliance

Dear Mr. Hanger:

These comments are submitted in response to the proposal to amend the State's NPDES rules as set forth in 40 Pa. Bulletin 847-76, February 13, 2010. The comments are submitted on behalf of the Pennsylvania Periphyton Coalition ("Coalition"), whose members include the Borough of Ambler, Southwest Delaware County Municipal Authority, Lower Paxton Township, Home Builders Association of Metropolitan Harrisburg, Borough of West Chester, Lower Paxton Township, West Goshen Sewer Authority, Harrisburg Authority, Telford Borough Authority and Warminster Municipal Authority. Based upon the following reasons, the Coalition does not believe the rules should be promulgated as proposed. Included with these comments is a one-page summary that the Coalition requests be provided to each member of the Board in the agenda packet prior to the meeting at which the final regulations will be considered.

Notice of Proposed Rulemaking is Insufficient

The preamble to the rule states that the primary goal of the proposed rulemaking is to reorganize existing Chapter 92 so that it will be consistent with the organization of the federal regulations. It also indicates that several new provisions to incorporate recent new requirements in the federal program are also proposed. Under the section titled "Compliance Costs," the preamble states that the new permit fees are the only broad-based requirement that would increase costs for permittees. We believe that such statements broadly misrepresent the effect of the underlying proposed regulatory changes and greatly underestimates the significant expenses that will be encountered by permittees should the proposed regulations be adopted. Moreover, the proposed rule

contains a number of changes with significant impact that are not identified or otherwise addressed in the preamble.

State law at 45 P.S. § 1201 and State regulations at 1 Pa. Code § 7.1 require that a notice of proposed rulemaking contain a brief explanation of the proposed administrative regulation or change. A number of changes are being made by the proposed regulation that contain absolutely no explanation or indication to the public that a change is being made. Minimum due process requirements are not being met where the public is asked to decipher a complex set of regulations, figure out where a change is being made and try to surmise the underlying rationale as to why a change is being made. At a minimum, it is incumbent upon the Environmental Quality Board to repropose the regulations and provide a sufficient description of the changes being made and the reason for the changes so that the public can appropriately comment.

In addition, the rule must be accompanied by a reasonable estimate of economic impacts. This simply has not occurred, particularly with respect to imposition of new, minimum technology-based requirements applicable to discharges to impaired waters. Contrary to the public notice, federal law certainly does not support or require the imposition of these new requirements.

We reserve our right to supplement these comments based upon requisite information being provided regarding the proposed regulatory changes.

Comment Period Should be Extended and a Public Hearing Provided

Due to the fact that significant changes are being made to the Commonwealth's NPDES permitting regulations, the Commonwealth should extend the permit comment period until the public has been informed of the underlying changes, the reasons for the changes and an adequate time to comment after receiving such information.

Furthermore, we hereby request that a hearing be provided on the proposed regulatory changes. At the hearing, the Department should be available to answer questions regarding the underlying changes and rationale.

EPA Approval of State Regulations Required

The preamble to the proposed rules states that "[s]ome of these provisions are needed to ensure continued federal approval of Pennsylvania's program by the Environmental Protection Agency." Pennsylvania's NPDES program was approved in 1978. *See* EPA's web site at *http://cfpub.epa.gov/npdes/statestats.cfm?view=specific* setting forth dates for approval of State NPDES programs. Except for changes associated with the authority to issue general permits, the State's NPDES permit program has never been modified although there have been numerous federal and state changes to their regulations, as applicable, over the last thirty-two (32) years.

EPA regulations at 40 C.F.R. § 123.62 set forth a process for modification of approved State programs. It is imperative that the State follow such federally-mandated procedures before modifying its regulations. The proposed changes are significant and Part 123 procedures must be followed.

Secondary Treatment Adjustments Should Not Be Eliminated

The proposed regulations would eliminate all the adjustments to secondary treatment regulations provided for by federal regulations at 40 C.F.R. Part 133 to address atypical situations. The federal regulation at §133.103 provides for adjustment of the BOD_5/TSS 85% removal requirement for combined sewers or where separate or combined sewers receive dilute influent (*i.e.,* not due to excessive I/I). In addition, POTWs receiving more than 10% of its design flow or loading from a particular industrial facility may have its limits adjusted proportionately based upon what the industrial categories' discharge limits would be if the facility was directly discharging. Section 133.103(c) also provides for adjustment of TSS requirements for waste stabilization ponds. These requirements were included in the rule to ensure the proper application of technology-based requirements where the assumptions underlying the rule were clearly not applicable to a particular discharge situation.

Moreover, § 304(d)(4) of the Clean Water Act declares that biological treatment facilities such as oxidation ponds, lagoons, ditches and trickling filters shall be deemed the equivalent of secondary treatment. Based upon such mandate, EPA secondary treatment regulations at 40 C.F.R. § 133.105 (and § 133.101(f)) provide for less stringent secondary treatment limitations for trickling filters and waste stabilization ponds. The EQB proposed rule would eliminate this statutorily mandated recognition of the limitations of trickling filters, oxidation ponds, lagoons and ditches and would now require these facilities, typically owned by smaller POTWs, to be upgraded to meet traditional secondary treatment standards.

