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INDEPENDENT REGULATORY REVIEW COMMISSION

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DEPARTMENT OF ENVIRONMENTAL PROTECTION
MAR 15 2010
SECRETARY'S OFFICE

Hand Delivery

Environmental Quality Board
16th Floor, Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, PA 17105-8474

Re: Proposed Rulemaking
National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance
25 Pa. Code Chs. 92 and 92a
40 Pa. Bull. 847 (February 13, 2010)

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ENVIRONMENTAL QUALITY BOARD

To Whom It May Concern:

Citizens for Pennsylvania's Future (PennFuture) submits these comments on the referenced Proposed Rulemaking, which would rescind 25 Pa. Code Chapter 92 and replace it with a new Chapter 92a. Like the existing Chapter 92, the new Chapter 92a would govern Pennsylvania's administration of the National Pollutant Discharge Elimination System (NPDES) under the federal Clean Water Act.

PennFuture is a public interest membership organization dedicated to creating a just future in which the environment, communities, and the economy thrive. PennFuture's statewide advocacy work on water quality issues has included extensive participation in policy and litigation matters involving Pennsylvania's NPDES regulations.

1. The proposed regulations would appropriately require the regulated entities to pay for the Commonwealth's share of the costs of administering the NPDES program and would equitably apportion the permit application and annual fees.

Through an updated and expanded schedule of application fees (in proposed Section 92a.28) and a new schedule of annual fees (in proposed Section 92a.62), the proposed rulemaking would appropriately end the Commonwealth's subsidizing the costs of administering the NPDES program by placing those costs on the people and entities who hold NPDES permits and discharge wastewater pursuant to them. The preamble to the proposed rulemaking explains that the "[t]he proposed fee structure will cover only the Commonwealth's share of the cost of administering the NPDES permit program," and that the proposed fees would represent only a small fraction of the overall cost of operating a sewage or industrial waste treatment facility. 40 Pa. Bull. at 850.

With one caveat addressed in the next comment, PennFuture supports the new fee structure in proposed sections 92a.28 and 92a.62. As the preamble notes, the proposed fees would properly internalize the costs of administering the NPDES program while appropriately taking into account the size of the facility by adopting fee structures that are graduated according to the volume of the wastewater discharge. 40 Pa. Bull. at 850. The proposed fee provisions are an appropriate means for covering the Commonwealth's costs for running the NPDES program and are consistent with similar cost-internalizing measures recently adopted or proposed for other regulatory programs administered by the Pennsylvania Department of Environmental Protection (PADEP). E.g., 39 Pa. Bull. 1982 (April 18, 2009) (adopting 25 Pa. Code § 78.19); 39 Pa. Bull. 623 (Oct. 24, 2009) (amending 25 Pa. Code § 78.19); 39 Pa. Bull. 6049 (Oct. 17, 2009) (proposed amendments to air quality program fee schedules).

2. The proposed regulations should clarify that discharges of treated mine drainage are "discharges of industrial waste" for the purposes of the sections governing application fees and annual fees.

Both the proposed application fee regulation, 25 Pa. Code § 92a.28, and the proposed annual fee regulation, id. § 92a.62, have different fee schedules for "individual NPDES permits for discharges of industrial waste," id. §§ 92a.28(c), 92a.62(c), and individual permits for . . . [m]ining activity," id. §§ 92a.28(d), 92a.62(d). As is true of the definitions in The Clean Streams Law and the existing NPDES regulations, see 35 P.S. § 691.1, 25 Pa. Code § 92.1, the definition of "industrial waste" in proposed section 92a.2 would specifically list "mine drainage" as one variety of industrial waste. 40 Pa. Bull at 857. A discharge of treated mine drainage therefore would constitute a discharge of industrial waste for the purposes of the proposed application fee and annual fee regulations.

The potential for confusion exists, however, because the treatment of mine drainage also might be thought to constitute a "mining activity," which the proposed regulations would define by reference to the noncoal and coal mining regulations in 25 Pa. Code Chapters 77 and 86, respectively. 40 Pa. Bull at 858. A "coal mining activity," for example, includes an "underground mining activity," which in turn includes "postclosure mine pool maintenance and any other work done on land or water in connection with a mine." 25 Pa. Code § 86.1. See also 35 P.S. § 691.315(a) (operation of a mine includes "any other work done on land or water in connection with the mine"). Thus, the discharge of treated mine drainage pumped or drained from an underground mine could be classified as a "mining activity" in addition to being a "discharg[e] of industrial waste."

The Board should eliminate the apparent overlap between these two categories by changing "Mining activity" in subsection (d) of Sections 92a.28 and 92a.62 to read "Mining activity other than discharge of mine drainage." This change would clarify that discharges of treated mine drainage are classified as "discharges of industrial waste" that are subject to the fee schedules in subsection (c) of Sections 92a.28 and 92a.62.

3. The definition of "surface waters" must match the breadth of the surface waters included in the statutory definition of "Waters of the Commonwealth."

Like the existing NPDES regulations, see 25 Pa. Code § 92.3, Section 92a.1(b) of the proposed regulations would provide that "[a] person may not discharge pollutants from a point source into surface waters except as authorized under an NPDES permit." 40 Pa. Bull. at 856. Also like the existing NPDES regulations, see 25 Pa. Code § 92.1, the definition of "Surface waters" in Section 92a.2 of the proposed regulations includes "[p]erennial and intermittent streams," but does not include ephemeral streams, swales, ditches, water courses, storm sewers, or other bodies or channels of conveyance of surface water, all of which are part of the "Waters of the Commonwealth" as defined in The Clean Streams Law. See 35 P.S. § 691.1 ("Waters of the Commonwealth" include "any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs, and all other bodies or channels of conveyance of surface and underground water, or part thereof, whether natural or artificial, within or on the boundaries of this Commonwealth") (emphasis added).

