Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code Chapter 92a)

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

Order

The Environmental Quality Board (Board) by this order deletes and reserves 25 Pa. Code Chapter 92 (relating to National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance) and replaces it with a new Chapter, Chapter 92a of the same name. This final-form rulemaking describes the process the Department of Environmental Protection (the Department) will follow in issuing National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of wastewater and stormwater in order to conform to the requirements of the Federal Clean Water Act and the Pennsylvania Clean Streams Law. This final-form rulemaking represents an extensive reorganization of existing Chapter 92 such that it follows the organization of the corresponding Federal regulations set forth in 40 CFR Part 122. The final-form rulemaking also sets forth a new NPDES fee structure designed to cover the Commonwealth's share of administering the NPDES program. In addition, several new provisions incorporating recent requirements established under the Federal program have been added, and treatment requirements based on the secondary treatment standard for discharges of treated sewage have been established.

The Order was adopted by the Board at its meeting of July 20, 2010.

A. Effective Date

These final rules will go into effect upon publication in the *Pennsylvania Bulletin* as final.

B. Contact Persons

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C. Statutory Authority

This final-form rulemaking is adopted under the authority of Sections 5(b)(1) and 402 of the Clean Streams Law (35 P.S. §§ 691.5(b)(1) and 691.402) which provide for the adoption of regulations necessary for the implementation of the Clean Streams Law and Section 1920-A of the Administrative Code of 1929 (71 P.S. §510-20) which authorizes the Board to promulgate rules and regulations necessary for the proper performance of the work of the Department.

D. Background and Purpose

Existing Chapter 92 sets forth requirements relating to the issuance of National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of treated wastewater and stormwater in accordance with the provisions of the Federal Clean Water Act. The existing regulations do not follow the organization of the comparable federal regulations set forth in 40 CFR Part 122. The primary purpose of this final-form rulemaking is to reorganize and replace existing Chapter 92 with a new Chapter 92a, which is organized in a manner more consistent with the organization of 40 CFR Part 122.

The final-form rulemaking includes provisions intended to update the Commonwealth's NPDES program to be consistent with changes at the federal level since Chapter 92 was amended in 1999. Treatment requirements based on the secondary treatment standard for discharges of treated sewage have been established, and a new NPDES permit fee structure is adopted.

The proposed rulemaking was adopted by the Environmental Quality Board (Board) at its November 17, 2009 meeting. The proposed rulemaking was published in the *Pennsylvania Bulletin* at 40 Pa. B. 847 (February 13, 2010). There was 30-day public comment period, which concluded on March 15, 2010. The Board received public comments on the proposed rulemaking from 42 commentators, including the Independent Regulatory Review Commission. The comments received on the proposed rulemaking are summarized in Section E of the Preamble and are more extensively addressed in a Comment and Response Document which is available from the Department.

The Board has considered all of the public comments received. The Department briefed the Agricultural Advisory Board at its April 21, 2010, meeting that the revisions did not affect the agricultural community. The WRAC was briefed on the proposed revisions at its April 14, 2010, meeting, and considered the revisions at its May 11, 2010, meeting. The WRAC approved the final-form rulemaking with several additional comments. Additional revisions were made to the final-form rulemaking in response to those comments. The WRAC has provided minutes of its meetings to document its consideration and approval of the final-form rulemaking.

E. Summary of Changes to Proposed Rulemaking

§ 92a.2 *Definitions*

The following definitions contained in the proposed rulemaking were deleted in the final-form rulemaking: "expanding facility or activity," immediate" and "permit-by-rule." The term "immediate" appears only once in the regulation (§ 92a.41(b)) and is explained in the context of that section.

The definition of "BMP – Best Management Practices" has been revised by deleting paragraphs (iii) and (iv) of the proposed definition which included measures designed to reduce erosion and runoff of soil and BMP measures developed under Title 25 to reduce pollutant loading to surface waters and replacing them with a new paragraph (iii) which provides that the term BMP "includes activities, facilities, measures, planning or procedures used to minimize accelerated erosion and sedimentation and manage stormwater to protect, maintain, reclaim, and restore the quality of waters and the existing and designated uses of waters within this Commonwealth before, during, and after earth disturbance activities." The new definition of BMP therefore focuses on practices relating to management of point sources of pollution.

The definition of "Minor amendment" was revised to provide that it includes an amendment to an NPDES permit to "allow for a change in ownership or operational control of a facility."

