RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 92a]

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

The Environmental Quality Board (Board) rescinds Chapter 92 and replaces it by adding Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance). This final-form rulemaking describes the process the Department of Environmental Protection (Department) will follow in issuing National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of wastewater and stormwater to conform to the requirements of the Federal Clean Water Act (33 U.S.C.A. §§ 1251—1387) and The Clean Streams Law (35 P. S. §§ 691.1—691.1001). This final-form rulemaking represents an extensive reorganization of existing Chapter 92 so that it follows the organization of the corresponding Federal regulations in 40 CFR Part 122 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System). 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 13, 2010.

A. *Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information, contact Ronald Furlan, Environmental Program Manager, Division of Planning and Permits, P. O. Box 8774, Rachel Carson State Office Building, Harrisburg, PA 17105-8774, (717) 787-8184); or William S. Cumings, Jr., Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, wcumings@state.pa.us. Persons with a disability may use the Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department's web site at www.depweb.state.pa.us.

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*

Chapter 92 set forth requirements regarding the issuance of NPDES permits for point source discharges of treated wastewater and stormwater in accordance with the Federal Clean Water Act. The regulations did not follow the organization of the comparable Federal regulations in 40 CFR Part 122. The primary purpose of this final-form rulemaking is to reorganize and replace existing Chapter 92 with 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 Board at its November 17, 2009, meeting. The proposed rulemaking was published 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 (IRRC). The comments received on the proposed rulemaking are summarized in Section E and are more extensively addressed in a Comment and Response Document which is available from the Department.

The Board 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 Water Resources Advisory Committee (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 in the proposed rulemaking were deleted in the final-form rulemaking: "expanding facility or activity," "immediate" and "permit-by-rule."

The definition of "BMP—Best Management Practices" has been revised by deleting proposed subparagraphs (iii) and (iv), which included measures designed to reduce erosion and runoff of soil and Best Management Practices (BMP) measures developed under 25 Pa. Code (relating to environmental protection) to reduce pollutant loading to surface waters, and replacing them with new paragraph (iii), which provides that the term "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—Best Management Practices" 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 (relating to erosion and sediment control). This revised definition eliminates a distinction between earth disturbances between 1 and 5 acres, and earth disturbances over 5 acres. Essentially, 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 in 40 CFR 122.26(b)(14) (relating to storm water discharges (applicable to State NPDES programs, see § 123.25)) 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 regarding incorporation of Federal regulations by reference, § 92.2, provided 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) regarding 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 in 40 CFR 132 (relating to water quality guidance for the Great Lakes System) have been incorporated by reference in 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 the 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 when applicable.

§ 92a.21. Application for a permit

Subsection (a) of the proposed rulemaking provided that specified subsections of 40 CFR 122.21 (relating to application for a permit (applicable to State programs, see § 123.25)) 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 rulemaking, persons proposing to discharge from a single residence sewage treatment plants (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. 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, 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 40 CFR 122.28(b)(2)(v) (relating to general permits (applicable to State NPDES programs, see § 123.25)) which provides that states and the United States Environmental Protection Agency (EPA) are authorized to allow persons to discharge under a general permit without submitting an NOI when the permitting authority finds that an NOI requirement would be inappropriate and provided that the discharge is not from a publicly-owned treatment works (POTW), combined sewer overflow (CSO), municipal separate storm sewer system (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 (relating to water quality standards). 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 an NOI shall 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. Permit-by-rule for SRSTPs

Proposed § 92a.25. Permit-by-rule for application of pesticides

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

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

Proposed § 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. A 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 a change in wastestream that may result in an increase of pollutants that may have the potential to exceed effluent limitations guidelines or violate effluent limitations or require new effluent limitations require prior approval from the Department. The approval will be approved in writing before the permittee may begin 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 a 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

Proposed § 92a.28, final-form § 92a.26, 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 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 an NOI for coverage under a general permit. This subsection has been amended to include a provision that the maximum will not be applicable to the fees established in Chapter 102.

Subsection (i) has been added providing that a 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 when 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

Proposed § 92a.29(a), final-form § 92a.27(a), 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. Subsection (e) has been added to address application requirements for stormwater discharges associated with industrial activity.

§ 92a.34. Cooling water intake structures

Proposed § 92a.36, final-form § 92a.34, provided that the requirements applicable to cooling water intake structures (CWIS) for new facilities under section 316(b) of the Federal Clean Water Act (33 U.S.C.A. § 1326(b)) in 40 CFR 125.80—125.89 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

Proposed § 92a.38(b) provided for Department consideration of Local and County Comprehensive Plans and zoning ordinances in the review of permit applications. A new specific requirement would not 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 permit conditions applicable to NPDES permits as set forth in 40 CFR 122.41(a)—(m) (relating to conditions applicable to all permits (applicable to State programs, see § 123.25)). 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 shall 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 proposed rulemaking 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 the 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 facilities, and certain exemptions and adjustments are provided for in this section. The requirement relating to weekly average discharge limitations for Biochemical Oxygen Demand BOD_5 and total suspended solids (TSS) in subsection (a)(2) has been revised to apply only to POTW facilities. The requirement for tertiary treatment in certain water quality-limited scenarios in the former subsection (b) has been deleted and the remainder of the section renumbered. Several new subsections have been added: subsection (f) provides 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; subsection (g) prvoides that POTW facilities with CSOs 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; subsection (h) provides 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 subsection (i) provides 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 (relating to special considerations).

Section 92a.47(a) describes secondary treatment. Subsection (a)(7) of the proposed regulation provided that one of the accomplishments of secondary treatment is treatment which complies with the requirements of § 95.2(1)—(3) relating to industrial waste and oil-bearing wastewaters. Subsequent to the adoption of this final-form rulemaking a notice was published in the *Pennsylvania Bulletin* at 40 Pa.B. (August 21, 2010) of amendments to Chapter 95, including an amendment to § 95.2. The amendment to § 95.2 deleted a reference to paragraph (1) and renumbered paragraphs (2) and (3) as paragraphs (1) and (2). Section 92a.47(a)(7) has been revised accordingly.

§ 92a.48. Industrial waste permit

This section outlines requirements for industrial water permits, incorporating much of former § 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 concentrated aquatic animal production (CAAP) into a surface water classified as a High Quality Water or an Exceptional Value Water. This could give the impression that § 93.4c applied only to special protection waters when they actually apply to discharges to all surface waters. To avoid 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 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 former § 92.55.

Subsection (b) provides that when 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 former § 92.81(a)(7)) provided 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 § 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 in the proposed rulemaking are retained except for some minor clarifications. Subsection (b) of the proposed rulemaking provided 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 provided, 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 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 (relating to application fees), a Federal or State agency that 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 notice of general permits

Subsection (c) of the proposed rulemaking (and former § 92.83(a)(3)) outlined mechanisms for approvals for coverage under a general permit. The mechanisms were either a notice 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 regarding administrative extensions in proposed § 92a.75(b) (relating to reissuance of expiring permits) were deleted in the final-form rulemaking.

F. *Summary of Comments and Responses Regarding the Proposed Rulemaking*

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

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

• *Definitions*. A number of definitions were revised as suggested by commentators. In addition, the definition of "BMP—Best Management Practices" was revised to better align the definition with the definition of BMP in other chapters.

• *Fees*. A provision was added that requires that 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 a general permit provided for in Chapter 102. Certain fees for general permits in Chapter 102 will be based on the amount of disturbed area rather than a 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*).

• *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 so that there will not be new provisions regarding 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 revisions to the final-form rulemaking are summarized as follows:

• *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*. 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, a sanitary sewer overflow 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 provisions in the proposed rulemaking, but these provisions represent established Department policy. The Department is committed to integrate pollution prevention into its everyday practices and to encourage and assist permittees in implementing pollution prevention practices whenever possible.

• *Applicability of Chapter 92a and other chapters containing NPDES requirements*. Some commentators believed that Chapter 92a does not or should not apply to their facilities or activities, which are point sources. Other commentators believed 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 regulations 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 when necessary, but that adjustments should be limited to certain pollutants or be justifiable based on a cost-benefit analysis. However, PWS is a protected use of this Commonwealth's rivers and streams and shall be protected as required by statute and regulation.

• *CWIS*. Comments were received to the effect that the Department should not presume to require Best Technology Available (BTA) for CWIS before Federal regulations regarding 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 new variances provided for in Federal regulation. The Department has always taken the position that new Federal variances will be reviewed for appropriateness in this Commonwealth and for compliance with 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 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 regarding 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 this Commonwealth's natural resources by ensuring that the water quality of rivers and streams is protected and enhanced. Chapter 92a implements the

Federal Clean Water Act and The 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 Chapter 92 was that it often used different language than the companion Federal regulations in 40 CFR Part 122 to describe requirements and it was often not clear if Chapter 92 requirements were more stringent than Federal requirements. The primary goal of the proposed rulemaking was to rebuild the regulations, starting with the Federal program requirements, incorporating additional or more stringent requirements only when there was clearly a basis for them. When 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 the Commonwealth's NPDES program. Permittees and other members of the regulated community will find it easier to determine if the Commonwealth 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 the Commonwealth's NPDES program by the EPA.

Compliance costs

New requirements are not 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 sewage treatment plant, the annual fee will be $1,250 per year ($3.42 per day) in this Commonwealth. 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 final-form rulemaking addresses wastewater treatment facilities, including industrial wastewater treatment facilities, POTWs and other facilities that treat sanitary wastewater. The treatment requirements of the NPDES regulations affect operational costs to some extent, but the final-form rulemaking does not include new broad-based treatment requirements that would apply to most facilities. For most facilities, the compliance cost of the final-form rulemaking is limited to the revised application and annual fees. Current annual income from NPDES application fees is estimated at $750,000, without 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, so that the total additional cost to the regulated community will be approximately $4.25 million per year.

Compliance Assistance Plan

In cases when 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 regarding 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 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 as follows:

• The Water Supply and Wastewater Infrastructure Program (PennWorks) administered by the Department of Community and Economic Development (DCED).

• The Community Development and Block Grant Program administered by the DCED.

• 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.

New forms, reports or other paperwork are not required under this final-form rulemaking, except for certain new requirements for CAAP facilities. CAAPs are fish hatcheries or fish farms. Under this final-form rulemaking, CAAPs would be required to have a written BMP plan to manage feed and nutrients to minimize excess feed that wastes resources and causes pollution without any benefit. Also, therapeutic drug use (for example, fungicides, antibiotics) shall 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 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 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 achieve or move beyond compliance.

This final-form rulemaking 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 or facility. Lower permit fees are assessed on facilities with lower average annual design flows, which effectively motivate dischargers to pursue point source discharge reductions by reducing the volume of wastewater that requires treatment. Section 92a.10 (relating to pollution prevention) 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; and (6) disposal.

I. *Sunset Review*

This final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 27, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 847, to IRRC and to 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 House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on August 18, 2010, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 19, 2010, and approved the final-form rulemaking.

K. *Findings*

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, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 40 Pa.B. 847.

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

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 92 and 92a, are amending by deleting §§ 92.1, 92.2, 92.2a—92.2d, 92.3—92.5, 92.5a, 92.7, 92.8a, 92.9, 92.11, 92.13, 92.13a, 92.15, 92.17, 92.21, 92.21a, 92.22, 92.23, 92.25, 92.31, 92.41, 92.51, 92.52a, 92.53, 92.55, 92.57, 92.59, 92.61, 92.63, 92.65, 92.67, 92.71, 92.71a, 92.72a, 92.73, 92.75, 92.77—92.79, 92.81—92.83 and 92.91—92.94; by adding §§ 92a.1, 92a.4—92a.7, 92a.9—92a.11, 92a.22, 92a.42—92a.46, 92a.49, 92a.52, 92a.53, 92a.55, 92a.71—92a.74, 92a.76, 92a.81—92a.83, 92a.86, 92a.88, 92a.91—92a.94 and 92a.101—92a.104 to read as set forth at 40 Pa.B. 847; and by adding §§ 92a.2, 92a.3, 92a.8, 92a.12, 92a.21, 92a.23—92a.36, 92a.41, 92a.47, 92a.48, 92a.50, 92a.51, 92a.54, 92a.61, 92a.62, 92a.75, 92a.84, 92a.85 and 92a.87 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order, 40 Pa.B. 847 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.

(c) The Chairperson of the Board shall submit this order, 40 Pa.B. 847 and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order, 40 Pa.B. 847 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect immediately.

JOHN HANGER,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 5106 (September 4, 2010).)

Fiscal Note: Fiscal Note 7-443 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 92. (Reserved)

§ 92.1. (Reserved).

§ 92.2. (Reserved).

§§ 92.2a—92.2d. (Reserved).

§§ 92.3—92.5. (Reserved).

§ 92.5a. (Reserved).

§ 92.7. (Reserved).

§ 92.8a. (Reserved).

§ 92.9. (Reserved).

§ 92.11. (Reserved).

§ 92.13. (Reserved).

§ 92.13a. (Reserved).

§ 92.15. (Reserved).

§ 92.17. (Reserved).

§ 92.21. (Reserved).

§ 92.21a. (Reserved).

§ 92.22. (Reserved).

§ 92.23. (Reserved).

§ 92.25. (Reserved).

§ 92.31. (Reserved).

§ 92.41. (Reserved).

§ 92.51. (Reserved).

§ 92.52a. (Reserved).

§ 92.53. (Reserved).

§ 92.55. (Reserved).

§ 92.57. (Reserved).

§ 92.59. (Reserved).

§ 92.61. (Reserved).

§ 92.63. (Reserved).

§ 92.65. (Reserved).

§ 92.67. (Reserved).

§ 92.71. (Reserved).

§ 92.71a. (Reserved).

§ 92.72a. (Reserved).

§ 92.73. (Reserved).

§ 92.75. (Reserved).

§§ 92.77—92.79. (Reserved).

§§ 92.81—92.83. (Reserved).

§§ 92.91—92.94. (Reserved).

CHAPTER 92a. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING, MONITORING AND COMPLIANCE

Subchap.
A. DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS
B. PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS
C. PERMITS AND PERMIT CONDITIONS
D. MONITORING AND ANNUAL FEES
E. TRANSFER, MODIFICATION, REVOCATION AND REISSUANCE, TERMINATION OF PERMITS, REISSUANCE OF EXPIRING PERMITS AND CESSATION OF DISCHARGE
F. PUBLIC PARTICIPATION
G. PERMIT COORDINATION WITH THE ADMINISTRATOR
H. CIVIL PENALTIES FOR VIOLATIONS OF NPDES PERMITS

Subchapter A. DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

Sec.
92a.1. Purpose and scope.
92a.2. Definitions.
92a.3. Incorporation of Federal regulations by reference.
92a.4. Exclusions.
92a.5. Prohibitions.
92a.6. Effect of a permit.
92a.7. Duration of permits and continuation of expiring permits.
92a.8. Confidentiality of information.
92a.9. NPDES permit satisfies other permit requirements.
92a.10. Pollution prevention.
92a.11. Other chapters applicable.
92a.12. Treatment requirements.

§ 92a.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

AEU—Animal Equivalent Unit—One thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit, as defined in 3 Pa.C.S. § 503 (relating to definitions).

Administrator—The Administrator of the EPA or an authorized representative.

Agricultural operation—The management and use of farming resources for the production of crops, livestock or poultry as defined in 3 Pa.C.S. § 503.

Agricultural process wastewater—Wastewater from agricultural operations, including from spillage or overflow from livestock or poultry watering systems; washing, cleaning or flushing pens, milkhouses, barns, manure pits; direct contact swimming, washing or spray cooling of livestock or poultry; egg washing; or dust control.

Applicable effluent limitations or standards—State, interstate and Federal effluent limitations or standards to which a discharge is subject under the State and Federal Acts, including, but not limited to, water quality-based and technology-based effluent limitations, standards of performance, toxic effluent standards and prohibitions, BMPs and pretreatment standards.

Applicable water quality standards—Water quality standards to which a discharge is subject under the State and Federal Acts, and regulations promulgated thereunder.

Application—The Department's form for applying for approval to discharge pollutants to surface waters of this Commonwealth under a new NPDES permit, or reissuance of an existing NPDES permit, or the modification or transfer of an existing NPDES permit.

Aquaculture project—A defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants and animals.

Authority—A body politic and corporate created under 53 Pa.C.S. Chapter 56 (relating to municipal authorities act).

BAT—Best Available Technology Economically Achievable—

(i) The maximum degree of effluent reduction attainable through the application of the best treatment technology economically achievable within an industrial category or subcategory, or other category of discharger.

(ii) The term includes categorical ELGs promulgated by the EPA under section 304(b) of the Federal Act (33 U.S.C.A. § 1314(b)).

BOD_5—Biochemical oxygen demand, 5-day—The 5-day measure of the pollutant parameter biochemical oxygen demand.

BMP—Best Management Practices—

(i) Schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce pollutant loading to surface waters of this Commonwealth.

(ii) The term includes treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. The term 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.

BTA—Best Technology Available—The combination of technologies and operational practices that achieves the most effective degree of impingement mortality and entrainment reduction applicable to the facility.

CAAP—Concentrated Aquatic Animal Production Facility—A hatchery, fish farm or other facility which meets the criteria in 40 CFR 122.24 (relating to concentrated aquatic animal production facilities (applicable to State NPDES programs, see § 123.25)).

CAFO—Concentrated Animal Feeding Operation—A CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under 40 CFR 122.23(b)(4) (relating to concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25)).

CAO—Concentrated Animal Operation—An agricultural operation that meets the criteria established by the State Conservation Commission under the authority of 3 Pa.C.S. Chapter 5 (relating to nutrient management and odor management) in Chapter 83, Subchapter D (relating to nutrient management).

$CBOD_5$—Carbonaceous biochemical oxygen demand, 5-day—The 5 day measure of the pollutant parameter carbonaceous biochemical oxygen demand.

CSO—Combined Sewer Overflow—An intermittent overflow or other untreated discharge from a municipal combined sewer system (including domestic, industrial and commercial wastewater and stormwater) prior to reaching the headworks of the sewage treatment facility which results from a flow in excess of the dry weather carrying capacity of the system.

Combined sewer system—A sewer system that has been designed to serve as both a sanitary sewer and a storm sewer.

Conventional pollutant—Biochemical oxygen demand, carbonaceous biochemical oxygen demand, suspended solids, pH, fecal coliform, oil or grease.

DMR—Discharge Monitoring Report—The Department or EPA supplied forms for reporting of self-monitoring results by the permittee.

Daily discharge—The discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably and accurately represents the calendar day for purposes of sampling:

(i) For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day.

(ii) For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

Discharge—An addition of any pollutant to surface waters of this Commonwealth from a point source.

Disturbed area—As defined in Chapter 102 (relating to erosion and sediment control).

Draft permit—A document prepared by the Department indicating the Department's tentative decision to issue or deny, modify, revoke or reissue a permit.

ELG—Effluent Limitations Guideline—A regulation published by the Administrator under section 304(b) of the Federal Act, or by the Department, to revise or adopt effluent limitations.

Earth disturbance activity—As defined in Chapter 102.

Effluent limitation or standard—A restriction established by the Department or the Administrator on quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into surface waters, including BMPs and schedules of compliance.

Entrainment—The incorporation of all life stages of fish and shellfish with intake flow entering and passing through a cooling water intake structure and into a cooling water intake system.

Existing discharge—A discharge that is not a new discharge or a new source.

Facility or *activity*—Any NPDES point source or any other facility or activity including land or appurtenances thereto that is subject to regulation under the NPDES Program.

Federal Act—The Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387) also known as the Clean Water Act or CWA.

GPD—Gallons per day.

Impingement—The entrapment of all life stages of fish and shellfish on the outer part of the intake structure or against a screening device during periods of intake water withdrawal.

Indirect discharger—A discharger of nondomestic wastewater introducing pollutants into a POTW or other treatment works.

