25 Pa Code Chapter 92a

National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring, and Compliance

Comment and Response Document

This document presents comments submitted in regard to the Environmental Quality Board's (EQB) proposed rulemaking, Chapter 92a, *National Pollutant Discharge Elimination System Permitting, Monitoring, and Compliance*, and the Department of Environmental Protection (Department) responses to those comments. The EQB approved publication of the proposed rulemaking at its meeting on November 17, 2009. The proposed rulemaking was published in the *Pa. Bulletin* on February 13, 2010 (40 Pa. Bull. 837). Public comments were accepted until the comment period closed on March 15, 2010.

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The applicable commentators are listed in parentheses following each comment.

GENERAL COMMENTS

PURPOSE AND REORGANIZATION OF THE REGULATION

1. Comment

Although the intent is to reorganize the Chapter consistent with the equivalent Federal regulation (40 CFR Part 122), it is difficult to understand how the proposed regulation mirrors federal regulation. There is no cross-walk table, and it is not clear which federal regulations are not incorporated by reference. There should be more information in the preamble to the final rulemaking. (11) (16) (27)

Department Response

Some materials are not routinely included in the rulemaking package in order to keep the rulemaking package manageable, but are available upon request. This includes the cross-walk table, which is presented at the end of this document. Any provision contained in 40 CFR Part 122 that is not specifically called out in Chapter 92a is not incorporated by reference. The Preamble to the final rulemaking has been updated as required based on comments received.

2. Comment

The role of EPA in approving these regulations is not described. EPA must approve these regulations as per 40 CFR § 123.62. (30) (32) (34)

Department Response

The preamble states that EPA must approve the final regulation as meeting the requirements of the Federal Clean Water Act. EPA has reviewed the proposed regulation and has submitted comments during the public comment period. These comments are contained herein.

3. Comment

The Department is already overwhelmed and environmental regulations are becoming more stringent. Benefits from streamlining the regulation may only be realized after the 5-year cycle has passed. During this critical period of budget and staffing cuts, the impacts of this proposed regulation to the Department and its customers must be carefully considered. (27)

Department Response

There may be some temporary disruption involved in the promulgation of any new or completely revised regulation, and these factors have been carefully considered. But the Department believes that this streamlined regulation will assist both the Department and the regulated community going forward, even if the impact is not immediate.

4. Comment

We agree with some commentators that several descriptions of proposed changes are missing from the Preamble. For the final-form regulation's Preamble, the EQB should describe each section of the final-form regulation. (42)

Department Response

The Preamble has been substantially modified and expanded to address the issues that have been raised in public comment, and this comment and response document addresses every issue raised. Describing each section of the final regulation, even those which are not substantively changed, and those which do not contain any different or more stringent requirements, would set a standard that is not appropriate for the rulemaking process.

NPDES PERMIT FEES

5. Comment

The proposed NPDES permit fees are excessive and burdensome. They would shift the financial burden from the Commonwealth to municipalities and local authorities, and/or increase the cost to industries, at a time when the economy is struggling. The Independent Regulatory Review Commission (IRRC) noted that several commentators supported this comment. (1) (2) (3) (7) (15) (19) (26) (29) (30) (32) (34) (35) (40) (42)

Department Response

The Department understands and recognizes the financial impact of fee increases on permittees, especially in challenging economic times. The new fee structure is advanced as part of a broader shift in policy in the Commonwealth to move towards self-sustaining programs, and to charge fees to cover the cost of operating those essential programs. Up until now, the taxpayers in this Commonwealth have subsidized the NPDES program heavily, but this is not fair to the taxpayer. The regulated community that benefits from the privilege of using the resources of the Commonwealth should cover more of the cost to sustain that privilege. The new fees, substantial as they are compared to the present fees, will cover only 40% of the true cost of the administering the program. The federal government still will cover the other 60%. Also, these fees are very competitive with what is charged by other states. As an example, for a 1 million gallon per day (MGD) sewage treatment plant, the annual fee will be $1,250 per year ($3.42 per day) in Pennsylvania. It is $5,250 in Ohio, $7,500 in New York, $15,000 in Illinois, between $3,000 and $5,500 in Michigan, and between $3,850 and $4,350 in Virginia.

6. Comment

The proposed NPDES permit fees increases can have a detrimental effect on customers who are already seeing rate increases due to mandated improvements in the treatment process. It is imperative to reduce costs in times like this with many business and residential customers struggling to pay utility bills. (14)

Department Response

See the response to the previous comment. The Department regrets the additional financial burden that will be placed on the regulated community, although these fees are still a small part of the cost of operating a wastewater treatment facility.

7. Comment

These increased costs would be borne by the ratepayers in addition to the costs necessary to comply with the Chesapeake Bay Strategy. Furthermore, communities in the Chesapeake Bay watershed face the prospect of a TMDL from the U.S. Environmental Protection Agency. Municipalities and authorities in the region have already been hit hard by Chesapeake Bay related costs and the proposed increased fees would be an added burden. (41)

Department Response

See the response to the previous comments. The ability of the Chesapeake Bay to assimilate nutrients has been exceeded, which has resulted in the need for more stringent limits for nutrients. This is part of a larger trend, whereas the ability of Pennsylvania's rivers and streams to accept pollutants is reaching its limit in many areas. More pollutants are having to be removed through expensive treatment, and less pollutants are able to be discharged. This trend is ongoing and unavoidable, because rivers and streams are of a constant size and the mass burden of pollutants continues to increase. As costs for treatment and point source discharges to rivers and stream increases, other options involving source reduction and

nondischarge alternatives begin to become more feasible. We can only recognize the challenge and prepare for it.

8. Comment

The citizens of the Commonwealth are the primary beneficiaries of the NPDES program, so the program should continue to be funded by general tax fund revenues. (11) (15) (16) (27) (40)

Department Response

The Department disagrees. The citizens of the Commonwealth generally benefit from point source discharges of treated wastewater, but not all do, and not all in the same measure. Nondischarge alternatives are becoming increasingly feasible for treated sewage, and the taxpayer should not subsidize industrial operations. The regulated community that benefits from the privilege of using the resources of the Commonwealth should cover the cost to sustain that privilege. The new fees, substantial as they are compared to the present fees, will still be heavily subsidized by the federal government.

9. Comment

The Department has no legal authority to impose fees for permits other than that provided for in Section 6 of the Clean Streams Law, which allows for "reasonable filing fees." This might include application fees, but not annual fees. The Department cannot reasonably charge for compliance inspections and other ongoing activities that are not related to permit application review and issuance. Provide the legal citation and basis for the fees. The IRRC noted that several commentators supported this comment. (5) (9) (11) (15) (16) (22) (27) (30) (32) (34) (42)

Department Response

Section 6 of the Clean Streams Law provides authority for the Department to charge fees for applications filed and for permits issued. More specifically, the Department is ". . . . authorized to charge and collect from persons and municipalities in accordance with its rules and regulations, reasonable filing fees for applications filed <u>and</u> for permits issued." 35 P.S. § 691.6. (emphasis added). Clearly, the Department is authorized to assess fees for permits issued as well as for permit applications, not just applications as some commentators asserted. The annual fees are fees relating to permits which have been issued.

Moreover, Section 1920-A(b). of the Administrative Code authorizes the Environmental Quality Board to ". . . formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department'"

The Department believes that the fees are reasonable and prudent. The fees are significantly lower than those of some neighboring states. See response to comment 5

10. Comment

Are these permit fees related to the cost of providing service, or are they a consequence of budgetary cutbacks to the Department? (36) (40)

Department Response

These fees are related to the cost of providing service. The Fee Report Form (attached) details how the fees were developed, and what costs they are designed to cover.

11. Comment

The preamble does not explain how the proposed fees are related to services rendered by the Department to permittees. The Fee Report Form or other detailed cost information is unavailable or does not clearly establish how the fees were developed. If the fees are not related to services rendered, but instead are intended to cover the Department's general expenses, they are taxes instead of fees. The IRRC noted that several commentators supported this comment. (5) (9) (11) (16) (22) (27) (40) (42)

Department Response

These fees are related to the cost of providing service. The Fee Report Form (attached) details how the fees were developed, and what costs they are designed to cover. The Fee Report Form is not routinely included in the rulemaking package in order to keep the rulemaking package manageable, but is available upon request.

12. Comment

The Department's Fee Report Form (which was not included in the Preamble, nor instructions on how to obtain it) shows that some 56 full-time regional and central office staff are engaged in NPDES permit review and issuance. It also mentions that some 5,000 individual NPDES permits and 5,000 general permit coverages are issued annually. The Wastewater Program Performance Measures portion of the Department's website actually states that: "In 2007, regional staff issued 769 new or renewed individual NPDES Permits for industrial and sewage facilities; 773 new or renewed authorizations for coverage under General NPDES Permits; 457 WQM permits for new or modified industrial waste and sewage collection and treatment facilities; and 183 authorizations for coverage under WQM General Permits. These totals include amendments to permits and transfers of permits from one operator to another." The Department's analysis to support the proposed application fee schedule does not seem to reflect its own reported data. (11) (27)

Department Response

The Fee Report Form states that the Department maintains about 5,000 individual NPDES permits and 5,000 general permits. Those permits are reissued once every 5 years, so the 2007 numbers that the commentator cites generally are consistent with the overall population of permits. (Multiply the 2007 website numbers for NPDES permits by five, and correct for new permits issued since 2007.)

13. Comment

The proposal provides for a review of the NPDES fee structure every three years. Can we assume that NPDES fees will increase every three years? If so, by what percent? (3)

Department Response

An internal review of the fees would be required every three years to assure that the fee structure produces enough income to cover the cost to the Commonwealth of administering the NPDES program. There is no set percentage increase, as any proposed change to fees would be the result of an analysis comparing fee income to the cost to the Commonwealth. The Department's staff complement and the duties that they perform are a matter of public record, as are the data and analyses performed to support any new or increased fees applicable to the regulated community.

14. Comment

Doubling the fees for a major facility based solely on the existence of a CSO (Combined Sewer Overflow) is tantamount to a CSO penalty. Imposing additional fees on ALCOSAN

will divert limited funds away from improving the CSOs and complying with a consent decree worked out in extensive discussions with DEP and EPA. (35)

Department Response

The intent is not to penalize facilities with CSOs, but they do require more effort and cost on the part of the Department to issue and maintain those permits. A major facility with a CSO would pay an annual fee of $5,000 in Pennsylvania. That annual fee would be $5,200 to $62,000 in Ohio, and $15,000 to $37,500 in New York. NPDES permit fees are unrelated to other costs that may be necessary to support the commentator's operation.

15. Comment

DELCORA is a CSO community. The new application fee will be $5,000 and an annual fee of $5,000. This equates to $25,000-30,000 per permit cycle as opposed to the current $500 fee. This is a significant change. (28)

Department Response

The change is significant but justified. Facilities with CSOs require more effort and cost on the part of the Department to issue and maintain those permits. A major facility with a CSO would pay an annual fee of $5,000 in Pennsylvania. That annual fee would be $5,200 to $62,000 in Ohio, and $15,000 to $37,500 in New York. The total cost for a 5-year permit term is commensurately higher in those states.

16. Comment

Any fee restructuring should be phased in, or coordinated with restructuring of user fees. (19) (36)

Department Response

The rulemaking process provides adequate notice (1+ year) of fee increases.

17. Comment

The effect of the proposed fee structure is to charge permittees twice in the final year of the permit, one annual fee and one fee for permit reissuance. (9) (11) (16) (27)

Department Response

The permittee pays only the reissuance fee in the final year of the permit. It is paid when the permittee submits their permit application for a reissued permit.

18. Comment

Greater fees should not be charged for larger facilities, because fewer large facilities are less costly to regulate as compared to many smaller facilities. The fee structure would reduce the incentive to consolidate or regionalize facilities and discharges. (15)

Department Response

Larger facilities should be charged higher fees because they do require more effort and cost on the part of the Department to issue and maintain those permits compared to smaller facilities. They also have a greater environmental impact, and consume more of the available resource (the capacity of Pennsylvania's rivers and streams to assimilate pollutants). When viewed on a MGD basis or on a per day basis, the fees are very modest and can easily and affordably be spread over a customer base. Based on an examination of permit fees in other states, other states also charge higher fees for larger facilities. The Department agrees, however, that it would be inappropriate to reduce the incentive to consolidate or regionalize facilities and discharges. The permit fee structure will not reduce this incentive, because fees for one larger facility will still generally be less expensive than fees for several smaller

facilities. As an example, the annual fee for a 6-MGD sewage treatment plant is $2,500. The annual fee for six 1-MGD facilities would be six times $1,250 or $7,500.

19. Comment

Regarding the proposed annual fees, the 98 enforcement staff listed in the Fee Report Form can only do so many inspections, report reviews, facility sampling and evaluations, etc., so in reality only a portion of the permitted NPDES dischargers get this personalized attention on an annual basis. Therefore, the vast majority of permitted discharges will see no direct, beneficial return from their annual fee. (11) (16) (27)

Department Response

The Department agrees that not all facilities will be inspected each year, but this does not mean that some or many facilities will see no direct benefit. Facilities are inspected at an established frequency, with larger facilities generally meriting more frequent inspections that require greater effort. Larger facilities also will pay greater fees to cover the proportionately higher frequency of inspections, and the greater effort required. This is as it should be. The Department proposes fees to cover the Commonwealth's share of the cost of all 98 enforcement staff, no more and no less.

20. Comment

Why should a permittee whose permit has been administratively extended have to pay any sort of annual fee? (11) (27)

Department Response

The provisions of proposed Section 92a.75(b) relating to administrative extensions have been deleted from the final rule. Accordingly, there are no administrative extensions to which the fees may be applied.

21. Comment

ARIPPA suggests that the proposed regulations and/or preamble clearly confirm that Application/Reissuance fees are paid only at time of initial application and every five years thereafter. ARIPPA is opposed to any proposal that would require such fees to be paid annually. (40)

Department Response

Application/reissuance fees are paid every 5 years. Annual fees are paid in each of the intervening 4 years.

22. Comment

With such a dramatic change to the fee structure, we suggest that the 3-year review cycle incorporate stakeholders, including industry, to help provide oversight and ensure transparency of services and costs. (13)

Department Response

This is already the policy of the Department, through the Water Resources Advisory Committee and other advisory groups. The Fee Report Form provides the basis for the fees, and describes what costs and services that the fee structure is intended to cover. The rulemaking process provides for public notice and transparency.

23. Comment

Our township opposes the proposed MS4 fee increases, since this will only take funds away from implementation, and/or the program is ineffectual. (23) (29)

Department Response

The Department understands the challenges that municipalities, especially smaller municipalities, face in trying to implement the Municipal Separate Storm Sewer System (MS4) program. With adequate and stable funding provided by the fee structure, the Department will be able to better assist municipalities meet their obligations through stable and qualified staffing in the MS4 program.

24. Comment

We support the proposed fee structure, as it will properly internalize the costs of administering the NPDES program, and institute fees commensurate with the volume of wastewater discharge. The IRRC noted that the commentator submitted this comment. (20) (42)

Department Response

The Board appreciates the comment.

25. Comment

Increasing the fees to do business in the Commonwealth is counter-productive to further business development and unwarranted, in light of the significant contributions already made to the Commonwealth from the coal industry. (26)

Department Response

The Department recognizes the significant contributions of the coal industry in this Commonwealth. Many industries make significant contributions in Pennsylvania. In a self-sustaining program, everybody should pay their fair share. The NPDES permit fees are still only a minor cost element and generally lower than other states charge, so there is no disincentive to industry. For example, a major industrial facility will pay an annual fee of $5,000 in Pennsylvania. The same facility would pay an annual fee of between $6,000 and $16,400 in Ohio, between $30,000 and $50,000 both in New York and Illinois, $8,700 in Michigan, and $4,800 in Virginia. Note that mining activities in Pennsylvania will still only pay a small application fee, and no annual fee, because the Department plans to incorporate the cost of the NPDES program as it applies to mining activities into the mining permit.

26. Comment

First, to support any such fee increase, DEP should come forward with complete program cost information, explaining the amount of time and resources required for review of individual permit applications, including the steps considered to control those costs. Generalized numbers are not sufficient to justify a significant permit fee increase, or to demonstrate that the proposed fee increases and additions are "reasonable." Second, the regulated community that bears such program costs will reasonably expect the program will perform in a responsive manner, delivering timely actions on applications. Very simply, almost half of the funds that DEP needs to run the state NPDES program are now going to be coming from private, not public monies. Regulated dischargers are already doing most of the work and paying substantive quantities of money to administer and run their NPDES programs. The initial perception of these fee increases is that PA is simply trying to make up for a budgetary shortfall, and these fee increases will have no impact or improvement on the environment, nor any improvement on permit review and approval. So the regulated industries are asking for efficiencies and appropriate performance from DEP for these significant fee increases. (33)

Department Response

The Fee Report Form (attached) provides the details of the costs and services that the fee structure is intended to cover. These costs and services are all directly related to the implementation of the NPDES program. The change in policy towards a self-sustaining program is part of a Commonwealth-wide effort to relieve the taxpayer of inappropriate or unnecessary financial burdens. Funding to the Department is not being increased, but instead the regulated community is paying more of the true cost of the service instead of funding being provided through the Commonwealth's General Fund. Regarding improved service, the Department acknowledges the challenge of providing adequate service with the limited resources allocated, and we plan to do better when provided with stable and adequate financing to support a stable and qualified staff. The fee structure, however, is not designed to support any increase in staff, so we do not anticipate an immediate improvement in service, but more of a gradual improvement in service as the program benefits from stable support. Stable support for the program will help improve efficiency, and efforts are underway to improve the efficiency of the permit writing process, and also the Discharge Monitoring Report (DMR) review function. Regarding the proportion of funding that comes from public and private sources, it is not clear why any financing should come from public sources for industrial facilities. Industries generally cover their own costs of doing business, and this is as it should be.