The definition of "Municipal separate storm sewer system" was transferred intact to the definition of "MS4 – Municipal Separate Storm Sewer System."

The definition of "Small municipal separate storm sewer system" was revised by deleting a cross reference to two paragraphs of the Federal definition of the same term.

The definition of "Stormwater discharge associated with construction activity" was revised consistent with a recent revision to this definition in Chapter 102, *Erosion and Sediment Control*. This revised definition eliminates any distinction between earth disturbances between 1 and 5 acres, and earth disturbances over 5 acres. Essentially, any potential discharge associated with an earth disturbance of 1 acre or more will meet the definition of a "Stormwater discharge associated with construction activity."

The definition of "Stormwater discharge associated with industrial activity" was revised by specifying the subparagraphs of the Federal definition at 40 CFR 122.26(b)(14) which are applicable. Subparagraph (x) of the federal definition which relates to construction activities was not incorporated into the definition.

The proposed definition of "TMDL – Total Maximum Daily Load" was replaced with a cross-reference to the definition of the same term in Chapter 96 (relating to water quality standards implementation).

§ 92a.3. *Incorporation of Federal regulations by reference.*

The existing regulation relating to incorporation of Federal regulations by reference,

§ 92.2 provides that appendices, future amendments and supplements thereto are incorporated by reference. That will remain the case. However, to ensure consistency with other regulations promulgated by the Board incorporating federal requirements, many of which do not specifically provide for the incorporation of future amendments to the federal regulations, the references to future amendments are being deleted in subsections (a) and (c) of the final-form rulemaking. The Board emphasizes that this does not mean future amendments to the listed regulations are not incorporated by reference – they are.

In addition, the language in subsections (a) and (c) relating to the applicability of a state or federal requirement in the event of a conflict between those requirements was slightly revised to make it clear that it would apply to one or more conflicts, not just more than one. The federal regulations at 40 CFR 132, relating to water quality guidance for the Great Lakes System, have been incorporated by reference in a new subsection (b)(7).

§ 92a.12. Treatment requirements.

Subsection (d) provides that a permittee of an affected facility, upon notice from the Department, is to take certain steps when there are new or changed water quality standards. These include steps necessary to plan, obtain a permit or other approval and construct facilities necessary to comply with the new water quality standards or treatment requirements. The proposed rulemaking has been amended in this final-form rulemaking by adding language requiring a permittee to undertake any other actions which may be necessary to comply with such requirements. The Board therefore clarifies that actions other than constructing new facilities may be appropriate.

Subsection (e) provides that a permittee is to submit either a report establishing that it is capable of meeting the new water quality standards or treatment requirements or a schedule of steps to comply with the new standards or requirements. Language has been added providing that the permittee is to provide information regarding "other actions that are necessary" to comply with the new standards or requirements where applicable.

§ 92a.21 Application for a permit.

Subsection (a) of the proposed rulemaking provided that specified subsections of 40 CFR 122.21 relating to applications for a permit are to be incorporated by reference, "except as required by the Department." The quoted phrase has been deleted from the final-form rulemaking because it was susceptible to misinterpretation, as indicated in the comments received regarding the proposed rulemaking.

Subsection (b) requires that persons desiring to discharge pollutants file applications for an individual permit. Under the proposed rule, persons proposing to discharge from a SRSTP or through the application of pesticides would have been covered by a permit-by-rule and accordingly, would not have been required to file an application. As noted below, the authorization for the permits-by-rule have been deleted. Accordingly, the references to the permits-by-rule have been deleted from the final-form rulemaking.

§ 92a.23. NOI for coverage under an NPDES general permit.

Under the existing regulation, all dischargers who wish to be covered under a general permit are required to submit a Notice of Intent (NOI) to be covered under the general permit. This is so regardless of whether the coverage granted is based on an initial NOI or an NOI for a reissued general permit. Subsection (c) of the final-form rulemaking provides that a discharge may also be authorized under a general permit without the submission of an NOI for coverage or with a requirement that an NOI be submitted for initial coverage, but not for reissuance of coverage. This is intended to address those situations which may have been covered under a permit-by-rule. This change is consistent with the 40 CFR 122.28(b)(2)(v) which provides that states and EPA are authorized to allow persons to discharge under a general permit without submitting an NOI where the permitting authority finds that an NOI requirement would be inappropriate and provided that the discharge is not from a POTW, CSO, MS4, primary industrial facility or a stormwater discharge associated with a construction activity.