It thus appears that the universe of "surface waters" to which the proposed NPDES program would apply would be narrower than the universe of such waters that constitute "Waters of the Commonwealth." It is unclear why this should be so, however, given that The Clean Streams Law provides the principal authority for the proposed rulemaking. See 40 Pa. Bull. at 847. Moreover, PADEP has a Technical Guidance Document (TGD) setting forth its "Policy and Procedure for Evaluating Discharges to Intermittent and Ephemeral Streams, Drainage Channels and Swales, and Storm Sewers," TGD No. 391-2000-014 (April 12, 2008), which explains that "[i]f successful, the end result of this process will be an NPDES permit for the discharge of treated wastewater." (Id., p. 1)

To make the proposed regulations consistent with The Clean Streams Law, the Board must expand the definition of "surface waters" in proposed Section 92a.2 to include all varieties of surface Waters of the Commonwealth, including ephemeral streams, ditches, swales, channels, storm sewers, and "all other bodies or channels of conveyance of surface . . . water, or parts thereof, whether natural or artificial." 35 P.S. § 691.1. Failing to expand the definition of "surface waters" in this manner would allow proposed Section 92a.1(b) to be read as prohibiting all discharges to ephemeral streams, swales, ditches, channels, and storm sewers, and the like, an unintended result that obviously would be at odds with TGD No. 391-2000-014.

4. Other terms and definitions in proposed Section 92a.2

a. The definition of **"NPDES form"** should include "a draft permit."

b. The definition of **"New source"** omits the portion of the definition of the same term set forth in subparagraph (b) of the federal NPDES regulations' definition, which is codified at 40 C.F.R. § 122.2. The preamble does not explain this omission, which appears to make the proposed state definition inconsistent with its federal counterpart. The final regulations should either incorporate the second trigger under subparagraph (b) of the federal definition or explain why omitting it does not render the state definition inconsistent with the federal definition.

c. Because an "activity" may not involve any construction, the use of the commencement of construction as the only triggering event in the definition **"New source"** does not in all instances fit with the inclusion of "activity" in that definition. PennFuture therefore recommends that, in addition to the recommendation in the preceding paragraph, the proposed definition be rewritten to read:

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

d. In the definition of **"Person,"** the limiting words "of this Commonwealth" should be deleted from the item "municipality or political subdivision of this Commonwealth." It is conceivable that a municipality or political subdivision in a bordering state would seek a permit to discharge into surface waters at a point within Pennsylvania. An out-of-state municipality or political subdivision also might have an ownership interest in a Pennsylvania discharger. For example, at least as of 1994, the City of Cumberland, Maryland owned the Evitts Creek Water Company, which held an NPDES permit to discharge wastewater into the waters of the Commonwealth. Given these possibilities, the definition of "Person" should include "municipality or political subdivision" without any political or geographical limitation.

e. The federal definition of **"Schedule of compliance"** requires that the "schedule of remedial measures" be "included in a 'permit'", which in turn is defined to mean an NPDES permit. See 40 C.F.R. § 122.2. See also id. § 122.47(a) ("The permit may, when appropriate, specify a schedule of compliance[.]"). Consistent with this aspect of the federal definition, the proposed Chapter 92a regulation governing schedules of compliance, Section 92a.51, would provide that "the applicant shall be required in the permit to take" remedial actions "in accordance with a legally applicable schedule of compliance," and that any schedule of compliance must be "specified in the permit." 40 Pa. Bull. at 869 (proposed Sections 92.51(a), (b)). This requirement to specify the schedule "in the permit" is important both to ensure that a proposed schedule of compliance is subject to public scrutiny during the permitting process and to make the schedule enforceable by citizens. See 33 U.S.C. § 1365(f)(6). The proposed definition of "Schedule of compliance" in Section 92a.2, however, would omit the "in the permit" requirement. For the state definition to be consistent with both federal law and the proposed Section 92a.51, the Board must add the words "in an NPDES permit," after "schedule of remedial measures" in the proposed definition of "Schedule of compliance."

f. The definition of "Waters of the United States" in the federal NPDES regulations excludes certain "[w]aste treatment systems." 40 C.F.R. § 122.2. However, that "exclusion applies only to manmade bodies of water which neither were originally created in waters of the

United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States." Id. The counterpart definition of **"Surface waters"** in Section 92a.2 of the proposed rulemaking similarly excludes "water at facilities approved for wastewater treatment" and goes on to list several examples of such facilities. What the proposed state definition lacks, however, is any counterpart to the language in the federal definition quoted above that limits the exclusion to manmade bodies of water that were neither originally created in nor resulted from the impoundment of the Waters of the United States. To make the state definition consistent with its federal counterpart, the Board must add the following sentence at the end of the definition of "Surface waters": "This exclusion applies only to manmade bodies of water that neither were originally created in surface waters nor resulted from the impoundment of surface waters."

5. Sections 92a.3(a) and (c) of the proposed regulations should be revised to eliminate the ambiguity they create over which regulatory provisions govern.

Subsections (a) and (c) of Section 92a.3 of the proposed regulations follow the same format. The first sentence of each subsection incorporates by reference certain federal NPDES regulations,[1] "including all appendices, future amendments and supplements thereto," but only "to the extent that these [federal] provisions are applicable and not contrary to the law of the Commonwealth." 40 Pa. Bull. at 860. The second sentence of each subsection states: "In the event of a conflict between Federal and regulatory provisions of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent."[2] Id.

So, the federal regulations referenced in Sections 92a.3(a) and (c) govern only if they are:

- applicable (begging the question, why would they be listed in the relevant provisions of Chapter 92a if they were inapplicable?); and
- not contrary to Pennsylvania law; and
- more stringent than any conflicting provision set out in Chapter 92a.