We believe that none of the adjustments provided for under the federal regulations should be eliminated and that DEP's rationale for imposing the more restrictive approach is not among the factors that may be considered in establishing or modifying BCT or secondary treatment technology-based requirements. (*See, e.g.,* 40 C.F.R. § 125.3) In *Municipal Authority of Union Township v. DEP*, EHB Docket No. 2001-043-L (February 4, 2002), the EHB found DEP's refusal to provide an adjustment to secondary treatment regulations provided for by Part 133 to be unjustified. The EHB pointed out, in the case addressing adjustment for POTWs based upon industrial influent, that "by failing to make an adjustment to account for the mixed nature of the wastestream, the Department's action effectively imposes a treatment standard for sewage on industrial wastewater" and "has taken the technology that must be dedicated to the treatment of one type of wastestream and imposed it on a different wastestream that has its own technological requirements." *Id.* at 10. Furthermore, the EHB provided:

> The Department . . . referred to the § 133.103(b) adjustment throughout their materials as a 'waiver' or a 'variance.' This usage, while

> common, to some extent loses sight of the basis for technology-based standards. The Section 133.103(b) adjustment is not intended to affect the POTW's obligation to apply secondary treatment to sewage. Even if an adjustment in final limits is made, the POTW's duty vis-a-vis sewage has not changed. Rather, § 133.103(b) merely adjusts the final limits in an arithmetic fashion that incorporates the different limits that apply to the nonsewage component of the mixed wastestream discharge. If anything, declining to make an adjustment would constitute a 'wavier' or 'variance' from the effluent limits that would normally apply to the nonsewage wastestream.

Id.

In a cursory statement, the proposed rule purports to justify the elimination of the federal provisions providing for adjustment of traditional secondary treatment values as follows:

> Certain exemptions and adjustments provided for in 40 CFR Part 133 would no longer be applicable, because these exemptions and adjustments are outdated and have been misinterpreted in a [sic] some cases. The STS [secondary treatment standard] 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. Under the proposed rulemaking, all discharges of treated sewage would be required to meet the STS.

40 Pa. Bulletin at 852.

This conclusory statement does not provide a technical basis for claiming all municipal entities, regardless of actual circumstances, may meet more restrictive requirements *when using only secondary treatment processes*. Under DEP's proposed approach, if an industrial category were to comprise 90% of a POTW's influent and, if directly discharging, be entitled to appropriate technology-based limits of BOD_5 and TSS monthly average effluent limitations of 300 mg/l, the new regulations would now require the POTW to meet technology-based monthly average limits of 30 mg/l for treatment of the same wastewater based upon the bald assertion that any competent sewage treatment operation can readily achieve the STS. Even under the proposal at § 92a.48, the regulations recognize that it would be appropriate to provide an industrial discharger monthly average limitations of 60 mg/l BOD_5 and TSS, yet this same wastestream would be required to meet monthly average limits of 30 mg/l based upon the fact that it is being treated by a municipality, not an industry. It is the same waste regardless of who treats it and, as such, it is the same technology-based standard that should apply.

As pointed out by the EHB in the *Union* case, "[t]o change technology-derived numbers based upon actual treatment capabilities represents a significant departure from the detailed, well established, regulatory program for setting effluent limits." *Union* at 9. The EHB further indicated that "the limits for the industrial flows should be the same

regardless of who is actually responsible for treating the wastestream prior to discharge" and that "perceived need" is not a basis for refusing to adjust permit limits. *Id.* at 7, 10.

Finally, the proposed rule ignores the implications of Clean Water Act § 402(m). This section provides that additional pretreatment of conventional pollutants cannot be required where the POTW is not meeting its limits as a result of inadequate design or operation. As such, should a POTW, due to the large percentage loadings of industrial flows, be unable to meet its effluent limits, instead of applying the correct technology-based requirement to the POTW, the proposed regulations would, in essence, require the POTW to upgrade its facility to treat the industry's conventional pollutants. Under the proposal, the underlying concern would then be exacerbated in that the upgrade may subject the POTW to tertiary treatment requirements, including monthly average requirements of 10 mg/l under proposed section 92a.47(c).

The other adjustments to secondary treatment standards should also not be eliminated. This includes the adjustments to the 85% removal requirement for dilute influent. The preamble to the proposal states that "[c]ertain industrial facilities have very weak influent and, in these cases, removal efficiency is not a valid measure of treatment effectiveness." The federal adjustments to percent removal requirements in §133.103 apply when municipal facilities have dilute influent which is not a result of excessive I/I. The rationale regarding industrial facilities and dilute influent also justifies retention of the percent removal adjustment as provided for by § 133.103. As DEP is now directing facilities to process all wet weather flows through their biological systems, the ability to achieve percent removal objectives is further compromised. Nowhere does DEP's record show that all facilities can achieve this requirement with the use of secondary technology. Absent that demonstration, the rule should remain unchanged.