Under the existing regulation, the NOI must, among other things, demonstrate that the discharge from the point source, individually or cumulatively, will not result in a violation of an applicable water quality standard established under Chapter 93. The phrase in subsection (a) stating "result in" a violation has been replaced with "cause or contribute to" a violation to ensure consistency with comparable federal language.

Subsection (c) outlines the factors which the Department will consider in determining whether a NOI must be submitted for coverage under a general permit. The factors include the type of discharge, the potential for toxic and conventional pollutant in the discharge and the estimated number of discharges to be covered. Another factor, the cumulative impact of the discharges has been added in this final-form rulemaking.

Proposed §§ 92a.24 and 92a.25 relating to permits-by-rule for SRSTPs and application of pesticides.

The proposed rulemaking would have established criteria and requirements for coverage of discharges from single residence sewage treatment plants (SRSTPs) and the application of pesticides under a permit-by-rule. The proposed provisions relating to the permits-by-rule have been deleted in the final-form rulemaking. Because of the deletions, the remaining sections of Subchapter B have been renumbered.

§92a.24. New or increased discharges, or change of waste streams.

Subsection (a) of the proposed rulemaking, § 92.26(a), would have authorized certain activities which result in increases in the discharge of certain permitted pollutants which do not have the potential to exceed effluent limitations without prior approval of the Department. Any change in the pollution profile of the effluent that may exceed effluent limitations or require new effluent limitations would have required prior approval of the Department.

This subsection was amended to delete the authorization for increases in the discharge of pollutants without prior notification to the Department. This authorization was deleted because it appeared to limit normal and usual variation in wastestreams, and normal increases in the pollutant load already provided for in the permit. The notification requirement has been amended to state that in addition to facility expansions or process modifications stated in the proposed rulemaking, production increases and any change in wastestream that may result in an increase of pollutants that may have the potential to exceed ELGs or violate effluent limitations or require new effluent limitations require prior approval from the Department. Such approval must be approved in writing before the permittee may commence the new or increased discharge or change in wastestream. The Board therefore clarifies that only changes that may exceed permit conditions or previous representations on permit applications need the prior approval of the Department.

Subsection (b), which relates to stormwater discharges associated with construction activity has been clarified to make it clear that the Department will determine if a permittee will be required to submit a permit application for any new or expanded disturbance area not identified in the permit before the permittee may initiate construction activity in the new or expanded disturbed area.

§ *92a.26. Application Fees*

Section 92a.28 of the proposed rulemaking set forth proposed permit application fees. The fees remain unchanged in this final-form rulemaking. An editorial change has been made to subsection (a) specifying that all fees collected are to be deposited into the Clean Water Fund account. Minor editorial changes have also been made that move the provision for the fee for mining activities from subsection (d) to subsection (c). Since a discharge from a mining activity is an industrial waste discharge, it most properly belongs in subsection (c) and is subject to applicable industrial waste requirements.

Subsection (g) sets a maximum fee of $2,500 for a Notice of Intent (NOI) for coverage under a general permit. This subsection has been amended to include a provison that the maximum will not be applicable to the fees established in Chapter 102, which relates to erosion and sediment control.

A new subsection (i) has been added providing that any Federal or State agency which provides funding to the Department for implementation of the NPDES program may be exempt from the requirement to pay permit application fees. This would only apply where the Federal or State agency provides significant funding or staff to assist the Department in the administration of the NPDES program.

§ 92a.27. Sewage discharges.

Section 92a.29(a) of the proposed rulemaking outlined additional application requirements applicable to new and existing sewage dischargers. It also contained an

exception from these requirements " . . . where aquatic communities are essentially excluded as documented by water quality data confirming the absence of the communities and confirming the lack of a trend of water quality improvement in the waterbody, and provided that the Department has determined that the primary cause of the exclusion is unrelated to any permitted discharge." The quoted language has been deleted from the final-form rulemaking.

§ 92a.32 Stormwater discharges.

This section outlines application requirements for different types of stormwater discharges. A new subsection (e) has been added to address application requirements for stormwater discharges associated with industrial activity.

§ 92a.34. Cooling water intake structures.

Section 92a.36 of the proposed rulemaking provided that the requirements applicable to cooling water intake structures for new facilities under section 316(b) of the Federal Act set forth in 40 CFR 125.80 – 89 would be incorporated by reference. Subsection (c) of the proposed rulemaking further provided that "[t]he Department will determine if a facility with a cooling water intake structure reflects the BTA for minimizing adverse environmental impacts based on a site specific evaluation." Subsection (c) has been deleted in the final-form rulemaking.