If there is a "conflict" between a listed federal NPDES regulation and a provision of Chapter 92a, however, and specifically if the federal regulation imposes a more stringent

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[1] The only difference between the two subsections is the particular federal NPDES regulations that they incorporate by reference. Subsection (a) of proposed Section 92a.3 incorporates the federal regulations listed in subsection (b), while subsection (c) incorporates the federal regulations listed other enumerated sections of Chapter 92a. 40 Pa. Bull. at 860.

[2] Because this sentence appears only in proposed Section 92a.3, which governs "[i]ncorporation of Federal regulations by reference," 40 Pa. Bull. at 860, it should be applied only to conflicts with the incorporated federal regulations referenced (indirectly) in subsections (a) and (c) of Section 92a.3. If the sentence were applied to all conflicts between provisions of Chapter 92a and the federal NPDES regulations, including federal regulations that are not incorporated by reference into Chapter 92a, then the indeterminacy problem discussed in the text would be pervasive, with the question of what provision applies turning on each person's analysis of whether or not a conflict exists and which of the conflicting provision is more stringent.

requirement than one set forth in Chapter 92a, the federal regulation clearly might be considered "contrary to the law of the Commonwealth." In that event, under the first sentence of subsections (a) and (c) of section 92a.3, the federal NPDES regulation would not be incorporated into Chapter 92a in the first place. As a result, even though the second sentence of each subsection apparently is intended to give effect to such more stringent federal NPDES regulations, the federal provisions could not be given effect because they would not have been incorporated into state law under the first sentence of each subsection.

A set of regulations should leave no question whatsoever as to which regulatory provisions – those set forth in 25 Pa. Code or those codified at 40 C.F.R. – govern. Everybody involved should be able to determine, immediately and definitively, which book they should be reading on a given issue. The confusing and seemingly contradictory language in both subsections (a) and (c) of proposed Section 92.3a creates ambiguity over the fundamental question of what law applies. The Board should clarify these provisions, and specifically should explain the relationship between the word "contrary" in the first sentence of subsections (a) and (c), which excludes the listed federal NPDES regulation at issue from incorporation into state law in the first place, and the word "conflict" in the second sentence of each subsection.

6. The proposed regulation governing confidentiality of information, 25 Pa. Code § 92a.8, is inconsistent with both the counterpart provision of the federal NPDES regulations and Section 607 of The Clean Streams Law.

Subsection (a) of proposed Section 92a.8 (governing confidentiality of information) would incorporate by reference the provisions of 40 C.F.R. § 122.7(b). 40 Pa. Bull. at 861. Subsection (b) of the proposed state regulation, however, is inconsistent with both the incorporated subsection of the federal NPDES regulations, 40 C.F.R. §122.7(b), and that federal regulation's next subsection, § 122.7(c). It further is inconsistent with the provision of state law it cites, Section 607 of The Clean Streams Law, 35 P.S. § 691.607.

Subsection (b) of proposed Section 92.8a excludes only "effluent data" from possible protection as confidential. The federal regulation at 40 C.F.R. § 122.7(b), however, which is applicable to state NPDES programs under 40 C.F.R. § 123.25(a)(3), provides that "[c]laims of confidentiality . . . will be denied" not only for "effluent data," id. § 122.7(b)(2), but also for "[t]he name and address of any permit applicant or permittee," id. § 122.7(b)(1), and "[p]ermit applications [and] permits," id. § 122.7(b)(2). By providing that only "effluent data" is off limits for protection as confidential, proposed Section 92a.8(b) is therefore inconsistent with 40 C.F.R. § 122.7(b). Although Section 92a.3(c) of the proposed regulations provides that a state regulation that conflicts with an incorporated federal regulation applies unless the federal regulation is more stringent, 40 Pa. Bull at 860, it makes sense to avoid confusion by revising Section 92a.8(b) so that it is consistent with 40 C.F.R. § 122.7(b).

Proposed Section 92a.8(b) also is inconsistent with 40 C.F.R. § 122.7(c), which is applicable to state programs under 40 C.F.R. § 123.25(a)(3). Section 92a.8(b) provides that "any information, other than effluent data, contained in NPDES forms" may be protected as confidential "upon a showing by any person that the information is not a public record for the purposes of section 607 of the [Clean Streams Law]," and goes on to enumerate the specific

varieties of documents that may be protected as confidential. 40 Pa. Bull. at 861. To the extent the information "contained in NPDES forms" is required by an NPDES application form, however, it is flatly excluded from being protected as confidential by 40 C.F.R. § 122.7(c). Section 122.7(c) provides: "Information required by NPDES application forms provided by the Director under § 122.21 may not be claimed confidential. This includes information submitted on the forms themselves and any attachments used to supply information required by the forms." 40 C.F.R. § 122.7(c). Thus, Section 92a.8(b) of the proposed state regulations must be revised to provide, as does 40 C.F.R. § 122.7(c), that information required by any NPDES application form may not be claimed or protected as confidential.[3]

Finally, proposed Section 92a.8(b) is inconsistent with the state statutory provision it cites, Section 607 of The Clean Streams Law, 35 P.S. § 691.607, which provides, in relevant part:

> All papers, records, and documents of the department, and applications for permits pending before the department, shall be public records open to inspection during business hours: Provided, however, [t]hat information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental content which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record.

35 P.S. § 691.607 (emphasis added). Thus, Section 607 excludes from the "public records" that must be "open to inspection" only a single, narrow category of information pertaining to the analysis of properties of coal. Id. See also 65 P.S. §§ 67.306 (Right-to-Know-Law does not "supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree"); 67.3101.1 (provisions of Right-to-Know-Law "regarding access to records" do not apply if they "conflict with any other Federal or State law").