Tertiary Treatment Standards for POTWs

Without any rationale for the new technology-based standards, the Department proposes to impose tertiary treatment standards for a discharge from a new source, new discharger or expanding facility or activity into a High Quality ("HQ") water or an Exceptional Value ("EV") water or a surface water or location for which the first intersected perennial stream is a HQ or EV water. Tertiary treatment standards would also be applicable to discharges that affect surface waters that are not achieving water quality standards ("WQS"), with the impairment attributed at least partially to point source discharges of treated sewage. Tertiary treatment would be defined as the following monthly average limits and seasonal modifiers would not be allowed: $CBOD_5$ and TSS - 10 mg/l, Total Nitrogen - 8 mg/l, Ammonia Nitrogen - 3 mg/l and Total Phosphorus - 1 mg/l. In addition, DO would have a 6.0 mg/l minimum limit.

These standards appear to be arbitrary and would purport to require additional advanced treatment for treatment's sake, even where the regulated pollutants are not the cause of any listed impairment. The fact that a facility discharges into a HQ or EV water, or a downstream water is HQ or EV, should not require tertiary treatment. Those are antidegradation designations that only require that the water quality not be degraded.

This may or may not require the use of the technologies DEP is now attempting to mandate. The WQS program (which includes antidegradation review requirements) is adequate to protect such waterbodies. Additional technology-based standards are inappropriate.

Furthermore, the second criteria in proposed §92a.47(b)(2) is particularly problematic. Water quality-based limits are only to be imposed "as necessary to achieve applicable water quality standards." (*See* CWA §§ 301(b)(1)(c), 303(d), 40 C.F.R. Part 130 and § 122.44(d)(1).) Water quality-based limits are not required of all facilities, only those facilities that are causing and contributing to the standards exceedance. 40 C.F.R. § 122.44(d). Where the primary cause of an impairment is non-point source related, point source limitations may be deferred. 40 C.F.R. § 130.2. EPA previously considered imposing pre-TMDL requirements and determined that such approach would be inappropriate as it could waste resources and impose unnecessary limitations. In fact, ten years after the adoption of § 122.44(d), EPA proposed and then withdrew a prohibition to address existing discharges to impaired waters. 64 Fed. Reg. 46068 (August 23, 1999) and 65 Fed. Reg. 43640 (July 13, 2000). EPA sought to set new requirements for existing dischargers to impaired waters pending TMDL development because of concerns that such waters not suffer further impairment. EPA wanted "reasonable further progress" to be achieved pending TMDL development. 64 Fed. Reg. 46046. EPA proposed to modify the prohibition section of the NPDES rules (§ 122.4) so that significant load increases from existing dischargers would not occur and some further reductions could be achieved. EPA specifically concluded that existing non-expanding facilities should simply be left alone, pending TMDL development. Their rationale is particularly applicable to the situation now proposed in Part 92a:

> Furthermore, it might be very disruptive to existing dischargers if they were required to offset their discharge before a TMDL is established only to possibly receive different permit limits and conditions once wasteload allocations and a margin of safety are established in a TMDL. EPA seeks to avoid these disruptions if possible.

64 Fed. Reg. 46068 (August 23, 1999). The Clean Stream Law and DEP's NPDES rules generally track these federal provisions. DEP's proposed approach clearly imposes new requirements, including several not authorized by federal law or the Clean Stream Law.

The definition of "expanding facility or activity" is extremely broad and would cover even *de minimis* changes to a facility if there is any increased flow or loading. Minor changes to a facility, although resulting in a slight increase in flow or loading, should not trigger the construction activities associated with meeting tertiary treatment standards. In fact, elsewhere in the proposal (§92a.26), it is recognized that an increase in permitted pollutants that do not have the potential to exceed permit limits can be undertaken without even obtaining the approval of the Department. Query why an action that is so insubstantial that it can be undertaken without Department approval is somehow considered significant enough to trigger tertiary treatment.

While we do not believe tertiary standards should be imposed at all (and reserve our rights regarding this issue), if the tertiary treatment standards are imposed it should only be limited to something so substantial that it could trigger the "new source" standard. The basic idea behind the new source standard is that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies. *See generally,* 49 Fed. Reg. 38043 (September 26, 1984). As such, EPA developed the new source criteria in 40 C.F.R. § 122.29(b) to only require upgrade in treatment when the changes are so substantial that the opportunity to incorporate new pollution equipment (rather than retrofit existing equipment) readily exists. The proposed DEP regulations at §92a.37 incorporate by reference the EPA new source criteria thereby only requiring facilities to meet more stringent technology-based requirements when very significant changes are being made to the facility. The proposed definition of "expanding facility" is inconsistent with such approach and would need to be modified.

Moreover, there is no need to require tertiary treatment simply if a water body is not meeting WQS. In such case, as discussed above, water-quality based effluent limitations should be imposed. Technology-based standards that potentially have nothing to do with the impairment are not appropriate.