27. Comment

The fee structure has no rational basis, and should be based on the CPI or COLA indices. ARIPPA suggests that the Department should be required to submit any fees or increases to fees to an independent time/labor review body that would equitably and openly determine the fairness of such charges. (40)

Department Response

All of the applicable requirements for a fee increase have been achieved and documented. The fees increases have no relationship to the CPI or COLA indices, but instead are the result of a change in policy towards a self-sustaining program as part of a Commonwealth-wide effort to relieve the taxpayer of inappropriate and unnecessary financial burdens. The commentator may review the basis for the fees in the Fee Report Form (attached). Since the fees cover only salaries of staff that directly support the program, it is unclear how there would be any question as to the fairness of the fees.

28. Comment

Will we be charged fees as a major facility, or as a facility subject to an ELG (Effluent Limitation Guideline)? (3)

Department Response

A facility that is classified as a major industrial facility would pay the fee for a major industrial facility as long as the facility continues to be classified as a major facility. Only minor facilities are classified based on whether an ELG applies or not.

29. Comment

If we pay one fee for our discharge of treated wastewater, would we have to pay another fee for our stormwater discharge? (3)

Department Response

Facilities that pay one fee for their discharge of treated wastewater would not pay a separate fee for their stormwater discharge. The proposed fee for stormwater discharges would apply only to facilities that have an individual NPDES permit covering one or more stormwater discharges, with no discharge of treated wastewater. (This would be an unusual situation,

since most standalone stormwater discharges would be covered under a general NPDES permit, rather than an individual NPDES permit.)

30. Comment

Sections 92a.28 and 92a.62 have been revised such that agencies of the Commonwealth would no longer be exempt from NPDES permit fees. PennDOT requests a specific exclusion for agencies of the Commonwealth from the need to pay NPDES permit fees (language is suggested). Other programs have such exemptions. The IRRC noted this comment. (18) (42)

Department Response

Accepted in part. There is no existing provision in Chapter 92 or Chapter 91, *General Provisions,* that provides an exclusion from NPDES permit fees for agencies of the Commonwealth. (Chapter 91 does provide an exclusion for agencies of the Commonwealth from Water Quality Management permit fees, which are separate and distinct from NPDES fees.) At this time, and as a matter of policy, the Department does not charge NPDES fees to agencies of the Commonwealth, and the proposed Chapter 92a does not change that policy. However, note that there is a change to the regulation at § 92a.26 and § 92a.62 in response to this comment, that provides for a possible NPDES fee exemption for any federal or state agency or independent state commission that provides funding to the Department for the implementation of the NPDES program. Such agencies or commissions should not have to pay for the same service twice.

31. Comment

The Department has long been subsidized as a part of the administration cost burden, paid through normal budgetary channels for the 'administration' of this program. Exactly what are PADEP staff supposed to do with the 'normal' salary they are paid daily other then monitor or administer the programs they were hired to monitor and administrate? The public can't be expected to make rational decisions on environmental activity if the expense is diverted away from the cost of same. These proposed regulations appear therefore to be "a sleight of hand" effort to disguise the true cost of questionable regulatory administrative/ bureaucratic activity though hiding its economic impact from the normal budgeting process external to the legislature decision making, whereby the public will be 'given' what is good for them even if it has no impact what so ever on their lives other then expanded expense. What is the need to require more funds acquired through administrative fiat vice legislative action [*sic*] when the follow on 'Compliance Costs' require no new personnel, skills, or certification? ARIPPA must question exactly where $5 million is spent by PADEP currently monitoring this program. (40)

Department Response

An NPDES permit, produced to meet the requirements of applicable state and federal statutes and regulations, is required for any discharge of pollutants to rivers and streams. The NPDES program at the Department currently is funded primarily through taxpayer dollars, both federal and state. The new fee structure is part of a policy change where the regulated community that benefits from the privilege of using the resources of the Commonwealth covers more of the cost to sustain that privilege. The new fees, substantial as they are compared to the present fees, will cover only 40% of the true cost of the administering the program. The federal government still will cover the other 60%. Every dollar collected in fees is to be targeted towards the salaries of the staff that directly support the NPDES program. See the Fee Report Form (attached) for details. Some of the remaining points that the commentator makes are unclear.

32. Comment

We are unable to understand the relevance of this language in the Preamble*: The artificially low fees that have been charged have been increasingly at odds with the Department's emphasis on Pollution Prevention and nondischarge alternatives. The proposed fee structure will better align the revenue stream with the true cost of point source discharges to surface waters, from both management and environmental standpoints.* (16)

Department Response

The relevance relates to the fact that the NPDES program, which regulates point source discharges of treated wastewater to surface waters, is not the only option for effective management of waste produced by people and industry. It is in fact one of the less appropriate options. It would be far better to produce less waste to begin with, if feasible. The principles of Pollution Prevention target source reduction in order to reduce the overall burden and cost of waste disposal. Municipalities and industries that manage Pollution Prevention well have reaped the benefits in terms of reduced costs. For waste that must be disposed, nondischarge alternatives potentially can be a more sustainable option long-term. By subsidizing the NPDES point source disposal option with taxpayer dollars, the cost/benefit comparison between the various options (source reduction, nondischarge alternatives, and point source disposal) are distorted because one option is artificially subsidized. The NPDES program, originally designed to gradually phase out point source discharges to rivers and streams, has generally had the opposite effect. The point source discharge option is the less expensive option partially because it is the subsidized option. However, since the rivers and streams of Pennsylvania are reaching their capacity to assimilate pollutants in many areas, the cost of the point source option is likely to continue to increase. The other options will gradually become more cost-effective going forward.

33. Comment

We recommend that the EQB provide with the final-form regulation the fully detailed calculation of each fee to establish that the fees are reasonable. (42)

Department Response

The Fee Report Form (attached) provides the information required to support the increased fees. It also contains a discussion of the manner in which the fees were distributed amongst the various categories of the regulated community. The information provided establishes that the total amount of funding required (about $5 million per year) is the same as the target fee income, such that the overall fee structure has been established as reasonable. However, the commentator appears to request the specific basis for each fee. The Department does not have the systems in place to track effort by the hour or by the facility, so we have generally relied upon our experience to estimate the relative cost impact of the various categories of facilities or activities. In addition, the NPDES fee structures of other comparable states were examined and used to help develop the new fee structure. Although there is considerable variation in some factors, there also is general agreement in others, especially that larger facilities cost more to permit and manage than smaller facilities. Given that detailed, hourly data are not available, the only other option would be to charge all facilities and activities equally, and that would not be reasonable.

GENERAL -- TREATMENT STANDARDS

34. Comment

There were no publications or scientific studies referenced to provide the technical, water quality basis for these changes related to stricter controls for fats, oil and grease, turbidity, color, fecal coliform, seasonal multipliers, secondary treatment, tertiary treatment, and industrial waste discharges. (24)

Department Response

The Department relies primarily on real-world experience, and how that experience relates to the goals and requirements of the program, when proposing new or changed regulations. An additional consideration is minimizing cost to both the regulated community and the Commonwealth. For treatment requirements, it is important to consider the feasibility and cost of the requirements, and the Department relies on published studies to the extent that they are helpful in evaluating feasibility and cost. Since the only treatment requirements contained in the final-form regulation already are routinely achieved by the regulated community, no additional studies or projections are required.

SECONDARY TREATMENT STANDARD

35. Comment

Contrary to what is stated in the preamble, requiring all sewage treatment plants to meet the Secondary Treatment Standard (STS) will be costly and unnecessary, with little or no environmental benefit. The Department has arbitrarily decided to drop key "variance" provisions to EPA's Secondary Treatment regulation, 40 CFR Part 133 that allow for modification of effluent requirements based on: a) systems with combined sewers; b) systems with certain industrial waste loadings; c) systems using waste stabilization ponds; d) systems with less concentrated influent wastewater; and (e) treatment equivalent to secondary treatment. There is inadequate documentation of the basis for this requirement, and/or no legal, technical or economic analysis has been performed. The exemptions and adjustments provided for in 40 CFR Part 133 related to relaxed limits for BOD and TSS continue to be necessary and appropriate. (5) (9) (11) (12) (16) (22) (27) (30) (32) (33) (34) (36) (42)

Department Response

Accepted in large part. The Department has determined that these provisions for adjustment of BOD and TSS limits have extremely limited applicability in this Commonwealth, and we note that the commentators have not claimed that any individual facility requires these adjustments to meet their effluent limits routinely. However, the final regulation at § 92a.47 has been modified to provide that, for any facility or activity that currently has relaxed limits for BOD or TSS, the effluent limits will remain in effect until such time as the permittee proposes an hydraulic expansion of their facility. At that time, the expanded facility should be designed to meet the normal limits for BOD and TSS. This is already the trend in wastewater treatment plant design for new and expanded facilities. In addition, the federal provisions that provide for exemptions from the requirement for 85% efficiency in removal of BOD and TSS for CSO systems and separate sanitary sewer systems have been added in full to the final regulation.

36. Comment

The exemptions and adjustments provided for in 40 CFR Part 133 related to relaxed limits for BOD and TSS continue to be appropriate for the following reasons:

- Eliminating them creates a disincentive for POTWs to accept industrial wastewater, which will result in industries having to build their own expensive treatment, and the Department having to permit more facilities.

- POTWs accepting industrial wastewater normally meet secondary limits, but are at higher risk of an upset, and the adjusted limits provide a margin of safety from liability. (21)

Department Response
See the response to the previous comment.

37. Comment
What is the basis and purpose for the requirement to include "significant biological treatment" as part of the STS? Under some conditions, some treatment facilities could find it hard to meet 65% removal through biological treatment. Technology exists to meet secondary limits without the biological component, allowing sewage systems to treat and discharge SSOs and possibly avoid construction of storage and added conveyance. A requirement based upon "significant biological treatment" should not be imposed. (5) (9) (30) (32) (34) (35) (42)

Department Response
This definition is as per 40 CFR 133.101(k), which is the federal definition of significant biological treatment as it applies to treatment equivalent to secondary treatment. It applies only to BOD, not nutrients or any other pollutant. The requirement in Chapter 92a is only that the secondary treatment standard would include significant biological treatment, and would not invalidate any existing provisions in permits related to bypass. Permits will remain unaffected. Bypassed flow would by definition not receive the full treatment normally provided for wastewater flow. Significant biological treatment is something that all POTWs already have, and which has a proven track record with regard to the ability to treat sewage and to control pathogens. The Department is concerned that certain new proposed treatment systems, which are primarily or exclusively physical treatment systems, are unproven with regard to the ability to adequately treat sewage, and will not approve these systems for use in this Commonwealth until their safety and reliability are demonstrated. Particular concerns are the deactivation of pathogens, especially disinfection-resistant pathogens such as *Cryptosporidium* and *Giardia*, and the ability to control ammonia toxicity. We consider these treatment systems unproven in regard to their ability to protect public health until their efficacy has been demonstrated. The requirement for 65% removal of BOD via biological treatment applies only to the BOD entering and exiting the biological treatment system, so the facility is not penalized for any BOD that may be removed during primary or physical treatment of sewage.

38. Comment
The proposed requirement for fecal coliform includes instantaneous maximum requirements. This is more stringent than the way that these limits previously have been applied, and is inconsistent with epidemiological data that indicate that harm from exposure is a statistical phenomenon, the standard for fecal coliform bacteria during the swimming season has for decades been set as a geometric mean (200/100 mL), with a statistical maximum (no more than 10% of samples over 1,000/100 mL). EPA has declared that geometric means are the most appropriate standard to be applied except for bathing beaches. There is inadequate documentation of the basis for this requirement. This is not a cost issue, it is a compliance and an environmental protection issue. In order to meet the stricter standard, many POTWs will increase the use of chlorine, which has more of an adverse effect on the receiving stream than a few thousand bacteria. Increasing chlorine use will conflict with other provisions of

our permit, which require that chlorine dosage be optimized and does not impact the water quality of the stream. The existing 10% qualifier should be retained. (5) (9) (27) (42)

Department Response

There are several issues to consider regarding fecal coliforms, but for sewage treatment plants, the main purpose of fecal coliform limits is to maintain and verify the integrity of the disinfection system, and its ability to control human pathogens. While fecal coliforms in the environment can have many sources (birds, mammals, and certain plant materials), fecal coliforms in treated sewage primarily are from humans. If they are present in quantity in effluent, you must assume that pathogens may be present in quantity. Excess fecal coliforms in the environment generally is less significant from a public health perspective than excess fecal coliforms in human sewage. Any breakdown in the treatment and disinfection process in a POTW has the potential for immediate and serious public health consequences.

The Department has to be able to independently verify that permittees are in compliance with any given permit condition, and our experience with the 10% qualifier has been poor in this regard. Unlike virtually any other sample result, no judgment can be made based on a given sample result. Permittees have taken to collecting excess samples to dilute the mathematical effect of one or more samples indicating a breakdown in disinfection. No comments were received indicating that the proposed maximum values of 1,000/100 mL and 10,000/100 mL were unreasonable or inappropriate – the only relevant comments were from commentators who opposed to any maximum limit at all. However, the Department has determined that we need an absolute maximum for this pollutant, just as for virtually all other pollutants. It is perhaps more important for fecal coliforms than it is for other pollutants, since any failure of the disinfection system can have immediate and serious adverse effects on human health. The Department is not currently aware of any facility that would have difficulty meeting the maximum limits for fecal coliforms.

The 10% qualifier may be appropriate for an instream standard, where nonpoint sources complicate the issue, and other sources not associated with human pathogens contribute, but it is not appropriate for treatment works where the permittee should have, and has every opportunity to have, reasonable control of the disinfection process. The maximum limits for fecal coliforms have been designed to achieve the instream standard, and the Department can defend this limit as protective of public health and all applicable water quality standards.

There is no conflict with existing provisions of permits that require that chlorine use for disinfection be minimized. By definition, sufficient chlorine must be used to ensure the effectiveness of the disinfection process, and the practice and principles of breakpoint chlorination are well established. It is possible that some permittees that currently do not manage their disinfection processes well may have to increase their attention to and control of the process, but this is fully appropriate. The issue is not excess chlorine versus "a few thousand bacteria," it is meeting minimum requirements to ensure the protection of public health and the attainment of water quality standards.

39. Comment

The proposed requirement for fecal coliform is more stringent than current requirements, and no rationale is presented for the limits. While § 92a.47 (5) may represent a good approach for wintertime limits, no rationale has been provided, and there is no leeway provided from the instantaneous maximum limits. (11) (16) (27)

Department Response

See the response to the previous comment.

40. Comment

The proposed requirement for fecal coliform includes instantaneous maximum requirements. The proposed regulation has arbitrarily tightened the regulations without basis or justification. It will cause the immediate need for expenditures in capital improvements to our disinfection facilities, when implementation has not been shown to improve water quality. Elimination of the 10% qualifier will result in needless increases in chlorine usage, and noncompliance with the chlorine minimization requirements of our permit. The existing 10% qualifier should be retained. (8)

Department Response

See the response to previous comments regarding this issue. There is no conflict with existing provisions of permits that require that chlorine use for disinfection be minimized. By definition, sufficient chlorine must be used to ensure the effectiveness of the disinfection process, and the practice and principles of breakpoint chlorination are well established. An examination of the records for the commentator's facility indicates that these limits are being achieved routinely, so it is not clear what improvements or capital expenditures may be required.

41. Comment

The allowance for no more than 10% of the samples over 1000/100 mL has been eliminated with no reason given. Excessive levels of chlorination would be required because of the potential for random interferences such as turbidity or normal variability in bacteriological testing. The current regulation is appropriate because there is an inherent operational control issue caused by the 24-72 hours time lag between the time of sampling and when the result is known when a dosage correction could be made. Excessive disinfection with chlorine can result in additional production and discharge of toxic disinfection byproducts such as trihalomethanes which would not be in the best interests improving receiving stream water quality. (21)

Department Response

See the response to previous comments regarding this issue. In addition, the Department does not agree that very high concentrations (>1,000.100 mL) of fecal coliforms would often be the result of harmless artifacts, contamination of the sample, or normal variability in testing procedures. These are disease-related indicator organisms, and they must be controlled at all times to protect public health. There is no conflict with existing provisions of permits that require that chlorine use for disinfection be minimized. By definition, sufficient chlorine must be used to ensure the effectiveness of the disinfection process. The practice and principles of breakpoint chlorination are well established and are designed to properly balance effective disinfection with minimal production of trihalomethanes and other disinfection byproducts.

42. Comment

EPA has declared that the use of instantaneous maximum or daily limits for pathogens is inappropriate except for bathing beaches. 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. It should not be finalized. (30) (32) (34)

Department Response

The EPA statement that the commentator cites refers to fecal coliforms in rivers and streams, not in treated wastewater effluent. The underlying rationale is not applicable to effluent, but the fact that EPA does recommend maximum limits for bathing beaches, where a single high fecal coliform result at a bathing beach or ocean shore area can close the beach, illustrates the need to ensure the integrity of the disinfection process at all times. The 10% qualifier may be appropriate for an instream water quality standard away from bathing beaches, where nonpoint sources complicate the issue, and other sources not associated with human pathogens contribute, but it is not appropriate for treatment works where the permittee should have, and has every opportunity to have, reasonable control of the disinfection process. The maximum limits for fecal coliforms have been designed to achieve the instream standard, and the Department can defend this limit as protective of public health and all applicable water quality standards. The Department does not project any cost impact, since these limits are routinely achieved by a wide margin in well operated treatment and disinfection systems. It is possible that some permittees that currently do not manage their disinfection processes well may have to increase their attention to and control of the process, but this is fully appropriate.

43. Comment

We suspect that one key reason that the Department proposes to standardize the STS stems from a 2002 Environmental Hearing Board (EHB) ruling against the department for refusing to grant one of the adjustments to secondary treatment effluent standards [*Municipal Authority of Union Township vs. DEP*, EHB Docket No. 2001-043-L, 2/4/02]. If so, the proposed standardization is inconsistent with the EHB decision, and/or does not justify removing these variance provisions entirely. (11) (27) (30) (32) (33) (34) (42)

Department Response

The Department considered the *Municipal Authority of Union Township vs. DEP* decision when incorporating the Secondary Treatment Standard in this rulemaking. The standardization proposal is fully consistent with the *Municipal Authority of Union Township vs. DEP* proceedings and rulings, partially because the EHB specifically highlighted the rulemaking process as the appropriate route to take if the Department proposed to eliminate the effluent limit adjustments in question. Furthermore, the Department believes that this approach is consistent with the provisions of 40 CFR 133.105(f), which state:

(f) Permit adjustments. Any permit adjustment made pursuant to this part may not be any less stringent than the limitations required pursuant to Sec. 133.105(a)-(e). Furthermore, permitting authorities shall require more stringent limitations when adjusting permits if: (1) For existing facilities the permitting authority determines that the 30- day average and 7-day average BOD5 and SS effluent values that could be achievable through proper operation and maintenance of the treatment works, based on an analysis of the past performance of the treatment works, would enable the treatment works to achieve more stringent limitations...