Using language virtually identical to that of Section 607, Section 92a.8(b) of the proposed rulemaking likewise would allow withholding from public scrutiny certain records revealing the analysis of properties of coal. 40 Pa. Bull. at 861. However, it also would add a second category of records that might be withheld from the public, namely "those that are confidential commercial information or methods or processes entitled to protection as trade secrets under State or Federal law." Id. This second category is nowhere to be found in Section 607 of The Clean Streams Law. It therefore would be impossible for a person to show that a

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[3] This inconsistency is not cured by the portion of proposed Section 92a.8(b) providing that if "the information being considered for confidential treatment is contained in an NPDES form, the Department will forward the information to the Administrator for concurrence in any determination of confidentiality," and will make the information available to the public if the Administrator notifies PADEP in writing that she does not concur. 40 Pa. Bull. at 861. If the information at issue is "required by NPDES application forms" it "may not be claimed as confidential," period, 40 C.F.R. § 122.7(c), so it would be unlawful for PADEP to accord it confidential treatment in the first place.

record falling into this second, "confidential commercial information/trade secrets" category "is not a public record for the purposes of section 607 of the State Act (35 P.S. § 691.607)," 40 Pa. Bull. at 861, and it is wrong for proposed Section 92a.8 to suggest otherwise.

It is axiomatic that "all regulations, whether interpretive or substantive[,] 'must be consistent with the statute under which they were promulgated.'" Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev., 983 A.2d 1231, 1241 (Pa. 2009) (quoting Popowski v. Public Util. Comm'n, 910 A. 2d 38, 53 (Pa. 2006)). Section 607 of The Clean Streams Law contains no exclusion for "confidential commercial information" or "trade secrets." The Pennsylvania General Assembly decided that "[a]ll papers, records, and documents of the department, and applications for permits pending before the department," except certain information pertaining to analysis of the properties of coal, "shall be public records open to inspection during business hours." 35 P.S. § 691.607. Had the General Assembly wanted to exclude "confidential commercial information" or "trade secrets" from the "public records" that PADEP must make available, it easily could have added a clause to Section 607 similar to that appearing at the end of the second sentence of Section 92a.8(b) of the proposed regulations – "and those that are confidential commercial information or methods or processes entitled to protection as trade secrets under State or Federal law." 40 Pa. Bull 861. It did not do so, however, and this Board has no authority to add, by regulation, an exclusion that the General Assembly omitted while using extraordinarily broad language to define the universe of "public records." The Board therefore must delete from proposed Section 92a.8(b) the last clause of that subsection's second sentence.

7. Proposed Section 92a.21(a) improperly purports to delegate to PADEP the power to un-incorporate federal regulations that this Board has incorporated by reference.

Section 92a.21(a) of the proposed regulations would provide that certain listed subsections of 40 C.F.R. § 122.21 "are incorporated by reference, except as required by the Department." 40 Pa. Bull. at 862. Frankly, this proposed provision makes no sense. One law either incorporates a provision(s) of another law or it does not. Incorporation of another law by reference is by definition a lawmaking function that must be performed by the General Assembly or the entity to which it has delegated legislative rulemaking authority. The lawmaking body may not delegate such a fundamental decision to the agency implementing the adopted statute or regulations. Moreover, even if it were legally permissible to delegate such a decision to the implementing agency, proposed Section 92a.21(a) neither provides any standards for PADEP's exercise of this un-incorporation authority nor suggests the mechanism by which PADEP might exercise it. Given that PADEP has no authority to adopt binding norms of general applicability, see Department of Environmental Resources v. Rushton Mining Co., 591 A.2d 1168 (Pa. Cmwlth.), allocatur denied, 600 A.2d 541 (Pa. 1991), PADEP would have to decide on a permit-by-permit basis whether all, or some, or none of the federal regulations listed in proposed Section 92a.21(a) should be considered to be incorporated into Pennsylvania law.

Incorporation by reference is by its nature a categorical process that must be done through the adoption of binding norms of general applicability by statute or regulation, and if a provision of federal law is so incorporated into state law, it may not be un-incorporated by the decision of an implementing agency. Because this Board may not delegate to PADEP the power

to create exceptions having the effect of un-incorporating otherwise incorporated provisions of federal law, it must delete the last clause of Section 92a.21(a) of the proposed regulations.

8. The federal NPDES program does not authorize the use of permits-by-rule.

Sections 92a.24 and 92a.25 of the proposed regulations would create NPDES permits-by-rule for single residence sewage treatment plants (SRSTPs) and the application of pesticides, respectively. 40 Pa. Bull. at 863. These regulations would represent the first permits-by-rule adopted as part of Pennsylvania's NPDES program.

The federal NPDES program, however, does not authorize states to use permits-by-rule. The federal NPDES regulations contain the following definition of "Permit":

> *Permit* means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 123 and 124. "Permit" includes an NPDES "general permit" (§122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

40 C.F.R. § 122.2.

This definition of "Permit" obviously makes no reference to a "permit-by-rule," and the process for issuance of a permit-by-rule does not satisfy all of the procedural requirements of 40 C.F.R. Part 124. Moreover, a permit-by-rule is not a final agency action that is subject to review before the Environmental Hearing Board or the Commonwealth Court, but instead is a generally unreviewable, legislative action of this Board. See Arsenal Coal Co. v. Department of Env. Resources, 477 A.2d 1333 (Pa. 1984). Thus, a permit-by-rule would not constitute a "permit" under the federal NPDES program because it "has not yet been the subject of final agency action." 40 C.F.R. § 122.2 (definition of "Permit"). As a result, the permits-by-rule in Sections 92a.24 and 92a.25 of the proposed rulemaking either must be replaced with general NPDES permits, or the activities in question must obtains individual NPDES permits.[4]

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[4] If the federal permit exclusion for the application of pesticides codified in 2006 at 40 C.F.R. § 122.3(h) remained in effect, it would be permissible for Pennsylvania to authorize that particular activity through a permit-by-rule, which would be more stringent than the federal exclusion. However, the federal permit exclusion at 40 C.F.R. § 122.3(h) was vacated last year, and the United States Supreme Court recently declined to review that decision. See National Cotton Council of America v. EPA, 553 F.3d 927 (6th Cir. 2009), cert. denied, 78 U.S.L.W. 3479 (Feb. 22, 2010).