Industrial waste—

(i) A liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from manufacturing or industry, or from an establishment, and mine drainage, refuse, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations.

(ii) The term includes all of these substances whether or not generally characterized as waste.

Instantaneous maximum effluent limitation—The highest allowable discharge of a concentration or mass of a substance at any one time as measured by a grab sample.

Intermittent stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing water, which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges.

Interstate agency—An agency of two or more states established by or under an agreement or compact, or any other agency of two or more states, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

Large municipal separate storm sewer system—A municipal separate storm sewer system as defined in 40 CFR 122.26(b)(4) (relating to storm water discharges (applicable to State NPDES programs, see § 123.25)).

Livestock—

(i) Animals raised, stabled, fed or maintained on an agricultural operation with the purpose of generating income or providing work, recreation or transportation. Examples include: dairy cows, beef cattle, goats, sheep, swine and horses.

(ii) The term does not include aquatic species.

MGD—Million gallons per day.

MS4—Municipal Separate Storm Sewer System—A separate storm sewer (including roads with drainage

systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains) which is all of the following:

(i) Owned or operated by a State, city, town, borough, county, district, association or other public body (created by or under State law) having jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes, including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, or a designated and approved management agency under section 208 of the Federal Act (33 U.S.C.A. § 1288) that discharges to surface waters of this Commonwealth.

(ii) Designed or used for collecting or conveying stormwater.

(iii) Not a combined sewer.

(iv) Not part of a POTW.

Major amendment—Any amendment to an NPDES permit that is not a minor amendment.

Major facility—A POTW with a design flow of 1.0 MGD or more and any other facility classified as such by the Department in conjunction with the Administrator.

Manure—

(i) Animal excrement, including poultry litter, which is produced at an agricultural operation.

(ii) The term includes materials such as bedding and raw materials which are commingled with that excrement.

Medium municipal separate storm sewer system—A municipal separate storm sewer system as defined in 40 CFR 122.26(b)(7).

Mining activity—A surface or underground mining activity as defined in Chapter 77 or Chapter 86 (relating to noncoal mining; and surface and underground coal mining: general).

Minor amendment—An amendment to an NPDES permit to correct a typographical error, increase monitoring requirements, change interim compliance dates by no more than 120 days, allow for a change in ownership or operational control of a facility, delete an outfall, change a construction schedule for a discharger that is a new source, or to incorporate an approved pretreatment program into an existing permit.

Minor facility—A facility not identified as a major facility.

Monthly average discharge limitation—The highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during the calendar month divided by the number of daily discharges measured during the month.

Municipality—A city, town, borough, county, township, school district, institution, authority or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes or other wastes.

NOI—Notice of Intent—A complete form submitted for NPDES general permit coverage which contains information required by the terms of the permit and by § 92a.54 (relating to general permits). An NOI is not an application.

NPDES—National Pollutant Discharge Elimination System.

NPDES form—An issued NPDES permit, the application, NOI or any DMR reporting form.

NPDES general permit or general permit—An NPDES permit that is issued for a clearly described category of point source discharges, when those discharges are substantially similar in nature and do not have the potential to cause significant adverse environmental impact.

NPDES permit—An authorization, license or equivalent control document issued by the Administrator or the Department to implement the requirements of 40 CFR Parts 122—124 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System; state program requirements; and procedures for decisionmaking) and the Federal Act.

New discharger—A building, structure, facility, activity or installation from which there is or may be a discharge of pollutants that did not commence the discharge at a particular site prior to August 13, 1979, which is not a new source, and which has never received a final effective NPDES permit for discharges at that site.

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

No exposure—Where industrial materials and activities are protected by a storm-resistant shelter to prevent exposure to stormwater. Industrial materials and activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

Nonconventional pollutant—A pollutant which is not a conventional or toxic pollutant.

Nonpoint source—A pollutant source that is not a point source.

POTWs—Publicly Owned Treatment Works—

(i) A treatment works which is owned by a state or municipality.

(ii) The term includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature.

(iii) The term also includes sewers, pipes or other conveyances if they convey wastewater to a POTW treatment plant.

(iv) The term also means the municipality as defined in section 502(4) of the Federal Act (33 U.S.C.A. § 1362(4)), which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

Perennial stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing waters and capable, in the absence of pollution or other manmade stream disturbances, of supporting a benthic macroinvertebrate community which is composed of two or more recognizable taxonomic groups of organisms which are large enough to be seen by the unaided eye and can be retained by a United States Standard No. 30 sieve (28 meshs per inch, 0.595 mm openings) and live at least part of their life cycles within or upon available substrates in a body of water or water transport system.

Person—Any individual, public or private corporation, partnership, association, municipality or political subdivision of this Commonwealth, institution, authority, firm, trust, estate, receiver, guardian, personal representative, successor, joint venture, joint stock company, fiduciary; department, agency or instrumentality of State, Federal or local government, or an agent or employee thereof; or any other legal entity.

Point source—A discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, CAAP, CAFO, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged.

Pollutant—A contaminant or other alteration of the physical, chemical, biological or radiological integrity of surface water that causes or has the potential to cause pollution as defined in section 1 of the State Act (35 P. S. § 691.1).

Pollution prevention—Source reduction and other practices that reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water or other resources, without having significant cross-media impacts.

Privately owned treatment works—A device or system used to treat wastewater that is not a POTW.

Process wastewater—Water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct or waste product.

SRSTP—Single Residence Sewage Treatment Plant—A system of piping, tanks or other facilities serving a single family residence located on a single family residential lot, that solely collects, treats, and disposes of direct or indirect sewage discharges from the residence into surface waters of this Commonwealth.

SSO—Sanitary Sewer Overflow—An overflow of wastewater, or other untreated discharge from a separate sanitary sewer system (which is not a combined sewer system), which results from a flow in excess of the carrying capacity of the system or from some other cause prior to reaching the headworks of the sewage treatment facility.

Schedule of compliance—A schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with effluent limitations, prohibitions, other limitations or standards.

Separate storm sewer—A conveyance or system of conveyances (including pipes, conduits, ditches and channels) primarily used for collecting and conveying stormwater runoff.

Setback—A specified distance from the top of the bank of surface waters, or potential conduits to surface waters, where manure and agricultural process wastewater may not be land applied. Examples of conduits to surface waters include, but are not limited to:

(i) Open tile line intake structures.

(ii) Sinkholes.

(iii) Agricultural wellheads.

Sewage—A substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals.

Significant biological treatment—The use of an aerobic or anaerobic biological treatment process in a treatment works to consistently achieve a 30-day average of at least 65% removal of BOD_5.

Small flow treatment facility—A treatment works designed to adequately treat sewage flows of not greater than 2,000 gallons per day for final disposal using a stream discharge or other methods approved by the Department.

Small municipal separate storm sewer system—A municipal separate storm sewer system as defined in 40 CFR 122.26(b)(16).

State Act—The Clean Streams Law (35 P. S. §§ 691.1—691.1001).

Stormwater—Runoff from precipitation, snow melt runoff and surface runoff and drainage.

Stormwater discharge associated with construction activity—The discharge or potential discharge of stormwater from construction activities into waters of this Commonwealth, including clearing and grubbing, grading and excavation activities involving 1 acre (0.4 hectares) or more of earth disturbance activity, or an earth disturbance activity on any portion, part or during any stage of, a larger common plan of development or sale that involves 1 acre (0.4 hectares) or more of earth disturbance activity over the life of the project.

Stormwater discharge associated with industrial activity—The discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant, and as defined in 40 CFR 122.26(b)(14) (i)—(ix) and (xi).

Surface waters—Perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps and estuaries, excluding water at facilities approved for wastewater treatment such as wastewater treatment impoundments, cooling water ponds and constructed wetlands used as part of a wastewater treatment process.

TMDL—Total Maximum Daily Load—The term as defined in Chapter 96 (relating to water quality standards implementation).

TSS—Total Suspended Solids—The pollutant parameter total suspended solids.

Toxic pollutant—Those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, may, on the basis of information available to the Administrator or the Department, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformations in these organisms or their offspring.

Treatment works—Any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement the State and Federal Acts, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a

reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from the treatment.

Vegetated buffer—A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing water runoff, enhancing water infiltration and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

WETT—Whole Effluent Toxicity Testing—

(i) A test, survey, study, protocol or assessment which includes the use of aquatic, bacterial, invertebrate or vertebrate species to measure acute or chronic toxicity, and any biological or chemical measure of bioaccumulation, bioconcentration or impact on established aquatic and biological communities.

(ii) The term includes any established, scientifically defensible method that is sufficiently sensitive to measure toxic effects.

WQBEL—Water Quality-based Effluent Limitation—An effluent limitation based on the need to attain or maintain the water quality criteria and to assure protection of designated and existing uses.

Water quality standards—The combination of water uses to be protected and the water quality criteria necessary to protect those uses.

Weekly average discharge limitation—The highest allowable average of daily discharges over a calendar week, calculated as the sum of all daily discharges measured during the calendar week divided by the number of daily discharges during that week.

Wetlands—Areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.

Whole effluent toxicity—The aggregate toxic effect of an effluent measured directly with a WETT.

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

(a) The Federal NPDES regulations in subsection (b) are incorporated by reference to the extent that these provisions are applicable and not contrary to the law of the Commonwealth. In the event of a conflict between a Federal regulatory provision and a regulation of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent.

(b) The following Federal regulatory provisions in 40 CFR Parts 122, 124, 125, and 132 are incorporated by reference:

(1) 122.2 (relating to definitions) unless the definitions in § 92a.2 (relating to definitions) are different.

(2) 123.25(c) (relating to requirements for permitting).

(3) 124.57(a) (relating to public notice).

(4) 125.1—125.3 (relating to criteria and standards for imposing technology-based treatment requirements under sections 301(b) and 402 of the act).

(5) 125.30—125.32 (relating to criteria and standards for determining fundamentally different factors under sections 301(b)(1)(A), 301(b)(2)(A) and (E) of the act).

(6) 125.70—125.73 (relating to criteria for determining alternative effluent limitations under section 316(a) of the act).

(7) 132 (relating to water quality guidance for the Great Lakes system).

(c) The Federal NPDES regulations in §§ 92a.4—92a.6, 92a.8, 92a.21, 92a.22, 92a.30—92a.35, 92a.41—92a.45, 92a.55, 92a.61, 92a.71—92a.74, 92a.85 and 92a.92 are incorporated by reference to the extent that these provisions are applicable and not contrary to the law of the Commonwealth. In the event of a conflict between a Federal regulatory provision and a regulation of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent.

§ 92a.8. Confidentiality of information.

(a) The provisions of 40 CFR 122.7(b) (relating to confidentiality of information) are incorporated by reference.

(b) The Department may protect any information, other than effluent data, contained in NPDES forms, or other records, reports or plans pertaining to the NPDES permit program as confidential upon a showing by any person that the information is not a public record for the purposes of section 607 of the State Act (35 P. S. § 691.607). Documents that may be protected as confidential and are not public records are those that if made public would divulge an analysis of chemical and physical properties of coal (excepting information regarding the mineral or elemental content that is potentially toxic in the environment), and those that are confidential commercial information or methods or processes entitled to protection as trade secrets under State or Federal law. If, however, the information being considered for confidential treatment is contained in an NPDES form, the Department will forward the information to the Administrator for concurrence in any determination of confidentiality. If the Administrator does not concur that some or all of the information being considered for confidential treatment merits the protection and notifies the Department in writing, the Department will make available to the public that information determined by the Administrator in consultation with the EPA Office of General Counsel not entitled to protection in accordance with 40 CFR Part 2 (relating to public information).

(c) Information approved for confidential status, whether or not contained in an NPDES form, will be disclosed, upon request, to the Administrator, or an authorized representative, who shall maintain the disclosed information as confidential.

§ 92a.12. Treatment requirements.

(a) Specific treatment requirements and effluent limitations for each discharge must be established based on the more stringent of the following:

(1) Requirements specified in Chapters 16, 77, 87—90, 93, 95, 96 and 102.

(2) The applicable treatment requirements and effluent limitations to which a discharge is subject under this chapter and the Federal Act.

(3) The treatment requirements and effluent limitations of this title.

(b) When interstate or international agencies under an interstate compact or international agreement establish applicable effluent limitations or standards for dischargers of this Commonwealth to surface waters that are more stringent than those required by this title, the more stringent standards and limitations apply.

(c) If the Department has confirmed the presence or critical habitat of endangered or threatened species under Federal or State law or regulation, the Department will limit discharges to these waters to ensure protection of these species and critical habitat.

(d) New or changed water quality standards or treatment requirements may result from revisions to Chapters 16, 77, 87—90, 92a, 93, 95, 96 or 102, or other plans or determinations approved by the Department. Upon notice from the Department, a permittee of an affected facility shall promptly take the steps necessary to plan, obtain a permit or other approval, and construct facilities or undertake other actions that are necessary to comply with the new water quality standards or treatment requirements.

(e) Within 180 days of the receipt of the notice, the permittee shall submit to the Department either a report establishing that its existing facilities are capable of meeting the new water quality standards or treatment requirements, or a schedule setting forth the nature and date of completion of steps that are necessary to plan, obtain a permit or other approval, and construct facilities or undertake other actions that are necessary to comply with the new water quality standards or treatment requirements. The permittee shall comply with the schedule approved by the Department.

(f) Whenever a point of projected withdrawal for a new potable water supply not previously considered is identified by the Department, the Department will notify a discharger if more stringent effluent limitations are needed to protect the point of withdrawal. The discharger shall meet the more stringent effluent limitations in accordance with a schedule approved by the Department. The Department will issue orders directing dischargers to achieve compliance or will impose permit modifications with compliance schedules, when necessary.

Subchapter B. PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

Sec.
92a.21. Application for a permit.
92a.22. Signatories to permit applications and reports.
92a.23. NOI for coverage under an NPDES general permit.
92a.24. New or increased discharges, or change of waste streams.
92a.25. Incomplete applications or incomplete NOIs.
92a.26. Application fees.
92a.27. Sewage discharges.
92a.28. Industrial waste discharges.
92a.29. CAFO.
92a.30. CAAP.
92a.31. Aquaculture projects.
92a.32. Stormwater discharges.
92a.33. Silviculture activities.
92a.34. Cooling water intake structures.
92a.35. New sources and new discharges.
92a.36. Department action on NPDES permit applications.

§ 92a.21. Application for a permit.

(a) The provisions of 40 CFR 122.21(b), (g)(1)—(7), (9)—(13), (h), (i), (j), (k), (l), (m)(1) and (6), (p), (q) and (r) (relating to application for a permit (applicable to State programs, see § 123.25)) are incorporated by reference.

(b) *Duty to apply*. Persons wishing to discharge pollutants shall file a complete application for an individual permit at least 180 days before the date on which it is desired to commence the discharge of pollutants or within another period of time that the Department determines is sufficient to ensure compliance with the Federal Act and the State Act, including applicable water quality standards and effluent limitations or standards.

(c) *Application forms*. Applicants for permits shall submit applications on Department permit application forms. At a minimum, the following are required to be submitted by applicants for a permit, except as otherwise specified:

(1) One original and two copies of the complete application. The Department may require additional copies, if needed to complete the review process.

(2) The applicable permit application fee and other fees as set forth in § 92a.26 (relating to application fees).

(3) If required by the application, proof that a written notice of an application has been submitted to the municipality and county in which the activity is or will be located at least 30 days before the Department may take action on the application. This notice must satisfy the notification requirements of section 1905-A of The Administrative Code of 1929 (71 P. S. § 510-5) and the Pennsylvania Municipalities Planning Code (53 P. S. §§ 10101—11107) if required.

(4) If required by the application, proof that public notice of the application has been published in a newspaper of general circulation in the locality in which the activity is or will be located once a week during a consecutive 4-week period.

(5) A description of the activities conducted by the applicant that require an NPDES permit; name, mailing address and location of the facility; up to four standard industrial codes (SIC) or North American Industry Classification System (NAICS) code that best reflect the principal products or services provided by the facility; the operator's name, address, telephone number, ownership status and entity status; a listing of all Department and EPA environmental quality permits for the facility; a topographic or other map extending 1 mile beyond the boundaries of the facility or activity; and a brief description of the nature of the business.

(6) Documentation that the applicant is in compliance with all existing Department permits, regulations, orders and schedules of compliance, or that any noncompliance with an existing permit has been resolved by an appropriate compliance action or by the terms and conditions of the permit (including a compliance schedule set forth in the permit) consistent with § 92a.51 (relating to schedules of compliance) and other applicable Department regulations.

(d) *Additional information*. The Department may require other information or data needed to assess the discharges from the facility and any impact on receiving waters, and to determine whether to issue an NPDES permit, or what conditions or effluent limitations (including water quality based effluent limitations) to place in the permit. The additional information may include, but is not limited to:

(1) The results of an effluent assessment (or estimate for new dischargers or new sources), including a list of the mass and concentration of pollutants found (or estimated to be for new discharges or new sources) in the wastewater discharge, under Department protocols.

(2) Information and data relating to the biological, physical and chemical characteristics of waters and habitat immediately upstream and downstream of the proposed discharge, performed under a Department-approved protocol.

(3) The results of a waterbody assessment, under Department protocols, setting forth the impact (or potential impact) of the discharges on surface waters of this Commonwealth.

(4) The results of whole effluent toxicity testing, an instream cause/effect survey, or other tests or surveys as needed to determine the impact of a discharge on a waterbody performed under a Department-approved protocol.

(e) *Addresses*. The Department will publish at least annually a list of addresses to which applications and their accompanying papers shall be submitted.

(f) *Supporting documentation*. A person required to file an application shall also file additional modules, forms and applications, and supply data as specified by the Department. Additional modules, forms, applications and data are considered a part of the application.

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

(a) Except as provided for in subsection (c), eligible dischargers, who wish to be covered by a general permit, shall file a complete NOI as instructed in the NOI. At a minimum, the NOI must identify each point source for which coverage under the general permit is requested; demonstrate that each point source meets the eligibility requirements for inclusion in the general permit; demonstrate that the discharge from the point sources, individually or cumulatively, will not cause or contribute to a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) and include other information the Department may require. By signing the NOI, the discharger agrees to accept all conditions and limitations imposed by the general permit.

(b) If the NOI is acceptable, the Department will process the NOI in accordance with § 92a.54 (relating to general permits).

(c) General permits for POTWs, CSOs, CAFOs, MS4s, primary industrial facilities, and stormwater discharges associated with industrial activities must require that an NOI be submitted for each issuance and reissuance of coverage under the general permit. A general permit for any other category of discharges may be designed to allow discharges to be authorized to discharge without submitting a NOI for coverage under the general permit. Alternatively, such a general permit may require an initial NOI for issuance of coverage, but no subsequent NOI for reissuance of coverage. The Department will consider the following in deciding whether an NOI must be submitted for coverage under the general permit: the type of discharge; the potential for toxic and conventional pollutants in the discharge; the estimated number of discharges to be covered by the permit and the cumulative impact of the discharges. The public notice of the general permit will provide the reasons for not requiring the NOI.

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

(a) *Sewage discharges and industrial waste discharges*. Facility expansions, production increases, process modifications, or any change of wastestream, that may result in an increase of pollutants that have the potential to exceed ELGs or violate effluent limitations specified in the permit, or that may result in a new discharge, or a discharge of new or increased pollutants for which no effluent limitation has been issued, must be approved in writing by the Department before the permittee may commence the new or increased discharge, or change of wastestream. The Department will determine if a permittee will be required to submit a new permit application and obtain a new or amended permit before commencing the new or increased discharge, or change of wastestream.

(b) *Stormwater discharges associated with construction activity*. The permittee shall notify the Department before initiating any new or expanded disturbed area not identified in the permit application. The Department will determine if a permittee will be required to submit a new permit application and obtain a new or amended permit before the permittee may initiate construction activity in the new or expanded disturbed area.