44. Comment

A new STS provision has been added regarding TRC (Total Residual Chlorine), and it is unclear why an industrial waste requirement (0.5 mg/L) is to be imposed on discharges of treated sewage. (11) (16) (27) (42)

Department Response

This is an existing requirement at existing 92.2d, and applies whenever chlorination is used for either discharges of treated sewage or industrial wastewater. No change to this requirement has been proposed as part of this rulemaking. The requirement is not an industrial waste requirement, but is merely listed in that section for organizational purposes.

45. Comment

Do the proposed STS limits supersede DRBC requirements? In particular, will the winter disinfection limits be relaxed from 200/100 mL to 2,000/100 mL? Also, it is not clear how the proposed STS limits will be applied to streams that already have TMDLs. (39)

Department Response

The more stringent of the Delaware River Basin Commission (DRBC) requirements and the Department's requirements will apply as an effluent limit, so the 200/100 mL limit would continue to apply during the cooler months for facilities that discharge to surface waters subject to DRBC requirements. The effluent limits associated with the proposed Secondary Treatment Standard (STS) are technology-based limits and would have no effect on water quality-based effluent limits specified in a TMDL. Those water quality-based effluent limits would remain fully applicable, and the more stringent of the technology-based limit and the water quality-based effluent limit would apply in the permit.

46. Comment

The EQB should better explain the need to amend existing requirements. The EQB should include a full evaluation of the costs imposed by the amendments and explain why the costs imposed are justified. (42)

Department Response

The need to amend the regulation to standardize treatment requirements, and in particular the incorporation of the Secondary Treatment Standard, is that the Department and permittees will stop wasting time and resources on evaluating and applying provisions that permittees do not need and do not add value. The Department has broad experience in this matter, and is motivated to improve the efficiency of the permit process and reduce costs. This is particularly important from the perspective of the regulated community now that permittees will be paying more of the cost of the NPDES program. The Department is urged, on one hand, to improve the speed and efficiency of the process, but attempts to do so are opposed based almost entirely on inapplicable or specious assertions. The only treatment requirements proposed in this final rulemaking already are routinely achieved by all well operated sewage treatment facilities. The fact that some facilities have had treatment upsets or irregularities in the past is not relevant -- the Department is responsible to assure that effluent limits protect public health. There are no treatment requirements in this final rulemaking that will increase the cost to the regulated community at large.

TERTIARY TREATMENT STANDARD

Department Response: The proposed amendments included, at § 92a.47, a proposal that a Tertiary Treatment Standard (TTS) would apply to all new or expanding discharges of treated sewage to impaired waters where the impairment has been attributed to discharges of treated sewage, or to surface water designated as a High Quality or an Exceptional Value (antidegradation) water. In all cases for point sources, the more stringent of the applicable technology-based effluent limit and the water quality-based effluent limit (WQBEL) is applied. For discharges to impaired or antidegradation waters, the WQBEL is expected to be the governing factor in determining the appropriate effluent limits. However, technology-based requirements should be developed and applied independent of water quality-based requirements. The TTS, as a more stringent technology-based treatment standard, would have complemented the more stringent WQBELs that apply in water quality-limited surface water segments. The TTS was proposed to address several recurring issues:

- In order to reduce possible disparities in treatment requirements amongst multiple point sources.

- An adequate WQBEL may not be available when it is needed (for example, a sewage treatment plant is proposed for expansion, but the TMDL has not yet been scheduled or completed). Applying a more stringent technology-based standard will minimize possible distortions in the planning and design process that may be introduced when the WQBEL is inadequate or unavailable. The facility may be grossly under-designed, necessitating a costly overhaul of the facility. Applying the TTS in scenarios where advanced treatment clearly will be required will minimize this risk, without increasing the risk that the facility may be over-designed.

- The relationship between the source and an impairment may be reliable, but it may not be effectively tied to any one or more pollutants. An impairment initially attributed to nutrient enrichment may, upon further study or with more data, subsequently be attributed to organic enrichment. Or an impairment that really is due to nutrient enrichment, and that is mitigated with effective nutrient controls, may simply be replaced by an impairment that is attributable to organic enrichment. By assuring a balanced approach to all likely pollutants of concern, vulnerabilities in the WQBEL process can be minimized without undue burden on the permittee.

Many comments were received on the TTS, nearly all of them opposing it based on perceptions or predictions of how the proposed TTS could be applied inappropriately or have unintended effects. At least one facility would have to modify operations in order to comply with the TTS. Based on some of these comments, it became evident that there would be some immediate cost implications for some facilities, which was inconsistent with both the intent of the TTS and the content of the Preamble.

For each of the comments received and listed below, the Department's response is the same – we appreciate your comments and, based largely on these comments, it is evident that additional work is required to support any new treatment standard for sewage facilities. In addition, the Department believes that there is increased attention to technology-based limits

at the Federal level, and these developments may be pertinent. Based on these considerations, the TTS has been removed in its entirety from the proposed § 92a.47. The Department still believes that a more stringent technology-based treatment standard is appropriate for the water quality-limited situations targeted by the TTS, and plans to pursue the issue unless developments at the Federal level obviate the issues that the TTS was intended to address.

47. Comment

This new requirement for advanced treatment is arbitrary and will be costly and create a pathway to advanced treatment for virtually all dischargers of treated sewage. There is inadequate documentation of the basis for this requirement. It is unnecessary, since the Department already has a comprehensive regulation designed to protect High Quality and Exceptional Value waters. (5) (8) (9) (11) (16) (21) (22) (26) (27) (30) (32) (33) (34) (35) (36)

48. Comment

The proposed limits for Total Nitrogen will require our plant to denitrify year-round. The proposed limit for TSS is a major reduction from the existing permit limit. (14) (31)

49. Comment

The standard should not apply to facilities that increase hydraulic capacity to better manage wet weather issues. (22)

50. Comment

The applicability of the standard regarding impaired waters is unclear or ambiguous, and should refer to the Integrated List of Waters. It may result in unnecessary treatment for pollutants not contributing to the impairment. We are concerned about some definitions and terminology. (5) (8) (9) (11) (16) (27) (33)

51. Comment

The standard could be interpreted to apply to downstream intersections of High Quality or Exceptional Value waters. (5) (9) (11) (22) (27)

52. Comment

The standard will increase treatment disparities, rather then reduce them. (9)

53. Comment

Some aspects of the proposed standard are more stringent than the treatment requirements for nutrients applicable to facilities in the Chesapeake bay watershed. The standard will constrain nutrient trading in the Chesapeake Bay watershed. (11) (16) (21) (27) (33) (42)

54. Comment

DELCORA currently is borderline for some of the proposed tertiary limits, and Delaware may declare a reach of the Delaware River as impaired for dissolved oxygen. The focus should be on nonpoint sources instead, as they are the main contributors of nutrients. (28)

55. Comment

By way of the proposed 60-day notification rule in proposed § 92a.26, will a facility expansion that still meets ELG or permit limit requirements now be told by the Department at

some date after they have commenced the increased discharge, which is pre-authorized under proposed § 92a.26, that they will now have to go back and meet the proposed tertiary treatment standards? (33)

56. Comment

While the preamble states that the new standard would only apply to new or expanding facilities, this is not the actual wording in the regulation. In order to meet the 8 mg/L requirement for Total Nitrogen, it is very possible that any fixed-film WWTP would have to convert to activated sludge. (39)

BOD_5 and TSS TREATMENT STANDARD FOR INDUSTRIAL DISCHARGES

NOTE: These comments refer to the proposal to set a minimum treatment standard for industrial discharges of Biochemical Oxygen Demand (BOD or BOD_5) and Total Suspended Solids (TSS).

Department Response: The proposed amendments included, at § 92a.48, a proposal to establish minimum treatment standards for BOD and TSS. These new treatment requirements were intended to address certain cases in this Commonwealth where existing technology-based limits for these parameters were inadequate or outdated.

A number of comments were received, all of them either opposed to the requirements or asking that exceptions be made for certain situations. Commentators generally were opposed to the proposal based on principle rather then any potential impact to their facility. For each of the comments received and listed below, the Department's response is the same – we appreciate your comments. The Department strives to balance the need for protecting the water quality in rivers and streams with the reasonable use of this Commonwealth's natural resources by permittees, and regulatory rulemaking is one way to pursue this balance. Based on trends in recent years and several of the comments, it appears that, although this proposed treatment standard would have limited impact on permittees and facilities in this Commonwealth, it also would have limited value. In addition, the exemptions requested are appropriate, and provision for these exceptions would have been required. Considering these factors, the proposed treatment requirements for BOD and TSS for industrial discharges have been deleted from § 92a.48. We do not anticipate revisiting this issue, as the need for these treatment requirements is no longer evident. For those few facilities that may still have inappropriately permissive effluent limits, the issue will be addressed through the WQBEL process, as suggested by one commentator.

57. Comment

While we have no objection to the proposed maximum level of 60 mg/L for $BOD_{5,}$ we object to the proposed standard for TSS of 60 mg/L as a monthly average. This is a significant reduction in our current permitted limit of 100 mg/L. We presume that there would be no change to the daily maximum or instantaneous limits for TSS in our current permit. (3)

58. Comment

The proposed limit for TSS will be a problem for closed-cycle cooling systems, where most of the TSS originates in the surface water, and is concentrated in the cooling system. The

proposal should be modified to specify the requirements as net values, the difference between intake and discharge concentrations. (13)

59. Comment
Contrary to what is stated in the preamble, the "technology-based" effluent limit requiring all industrial dischargers to meet 60 mg/L for BOD_5 and TSS is onerous and will be costly. There is inadequate documentation of the basis for this requirement. ELGs are established based on industry-specific factors, and a "one-size fits all" approach is not appropriate. (5) (9) (12) (33)

60. Comment
Even though it may be true that few, if any, facilities in Pennsylvania would exceed these limits at the present time, once the economy recovers, the existing treatment facilities may not be able to meet these requirements. (5) (9) (12)

61 Comment
One PA pharmaceutical company has estimated multi-million dollar upgrades would be necessary to achieve the proposed level of treatment. The Clean Streams Law requires the Department to consider the immediate and long-range economic impacts of this proposed regulation. (33)

62. Comment
The proposed limit for $CBOD_5$ could be a problem for stormwater runoff of propylene glycol-based deicing fluids at our airport. Even when the fluids are well managed, we can occasionally exceed 50 mg/L $CBOD_5$. We request that you consider this as an exception, and allow for occasional exceedences. (19)

63. Comment
The Department already has mechanisms in place to protect the water quality of receiving water bodies via Chapter 93. Department water quality engineers model each discharge with the WQM 7.0 model to determine if additional water quality based effluent limitations for BOD5 are required to protect water quality during each permit renewal cycle. This modeling method has proven very effective in protecting in-stream water quality across the Commonwealth. If the basis of promulgating additional technology based effluent limits for industrial dischargers is violation of water quality standards on receiving water bodies, the Department needs to re-evaluate the dischargers that are causing water quality violations instead of blanketing all industrial point source categories with an unjustified technology based standard. (33)

64. Comment
Where the Federal Effluent Limitation Guideline already specifies a concentration-based ELG for TSS/BOD, that Federal limit should prevail. (37)

INADEQUATE PUBLIC PARTICIPATION AND NOTICE

Department Response: Several commentators submitted the comment that the public participation process was inadequate, and suggested additional public participation. The

EQB appreciates the importance of the public participation process. Notice of proposed rulemaking was published in the *Pennsylvania Bulletin* in accordance with the requirements of the Commonwealth Documents Law. Section 1 of that law requires that the EQB give public notice of its intention to promulgate or amend any regulation and that such notice include (1) the text of the proposed regulation prepared in such a manner as to indicate the words to be added or deleted from the presently effective text thereof, if any, (2) a statement of the statutory authority for the proposed regulation, (3) a brief explanation of the proposed regulation, (4) a request for written comments by any interested person and (5) any other statement required by law. 45 P.S. § 1201. The proposed regulation confirms to these requirements in all respects.

The Department has met all the obligations of the Regulatory Review Act and the public participation process to make the proposed rulemaking readily available to the public for comment. In addition to presenting the rulemaking package to the EQB on November 17, 2009 and publication of the proposed rulemaking in the *Pennsylvania Bulletin* on February 13, 2010; DEP staff presented the language of the proposed rulemaking to the Water Resources Advisory Committee on July 22, 2008 and October 8, 2008, and to the Agricultural Advisory Board on June 17, 2009. The language presented at those public meetings and the minutes of those meetings are always made available at DEP's web site: www.depweb.state.pa.us; Link: Public Participation. Throughout the advisory committee process DEP was receptive to the concerns of the committees and incorporated changes per those discussions.

The EQB has received comments from over 40 commentators on the proposed rulemaking and has chosen not to withdraw the regulation or extend the public comment period for this rulemaking. Supplemental or contingency processes, such as advance notice of rulemaking or public hearings, are not justified for this rulemaking. All comments related to public participation have been included herein.

65. Comment

There was insufficient public participation in development of the regulation, and we are not aware of any stakeholder input. (24)

66. Comment

The comment period is too short and should be extended, and/or the regulation should be re-proposed, and/or a public hearing should be provided. (4) (5) (9) (21) (22) (24) (27) (30) (32) (34) (36)

67. Comment

The advance notice of rulemaking process should be invoked. (21)

68. Comment

The lack of adequate public notice on several issues violates the public notice requirements of the Commonwealth Documents Law. This is especially of concern for changes that could result in increased expenditures of public money. (5) (9)

69. Comment

We request that the Board withdraw this flawed regulation, and only proceed if the new regulation is developed with the input of the regulated community, and/or if the new regulation is negotiated with the regulated community. (5) (9) (22) (24)

MISSING FEDERAL PROVISONS

70. Comment

The following provisions should be incorporated by reference:

1. 40 CFR 122.21(c)(2) – *Time to Apply for Permits under Section 405(f) of the CWA*
   All Treatment Works treating domestic sewage (TWTDS) whose sewage sludge use or disposal practices are regulated by 40 CFR Part 503 must submit a permit application. This is one of the requirements for a State program listed in 40 CFR 123.25(a)(4) and should be incorporated into Chapter 92a.

2. 40 CFR 124.56 – *Fact Sheets*
   This regulation lists additional requirements that should be in a fact sheet. This is one of the requirements for a State program listed in 40 CFR 123.25(a)(32) and should be incorporated into Chapter 92a.

3. 40 CFR 124.59 – *Comments from government agencies*
   This regulation addresses comment which may be received from the Corps of Engineers, US Fish and Wildlife Services, or other government agency. Chapter 92a should incorporate this regulation.

4. 40 CFR Part 129 – *Toxic Pollutant Effluent Standards*
   This is one of the requirements for a State program listed in 40 CFR 123.25(a)(37). If these regulations are identified in another Pennsylvania regulation (Chapter 16 or 93, perhaps), then Chapter 92a should make reference to where these regulations are located. If not, Chapter 92a should incorporate these Federal regulations.

5. 40 CFR Part 132 – *Water Quality Guidance for the Great Lakes System*
   This is one of the requirements for a State program listed in 40 CFR 123.25(a)(38). If these regulations are identified in another Pennsylvania regulation (Chapter 93, perhaps), then Chapter 92a should make reference to where these regulations are located. If not, Chapter 92a should incorporate these Federal regulations. (25)

Department Response

The Department must have the legal authority to apply all of the provisions that have been cited by the commentator, and also must administer its NPDES program consistent with the minimum requirements of each, but that is not equivalent to incorporating them directly. The Department may have more stringent requirements, and may elect not to apply variances and exceptions provided for in Federal regulations.

40 CFR 122.21(c)(2) – *Time to Apply for Permits under Section 405(f) of the CWA*
As per § 92a.47(a)(6), permittees of facilities that treat sewage are required to comply with applicable Department regulations with regard to the disposal or beneficial reuse of sewage sludge (biosolids). These regulations are contained in Chapter 271, Subchapter J which relates to the beneficial use of sewage sludge by land application. These requirements are

based on federal requirements outlined in 40 CFR Part 503 and the Department believes that they meet or exceed the requirements of 40 CFR 122.21(c)(2).

40 CFR 124.56 – *Fact Sheets*
The Department believes that § 92a.53 (3)—(5) effectively covers the requirements of 40 CFR 124.56 and 40 CFR 124.8. All relevant determinations and calculations must be included in the fact sheet.

40 CFR 124.59 – *Comments from government agencies*.
Accepted. 40 CFR 124.59 has been incorporated by reference in § 92a.85.

40 CFR Part 129 – *Toxic Pollutant Effluent Standards*.
Standards relating to toxic pollutant effluents are set forth in Chapters 93 and 96 as well as in the Statement of Policy relating to Water Quality Toxics Management Strategy in Chapter 16. The approach to addressing these standards in Chapter 92a is the same as that in existing Chapter 92 which was reviewed and approved by EPA in its review of the 2000 amendments to Chapter 92.

40 CFR Part 132 – *Water Quality Guidance for the Great Lakes System*
Accepted. 40 CFR Part 132 has been incorporated by reference in § 92a.3 (b).

POTW PERMITS NOT RECORDED

71. Comment

The Department does not enforce the requirement in Section 202 of the Clean Streams Law that any permit to discharge treated wastewater from a POTW be recorded in the county office of the recorder of deeds. Failure to comply with the statute may put municipalities at risk, and the regulations should serve to remind permittees of their legal obligations by including a reminder of this statutory requirement. (9)

Department Response

The Department has exercised its enforcement discretion with respect to this provision of the Clean Streams Law.