9. Section 92a.26(a)

A. Several provisions of proposed Section 92a.26(a) should be modified or clarified.

Section 92a.26(a) of the proposed regulations is even more difficult to understand than its counterpart in Pennsylvania's existing NPDES regulations, 25 Pa. Code § 92.7. To begin with, it is unclear why the changes at issue are limited to "[f]acility expansions or process modifications," 40 Pa. Bull. at 863, 864, because other varieties of changes can result in new or increased discharges of pollutants or changes in waste streams. For example, adding a second or third shift at a manufacturing plant with a wastewater discharge would involve neither a facility expansion nor a process modification, but it would be expected to increase the amount of pollutants discharged. Because each of the first two sentences of proposed Section 92a.26(a) begins by limiting its scope to "[f]acility expansions or process modifications," however, a permittee would not be required to notify PADEP at all of this hypothetical doubling or tripling of wastewater and pollutant output. Similarly, substituting one chemical for another might not be considered a "process modification" if the basic manufacturing process or waste treatment process would remain the same, but again, such a change clearly should be within the scope of the regulation. To capture all the possible changes for which notification should be provided, in each of the first two sentences of proposed Section 92a.26(a), the Board should either: a) replace "Facility expansions or process modifications, which" with "Any change that"; or b) add the words "or other changes" after "Facility expansions or process modifications". If the Board chooses neither of these options, it should at least provide definitions of "facility expansions" and "process modifications" in Section 92a.2 that are broad enough to encompass any changes that should be covered by the regulation.

The second sentence of proposed Section 92a.26(a) uses a term – "new discharge" – that is not defined in the proposed regulations (though "new discharger" is). Is moving the discharge pipe from one waterway to another a "new discharge" for these purposes, or is it just an old discharge in a new location? (Note that, reinforcing the comment in the preceding paragraph, such a relocation of the discharge would not result from a facility expansion or process modification.) The regulations should minimize the chance for confusion by defining the term "new discharge" in Section 92a.2.

Another source of confusion in the second sentence of proposed Section 92a.26(a) is the juxtaposition of different formulations of similar terms. At one point that sentence refers to "the potential to exceed ELGs [effluent limitation guidelines] or violate effluent limitations specified in the permit," and at another point refers to "a discharge of new or increased pollutants for which no effluent limitation has been issued." 40 Pa. Bull. 864. The word "issued" in the second quoted clause suggests that the "effluent limitations" have been promulgated through rulemaking, the way ELGs are. See 40 Pa. Bull. 868 (proposed Section 92a.48(a)(1)). But the use of "effluent limitations" in the second quoted clause harkens back to "effluent limitations specified in the permit" in the first clause, and thus could be interpreted to mean the same. We suspect that the phrase "for which no effluent limitation has been issued" is intended to mean "for which no ELG has been promulgated and no effluent limitation has been specified in the permit," in which case we suggest using our revision. If that is not the intended meaning, the Board should clarify what "for which no effluent limitation has been issued" means.

B. Any new or increased discharge or change in wastestream that requires advance approval must be approved through the issuance or revision of an NPDES permit.

Section 92a.26(a) would allow PADEP to "determine if a permittee will be required to submit a new permit application and obtain a new or amended permit before commencing the new or increased discharge, or change of wastestream," and further would authorize PADEP to approve certain changes "in writing" without the issuance or revision of an NPDES permit. 40 Pa. Bull. at 864.

The first problem with this portion of proposed Section 92a.26(a) is that it provides no standards by which PADEP is to make the required determination of whether the permittee must submit a permit application, and no standards for PADEP's approval of a change "in writing" without the issuance or revision of a permit. The second and even more fundamental problem is that, as proposed Section 92a.1(b) would make clear, the only variety of document that may authorize the discharge of pollutants from a point source into surface waters is "an NPDES permit." 40 Pa. Bull. 856 (proposed Section 92a.1(b)). Both of these shortcomings would be eliminated by requiring that all of the changes described in the second sentence of proposed Section 92a.26(a) must be approved through the submission of a permit application and issuance or revision of an NPDES permit, which would be subject to the standards governing such actions in proposed Section 92a.38.[5]

10. The proposed regulations would appropriately prohibit the use of both the "no exposure" conditional permit exclusion and general permits for discharges to High Quality Waters or Exceptional Value Waters.

Section 92a.34(b) of the proposed regulations provides that the "no exposure" conditional permit exclusion for discharges of stormwater associated with industrial activity may be used only if "the facility or activity does not discharge to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards)." 40 Pa. Bull. at 866. Similarly, Section 92a.54(a)(8) of the proposed regulations would retain the limitation currently found in 25 Pa. Code § 92.81(a)(8) by precluding discharges to High Quality Waters and Exceptional Value Waters from being authorized though a general permit. 40 Pa. Bull. at 870. PennFuture supports both of these proposed subsections, which appropriately help

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[5] In addition, because the permit shield of Section 402(k) of the federal Clean Water Act, 33 U.S.C. § 1342(k), only applies to those pollutants identified during the NPDES permit application process, see, e.g., In re Ketchikan Pulp Co., 7 E.A.D. 605, 1998 EPA App. LEXIS 85, at *39 (Env. App. Bd. 1998) ("when the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of an NPDES permit, even though the permit does not expressly mention those pollutants") (emphasis added), this procedure would benefit permittees in the event that the change at issue introduced a pollutant not disclosed in a previous NPDES permit application for the facility.

to accord High Quality Waters and Exceptional Value Waters the special protection they deserve.