Furthermore, the regulation fails to provide a definition of a "surface water that is not achieving water quality standards." Is this meant to be limited to a CWA § 303(d) listed water body or can the Department otherwise deem a water body as not achieving WQS even if the Department did not list the water body under § 303(d)? At a minimum the regulation should be limited to § 303(d) listed water bodies. As the Chesapeake Bay is listed as impaired, would any facility subject to the Chesapeake Bay Program be subject to tertiary treatment standards? Such an approach would significantly impact the trading program and is contrary to the representations DEP has made to the legislature and regulated entities regarding the cost-savings to be obtained through the trading program. At a minimum, clarification to avoid such results is required.

The proposed regulation also fails to limit the imposition of tertiary treatment standards only to the dischargers causing the impairment and for the pollutant relevant to the impairment. Instead, it purports to impose tertiary treatment standards upon any permittee, as long as the impairment is attributed to some point source.

The tertiary treatment standards under the proposal would apply even if the impairment is for a pollutant or parameter (*e.g.,* temperature) where the pollutants regulated by the tertiary treatment standard would have nothing to do with such impairment. The mere identification of a water body as impaired should not require tertiary treatment. The fact that a water body is impaired by metals, chloride or sediment is hardly a justification for imposing tertiary treatment directed at nutrient and oxygen demanding pollutants. The rule as proposed is completely arbitrary as it mandates nutrient reduction, including total nitrogen removal even where the impairment is not caused by nutrients. The requirement for universal total nitrogen reduction is particularly arbitrary. DEP's statewide nutrient plan and prior stream nutrient TMDLs have uniformly focused on phosphorus control, not nitrogen. DEP's recent comments on the Indian, Paxton and Goose Creek TMDLs

sought EPA's elimination of total nitrogen reduction requirements because the parameter was not the limiting nutrient. EPA complied with that request. Therefore, imposing a universal requirement for total nitrogen reduction for any discharge to an impaired water is arbitrary and wasteful of local resources. DEP does not have authority to impose requirements it has routinely concluded are unnecessary to achieve use protection. As this is a major change in DEP position, the legal and technical basis for the changed position must be presented to the public, and that has not occurred.

Moreover, there is no indication how the tertiary treatment standards for the different pollutant parameters were developed. These values appear to be arbitrary. The Department should provide the public with copies of its analyses identifying how it determined these particular values are reasonable and appropriate for all discharges to impaired waters.

Furthermore, the preamble provides that "[t]hese effluent treatment requirements are sufficiently stringent to require advanced treatment as compared to secondary treatment for sewage." The costs for advanced treatment are significant, yet the proposal indicates elsewhere that the only costs associated with the proposal are those associated with permit fees. The Department must undertake a financial analysis of the impact of this section (and other proposed sections) on the regulated community before proceeding with rulemaking.

We request that the proposal to develop tertiary treatment standards not be finalized. With permittees already facing financial difficulties, query why "treatment for treatment's sake" would now be imposed where limited financial funds could be better spent on something that has an environmental benefit.

Significant Biological Treatment Would Be Required

The existing regulations at 25 Pa Code § 92.2c(a) require sewage discharges, except for CSOs, to meet secondary treatment requirements. Consistent with the federal regulations, end-of-pipe effluent limitations are established with the choice of technology being left to the discretion of the permittee. The proposal, in contrast, at § 92a.47 would, in addition to the end-of-pipe numerical values, declare that secondary treatment include "significant biological treatment" (which would be defined as the use of an aerobic or anaerobic biological treatment process to consistently achieve a thirty-day average of 65% removal of BOD_5). Federal and state regulations have not dictated in the past how municipalities can meet the end-of-pipe effluent limitations and such restriction should not now be imposed.

Where significant physical/chemical treatment precedes biological treatment, it may be difficult for the biological treatment process to consistently achieve an additional 65% removal without filtration or other tertiary treatment technology. This would apply in the situation where the biological treatment process would be fully capable of achieving 65% removal if the wastestream wasn't first subjected to the significant physical/chemical treatment. As the quality of the effluent would be high quality and easily meet secondary

treatment standards, the municipality should not be penalized because its higher quality waste is due to the use of treatment before biological.

We do not believe the Department has the authority to dictate the type of treatment a facility can utilize to meet permit effluent limitations. The Clean Water Act and Clean Streams Law leave such choice to the permittee. A requirement based upon "significant biological treatment" should not be imposed.

Secondary Treatment Should Not Include Fecal Coliform Instantaneous Maximum Limits

EPA has declared that the use of instantaneous maximum or daily limits for pathogens is inappropriate except for bathing beaches.

> Other than in the beach notification and closure decision context, the geometric mean is the more relevant value for ensuring that appropriate actions are taken to protect and improve water quality because it is a more reliable measure, being less subject to random variation, and more directly linked to the underlying studies on which the 1986 bacteria criteria were based.

69 Fed Reg. 67224 (Nov. 16, 2004).

Other states are amending their regulations to eliminate daily pathogen requirements. DEP should not, instead, be defining secondary treatment by establishing a summer fecal coliform instantaneous maximum limit of 1,000/100 ml and a winter limit of 10,000/100 ml.