§ 92a.36. Department action on NPDES permit applications.

Subsection (b) of the proposed rulemaking provided for Department consideration of Local and County Comprehensive Plans and zoning ordinances in the review of permit applications. No new specific requirement would have been applicable to applicants, as this is the current policy of the Department. This subsection has been deleted in the final-form rulemaking, and the requirement will continue to be implemented through policy.

§ 92a.41. Conditions applicable to all permits.

This section generally incorporates all permit conditions applicable to NPDES permits as set forth in 40 CFR 122.41(a)-(m). Subsection (b) of the proposed rulemaking provided that "[t]he immediate notification requirements of § 91.33 (relating to incidents causing or threatening pollution) supersede the reporting requirements of 40 CFR 122.41(l)(6)." The quoted language has been deleted and the subsection has been revised to provide that the permittee must provide oral notification to the Department "as soon as possible but no later than 4 hours after the permittee becomes aware of the incident causing or threatening pollution" and provide a written submission within 5 days of becoming aware of the incident.

Subsection (c) of the proposal would have provided that a "discharger may not discharge floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits." This subsection has been revised to

account for the difference in the characteristics of the listed materials and their interactions with receiving waters. Subsection (c) now provides that "[t]he discharger may not discharge floating materials, scum, sheen or substances that result in deposits in the receiving water. Except as provided for in the permit, the discharger may not discharge foam, oil, grease, or substances that produce an observable change in color, taste, odor, or turbidity of the receiving water."

§ 92a.47. Sewage permit.

This section outlines requirements for sewage permits involving discharges of treated sewage. Sewage discharges must meet certain requirements, but some requirements apply only to POTW (Publicly Owned Treatment Works) facilities, and certain exemptions and adjustments are provided for in this section. The requirement relating to weekly average discharge limitations for BOD_5 (Biochemical Oxygen Demand) and TSS (Total Suspended Solids) in subsection (a)(2) has been revised to apply only to POTW facilities. The requirement for tertiary treatment in certain water quality-limited scenarios at the former subsection (b) has been eliminated in full, and the remainder of the section renumbered. Several new subsections have been added: (f) Providing that POTW facilities that have relaxed limits for BOD_5 and TSS may retain those limits until a new or amended water quality management permit authorizing an increase in the design flow of the facility is issued; (g) Providing that POTW facilities with CSOs (Combined Sewer Overflows) that cannot meet the removal efficiency requirements of subsection (a)(3) for BOD_5 and TSS during wet weather may be held to a less stringent standard; (h) Providing that POTW facilities with CSOs that cannot meet the removal efficiency requirements of subsection (a)(3) for BOD_5 and TSS during dry weather may be held to a less stringent standard as long as certain conditions apply; and (i) Providing that POTW facilities that cannot meet the removal efficiency requirements of subsection (a)(3) for BOD_5 and TSS in separate sewers due to less concentrated influent may be held to a less stringent standard as long as certain conditions apply. These new subsections largely mirror exemptions and adjustments provided for in 40 CFR 133.103.

92a.48. Industrial waste permit.

This section outlines requirements for industrial water permits, incorporating much of existing § 92.2d. Proposed subsection (a)(4) would have required that industrial discharges of conventional pollutants be assigned technology-based limits of no greater than 50 mg/L of $CBOD_5$ and 60 mg/L of TSS. This provision has been deleted in the final-form rulemaking.

§ 92a.50. CAAP.

Subsection (a) of the proposed rulemaking would have provided that the antidegradation requirements of § 93.4c would apply to discharges from a CAAP into a surface water classified as a High Quality Water or an Exceptional Value Water. This could give the impression that the requirements of § 93.4c apply only to special protection waters when they actually apply to discharges to all surface waters. To avoid

any confusion, the language in proposed subsection (a) has been deleted in the final-form rulemaking.

Subsection (d) of the proposed rulemaking, renumbered subsection (c) in the final-form rulemaking, would have authorized the limited use of products or chemicals that contain any carcinogenic ingredients which would otherwise be prohibited provided certain conditions are met. Among the conditions outlined in the proposed rulemaking was that the permittee "[d]emonstrate through sampling or calculation that any carcinogen in the proposed chemical will not be detectable in the final effluent, using the most sensitive analytic method available." The phrase "most sensitive analytic method available" has been revised to provide for the use of an "EPA-approved analytic method for wastewater analysis with the lowest published detection limit" to eliminate guesswork as to what constitutes an appropriate analytic method.