11. The provisions of 25 Pa. Code § 91.33 cannot supersede, and in some respects do not satisfy, the reporting requirements of 40 C.F.R. § 122.41(l)(6).

Section 92a.41(b) of the proposed regulations would provide that "[t]he immediate notification requirements of [25 Pa. Code] § 91.33 (relating to incidents causing or threatening pollution) supersede the reporting requirements of 40 CFR 122.41(l)(6)," which are applicable to state NPDES programs under 40 C.F.R. § 123.25(a)(12). Technically, under the Supremacy Clause of the U.S. Constitution, U.S. Const., art. VI, cl. 2, no state law may supersede a federal law. To the extent the notification provisions of 25 Pa. Code § 91.33 are more stringent than those of 40 C.F.R. § 122.41(l)(6), they simply may be approved as satisfying the corresponding federal standards, see 40 C.F.R. § 123.25(a), thus making it unnecessary to replicate or incorporate by reference the requirements of 40 C.F.R. § 122.41(l)(6) in the state regulations.

Compliance with 25 Pa. Code § 91.33 cannot fully satisfy 40 C.F.R. § 122.41(l)(6), however, because of differences between the two regulations. The federal regulation enumerates three specific kinds of incidents that must be reported within 24-hours, see 40 C.F.R. § 122.41(l)(6), while the state regulation provides a standard that would not necessarily mandate (immediate) notification every time one of those three kinds of incidents occurs, see 25 Pa. Code § 91.33. Moreover, the federal regulation contains a (waivable) requirement to provide a written submission that must "contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance." 40 C.F.R. § 122.41(l)(6). The state regulation at 25 Pa. Code § 91.33 does not require any written submission.

PennFuture recommends that the Board rewrite proposed Section 92a.41(b) as follows:

> (b) NPDES permits must include permit conditions containing:
>
> (1) The immediate notification requirements of § 91.33 (relating to incidents causing or threatening pollution), which, in addition to the circumstances described therein, must be followed when there is:
>
> (A) Any unanticipated bypass which exceeds any effluent limitation in the NPDES permit;
>
> (B) Any upset which exceeds any effluent limitation in the NPDES permit; or
>
> (C) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Department in the NPDES permit to be reported immediately.
>
> (2) The written submission requirements of 40 C.F.R. § 122.41(l)(6) (relating to conditions applicable to all permits (applicable to State NPDES programs, see 40 C.F.R. § 123.25), which are incorporated by reference.

12. Section 92a.48(a)(3) of the proposed regulations should be revised to make clear that it applies where the relevant ELGs lack limitations for a specific parameter(s) of concern.

Section 92a.48(a)(3) of the proposed regulations would require that "[f]or those industrial categories for which no effluent limitations have been established under paragraph (1)" – i.e., for which EPA has not promulgated ELGs – an industrial waste discharge must meet "Department-developed technology-based limitations established in accordance with 40 CFR 125.3 (relating to technology-based treatment requirements in permits)." 40 Pa. Bull. at 868. The pending proposed amendments to 25 Pa. Code Chapter 95, 39 Pa. Bull. 6467 (Nov. 7, 2009), help to illustrate a potential problem with the proposed formulation of Section 92a.48(a)(3), which should be revised to make clear that in addition to the situation in which EPA has promulgated no ELGs at all for a particular industrial category, it applies where the promulgated ELGs for the relevant industrial category lack limitations for a specific parameter(s) for which the state wishes to impose technology-based effluent limitations.

PADEP applies the ELGs for centralized waste treatment (CWT) facilities in 40 C.F.R. Part 437 to gas well wastewater treatment facilities. Certain pollutants of concern, however, including chloride, sulfate, and total dissolved solids (TDS), are not limited by those particular ELGs. This Board therefore has initiated a rulemaking proceeding to establish technology-based effluent limitations for the pollutants of concern for which the ELGs fail to specify limitations. See 39 Pa. Bull. 6467 (Nov. 7, 2009).

Under one reading of proposed Section 92a.48(a)(3), however, a gas well wastewater treatment facility (or any other CWT) would not have to comply with any technology-based limitations established by PADEP or this Board, because it would not satisfy the initial condition of being in an "industrial categor[y] for which no effluent limitations [ELGs] have been established under paragraph (1)." 40 Pa. Bull. at 868 (emphasis added). EPA has established some ELGs for CWTs; they just do not include limitations for chloride, sulfate, or TDS.

In short, the main problem with the wording of proposed Section 92a.48(a)(3) is that it does not clearly apply to the situation in which EPA has promulgated ELGs that do not contain limits for a parameter(s) of concern for which PADEP or this Board wish to establish technology-based limitations. To correct this shortcoming, PennFuture recommends that the Board add the following clause after the initial clause: "or for which the effluent limitations established under paragraph (1) do not limit a particular parameter,". In addition, to account for the establishment of technology-based effluent limitations through regulations promulgated by this Board, PennFuture further recommends that the Board delete the word "Department-developed" from this subsection. Putting these changes together, the revised Section 92a.48(a)(3) would read:

> (3) For those industrial categories for which no effluent limitations have been established under paragraph (1), or for which the effluent limitations established under paragraph (1) do not limit a particular parameter, technology-based limitations established in accordance with 40 CFR 125.3 (relating to technology-based treatment requirements in permits).