§ 92a.25. Incomplete applications or incomplete NOIs.

The Department will not process an application or NOI that is incomplete or otherwise deficient. An application for an NPDES individual permit is complete when the Department receives an application form and supplemental information completed in accordance with this chapter and the instructions with the application. An NOI to be covered by an NPDES general permit issued by the Department is complete when the Department receives an NOI setting forth the information specified in the NOI and by the terms of the general permit.

§ 92a.26. Application fees.

(a) The application fee is payable to the Clean Water Fund according to the fee schedule set forth in this section. All flows listed in this section are annual average design flows.

(b) Applications fees for individual NPDES permits for discharges of treated sewage are:

SRSTP	$100 for new; $100 for reissuance
Small flow treatment facility	$250 for new; $250 for reissuance
Minor facility < 50,000 GPD	$500 for new; $250 for reissuance
Minor facility > = 50,000 GPD < 1 MGD	$1,000 for new; $500 for reissuance
Minor facility with CSO	$1,500 for new; $750 for reissuance
Major facility > = 1 MGD < 5 MGD	$2,500 for new; $1,250 for reissuance
Major facility > = 5 MGD	$5,000 for new; $2,500 for reissuance
Major facility with CSO	$10,000 for new; $5,000 for reissuance

(c) Applications fees for individual NPDES permits for discharges of industrial waste are:

Minor facility not covered by an ELG	$1,000 for new; $500 for reissuance
Minor facility covered by an ELG	$3,000 for new; $1,500 for reissuance
Major facility < 250 MGD	$10,000 for new; $5,000 for reissuance
Major facility > = 250 MGD	$50,000 for new; $25,000 for reissuance

Mining activity	$1,000 for new; $500 for reissuance
Stormwater	$2,000 for new; $1,000 for reissuance

(d) Application fees for individual NPDES permits for other facilities or activities are:

CAFO	$1,500 for new; $750 for reissuance
CAAP	$1,500 for new; $750 for reissuance
MS4	$5,000 for new; $2,500 for reissuance

(e) Application fees for transfers of individual permits are:

SRSTP	$50
Small flow treatment facility	$100
Other domestic wastewater	$200
Industrial waste	$500

(f) Application fees for amendments to individual permits are:

Amendment initiated by Department	No charge
Minor amendment	$200
Major amendment	Same as reissuance permit fee

(g) NOI fees for coverage under a general permit under § 92a.23 (relating to NOI for coverage under an NPDES general permit) will be established in the general permit. NOI fees may not exceed $2,500, except as provided in Chapter 102 (relating to erosion and sediment control). An eligible person shall submit to the Department the applicable NOI fee before the Department approves coverage under the general permit for that person.

(h) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the EQB. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and contain recommendations to increase fees to eliminate the disparity, including recommendations for regulatory amendments to increase program fees.

(i) Any Federal or State agency or independent state commission that provides funding to the Department for the implementation of the NPDES program through terms and conditions of a mutual agreement may be exempt from the fees in this section.

§ 92a.27. Sewage discharges.

(a) The following additional application requirements apply to new and existing sewage dischargers (including POTWs and privately owned treatment works), as applicable:

(1) The following sewage dischargers shall provide the results of whole effluent toxicity testing to the Department:

(i) Sewage dischargers with design influent flows equal to or greater than 1.0 million gallons per day.

(ii) Sewage dischargers with approved pretreatment programs or who are required to develop a pretreatment program.

(2) In addition to the sewage dischargers in paragraph (1), the Department may require other sewage dischargers to submit the results of toxicity tests with their permit applications, based on consideration of the following factors:

(i) The variability of the pollutants or pollutant parameters in the sewage effluent (based on chemical-specific information, the type of treatment facility and types of industrial contributors).

(ii) The dilution of the effluent in the receiving water (ratio of effluent flow to receiving stream flow).

(iii) Existing controls on point or nonpoint sources, including calculations of TMDLs for the waterbody segment, and the relative contribution of the sewage discharger.

(iv) Receiving surface water characteristics, including possible or known water quality impairment, and whether the sewage discharges to an estuary, one of the Great Lakes or a surface water that is classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards).

(v) Other considerations including, but not limited to, the history of toxic impact and compliance problems at the sewage discharge facility, which the Department determines could cause or contribute to adverse water quality impacts.

(3) For sewage dischargers required under paragraph (1) or (2) to conduct toxicity testing, the EPA's methods or other protocols approved by the Department, which are scientifically defensible and sufficiently sensitive to detect aquatic toxicity and approved by the Department, shall be used. The testing shall have been performed since the last NPDES permit reissuance, or when requested by the Department, whichever occurred later.

(b) CSO dischargers shall submit the following information:

(1) The results of an evaluation determining the frequency, extent and cause of the CSO discharge, including identifying the points of inflow into combined systems.

(2) An evaluation of the water quality impacts of the CSO discharge on receiving waters.

(3) A description of the nine minimum controls (NMCs) described in the EPA publication entitled "Combined Sewer Overflows—Guidance for Nine Minimum Controls" (EPA publication number 832-B-95-003 (September 1995) as amended or updated) used at the facility to minimize or eliminate the CSO discharge impact on receiving water quality.

(4) A long-term control plan (LTCP) to minimize or eliminate the CSO discharge with an implementation schedule.

(5) An update on the progress made with the implementation of the LTCP and future activities with schedules to comply with water quality standards.

§ 92a.28. Industrial waste discharges.

(a) *Existing industrial discharges*. Dischargers of industrial waste from sources other than new sources or new discharges subject to subsection (b), nonprocess wastewater discharges subject to subsection (c) and stormwater discharges associated with industrial activity subject to § 92a.32 (relating to stormwater discharges), shall submit the applicable information required to be submitted under 40 CFR 122.21(g)(1)—(7) and (g)(9)—(13) (relating to application for a permit (applicable to State programs, see § 123.25)).

(b) *New sources and new discharges*. Except for new discharges of industrial facilities that discharge nonprocess wastewater subject to subsection (c) and new discharges of stormwater associated with industrial activity subject to § 92a.32, new discharges and new sources applying for NPDES permits shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(k).

(c) *Nonprocess industrial waste discharges*. Except for stormwater discharges associated with industrial activity subject to § 92a.32, industrial waste dischargers applying for NPDES permits that discharge only nonprocess wastewater not regulated by an effluent limitation guideline or new source performance standard shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(h).

§ 92a.29. CAFO.

(a) Except as provided in subsections (b)—(d), each CAFO shall have applied for an NPDES permit on the following schedule, and shall have obtained a permit:

(1) By May 18, 2001, for any CAFO in existence on November 18, 2000, with greater than 1,000 AEUs.

(2) By February 28, 2002, for any other CAFO in existence on November 18, 2000.

(3) Prior to beginning operation, for any new or expanded CAFO that began operation after November 18, 2000, and before October 22, 2005.

(b) A poultry operation that is a CAFO, which is in existence on October 22, 2005, and that is not using liquid manure handling systems, shall apply for an NPDES permit no later than the following, and shall obtain a permit:

(1) By April 24, 2006, for operations with 500 or more AEUs.

(2) By January 22, 2007, for all other operations.

(c) After October 22, 2005, a new operation, and an existing operation that will become a CAFO due to changes in operations such as additional animals or loss of land suitable for manure application, shall do the following:

(1) Apply for an NPDES permit at least 180 days before the operation commences or changes.

(2) Obtain an NPDES permit prior to commencing operations or making changes, as applicable.

(d) Other operations not described in subsections (a)—(c) that will become newly regulated as a CAFO for the first time due to the changes in the definition of a CAFO in § 92a.2 (relating to definitions) shall apply for a permit by April 24, 2006, and obtain a permit.

(e) The NPDES permit application requirements include, but are not limited to, the following:

(1) A nutrient management plan meeting the requirements of Chapter 83, Subchapter D (relating to nutrient management) and approved by the county conservation district or the State Conservation Commission. The plan must include:

(i) Manure application setbacks for the CAFO of at least 100 feet, or vegetated buffers at least 35 feet in width.

(ii) A statement that manure that is stockpiled for 15 consecutive days or longer shall be under cover or otherwise stored to prevent discharge to surface water during a storm event up to and including the appropriate design storm for that type of operation under § 91.36(a)(1) and (5) (relating to pollution control and prevention at agricultural operations).

(2) An erosion and sediment control plan meeting the requirements of Chapter 102 (relating to erosion and sediment control).

(3) When required under § 91.36(a), a water quality management permit, permit application, approval or engineer's certification, as required.

(4) A preparedness, prevention and contingency plan for pollutants related to the CAFO operation.

(5) A water quality management permit application as required under this chapter and Chapter 91 (relating to general provisions), when treatment facilities that would include a treated wastewater discharge are proposed.

(6) Measures to be taken to prevent discharge to surface water from storage of raw materials such as feed and supplies. These measures may be included in the nutrient management plan.

§ 92a.30. CAAP.

The provisions of 40 CFR 122.24 (relating to concentrated aquatic animal production facilities (applicable to State NPDES programs, see § 123.25)) are incorporated by reference.

§ 92a.31. Aquaculture projects.

The provisions of 40 CFR 122.25, 125.10 and 125.11 (relating to aquaculture projects (applicable to State NPDES programs, see 123.25); and criteria for issuance of permits to aquaculture projects) are incorporated by reference.

§ 92a.32. Stormwater discharges.

(a) The provisions of 40 CFR 122.26(a), (b), (c)(1), (d), (e)(1), (3)—(9) and (f)—(g) (relating to storm water discharges (applicable to State NPDES programs, see § 123.25)) and 122.30—122.37 are incorporated by reference.

(b) *No exposure stormwater discharges*. Discharges composed entirely of stormwater are not stormwater discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to stormwater and the discharger satisfies the conditions in 40 CFR 122.26(g). A facility or activity with no stormwater discharges associated with industrial activity may qualify for a conditional exclusion from a permit, provided that the facility or activity does not discharge to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards). To qualify for the conditional exclusion from a permit, the responsible person shall complete, sign and submit to the Department a "No Exposure Certification" at least once every 5 years in lieu of a permit application.

(c) *Municipal separate storm sewer systems*. The operator of a discharge from a large, medium or small municipal separate storm sewer shall submit in its application the information required to be submitted under 40 CFR Part 122 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System). Permits for discharges from municipal separate storm sewer systems are not eligible for a "no exposure" conditional exclusion from a permit under subsection (b).

(d) *Stormwater discharges associated with construction activity*. Applicants for individual NPDES permits for the discharge of stormwater associated with construction

activity shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(g)(7) (relating to application for a permit (applicable to State programs, see § 123.25)) and 122.26(c)(1). In addition, stormwater dischargers shall submit information required in Chapter 102 (relating to erosion and sediment control) as appropriate. Permits for stormwater discharges associated with construction activity are not eligible for a "no exposure" conditional exclusion from a permit under subsection (b).

(e) *Stormwater discharges associated with industrial activity*. Applicants for individual NPDES permits for the discharge of stormwater associated with industrial activity shall submit the information required to be submitted, as applicable, under 40 CFR 122.21(g)(7) and 122.26(c)(1).

§ 92a.33. Silviculture activities.

The provisions of 40 CFR 122.27 (relating to silvicultural activities (applicable to State NPDES programs, see § 123.25)) are incorporated by reference.

§ 92a.34. Cooling water intake structures.

(a) The provisions of 40 CFR 125.80—125.89 (relating to requirements applicable to cooling water intake structures for new facilities under section 316(b) of the Act) are incorporated by reference.

(b) The location, design, construction and capacity of cooling water intake structures, in connection with a point source, must reflect the BTA for minimizing adverse environmental impacts in accordance with the State Act and section 316(b) of the Federal Act (33 U.S.C.A. § 1326(b)).

§ 92a.35. New sources and new discharges.

The provisions of 40 CFR 122.29 (relating to new sources and new dischargers) are incorporated by reference.

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

The Department will not issue an NPDES permit unless the application is complete and the documentation submitted meets the requirements of this chapter. The applicant, through the application and its supporting documentation, shall demonstrate that the application is consistent with:

(1) Plans approved by the Department under the Pennsylvania Sewage Facilities Act (35 P. S. §§ 750.1—750.20), wastewater facility capabilities, service areas, selected alternatives and any adverse effects on the environment of reasonably foreseeable future development within the area of the project resulting from construction of the wastewater facility.

(2) Other applicable environmental laws and regulations administered by the Commonwealth, Federal environmental statutes and regulations, and if applicable, river basin commission requirements created by interstate compact.

(3) Standards established for the wastewater facilities through permits to implement the requirements of 40 CFR Parts 122, 123, 124 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System; State program requirements; and procedures for decisionmaking) and the Federal Act.

Subchapter C. PERMITS AND PERMIT CONDITIONS

Sec.
92a.41. Conditions applicable to all permits.
92a.42. Additional conditions applicable to specific categories of NPDES permits.
92a.43. Establishing permit conditions.
92a.44. Establishing limitations, standards, and other permit conditions.
92a.45. Calculating NPDES permit conditions.
92a.46. Site-specific permit conditions.
92a.47. Sewage permit.
92a.48. Industrial waste permit.
92a.49. CAFO.
92a.50. CAAP.
92a.51. Schedules of compliance.
92a.52. Variances.
92a.53. Documentation of permit conditions.
92a.54. General permits.
92a.55. Disposal of pollutants into wells, into POTW or by land application.

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

(a) Unless indicated otherwise in this section, NPDES permits must include the permit conditions specified in 40 CFR 122.41(a)—(m) (relating to conditions applicable to all permits (applicable to State programs, see § 123.25)) including the following:

(1) Duty to comply.

(2) Duty to reapply.

(3) Need to halt or reduce activity not a defense.

(4) Duty to mitigate.

(5) Proper operation and maintenance.

(6) Permit actions.

(7) Property rights.

(8) Duty to provide information.

(9) Inspection and entry.

(10) Monitoring and records.

(11) Signature requirements.

(12) Reporting requirements.

(13) Bypass.

(b) The permittee shall comply with the immediate oral notification requirements of § 91.33 (relating to incidents causing or threatening pollution). Oral notification is required as soon as possible, but no later than 4 hours after the permittee becomes aware of the incident causing or threatening pollution. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the incident causing or threatening pollution. The written submission must conform to the requirements of 40 CFR 122.41(l)(6).

(c) The 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 the color, taste, odor or turbidity of the receiving water.

§ 92a.47. Sewage permit.

(a) Sewage, except that discharged from a CSO that is in compliance with subsection (b), or as provided for in subsections (f)—(i), shall be given a minimum of secondary treatment. Secondary treatment for sewage is that treatment that includes significant biological treatment and accomplishes the following:

(1) Monthly average discharge limitation for BOD_5 and TSS may not exceed 30 milligrams per liter. If $CBOD_5$ is specified instead of BOD_5 the limitation may not exceed 25 milligrams per liter.

(2) Weekly average discharge limitation for BOD_5 and TSS may not exceed 45 milligrams per liter for POTW facilities. If $CBOD_5$ is specified instead of BOD_5 the limitation may not exceed 40 milligrams per liter.

(3) On a concentration basis, the monthly average percent removal of BOD_5 or $CBOD_5$, and TSS, must be at least 85% for POTW facilities.

(4) From May through September, a monthly average discharge limitation for fecal coliform of 200/100 mL as a geometric mean and an instantaneous maximum effluent limitation not greater than 1,000/100 mL.

(5) From October through April, a monthly average discharge limitation for fecal coliform of 2,000/100 mL as a geometric mean and an instantaneous maximum effluent limitation not greater than 10,000/100 mL.

(6) Provision for the disposal or beneficial use of sludge in accordance with applicable Department regulations.

(7) Compliance with § 95.2(1) and (2) (relating to effluent standards for industrial waste).

(8) Compliance with § 92a.48 (b) (relating to industrial waste permit) if chlorine is used.

(b) Dischargers of sewage from a CSO shall implement, as approved by the Department, nine minimum controls (NMCs) and a long-term control plan (LTCP) to minimize or eliminate the CSO discharge impact on the water quality of the receiving surface water.

(c) Discharges from an SSO are prohibited.

(d) When pollutants contributed by indirect dischargers result in interference or pass through, and a violation is likely to recur, a permittee shall develop and implement specific local limits for indirect dischargers and other users, as appropriate, that together with appropriate sewerage facility or operational changes, are necessary to ensure renewed or continued compliance with the plant's NPDES permit or sludge use or disposal practices.

(e) POTWs that serve indirect dischargers shall give notice to the Department in accordance with 40 CFR 122.42(b) (relating to additional conditions applicable to specific categories of NPDES permits (applicable to State NPDES programs, see § 123.25)).

(f) POTWs with effluent limits that are less stringent than those specified in subsection (a)(1) and (2) in effect on October 9, 2010, shall meet the requirements of subsection (a)(1) and (2) when a new or amended water quality management permit authorizing an increase in the design flow of the facility is issued under the provisions of Chapter 91 (relating to general provisions).

(g) POTWs subject to this section may not be capable of meeting the percentage removal requirements established under subsection (a)(3) during wet weather, where the treatment works receive flows from combined sewers (that is, sewers which are designed to transport both storm water and sanitary sewage). For those treatment works, the decision must be made on a case-by-case basis as to whether any attainable percentage removal level can be defined, and if so, what the level should be.

(h) POTWs subject to this section may not be capable of meeting the percentage removal requirements established under subsection (a)(3) during dry weather, where the treatment works receive flows from combined sewers. The Department may substitute less stringent removal requirements than that specified in subsection (a)(3) for any POTW with less concentrated influent wastewater for combined sewers during dry weather. The Department may substitute either a lower percent removal requirement or a mass loading limit for the percent removal requirements specified in subsection (a)(3) provided that the permittee satisfactorily demonstrates all of the following:

(1) The treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits, but the percent removal requirements cannot be met due to less concentrated influent wastewater.

(2) To meet the percent removal requirements, the treatment works would have to achieve significantly more stringent effluent concentrations than would otherwise be required by the concentration-based standards.

(3) The less concentrated influent wastewater does not result from either excessive infiltration or clear water indirect dischargers during dry weather periods. The determination of whether the less concentrated wastewater results from excessive infiltration is discussed in 40 CFR 35.2005(b)(28) (relating to definitions), plus the additional criterion that either 40 gallons per capita per day or 1,500 gallons per inch diameter per mile of sewer may be used as the threshold value for that portion of the dry weather base flow attributed to infiltration. If the less concentrated influent wastewater is the result of clear water indirect dischargers, the treatment works must control these discharges pursuant to 40 CFR Part 403 (relating to general pretreatment regulations for existing and new sources of pollution).

(i) The Department may substitute less stringent removal requirements than that specified in subsection (a)(3) for any POTW with less concentrated influent wastewater for separate sewers, provided that the permittee satisfactorily demonstrates all of the following:

(1) The treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits but its percent removal requirements cannot be met due to less concentrated influent wastewater.

(2) To meet the percent removal requirements, the treatment works would have to achieve significantly more stringent limitations than would otherwise be required by the concentration-based standards.

(3) The less concentrated influent wastewater is not the result of excessive inflow/infiltration. The determination of whether the less concentrated wastewater is the result of excessive inflow/infiltration will be based on the definition of excessive inflow/infiltration in 40 CFR 35.2005(b)(16), plus the additional criterion that inflow is nonexcessive if the total flow to the POTW (that is, wastewater plus inflow plus infiltration) is less than 275 gallons per capita per day.

§ 92a.48. Industrial waste permit.

(a) Industrial waste regulated by this chapter must meet the following requirements:

(1) EPA-promulgated effluent limitation guidelines established under section 304(b) of the Federal Act (33 U.S.C.A. § 1314(b)).

(2) Compliance with § 95.2 (relating to effluent standards for industrial waste).