§ 92a.51. Schedules of compliance.

Subsection (a) of the proposed rulemaking would have provided, in part, that a schedule of compliance is to require compliance with final enforceable effluent limitations as soon as practicable, but in no case longer than 3 years, unless the Environmental Hearing Board (EHB) or a court of competent jurisdiction issues an order for a longer time of compliance. The 3-year limitation has been changed to 5 years in the final-form rulemaking. In addition, the reference to the EHB has been deleted. Schedules of compliance may only be extended by a court of competent jurisdiction, as under existing § 92.55.

Subsection (b) provides that where the period of time for compliance exceeds 1 year, a schedule would be set forth in the permit specifying interim requirements and the dates for their achievement. A sentence has been added to the final-form rulemaking providing that the time between interim requirements may not exceed 1 year.

§ 92a.54. General permits

Subsection (a)(7) of the proposed rulemaking (as well as the existing regulation at § 92.81(a)(7)) provides that a general NPDES permit may be issued if discharges from point sources, among other things, "[i]ndividually and cumulatively do not have the potential to cause significant adverse environmental impact." This subsection has been clarified in the final-form rulemaking to address violations of water quality standards also. Accordingly, a general permit may be issued where point source discharges "[i]ndividually and cumulatively do not have the potential to cause or contribute to a violation of an applicable water quality standard established under Chapter 93 . . . or cause significant adverse environmental impact."

Subsection (c) of the proposed rulemaking (as well as existing § 92.81(c)) outlined two ways a permittee would be authorized to discharge under the general permit – (1) following a waiting period specified in the general permit or (2) upon receipt of notification of approval for coverage under the general permit from the Department. The

final-form rulemaking authorizes a third way of authorizing a discharge -- immediately upon submission of the NOI. The manner in which a discharge may be authorized will be specified in the general permit.

§ 92a.61. Monitoring.

The monitoring provisions outlined in the proposed rulemaking are retained except for some minor clarifications. Subsection (b) of the proposed rulemaking provides that the Department may impose reasonable monitoring requirements, including monitoring of the intake and discharge flow of a facility or activity. This subsection has been slightly revised to make it clear that the provision addresses surface water intake and discharge waters, and that monitoring would not be limited to monitoring of the flow parameter.

Subsection (d) of the proposed rulemaking provides, in relevant part, that a discharge authorized by an NPDES permit that is "not a minor discharge" shall be monitored by the permittee for certain named parameters. This section was revised to make it clear that the discharge authorized by the NPDES permit is that issued to a facility which is not a minor facility rather than for a minor discharge.

§ 92a.62. Annual fees.

The annual fees established in this section remain unchanged from those set forth in the proposed rulemaking. Subsection (a) has been revised to make it clear that these fees are to be paid to the Clean Water Fund and that the categories of fees are based on annual average design flows. In addition, subsection (b) has been revised to make it clear that the annual fees are for discharges of treated sewage, not domestic sewage as was inadvertently stated in the proposed rulemaking.

As with permit fees established under § 92a.26, any Federal or State agency which provides funding to the Department for the implementation of the NPDES program may be exempt from the payment of annual fees.

§ 92a.75. Reissuance of expiring permits.

Subsection (b) of the proposed rulemaking would have authorized the administrative extension of a permit for a minor facility for a maximum of 5 years provided certain conditions were met; namely the permittee is in compliance with applicable requirements and no changes in Department regulations have occurred since the permit was issued which would affect the effluent limitations. This subsection has been deleted in the final-form rulemaking because it was found to be confusing and subject to misinterpretation.

§ 92a.84. Public participation.

Subsection (c) of the proposed rulemaking (and existing § 92.83(a)(3)) outlined mechanisms for approvals for coverage under a general permit. The mechanisms were: notice will be published in the *Pennsylvania Bulletin* of each NOI under an applicable

general NPDES permit and of each approval of coverage, or notice will be published in the *Pennsylvania Bulletin* of each approval of coverage only. The final-form rulemaking authorizes a third mechanism; a NOI would not be required for coverage under a general permit. This is consistent with the requirements of 40 CFR 122.28(b)(2)(v) which authorizes discharges under a general permit without submitting an NOI under specified conditions.

§ 92a.85. Notice to other government agencies.

Subsection (a) was added to incorporate by reference 40 CFR 124.59 (relating to conditions requested by the corps of engineers and other government agencies).