COMMENTS RELATED TO SPECIFIC REGULATORY SECTIONS

92a.2 PURPOSE AND SCOPE

72. Comment

The language here states that the provisions of this Chapter implement NPDES. This could give the impression that all of the Commonwealth's NPDES regulations are in Chapter 92a. It is understood that part of the NPDES program is implemented by other parts of 25 PA Code such as Chapter 102. We would suggest adding a reference here to other Chapters that include NPDES implementation. (25)

Department Response

The Department disagrees. As the commenter notes, it is understood that the NPDES program is implemented by other parts of Title 25 of the Pennsylvania Code. Where appropriate, the final rule includes cross-references to other Chapters of Title 25, but adding the language as suggested by the commenter could limit its applicability to any future changes to Title 25 which might affect the scope of these regulations. Note that § 92a.11 identifies other chapters in Title 25 which currently have requirements that could pertain to the NPDES program, and it is § 92a.11 that is intended to address the issue that the commentator identifies.

92a.2 DEFINITIONS

73. Comment

CAFO – Federal regulations define a Medium CAFO in 40 CFR 122.23(b)(6). The definition of a CAFO in 40 CFR 122.23(b)(2) includes Medium. If all Medium CAFOs defined in 122.23(b)(6) would not be captured by CAFOs with greater than 300 AEUs, then the Chapter 92a CAFO definition should also incorporate 122.23(b)(6). (25)

Department Response

The Board has not proposed any substantive changes to the existing provisions in Chapter 92 relating to CAFO discharges. Currently, Department staff and EPA Region III staff are actively engaged in discussions regarding the components of the Commonwealth's CAFO program. The definition of medium CAFOs, as well as other issues, are a part of this discussion. If appropriate, all necessary revisions to the CAFO program will be included in comprehensive regulatory changes to the CAFO program. CAFO program changes would require additional review, through the Agricultural Advisory Board and other mechanisms, which were not engaged in this current revision to Chapter 92a to the extent required to amend the existing, EPA-approved CAFO program in this Commonwealth.

74. Comment

CAO – should "and" be inserted before "in Chapter 83"? (25)

Department Response

The definition has been revised to clarify the issue.

75. Comment

Daily Discharge – Suggest that this definition at subparagraph (ii) be modified to reflect the fact that averaging of pH values requires a log conversion. pH values themselves cannot be averaged. (5) (9) (22)

Department Response

This definition is contained in existing § 92.1, and no change has been proposed. Averaging of pH values does require a log conversion, but this definition does not preclude the use of

log conversions to calculate an average. In all cases, the Department would reasonably expect that the mathematically correct procedure would be applied, which is not necessarily the sum of all measurements divided by the number of observations.

76. Comment

Expanding facility or activity – This definition is far too broad, and could have unintended impacts regarding hydraulic re-rating of facilities to comply with Chapter 94, *Municipal Wasteload Management*. Suggest that this definition be modified to reflect the fact that normal increases in flow or loading, as a result of planned and previously approved sewage or industrial loadings, would not cause a facility to be classified as an expanding facility. (5) (9) (11) (16) (22) (27) (32) (34)

Department Response

This definition has been deleted from the final regulation because the term is not used.

77. Comment

Immediate – Four hours may be too short a time period for staff to report spills to the Department, for instance, when facility staff are shorthanded on weekends. The staff should remain focused on responding to and terminating any spill or other release to the environment instead of recordkeeping and reporting. This time limit should be 8 hours instead, or otherwise reconsidered and incorporated into § 92a.41 directly to avoid the misuse of the term elsewhere. (5) (9) (11) (16) (27)

Department Response

The comment is accepted to the extent that the applicable requirements have been incorporated into § 92a.41(b) and the definition has been deleted. The 4-hour time limit has been retained. Eight hours is a full work shift, and cannot reasonably be advanced as representative of immediate notification, even under the most adverse conditions. The 4-hour time limit is advanced with full consideration of likely distractions, and the possible need for information gathering and immediate remedial actions. A longer time period allowance would needlessly delay a comprehensive response, and possibly endanger public health.

78. Comment

Immediate –It should be clear that the 4-hour time period begins at the point at which the owner becomes aware or reasonably should have known of the situation. (22) (30) (32) (34)

Department Response

This definition has been deleted from the proposed final regulation because the applicable requirements have been incorporated into § 92a.41(b). However, the comment has been accepted and has been incorporated into § 92a.41(b).

79. Comment

Immediate – In our review of the regulation, we found the term "immediate" used only in Subsection 92a.41(b). Therefore, we recommend incorporating this time limitation into that section rather than defining "immediate" in Section 92a.2. In addition, the EQB should explain how the time limit is reasonable. (42)

Department Response

The comment is accepted to the extent that the applicable requirements have been incorporated into § 92a.41(b) and the definition has been deleted. The 4-hour time limit

is advanced to allow time for facility personnel to gather any needed information, and if practicable to take immediate actions that may mitigate the problem at the source. Conversely, a longer time period allowance would needlessly delay a comprehensive response, and possibly endanger public health.

80. Comment

MS4—Municipal Separate Storm Sewer System – There is no definition here – only a repeat of "A municipal separate storm sewer system". Suggest referencing the MS4 definition in 40 CFR 122.26(b)(18).

Department Response

Accepted. The definition of MS4 has been consolidated under this acronym.

81. Comment

Minor Amendment – The term omits one of the provisions of the EPA regulation (40 CFR § 122.63), which should be included. This is: to change ownership or operational control when no other change is necessary and a written agreement containing the date for the transfer of responsibility is provided. (See § 122.63(d).) If this provision is excluded, then otherwise minor changes (such as the change in operating responsibility from a municipality to an authority) would require the entire major permit amendment process to be followed, unnecessarily increasing costs for both the permittee and the Department. This restrictive definition conflicts with proposed § 92a.73, incorporating the EPA regulations for minor permit modification. (5) (9) (25)

Department Response

Accepted. The provision to process a change in ownership or operational control of a facility as a minor amendment has been reinstated.

82. Comment

Minor Amendment – With regards to changing an interim compliance date by no more to 120 days, the definition should specify that this could be considered a minor amendment so long as the ultimate/final compliance date does not change. [See 40 CFR 122.63(c)] (25)

Department Response

This is not required because 40 CFR 122.63 is incorporated by reference, such that a proposed change to the final compliance date may not be processed as a minor amendment.

83. Comment

Minor Amendment – This is not a definition of a minor amendment; it is simply a short, specific list of items that would be considered minor changes to a permit. Further, the list of items constituting a minor amendment does not include everything that could possibly be a minor amendment item and it does not allow for professional judgment on the part of the permit writer. (Revised language is suggested)

The IRRC took note of this comment, and recommended that the EQB review whether this definition is appropriate. (33) (42)

Department Response

As per 40 CFR § 122.63, only certain minor changes to an existing permit may qualify as a minor amendment. There is no allowance for professional judgment on the part of the permit writer or anyone else. The list contained in the definition of "minor amendment" essentially replicates this list, so the definition is fully appropriate.

84. Comment

Minor Discharge – This is no longer included in the definitions, but is still mentioned in 92a.61(d). This term should be defined. (25)

Department Response

"Minor discharge" has been changed to "minor facility," an accurate and defined term, in 92a.61(d), such that no new definition of "minor discharge" is required.

85. Comment

NPDES and NPDES Permit – An NPDES permit is not issued by DEP "to implement the requirements of 40 CFR parts 122–124" as is stated in the definition of NPDES permit; it is issued pursuant to the state Clean Streams Law. This is the reason that the federal regulations are incorporated by reference; the Commonwealth has no authority to enforce federal regulations. The Commonwealth's program is accepted as equivalent to one issued by EPA under the Federal Act pursuant to the provisions of section 402(b) and (c) of that statute. This problem should be corrected. (5) (9)

Department Response

NPDES permits are issued to implement the requirements of 40 CFR 122-124, and also to satisfy the requirements of the Commonwealth's Clean Streams Law. Other states (e.g. Ohio) refer to their discharge permits as NPDES permits. These definitions are appropriate as is.

86. Comment

NPDES form – This definition should include "a draft permit." (20)

Department Response

A draft permit is an NPDES permit which is an NPDES form. There is no discernible advantage to adding the term to the definition.

87. Comment

New source – This definition should include subparagraph (b) of the Federal definition at 40 CFR 122.2, or explain why it is omitted. (20) (42)

Department Response

Subparagraph (b) of the Federal definition at 40 CFR 122.2 does not appear to be useful, as it defines a highly specific situation that is unlikely to apply. It is unclear when you would start to apply the 120-day time period, and how you would decide whether to apply the standard since you cannot see into the future to see if and when it would be promulgated. Also, it is not practical to promulgate a standard that has been proposed within the previous 120 days, as the rulemaking process takes longer than that even under optimum conditions.

88. Comment

New source – Since an activity that results in a discharge of pollution might not involve any construction, construction should not be the sole triggering event, and the Board should revise the definition to capture such activities (language is suggested). (20)

Department Response

One major goal of the proposed rulemaking is to standardize definitions and terminology between Chapter 92a and the equivalent terms in the companion Federal regulation at 40 CFR Part 122. Although there may be merit to the comment, the Board chooses to maintain consistency with the Federal terminology in this case.

89. Comment

POTW – The provision at subparagraph (iii) should be clarified to ensure that the conveyance facilities must also be owned by a municipality. The easiest way to do this is to add "and is owned by a municipality" at the end of the sentence. Otherwise, the subparagraph could be interpreted to mean that private sewers or sewage hauling vehicles are part of the POTW. (5) (9) (22)

Department Response

As per subparagraph (i), the treatment works must be publicly owned, so there should be no possible confusion. This definition is based on the Federal definition at 40 CFR 403.3, and the Board chooses to maintain consistency with the Federal terminology in this case.

90. Comment

Person – This definition should be modified to delete the words "of this Commonwealth" 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 Pennsylvania surface waters (an example of where this has occurred in the past is provided). (20)

Department Response

The definition is identical to the existing definition of "person" in Section 92.1 which was reviewed and approved by EPA following the 2000 amendments to Chapter 92. No change to this definition has been proposed. The Department is not concerned that a potential permittee may advance the argument that they do not meet the definition of "person" based on their state of residence, or lack thereof.

91. Comment

Pollutant – This definition is different than the definition in 40 CFR 122.2. According to the provision in 92a.3.(b)(1), the State definition will take precedence if there are differences. PADEP needs to document that the definition in Chapter 92a would cover all pollutants as defined in 122.2. (25)

Department Response

The definition is identical to the definition of "pollutant" in existing Section 92.1 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. No change to this definition has been proposed.

92. Comment

Schedule of compliance – The phrase "in an NPDES permit" must be added after "schedule of remedial measures" to be consistent with Federal law and the proposed 92a.51. See this definition in 40 CFR 122.2. (20) (42)

Department Response

Except for the correction of two minor typographical errors, the definition is identical to the definition of "schedule of compliance" in existing Section 92.1, which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. Section 92a.51 clearly states that a schedule of compliance is to be included in a permit.

93. Comment

Significant biological treatment – The usefulness and consequences of this definition are not apparent. (11) (16) (27)

Department Response

This definition has been added because the term in used in 92a.47(a). Further discussion of the basis and usefulness of the term is provided in the response to comment 37.

94. Comment
Stormwater discharge associated with industrial activity – The reference to 40 CFR 122.26(b)(14) would also include 122.26(b)(14)(x) which also is covered under the 92a.2 definition for *Stormwater discharge associated with construction activity* in paragraph (ii). Perhaps the reference to 122.26(b)(14) in this definition of industrial stormwater should explicitly exclude subsection (x), since § 92a.2 includes a separate definition for construction stormwater discharges. (25)
Department Response
Accepted.

95. Comment
Surface waters – This definition must match the breadth of the definition of "Waters of the Commonwealth" in the Clean Streams Law. The definition should include "any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs…", etc. (20)
Department Response
The definition is identical to the definition of "surface waters" in existing Section 92.1 which was reviewed and approved by EPA in its review of the 2000 amendments to Chapter 92. No change in the definition has been proposed.

96. Comment
Surface waters – This definition must match the definition of "Waters of the United States" in Federal regulations, in that the exclusion for wastewater applies only to manmade bodies of water. Add the following sentence at the end of the definition: "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." (25)
Department Response
See the response to the previous comment.

97. Comment
TMDL –You should either add definitions for wasteload allocation (WLA) and load allocation (LA), or just refer to Chapter 96. (11) (16) (27)
Department Response
Accepted.

98. Comment
Treatment Works – It appears that the definition is intended to include purely internal water recycle/reuse facilities that do not discharge to surface waters. Is that right? If not, why is the term defined this way? (9)
Department Response
This definition is as per Section 212 of the Federal Clean Water Act, and is used consistent with the overall goal of using Federal requirements and definitions where possible. Chapter 92a regulates only facilities or activities that require an NPDES permit, and there is no intent expressed or implied to regulate new types of facilities under Chapter 92a.

99. Comment

Treatment Works – This is a common term, but it is unclear why such a detailed and qualified definition is appropriate. We suggest deleting it or removing much of the qualifying language. (Specific revisions are suggested.) In addition, the phrase "used for ultimate disposal of residues resulting from the treatment" could be interpreted to include landfills, abandoned mines, farm fields, and the sale of commercial product. Is it the Department's intent to include such activities? (11) (16) (27)

Department Response

This definition is as per Section 212 of the Federal Clean Water Act, and is used consistent with the overall goal of using Federal requirements and definitions where possible. Chapter 92a regulates only facilities or activities that require an NPDES permit, and there is no intent expressed or implied to regulate new types of facilities under Chapter 92a.

100. Comment

You need a definition for "intersected perennial stream." (9)

Department Response

This term has been deleted from the final regulation and so no definition is needed.

92a.3 INCORPORATION OF FEDERAL REGULATIONS BY REFERENCE

101. Comment

Subsections 92a.3(a) and (c) should be revised to eliminate the ambiguity they create over which regulatory provisions govern.

The IRRC took note of this comment, and recommends that the EQB explain the need for the phrases and how they may be interpreted.(20)

Department Response

The Department does not agree that there is any ambiguity with respect to the subsections. The language of subsection 92a.3(a) and 92a.3(c) is almost identical to that of existing Section 92.2(a) which provides, in relevant part, that " . . . the Federal NPDES regulations in subsection (b), including all appendices, future amendments and supplements thereto, are incorporated by reference to the extent that these provisions are applicable and not contrary to Pennsylvania law. In the event of any conflict among Federal and Pennsylvania regulatory provisions, the provision expressly set out in this chapter shall be utilized unless the Federal provision is more stringent." The Department has received no indications from the regulated community that there is any ambiguity with respect to this provision.

102. Comment

Proposed §§ 92a.3(a) and 92a.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 that the Department, in adopting regulations, consider certain delineated factors. Such action would not occur if the Department delegates its future rulemaking authority to EPA. To our knowledge, EPA has not approved Pennsylvania to incorporate future federal regulations by reference. (30) (32) (34)

Department Response

Regulations implementing the NPDES requirements are promulgated by the Environmental Quality Board under the authority of Section 510 of the Administrative Code as well as the Clean Streams Law. Section 5(a) of the Clean Streams Law is not a section authorizing the promulgation of regulations – rather it is a section outlining factors which should be considered, as applicable.

The Board and the Department have incorporated various Federal regulations by reference on numerous occasions. Incorporation by reference, including future amendment so regulations so incorporated, is authorized by the Statutory Construction Act (the Act), (1 Pa.C.S. §§ 1501 – 1991). Section 1501(a)(1)(ii) of the Act provides that it shall apply to, *inter alia,* "[e]very document codified in the *Pennsylvania Bulletin* except legislative, judicial and home rule charter documents." Section 1937 of the Act provides that:

> A reference to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute to which such reference is made.

With respect to a comment regarding delegation of "future rulemaking authority to EPA," the public will always have the opportunity to provide comments to EPA on any proposed regulations. More importantly, the Federal regulations establish minimum requirements which the Department must follow in its administration of the NPDES program.

Finally, EPA has in fact approved the incorporation of future regulations by reference. Existing section 92.2(a) specifically provides that "the Federal regulations . . . including all Appendices, future amendments and supplements thereto, are incorporated by reference . . . ." EPA approved this regulation during its review of the 2000 amendments to Chapter 92.

It should be noted that language in the proposal providing for the automatic incorporation of future amendments to the regulations incorporated in this rulemaking was deleted from the final rule, but not in response to these comments. Rather, the language was deleted to ensure consistency with other regulations of the Department which provide for the incorporation of federal regulations to avoid any implication that the inclusion of references concerning incorporation of future amendments to federal regulations in one regulation and the absence of such language in another regulation precludes the incorporation of future amendments to those regulations where there is no such reference.

103. Comment

Subsections (a) and (b) incorporate by reference the federal NPDES regulations, "including all appendices, future amendments and supplements thereto...." While the Department of Environmental Protection (Department) may impose requirements already mandated by the federal government, the incorporation by reference of future, and consequently unknown, requirements may be an improper delegation of the agency's statutory authority. Further, new obligations may be imposed without members of the regulated community and other parties having the opportunity for public comment as provided for in the Commonwealth Documents Law and the Regulatory Review Act. Additionally, section 1.6 of the PA Code and Bulletin *Style Manual* provides:

> *A rule adopting a code, standard or regulation by reference does not include subsequent amendments, rescissions or editions. If an*

> *agency wishes to incorporate subsequent amendments, rescissions or editions, the agency* ***must explicitly*** *do so by amendment of its existing rules or by rescinding its existing rules and promulgating new rules. [Emphasis added.]*

Therefore, the Department should delete the phrase "future amendments and supplements thereto" in reference to incorporating the federal regulations. (42)

Department Response

The Department disagrees. See the response to the previous comment.

104. Comment

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. (30) (32) (34)

Department Response

40 CFR 123.25(c) exists and is the correct reference.

92a.4 EXCLUSIONS

105. Comment

It appears that deleting the exclusions in existing § 92.4(a)(4) could have an impact on certain facilities, but no information is provided regarding the impact on those facilities, or the overall practical effect of this change. This should be addressed in the final rulemaking proposal. (11) (16) (27)

Department Response

This exception was deleted consistent with the overall goal of reverting to Federal requirements and terminology wherever possible. There is no apparent basis for this exception, nor any apparent need, as the activity does not describe a discharge to surface water. The commentator has not identified any specific concern, so there is no issue that remains to be addressed in the final rulemaking.