Furthermore, the proposal fails to identify why the rule has dropped the qualifying phrase in current §92.2c(b)(2) that the standard can not be exceeded in more than 10% of the samples tested. Nor does the proposal identify why such qualification was not added to the new winter limit.

This is a significant change from the current regulatory approach and the preamble has absolutely no discussion of the underlying rationale or the cost of compliance associated with this new restriction.

Industrial Facilities Should Not be Limited to Arbitrary Conventional Pollutant Limits

Proposed § 92a.48(a)(4) would arbitrarily limit industrial facilities to monthly average limitations of 60 mg/l for BOD_5 and TSS. A 50 mg/l monthly average standard would apply for $CBOD_5$. EPA establishes technology-based standards for industries after undertaking an exhaustive analysis of the various factors delineated in § 304 of the Clean Water Act, including the age of equipment and facilities involved; the process employed; the engineering aspects of the application of various types of control techniques; process changes; the cost of achieving such effluent reduction; and non-water quality

environmental impact (including energy requirements). The preamble purports to justify this approach by declaring all EPA effluent guidelines to be "outdated" (even those recently promulgated) and, without setting forth any underlying analysis, declaring that all categories of industries should be able to meet this standard.

Again, we do not believe the Department has the legal authority to impose such artificial restrictions. Moreover, such an approach would artificially restrict production at industrial facilities and limit the availability of much-needed jobs in our communities. The proposed restriction should not be finalized.

Schedules of Compliance

Existing § 92.55 provides that "if a deadline specified in section 301 of the Federal Act has passed, any schedule of compliance specified in the permit shall require compliance with final enforceable effluent limits as soon as practicable, but in no case longer than 3 years . . . ." The new regulation would apply the three-year limitation to all schedules of compliance, regardless if the deadline specified in section 301 of the Federal Act has passed. This effectively forces communities to achieve compliance with any new mandate within three years, regardless of the actual capability to do so. DEP should not restrict the use of schedules of compliance to three (3) years. Among other things, this potentially would preclude longer schedules of compliance necessary to upgrade treatment plants to meet new requirements, such as new water quality standards, nutrient removal to meet Chesapeake Bay requirements or, if EQB were to proceed with the proposal, tertiary treatment for POTWs. Similarly, it may be deemed to limit compliance schedules to three years (3) for implementing CSO requirements pursuant to an approved Long Term Control Plan. If more time were needed, such requirements would then have to be established under an enforcement order.

Nowhere does the rule explain the basis for this new mandate or demonstrate that, in general, a three year schedule is sufficient to allow a discharger to design, finance and construct facilities. Moreover, with DEP's reduction in personnel, one can reasonably expect there to be delays in obtaining the necessary permits. Absent some demonstration that such a schedule is reasonable, this restriction should not be adopted. The fact that DEP may grant additional time under an enforcement order, but is not required to do so, does not obviate DEP's need to demonstrate the necessity and reasonableness of this major change to the rules governing schedules of compliance.

If the three-year deadline were to be maintained, many facilities would be forced to reduce the planning phase which would result in the needless expenditure of funds. Moreover, compliance schedules inherently require DEP timely action in responding to plans and issuing construction and discharge permits. Particularly with DEP's reduction in staff to review Act 537 plans, issue construction permits and issue discharge permits, the three-year time frame is unreasonable. It should not be maintained.

General Prohibition Against Discharge of, among Other Things, any Floating Material, Oil, and Substances that Produce Color, Odors or Tastes

The existing prohibition at §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. Similarly, existing §93.6(a) provides that water may not contain substances attributable to point or nonpoint source discharges in concentration or amounts "sufficient to be **inimical or harmful to** the water uses to be protected or to human, animal, plant or aquatic life." Although not a clear-cut standard, it is at least based upon a threshold of having an "inimical or harmful" impact. In addition, the existing regulation at §93.6(b) provides for specific substances "**to be controlled**" including, but are not limited to, floating materials, oil, grease, scum and substances that produce color, tastes, odors, turbidity or settle to form deposits. This provision is not an out-and-out prohibition, but merely requires the "control" of such things as color, tastes, and odor.

In contrast, the newly proposed rule at § 92a.41(c) would be a flat prohibition on the discharge of "floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits." As the preamble indicates that "'floating material' refers to floating solid material," this prohibition would purport to prohibit a discharge from a BNR facility as it would likely have nitrogen gas attaching to solids and causing some of the solids to float.

Also, it appears that this section would establish a zero effluent limitation for oil and grease. As to color, it is unclear whether this means that the discharge must be black (*i.e.*, the absence of color), the exact color of the receiving water (*i.e.*, in that case it would not be producing a different color) or something else. In addition, it would be inconsistent with the water quality standards for color. As to a prohibition against substances that produce taste or odor, one can only guess how this could potentially be interpreted.

The regulations should not have a flat prohibition on the discharge of floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits. As indicated above, the result would be nonsensical. The Clean Streams Law and CWA require that permit restrictions (other than technology-based limits) be tied to some demonstration of use impairment. There either needs to be a standard based upon the impact (*e.g.*, inimical or harmful) or the standard should, consistent with the existing regulation, require these pollutant parameters to merely be controlled.