13. Section 92a.50(a) of the proposed regulations should be revised to make clear that the existing use protection requirements of 25 Pa. Code § 93.4c(a) apply to all discharges from concentrated aquatic animal production facilities (CAAPs).

Section 92a.50(a) of the proposed regulations would provide: "(a) For discharges from a CAAP into a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93(relating to water quality standards), the requirements of § 93.4c (relating to implementation of antidegradation requirements) apply." 40 Pa. Bull. at 869. The negative implication of this provision is that the requirements of 25 Pa. Code § 93.4c apply only if the CAAP discharges into a High Quality Water or Exceptional Value Water. In fact, the existing use protection provisions in subsection (a) of § 93.4c apply to a discharge from a CAAP into any surface water of the Commonwealth. To remove the negative implication and make clear that the existing use protection requirements of 25 Pa. Code § 93.4c(a) apply to all discharges from a CAAP, the following sentence should be added to the section: "For all other discharge from a CAAP into a surface water, the requirements of § 93.4c(a) (relating to implementation of antidegradation requirements) apply."

14. Section 92a.51 of the proposed regulations governing schedules of compliance must either incorporate the relevant portions of 40 C.F.R. § 122.47 by reference or be revised so that it is consistent with § 122.47.

A. Section 92a.51(a)

Section 122.47(a)(1) of the federal NPDES regulations, which is applicable to state programs under 40 C.F.R. § 123.25(a)(18), provides:

> (1) *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.

40 C.F.R. § 122.47(a)(1).

In contrast, the last sentence of Section 92a.51(a) of the proposed regulations would provide:

> (a) Any schedule of compliance specified in the permit must require compliance as soon as practicable, but in no case longer than 3 years, unless the EHB or any other court of competent jurisdiction issues an order allowing a longer time for compliance.

40 Pa. Bull. at 869.

The first problem with the proposed state regulation is that "practicable" is less stringent or exacting than "possible." That is to say, something that is possible may not be practicable, but the federal regulation expressly requires "compliance as soon as possible," even it is

impracticable. 40 C.F.R. § 122.47(a)(1). And if the Board believes that the two words have precisely the same meaning, then there is no reason not to use "possible," as in the federal regulation.

The second problem with the proposed state regulation is that its outside deadline of "3 years" generally will be longer than the outside deadline in the federal regulation of "the applicable statutory deadline under the CWA," 40 C.F.R. § 122.47(a), and often would authorize the granting of an extension through a schedule of compliance that would be prohibited under the federal regulation. For example, for a toxic pollutant effluent standard or limitation established pursuant to Section 307 of the Clean Water Act, the latest the standard or limitation may take effect is "three years after the date of promulgation." 33 U.S.C. § 1317(a)(6). For such a standard promulgated in (for example) 1990, the "applicable statutory deadline under the CWA" would be at the latest in 1993. As a result, under 40 C.F.R. § 122.47(a)(1), the permitting authority issuing or reissuing an NPDES permit in 2010 could not include a schedule of compliance in the permit for that particular standard or limitation (i.e., the permit would have to require compliance with the standard or limitation immediately).

The federal schedule of compliance regulation contains special provisions for two comparatively rare situations: a) for a new source or new discharger, when "requirements [are] issued or revised after commencement of construction but less than three years before commencement of the relevant discharge;" or b) for "recommencing dischargers," when "requirements [are] issued or revised less than three years before recommencement of discharge." 40 C.F.R. § 122.47(a)(2). In those situations, the permitting authority may include a schedule of compliance "only when necessary to allow a reasonable opportunity to attain compliance with" the recently-adopted requirement." Id. If the standards were issued or revised before the commencement of construction or more than three years before the commencement or recommencement of the discharge, however, any schedule of compliance may not extend beyond "the applicable statutory deadline under the CWA." Id. § 122.47(a)(1). Because most of those deadlines already have expired, the permitting authority must require compliance with them immediately.

Section 92a.51(a) appears to assume (incorrectly) that the phrase "but not later than the applicable statutory deadline under the CWA" in 40 C.F.R. § 122.47(a)(1) is the equivalent of saying "but in no case longer than 3 years." If this were true, of course, 40 C.F.R. § 122.47(a)(1) would simplify matters by using the definitive, "three year" formulation. But again, if the Board believes that the two formulations are precisely equivalent, then it should not hesitate to ensure consistency with the federal regulation by using the language of § 122.47(a)(1).

The third problem with proposed Section 92a.51(a), contained in its last clause, exacerbates the second by purporting to allow the Pennsylvania Environmental Hearing Board (EHB) or a court to extend, without limitation, the outside compliance deadline of three years. First, the use of the word "other" before "court of competent jurisdiction" in the last clause of proposed Section 92a.51(a) is clearly incorrect, because the EHB is not a court but instead "an independent quasi judicial agency," and thus part of the Commonwealth's Executive Branch. 35 P.S. § 7513(a) (emphasis added). See Baughman v. Bradford Coal Co., 592 F.2d 215, 218-19 & n. 5 (3d Cir.) (EHB is not a "court" within the meaning of Section 304(b)(1)(B) of federal Clean

Air Act, 42 U.S.C. § 7604(b)(1)(B)), cert. denied, 441 U.S. 961 (1979). Second, and related, the EHB's powers are limited to reviewing and issuing adjudications on actions of PADEP. See 35 P.S. § 7514(a). Although the Board may substitute its discretion for PADEP where it finds PADEP has abused its discretion, see, e.g., Warren Sand & Gravel v. Department of Env. Resources, 341 A.2d 556, 565 (Pa. Cmwlth. 1975), it is purely a reviewing body that has no power to issue an order that would be beyond the power of PADEP. Thus, the EHB cannot by "order" establish a compliance period longer than the maximum period PADEP could put in an NPDES permit in the first place. See also Marinari v. Department of Environmental Resources, 566 A.2d 385, 387 (Pa. Cmwlth. 1989) (EHB lacks general equitable powers of a court). Finally, and most important, the last clause of Section 92a.51(a) is obviously inconsistent with 40 C.F.R. § 122.47(a)(1), which does not authorize any administrative tribunal or court to extend its outside deadline of "the applicable statutory deadline under the CWA." Id. The Board therefore must delete the last clause of proposed Section 92a.51(a).