92a.5 PROHIBITONS

106. Comment

Why delete the phrase allowing for exceptions, as provided for in Federal regulations, for the rule that sanitary sewer overflows may not be permitted? It is in the existing regulation, and nothing has changed. (11) (16) (27) (33)

Department Response

This provision has been confusing, because Federal regulations do not provide for SSOs (sanitary sewer overflows), and never have made such provision.

107. Comment

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. 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. (30) (32) (34)

Department Response

This provision has been confusing, because Federal regulations do not provide for SSOs, and never have made such provision. An SSO is an inherently unacceptable condition involving the overflow of raw, untreated or partially treated sewage to rivers and streams. An SSO presents an immediate and unacceptable threat to public health. The fact that an SSO is an unacceptable condition, and may not be provided for in a permit, is not the same as pretending that they never occur. Under certain extraordinary conditions, even a well designed and operated treatment system may be overwhelmed, resulting in an SSO. Properly designed treatment systems minimize the threat of an SSO, but generally cannot eliminate it entirely. The Department uses its enforcement discretion when evaluating whether an SSO has resulted from preventable conditions in the design or operation of a treatment system, or unavoidable conditions that the permittee has no control over.

108. Comment

In the proposed language for 92a.5(b), the Department states, "A permit may not be issued, modified, or reissued for a sanitary sewer overflow." This language is a distinct change from current PA DEP regulation 92.73(8), which states that a permit will not be issued, modified, or reissued "for a sanitary sewer overflow, except as provided for in the Federal regulations." The Chamber is concerned that this change in language in the proposed rule, specifically the deletion of "as provided for in the Federal regulations" ignores or disallows the language as contained in 40 CFR 122.41(m)(4)(i)(A)-(C), which provides exception to a treatment system bypass if a bypass is (a) unavoidable to prevent severe property damage or personal injury, (b) there were no feasible alternatives, and (c) the NPDES authority was notified. The Chamber is also concerned that the proposed language of 92a.5(b) also disallows any EPA regulation or policy on bypass or blending, such as EPA's proposed November 2003 wet weather blending policy. The Chamber requests that the proposed 92a.5 language be modified to specifically allow these Federal regulations and policies.

The IRRC took note of this comment, as well as related comments, and recommends that the EQB explain why the phrase "except as provided in federal regulations" is no longer needed. (33) (42)

Department Response

See the response to the previous comment: Federal regulations do not provide for SSOs, and never have made such provision. The Federal provisions that the commentator refers to (at 40 CFR 122.41(m)(4)(i)(A)-(C)) provide for bypassing of certain parts of a treatment system, such as a treatment reactor, under certain conditions. This is a reasonable permit condition that does not in itself present any threat to public health, and one that the Department incorporates into NPDES permits as per § 92a.41(a)(13). This will not change. The Federal bypass provision at 122.41 will continue to be provided for in essentially all permits for discharges of treated sewage. While it is acceptable, under the appropriate conditions, to bypass a treatment reactor, it is never acceptable to discharge untreated or partially treated sewage to surface waters. It is primarily because of confusion on this issue, and the distinction between bypassing treatment systems and discharging raw sewage, that the Board clarifies the regulatory requirements.

There is no “blending” policy from EPA or the Department. EPA’s 2003 “blending” proposal has already been supplanted by the proposed “Peak Wet Weather” policy, which is substantially different from the 2003 “blending” proposal. Should such a policy be issued by EPA, the Department would evaluate the policy and take appropriate actions to revise regulations and guidance if appropriate. The Board cannot reasonably provide for any such policy before it has been evaluated to ensure that it is appropriate and conforms to the requirements of the Clean Streams Law.

92a.7 DURATION OF PERMITS AND CONTINUATION OF EXPIRING PERMITS

109. Comment

This section should include language similar to 40 CFR 122.46(b) that states a permit cannot be extended by modification beyond the maximum duration (5 years). Also, an expired permit cannot be amended or modified, and this should be made clear in 92a.7. (25)

Department Response

Section 92a.7 in its present form accomplishes both of these requirements, as no permit term may exceed 5 years under any conditions, and any expired permit must be reissued. There is no provision for any other course of action. Except for a minor clarification, the language is identical to that of existing section 92.9 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

92a.8 CONFIDENTIALITY OF INFORMATION

110. Comment

The section is inconsistent with both the counterpart provision of the Federal NPDES regulations and Section 607 of the Clean Streams Law. In order to meet Federal requirements, revise § 92a.8(a) and (b) to provide that the name and address of any permit applicant or permittee, permit applications and permits, and any information required by any NPDES application form, may not be claimed as protected as confidential information. Based on the only narrow exclusion provided for in Section 607 of the Clean Streams Law, which provides that only information related to the chemical and physical analysis of coal may be protected as confidential, the Board must delete the last clause in the second sentence of § 92a.8(b).

The IRRC took note of this comment and recommends that the EQB provide an explanation and clarification in the regulation regarding what state or federal law, in addition to the Clean Streams Law, will be considered in regard to confidentiality of information. (20) (42)

Department Response

These subsections were drafted so as to address conflicting state and federal requirements relating to the treatment of confidential information. The Department is not authorized to make public information that was submitted to EPA which the EPA Office of General Counsel has determined to be confidential. Sections 92a.8(b) and 92a.8(c) are almost identical to the language of existing sections 92.63(b) and 92.63(c), which were reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

111. Comment

This section should also reference 40 CFR 122.7(c) which states, “Information required by NPDES application forms … may not be claimed confidential.” (25)

Department Response

Sections 92a.8(b) and 92a.8(c) are almost identical to the language of existing sections 92.63(b) and 92.63(c) which were reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. See the response to the previous comment.

112. Comment

It appears that if the Administrator (EPA) decides that given information is not eligible for protection, it will be made available to the public immediately. FirstEnergy asks that a permittee be given the right to appeal. (37)

Department Response

Appeals of the determinations of the Administrator are to be in accordance with Federal law. The Board does not have the authority to prescribe procedures for appeals of actions of the Administrator.

113. Comment

Subsections (a) and (b) appear to be inconsistent regarding what information can be considered confidential. For example, a request for confidentiality of a permit or permit application must be denied under Subsection (a), but it appears that under Subsection (b) it may be possible for the Department to grant confidentiality for that same information. The EQB should reconcile these subsections. (42)

Department Response

See the response to comment 110.

92a.10 POLLUTION PREVENTION

114. Comment

The proposed regulations would give process changes and materials substitution a higher priority than reuse, recycling, treatment or disposal in the hierarchy of pollution prevention to be encouraged by PADEP. PADEP should not dictate the implementation of process changes or materials substitutions for a mining operation, in lieu of other pollution prevention techniques, because such changes may lead to fundamental process changes which may be impractical. Rather, the regulation should be restored to its existing form. In reviewing EPA's 2010-2014 Pollution Prevention Program (P2) Strategic Plan, the term "encourage" is used throughout the document. At the very least, the proposed regulations should be revised to indicate that PADEP may only "encourage," but not mandate, process changes and materials substitution. (26)

Department Response

Section 92a.10 cites the Pollution Prevention hierarchy, which has been established based on the consensus of the critical community and is not reasonably debatable. It is appropriate to consider Pollution Prevention measures in this order in all applications. This does not mean that action must be taken in this order in all applications. The only revision between existing § 92.2b and proposed § 92a.10 is the addition of Pollution Prevention (P2) source reduction measures (process change and materials substitution) to the top of the hierarchy, where they belong. The commentator's concern appears to be unfounded, since § 92a.10 is unchanged from § 92.2b in that it provides only for the Department to encourage P2 measures, exactly as proposed by the commentator.

115. Comment

The Preamble states that:

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state

environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance.

The first sentence in this section represents factual information supported by statute, the remaining language in the section is untrue, offensive to industry, and appears to outline a perceived management license the Department does not possess. Accordingly, ARIPPA suggests this language be struck. (40)

Department Response

The Department disagrees. The language that the commentator takes issue with is established Department policy. The Department is committed to integrate P2 into its everyday practices, and to encourage and assist permittees in implementing P2 practices, wherever possible. Industries and facilities that manage P2 well have reaped the benefits.

92a.11 OTHER CHAPTERS APPLICABLE

116. Comment

Mining operations in PA are currently subject to 25 Pa. Code Chapters 87-89. PCA interprets the Proposed Rulemaking as an attempt to include the effluent limitations from the mining program into Chapter 92a, such that the more stringent limit derived using either the general NPDES permit program regulations in Chapter 92a or Chapters 78-79 must be applied. If Chapter 92a is adopted as written, PADEP could impose more stringent technology-based treatment requirements into mining permits to override the limits currently in Chapters 87-89, if such technology-based limits were developed using best professional judgment or through another means. It also opens the door to the direct imposition of more stringent water-quality-based limits in mining permits. The effluent limitations from the mining program in Chapters 87-89 were set at sufficient levels to protect receiving waters. The Pennsylvania Coal Association opposes the inclusion of Section 92a.11 in the final regulations. (26)

Department Response

Mining operations and activities in this Commonwealth, to they extent that they involve facilities or activities that require NPDES permits, have always been fully subject to the requirements of Chapter 92 (and now, Chapter 92a). Chapter 92 has been, and Chapter 92a will be, the approved NPDES program -- Chapters 87-89 draw their authority to regulate and issue NPDES permits for mining activities through the Commonwealth's NPDES regulations. Applicable technology-based or water quality-based effluent limits will always be the more stringent of those contained in any applicable chapter in Title 25, including Chapter 92a. However, as a matter of policy and organization, treatment requirements specific to mining facilities or activities are contained in Chapters 87-89, because that is the purpose of those chapters. Section 92a.11 merely lists and clarifies the relationship between the various chapters, and does not add any new or more stringent requirements. This clarification is timely and appropriate.

92a.12 TREATMENT REQUIREMENTS

117. Comment

We support the retention of the provision at § 92a.12(c), which is the Department's affirmation of its intent to protect threatened and endangered species and critical habitat. (10)

Department Response

The Board appreciates the comment.

118. Comment

Regarding when dischargers may be required to meet more stringent effluent limits to accommodate a new drinking water withdrawal, by deleting reference to the specific pollutants (total dissolved solids, nitrite-nitrate nitrogen, fluoride) in existing § 92.8a(c), the proposed provision at § 92a.12 (f) could now be applied to any pollutant. The existing list of specific parameters should be retained, and/or this is a significant change and the consequences are unclear. (11) (16) (18) (27)

Department Response

The specific list of pollutants (total dissolved solids, nitrite-nitrate nitrogen, fluoride) has been deleted since it never has been true that effluent limits for these pollutants are the only ones that can be affected by the establishment of a new PWS (potable water supply). Effluent limits for these 4 pollutants (in addition to sulfate and chloride) are the most likely ones to be affected by the establishment of a new PWS, but the establishment of a new PWS could possibly affect upstream effluent limits for any pollutant controlled under a THH (threshold human health) water quality criterion. This issue is clarified in § 92a.12 (f), but it is not expected to not have a practical effect. It is uncommon for a new PWS to affect upstream permit conditions in any case. The Department generally assures that no such measures are required, because effluent limits are designed to achieve the PWS protected use.

119. Comment

Subsection 92a.12(f) should be clarified regarding a point of projected withdrawal for a new potable water supply. The clarification should include applicability, distance from the discharge to the intake, cost-benefit analysis and implementation timing. (13)

Department Response

It is unclear what clarification that the commentator desires, but the comment appears to reflect a concern that a new PWS may have an inappropriate and/or immediate effect on upstream effluent limits. PWS is a protected use for surface waters in Chapter 93, meaning that it would have priority as compared to the availability of surface waters for assimilation of pollutants, which is not a protected use. No cost/benefit analysis would be applicable. The process involved in establishing a new proposed PWS would allow sufficient time to coordinate the two activities (permitting and constructing the new PWS, and adjusting upstream permit limits, if necessary).

120. Comment

How would § 92a.12 (f) be applied to an existing PennDOT roadway located adjacent to a new potable water supply? Would PennDOT or the water supplier be responsible for constructing post-construction BMPs if deemed necessary? (18)

Department Response

The Department should not speculate regarding theoretical scenarios, but the PWS would not be responsible for any measures required to render the surface water fit as a source of raw fresh water. The Department generally assures that no such measures are required, because effluent limits are designed to achieve the PWS protected use. Under certain conditions involving toxic pollutants, some adjustments to upstream permit limits may be required. It is

not expected that any such adjustments involving conventional pollutants such as suspended solids would be required.

121. Comment

References to Chapters 16, 77, 88, 90, 92a, and 102 have been added to § 92a.12(d) addressing new or changed water quality standards and treatment requirements. PennDOT is concerned with including a reference to Chapter 102 in this subsection. This could open the door to applying certain standards, i.e. post-construction controls, to PennDOT's existing roadways. This could be extremely costly. Federal regulations at 40 CFR 122.34(b)(5)(i) do not authorize post-construction controls absent a qualifying project, which is a new development or redevelopment project. The reference to Chapter 102 should be deleted.

The IRRC took note of this comment, and recommends that the EQB explain how it will apply this provision and why it is reasonable to include Chapter 102 in Subsection (d). (18) (42)

Department Response

The reference to Chapter 102 in this section is appropriate for purposes of identifying the applicable water quality standards and treatment requirements for discharges associated with construction activities, and identifies the existing relationship between Chapter 92a and other chapters that may contain applicable NPDES-based treatment requirements. Further, by including an express reference to Chapter 102 in this and other sections of 92a, the definition of "road maintenance activities" in Chapter 102 and the associated permit exemptions for example, are expressly recognized in Chapter 92a. The Department believes this provides clarity to the regulated community, including PennDOT.

Chapter 92 has been, and Chapter 92a will be, the approved NPDES program and Chapter 102 draws its authority to regulate and issue NPDES permits from the Commonwealth's NPDES regulations. To the extent that NPDES-based requirements and exemptions are contained in Chapter 102, the reference to Chapter 102 again provides clarity and signals that these Chapters should be read and applied together. The reference in 92a.12(d) to Chapter 102 does not convert the additional, non-NPDES specific requirements to water quality standards and treatment requirements if that is not their function in Chapter 102. The Department does not agree that the reference to Chapter 102 should be deleted and further cautions that the removal of this reference could prove problematic for PennDOT and others in the regulated community, as there would be no express statement in regulation that the standards in Chapter 102 for NPDES regulated stormwater discharges associated with construction activities may be met by following the requirements of Chapter 102. This revision to Chapter 92a does not signal any shift in the way the Department will continue to implement the requirements of the NPDES program.

122. Comment

Sections 92a.12(d)-(f) appear to give PADEP the authority to effectively revise the mining regulations in Chapters 87-89 by adopting new treatment requirements under Chapter 92a. This proposed regulation appears to unnecessarily broaden the authority of PADEP under the mining program and to eliminate the necessity for PADEP to reopen a permit to insert

updated requirements. In addition, the 180-day limit is simply not enough time as compliance may take much longer. (26)

Department Response

Should new or revised treatment requirements that apply to mining facilities or activities be promulgated in Chapter 92a, these treatment requirements would be applicable to mining facilities or activities. There is no possible broadening of authority involved, since the Department already has the required authority. However, as a matter of policy and organization, treatment requirements specific to mining facilities or activities are contained in Chapters 87-89, because that is the purpose of those chapters. Any new treatment requirements would require a reissued or amended permit that would be subject to public notice. The 180-day time period does not require compliance within 180 days, but only that the permittee will propose a schedule of compliance within 180 days. All of these requirements are currently in-force based on existing Chapter 92 requirements, and § 92a.12 is not substantively different from existing § 92.8a.

123. Comment

In § 92a.12(c), the identification of threatened or endangered species or critical habitat does not require any public notice. FirstEnergy believes that the imposition of limitations on discharges to these waters should be restricted to times of permit applications or renewals. Imposition of discharge limits to protect endangered species without adequate warning may require costly equipment and process modifications without the benefit of a cost benefit analysis. (37)

Department Response

Section 92a.12(c) is not substantively different from existing 92.2a(c), so the Board has not proposed any change to the existing requirement, and no new or more stringent requirements will apply. Section 92a.12(c) does not create any shortcut to the imposition of new treatment requirements or effluent limitations, as any amended or reissued permit would still require public notice. If a permittee cannot comply with the new treatment requirements or effluent limitations immediately, the normal procedure to establish a schedule of compliance will apply. However, there is no basis for the contention that the existing NPDES permit should be allowed to expire before needed actions can be implemented, and no cost benefit analysis would apply. There will always be adequate notice of new treatment requirements or effluent limitations, as the process employed to implement new requirements is well established.

92a.21 APPLICATION FOR A PERMIT

124. Comment

What is the justification for requiring four consecutive weeks of public notice for a permit application at § 92a.21(c)(4)? This is only required by statute for industrial waste permits. (5) (9)

Department Response

The provision at § 92a.21(c)(4) does not require four consecutive weeks of public notice for all NPDES permit applications. It requires that the applicant present proof that the four consecutive weeks of public notice was performed only if four consecutive weeks of public notice is required by the application. The application will specify this requirement, if applicable, which may be based on a statutory requirement. The requirement, if applicable, would be designed to achieve reasonable assurance that the public is aware of, and has an opportunity to participate in, any decision related to the issuance or reissuance of an NPDES permit.

125. Comment

Subsection 92a.21(a) provides that certain Federal regulations "are incorporated by reference, except as required by the Department." The phrase "except as required by the Department" is broad and infers the Department may unilaterally change the requirements of the federal regulation outside the regulatory review process. This would allow changes without notice and review by the public, regulated community, legislature or the Commission. We recommend deleting the phrase "except as required by the Department." (20) (42)

Department Response

Accepted. This phrase was intended to allow the Department to require additional information to support a permit application when appropriate, but this is provided for in subsection (d).