(3) For those industrial categories for which no effluent limitations have been established under paragraph (1), Department-developed technology-based limitations estab-

lished in accordance with 40 CFR 125.3 (relating to technology-based treatment requirements in permits).

(b) For facilities or activities using chlorination, the following apply:

(1) If the EPA adopts a National categorical ELG promulgating limits for Total Residual Chlorine (TRC) or free available chlorine for a specific industry or activity under section 301 or 304(b) of the Federal Act (33 U.S.C.A. §§ 1311 and 1314(b)), that ELG constitutes BAT for the industry or activity. If the EPA has not promulgated a National ELG for TRC or free available chlorine for an industry or activity, the Department may develop a facility-specific BAT effluent limitation for TRC. Factors, which will be considered in developing a facility-specific BAT effluent limitation, include the following:

(i) The age of equipment and facilities involved.

(ii) The engineering aspects of the application of various types of control techniques and alternatives to the use of chlorine or reductions in the volume of chlorine used during the disinfection process.

(iii) The cost of achieving the effluent reduction.

(iv) Nonwater quality environmental impacts (including energy requirements).

(v) Other factors the Department deems appropriate.

(2) For facilities where the EPA has not promulgated a National ELG setting forth limits for TRC or free available chlorine for an industry or activity, and the Department has not developed a facility-specific BAT effluent limitation for TRC under the factors in paragraph (1), an effluent limitation for TRC of 0.5 milligrams per liter (30-day average) constitutes BAT.

(3) Facilities using chlorination that discharge to an Exceptional Value Water, or to a High Quality Water where economic or social justification under § 93.4c(b)(1)(iii) (relating to implementation of antidegradation requirements) has not been demonstrated under applicable State or Federal law or regulations, shall discontinue chlorination or dechlorinate their effluents prior to discharge into the waters.

§ 92a.50. CAAP.

(a) Each discharger shall prepare and implement a BMP plan that addresses:

(1) Solids and excess feed management and removal.

(2) Proper facility operation and maintenance.

(3) Nonnative species loss prevention.

(4) Facility personnel training.

(5) Removal, handling and disposal/utilization of bioresidual solids (sludge).

(b) Permittees shall report any investigational/therapeutic drugs usage as follows:

(1) For investigational/new drugs, the permittee shall provide the Department with an oral notification within 7 days of initiating application of the drug, and a New Drug Usage Report shall be filed monthly.

(2) Changes in or increases in usage rates shall be reported to the Department through both oral notification and written report on the Drug Usage Report Form, quarterly.

(c) Products or chemicals that contain any carcinogenic ingredients are prohibited, except that limited use of those chemicals may be permitted provided that the permittee shall:

(1) Thoroughly investigate the use of alternative chemicals.

(2) Demonstrate that no suitable alternatives are available.

(3) Demonstrate through sampling or calculation that any carcinogen in the proposed chemical will not be detectable in the final effluent, using the EPA-approved analytic method for wastewater analysis with the lowest published detection limits.

§ 92a.51. Schedules of compliance.

(a) With respect to an existing discharge that is not in compliance with the water quality standards and effluent limitations or standards in § 92a.44 or § 92a.12 (relating to establishing limitations, standards, and other permit conditions; and treatment requirements), the applicant shall be required in the permit to take specific steps to remedy a violation of the standards and limitations in accordance with a legally applicable schedule of compliance, in the shortest, reasonable period of time, the period to be consistent with the Federal Act. Any schedule of compliance specified in the permit must require compliance with final enforceable effluent limitations as soon as practicable, but in no case longer than 5 years, unless a court of competent jurisdiction issues an order allowing a longer time for compliance.

(b) If the period of time for compliance specified in subsection (a) exceeds 1 year, a schedule of compliance will be specified in the permit that will set forth interim requirements and the dates for their achievement. If the time necessary for completion of the interim requirement such as the construction of a treatment facility is more than 1 year and is not readily divided into stages for completion, interim dates will be specified for the submission of reports of progress towards completion of the interim requirement. The time between interim dates may not exceed 1 year. For each NPDES permit schedule of compliance, interim dates and the final date for compliance must, to the extent practicable, fall on the last day of the months of March, June, September and December.

(c) Either before or up to 14 days following each interim date and the final date of compliance, the permittee shall provide the Department with written notice of the permittee's compliance or noncompliance with the interim or final requirement.

§ 92a.54. General permits.

(a) *Coverage and purpose*. The Department may issue a general permit, in lieu of issuing individual permits, for a clearly and specifically described category of point source discharges, if the point sources meet the following conditions:

(1) Involve the same, or substantially similar, types of operations.

(2) Discharge the same types of wastes.

(3) Require the same effluent limitations or operating conditions, or both.

(4) Require the same or similar monitoring.

(5) Do not discharge toxic or hazardous pollutants as defined in sections 307 and 311 of the Federal Act (33 U.S.C.A. §§ 1317 and 1321) or any other substance that—because of its quantity; concentration; or physical, chemical or infectious characteristics—may cause or contribute to an increase in mortality or morbidity in either an individual or the total population, or pose a substan-

tial present or future hazard to human health or the environment when discharged into surface waters.

(6) Are more appropriately controlled under a general permit than under individual permits, in the opinion of the Department.

(7) Individually and cumulatively do not have the potential to cause or contribute to a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) or cause significant adverse environmental impact.

(8) Do not discharge to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93.

(b) *Administration of general permits*. General permits may be issued, amended, suspended, revoked, reissued or terminated under this chapter. Issuance of a general permit does not exempt a person from compliance with this title. General permits have a fixed term not to exceed 5 years.

(c) *Department specification*. The Department may specify in the general permit that an eligible person who has submitted a timely and complete NOI is authorized to discharge in accordance with the terms of the permit under one of the following:

(1) Immediately upon submission of the NOI.

(2) After a waiting period following receipt of the NOI by the Department as specified in the general permit.

(3) Upon receipt of notification of approval of coverage under a general permit from the Department.

(d) *Department notification*. The Department will, as applicable, notify a discharger that it is or is not covered by a general permit. A discharger so notified may request an individual permit.

(e) *Denial of coverage*. The Department will deny coverage under a general permit when one or more of the following conditions exist:

(1) The discharge, individually or in combination with other similar discharges, is or has the potential to be a contributor of pollution, as defined in the State Act, which is more appropriately controlled under an individual permit.

(2) The discharger is not, or will not be, in compliance with any one or more of the conditions of the general permit.

(3) 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.

(4) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source.

(5) Categorical point source effluent limitations are promulgated by the EPA for those point sources covered by the general permit.

(6) The discharge is not, or will not, result in compliance with an applicable effluent limitation or water quality standard.

(7) Other point sources at the facility require issuance of an individual permit, and issuance of both an individual and a general permit for the facility would constitute an undue administrative burden on the Department.

(8) The Department determines that the action is necessary for any other reason to ensure compliance with the Federal Act, the State Act or this title.

(9) The discharge would be to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93.

(f) *Requiring an individual permit*. The Department may revoke or terminate coverage under a general permit, and require the point source discharger to apply for and obtain an individual permit for any of the reasons in subsection (e). An interested person may petition the Department to take action under this subsection. Upon notification by the Department under this subsection that an individual permit is required for a point source, the discharger shall submit a complete NPDES application, in conformance with this chapter, within 90 days of receipt of the notification, unless the discharger is already in possession of a valid individual permit. Failure to submit the application within 90 days will result in automatic termination of coverage of the applicable point sources under the general permit. Timely submission of a complete application will result in continuation of coverage of the applicable point sources under the general permit, until the Department takes final action on the pending individual permit application.

(g) *Action of the Department*. Action of the Department denying coverage under a general permit under subsection (e), or requiring an individual permit under subsection (f), is not a final action of the Department until the discharger submits and the Department takes final action on an individual permit application.

(h) *Termination of general permit*. When an individual permit is issued for a point source that is covered under a general permit, the applicability of the general permit to that point source is automatically terminated on the effective date of the individual permit.

(i) *Coverage under general permit*. A point source excluded from a general permit solely because it already has an individual permit may submit an NOI under § 92a.23 (relating to NOI for coverage under an NPDES general permit). If the NOI is acceptable, the Department will revoke the individual permit and notify the source that it is covered under the general permit.

Subchapter D. MONITORING AND ANNUAL FEES

Sec.
92a.61. Monitoring.
92a.62. Annual fees.

§ 92a.61. Monitoring.

(a) The provisions of 40 CFR 122.48 (relating to requirements for recording and reporting of monitoring results (applicable to State programs, see § 123.25)) are incorporated by reference.

(b) The Department may impose reasonable monitoring requirements on any discharge, including monitoring of the surface water intake and discharge of a facility or activity, other operational parameters that may affect effluent quality, and of surface waters adjacent to or associated with the intake or discharge flow of a facility or activity. The Department may require submission of data related to the monitoring.

(c) Each person who discharges pollutants may be required to monitor and report all toxic, conventional, nonconventional and other pollutants in its discharge, at least once a year, and on a more frequent basis if required by a permit condition. The monitoring requirements will be specified in the permit.

(d) Except for stormwater discharges subject to the requirements of subsection (h), a discharge authorized by an NPDES permit for a facility that is not a minor facility or contains toxic pollutants for which an effluent standard has been established by the Administrator under section 307(a) of the Federal Act (33 U.S.C.A. § 1317(a)) shall be monitored by the permittee for at least the following:

(1) Flow (in GPD or MGD).

(2) Pollutants (either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) that are subject to abatement under the terms and conditions of the permit.

(3) Pollutants that the Department finds, on the basis of information available to it, could have an impact on the quality of this Commonwealth's waters or the quality of waters in other states.

(4) Pollutants specified by the Administrator in regulations issued under the Federal Act as subject to monitoring.

(5) Pollutants in addition to those in paragraphs (2)—(4) that the Administrator requests in writing to be monitored.

(e) Each effluent flow or pollutant required to be monitored under subsections (c) and (d) shall be monitored at intervals sufficiently frequent to yield data that reasonably characterize the nature of the discharge of the monitored effluent flow or pollutant. Variable effluent flows and pollutant levels shall be monitored at more frequent intervals than relatively constant effluent flows and pollutant levels that may be monitored at less frequent intervals.

(f) The permittee shall maintain records of the information resulting from any monitoring activities required of it in its NPDES permit as follows:

(1) Records of monitoring activities and results must include for all samples:

(i) The date, exact place and time of sampling.

(ii) The dates analyses were performed.

(iii) Who performed the analyses.

(iv) The analytical techniques/methods used.

(v) The results of the analyses.

(2) The permittee shall also be required to retain for a minimum of 3 years any records of monitoring activities and results including all original strip chart recordings for continuous monitoring instrumentation and calibration and maintenance records. This period of retention may be extended during the course of any unresolved litigation regarding the discharge of pollutants by the permittee or when requested by the Department or the Administrator.

(g) The permittee shall periodically report, at a frequency of at least once per year, using a format or process established by the Department, results obtained by a permittee pursuant to monitoring requirements. In addition to these results, the Department may require submission of other information regarding monitoring results it determines to be necessary.

(h) Requirements to report monitoring results from stormwater discharges associated with industrial activity, except those subject to an effluent limitation guideline or an NPDES general permit, will be established in a case-by-case basis with a frequency dependent on the nature and effect of the discharge.

(i) The monitoring requirements under this section must be consistent with any National monitoring, recording and reporting requirements specified by the Administrator in regulations issued under the Federal Act.

(j) The Department may require that the permittee perform additional sampling for limited periods for the purpose of TMDL development, or for other reasons that the Department determines are appropriate.

§ 92a.62. Annual fees.

(a) Permittees shall pay an annual fee to the Clean Water Fund. The annual fee must be for the amount indicated in the following schedule and is due on each anniversary of the effective date of the permit. The flows listed in this section are annual average design flows.

(b) Annual fees for individual NPDES permits for discharges of treated sewage are:

SRSTP	$0
Small flow treatment facility	$0
Minor facility < 50,000 GPD	$250
Minor facility > = 50,000 GPD < 1 MGD	$500
Minor facility with CSO	$750
Major facility > = 1 MGD < 5 MGD	$1,250
Major facility > = 5 MGD	$2,500
Major facility with CSO	$5,000

(c) Annual fees for individual NPDES permits for discharges of industrial waste are:

Minor facility not covered by an ELG	$500
Minor facility covered by an ELG	$1,500
Major facility < 250 MGD	$5,000
Major facility > = 250 MGD	$25,000
Mining activity	$0
Stormwater	$1,000

(d) Annual fees for individual NPDES permits for other facilities or activities are:

CAFO	$0
CAAP	$0
MS4	$500

(e) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the EQB. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and contain recommendations to increase fees to eliminate the disparity, including recommendations for regulatory amendments to increase program fees.

(f) Any Federal or State agency or independent state commission that provides funding to the Department for the implementation of the NPDES Program through terms and conditions of a mutual agreement may be exempt from the fees in this section.

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

Sec.
92a.71. Transfer of permits.
92a.72. Modification or revocation and reissuance of permits.
92a.73. Minor modification of permits.
92a.74. Termination of permits.
92a.75. Reissuance of expiring permits.
92a.76. Cessation of discharge.

§ 92a.75. Reissuance of expiring permits.

(a) A permittee who wishes to continue to discharge after the expiration date of its NPDES permit shall submit an application for reissuance of the permit at least 180 days prior to the expiration of the permit unless permission has been granted for a later date by the Department. The application fees specified in § 92a.26 (relating to application fees) apply.

(b) Upon completing review of the application, the Department may reissue a permit if, based on up-to-date information on the permittee's wastewater treatment practices and the nature, contents and frequency of the permittee's discharge, the Department determines that:

(1) The permittee is in compliance with existing Department-issued permits, regulations, orders and schedules of compliance, or that any noncompliance with an existing permit has been resolved by an appropriate compliance action.

(2) The discharge is, or will be under a compliance schedule issued under § 92a.51 (relating to schedules of compliance) and other applicable regulations, consistent with the applicable water quality standards, effluent limitations or standards and other legally applicable requirements established under this title, including revisions or modifications of the standards, limitations and requirements that may have occurred during the term of the existing permit.

Subchapter F. PUBLIC PARTICIPATION

Sec.
92a.81. Public access to information.
92a.82. Public notice of permit applications and draft permits.
92a.83. Public notice of public hearing.
92a.84. Public notice of general permits.
92a.85. Notice to other government agencies.
92a.86. Notice of issuance or final action on a permit.
92a.87. Notice of reissuance of permits.
92a.88. Notice of appeal.

§ 92a.84. Public notice of general permits.

(a) Public notice of every proposed general permit will be published in the *Pennsylvania Bulletin*. The contents of the public notice will include at least the following:

(1) The name, address and phone number of the agency issuing the public notice.

(2) A clear and specific description of the category of point source discharges eligible for coverage under the proposed general permit.

(3) A brief description of the reasons for the Department's determination that the category of point source discharges is eligible for coverage under a general permit in accordance with these standards.

(4) A brief description of the terms and conditions of the proposed general permit, including applicable effluent limitations, BMPs and special conditions.

(5) A brief description of the procedures for making the final determinations, and other means by which interested persons may influence or comment on those determinations.

(6) The address and phone number of the Commonwealth agency at which interested persons may obtain further information and a copy of the proposed general permit.

(7) The NOI fee for coverage under the general permit.

(b) There will be a 30-day period following publication of notice during which written comments may be submitted by interested persons before the Department makes its final determinations. Written comments submitted during the 30-day comment period will be retained by the Department and considered in making the final determinations. The period for comment may be extended at the discretion of the Department for one additional 15-day period. The Department will provide an opportunity for any interested person or group of persons, any affected State, any affected interstate agency, the Administrator or any interested agency, to request or petition for a public hearing with respect to the proposed general permit. The request or petition for public hearing, which must be filed within the 30-day period allowed for filing of written comments, must indicate the interest of the party filing the request and the reasons why a hearing is warranted. A hearing will be held if there is a significant public interest, including the filing of requests or petitions for the hearing.

(c) Upon issuance of a general permit, the Department will place a notice in the *Pennsylvania Bulletin* of the availability of the general permit. The notice of availability will indicate one of the following:

(1) An NOI is not required for coverage under the general permit.

(2) A notice will be published in the *Pennsylvania Bulletin* of each NOI under an applicable general permit, and of each approval for coverage under a general permit.

(3) A notice will be published in the *Pennsylvania Bulletin* of every approval of coverage only.

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

(a) The provisions of 40 CFR 124.59 (relating to conditions requested by the Corps of Engineers and other government agencies) are incorporated by reference.

(b) The Department will do the following:

(1) Provide a subscription to the *Pennsylvania Bulletin* for any other states whose waters may be affected by the issuance of an NPDES permit, to any interstate agency having water quality control authority over water that may be affected by the issuance of an NPDES permit, and to all Pennsylvania District Engineers of the Army Corps of Engineers.

(2) At the time of issuance of public notice under § 92a.82 (relating to public notice of permit applications and draft permits), transmit to other states, whose waters may be affected by the issuance of an NPDES permit, a copy of fact sheets prepared under § 92a.53 (relating to documentation of permit conditions). Upon request, the Department will provide the states with a copy of the application and a copy of the draft permit. Each affected state will be afforded an opportunity to submit written recommendations to the Department and the Administrator. The Department will consider these comments during preparation of the permit decision. If the Department decides not to incorporate any written recommendations

thus received, it will provide a written explanation of its reasons for deciding not to accept any of the written recommendations.

(3) At the time of issuance of public notice under § 92a.82, transmit to any interstate agency having water quality control authority over waters that may be affected by the issuance of a permit a copy of fact sheets prepared under § 92a.53. Upon request, the Department will provide the interstate agency with a copy of the application and a copy of the draft permit. The interstate agency shall have the same opportunity to submit recommendations and to receive explanations in paragraph (2).

§ 92a.87. Notice of reissuance of permits.

Notice of reissuance of permits will be accomplished as specified in §§ 92a.81—92a.83, 92a.85 and 92a.86 for any draft individual permit.

[Pa.B. Doc. No. 10-1926. Filed for public inspection October 8, 2010, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 96]

Water Quality Standards Implementation

The Environmental Quality Board (Board) amends Chapter 96 (relating to water quality standards implementation) to read as set forth in Annex A. The final-form rulemaking codifies, with some revisions, the Department's existing guidance entitled "Final Trading of Nutrient and Sediment Reduction Credits—Policy and Guidelines" (No. 392-0900-001, December 2006) as it relates to the Chesapeake Bay (Nutrient Credit Trading Policy). The Nutrient Credit Trading Policy provides a cost-effective means for facilities subject to meet limits for nitrogen, phosphorus and sediment to meet those limits by working with other facilities or with nonpoint sources, or both. The Nutrient Trading Program helps the Commonwealth achieve its Chesapeake Bay nutrient reduction goals from the agriculture sector and provides a source of revenue to farmers and other property owners while advancing the restoration and protection of the water quality of the Chesapeake Bay.

This order was adopted by the Board at its meeting on July 13, 2010.

A. *Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information, contact Ann Roda, Program Analyst, Water Planning Office, P. O. Box 2063, Rachel Carson State Office Building, Harrisburg, PA 17105-2063, (717) 772-4785; or Kristen Furlan, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) web site (http://www.dep.state.pa.us).

C. *Statutory Authority*

The final-form rulemaking is being made under the authority of section 5(b) of The Clean Streams Law (35 P. S. § 691.5(b)), which provides for the adoption of regulations necessary for implementation of The Clean Streams Law (35 P. S. §§ 691.1—691.1001); sections 202, 307 and 402 of The Clean Streams Law (35 P. S. §§ 691.202, 691.307 and 691.402), which authorize the Department to establish requirements related to pollution and potential pollution; and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20(b)), which authorizes the Board to promulgate rules and regulations as may be determined by the Board for the proper performance of the work of the Department.