SSO Prohibition

The existing regulation at 25 Pa. Code § 92.73(8) provides that a permit will not be issued, modified, renewed or reissued for a sanitary sewer overflow ("SSO") "except as

provided for in the federal regulations." The new regulation at § 92a.5 would delete this exception, essentially prohibiting the permitting of any SSO regardless if the federal regulations would allow such discharge. Notwithstanding EPA Region III's new position (without a change in the underlying regulation), EPA (including Region III) has historically held that an SSO is subject to the bypass regulation (which would address, among other things, severe storms where overflows could not reasonably be expected to be prevented). In fact, EPA Region III has historically objected to DEP permits that did not contain a bypass provision applicable to SSOs. There has been no applicable change in federal law or regulation since.

The deletion of the exception would purport to preclude any defense for sewer overflows even if due to Hurricane Ivan or another catastrophic storm typically considered "acts of God" and not controllable. In essence, this new provision requires the design of a collection system to withstand any and all storms, regardless of intensity. It presumes that DEP has adopted such a design requirement for collection systems when it has not. Surely, municipalities cannot reasonably be expected to design their sewer systems (and treatment plants) to handle all flows associated with such catastrophic events. The existing regulation should be maintained.

Permit Costs

DEP proposes to increase permit application fees and to impose significant new annual fees. The preamble indicates that whereas the Department has been collecting approximately $750,000 in fees, the proposal would provide for, in essence, a 700% increase, resulting in aggregate fees of $5,000,000 a year. As an example, POTWs with flows between 1 and 5 mgd would, instead of the current $500 application fee, now be subject to a $1,250 reissuance fee and a $1,250 annual fee for the permit resulting in a five-year permit now costing $7,500. Furthermore, amendments requested by the permittee would also be subject to the same reissuance fee (except for minor amendments which would cost $200). POTWs with flows of 5 mgd or greater would be subject to a $2,500 reissuance fee and $2,500 annual fee resulting in a five-year permit fee of $15,000. Costs would be even higher if the POTW has a CSO.

We believe these fees to be unreasonable. Our members will be subject to astronomical increases. For example, the Coalition members with POTWs flows greater than 5 mgd would be subject to an increase in permit fees of three thousand percent (*i.e.*, from $500 to $15,000). EPA had proposed to limit funding to states that did not have a mechanism in place to collect program operation costs. Due to the huge public outcry against such an approach, EPA reconsidered its proposal and decided not to promulgate a final regulation. These fees are not required by any applicable law.

We question whether DEP has the authority to impose the annual fees. Section 6 of the Clean Streams Law only provides the Department the authority to impose reasonable permit application fees. It does not provide the authority for the Department to impose annual fees. Furthermore, even if the Department were to be able to collect annual fees,

such funds would likely be required to go to the State Treasury and not to the Department's own budget.

Continuation of Expiring Permits

Proposed §92a.7 would provide for the administrative continuance of an expired permit where a permittee submitted a timely and complete permit application and the Department, through no fault of the permittee, does not timely reissue the permit. Section 92a.7(b)(1) however references proposed §92a.75 (relating to reissuance of expiring permits) which provides for the administrative extension of permits for a minor facility for a maximum of five (5) years as long as certain conditions are met, including the permittee being in compliance with the permit, regulations, orders and schedule of compliance. It is unclear whether these two regulations are intended to (1) limit any administrative extensions only to minor facilities that meet the criteria in §92a.75 or (2) all facilities would be eligible for administrative continuances, but minor facilities would be limited to five years and subject to other conditions as set forth in §92a.75. As the preamble states that the "proposed rulemaking limits administrative extension of existing permits to minor facilities with good compliance histories, and for a period not to exceed 5 years," it appears that the first interpretation may be intended. As such, DEP would place major facilities in noncompliance (*i.e.*, discharge without a permit) due to the Department's failure to timely reissue the permit. Such result would be wholly inappropriate, if it is intended by the rule changes.

Even if the limitation to extending permits in the proposal is intended only to apply to minor facilities, it would similarly be inequitable to have the minor facility be deemed to be discharging without a permit where the failure to issue the permit is solely due to the Department's failure to timely act. The permittee should not be penalized for the Department's failure.

Information available on EPA's web site identifies permit backlogs for approved NPDES states. The information at http://www.epa.gov/npdes/pubs/grade.pdf setting forth 2007 information, indicates that Pennsylvania has a permit backlog of at least 112 out of 387 major facilities. For minor facilities, http://www.epa.gov/npdes/pubs/grade_minor.pdf indicates that the Pennsylvania permit backlog is at least 828 out of 4,077 facilities. There are likely a greater number since EPA counted permits as current if the expiration dates are not older than 180 days. Particularly with DEP recently losing a significant number of positions, one can not reasonably expect the permit backlog situation to improve. Declaring that permits cannot be extended, whether applicable to major and/or minor permittees, and putting facilities into noncompliance will not cure DEP's permit backlog problem. Instead it would increase resource demands in addressing associated enforcement concerns. All permits should continue if the permittee has submitted a timely and complete permit application and the permit, due to no fault of the permittee, is not timely reissued by DEP.