126. Comment

Paragraph (a) incorporates certain sections of Federal regulations, "except" as required by Department application. That could imply that an application requirement can override a regulatory requirement. The Department application can require additional information. Please revise the language accordingly. Paragraph (c)(5) requires the applicant to submit a topographic map, but does not include what is required to be contained on the map. See 40 CFR 122.21(f)(7) for topographic map requirements. (25)

Department Response

See the response to the previous comment. With respect to the topographic map requirement of subsection (c)(5), the Department believes that subsection (c)(5) satisfies the requirements of 40 CFR 122.21(f)(7) considering that permit application forms require the specific annotations and information listed in 40 CFR 122.21(f)(7), and more. The Department must have the legal authority to implement 122.21(f)(7), and it does have such legal authority as described at § 92a.21(d). The language of subsection (c)(5) is identical to that of existing § 92.21(b)(4), which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

127. Comment

Additional information that may be requested by the Department to support a permit application may require advance planning and budgeting. FirstEnergy requests confirmation that the same procedure of negotiating a reasonable compliance schedule for changes in water quality standards, effluent limitations, or other standards and treatment requirements be applicable to the category of additional information. (37)

Department Response

When the Department requests additional information to support a permit application, and that information is readily available, that information should be provided promptly. When the Department requests additional information to support a permit application, and that information involves studies that have not yet been performed, or data that has not yet been collected, sufficient time will be provided for the studies or data collection. If a long-term effort is required, the studies or data collection may be incorporated into the current permit, in order to support a subsequent reissuance of the permit. In this case, the normal public notice and participation process will apply.

92a.23 NOI FOR COVERAGE UNDER A GENERAL PERMIT

128. Comment

In Paragraph (c), MS4 dischargers should also be included in the list of dischargers that must have an NOI. [See 40 CFR 122.28(b)(2)(v)] (25)

Department Response

Accepted.

92a.24 PERMIT-BY-RULE FOR SRSTPs

129. Comment

A permit-by-rule cannot qualify as an NPDES permit, because it is not a final agency action that is subject to review and cannot satisfy all of the procedural requirements of 40 CFR Part 124. The permit-by-rule in this section must be replaced with a general permit, or requirement for an individual permit. Otherwise, the EQB should explain how these sections are consistent with the federal definition of "permit." (20) (42)

Department Response

This section has been deleted for the final rulemaking. However, section 92a.23(c) (relating to NOI for coverage under an NPDES general permit) and other sections have been revised to provide that some categories of discharges meeting certain requirements may be authorized without the submission of a Notice of Intent for coverage under a general permit in the same manner as that provided for under 40 CFR 122.28(b)(v).

130. Comment

NPDES permits have a 5 yr limitation [40 CFR 122.46(a)]. A permit-by-rule cannot obviate this requirement. The Department needs a record in support of the permit, and the regulatory process to promulgate this permit needs to follow the same public process as for individual or general permits, including a fact sheet for the draft permit. The decision not to require an NOI would have to meet the requirements of 40 CFR 122.28(b)(2)(v). (25)

Department Response

See the response to the previous comment.

92a.25 PERMIT-BY-RULE FOR APPLICATION OF PESTICIDES

131. Comment

A permit-by-rule cannot qualify as an NPDES permit, because it is not a final agency action that is subject to review and cannot satisfy all of the procedural requirements of 40 CFR Part 124. The permit-by-rule in this section must be replaced with a general permit, or requirement for an individual permit. (20)

Department Response

See the response to comment 129.

132. Comment

EPA is developing a general permit for application of pesticides "directly to waters of the United States," and "application to control pests that are present over waters, including near such waters", which are currently excluded under 40 CFR 122.3(h). EPA expects to issue a draft general permit for those pesticide discharges in May of this year. Under the court's mandate, these pesticide discharges will be subject to an NPDES requirement beginning in April 2011. The State's regulations should clarify that these particular discharges of pesticides will require a permit as of April 9, 2011. Until then, any permit issued by the Department would not be deemed to be a CWA permit. Once CWA coverage of these discharges goes into effect, if the Commonwealth pursues the use of a permit-by-rule for covering the regulated discharges, the same concerns as stated previously for 92a.24 apply. (25)

Department Response
See the response to comment 129. The approach that the Department takes with regard to authorizing the discharge of pesticides will depend on the form of the EPA general permit.

92a.26 NEW OR INCREASED DISCHARGES

133. Comment
There should be a time limit on the approval process described at § 92a.26(a) and (b). Otherwise, the permittee may have to wait for an indeterminate period of time. We suggest a time limit on the Department's timeframe for response. The permittee should be able to submit a new application upfront if it chooses. The IRRC noted that several commentators supported this comment. (5) (9) (22) (40) (42)
Department Response
The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. The permittee always has the option to submit a new permit application, and the Department will require this if appropriate. But it may not always be clear to the permittee whether a change in facility or wastestream is substantial enough to justify the full cost and effort of a new permit application. The purpose of this section is to provide a mechanism whereas a permittee can check with the Department as to whether a new application is required, and also to ensure that substantial changes to facilities or wastestreams that have not been considered by the Department in previous applications are evaluated before they are implemented. This section has been revised to address the concerns that have been identified, and all time period requirements have been eliminated. If a permittee has a concern regarding the Department's response time, the permittee has the option to submit a new application to invoke the formal permit amendment or reissuance process.

134. Comment
It should be clear that normal increases in flow and loading, those that do not require a physical modification of the facility, are not captured under this section. (9)
Department Response
Accepted. This section has been revised to address this concern.

135. Comment
This section should be amended to require a Pennsylvania Natural Diversity Inventory screening when new loadings are being considered for approval. If a potential conflict with threatened or endangered species is identified, coordination and consultation with the appropriate State or Federal natural resource agencies is required. (10)
Department Response
The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. A proposed change to a facility or wastestream that is substantial enough to affect the results of a Pennsylvania Natural Diversity Inventory screening would be substantial enough to require new effluent limits, which in turn would require a major amendment or reissuance of a permit. At that point, a Pennsylvania Natural Diversity Inventory screening would be triggered by the presence of the threatened or endangered species.

136. Comment

Dischargers should not be required to report situations that have no potential to exceed effluent limits, and it is not clear when the 60-day time period allowed for the report begins. The regulation should specifically state what action starts the 60-day time period. (11) (16) (27) (42)

Department Response

Accepted. This section has been revised to address this concern.

137. Comment

Does § 92a.26 (b) only apply to facilities or activities projects requiring a permit? PennDOT would want this interpretation. (18)

Department Response

Yes.

138. Comment

This section should be modified to include changes other than facility expansions or modifications, because other changes can result in new or increased discharges of pollutants. For example, an addition of a second or third work shift at a facility or a new chemical is used. Alternatively, the Board should at least provide definitions of "facility expansions" and "process modifications." The term "new discharge" should be defined to minimize the potential for confusion. The phrase "for which no effluent limitation has been issued" could be confusing, so we suggest it be reworded.

The IRRC took note of this comment and recommends that the EQB review subsection (a) to determine if other factors beyond facility expansions or modifications should be considered in determining whether the Department should be notified of increases of permitted pollutants. (20) (42)

Department Response

Accepted in large part. This section has been revised to include changes other than facility expansions or modifications. Any change to the facility or wastestream that has the potential to exceed permit limits, or involves a new discharge, or pollutants in type or quantity that have not previously been evaluated will first have to be evaluated by the Department. However, it is not clear what might be confusing about the phrase "for which no effluent limitation has been issued."

139. Comment

Subsection 92a.26(a) would allow the Department to determine if a new or revised permit is needed, and approve certain changes in writing without the issuance of a revised permit. One problem is that there are no criteria specified as to how the Department may make this determination. Another problem is that such a change can only be approved through a new or revised permit. Therefore, this subsection should be revised to require the submission of a permit application and issuance or revision of an NPDES permit, subject to the standards governing such actions in the proposed § 92a.38. (20)

Department Response

The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. The determination as to

whether a change is substantial enough to require an amended or reissued permit is inherently a site-specific determination, and it is well within the duties and discretion of the Department to determine if changes in the facility or wastestream will require an amended or reissued permit. If an amended or reissued permit is required, the normal requirements will apply as for any amended or reissued permit.

140. Comment

The proposed regulations do not clearly indicate how the Department plans to handle pollutants that exist in the permitted discharge which currently lack effluent limits, but are now identified again as a result of the proposed facility expansion or process change. If the Department requires a new application based on a new or increased wastestream, the proposed regulations do not clearly indicate whether this scenario will be considered a "NEW NPDES PERMIT APPLICATION" or a "REISSUANCE OF AN EXISTING PERMIT" as it relates to fees. (40)

Department Response

If the current permit is determined to be inadequate, any such permit action would by definition be either a major amendment to a permit or a reissued permit. Both actions are clearly identified in the fee tables.

141. Comment

The EQB should explain how it will review the notification after the increased discharge begins. If the notification can result in more stringent requirements, the EQB should explain how the owner of a facility can have a facility expansion or process modification reviewed for its implications prior to the investment so that the owner has the opportunity to explore alternatives. (42)

Department Response

This section has been revised to address this concern. The purpose of this section is not to provide an alternate pathway for approval of facility expansions or new or increased loads, but rather to provide a pathway to allow for minor changes that do not require an amended or reissued permit. The permittee may not implement any change in facility or wastestream without prior review or approval of the Department, unless the permittee is certain that the action will not violate permit conditions, or exceed any representations that the permittee has made to the Department in previous permit applications. Any major expansion or investment by the permittee generally will require an amended or reissued permit, such that the permittee will have adequate opportunity to evaluate the implications of the proposed major expansion or investment, and explore alternatives. This section is intended to clarify the issue of when changes in a facility or wastestream may require an amended or reissued permit, and does not describe any new or more stringent requirements than currently exist.

92a.28 APPLICATION FEES

142. Comment

It should be clear that the fees are based on annual average design flow, rather than some other design flow. (5) (9)

Department Response

Accepted.

143. Comment

Here and in § 92a.62, "mining activity" should be changed to "mining activity other then discharge of mine drainage" to clarify that discharges of treated mine wastewater are discharges of industrial waste that are subject to the fee schedule in subsection (c). Otherwise, you have a conflict with the definition of "industrial waste," which includes mine drainage. (20) (42)

Department Response

The term "mining activity" as applied in Chapter 92a, includes all surface and underground mining activities identified in Chapters 77 and 86, and is intended to encompass discharges of treated mine drainage. As the commentator points out, there is potential confusion based on the definition of "industrial waste," and "mining activity" has been moved to the industrial waste section in the fee tables to minimize this potential for confusion.

144. Comment

The proposed regulations do not clearly indicate whether "Mining activity" includes discharges associated with any coal or noncoal mining activity. ARIPPA would like the proposed regulations to clarify that "Mining activity" under individual NPDES Permits does not require any or, any additional, fee (there is no annual NPDES fee for mining activity). ARIPPA suggests that the reference to a major facility <250 MGD be modified to be >1 MGD or >250 MGD…this would make the criteria consistent with the definition of "*Major facility*" as proposed in the regulations. (40)

Department Response

Based on the definition of "mining activity," the term encompasses discharges associated with coal and noncoal mining activity. There is no applicable annual fee. The suggested change to the fee tables would not be correct in all instances, so it is not accepted.

92a.29 SEWAGE DISCHARGES

145. Comment

A new requirement for any discharge of treated sewage with a CSO (combined sewer overflow) is proposed at § 92a.29(b)(5). Such facilities would have to provide an update on progress made with implementation of their LTCP (Long-Term Control Plan). We suggest at least mentioning this in the final rulemaking. (11) (16) (27)

Department Response

The comment is noted. The need for an update on progress implementing the LTCP is implicit in the language of this section (renumbered as § 92a.27 in the final rule, see subsection (b)(5)). No change has been made to the language.

146. Comment

Paragraph (a) is exempt where aquatic communities are essentially excluded. There is no exemption of this type found in 40 CFR 122.21(j)(5). The Board should remove this exemption. (25)

Department Response

Accepted.

147. Comment

NPDES permits now require a weekly sample currently formerly biweekly and monthly obviously this proposal represents a doubling of sampling/analysis/ administration/ reporting with virtually no new benefits. Also current TSS maximum for any 'instantaneous' sample is 50 mg/L, not 45mg/L. POTW may be due to availability of water and restroom facilities to >45 people per day during outage periods. This designation is not in current NPDES permit,

but this '% removal' requirement is new. The regulations do not clearly indicate if it will be applicable to facilities with daily staffing <45 people, but 'outage' potential greater then same. (40)

Department Response

Accepted in part. The requirement for weekly effluent limits for BOD and TSS has been changed to apply to POTW facilities only. The percent removal requirements already apply only to POTW facilities, so it is not a concern for industrial facilities.

92a.34 STORMWATER DISCHARGES

148. Comment

We support the appropriate prohibition of the "no exposure" conditional permit exclusion for discharges of stormwater associated with industrial activity that discharge to High Quality or Exceptional Value Waters. (20)

Department Response

The Board appreciates the comment.

149. Comment

Recommend that this section also contain language for stormwater associated with industrial activities. See current Chapter 92 § 92.21a.(d). (25)

Department Response

Accepted.

150. Comment

We interpret this section to mean that stormwater associated with industrial or mining activities, which qualifies for "no exposure" status (i.e., there is no exposure of industrial or mining materials and activities to stormwater) would be regulated if the stormwater discharges to an Exceptional Value (EV) or High Quality (HQ) stream, but would not be regulated if the stormwater discharges to any other surface water. This section is overly stringent and should be deleted. If stormwater does not contact industrial activities or materials, there is no need to regulate it and nothing that can be done on the part of an operator to prevent pollution of the stormwater or the receiving stream. If stormwater does not contact industrial activities or materials, there is no need to regulate it. (26) (38)

Department Response

The commentator's interpretation is correct, but stormwater, even stormwater that has not been exposed to industrial activities or materials, has the potential to have degrading effects on HQ and EV streams. Stormwater that is allowed to runoff in quantities that exceed the natural flow and velocity conveyance capacity of the receiving stream will have degrading effects by scouring and destabilizing the natural channel. Excessive suspended solids in runoff can have degrading effects via sedimentation in the stream. It is not true that there is nothing that the permittee can do to prevent pollution of the stormwater or the receiving stream, as stormwater systems can be designed to minimize excess runoff and erosion, and to maintain the natural hydrograph of the receiving stream.

92a.36 COOLING WATER INTAKE STRUCTURES

151. Comment

The Chamber believes that until such time when EPA issues their new draft Phase II 316(b) rule, the Department should not presume that they can or should determine if a facility with a cooling water intake structure reflects the BTA for minimizing adverse environmental impacts, even with a site-specific evaluation. BTA has not been defined for the (pending)

new rule yet, and as such, DEP should wait until EPA moves forward with the new draft Federal regulation. Pre-emptive State requirements such as the proposed section 92a.36 may conflict with what is ultimately deemed to be BTA and disallow portions of the Federal rule. (33)

Department Response

The Department acknowledges the uncertainty, but it may not ignore its ongoing obligation to make BTA determinations. Although EPA suspended the Phase II Rule, the provision in 40 CFR 125.90(b) was retained, which directs permitting authorities to use best professional judgment to develop controls for minimizing adverse environmental impact associated with cooling water intake structures. The Department is required by Section 316(b) of the Clean Water Act, 40 CFR 125.90(b) and 72 FR 37107 – 37109 (July 9, 2007) to make BTA determinations using best professional judgment. If and when EPA moves forward with a new Federal Regulation, DEP will reevaluate and incorporate all relevant developments into its policies and practices. The Department is motivated to avoid scenarios whereas permittees are required to make major and costly modifications to intake structures, and then subsequently the modifications are determined to be insufficient or overkill with respect to future BTA determinations. Also, note that subsection (c) in the proposed rulemaking, which had referred to the need to perform a site-specific determination at each facility, has been deleted for the final rule.

152. Comment

The Department should clarify whether it intends to require current permittees to install treatment for reducing impingement and entrainment prior to the issuance of the revised Federal language for the 316(b) rule for existing facilities. (37)

Department Response

Although the uncertainty at the Federal level has complicated the issue, 316(b) requirements have been applicable since the Clean Water Act was promulgated. The Department has already taken steps to reduce impingement and entrainment at some facilities, while other facilities are still collecting data to assist in the BTA determination and to help identify remedial options if appropriate. These efforts will not stop because of the current uncertainty at the Federal level, as dealing with uncertainty is common in the course of the Department's duties. It is reasonable to expect that developments at the Federal level will affect how the Department implements the 316(b) rule at some point.

153. Comment

The IRRC notes that commentators believe that until BTA is clearly defined in the new federal rule, the EQB should not move forward with this section. In light of the public comments, the EQB should explain how the public was provided with the opportunity to provide effective comments and how this provision will be reasonably implemented. (42)

Department Response

See the two previous responses with regard to this section. No commentator has suggested that the section be deleted -- that would not be an option as it would not meet minimum requirements for an EPA-approved NPDES program. Subsection (a) incorporates by reference the essential Federal regulations, and subsection (b) refers to a statutory requirement of the Clean Water Act. The public has been provided with the opportunity to provide effective comments regarding the regulation, and the public will be provided with an opportunity to provide effective comments during the public comment period of any draft permit affected by the 316(b) rule.

92a.38 DEPARTMENT ACTION ON NPDES PERMIT APPLICATIONS

154. Comment

Based on § 92a.38(b), the Department would now consider Local and County Comprehensive Plans and zoning ordinances when reviewing applications. The preamble should mention that this already is longstanding Department policy. It is unclear how this relates to "an integrated approach to water resources management." (11) (16) (27)

Department Response

Subsection (b) has been deleted based on a determination that consideration of local and county comprehensive plans should continue to be implemented through established policy (DEP-ID: 012-022-001, *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure the Coordination*).

155. Comment

Subsection 92a.38(b) should be modified to refer to "plans and ordinances" consistently. (18)

Department Response

See the response to the previous comment.

156. Comment

PennDOT requests the addition of a public health or safety exception to permit requirements. Other programs have such exceptions. (18)

Department Response

It is unclear what threat to public health or safety could motivate the Department to issue an NPDES permit under conditions that do not meet the requirements specified in § 92a.38. These requirements are established primarily to comply with Federal and State law, and Federal regulations, and may not be waived. Should a situation arise where a threat to public health or safety somehow conflicts with the requirements of § 92a.38, the Department and the permittee would have to work together to satisfy the minimum requirements of § 92a.38 and address the threat to public health or safety. An NPDES permit issued without adequate basis could in itself constitute a threat to public health or safety.