D. *Background and Purpose*

The Chesapeake Bay is polluted from nutrients and sediment and in 2005 water quality standards under the Federal Clean Water Act (33 U.S.C.A. §§ 1251—1387) to address this pollution came into effect. To meet these requirements under the Federal Clean Water Act, the United States Environmental Protection Agency (EPA) and the affected states developed a maximum nutrient load, or "cap load," for each major tributary. As a result, approximately 200 municipal sewage treatment plants and others discharging nutrients to this Commonwealth's Bay tributaries must cap those discharges or they will be in violation of the downstream water quality standards, under Federal and State law.

In January 2006, the Department initiated an intensive stakeholder process regarding these legal requirements. First, it refocused and expanded the standing Chesapeake Bay Advisory Committee of the Department to include local government associations, the agricultural community and multiple associations. The Chesapeake Bay Advisory Committee was tasked with discussing the wide variety of issues surrounding the Commonwealth's compliance strategy and to consider various approaches to meeting the Federally driven water quality obligations.

After receiving input through a series of meetings held over a 9-month period, the Department developed a revised plan to address the legal mandate. The plan included permitting requirements for sewage treatment plants and other "point sources" governed by the Federal National Pollutant Discharge Elimination System (NPDES) regulations controlling agricultural run-off and the Nutrient Credit Trading Policy.

The Nutrient Credit Trading Policy was one of several compliance alternatives provided to NPDES permittees required to reduce their effluent discharges under the Department's plan. The other compliance alternatives identified for NPDES permittees were as follows: implementation of nutrient reduction treatment technology; retirement of existing onlot septic systems; wastewater reuse; and land application. Nutrient trading provides those sewage treatment plants with options that have the potential to reduce compliance costs substantially. For example, in 2008, Fairview Township decided to use credits to meet its nutrient reduction obligation and in so doing announced a cost savings of approximately 75%. The Mount Joy Borough Authority investigated costs of upgrading and found that by installing the first level of nitrogen treatment they could reduce nitrogen by about 50% for about $8 per pound. However, to reach their cap loads, an additional upgrade would increase the price to about $12 per pound. Instead, the Mount Joy Borough Authority contracted with a local farmer and invested in more than 900 acres of no-till agriculture to meet their permit cap at a cost of only $3.81 for every pound reduced.

Another important example is the Harrisburg Authority. The Harrisburg Authority underwent a public bidding

process, the first of its kind, to help it incorporate nutrient credits into its compliance plan for meeting nitrogen and phosphorous limits. The Harrisburg Authority used the bids to help estimate design and construction costs to compare the costs of three different approaches for compliance: one that completely relied on treatment plant upgrades; one that completely relied on nutrient trading; and one that combined trading with construction. Working with its consultant, the Harrisburg Authority determined that the lowest cost of compliance would be a combination of trading and construction. By purchasing nutrient credits, the Harrisburg Authority estimates that it will save $28 million over the next 20 years, which will save ratepayers an estimated $48 per year on sewer service charges.

The Department's nutrient credit trading program is built upon the core elements prescribed for a valid trading program. For example, credits can only be generated for nutrient reductions above and beyond those required for regulatory compliance. There are also caps on the total tradable credits for "nonpoint sources" at the excess level available in the watershed from best management practices (BMPs) beyond those needed to meet compliance goals.

Since the publication of the interim final policy and as of May 2010, the Department has received 89 proposals that have been submitted for review to generate nutrient reduction credits in the Chesapeake Bay watershed, mostly but not exclusively by farmers. Of those, 59 have been approved for a total of 2,999,765 nitrogen credits and 249,543 phosphorous credits. There have also been eight contracts entered into for the use of credits toward permit compliance.

The Department and its partners continue to seek enhancements to the Department's nutrient trading program. For example, the Pennsylvania Infrastructure Investment Authority (PENNVEST) has been authorized by the EPA as well as by the PENNVEST Board to invest up to $50 million to facilitate the nutrient credit trading program. PENNVEST is also preparing to provide an exchange role to facilitate the use of credits by sewage treatment plants. Further, the Department regularly meets with stakeholders to improve the trading program.

The Department consulted with a number of boards and committees throughout the process of developing the Nutrient Credit Trading Policy, the proposed rulemaking and this final-form rulemaking. The Department presented a summary of comments received on the proposed rulemaking to the Water Resources Advisory Committee (WRAC) on April 14, 2010, and then presented the final-form rulemaking to the WRAC on May 11, 2010. At that meeting, the WRAC endorsed the final-form rulemaking. The Department presented a summary of comments received on the proposed rulemaking to the Agricultural Advisory Board (AAB) on April 21, 2010. The AAB raised few comments or concerns.

The EPA supports credit trading generally, having published a National policy in that regard in 2003, and a detailed NPDES permit writer's manual on the subject in 2007. The Department conferred with the EPA on this program for the past several years and the EPA agrees with the approach. There are no Federal regulations for nutrient credit trading, although there are several air quality-related trading programs administered by the EPA and other states, including the Commonwealth.

The Commonwealth has been leading the way Nationally in developing its nutrient trading program and it is one of the first programs in the country to have both nonpoint sources and point sources utilizing a nutrient credit trading program. Harnessing market forces can be an effective way to achieve environmental regulatory goals at less expense than traditional command and control regulations. Market-based programs such as trading provide incentives for entities to create credits by going beyond statutory or regulatory obligations.

This final-form rulemaking will provide clear and certain standards for nutrient credit trading in this Commonwealth and thereby support the Department's efforts to implement its nutrient credit trading program. To ensure the continued effectiveness of the nutrient credit trading program and to meet new Federal or Commonwealth requirements, the Department will periodically review the nutrient trading program and recommend modifications that may be advisable.

E. *Summary of Regulatory Requirements and Major Changes to the Proposed Rulemaking*

Subsection (a)—Definitions

The final-form rulemaking adds a number of definitions to clarify various new terms. Most of the definitions were taken from the Nutrient Credit Trading Policy, with revision in some cases based on the Department's experience in implementing the program since the Nutrient Credit Trading Policy was finalized and also based on public comments and comments from stakeholders. Some of the definition revisions are intended solely for clarification or style.

There are several substantive changes to definitions from the proposed rulemaking. The Department added a subparagraph to the definition of "BMP—Best management practice" to conform to the definitions in Chapter 102 (relating to erosion and sediment control). The Department retained the four existing subparagraphs to ensure adequate flexibility for point and nonpoint source pollutant reduction activities.

The Department revised the definition of "DMR—Discharge monitoring report" to adopt the definition of the term as it is stated in the concurrent final-form rulemaking replacing Chapter 92 with Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance).

The Department removed references to "offsets" from the definitions of "certification," "registration," "threshold," "trading ratio" and "verification" as offsets do not get certified, verified and registered and may not be traded under the final-form rulemaking. Deletion of the word "offset" is made throughout the final-form rulemaking, where applicable, for the same reason.

The final-form rulemaking amends the definition of "edge of segment ratio" by deleting "land-applied" because land application is not a necessary prerequisite to the use of the edge of segment (EOS) ratio. The final-form rulemaking also deletes "nonpoint" from the definition because the EOS ratio may also be employed when calculating credits generated by point sources.

The final-form rulemaking amends the definition of "offset" to conform better to the definition in the NPDES permit and the one used in a Department implementation guideline, namely its *Chesapeake Bay Tributary Strategy Implementation Plan for Sewage Facilities Planning*, dated April 24, 2007.

The final-form rulemaking adds a definition of "pollutant reduction activity" because the term is used throughout the final-form rulemaking. The definition was created

for this final-form rulemaking and applies to activities by both point and nonpoint sources.

The final-form rulemaking expressly defines the "reserve ratio" as "10%." This number was included to ensure the regulated community that the reserve ratio will be consistent among persons receiving certifications.

The final-form rulemaking clarifies in the definition of "threshold" that the activities and performance standards required beyond baseline compliance are specified in subsection (d)(3).

The final-form rulemaking clarifies the definition of "tradable load" by indicating that it applies to an amount of nonpoint source pollutant reductions. This term is defined to ensure that reductions needed by nonpoint sources to meet the Commonwealth's Chesapeake Bay Tributary Strategy (Tributary Strategy) will not be traded away.

The final-form rulemaking amends the definition of "verification" to cover situations in which a technology, rather than a practice, will be used to generate credits. Sometimes for these projects, the verification plan will be in a permit or other Department approval needed for the project.

Subsections (b), (i) and (k)—General provisions

The final-form rulemaking contains several subsections with overarching provisions. Subsection (b) sets forth the core concepts and basic requirements of the trading program. Subsection (i) contains provisions regarding the interaction of § 96.8 and important provisions elsewhere in 25 Pa. Code (relating to environmental protection) regarding protection of water quality. Subsection (k) makes it clear that this final-form rulemaking is not intended to limit the Department's existing authority to allow the use of credits or offsets in other contexts.

Subsection (c)—Methodology for calculating credits and offsets

Much of the methodology for establishing the water quality standards for the Chesapeake Bay, and determining effectiveness of various activities to meet those standards, is based on scientific work done by the EPA. This includes the use of several complex models and the scientific research related to them. Subsection (c) identifies those models and the research and establishes them as a basis for the Department's decisions regarding, among other things, the amount of reductions (and therefore credits) to assign to a given pollutant reduction activity. These models and the related research are an ongoing effort and the language of this subsection allows for the use of the most up-to-date versions of the models and most current research. Changes from the proposed rulemaking in this subsection are designed to add certainty, clarity and transparency.

An important provision in this subsection is paragraph (2), which allows the person seeking certification to use pollutant removal efficiencies, EOS ratios and delivery ratios that are consistent with the most up-to-date version of the Chesapeake Bay Watershed Model (the version at the time of writing this preamble is Version 4.3) in calculating credits. The removal efficiencies represent average nutrient and sediment reduction performance capabilities for various BMPs. They undergo extensive peer review by a technical review team managed by the EPA Chesapeake Bay Program. Recommendations are then reviewed by the EPA Chesapeake Bay Program committee and subcommittee process. These efficiencies change with the science of the models and related research. The final-form rulemaking states that the pollutant removal efficiencies and EOS and delivery ratios will be available on the Department's Nutrient Credit Trading web site: http://www.dep.state.pa.us, Keyword: "Nutrient Trading."

The EOS and delivery ratios are used to identify the fate and transport of nutrients and sediment from their initial creation at a certain location to the Bay. For example, a pound of nitrogen reduced in the upper reaches of the Susquehanna has much less impact than a pound reduced near the border with Maryland. The delivery ratio accounts for that difference.

Subsection (d)—Eligibility requirements

This subsection describes the various requirements for a source to be able to generate credits for use under the final-form rulemaking. There are two components. First, the generator shall meet "baseline" requirements, which essentially are the legal requirements that apply to that operation. For a nonpoint source, these are the legal requirements and pollutant load associated with the location applicable on January 1, 2005, or later.

The second requirement is "threshold." This requirement is defined as either a 100-foot manure set back, a 35-foot vegetative buffer or a 20% adjustment made to the overall reduction. It provides an added level of nutrient and sediment reduction that would not necessarily be accomplished without the financial incentives of trading. Threshold, therefore, adds to the nutrient reduction benefits for the Bay, especially from the agriculture sector.

Therefore, only after demonstrating compliance with the applicable legal requirements (baseline) and achieving an additional set of pollutant reductions (threshold) can a person begin to generate credits under the final-form rulemaking. The Department received numerous proposals for the generation of credits that achieve these requirements and has approved many of them.

Subsection (d) also addresses a person's compliance status as a consideration in the Department's certification decision. In the final-form rulemaking, the Department narrowed subsection (d)(4) to apply when past or current noncompliance indicates a lack of ability or intention to comply with the stated items. The Department does not intend to let minor infractions exclude a person from engaging in trading.

Subsections (e), (f) and (g)—Certification, verification and registration

These subsections describe the procedural requirement that the Department has in place to ensure that credits are calculated correctly and accomplish pollutant reductions.

The first step is "certification," which is typically done in advance of pollutant reduction activities. In reviewing certification requests, the Department evaluates detailed requests for approval of a pollutant reduction activity for the purpose of certifying that activity as being capable of generating credits. A person may want to have a proposed pollutant reduction activity certified to obtain from the Department the number of credits that can be expected, prior to completing the activity.

Calculation of the number of credits a certified pollutant reduction activity may generate will include appropriate adjustments such as the reserve and delivery ratios, with particular attention being paid to the requirements of subsection (c), regarding methodology. The result is a letter from the Department indicating the pollutant reduction activity being certified and the amount of credits

that may be generated. The person can use the certification to market the anticipated credits. The Department's certification decision is a final action.

Certification requirements have been clarified in the final-form rulemaking to explain elements of the calculation for a point source generating credits and to explain, consistent with the definition of "reserve ratio," that a credit calculation for a point or nonpoint source must include a 10% set aside for the Department's credit reserve.

Certification requirements also include a restriction on certification of requests that include a pollutant reduction activity regarding farmland conversion. This is described more fully in Part F of this preamble.

A paragraph has been added to subsection (e) to affirm that a person to whom the Department issues a certification under § 96.8 shall comply with the terms and conditions of the certification. Failure to comply will expose the person to available remedies, including the remedies available under The Clean Streams Law. Provisions have also been added to subsection (e) to specify a typical certification term of 5 years, to describe the process for renewal of a certification and to provide for revocation of a certification in the event of failure to comply with conditions of a certification.

A second important procedural requirement and a key component of the certification decision is a review of the "verification" plan. This plan is required by subsection (e)(5). This paragraph has been amended to clarify that one of the two methods listed for verification must be selected, namely self-verification (which can include submission of DMRs by a point source) and third-party verification.

The verification process, itself, has been moved to subsection (f), regarding verification requirements for the Chesapeake Bay. Verification is a condition of "registration," the final step, under subsection (f)(1). Verification can take a number of forms, but it must demonstrate that the pollutant reduction activity was implemented as described in the certification. The Department may also conduct other verification activities, in addition to those in the plan submitted under subsection (f)(2).

The final procedural step in these subsections is "registration," under subsection (g). This is the Department's accounting mechanism to track verified credits before they are used to comply with the NPDES permit effluent limits for the Bay.

Under subsection (g)(3), the Department will not register credits for persons who demonstrate a lack of ability or intention to comply with the requirements of § 96.8, Department regulations or other relevant requirements. See also subsection (d)(4) and (6).

Subsection (h)—Use of credits and offsets

This subsection addresses the obligations of persons who use credits and offsets to meet permit requirements. This underscores that the use of credits and offsets only applies to the nutrient and sediment effluent limits in NPDES permits for the purposes of restoration and protection of the water quality of the Chesapeake Bay. See subsection (h)(1) and (2). This language is not intended to limit the Department's existing authority to allow the use of credits or offsets in other contexts. See subsection (k).

Credit and offset failure is addressed in subsection (h)(5). There are several factors that come into play with this issue. First, it is important that credits and offsets generate real reduction in pollutant loads delivered to the Bay. In addition, the one sector most likely to purchase credits, sewage treatment plant operators, has expressed concern over purchasing credits and then later being subject to enforcement action by the Department if the credits are not accepted due to credit failure. This subsection seeks to address both concerns while reminding facility operators of their obligation to meet permit effluent limitations, conditions and stipulations.

Two key components of this subsection are "the Department determines that replacement credits will be available" and "the existence of an approved legal mechanism that is enforceable by the Department." An example is the use of the credit reserve.

Subsection (i)—Water quality and Total Maximum Daily Loads (TMDLs)

This subsection is aimed at protecting and restoring the water quality of the Chesapeake Bay. However, there may be local water quality issues that can affect a decision on a credit or offset proposal. This would be most likely if the receiving waterbody at the location where the credits or offsets will be generated is listed as "impaired" through the Department's formal listing process under The Clean Water Act. There are also local antidegradation requirements that are part of the Commonwealth's water quality regulations. This subsection makes it clear that those and other existing regulatory requirements take precedence over any decisions made under this final-form rulemaking.

Subsection (j)—Public participation

The Department is committed to a transparent process in the implementation of its trading program. Therefore, the final-form rulemaking codifies the current process of publishing notice in the *Pennsylvania Bulletin* whenever: (1) a credit proposal is submitted and is administratively complete; and (2) the Department makes a final decision on certification.

Subsection (k)—Use of credits and offsets generally

While this final-form rulemaking only authorizes trading to meet the nutrient and sediment cap loads for the Chesapeake Bay, it is not intended to foreclose the use of credits or offsets in other contexts.

F. *Summary of Major Comments and Responses on the Proposed Rulemaking*

The Board approved publication of the proposed rulemaking at its meeting of November 17, 2009. The proposed rulemaking was published at 40 Pa.B. 876 (February 13, 2010) with a 30-day public comment period. The public comment period closed on March 15, 2010.

A number of commentators pointed out concerns with the terms "offset" and "credit," suggesting, among other things, that they be addressed separately and that offsets not be subject to the certification, verification and registration processes in the proposed rulemaking. In response, the Department made a number of revisions to the final-form rulemaking to address the concerns raised by the commentators. Specifically, the definition of "offset" has been revised to more accurately reflect the use of the term and to match more closely the permit definition. The term was also removed from many sections of the final-form rulemaking, which was clarified so that offsets are approved rather than being treated the same as credits.

Several commentators requested that the definition of "baseline," and also the point source baseline requirements in subsection (d), be revised so as not to prevent

sources from generating Bay-related credits if a local TMDL limit results in greater reductions than those needed to comply with Bay annual cap loads. Several commentators stated that more guidance is needed on how a TMDL may affect baseline and that it was not clear if a participant needed to meet the TMDL requirements before they could be considered in baseline or if they only needed to meet their State regulatory requirements for baseline before they start trading. In addition, one commentator thought the term "similar allocation" in subparagraph (ii) of this definition and subsection (d)(2)(ii) was unclear. That commentator recommended that the Department work with stakeholders to address these concerns and use greater detail in setting forth its intent in the final-form rulemaking. Similar comments were received regarding proposed subsection (h). Changes were not made to the final-form rulemaking. In the 2003 "Water Quality Trading Policy Statement," the EPA outlined that baselines for generating credits should be derived from and be consistent with water quality standards. The policy states that when a TMDL has been approved or established by the EPA the applicable point source waste load allocation or nonpoint source load allocation would establish the baseline for generating credits. The final-form rulemaking is consistent with this EPA guidance and provides consistency across sectors.

Two commentators requested that "liquidity in the market" be removed from the definition of "credit reserve." The Department made this change.

One commentator stated that the definition of "credit" should reflect how a delivery ratio, when applied to a point source cap load, determines how many credits are needed. A change has not been made to the final-form rulemaking. The authorizing language in NPDES permits will contain the conditions by which credits may be applied toward compliance with point source cap loads.

Several comments sought clarification on the meaning of the term "defined compliance point" in the definition of "delivery ratio." The Department responds that a compliance point is typically defined in a TMDL.

One commentator requested clarification on the definition of "DMR—Discharge monitoring report" in light of the fact that in § 92.1 a discharge monitoring report (DMR) is the same as an NPDES reporting form. Clarification has been added by adopting the definition of the term as it is stated in the concurrent rulemaking replacing Chapter 92 with Chapter 92a.

Several commentators stated that it was unclear how the EOS ratio reflects pollutant contributions associated with groundwater flows and asked if the ratio really reflects pollutant contributions associated with groundwater flows. The comments requested clarification to address the comparison between the relatively short amount of time it takes for surface runoff of pollutants into streams, saying it should take considerably longer for groundwater contributions to occur in those same streams. The Department responds that the EOS ratios were developed by dividing the amount of nutrients coming from the model segment (the EOS loads) by the total amount of nutrients applied to the land within the segment (the input loads). The total nitrogen inputs are first adjusted to subtract out the amount of nitrogen that would be removed by crop uptake.