§ 92a.87. Notice of reissuance of permits

The proposed rulemaking would have established a public notice process for administrative extensions of permits. This portion of the proposed rulemaking has been deleted since the provisions relating to administrative extensions in proposed section 92a.75(b) were deleted in the final-form rulemaking.

F. <u>Summary of Comments and Responses Regarding the Proposed Rulemaking</u>

The Board approved the proposed rulemaking with a 30-day comment period on November 17, 2009. A notice of proposed rulemaking was published in the *Pennsylvania Bulletin* at 40 Pa. B. 847 (February 13, 2010). Public comments were accepted from February 13 until March 15, 2010. The Department received comments from 42 commentators during the public comment period.

Detailed responses to all comments received are contained in the Comment and Response document. The major changes to the proposed rulemaking in response to comments received are summarized here:

- **Definitions –** A number of definitions were revised as suggested by commentators. In addition, the definition of BMP (Best management Practice) was revised to better align the definition with the definition of BMP in other chapters.
- **Fees –** A provision was added that requires that all fees collected be deposited to the Clean Water Fund. In addition:
    - The fee for "mining activity" was relocated within the fee tables to the section covering discharges of industrial wastewater.
    - An exception to the $2,500 maximum fee for coverage under a general permit was added for any general permit provided for in Chapter 102 (*Erosion and Sediment Control*). Certain fees for general permits in Chapter 102 will be based on the amount of disturbed area rather than any set fee.
    - A provision was added allowing for the waiver of permit fees for any federal or state agency or commission that provides funding or staffing to the Department for implementation of the NPDES program.

- **Treatment requirements –** Certain treatment requirements that had been proposed were deleted from the final-form rulemaking. Specifically, the requirement for tertiary treatment as a minimum treatment requirement for discharges of treated sewage in certain water quality-limited situations was deleted. Minimum treatment requirements for conventional pollutants in industrial waste discharges were deleted. The incorporation of the secondary treatment standard for discharges of treated sewage was retained, but certain adjustments and exemptions from the requirements of the secondary treatment standard that are provided for in Federal regulations were reinstated in part.
- **Permit-by-Rule –** Provisions designed to provide for permit-by-rule coverage for application of pesticides, and also for certain small discharges of treated sewage, were deleted. These discharges will instead be covered under general permits.
- **New or increased discharges, or change of wastestream –** This section is designed to assure that permittees inform the Department of important changes to their facility or wastestream, and if necessary file for an amended or reissued permit. This section was revised to make it clear that only changes that could violate permit conditions, or that exceed previous representations on permit applications, need be reported.
- **Department action on permit applications –** A subsection that provided that the Department will consider local and county plans and zoning when making permitting decisions was deleted. The Department will still consider plans and ordinances under the existing guidance (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*).
- **Conditions applicable to all permits –** A provision designed to control certain conditions (floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits) has been revised to make it clear that many of these conditions are acceptable to the extent that they are provided for in the permit. Even if not provided for in the permit, they are all acceptable to the extent that they do not result in an observable effect on the condition of the receiving water. In addition, certain oral and written reporting requirements relating to incidents causing or threatening pollution were clarified based on comments received.
- **Administrative extensions of permits –** New proposed language that applied to administrative extensions of permits was deleted, such that there will be no new provisions related to administrative extensions. Some commentators felt the new provision was confusing and subject to misinterpretation, and the Department agreed.

Comments were received that did not result in any revisions to the regulation are summarized:

- **Fees** – Many commentators noted that the proposed permit fee structure is excessive, unjustified, or otherwise poorly conceived. While the concern of the regulated community is understandable, these fees are required as part of a fundamental shift to a self-sustaining program. They are reasonable and compare favorably with fees assessed by neighboring and other states.