157. Comment

Based on § 92a.38(b), the Department would now consider Local and County Comprehensive Plans and zoning ordinances when reviewing applications. Plans and zoning ordinances should not be used by DEP as grounds for denying the reissuance of a permit for facilities that already are in existence. This provision should apply only to new facilities, or changes to facilities that may affect compliance with the plan or zoning. (26) (33) (37) (42)

Department Response

Subsection (b) has been deleted based on a determination that consideration of local and county comprehensive plans should continue to be implemented through established policy (DEP-ID: 012-022-001, *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure the Coordination*)

158. Comment

Paragraph (a)(2) requires an application to be consistent with "other applicable statutes and regulations administered by the Commonwealth," and "if applicable, river basin commission requirements created by interstate compact." There are two concerns with these phrases. First, the scope of these provisions cannot be determined. Who determines what is "applicable"? The phrases quoted above do not provide the reader with the information needed to comply with the regulation. We recommend either deleting these phrases or amending them to provide specific compliance requirements. Second, because the scope of the above quoted phrases cannot be determined, we recommend that the EQB explain its authority to enforce "other applicable statutes and regulations administered by the Commonwealth." Also, the EQB should explain its authority over "river basin commission requirements created by interstate compact." (42)

Department Response

The term "applicable" refers to other environmental laws of the Commonwealth. The purpose of this subsection is to ensure that an application for an NPDES permit is consistent with applicable environmental laws and regulations of the Commonwealth. The term is not limited to laws and regulations administered by the Department because some environmental laws are administered by other departments as well as local government units. This section does not establish any authority over river basin commission requirements. Rather, it is intended to ensure that NPDES applications ensure consistency with those requirements.

92a.41 CONDITONS APPLICABLE TO ALL PERMITS

159. Comment

The provision at § 92a.41(c) purports to prohibit completely some substances or properties that are inevitably a component of treated wastewater (e.g. color or turbidity), and may contradict other provisions in the permit (e.g., numeric permit limits for color or turbidity). This provision would place all permittees in immediate noncompliance, with no reasonable options. Very high costs would be incurred trying to comply with this inappropriate prohibition. This change should be reevaluated, and/or permit requirements should be more site-specific to address these concerns, and/or the qualifying language "amounts sufficient to be inimical to the water uses" reinserted, and/or the qualifying language should apply only to color, turbidity, and settleable solids. (5) (6) (9) (11) (14) (16) (22) (24) (26) (27) (30) (32) (33) (34) (35) (38)

Department Response

Accepted. Section 92a.41(c) has been modified to provide that the only conditions that are prohibited are floating solids, scum, sheen, or substances that result in deposits in the receiving water. The other conditions are all allowable to the extent that they are provided for in the permit, or to the extent that they do not result in an observable change in the condition of the receiving water. This change will address the original concern, while not placing the permittee in an unreasonable situation.

The issue has been that enforcement staff in the field have no way to determine if these conditions are "inimical to the water uses to be protected" or not, and permit conditions must be enforceable. The revised language would place the burden of determining the extent to which these conditions are consistent with water quality standards back where it belongs -- with the permit writer. The permit writer establishes all other water quality-based permit conditions, and this should be no exception.

Generally, these conditions should not be observed unless provided for in the permit, but the Department retains and reserves enforcement discretion should minor or transient instances of these conditions be observed during facility inspections.

160. Comment

We believe the commentators have outlined a significant change from existing regulation of water quality. While we agree that the phrase "inimical to the water uses" is vague and should be made clearer, we question the effect and basis for the proposed language which imposes a ban on all of these parameters in discharges. Based on the comments and the Preamble, it does not appear that the proposed language was developed to address specific violations or damage occurring to the environment. To the contrary, via NPDES permit, the Department has for many years allowed Glatfelter to meet a different standard than what is proposed in Subsection (c) for color. Therefore, we request a detailed explanation of why Subsection (c), as proposed, is reasonable, feasible and necessary. In addition, we request an explanation of the direct and indirect costs imposed on permit holders to meet Subsection (c) and how many permits would be either invalidated or would not be renewable under Subsection (c). (42)

Department Response

Accepted. See the response to the previous comment. Based on the revised provision, no cost impact to the regulated community is anticipated, and no permits will be invalidated or otherwise rendered unsustainable.

161. Comment

Regarding § 92a.41(b), a state requirement cannot "supersede" a Federal requirement, it can only satisfy it by being as stringent as, or in this case, more stringent than the Federal requirement. Compliance with § 91.33 cannot fully satisfy 40 CFR 122.41(l)(6) because some conditions are not provided for (an unanticipated bypass or an upset that violates an effluent limit, or a violation of a maximum daily limit), and no written report is required in § 91.33. (Revised language is suggested.) (20)

Department Response

Accepted in part. Subsection (a) has been revised to eliminate any confusion over the term "supersede." Compliance with § 91.33 does not have to fully satisfy the requirements of 40 CFR 122.41(l)(6) because 40 CFR 122.41(a)—(m) is incorporated by reference, and its requirements are fully applicable. However, subsection (a) was further revised to clarify the notification requirements, and to distinguish between oral and written notification requirements.

92a.48 INDUSTRIAL WASTE PERMIT

162. Comment

The provision at § 92a.48(a)(3) should be amended to provide for Department-developed technology-based limitations for the case where a Federal ELG has been issued for an industrial category, but it does not encompass a particular pollutant of concern. (Revised language is suggested.) (20)

Department Response

The proposed change is unnecessary, as the Department can develop technology-based limits for any pollutant that does not already have a applicable technology-based limit, or for any pollutant for which new information requires a reevaluation of the existing applicable technology-based limit. This reevaluation may or may not be performed as per 40 CFR 125.3.

92a.50 CAAPs

163. Comment

Subsection (a) gives the impression that the requirements of § 93.4c apply only for discharges to High Quality or Exceptional Value Waters. In fact, the existing use protection provisions of § 93.4c(a) apply for all discharges from a CAAP. (20) (25)

Department Response

Accepted. This subsection has been deleted to avoid the confusion.

164. Comment

Paragraph (d)(3) requires the use of "the most sensitive analytic method available." It is not clear how to meet this standard. Furthermore, it could require the use of expensive or elaborate equipment that may not be available or even developed yet. The regulation should clearly state what reasonable methods are acceptable. (42)

Department Response

Accepted. Revised language provides for the use of the EPA-approved method for wastewater analysis with the lowest published detection limits. The Department reserves its discretion to approve alternate analytical methods based on consideration of cost or availability.

92a.51 SCHEDULES OF COMPLIANCE

165. Comment

In § 92a.51(a), requiring compliance "as soon as practicable" is not consistent with the Federal requirement, which specifies "as soon as possible." The outside deadline of three years generally will be longer than the outside deadline in the Federal regulation of "the applicable statutory deadline under the Clean Water Act." The Environmental Hearing Board (EHB) is not a court, but a reviewing body, so the phrase that refers to any "other" court of competent jurisdiction should be modified, and the EHB has no power to issue an order that would be beyond the authority of the Department. Therefore, the EHB cannot establish a compliance period longer than DEP could establish on its own. The simplest fix is to incorporate by reference 40 CFR 122.47(a)(1), but otherwise these problems must be corrected. (20)

Department Response

The phrase "as soon as practicable" is identical to that which appears in existing section 92.55(a) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. The Environmental Hearing Board will not be authorized to issue orders allowing a longer time for compliance. Accordingly, the reference to the EHB has been deleted.

166. Comment

In paragraph (a), recommend replacing the phrase "the period to be consistent with" with "but not later than the applicable statutory deadline under". This more accurately reflects the language in 40 CFR 122.47(a)(1). (25)

Department Response

The phrase at issue, " the period not to be inconsistent with", is identical to the language in existing section 92.55(a) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

167. Comment

Federal 40 CFR 122.47(a)(3)(i) requires that the time between interim dates may not exceed one year. The following should be added to paragraph (b) after the first sentence, "The time between interim dates shall not exceed 1 year." (20) (25)

Department Response

Accepted. The language proposed by the commentator has been slightly modified, and relocated as the third sentence in subsection (b).

168. Comment

Federal 40 CFR 122.47(a)(4)(c) requires that the notification requirement specified in § 92a.51(c) be written into the permit. (20)

Department Response

This provision requires that the permittee provide notification of compliance or noncompliance within 14 days following the interim date. Permit writers rely on this provision to include this requirement as a permit condition. It does not add value to reiterate in regulation that this requirement will be a permit condition. Section 92a.51 (c) is identical to existing section 92.55 (c) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

169. Comment

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 years. The rule does not explain the basis for this new mandate or demonstrate that, in general, a 3-year schedule is sufficient for a discharger to design, finance and construct facilities. 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. (30) (32) (34)

Department Response

The 3-year time frame for schedules of compliance set forth in the proposal is not a new requirement. However, the time frame for schedules of compliance has been revised under the final rule. Subsection (a) provides that schedules of compliance may now be for up to five years. This is consistent with the 5-year terms for permits issued.

92a.52 VARIANCES

170. Comment

The Pennsylvania Coal Association believes that PADEP should automatically incorporate any federal variances adopted after November 2000 into the Proposed Rulemaking and fails to see the rationale for the exclusion. (26)

Department Response

The language of this section is verbatim from the language of existing section 92.2 (c), and no new or more stringent requirements are proposed. The Department will consider variance requests on a case-by-case basis. Historically, the Department has granted very few variances. Variances granted have related only to fundamentally different factors and thermal discharges, which are specifically incorporated into sections 92a.3 (b)(5) and 92a.3 (b)(6) respectively.

171. Comment

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. The proposal fails to provide adequate notice of the underlying standard, or 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. (30) (32) (34)

Department Response

See the response to the previous comment. This is an existing provision, and the date was set based on the effective date of the last revision to Chapter 92.

172. Comment

Proposed §92a.52 creates a potential conflict with the language of § 92a.3 regarding incorporation of Federal regulations by reference. Proposed § 92a.52 should be deleted because its intent is included in § 92a.3(c), or otherwise explain why this section is needed. (37) (42)

Department Response

See the response to comment 170. This is an existing provision, included to ensure that any future variance provided for in Federal regulations receives adequate review before it is adopted in this Commonwealth.

173. Comment

The Chamber does not support this exclusion of incorporating a Federal regulation by reference. This language creates a potential conflict with the language of 92a.3 that states that Federal NPDES regulations including appendices, future amendments and supplements are incorporated by reference. A variance would very likely be part of those regulations and not easily separated. In response to WRAC comments, the Department indicated that they included this language to allow them to evaluate each new Federal exclusion on a case-by-case basis. This intention is completely missed in the proposed regulation and accompanying preamble. Instead, the proposed language draws a hard line in the sand. The Chamber recommends that DEP change the language to read: "For any new or amended Federal regulation enacted after November 18, 2000 which creates a variance to existing NPDES permitting requirements, the Department will review any new variances to determine that they are appropriate for the Commonwealth under the provisions of the Clean Streams Law." (33)

Department Response

See the response to comment 170. This is an existing provision, designed to ensure that any future variance provided for in Federal regulations receives adequate review before it is adopted in this Commonwealth. The Department does not agree with the commentator's interpretation that this section precludes the Department from acting on any new Federal variance. This provision means that any such variance is not incorporated into regulation

automatically. The net effect of the present language and the proposed language would be the same: the Department will review any new variance for appropriateness in this Commonwealth before it may be applied. If determined to be appropriate, it would be implemented, and also incorporated into a future rulemaking.

92a.53 DOCUMENTATION OF PERMIT CONDITONS

174. Comment

The Pennsylvania Coal Association supports the obligation of PADEP under this section to produce complete fact sheets for all permits. (26)

Department Response

The Board appreciates the comment.

175. Comment

Section 92a.53 does not address the provisions of §124.8(b)(5) and (6) or 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. (30) (32) (34)

Department Response

The Department believes that § 92a.53 (3)—(5) effectively covers the requirements of 40 CFR 124.56 and 40 CFR 124.8. All relevant determinations and calculations must be included in the fact sheet.

92a.54 GENERAL PERMIT

176. Comment

The provision at § 92a.54(a) should be amended to prohibit the use of general permits in waters that support threatened and endangered species and critical habitat. The IRRC took note of this comment and recommends that the EQB explain whether this protection is needed. (10) (42)

Department Response

As per § 92a.54(a)(7), general permits must inherently be of low environmental concern and impact, such that the potential of a general permit to have adverse effects is low. This standard may not be sufficient to ensure a nondegrading discharge, such that general permits cannot reasonably be applied in High Quality (HQ) and Exceptional Value (EV) waters, but a discharge covered under a general permit should be of minimal concern to aquatic species, whether endangered or not. In addition, while surface waters are formally classified as HQ and EV, such that it is clear where they start and where they end, this is not necessarily true of waters that may support threatened or endangered species. The determination as to whether a discharge, whether covered under a general permit or an individual permit, can affect threatened or endangered species is necessarily a site-specific determination. Based on this rationale, a flat prohibition on the use of general permits under the conditions proposed is neither necessary nor practical.

177. Comment

We support the continued and appropriate prohibition of general permits for facilities or activities that discharge to High Quality or Exceptional Value Waters. (20)

Department Response

The Board appreciates the comment.

178. Comment

Paragraph (e)(3) states:

The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, schedule of compliance or order issued by the Department.

This provision is not clear. For example, if a person was cited for past violations, there would be a record of that event and an ability to appeal the result. However, this provision penalizes the person for "lack of ability or intention to comply." How will this provision be enforced and how can an action taken under it be appealed? The EQB should explain the intent of this provision, its reasonableness and how it would be enforced. (42)

Department Response

This provision is identical to existing § 92.83(b)(3), so no new or more stringent requirements are proposed, nor has the Department encountered any of the potential issues described by the commentator. This provision is consistent with the Federal provision at 40 CFR 122.28 (b)(3), which allows the Director (Department) the discretion to require an individual permit. As per the requirements of 40 CFR 123.25(a)(11), the Department must have the legal authority to require an individual permit instead of a general permit. Section 92a.54 (e) clarifies the conditions under which the Department would exercise this option.

This provision would apply to a permittee who has demonstrated one or more instances of noncompliance with requirements described in a regulation, permit, schedule of compliance, or order of the Department. In some cases, it may be evident that the permittee cannot comply before the noncompliance manifests. For example, the permittee may not have a suitable facility or equipment, or may engage in business practices or agreements that preclude compliance. In this case, the Department would be able to require that the permittee apply for an individual permit. Since any such situation would require an individual evaluation, it is not practical to list all of the situations that may prompt the Department to require an individual permit. As per subsection (g), the permittee may appeal to the Environmental Hearing Board after the Department takes final action on the individual permit application.

92a.61 MONITORING

179. Comment

The provision at § 92a.61(b) may modify or be inconsistent with the requirements of Chapter 94, *Municipal Wasteload Management*, or the way that those requirements have been implemented, as regards the monitoring of influent flow to sewage treatment plants. If so, we object to this change. (5) (9) (24)

Department Response

In § 92a.61(b), the term "intake" refers only to intake flow from surface waters, and does not include influent, which refers only to untreated wastewater. There is no effect on the requirements of Chapter 94 or the way that those requirements have been implemented. To preclude any possible confusion, the term has been changed to "surface water intake." Note that this provision primarily is intended to allow for monitoring of pollutants rather then flow, but under some conditions flow monitoring of intake surface waters may be appropriate.

180. Comment

We support § 92a.61(e) as a well conceived change to the Department's usual policy of establishing the frequency of effluent flow monitoring based solely on the design flow of the facility. (5) (9)

Department Response

The Board appreciates the comment. The provisions of § 92a.61(e) are contained in existing § 92.41(d), such that no change is proposed regarding requirements for the monitoring frequency of effluent flow.

181. Comment

Subsection 92a.61(j) includes a provision that provides that DEP can require a permittee to perform additional sampling for purposes of TMDL development. PennDOT requests that this provision be deleted, or an explanation provided as to how this might apply to stormwater runoff associated with construction activities generally, and PennDOT projects specifically. (18)

Department Response

The Department has the authority to require any reasonable monitoring and additional sampling related to the development and implementation of TMDLs. For the purposes of TMDL development and implementation related to stormwater runoff, monitoring and/or sampling requirements would likely relate to runoff rate and volume which would/could be utilized in modeling applications to determine the volume and rate reductions required to implement a successful stormwater TMDL through both new and retrofit types of projects. The Department does not agree this provision should be deleted.

182. Comment

Section 92a.61(d)(4), (5) and (i) would require monitoring for pollutants specified by EPA in regulations issued under the Clean Water Act as subject to monitoring and any pollutants that the Administrator requests in writing to be monitored. It is 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, they violate applicable due process procedures. (30) (32) (34)

Department Response

These requirements are contained in existing § 92.41(c) and (h), and the Board does not propose any change to these existing requirements. Requests from the Administrator (EPA) for monitoring or data would be made under the provisions of Federal regulations, and would be both reasonable and supportable on that basis. Any new monitoring requirements proposed to be incorporated into an NPDES permit would be subject to public notice and comment.

92a.75 REISSUANCE OF EXPIRING PERMITS

183. Comment

The Department proposes to allow administrative extensions for minor facilities under some conditions, after completing review of the application. Why not simply reissue the permit? What is the advantage of the administrative extension, given that the application has already been reviewed? (11) (27)

Department Response

Subsection (b) has been deleted because it was confusing and subject to misinterpretation.

184. Comment

The reference to "other applicable regulations" in § 92a.75(c)(2) is unnecessary and confusing. It appears that a schedule of compliance can only be issued under § 92a.51, so the Board should eliminate this phrase. (20)

Department Response

The language is identical to that of existing section 92.13(b)(2) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. Schedules of compliance could possibly be issued to achieve the requirements of other chapters that contain additional NPDES requirements for certain point sources (e.g., mining activities, or construction activities). In this case, the schedule of compliance would have to comply with the requirements of § 92a.51, but may contain other applicable requirements.