Future Amendments to Federal Regulations Should Not be Incorporated By Reference

Proposed §§ 92a.3(a) and 92.a.3(c) purport to incorporate by reference future amendments to federal regulations. We believe that DEP does not have such authority. Section 5(a) of the Clean Streams Law requires the Department, in adopting regulations, to consider certain delineated factors. Such statutory mandated action would not occur if the Department delegates its future rulemaking authority to EPA. Similarly, the Environmental Quality Board under 71 P.S. § 510-20 cannot delegate its authority to another entity. The regulations cannot appropriately delegate future rulemaking authority to another agency, let alone a federal agency.

Furthermore, EPA, in reviewing State NPDES programs for approval under the Clean Water Act, historically requires, at a minimum, a legal opinion from the State Attorney General's Office regarding the legality of State incorporation of future federal NPDES regulations by reference and whether such approach is inconsistent with the State Constitution or other law. Absent sufficient justification, such incorporation is not approvable by EPA. To our knowledge, EPA has not approved Pennsylvania to incorporate future federal regulations by reference.

In discussing proposed § 92a.3, we note that the reference in §92a.3(b)(2) should be to §123.25(a), not §123.25(c). There is no subsection (c) to § 123.25.

Immediate Notification Should Not be Required

Section 92a.1 sets forth a new definition of "immediate" as "as soon as possible, but not to exceed 4 hours." It is unclear whether the definition would apply to proposed section 92a.41(b) which references the "immediate notification requirements of § 91.33." It would not be appropriate to apply the "not to exceed 4 hours" standard to notification under § 91.33 as an immediate action under such regulation can only occur after the permittee has knowledge of the situation. If the Department is to apply the four-hour standard, then it should be based upon four hours after the permittee has knowledge of the situation. The Department should clarify this situation in the final rule.

Fact Sheet Explanation of Permit Conditions Should Meet Federal Minimum Requirements

Proposed § 92a.53 provides for the development of fact sheets but only addresses some of the minimum required provisions as set forth in 40 C.F.R. § 124.8. It does not address the provisions of § 124.8(b)(5) and (6) and totally ignores all of the requirements for fact sheets set forth in 40 C.F.R. § 124.56. The DEP regulation should be amended to be consistent with the minimum requirements set forth in the federal regulations. *See, e.g.*, 40 C.F.R. § 123.25(a)(27) and (32) incorporating §§ 124.8 and 124.56, respectively, as minimum requirements.

Variances

Proposed § 92a.52 provides that any new or amended federal regulation enacted after November 18, 2000 which creates a variance to existing NPDES permitting requirements is not incorporated by reference. This provision is another example where substantive regulatory provisions are being proposed but the proposal fails to provide adequate notice of the underlying standard. The preamble is devoid of any discussion of this proposed amendment. Nowhere does the proposal identify the genesis of the November 18, 2000 date nor the federal amendments that occurred afterward that it is purposely omitting. Surely leaving the regulated community to guess as to the underlying intent does not meet minimum due process requirements.

Automatic Monitoring Obligations Cannot Appropriately Be Triggered by EPA

Sections 92a.61(d)(4), (5) and (i) would require monitoring for pollutants specified by the EPA Administrator in regulations issued under the Clean Water Act as subject to monitoring and any pollutants that the Administrator requests in writing to be monitored. As discussed above, future EPA regulations cannot be appropriately incorporated by reference. In addition, it is totally inappropriate to require a permittee to comply with a request by EPA, particularly if such request is unreasonable or otherwise not supportable. Monitoring changes constitute changes to the NPDES requirements, subject to notice and comment. These provisions should be deleted as, among other things, it violates applicable due process procedures.

Fact Sheet Should Be Provided to the Permittee

Section 92a.82(e) would provide for the fact sheet to be sent to any person who requests it. Consistent with 40 C.F.R. § 124.8 ("The Director shall send this fact sheet to the applicant and, on request, to any other person."), the fact sheet is required to be provided to the permittee without a request. This requirement is applicable to approved State programs. *See* 40 C.F.R. § 123.25(a)(27).

Only after the permittee receives the requisite fact sheet should the thirty-day clock for the permittee to comment upon a permit commence. The federal regulations set up a process where a permittee is to be provided the full thirty-day minimum comment period to review the underlying bases for the draft permit conditions as set forth in the fact sheet and to comment upon it. Furthermore, as proposed section 92a.85 would provide for fact sheets to be provided to other states or interstate agencies without requiring a request, it is inexplicable that the permittee would also not be provided the fact sheet.

A Response to Comments Regulation Should be Provided

Consistent with the federal minimum requirements of 40 C.F.R. § 123.25(a)(31), Pennsylvania regulations should provide that a response to permit comments be provided meeting the standards set forth in §124.17(a) and (c).

The Coalition appreciates the opportunity to comment on the rules as proposed and requests the opportunity to provide additional comments once the requisite information regarding proposed changes and underlying rationale is provided to the regulated community.