- **Sanitary sewer overflows (SSOs)** – Some commentators argued that these conditions, involving the overflow of raw, untreated or partially treated sewage into rivers and streams should be allowable under some conditions. However, an SSO is an inherently unacceptable condition and an immediate threat to public health.
- **Fecal coliform limits** – Some commentators argued against a maximum level of fecal coliforms in effluent. However, as a measure of effective disinfection of treated sewage, fecal coliforms must be controlled on an ongoing basis.
- **Confidentiality of information** – Some commentators suggested revisions to these provisions based on certain interpretations of applicable Federal or Commonwealth requirements. The existing provisions were determined to achieve a proper balance of the competing Federal and Commonwealth requirements.
- **Pollution prevention** – Two commentators took issue with the Pollution Prevention (P2) provisions in the rulemaking, but these provisions represent 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.
- **Applicability of Chapter 92a and other chapters containing NPDES requirements** – Some commentators believe that the requirements of Chapter 92a do not or should not apply to their facilities or activities, which are point sources. Other commentators believe that requirements in other chapters that contain NPDES-based requirements do not have the full force of the NPDES regulation, Chapter 92a. The language in the regulation properly clarifies these issues, and that clarification is both timely and appropriate.
- **New potable water supply (PWS) intakes** – Comments were received to the effect that a new PWS should not automatically be accommodated by adjusting upstream permit limits where necessary, but that any such adjustments should be limited to certain pollutants, or be justifiable based on a cost-benefit analysis. However, PWS is a protected use of the Commonwealth's rivers and streams, and must be protected as required by statute and regulation.
- **Cooling water intake structures (CWIS)** – Comments were received to the effect that the Department should not presume to require BTA (Best Technology Available) for CWIS before Federal regulations related to CWIS are promulgated. The Department acknowledges the uncertainty, but it may not ignore its ongoing obligation to make BTA determinations.
- **Variances** – Several commentators suggested that the Board should automatically incorporate by reference any new variances provided for in Federal regulation. The Department has always taken the position that any new Federal variances must be reviewed for appropriateness in this Commonwealth, and for compliance with the provisions of the Clean Streams Law.
- **Public notice** – Two commentators felt that public notice at the site of a new or reissued permit is inappropriate, and suggested a posting at the Department's offices, but posting at the site of the discharge is a fundamental component of public notice. Several commentators objected to the deletion of the requirement that the location of the first downstream PWS be included in public notice, but

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

- **Procedure for civil penalty assessments** – Two commentators proposed a major reworking of the procedure for civil penalty assessments, specifically in relation to the process of a penalty assessment hearing that would apply. Hearings related to civil penalty assessments are based on a well established, Department-wide process and the commentators did not advance a compelling rationale as to why it should be changed.

G. Benefits, Costs and Compliance

Benefits

Chapter 92a will help protect the environment, ensure the public's health and safety, and promote the long-term sustainability of the Commonwealth's natural resources by ensuring that the water quality of our rivers and streams is protected and enhanced. Chapter 92a implements the requirements of the Federal Clean Water Act and the Pennsylvania Clean Streams Law for point source discharges of treated wastewater to the rivers and streams of this Commonwealth.

The revision primarily is designed to improve the effectiveness and efficiency of the NPDES permits program. The major problem with the existing Chapter 92 is that it often uses different language than the companion Federal regulation 40 CFR Part 122 to describe requirements, and it is not often clear if Chapter 92 requirements are more stringent than Federal requirements. The primary goal of the proposed rulemaking was to rebuild the regulation, starting with the Federal program requirements, incorporating additional or more stringent requirements only where there was clearly a basis for them. Where feasible, Chapter 92a reverts to Federal terminology and definitions to minimize possible distortions or ambiguity. The Department expects that the reorganization of the NPDES regulation will have a substantive positive effect on Pennsylvania's NPDES program. Permittees and other members of the regulated community will find it easier to determine if Pennsylvania has additional requirements compared to Federal requirements. A supplemental benefit is that turnover in permit engineers and writers should be less disruptive, since new staff should find it easier to understand the streamlined regulatory requirements.

The final-form rulemaking also includes new provisions designed to keep the program current with recent changes at the Federal level. Some of these provisions are needed to ensure continued Federal approval of Pennsylvania's NPDES program by the U.S. Environmental Protection Agency (EPA).

Compliance Costs

No new requirements are proposed in this final-form rulemaking that would require general increases in personnel complement, skills, or certification. The new permit fees are the only broad-based new requirement that would increase

costs for permittees, but the fees have been structured to assure that smaller facilities, that are more financially constrained and also have a lower potential environmental impact, are assessed the lowest fees. The new permit fees are relatively small on both a per gallon basis and a per customer basis, especially for larger facilities. The cost of securing and maintaining an NPDES permit to discharge treated wastewater to surface waters is small compared to the cost of operating these facilities. Moreover, these NPDES 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. The annual fee for the same facility 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.