185. Comment

Subsection 92a.75(b) appears to conflict with the provisions of § 92a.7 regarding administrative extensions. (24) (26) (30) (32) (34)

Department Response

Accepted. Subsection (b) has been deleted because it was confusing and subject to misinterpretation.

186. Comment

Paragraph (a) allows the Department to grant a later date for submission of a permit renewal application. The regulation is not clear that such date cannot be later than the permit expiration date, as required in 40 CFR 122.21(d). Please clarify the regulation. (25)

Department Response

The language of subsection (a) is identical to that of existing section 92.13(a) which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. The Department agrees that a permit may not be reissued after it has already expired, but no clarification is required in this case. Since no permit term may exceed 5 years, the Department is unable to grant permission for an extension of time beyond the 5-year term.

187. Comment

Paragraph (b) allows for administrative extensions for minor facilities. It is unclear if this is intended to limit extensions only to minor facilities. If a permit for a major facility is not reissued prior to the expiration date, is an expired major permit no longer in effect, making it a discharge without a permit? Declaring that permits cannot be extended, whether applicable to minor or major facilities, would not be appropriate and would put facilities in noncompliance given DEP's backlog. Please clarify. (25) (30) (32) (34)

Department Response

Accepted. Subsection (b) has been deleted because it was confusing and subject to misinterpretation.

92a.82 PUBLIC NOTICE OF PERMIT APPLICATIONS AND DRAFT PERMITS

188. Comment

One important component of public notice of draft permits has been deleted, that of the need to identify the location of the first downstream potable water supply. It should be reinserted for the final rulemaking. (11) (16) (25) (27) (42)

Department Response

This provision has been deleted as per Homeland Security requirements. The Department will still include this information in public notice to the extent that it is allowable under Federal regulations issued by the Department of Homeland Security, but it is not appropriate to retain it as a regulatory requirement.

189. Comment

Subsection 92a.82(b) would require that public notice of a draft permit or permit application be posted at the site of the existing or proposed discharge under some conditions. This is impractical for mining operations which often are in remote locations, and could be a safety hazard to the public. We believe that it would be a better option to have the permits on file at the DEP District Mining Office, where the public can safety access and view the documents. (17) (26)

Department Response

One of the primary components of public notice is to post notice of the proposed discharge at the site of the proposed discharge. The permit may be filed at the District Mining Office, but 92.82(b) refers to a public notice posting, not the actual permit, and documents in files do not help the public become aware of proposed new or reissued permits. Also, this requirement applies to the applicant making a posting -- the Department posts notice in the *Pennsylvania Bulletin*. If the main premises of a mining company are outside the limits of this Commonwealth, there would be no effective posting by the applicant at all if there is none at the site. All industrial facilities perform such posting, often at remote sites. Since the requirement is that the posting be made near the entrance to the premises, there is no authorization for the public to enter any industrial site for the purpose of seeking notice of a proposed discharge..

190. Comment

Paragraph (b) as currently written gives the misleading impression that public notice of draft individual permits are only required for new facilities and does not include reissued permit draft documents. To clarify the regulation, the paragraph should begin "A public notice of every newly developed draft individual permit for a new or reissued permit, …". (25)

Department Response

The suggested change is not necessary. The definition of "draft permit" in section 92a.2 clearly indicates that it applies to reissued permits. Therein a "draft permit" is defined as "[a] document prepared by the Department indicating the Department's tentative decision to issue or deny, modify, revoke, or reissue a permit."

191. Comment

Paragraph (b) did not carryover the requirements of existing Chapter 92.61(a)(9) pertaining to the antidegradation classification of the receiving water for new or increased dischargers. This requirement should be considered. (25)

Department Response

The Department disagrees. Section 92a.82(b)(2) provides that public notice of a draft permit is to include, among other things, " [t]he name and existing use protection classification of the receiving surface water under § 93.3 (relating to protected water uses) to which each

discharge is made . . . ." High Quality and Exceptional Value Waters are among the existing use classifications to be included.

192. Comment

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 fact sheet is required to be provided to the permittee without a request. Only after the permittee receives the requisite fact sheet should the thirty-day clock for the permittee to comment upon a permit commence. (30) (32) (34)

Department Response

The fact sheet is part of the permit, and is automatically sent to the permittee as part of the permit. No request by the permittee is required.

193. Comment

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). (30) (32) (34)

Department Response

The requirements of §124.17(a) and (c) are effectively covered by § 92a.81(a), 92a.82 (b)(5), (d), 92a.84(a)(5), (b), and 92a.86.

92a.85 NOTICE TO OTHER GOVERNMENT AGENCIES

194. Comment

Existing Chapter 92.65(4) and (5) are not included. Please include or explain why these sections are not required. (25)

Department Response

Existing § 92.65 (4) and (5) were considered unnecessary and largely redundant to the requirements of § 92a.85(1)—(3), and 92a.82(e). The Department is motivated to reduce administrative burden that may not add value, is not a Federal requirement, and may increase costs to the regulated community.

92a.103 PROCEDURE FOR CIVIL PENALTY ASSESSMENTS

195. Comment

The provisions at § 92a.103 inappropriately allows the for civil penalties under some conditions, because the civil penalties may be assessed without a public hearing, which is required under Section 605 of the Clean Streams Law. Allowing the opportunity for a hearing is not adequate, because the Law specifies that the hearing must be performed. (5) (9)

Department Response

The process outlined in section 92a.103 is identical to that set forth in existing section 92.93 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92.

Section 605 of the Clean Streams Law, 35 P.S. § 691.605, provides that the "department, after hearing, may assess a civil penalty upon a person or municipality for . . . " a violation of the Clean Streams Law. The regulation complies with the requirements of this language in the sense that it provides an opportunity for a hearing on the proposed assessment. Insofar as

due process is concerned, the minimum constitutional due process requirement is that there be an opportunity for a hearing, as articulated in numerous Federal and State cases.

Under current practice, proposed assessments include a statement indicating that the permittee may request a pre-assessment hearing. The permittees are thus notified of their rights to a pre-assessment hearing and are provided an opportunity to request such a hearing. If a hearing is requested, it will be held. Any waiver of a hearing is based on a voluntary, knowing decision of the permittee not to contest the assessment or to request a hearing.

Since its adoption in 2000, this process has worked well for both the permittees and the Department.

196. Comment

Section 92a.103 should be modified to ensure unbiased public hearings. This should be accomplished by requiring that the hearing officer be selected from a region other than the one that regulates the permittee's facility. The hearing officer should not be from the water quality organization. Persons subject to a hearing under this section may be represented by counsel and will have the opportunity if requested to examine and cross examine the Department's witnesses, to offer and examine witnesses, and to have their witnesses cross examined, all under oath. The hearing officer's conclusions and recommendations will be set forth in writing and served upon the person and the Department. All matters of record at the hearing will be admissible before any tribunal before which an appeal of the matter is brought. (5) (9)

Department Response

Section 92a.103 is identical to existing § 92.93, so the Board has not proposed any change to existing requirements regarding the procedure for civil penalty assessments. The Department has established internal procedures ensuring that hearings regarding civil penalty assessments are unbiased. The process ensures that officials presiding over the hearing ~~are~~ have not previously been involved in the matter. This process is outlined in a guidance document issued by the Department, *Civil Penalty Assessment Informal Hearing Procedure* (DEP-ID: 362-4180-006). The Department does not believe that the strict formality that the commentator proposes would be an improvement to the process.

Typographical Errors and Stylistic Suggestions.

- Change "for" to "that authorizes" in 92a.5(b) (20)
- Change "Confidentially" to Confidentiality" in 92a.8 title. (20) (37)
- Change "previous" to "existing" in 92a.7(b)(2) to be consistent. (20)
- Change "discharges" to "dischargers" in 92a.37 title (20)
- Change 92a.54(e)(6) to read: "The discharge is not in compliance with, or will not result in compliance with, an applicable effluent limitation or water quality standard." (20)
- Change "processing" to "possessing" in 92a.81(b) (20)

Attachment A
Cross-walk Table

Subchapter A. DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

92a.1.	Purpose and scope.	92.3
92a.2.	Definitions.	92.1*
92a.3.	Incorporation of Federal regulations by reference.	92.2*
92a.4.	Exclusions.	92.4*
92a.5.	Prohibitions.	92.2, 92.73*
92a.6.	Effect of a permit.	92.2
92a.7.	Duration of permits and continuation of expiring permits.	92.9
92a.8.	Confidentiality of information.	92.2, 92.63*
92a.9.	NPDES permit satisfies other permit requirements.	92.5
92a.10.	Pollution prevention.	92.2b*
92a.11.	Other chapters applicable.	92.17*
92a.12.	Treatment requirements.	92.2a, 92.8a

Subchapter B. PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

92a.21.	Application for a permit.	92.2, 92.21
92a.22.	Signatories to permit applications and reports.	92.23*
92a.23.	NOI for coverage under an NPDES general permit.	92.83*
92a.24.	Permit-by-Rule for SRSTPs.	New
92a.25.	Permit-by-Rule for application of pesticides.	New
92a.26.	New or increased discharges, or change of wastestream.	92.7*
92a.27.	Incomplete applications or incomplete NOIs.	92.25
92a.28.	Application fees.	92.22*
92a.29.	Sewage discharges.	92.21a*
92a.30.	Industrial waste discharges.	92.21a*
92a.31.	CAFO.	92.5a
92a.32.	CAAP.	92.2
92a.33.	Aquaculture projects.	92.2
92a.34.	Stormwater discharges.	92.2, 92.21a*

92a.35.	Silviculture activities.	92.2
92a.36.	Cooling water intake structures	New
92a.37.	New sources and new discharges.	92.2
92a.38.	Department action on NPDES permit applications.	New

Subchapter C. PERMITS AND PERMIT CONDITIONS

92a.41.	Conditions applicable to all permits.	92.2, 92.51*
92a.42.	Additional conditions applicable to specific categories of NPDES permits.	92.2, 92.53*
92a.43.	Establishing permit conditions.	92.2
92a.44.	Establishing limitations, standards, and other permit conditions.	92.2, 92.31*
92a.45.	Calculating NPDES permit conditions.	92.2, 92.57*
92a.46.	Site specific permit conditions.	92.52a
92a.47.	Sewage permit.	92.2c*
92a.48.	Industrial waste permit.	92.2d*
92a.49.	CAFO.	92.5a
92a.50.	CAAP.	New
92a.51.	Schedules of compliance.	92.55*
92a.52.	Variances.	92.2
92a.53.	Documentation of permit conditions.	92.59*
92a.54.	General permits.	92.81, 92.83
92a.55.	Disposal of pollutants into wells, into POTW or by land application.	92.2

Subchapter D. MONITORING AND ANNUAL FEES

92a.61.	Monitoring.	92.2, 92.41
92a.62.	Annual fees.	New

Subchapter E. TRANSFER, MODIFICATION, REVOCATION AND REISSUANCE, TERMINATION OF PERMITS, REISSUANCE OF EXPIRING PERMITS AND CESSATION OF DISCHARGE

92a.71.	Transfer of permits.	92.2, 92.71a*
92a.72.	Modification or revocation and reissuance of permits.	92.2, 92.13a*
92a.73.	Minor modification of permits.	92.2
92a.74.	Termination of permits.	92.2

92a.75.	Reissuance of expiring permits.	92.13*
92a.76.	Cessation of discharge.	92.72a*

Subchapter F. PUBLIC PARTICIPATION

92a.81.	Public access to information.	92.63
92a.82.	Public notice of permit application and draft permits.	92.61*
92a.83.	Public notice of public hearing.	92.61*
92a.84.	Public notice of general permits.	92.82
92a.85.	Notice to other government agencies.	92.65*
92a.86.	Notice of issuance or final action on a permit.	New
92a.87.	Notice of reissuance of permits.	92.67*
92a.88.	Notice of appeal.	92.61

Subchapter G. PERMIT COORDINATION WITH THE ADMINISTRATOR

92a.91.	NPDES forms.	92.75, 92.77*, 92.78*
92a.92.	Decision on variances.	New
92a.93.	Administrator’s right to object to issuance or modification of certain permits.	92.15
92a.94.	Reports of violations.	92.79

Subchapter H. CIVIL PENALTIES FOR VIOLATIONS OF NPDES PERMITS

92a.101.	Applicability.	92.91
92a.102.	Method of seeking civil penalty.	92.92
92a.103.	Procedure for civil penalty assessments.	92.93
92a.104.	Disbursement of funds pending resolution of appeal.	92.94

* Substantive changes are proposed.

Attachment B
Fee Report Form (Excerpts)

Chapter 92a, *NPDES Permitting, Monitoring, and Compliance*

FEE TITLE AND RATE:

Current NPDES Permit Fees:
Individual Permits: The application fee for essentially all individual NPDES permits is $500 per 5-year permit term. There are no annual fees.
General NPDES Permits: The fee for most general NPDES permits is $100 per 5-year term.

Proposed NPDES Permit Fees:
(Attached as Tables 1 and 2)

FUND FEE IS DEPOSITED INTO: The Clean Water Fund

FEE OBJECTIVE: The objective of the fee structure is to recover all of the costs to the Commonwealth of administering the NPDES program. The proposed fee structure will cover only the Commonwealth's share of the cost of administering the NPDES permit program (about 40% of the total cost, with the other 60% covered by federal grant).

FEE RELATED ACTIVITIES AND COSTS:

1. Issue NPDES Permits

Activities: Environmental engineers and engineering specialists write the NPDES permits, a demanding process that overlaps with all aspects of locating, planning, and operating wastewater treatment facilities. Based on the information provided on the applications, permitting staff evaluate federal and Commonwealth technology-based treatment requirements, and calculate water quality-based treatment requirements based on the nature of the receiving water. The treatment requirements serve as the specifications that the facility will be designed or redesigned to achieve. NPDES permits are highly structured and complex documents that cover many aspects of the operation and performance of treatment facilities. Ultimately, the NPDES permit, together with the Water Quality management permit issued under Chapter 91, assures that the facility is properly designed and operated to achieve water quality standards in the streams and rivers of this Commonwealth.

The duties of the permit writer are primarily technical, but also includes site visits, meetings with the applicant or permittee, coordination with compliance personnel and field staff,

preparation of public notice, and coordination of public hearing. NPDES permits are issued by the regions. Staff engineers in central office provide technical and policy support.

Level of effort: Approximately 56 full-time staff maintaining 5000 individual permits and 5000 general permits. According to the federal database ICIS, Pennsylvania is second or third among states in the number of NPDES permits issued.
Cost: $1,900,000

2. Compliance and Monitoring

Activities: Compliance Specialists initiate and track enforcement actions. They write NOVs (Notice of Violation), COAs (Consent Order Agreements), and legal documents in support of enforcement actions; enter enforcement action data in computer systems; meet with permittees; and serve as legal liaison between technical staff and regional counsel. Site visits may be required to ground truth resolutions or agreements. Water Quality Specialists are field staff that perform site inspections with the NPDES permit in hand. They verify compliance with permit conditions, which may include sampling of the effluent and affected surface waters, and review DMRs as required for facilities that need attention. These functions are performed almost exclusively at the regions.

Level of effort: Approximately 75 full-time staff.
Cost: $2,600,000

3. Administrative and Training

Activities: Department administrative staff support all aspects of permitting, monitoring, and compliance at the regions. Central office staff provide internal training on specialized topics (e.g. water quality modeling).

Level of effort: 12 full-time staff
Cost: $408,000

4. Other

Activities: Certain other specialized activities that directly support the NPDES permitting program are performed out of central office. These include Clean Water Act 316(a) (thermal variances) and 316(b) (design standards for cooling water intake structures) support and water quality standards support. NPDES Information Analysis staff track permit information, maintain the database, and provide required permit information to EPA. Regional biologists support site-specific field and habitat assessment studies.

Level of Effort: 11 full-time staff
Cost: $374,000

ANALYSIS:

The Department's policy is that the program fee structure should support the Commonwealth's cost of running the program. With that goal, two decisions are required:

1. How to distribute the fees amongst the various classes of point sources.

2. Whether to implement annual fees in addition to application fees, and how to distribute the total cost between annual fees and application fees.

In addition to internal deliberations, the Department investigated the NPDES permit fee structures of other states. While there was substantial variation in how states distribute fees, there was broad consensus that larger dischargers pay higher fees. In some cases, additional fee multipliers were assessed for discharges with a higher environmental impact, as measured by pollutant loading or compliance history. Industrial dischargers usually pay greater fees, but not markedly so in most cases. Industrial dischargers of toxic pollutants sometimes pay higher fees. All of the states investigated have annual fees associated with NPDES permits, and most have application fees. There is no consensus as to the magnitude of the annual fee relative to the application fee.

While various combinations of these factors were considered, the following principles were determined to be most appropriate in terms of fairness to the regulated community, the resources expended by the Department, and the relative environmental impacts of different classes of facilities:

- Permit fees for industrial wastewater will be higher than fees for treated sewage. Permits for industrial wastewater are more variable and require greater resources to issue and maintain. Toxic and persistent pollutants are more often present in greater quantities in industrial discharges, with increased potential for adverse environmental impact relative to the conventional pollutants discharged in treated sewage.
- Permit fees will be higher for facilities with higher flows. Higher flows generally track with higher pollutant loadings and increased potential adverse environmental impact.
- Application fees for a new facility will be twice that for a reissued permit, reflecting the substantially greater resources required to issue an NPDES permit for a new facility. Setting application fees higher also better compensates the Department for processing applications for new permits that are submitted on a contingency basis, and that may or may not result in a facility being built.
- Annual fees will be implemented, and be designed to cover the ongoing costs associated with maintaining the permit coverage, including the cost of compliance inspections, sampling, and reports. Integrating annual fees into the process spreads the cost of the permit over the 5-year permit cycle, and this should help the permittee manage costs. It avoids penalizing facilities that may suspend or terminate permit coverage during the cycle.
- Annual fees and permit reissuance fees, which occur every five years, should be the same if practicable. Setting the annual fee to the same value as the permit reissuance fee means that permittees generally can count on a uniform fee every year when producing the annual budget.

RECOMMENDATION AND COMMENT:
The proposed rulemaking provides for a general review of the permit fee structure every three years, to assure that the fees continue to cover the cost of maintaining the program.