The simplest way to fix proposed Section 92a.51(a) would be to incorporate by reference the provisions of 40 C.F.R. 122.47(a)(1). If the Board does not choose that mechanism, however, it must correct the three problems identified immediately above.

B. Section 92a.51(b)

Subsection (b) of Section 92a.51 of the proposed regulations lacks one specific requirement of the counterpart federal regulation, namely that "[t]he time between interim dates shall not exceed 1 year[.]" 40 C.F.R. § 122.47(a)(3)(i). The Board therefore must add, after the first sentence of proposed Section 92a.51, a new sentence reading: "The time between interim dates shall not exceed one year."

C. Section 92a.51(c)

Unlike its federal counterpart, 40 C.F.R. § 122.47(a)(4), subsection (c) of Section 92a.51 of the proposed regulations fails to provide that the notification requirement it establishes must be written into the permit. See 40 C.F.R. § 122.47(a)(4) ("the permit shall be written to require"). The Board therefore must add, at the beginning of Section 92a.51(c), a clause reading: "The schedule of compliance specified in the permit shall require that".

15. The reference to "other applicable regulations" in Section 92a.75(c)(2) is unnecessary and confusing.

The proposed regulations contain only one section authorizing the inclusion of a schedule of compliance in an NPDES permit, namely Section 92a.51, titled "Schedules of compliance." Nevertheless, proposed Section 92a.75(c)(2) refers to "a compliance schedule issued under § 92a.51 (relating to schedules of compliance) and other applicable regulations." 40 Pa. Bull at 872. Because it does not appear to PennFuture that any section of the proposed regulations other than Section 92a.51 authorizes the establishment of a schedule of compliance, we recommend that the Board avoid confusion by eliminating the words "and other applicable regulations" from proposed Section 92a.75(c)(2).

16. Miscellaneous clarifications and wording suggestions

a. PennFuture recommends that the word "for" in proposed Section 92a.5(b) be changed to "that authorizes".

b. Subsections (b), (b)(1), and (b)(2) of proposed Section 92a.7 refer to the same NPDES permit as "an expiring permit," "an existing permit," and "the previous permit." To minimize the chance of confusion, PennFuture recommends that the word "previous" in subsection (b)(2) be changed to "existing," as in subsection (b)(1).

c. The title of proposed Section 92a.8 contains a typographical error: the word "Confidentially" should read "Confidentiality."

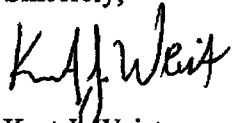
d. In both the table of contents for Subchapter B and the regulation itself, the title of proposed Section 92a.37 contains a typographical error: the word "discharges" should read "dischargers" as in the text of the proposed regulation.

e. Recognizing that it reproduces virtually verbatim the existing regulation at 25 Pa. Code § 92.83(b)(6), proposed Section 92a.54(e)(6) is awkward. PennFuture recommends that the Board revise it to read: "The discharge is not in compliance with, or will not result in compliance with, an applicable effluent limitation or water quality standard."

f. Proposed Section 92a.81(b) contains a typographical error: the word "processing" should read "possessing".

Thank you for your consideration of these comments. Please feel free to contact me at 717-214-7920 if you have any questions about PennFuture's comments.

Sincerely,



Kurt J. Weist
Senior Attorney

Summary of Comments
of Citizens for Pennsylvania's Future (PennFuture)
Proposed Rulemaking, 25 Pa. Code Chapters 92 and 92a
National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance

- The proposed regulations would appropriately require the regulated entities to pay for the Commonwealth's share of the costs of administering the NPDES program and would equitably apportion the permit application and annual fees, but the Board should clarify that discharges of treated mine drainage are "discharges of industrial waste" for the purposes of applying the fee schedules.

- The proposed regulations would appropriately prohibit the use of both the "no exposure" conditional permit exclusion and general permits for discharges to High Quality Waters or Exceptional Value Waters.

- The definition of "surface waters" must match the breadth of the surface waters included in the statutory definition of "Waters of the Commonwealth," and the definitions of several other terms in proposed Section 92a.2 should be clarified.

- Sections 92a.3(a) and (c) of the proposed regulations should be revised to eliminate the ambiguity they create over which regulatory provisions govern.

- Proposed Section 92a.8 governing confidentiality of information is inconsistent with both the federal NPDES regulations and Section 607 of The Clean Streams Law.

- Proposed Section 92a.21(a) improperly purports to delegate to PADEP the power to un-incorporate federal regulations that this Board has incorporated by reference.

- The Board may not create permits-by-rule for single residence sewage treatment plants and the application of pesticides because the federal NPDES program does not authorize the use of permits-by-rule.

- Proposed Section 92a.26(a) should be revised to provide that any new or increased discharge or change in wastestream that requires advance approval must be approved through the issuance or revision of an NPDES permit.

- Proposed Section 92a.41(b) must be rewritten so that it satisfies all of the reporting requirements of 40 C.F.R. § 122.41(l)(6).

- Proposed Section 92a.48(a)(3) should be revised to make clear that it applies where the relevant effluent limitation guidelines lack limitations for a specific parameter(s) of concern.

- Section 92a.51 of the proposed regulations governing schedules of compliance must either incorporate the relevant portions of 40 C.F.R. § 122.47 by reference or be revised so that it is consistent with § 122.47.