Sincerely,

Gary B. Cohen

Enclosure: One Page Summary

cc: Bruce Jones, Borough of Ambler
George Crum, Southwest Delaware County Municipal Authority
George Wolfe, Lower Paxton Township
Keith Ashley, Home Builders Association of Metropolitan Harrisburg
Kevin Oakes, Borough of West Chester
Michael Moffa, West Goshen Sewer Authority
Michelle Torres, Harrisburg Authority
Mark Fournier, Telford Borough Authority
Tim Hagey. Warminster Municipal Authority
John Hall, Esq.
Mark Weand, Esq.
Ross Unruh, Esq.
Steve Stine, Esq.
Paul Bruder, Esq.
Robert Nemeroff, Esq.
Joseph Bresnan, Esq.

HALL & ASSOCIATES

Summary of Primary Comments on Proposed 25 Pa. Code Chs. 92 and 92a
Pennsylvania Periphyton Coalition, Gary Cohen (Hall & Associates)

Tertiary Treatment Standards for POTWs Should Not Be Imposed: The proposal to impose TTS should not be promulgated. Municipalities are already facing financial difficulties – there is no basis for imposing advanced "treatment for treatment's sake" with no environmental benefit. Moreover, there is no indication how the TTS for the different pollutant parameters were developed. These values appear to be arbitrary. While we do not believe TTS should be imposed at all, we note the inappropriate overly-broad nature of the proposal in that it would apply: (a) to dischargers not identified as causing the impairment; (b) to situations where the pollutants regulated by TTS have nothing to do with the impairment (*e.g.,* temperature) and would require total nitrogen removal even where the impairment is not caused by nutrients; and (c) to *de minimis* changes to a facility (based upon the definition of "expanding facility or activity"), even for those changes that would not even require DEP approval under proposed § 92a.26.

Notice of Proposed Rulemaking is Insufficient: The preamble informs the pubic that the proposal merely reorganizes the regulations to be consistent with federal regulations and the only new costs are those associated with permit fees. In fact, the regulations would impose **costly** new requirements **beyond that required by federal law** (*e.g.,* deletion of secondary treatment standard adjustments and imposition of tertiary treatment standards ("TTS")). Moreover, the preamble fails to provide one iota of information even identifying the change or the underlying rationale for a number of changes that would have significant impact (*e.g.,* limiting all compliance schedules to three years, deletion of fecal coliform exceedances being allowed in 10% of the samples) or that are otherwise proposed. Failure to provide such information does not meet applicable due process requirements which require, at a minimum, a brief explanation of the proposed regulation or change. In addition, the proposal must also have a reasonable estimate of economic impacts – something it fails to do.

Schedules of Compliance Should Not be Limited to Three Years: Whereas existing § 92.55 would limit permit compliance schedules to three years only if a deadline specified in the CWA has passed, the proposal would limit all compliance schedules to three years. If a new requirement is put in a permit (*e.g.,* tertiary treatment for POTWs, new water quality standard, long-term control plans for CSO communities), compliance cannot reasonably be expected to occur in three years in all situations. This concern is particularly exacerbated by the decrease in DEP personnel as compliance would involve DEP action in approving plans (*e.g.,* Act 537 Plans) and issuing permits in addition to the various actions required by the permittee to design, finance, plan, construct and begin operation of a plant upgrade. As such, the regulations would artificially place permittees in noncompliance. Particularly troubling about the proposal is that nowhere in the preamble or elsewhere does the proposal identify this change. The general public has not been provided due process notice of the change or the reasons for the change. The change should not be made.

EPA Approval of State Regulations Is Required: It has been thirty-two years since Pennsylvania's NPDES program was approved by EPA pursuant to 40 C.F.R. Part 123. Since that time there have been numerous changes to EPA and Pennsylvania's NPDES rules. The preamble to the proposal readily acknowledges that "[s]ome of these provisions are needed to ensure continued federal approval of Pennsylvania's program." Part 123 requires that significant changes must go through the State program modification process. It is imperative that the State follow such federally-mandated procedures before modifying its regulations. The proposed changes are significant and Part 123 procedures must be followed.

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From: Gary Cohen [gcohen@hall-associates.com]
Sent: Monday, March 15, 2010 3:48 PM
To: EP, RegComments
Cc: Hines, John; John Hall
Subject: Proposed Changes to Chs. 92 and 92a - NPDES Permitting, Monitoring and Compliance
Attachments: PA Periphyton Coalition Chapter 92a Comments 03-15-10.pdf

Honorable John Hanger, Chairman, PA Environmental Quality Board:

Attached are the comments of the Pennsylvania Periphyton Coalition on the proposed 25 PA Code, Chapters 92 and 92a regulations which appeared in the Pennsylvania Bulletin on February 13, 2010. This transmittal includes a one page summary of the Coalition comments that we request be provided to each member of the Board in the agenda packet prior to the meeting at which the final regulations will be considered.

We would appreciate a confirmation of the receipt of this e-mail submittal.

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