Several commentators questioned the use of the EOS factor on a specific farm field, since the EOS was not developed for site specifics, but rather larger watershed segments. The Department responds that the EOS factor is the best science that is currently available to make this correlation. As the science and values evolve, the Department will make additions to the quantification and application of the ratio.

Two commentators suggested that the credit reserve of 10% should be set in the regulation to add certainty to the final-form rulemaking. The Department made this revision in the definition of "reserve ratio."

One commentator questioned what criteria and process will be used by the Department in determining what is "reasonably attainable" in the definition of "tradable load." The Department retained this language in the final-form rulemaking, as flexibility is needed. During program development, the Commonwealth recognized that the Chesapeake Bay Watershed model estimates were based on the assumption that everyone who can reduce nutrients and sediment will do so to the maximum extent. This is commonly referred to as the "everything, everywhere, by everybody" (E3) scenario. Since the E3 scenario likely overestimated the maximum feasible nutrient and sediment load reductions, the Commonwealth made adjustments to the estimates to better represent a feasible effort. The Commonwealth reduced nonpoint source reductions in E3 by 10% and estimated the reductions for those BMPs in the Tributary Strategy that were not included in the E3 scenario. After adjusting the E3 scenario estimates, the Commonwealth estimated the maximum allowable credits as the difference between the load estimates from the revised E3 scenario and the Tributary Strategy loadings goal. The scenario values and the tradable load values will change as new BMPs are developed or the efficiencies of existing BMPs are revised. The Department notes that the modifier "reasonable" is found in other environmental regulations, as well when the exercise of judgment and flexibility are similarly appropriate.

Two commentators suggested that offsets should not be mentioned in the definition of "threshold" and that the definition of "tradable load" should somehow incorporate the term "threshold." It was also stated that the term "reasonably attainable" in the definition of "tradable load" is ambiguous and open-ended. The term "offset" has been removed from the definition of "threshold." Additionally, when the tradable load was developed, it did not include reductions associated with threshold so it would be inappropriate to add "threshold" to the definition. Information on how the tradable load was developed can be found on the Department's Nutrient Trading web site. Changes have not been made regarding the term "reasonably attainable." The Department will need flexibility regarding the information generated by TMDL models and water quality standards and it is not possible to have a more accurate terminology.

One commentator suggested that it was unclear what is meant by "water quality" or what would be included in "other considerations" as set forth in the definition of "trading ratios." The commentator stated that if the Department intends to impose a trading ratio, reserve or other reduction on the sale of credits from a point source seller to a point source buyer, then the regulation should set forth specific amounts. The Department responds that much of the definition of the term "trading ratio" is taken from the EPA's 2003 "Water Quality Trading Policy Statement." The phrases "water quality" and "other considerations" are used in the definition of "trading ratios" because when calculating the reductions, trading ratios need to be considered and used as appropriate to help ensure the trade provides the desired level of nutrient

reductions and water quality benefits. Point source credits are calculated based on reductions to the Chesapeake Bay and will include the application of the delivery ratio and reserve ratio. This information on the applicable trading ratios for calculating credits is readily available on the Department's Nutrient Trading web site. The authorizing language in NPDES permits will contain the conditions by which credits may be applied toward compliance and will address what ratios may be used by a permittee when credits are applied toward permit compliance.

Several commentators stated that there is ambiguity in how the Department will have the ability to readjust BMP reduction efficiencies, thresholds and delivery ratios. The comments stated that to maintain confidence and stability in the trading program, it must be stated clearly in the regulation that once credits are verified, registered and sold, the number of credits is guaranteed for the current or future years for which they are purchased and cannot be reduced based on further review of how they were originally determined. The Department responds that flexibility in the BMP efficiencies and in the EOS and delivery ratios is needed to ensure the actions undertaken within the program reflect the water quality standards downstream. The Chesapeake Bay model is ever evolving to accurately measure and model the progress that is made in reaching a restored Bay. To balance this flexibility, the Department added section subsection (e)(8), which outlines that a pollutant reduction activity will generally be certified for a duration of 5 years.

One commentator stated that the proposed rulemaking failed to establish objective standards. A major concern is that the regulated community is not apprised of the specific criteria that the Department will use, such as the following: the specific reserve factor, if any, that would apply to point source trades; how trades will be calculated based upon the deliverable loads of the seller; and how trades will be calculated based upon the deliverable loads of the purchaser. The final-form rulemaking should identify the underlying criteria for how trades can occur. The Department responds that the final-form rulemaking identifies how credits and offsets may be used in the Chesapeake Bay Watershed. Subsection (h) refers to the use of credits to meet NPDES permit requirements. Credits are calculated based on what is delivered to the Chesapeake Bay. The authorizing language in NPDES permits will contain the conditions by which credits may be applied toward compliance, which will address delivered loads. The Department provided clarification in the definition of "reserve ratio" that it will be 10%. The final-form rulemaking states that information on the delivery and EOS ratios will be available on the Department's Nutrient Trading web site.

One commentator stated that the rules governing the trading market must be consistent and predictable to encourage investment and participation and that, therefore, the Board and the Department need to work with stakeholders to develop greater specificity in the criteria, procedures and standards in the final-form rulemaking. The Department worked with stakeholders to develop the final-form rulemaking and added greater specificity to it. The Department added clarity by identifying where ratios and efficiencies can be found, clarifying the three-step process regarding certification, verification and registration, providing a time frame for certification and clarifying permittee responsibility.

A commentator requested more transparency regarding information the Department uses in calculating credits and offsets. The Department responds that this information will be readily available on the Department's Nutrient Trading web site.

One commentator asked that the final-form rulemaking address timetables and notification requirements regarding eligibility determinations, credit certifications, verifications or other types of decisions to be made by the Department to increase predictability. In the final-form rulemaking, eligibility determinations will be made as part of the credit certification action. Consistent with current practice, the Department will attempt to issue decisions on certification within 60 days of receipt of a complete proposal. This time period will also include a 30-day period for informal comments from the public. The final-form rulemaking does not include a time period because projects vary widely in scope, some requiring significantly more review. In addition to maintaining communication with submitters during the Department's review, the Department will publish notice in the *Pennsylvania Bulletin* when it makes a final certification decision, under subsection (j). The Department's web site and on-line trading platform, which is called NutrientNet, will contain information about certified projects as well as market pricing.

One commentator expressed concern about being able to appeal if credits are not registered and to be able to use credits in a later water year. The Department responds that the final-form rulemaking does not include an appeal process, as it is not necessary and the Department does not typically set forth appeal processes in its regulations. For the nutrient trading program, the Department's certification action (approval or denial) is a final action of the Department that is intended to be appealable.

Comments were submitted in support of, and questioning, the use of "delivery ratios" to calculate credits. Some commentators also thought that a delivery ratio should not be applied to credits generated by a point source. The Department responds that credits are calculated based on what is delivered to the Chesapeake Bay and will include the application of the reserve ratio. The authorizing language in NPDES permits will contain the conditions by which credits may be applied towards compliance. The permit conditions will address the issue raised regarding delivered loads.

Several comments were submitted regarding clarification on how the proposed rulemaking affects point source to point source trades. One commentator believed that point source to point source credits should be certified as pound for pound without the 10% reserve ratio or with a less restrictive reserve ratio. These commentators also felt that point source credits should not be subject to the reserve ratio because there is a certainty that the credits were actually generated by virtue of certification on the DMR by the permittee. One commentator stated that the final-form rulemaking should be clarified to indicate that pollution reduction failures and uncertainty are generally associated with nonpoint source projects. The Department has not made these changes. The credit reserve is intended to provide an insurance pool of credits in times of need and it will be populated by a 10% reserve ratio applied across the board.

One commentator suggested that point sources should not have to wait until the end of the water year to receive certification and verification, as verification can be done through DMRs. One commentator suggested that a signed DMR should replace the certification and verification process for point sources. The final-form rulemaking has

been revised to clarify that a point source may obtain certification of a pollutant reduction activity prior to the end of the compliance year, the definition of "DMR—Discharge monitoring report" has been expanded, "pollutant reduction activity" has been defined and includes "effluent control," subsection (c)(5) has been revised regarding the use of DMR and offset information as an acceptable methodology and subsection (e)(3)(iv) has been added for calculating reductions generated by a point source. As outlined in subsection (e)(5)(ii)(A), the verification plan can be self verification, which can include the signed DMR.

One commentator requested a mechanism to transfer the long-term responsibility for ensuring that nutrient credits are in place to offset the pollution loads generated by a new development from the builder or developer to a third party once a project is completed. The Department responds as follows. The Department has not made revisions to the final-form rulemaking to include this mechanism because the mechanism that the commentator seeks is related to Act 537 planning and guidance is available in the Department's "Implementation Plan for Sewage Facilities Planning" document. Specifically, the Act 537 planning submission must include assurances that will be provided to guarantee the long-term operation, maintenance and compliance of the treatment facility in accordance with 25 Pa. Code §§ 71.65, 71.71 and 71.72 (relating to individual and community sewerage systems; general requirements; and sewage management programs for Department permitted sewage facilities and community onlot systems). If a developer or municipality chooses to purchase credits for compliance they are only required to purchase credits sufficient to satisfy each NPDES permit cycle but they must have assurances in place, as they would for other permit obligations, to address long term operation and maintenance. A formal agreement between the municipality and a permittee that establishes the permittee's responsibility for operating and maintaining the system in compliance with its permit by providing credits, and the responsibility of the municipality or local agency for oversight of the system, would normally be an acceptable assurance.

One commentator requested that the Department replace general references to other laws and regulations to the specific laws and regulations. The Department has not made these revisions to the final-form rulemaking since the applicable laws and regulations are dynamic. The approach in the final-form rulemaking is consistent with that in some environmental statutes, such as the Oil and Gas Act (58 P. S. §§ 601.101—601.605) and the Pennsylvania Safe Drinking Water Act (35 P. S. §§ 721.1—721.17).

One commentator recommended that a "stormwater BMP offset" option be developed as part of Chapter 102 and that the option may also have applicability to the nutrient credit trading program. Under a "stormwater BMP offset" program, the commentator suggested that builders, developers and other applicants would be permitted to fund offsite stream buffers or other BMP in return for offsets of certain postconstruction stormwater management BMP requirements. The commentator stated that applicants would still need to install erosion and sedimentation control measures, as well as stormwater facilities, to control the runoff rate to predevelopment conditions but would offset stormwater infiltration areas. The final-form rulemaking will allow the use of credits to meet permit effluent limits for pollutants (namely, nitrogen and phosphorus) and sediment. The recent amendments to Chapter 102 authorize trading and credits for riparian buffers in the stormwater context. These Chapter 102 amendments are consistent with and would build upon this final-form rulemaking.

Two commentators suggested changes to the definition of "BMP—Best management practices." The suggested revisions have not been made in the final-form rulemaking; however, subparagraph (iii) has been added to the definition of "BMP—Best Management Practice" to include the activities regarding stormwater. This added definition mirrors the BMP definition included in the recent amendments to the Chapter 102 final-form rulemaking.

Two commentators asked that the Department publish an advance notice of final rulemaking to allow an additional public comment period. The Department did not do this. During the drafting process of the proposed rulemaking, the Department solicited comments during a number of stakeholder meetings and the proposed rulemaking is based on *Nutrient and Sediment Reduction Credit Trading—Final Policy and Guidelines*, which involved two comment periods.

Commentators questioned referencing a specific version of the Chesapeake Bay model and other models and technical references in subsection (c) saying most of the references are already out of date. For the most part, the Department has not removed the references as they serve as background material to the Chesapeake Bay program and watershed model.

One commentator asked how the regulated community will know what other sources the Department may rely upon under subsection (c)(6), which includes the sentence "The Department may also rely on other published or peer-reviewed scientific sources." The commentator asked whether the Department will publish a list in the *Pennsylvania Bulletin*. The Department will not publish a list of all published and peer reviewed scientific sources that may be available. Subsection (c)(6) provides flexibility to the regulated community in what methodology they propose to use for calculating reductions but the important component to the methodology is that it must fall within the outlined criteria.

One commentator asked for explicit regulatory language to prohibit changes in the credit calculation methods for certifications covering multiple years. The commentator stated that there needs to be certainty and predictability for both the sellers who are making investments in BMPs and buyers who are relying on those credits being available. Similarly, this commentator stated that subsection (e)(5)(ii) and (iii) creates a time line bottleneck in which many credits must be certified in the fall and early winter so that the entity implementing the BMPs can have an idea how many credits will be available for sale if he goes through the expense of implementing the BMPs in the spring. The Department added subsection (e)(8) to address the duration of credit certification. By the addition of subsection (e)(8), the Department does not feel a bottleneck will occur as the commentator expressed. The term of a certification will generally be 5 years, during which time the Department would not anticipate changing the terms of the certification. If, at the end of the 5-year period, the holder of the certification wishes to renew it, the certification may be renewed.

One commentator asked how a generator will know what the applicable threshold is. The Department has added certainty to the threshold provisions by removing

the words "by the Department" from subsection (d)(1). Applicable threshold requirements are in subsection (d)(3).

One commentator stated that the nonpoint source baseline requirements, while logical, could result in unintended consequences due to the details of compliance with current regulations. For example, in Chapter 83 (relating to State Conservation Commission) there is a wide range in management that can be used to meet the requirements of the chapter. A plan for a farm could be written with all surface application of manure or with all manure being injected; the commentator questioned which manure management activity would meet baseline compliance and stated that the answer has major implications for calculating credits. The commentator explained, for example, that if the plan for surface application is the baseline and is modified to all manure being injected then the management change could be used to generate credits but if the plan already calls for the injection of the manure this could not be used to generate credits. It was suggested by this comment and several others that in addition to simply requiring compliance with current regulations, additional criteria may be required, such as using the existing compliance management on a certain date as the baseline. These commentators stated that setting a specific date in the regulation the Department would ensure that operations do not go backward in management just to generate nutrient credits. The Department revised the final-form rulemaking to include January 1, 2005, as the date for baseline, unless a revision to baseline has been made since that date, in which case the revised requirements must be met. For example, in the recent amendments to Chapter 102, an agricultural operation may need to meet those requirements for baseline.

Two commentators suggested that a reference be added to the nonpoint source baseline provision that an operation must also meet in § 92.5a (relating to CAFOs), if applicable to their operation. This reference has been added to the final-form rulemaking and reflects the new numbering of this section as § 92a.29 (relating to CAFOs).

Two commentators suggested that additional information be included in subsection (d)(3)(i)(B) so that no applications of mechanically applied manure be allowed in the 35 feet of permanent vegetation between the field and surface water. These commentators recommended the use of language from Chapter 83, which is "There is no mechanical application of manure within the buffer area." The Department revised the final-form rulemaking to include this language.

Several commentators felt the threshold provisions contained too much flexibility. One commentator asked whether the "other requirements" will be promulgated as regulations and, if not, how generators will know what they are. The commentator expressed concern about enforceability if the requirements are not set out in the regulations. The commentator expressed similar concerns for subsection (d)(5), regarding other eligibility requirements, and subsection (e)(3)(v), regarding calculation requirements. The Department responds that flexibility in this final-form rulemaking is needed to ensure the actions undertaken within the program reflect the water quality standards downstream and reflect changes regarding the protection and restoration of the Chesapeake Bay. The Department will establish requirements in the most prudent manner available under the circumstances, taking into account many factors. By way of example, if the EPA establishes a TMDL that necessitates a quick determination by the Department, then the Department will likely post notice on its Nutrient Trading web site and make case-by-case determinations until a regulatory amendment, if necessary, is adopted.

Several commentators questioned the "compliance status" provision in subsection (d)(4), saying it is too broad and should be eliminated. The Department responds that it has narrowed subsection (d)(4) to apply when past or current noncompliance indicates a lack of ability or intention to comply with the stated items. The Department does not intend to let minor infractions exclude a person from engaging in trading.

One commentator asked what the appeal process is for someone under subsection (d)(6) and suggested it should be cross-referenced or set forth in the final-form rulemaking. The Department responds that the final-form rulemaking does not include an appeal process, as it is not necessary and the Department does not typically set forth appeal processes in its regulations.

One commentator suggested that the regulation address the issue of eligibility for generation of nutrient credits as a result of idling of whole farms or substantial portions of farms and that the regulation should expressly prohibit the ability of nutrient credits to be generated and utilized in a manner that facilitates the idling and nonfarm development of farmland. The commentator also expressed concern with respect to the ability of nutrient credits to be generated through manipulation of Federal conservation programs to finance long-term land-banking of farms for future nonfarm development. The Department incorporated the requested protections into subsection (e).

One commentator suggested that the Department should make clear that projects already certified do not need to be recertified under the new standards and that the new regulation should only apply prospectively to new projects. The Department added subsection (e)(9)(iv) to address this comment. If a proposal has been certified and the certification does not contain an expiration date, the recipient of the certification must submit a request for renewal by April 13, 2015. At that point, the certification, if renewed, will be updated to meet the requirements in § 96.8 and other applicable laws, water quality standards and requirements in effect at that time.

Subsection (e)(2)(i)(D) states the "implementation of the pollutant reduction activity must be verified to the extent acceptable to the Department. . . ." The commentator asked what "the extent acceptable" to the Department means. The commentator wrote that there is a reference to paragraph (4) and the "verification plan" but that it is unclear how the "extent acceptable" is identified. The commentator added that paragraph (2)(i)(D) appears to be unnecessary since verification is covered in paragraph (4). The Department responds that the phrase "to the extent acceptable to the Department" has been deleted. Paragraph (2)(i)(D) remains in the final-form rulemaking as a useful reference point.

One commentator suggested that subsection (e)(2)(ii)(E) should require only that information on any source of "public or governmental" funding be provided. The commentator sought clarification on the terms "financial guarantee mechanisms," "contractual arrangements" and "insurance products" in subsection (e)(2)(ii)(F). The Department has not made these revisions. Information on all sources of funding is useful to help the Department assure the viability of a proposed credit generation opera-

tion. The questioned terms are used as an example of ways that a person may outline how failure of the pollutant reduction activity will be managed. For example, a person may provide an explanation that they have contracts with multiple farms but only half of those farms are submitted for certification and, if needed, the remainder could be used to address nutrient reduction failure. Another example would be an explanation of the performance guarantee that is provided by the product manufacture.

Several commentators wondered if it is appropriate or necessary to include actual numbers for the tradable load, as had been proposed in subsection (e)(3)(vi). One comment suggested that the Department should provide public information on the genesis of the numbers. One comment stated the section should include the fact that tradable load for the Chesapeake Bay Watershed is for the portion of the watershed in this Commonwealth. It was suggested that the numbers be deleted to allow the Department to periodically reevaluate tradable load without subsequent amendments to the regulation. The Department revised this subsection, renumbered as subsection (e)(4)(i). The revisions include the removal of the specific tradable load amount, clarification that the tradable load is for the portion of the Chesapeake Bay Watershed in this Commonwealth and assurance that the specific loading can be found on the Department's Nutrient Trading web site.

One commentator questioned the phrase ". . . unless otherwise revised by the Department" in subsection (e)(3)(vi), which sets forth the level at which the sum of all credits may not exceed. The Department responds that the phrase ". . . unless otherwise revised by the Department" has been deleted from the final-form rulemaking.

Several commentators suggested that subsection (e)(3)(vii), regarding cost-sharing, should add some clarifying statement that the credits may be available "to the applicant" for certification, if the funding source provider allows. A commentator stated that this subsection should be struck because the Department should simply be following the rules established by the funding agency, not enforcing additional rules on the funding source. According to the commentator, such latitude on being able to approve or deny credits accrued from a BMP implementation project that was fully or partially subsidized by Federal funds limits the predictability for credit generation and thereby inhibits initiating nutrient trading activities and projects that would implement BMPs, reduce pollutant loads and generate nutrient credits through the use of Federal or State funds. The commentator is also concerned with how this provision may affect point source to point source trades. The Department responds that trading of cost-shared BMPs, when allowed by the grantor, encourages participation in BMP programs and remains constant with the goal of maximizing the rate of BMP implementation. Credits will only be restricted if the funding source restricts the use or ability of that funding to be used to generate marketable credits.