The rule addresses wastewater treatment facilities, including industrial wastewater treatment facilities, publicly-owned treatment works (POTWs), and other facilities that treat sanitary wastewater. The treatment requirements of the NPDES regulation affect operational costs to some extent, but the final-form rulemaking does not include any new broad-based treatment requirements that would apply to most facilities. For most facilities, the compliance cost of the rule is limited to the revised application and annual fees. Current annual income from NPDES application fees is estimated at $750,000, with no annual fees, versus a cost of running the program estimated at $5 million. The new fee structure is designed to return annual income of approximately $5 million, such that the total additional cost to the regulated community will be approximately $4.25 million per year.

Compliance Assistance Plan

In cases where the receiving water is water quality-limited (impaired), wastewater treatment facilities may be required to upgrade their treatment capabilities. This would involve a significant compliance cost burden related to engineering, construction and operating costs for upgrading the wastewater treatment facility. The Department's Technical and Financial Assistance Program in conjunction with the Pennsylvania Infrastructure Investment Authority (PENNVEST) offers financial assistance to eligible public water systems. This assistance is in the form of a low-interest loan, with some augmenting grant funds for hardship cases. Eligibility is based upon factors such as public health impact, compliance necessity and project/operational affordability. Other potential sources of financial assistance for wastewater treatment facility upgrades are:

- The Water Supply and Wastewater Infrastructure Program (PennWorks), administered by the Pennsylvania Department of Community Development
- The Community Development and Block Grant Program, administered by the Department Pennsylvania Department of Community Development
- The Growing Greener New or Innovative Water/Wastewater Technology Grant program, administered by the Department

Paperwork Requirements
Most public or commercial permittees will be required to submit annual fees to the Department.

No new forms, reports, or other paperwork are required under this final-form rulemaking, except for certain new requirements for concentrated aquatic animal production (CAAP) facilities. CAAPs are fish hatcheries or fish farms. Under this rule, CAAPs would be required to have a written BMP (Best Management Practice) plan to manage feed and nutrients to minimize excess feed that wastes resources and causes pollution without any benefit. Also, therapeutic drug use (e.g. fungicides, antibiotics) must be tracked and reported. The implementation of a BMP plan to manage feed costs and impacts is widely recognized as an appropriate industry practice, and well run facilities already have them in place. Other options that were considered, such as establishing strict mass and concentration-based requirements for discharges of pollutants from CAAPs, were rejected as unnecessary and potentially burdensome. Facilities already are required to secure approval for any discharge of any therapeutic drug that may be detectable in the effluent. The Department generally considers the use of these therapeutic drugs as safe and of low environmental concern, but tracking use rates will support investigation of any potential environmental impact of the drugs, or allegation of same.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 (42 U.S.C. §§ 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 achieve or move beyond compliance.

This regulation commits the Department to encouraging pollution prevention by providing assistance to the permittee and users of the permittee's facilities in the consideration of pollution prevention measures such as process changes, materials substitution, reduction in volume of water use, in-process recycling and reuse of water and general measures of "good housekeeping" within the plant of facility. Lower permit fees are assessed on facilities with lower average annual design flows, which effectively motivates dischargers to pursue point source discharge reductions by reducing the volume of wastewater that requires treatment. Section 92a.10 of the regulation incorporates the established hierarchy for Pollution Prevention, in descending order of preference for environmental management of wastewater: (1) Process change, (2) Materials substitution, (3) Reuse, (4) Recycling, (5) Treatment, (6) Disposal.

I. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745(a)) on January 27, 2010, the Department submitted a copy of the proposed rulemaking, published at 40 Pa.B. 847 (February 13, 2010), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under Section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the official public comment period. In preparing this final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on _____, 2010 this final-form rulemaking were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2010 and approved the final-form rulemaking.

K. Findings of the Board

The Board finds that:

1. Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240)(45 P.S. §§1201 and 1202) and regulations promulgated thereunder at 1 *Pennsylvania Code* §§ 7.1 and 7.2.

2. A public comment period was provided as required by law, and all comments were considered.

3. These regulations do not enlarge the purpose of the proposal published at 40 *Pennsylvania Bulletin* 847 (February 13, 2010)

4. These regulations are necessary and appropriate for the administration and enforcement of the authorizing acts identified in Section C of this Order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code* Chapter 92a, are adopted to read as set forth in Annex A.

(b) Existing regulations at 25 *Pennsylvania Code* Chapter 92 are deleted and the sections reserved as set forth in Annex A.

(c) The Chairperson of the Board shall submit this Order and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form, as required by law.

(d) The Chairperson of the Board shall submit this Order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(e) The Chairperson of the Board shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(f) This Order shall take effect immediately.

By:

John Hanger
Chairman
Environmental Quality Board