A commentator suggested that the regulation include a provision allowing a seller to use the credits in a subsequent water year when, due to no fault of the seller, the Department does not timely act upon the verification and certification. The commentator stated that protections can be built into this approach to assure that it will not result in more deliverable loads to the Chesapeake Bay than is otherwise provided for. The Department responds that, consistent with past practice and EPA guidance, the final-form rulemaking only allows credits generated by a pollutant reduction activity to be used to meet permit effluent limits for the compliance period for which they are certified, verified and registered. Currently, a credit has a shelf life of 1 year, which means it can only be used for that year, though the activity that generated the reduction will be generally certified for 5 years.

A commentator questioned the reference to "basic contract elements" in proposed subsection (f)(2)(ii). The reference to "basic contract elements" has been removed from the final-form rulemaking.

Regarding proposed subsection (f)(2)(ii), several commentators questioned, based on the definition of "registration," why a contract needs to be in place to buy or sell credits prior to those credits being registered. These commentators questioned whether the requirement creates a predicament for credit generators who may not yet have a customer but have actually created credits. This subsection, final-form subsection (g)(2)(ii), still requires a valid contract that ensures that the requirements under § 96.8 will be met. This requirement will help ensure the integrity of the nutrient trading program. The requirement for a contract is also in the Department's Nutrient Trading guidance document.

Many comments were submitted regarding proposed subsection (g)(5). Many commentators stated that a broad exception needs to be included. It was suggested that if a permittee has purchased credits through a valid contract, and the credits later become unavailable through no fault of the permittee, then the permittee should not be penalized and should not risk enforcement action by the Department. One commentator said the expectations of the introductory sentence are unclear and asked what enforcement tools will be available to permittees. One commentator questioned if the permittee would still be responsible if PENNVEST becomes the nutrient credit clearinghouse.

The Department responds that this paragraph, now subsection (h)(5), is designed to offer protection to a permittee when credits are unavailable through no fault of the permittee. The Department made efforts to provide mechanisms for assistance and to help ensure that failure of credit availability in the market as a whole, during a major storm event, for instance, does not occur. The final-form rulemaking specifies that the Department will retain a 10% credit reserve, which will be set aside to address pollutant reduction failures and uncertainty. In addition, credit purchases through private aggregators or PENNVEST may help minimize risk. The Department is unable to extend the protection as far as the commentators requested, however, because the permittees are required by law to meet their effluent limits, regardless of the manner in which they have chosen to do so. A permittee can enforce the terms of its contract in the same manner that it can enforce any other contract; to some extent, this will be dependent upon the contract language. Similarly, if PENNVEST could not provide replacement credits, a permittee would still be responsible for meeting the terms of its permit. The Department's approach is consistent with the EPA's "Water Quality Trading Policy," dated January 13, 2002, which states the following: "In the event of default by another source generating credits, an NPDES permittee using those credits is responsible for complying with the effluent limitations that would apply if the trade had not occurred."

One commentator suggested that proposed subsection (h)(2) is vague and should be eliminated. This commentator also asked if discharges from New York going through

waterways in this Commonwealth impact facilities in this Commonwealth from the right to trade if New York is above its cap load. This commentator suggested that if this subsection means that trading will be based upon the consideration of deliverable loads, then the regulation should reflect how the adjustments will be made. Proposed subsection (h)(2), final-form subsection (i)(2), has not been deleted. The Department responds that in the 2003 "Water Quality Trading Policy Statement," the EPA outlined that trading may be used to maintain water quality in waters where water quality standards are attained in ways such as compensating for new or increased discharges of pollutants. Typically, compliance points are outlined in a defined TMDL. Discharges from New York going through this Commonwealth at this time do not impact this Commonwealth's ability to trade.

A comment was submitted that the public notices called for under § 92.61 are significantly different than what the Department has been using for credit generating proposals and are not appropriate for this purpose. This commentator suggested that the last sentence of proposed subsection (i) should be deleted. The Department did not delete this sentence in the final-form rulemaking as the sentence makes clear that the public participation requirements for the Nutrient Trading Program are different from what is required for permit applications.

G. *Benefits, Costs and Compliance*

Benefits

Harnessing market forces can be an effective way to achieve environmental regulatory goals at less expense than traditional command and control regulations. Market-based programs such as trading provide incentives for entities to create credits by going beyond any statutory or regulatory obligations. The final-form rulemaking provides clear and certain standards for nutrient credit trading in this Commonwealth and thereby supports the Department's efforts to implement its nutrient credit trading program.

Compliance costs

The final-form rulemaking does not create new compliance requirements. It is essentially a voluntary program that provides economic incentives for increased pollutant reductions beyond those required by law.

Compliance Assistance Plan

While there are not new compliance requirements in this final-form rulemaking, the Department has an active and comprehensive outreach and education effort. Department staff will continue to attend public meetings of various kinds to describe the program and assist with its use by interested persons.

Paperwork requirements

There are no paperwork requirements as that term is normally used, as this is a voluntary program. The final-form rulemaking does contain requirements for submittal of certain information, as stated in § 96.8(e). However, the cost of these requirements will normally be returned through revenue earned in the sale of the credits or avoidance of more expensive compliance methods if credits or offsets were not used.

H. *Pollution Prevention*

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) establishes 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. This final-form rulemaking is essentially a pollution prevention incentive program, as described previously in this preamble.

I. *Sunset Review*

This final-form rulemaking 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. § 745.5(a)), on February 3, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 876, to the Independent Regulatory Review Commission (IRRC) and to the House and Senate Environmental Resources and Energy Committees (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 public comment period, as well as other documents when requested. In preparing the 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 (71 P. S. § 745.5a(j.2)), on August 18, 2010, the final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 19, 2010, and approved the final-form rulemaking.

K. *Findings*

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, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 40 Pa.B. 876.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 96, are amended by adding § 96.8 to read as set forth in Annex A.

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

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Committees as required by the Regulatory Review Act.

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

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

JOHN HANGER,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 5106 (September 4, 2010).)

Fiscal Note: Fiscal Note 7-451 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 96. WATER QUALITY STANDARDS IMPLEMENTATION

§ 96.8. Use of offsets and tradable credits from pollution reduction activities in the Chesapeake Bay Watershed.

(a) *Definitions*. The following words and terms, when used in this section, have the following meanings, unless the context indicates otherwise:

Aggregator—A person that arranges for the sale of credits generated by another person, or arranges for the credits to be certified, verified and registered.

Agricultural operation—The management and use of farming resources for the production of crops, livestock or poultry, or for equine activity.

Baseline—

(i) The compliance activities and performance standards that must be implemented to meet current environmental laws and regulations related to the pollutant for which credits or offsets are generated.

(ii) The term includes allocations established under this chapter, in a TMDL or in a similar allocation, for the pollutant.

BMP—Best management practice—

(i) Schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce pollutants to surface waters of this Commonwealth.

(ii) The term includes treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(iii) The term 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.

(iv) The term also includes riparian buffers, soil and slope stabilization measures, control of fertilization practices, and other actions and measures designed to reduce erosion and runoff of soil, sediment and pollutants from the land surface during precipitation events; or to reduce the contamination of groundwater with pollutants that may affect surface waters.

(v) The term includes BMP measures developed under this title to reduce pollutant loading to surface waters.

Certification—Written approval by the Department of a proposed pollutant reduction activity to generate credits before the credits are verified and registered to be used to comply with NPDES permit effluent limitations.

Credit—The tradable unit of compliance that corresponds with a unit of reduction of a pollutant as recognized by the Department which, when certified, verified and registered, may be used to comply with NPDES permit effluent limitations.

Credit reserve—Credits set aside by the Department to address pollutant reduction failures and uncertainty.

DMR—Discharge monitoring report—The Department or EPA supplied forms for reporting of self-monitoring results by the permittee.

Delivery ratio—A ratio that compensates for the natural attenuation of a pollutant as it travels in water before it reaches a defined compliance point.

Edge of segment ratio—A ratio that identifies the amount of a pollutant expected to reach the surface waters at the boundary of a Chesapeake Bay Watershed Model segment through surface runoff and groundwater flows from a pollutant source within a watershed segment.

Nutrient—Nitrogen or phosphorus.

Offset—The pollutant load reduction measured in pounds that is created by an action, activity or technology which when approved by the Department may be used to comply with NPDES permit effluent limitations, conditions and stipulations under Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance). The offset may only be used by the NPDES permittee that the Department determines is associated with the load reduction achieved by the action, activity or technology.

Pollutant—Nutrient or sediment.

Pollutant reduction activity—An activity, such as a BMP or effluent control, that is implemented to prevent or reduce a pollutant load to surface waters of this Commonwealth.

Registration—An accounting mechanism used by the Department to track certified and verified credits before they may be used to comply with NPDES permit effluent limitations.

Reserve ratio—A 10% ratio that is applied to the pollutant reductions generated, which establishes the credits to be set aside for the Department's credit reserve.

Threshold—Activities and performance standards beyond baseline compliance which are required under subsection (d)(3) before credits may be certified.

Tradable load—The amount of nonpoint source pollutant reduction determined to be the projected future pollutant load that is the difference between the total reduction theoretically possible from maximum implementation of pollutant reduction activities, and the reduction

associated with a level of pollutant reduction activities identified by the Department as reasonably attainable.

Trade—A transaction that involves the sale or other exchange, through a contractual agreement, of credits that have been certified, verified and registered.

Trading ratio—A ratio applied to adjust a pollutant reduction when calculating credits for a pollutant reduction activity. A trading ratio is used to address uncertainty, water quality, reduction failures or other considerations. The term will include a delivery ratio, an edge of segment ratio and a reserve ratio.

Verification—Assurance that the verification plan contained in a certification, permit or other approval issued by the Department under this section has been implemented. Verification is required prior to registration of the credits for use in an NPDES permit to comply with NPDES permit effluent limitations.

(b) *Chesapeake Bay water quality.*

(1) Credits and offsets may be used to meet legal requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(2) Credits may be generated only from a pollutant reduction activity that has been certified, verified and registered under this section.

(3) Credits and offsets may be used by permittees to meet effluent limits for nitrogen, phosphorus and sediment expressed as annual loads in pounds contained in NPDES permits that are based on compliance with water quality standards established under the Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387), specifically for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(4) Credits and offsets may only be used for comparable pollutants, unless otherwise authorized by the Department. For example, nitrogen credits or offsets may only be used to meet nitrogen effluent limits.

(5) The use of credits and offsets must comply with legal requirements under applicable laws and regulations, including the requirements of this section.

(6) Credits and offsets may not be used to comply with technology-based effluent limits, except as expressly authorized under Federal regulations administered by the EPA.

(c) *Methodology.*

(1) *General.* The Department will use one or more of the methods, data sources or conclusions contained in this subsection when certifying a pollutant reduction activity to generate credits.

(2) Credits may be calculated by use of pollutant removal efficiencies for BMPs, and edge of segment and delivery ratios addressing fate and transport of pollutants, consistent with the most up-to-date version of the Chesapeake Bay watershed model. The pollutant removal efficiencies and edge of segment and delivery ratios will be available on the Department's Nutrient Trading web site.

(3) The Department may rely on results from the following modeling tools, as amended or updated, to approve other pollutant removal efficiencies for BMPs:

(i) Science Algorithms of the EPA Models-3 Community Multiscale Air Quality (CMAQ) Modeling System, Atmospheric Modeling Division, National Research Laboratory, U.S. Environmental Protection Agency, EPA/600/R-99/030, (Daewon Byun and Kenneth L. Schere, 2006).

(ii) EPA Watershed Model (Donigian et al. 1994; Linker 1996; Linker et al. 2000).

(iii) EPA Chesapeake Bay Hydrodynamic Model (Wang and Johnson 2000).

(iv) EPA Estuarine Water Quality Model (Cerco and Cole 1993, 1995a, 1995b; Thomann et al. 1994; Cerco and Meyers 2000; Cerco 2000; Cerco and Moore 2001; Cerco et al. 2002a).

(4) The Department may rely on the methods, data sources and conclusions in the following EPA documents, as amended or updated:

(i) *Technical Support Document for Identification of Chesapeake Bay Designated Uses and Attainability.* EPA 903-R-03-004. Region III Chesapeake Bay Program Office, Annapolis, Maryland (2003).

(ii) *Technical Support Document for Identification of Chesapeake Bay Designated Uses and Attainability-2004 Addendum.* EPA 903-R-04-006. Region III Chesapeake Bay Program Office, Annapolis, Maryland (2004).

(iii) *Revision, Chesapeake Bay Program Analytical Segmentation Schemes: decisions and rationales, 1983-2003.* EPA 903-R-04-008. CBP/TRS 268/04. Chesapeake Bay Program Office, Annapolis, Maryland (2004).

(iv) *Revision, Chesapeake Bay Program Analytical Segmentation Schemes: decisions and rationales, 1983-2003—2005 Addendum.* EPA 903-R-05-004. CBP/TRS 278/06. Chesapeake Bay Program Office, Annapolis, Maryland (2005).

(v) *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment The Collaborative Process, Technical Tools and Innovative Approaches. Loads.* EPA 903-R-03-007. Region III Chesapeake Bay Program Office, Annapolis, Maryland (2006).

(vi) *Summary of Decisions Regarding Nutrient and Sediment Load Allocations and New Submerged Aquatic Vegetation (SAV) Restoration Goals.* April 25, 2003, Memorandum to the Principals' Staff Committee members and representatives of the Chesapeake Bay headwater states. Virginia Office of the Governor, Natural Resources Secretariat, Richmond, Virginia.

(vii) *The 2002 Chesapeake Bay Eutrophication Model.* EPA 903-R-04-004. U.S. Army Corps of Engineers, Engineer Research & Development Center, Environmental Laboratory (Cerco, C.F., and Noel, M.R., 2004).

(viii) *Ecosystem models of the Chesapeake Bay Relating Nutrient Loadings, Environmental Conditions and Living Resources Technical Report.* Chesapeake Bay Program Office, Annapolis MD (Kemp, MW., R. Bartlescn, S. Blumenshine, J.D. Hagey, and W.R Boynlen, 2000).

(ix) *Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and Its Tidal Tributaries.* U.S. EPA 2003b. EPA 903-R-03-002. Chesapeake Bay Program Office, Annapolis, Maryland.

(5) For a point source, the Department may rely on the information supplied by the permittee in the DMR, including offset information, when certifying a pollutant reduction activity to generate credits.

(6) When certifying a pollutant reduction activity to generate credits, the Department may rely on methods, data sources and conclusions contained in the *Pennsylvania Agronomy Guide* published by Pennsylvania State University, and the *Pennsylvania Technical Guide* published by the Federal Natural Resources Conservation

Service. The Department may also rely on other published or peer-reviewed scientific sources.

(d) *Eligibility requirements for the Chesapeake Bay.*

(1) *General.* To generate credits or offsets, the person shall demonstrate a reduction in the pollutant load beyond the pollutant load allowed under applicable baseline requirements, and beyond any applicable threshold.

(2) *Baseline requirements to generate credits.*

(i) For a nonpoint source, the baseline is the set of requirements in regulations applicable to the source at the location where the credits or offsets are generated, and the pollutant load associated with that location as of January 1, 2005. If since that date new requirements or operation changes have occurred that necessitate a revised set of requirements those establish the baseline. For an agricultural operation, baseline includes compliance with the erosion and sedimentation requirements for agricultural operations in Chapter 102 (relating to erosion and sediment control), the requirements for agricultural operations under § 91.36 (relating to pollution control and prevention at agricultural operations), § 92a.29 (relating to CAFOs) and the requirements for agricultural operations under Chapter 83, Subchapter D (relating to nutrient management), as applicable.

(ii) For a point source, the baseline is the pollutant effluent load associated with effluent limitations contained in the NPDES permit based on the applicable technology based requirements, or the load in a TMDL or similar allocation, whichever is more stringent.

(3) *Threshold requirements to generate credits.*

(i) To generate credits, an agricultural operation must meet one of the following threshold requirements at the location where the credits are generated.

(A) Manure is not mechanically applied within 100 feet of a perennial or intermittent stream with a defined bed or bank, a lake or a pond. This threshold can be met through one of the following:

(I) There is not a perennial or intermittent stream with a defined bed or bank, a lake or a pond on or within 100 feet of the agricultural operation.

(II) The agricultural operation does not mechanically apply manure, and applies commercial fertilizer at or below agronomic rates contained in the current *Penn State University Agronomy Guide* published by Pennsylvania State University.

(B) A minimum of 35 feet of permanent vegetation is established and maintained between the field and any perennial or intermittent stream with a defined bed or bank, a lake or a pond. The area may be grazed or cropped under a specific management plan provided that permanent vegetation is maintained at all times and there is no mechanical application of manure within the buffer area.

(C) The applicant applies an adjustment of at least 20% to the overall amount of the pollutant reduction generated by the pollutant reduction activity the person is submitting for certification.

(ii) The Department may establish other threshold requirements necessary to ensure the effectiveness of the use of credits to meet legal requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(4) *Compliance status.* A person who by past or current noncompliance has demonstrated a lack of ability or intention to comply with any of the following is not eligible for certification or offset approval or to use credits or offsets to meet permit effluent limits:

(i) A Department regulation, permit, schedule of compliance, order or certification.

(ii) A law or regulation that addresses pollution of waters of this Commonwealth.

(iii) A contract for the exchange of credits.

(5) *Other requirements.* The Department may establish other eligibility requirements to ensure the effectiveness of the use of credits and offsets to meet legal requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(6) *Failure to meet eligibility requirements.* If at any time prior to registration of a credit the Department determines that a person no longer meets the eligibility requirements under this section, the Department may take appropriate action, such as prohibiting the person from participating in any trading under this section or denying a request for certification, registration of any credits or approval of offsets.

(e) *Certification requirements for the Chesapeake Bay.*

(1) *General.* A pollutant reduction activity must be certified by the Department for the generation of credits before the credits may be applied to meet permit effluent limitations. Certification will serve as the Department's final determination of the amount of credits that the pollutant reduction activity may generate. A permittee may only use credits to meet permit effluent limits if certification is followed by verification and registration of the credits.

(2) *Request for certification.* A person who wishes to have a pollutant reduction activity certified by the Department to generate credits shall submit a written request for certification in the format required by the Department.

(i) The request for certification must contain information sufficient to demonstrate the following:

(A) That the location where the pollutant reduction activity will be implemented will meet applicable eligibility requirements under subsection (d) and will continue to meet those requirements throughout the applicable term of the certification.

(B) That the pollutant reduction activity will meet acceptable standards for construction and performance, including operation and maintenance, throughout the applicable term of the certification.

(C) That the calculation requirements of this section have been met.

(D) That the implementation of the pollutant reduction activity will be verified as described in a verification plan that meets the requirements of paragraph (5).

(ii) The request for certification must contain the following additional information:

(A) A detailed description of how the credits will be generated by the pollutant reduction activity, including calculations, assumptions and photos.

(B) A map illustrating the locations of the proposed pollutant reduction activity.

(C) Details on the timing of credits, such as the timing of credit generation and delivery, timing of a phase-in

period and the time frame for sale and use of credits toward permit effluent limits.

(D) The water quality classification under Chapter 93 (relating to water quality standards), and any applicable impairment listings under section 303(d) of the Federal Water Pollution Control Act (33 U.S.C.A. § 1313(d)), for the receiving stream segment nearest the location of the proposed pollutant reduction activity.

(E) Information on sources of funding used to pay for any portion of the pollutant reduction activity, including the dollar amount and any conditions and restrictions regarding the use of the funds toward the generation or sale of credits.

(F) A description of how risks of failure of the pollutant reduction activity will be managed, such as the use of financial guarantee mechanisms, contractual arrangements, insurance products or reduction of the concentration of projects in a particular sub-watershed.

(G) A description of preservation and conservation easements on lands where the pollutant reduction activity is to be implemented.

(H) Identification of notations on documents submitted in the request which the person submitting the request claims to be confidential business information or a protected trade secret protected from disclosure by law, and a justification for the claims.

(I) The name of the person submitting the request and the names of the participants involved in the pollutant reduction activity.

(J) The professional qualifications of the persons who completed the calculations, conducted the baseline and threshold determinations or otherwise contributed to the technical merits of the request.

(K) Contact information for the person submitting the request.

(3) *Calculation requirements.* The following credit calculation requirements apply:

(i) The calculations must demonstrate how the pollutant reductions will be achieved from the proposed pollutant reduction activity to generate credits for the applicable period of time.

(ii) The pollutant reductions must be expressed in pounds per year.

(iii) The calculations used must be based on methodologies that the Department determines are appropriate under subsection (c).

(iv) The calculation for a point source may include excess load capacity attributable to activities such as effluent controls or the use of offsets.

(v) The calculation must include a 10% set aside for the Department's credit reserve.

(vi) The Department may establish other calculation requirements necessary to ensure that the use of credits is effective in meeting water quality requirements, and to address uncertainty for reasons such as unforeseen events that may disrupt pollutant reduction activities. The calculation requirements may include the need to use trading ratios, risk-spreading mechanisms and credit reserves. These calculation requirements may reduce the amount of credits the Department may certify for a pollutant reduction activity.

(4) *Other requirements considered for certification.*

(i) The annual sum of all credits certified from nonpoint sources in this Commonwealth's portion of the Chesapeake Bay Watershed may not exceed the applicable tradable load calculated by the Department for this Commonwealth's portion of the Chesapeake Bay Watershed. The tradable load will be available on the Department's Nutrient Trading web site.

(ii) If State or Federal funds are used to cost-share any portion of the pollutant reduction activity contained in the request for certification, the Department may allow the portion of the credits or offsets paid for by State and Federal funds to be available for certification, unless to restrict trading of that portion of the credits restrictions have been placed on the funds by the provider of the funds.

(iii) The Department will not certify a request that includes a pollutant reduction activity related to a farm land conversion action that includes the purchase and idling of a whole farm or a substantial portion of a farm to provide credits for use offsite. The Department will not certify a request that includes a pollutant reduction activity related to a farm land conversion action that includes farmland that is converted from agricultural land to another development type such as commercial or residential. However, to support farm land conservation programs, if a portion of farm land is retired or converted through a program such as one of the following, the action may be eligible for certification:

(A) The United States Department of Agriculture's Farm Services Agency Conservation Reserve Program (CRP).

(B) The United States Department of Agriculture's Conservation Reserve Enhanced Program (CREP).

(C) The United States Department of Agriculture's Natural Resources and Conservation Service's Environmental Quality Incentives Program (EQIP).

(5) *Verification plan.* A request for certification must contain a verification plan.

(i) The verification plan must include the methods for credit verification, such as the documentation of the implemented pollutant reduction activity, sufficient to allow the Department to verify that the pollutant reduction activity in the certification was properly implemented during the applicable compliance period.

(ii) The verification plan must also include one of the following methods. The method contained in the verification plan is subject to approval by the Department:

(A) Self-verification by the person responsible for implementing the pollutant reduction activity.

(B) Third-party verification.

(6) *Certification by the Department.* The Department will certify a pollutant reduction activity when it has determined that the requirements of paragraphs (1)—(5) have been met. In addition, the following apply:

(i) The Department may make a certification contingent on conditions to ensure that the requirements of this chapter will be satisfied.

(ii) The Department may only certify the pollutant reduction activity that will generate credits for use to meet permit effluent limits for the compliance period for which they are certified, verified and registered under this section.

(iii) The Department will only approve a request for certification for multiple compliance periods if the pollutant reduction activity that will generate the credits will be verified and registered separately for each compliance period.

(7) *Compliance.* A person to whom the Department issues a certification under this section shall comply with the terms and conditions of the certification.

(8) *Duration of certification.* The term of a certification is 5 years, unless the certification expressly states otherwise. To obtain a certification term longer than 5 years, a person requesting certification shall demonstrate to the Department's satisfaction that a longer term is warranted based on technological or economic factors, taking into consideration the requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(9) *Renewal of certification.*

(i) A person seeking renewal of a certification shall submit a written request for renewal at least 180 days prior to the expiration of the certification.

(ii) The Department will provide public notice and an opportunity for informal comment when an administratively complete request is submitted.

(iii) The Department's final determination on a request for renewal will be based on the requirements of this section and on other applicable laws, water quality standards and requirements in effect at the time of the Department's determination.

(iv) By April 13, 2015, the recipient of a certification issued prior to October 9, 2010, shall submit a request for renewal of the certification. The Department will process the request in accordance with this paragraph. This subparagraph does not apply to a certification containing an expiration date.

(10) *Revocation.* The Department may revoke a certification for failure to comply with the conditions of the certification.

(f) *Verification requirements for the Chesapeake Bay.*

(1) *General.* Credits must be verified prior to registration. The following applies to verification:

(i) Verification must be conducted as described in the approved verification plan.

(ii) Verification must demonstrate that the pollutant reduction activity has been implemented as described in the certification, and that other requirements, such as baseline and threshold, are met.

(2) The Department may conduct other verification activities, such as monitoring and conducting inspections and compliance audits, to ensure that the pollutant reduction obligations are being met.

(g) *Registration requirements for the Chesapeake Bay.*

(1) *General.* Credits must be registered by the Department before they may be applied to a permit to meet effluent limitations.

(2) *Registration requirements.* The following registration requirements apply:

(i) Credits must be certified under the provisions of subsection (e).

(ii) Credits must be addressed in a valid contract that ensures that the requirements of this section will be met.

(iii) Credits must be verified prior to registration, under subsection (f).

(iv) The Department will assign a registration number to each registered credit for reporting and tracking purposes.

(3) *Failure to implement.* The Department will not register credits if the person who generates the credits has not implemented, or demonstrates a lack of ability or intention to implement, operations and maintenance requirements contained in the certification, verification plan, or other requirements of this section. The Department will not register credits submitted by an aggregator that is currently not complying, or demonstrates a lack of ability or intention to comply, with this section.

(h) *Use of credits and offsets to meet NPDES permit requirements related to the Chesapeake Bay.*

(1) A permittee will only be authorized to use credits and offsets through the provisions of its NPDES permit. The permit conditions will require appropriate terms, such as recordkeeping, monitoring and tracking, and reporting in DMRs.

(2) Only credits and offsets generated from activities located within the Chesapeake Bay Watershed may be used to meet NPDES permit requirements related to the Chesapeake Bay. Credits generated in either the Susquehanna or Potomac basins may only be used in the basin in which they were generated, unless otherwise approved by the Department.

(3) A permittee shall ensure that the credits and offsets that the permittee applies to its permit for compliance purposes are certified, verified and registered, or approved, under this section for the compliance period in which they are used.

(4) The Department may authorize a period of 60 days or less following the completion of the annual compliance period in an NPDES permit, for a permittee to come into compliance through the application of credits and offsets to the permit provided that the credits were registered and offsets were approved for use during that compliance period.

(5) A permittee relying on credits to demonstrate compliance with its permit effluent limitations, conditions and stipulations under Chapter 92a shall attain and maintain compliance with its permit. A permittee is responsible for enforcing the terms of its trade contract, when needed to ensure compliance with its permit. The Department may waive this requirement where the pollutant reduction activity fails due to uncontrollable or unforeseeable circumstances such as extreme weather conditions, and timely notice is provided to the Department, if the following apply:

(i) The failure is not due to negligence or willfulness on the part of the permittee.

(ii) The Department determines that replacement credits will be available.

(iii) The Department determines that the requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay will be met due to the requirements of this section, which may include the type of methodologies used when certifying credits, the existence of an approved legal mechanism that is enforceable by the Department, and the use of a credit reserve.

(6) A permittee shall document the use of credits and offsets in DMR forms, which the permittee shall submit at the end of each compliance year or as otherwise

provided or required in the permit. Credits and offsets shall only be used to meet permit effluent limits for the compliance period for which they are certified, verified and registered, or approved, by the Department under this section.

(i) *Water quality and TMDLs.*

(1) Use of credits and offsets under this section will be allowed only where surface water quality will be protected and maintained as required by applicable regulations, including this chapter, Chapters 92a and 93, as well as Department permits, schedules of compliance and orders.

(2) Use of credits and offsets under this section must ensure that there is no net increase in discharge of pollutants to the compliance point used for purposes of determining compliance with the water quality standards established by the states of Maryland and Virginia for restoration, protection and maintenance of water quality of the Chesapeake Bay.

(3) Where a TMDL has been established for the watershed where the permitted activity is located, the use of credits and offsets under this section will be consistent with the assumptions and requirements upon which the TMDL is based.

(4) Use of credits and offsets under this section will comply with the antidegradation requirements contained in Department regulations.

(j) *Public participation.* The Department will publish a notice in the *Pennsylvania Bulletin* of the receipt of administratively complete requests for certifications of a pollutant reduction activity to generate credits. The notice will provide an opportunity for informal comments. This notice is not required to follow the requirements of § 92a.82 (relating to public notice of permit applications and draft permits). The Department will also publish notice in the *Pennsylvania Bulletin* of its final certification determination.

(k) *Use of credits and offsets generally.* Nothing in this section precludes the Department from allowing the use of credits and offsets to be used to meet permit limits other than those established for restoration, protection and maintenance related to the water quality of the Chesapeake Bay.

[Pa.B. Doc. No. 10-1927. Filed for public inspection October 8, 2010, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF PODIATRY

[49 PA. CODE CH. 29]

Continuing Education

The State Board of Podiatry (Board) amends Chapter 29 to read as set forth in Annex A.

The final-form rulemaking amends § 29.61(a) (relating to requirements for biennial renewal and eligibility to conduct educational conferences) to increase the biennial continuing education requirement for podiatrists from 30 hours to 50 hours, effective with the renewal of licensure for the biennial license period that begins January 1, 2011. Consistent with existing requirements, at least 30 hours shall be in podiatry courses and programs approved by the Board or the Council on Podiatric Medical Education (CPME). The remaining 20 hours shall be either in Board- or CPME-approved podiatry courses and programs or in courses and programs in medical subjects that are approved by the American Medical Association (AMA) or the American Osteopathic Association (AOA).

The final-form rulemaking further amends § 29.61(a) by: making editorial changes to the 10-hour limitation on the number of continuing education hours that may be obtained by means of the Internet or through the reading of professional journals and magazines; adding a provision formerly in § 29.63a, that continuing education credit will not be awarded for courses or programs in office management or marketing the practice; and clarifying that a licensee bears the responsibility for ensuring that continuing education hours have been approved prior to participating in the course or program for which continuing education credit is sought.

The final-form rulemaking also rescinds § 29.63a because its contents are adequately treated in final-form § 29.61.

Statutory Authority

Section 9.1 of the Podiatry Practice Act (act) (63 P. S. § 42.9a) authorizes the Board to prescribe continuing education requirements, while section 15 of the act (63 P. S. § 42.15) authorizes the Board to adopt regulations as it deems necessary and proper to carry out its statutory responsibilities.

Summary of Comments and Responses to Proposed Rulemaking

The Board published a notice of proposed rulemaking at 39 Pa.B. 7107 (December 19, 2009), with a 30-day public comment period. The Board received a general comment in support of the proposed rulemaking from the Pennsylvania Podiatric Medical Association, a professional organization that represents the majority of licensed podiatrists in this Commonwealth.

The Board received comments from the Independent Regulatory Review Commission (IRRC) and the House Professional Licensure Committee (House Committee) as part of their review of the proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.12). The Board did not receive comments from the Senate Consumer Protection and Professional Licensure Committee (Senate Committee) as part of its review of the proposed rulemaking under the Regulatory Review Act.

The following discussion summarizes the comments and the Board's responses:

The proposed rulemaking required that the additional 20 hours of continuing education shall be either in courses and programs in podiatry that are approved by the Board or CPME or in courses and programs in "related medical subjects" that are approved by AMA or AOA. IRRC commented that the phrase "related medical subjects" is vague because it does not apprise a licensee of what medical subjects are related to the practice of podiatry. IRRC recommended that a more precise standard be included in the final-form rulemaking.

Consistent with the regulatory approach utilized by many other states' podiatric licensing boards, the proposed rulemaking was intended to permit a licensee to obtain continuing education credit, up to a maximum of 20 hours, for a course or program in a medical subject

that is approved by AMA and AOA. As stated in the proposed rulemaking, the collaborative, interdisciplinary approach to the diagnosis and treatment of medical conditions has fostered a commonality of interests among podiatrists and allopathic and osteopathic physicians. Podiatrists can obtain useful information and insight for their practices from medical subjects as diverse as diabetes management, orthopedics, dermatology and radiology. To clarify that podiatrists are not limited in the medical subjects they may take in continuing education courses and programs offered under the auspices of AMA or AOA, the final-form rulemaking deletes "related" as a modifier of "medical subjects" in § 29.61.

The House Committee commented that the Board's use of the terms "course," "program" and "educational conference" in § 29.61 and other continuing education regulations is confusing and requested a clarification of their meanings.

The terms have been used interchangeably to refer to educational offerings. "Educational conference" is used in section 9.1 of the act and the term is referenced throughout the Board's continuing education regulations. In 2003, when the continuing education regulations were last amended, the Board employed the terms "course" and "program" as an alternate usage to "educational conference." The new terms are more descriptive of the continuing education options available to podiatrists on the Internet and through self-study. Although it has not been advised by a podiatrist that the alternate usage in the regulations has led to misapprehension of the continuing education requirements, the Board intends to utilize more uniform terminology in the continuing education regulations. Because making these changes now would enlarge the original purpose of the proposed rulemaking, the Board will initiate a separate rulemaking to address the matter.

The final-form rulemaking retains language in § 29.61 that prohibits the carrying over of excess continuing education hours from one biennial license period to another. The House Committee questioned whether it would be beneficial, given considerations of time management and cost, to permit a podiatrist to carry over a minimum number of continuing education hours to the next biennial license period without defeating continuing education's purpose of maintaining current skills and knowledge.

The Board believes that allowing a podiatrist to utilize continuing education hours from an earlier biennial license period is contrary to section 9.1 of the act, which requires a podiatrist who is applying for license renewal to have completed the required hours of continuing education during the immediately preceding biennial license period. All but 1 of the other 18 licensing boards within the Bureau of Professional and Occupational Affairs (BPOA) that require continuing education as a condition of license renewal prohibit the carrying over of excess continuing education hours from one biennial license period to another.

The House Committee and IRRC questioned how a licensee can fulfill his responsibility, in revised § 29.61, to ensure that a particular course or program is approved for continuing education credit prior to participating in the course or program.

The regulations require a podiatrist to obtain continuing education hours in courses and programs that have been approved by the Board, CPME, AMA or AOA. A podiatrist can ascertain whether a course or program is approved for continuing education credit by contacting these four approving bodies. The Board maintains an updated listing of currently approved programs and courses on its web site; likewise, CPME, AMA and AOA each maintains a web site with information about approved continuing education providers. In addition, the promotional and solicitation materials for a continuing education course or program typically indicate whether it is sanctioned by an approving body.

The House Committee asked whether the current biennial renewal fee of $395 is adequate to support the additional workload for the Board's administrative office in auditing the increased number of continuing education hours completed by licensees.

The Board does not believe the costs of the additional auditing workload will be substantial. Like all other BPOA licensing boards with continuing education requirements, the Board does not audit its licensees for continuing education compliance; rather, it randomly selects a percentage of its licensees for a compliance audit. The Department of State's Bureau of Finance and Operations, which monitors the revenues and expenses of BPOA licensing boards, has not advised the Board that its current biennial renewal fee is inadequate to defray costs associated with a modest expansion of its administrative activities.

The House Committee asked how the Board has apprised podiatrists of the increased continuing education requirement other than through the posting of a notice on the Board's web site.

In December 2008, the Board mailed a notice about the initiation of this rulemaking to each currently licensed podiatrist in this Commonwealth. The notice provided information about the type and number of continuing education hours that would be required as a condition of license renewal for the 2011-2012 license period. Contemporaneous with the submission of final-form rulemaking, the Board mailed a reminder notice about the increased continuing education requirement to each currently licensed podiatrist in this Commonwealth.

The House Committee asked whether the increased continuing education requirement would affect reciprocity with neighboring states.

The increased continuing education requirement will not have a direct impact on reciprocity because reciprocity is based on the similarity of states' requirements for initial licensure rather than their requirements for renewal of licensure. Moreover, given that four of six states that border this Commonwealth currently require podiatrists to complete at least 50 hours of continuing education biennially, it is unlikely that continuing education will prove to be a determining factor in the decisions of podiatrists to seek practice privileges across state lines.

Fiscal Impact

The final-form rulemaking will require podiatrists to incur costs in meeting the increased continuing education requirement. The costs cannot be quantified because of the large number and type of continuing education courses and programs available; however, the costs are not believed to be substantial or burdensome. Many podiatrists already exceed the current 30-hour continuing education requirement.

The final-form rulemaking will cause the Board's administrative office to incur unspecified costs regarding auditing compliance with the increased continuing education requirement. The current $395 biennial renewal fee

paid by podiatrists will defray the costs, which, as previously noted, are not believed to be substantial.

The final-form rulemaking will not have a fiscal impact on the public or on other agencies and political subdivisions of this Commonwealth.

Paperwork Requirements

The final-form rulemaking will require podiatrists to retain records regarding their increased continuing education hours and to submit the records to the Board upon audit. The final-form rulemaking will require the Board to revise its biennial renewal application. The final-form rulemaking will not create additional paperwork for the general public or for other agencies and political subdivisions of this Commonwealth.

Effective Date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin* and will apply to the renewal of licensure for the 2011-2012 biennial license period.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on December 9, 2009, the Board submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 7107, to IRRC and the Chairpersons of the House and Senate Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on September 15, 2010, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on September 16, 2010, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should contact Gina Bittner, Administrator, State Board of Podiatry, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-4858, ST-PODIATRY@state.pa.us.

Findings

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 the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) The amendments to the final-form rulemaking do not enlarge the original purpose of the proposed rulemaking published at 39 Pa.B. 7107.

(4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the act.

Order

The Board, acting under authority of the act, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 29, are amended by amending § 29.61 and by deleting § 29.63a to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

RICHARD G. STUEMPFLE, DPM,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 5655 (October 2, 2010).)

Fiscal Note: Fiscal Note 16A-4410 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 29. STATE BOARD OF PODIATRY

CONTINUING EDUCATION

§ 29.61. Requirements for biennial renewal and eligibility to conduct educational conferences.

(a) Effective with the renewal of licensure for the 2011-2012 biennium, a licensee applying for biennial renewal of a license shall have completed 50 clock hours of continuing education in approved courses and programs during the preceding biennium. At least 30 of the clock hours must be in courses and programs in podiatry that are approved by the Board or the Council on Podiatric Medical Education (CPME). The remaining clock hours must be either in courses and programs in podiatry that are approved by the Board or the CPME or in courses and programs in medical subjects that are approved by the American Medical Association or the American Osteopathic Association. A maximum of 10 clock hours may be in approved courses and programs that involve the use of the Internet or the reading of professional journals or magazine articles. Continuing education credit will not be awarded for clock hours in office management or marketing the practice. Excess clock hours may not be carried over to the next biennium. A licensee is responsible for ensuring that a particular course or program is approved for continuing education credit prior to participating in the course or program.

(b) Providers approved by the Board are eligible to conduct educational conferences.

(c) Applicants for license renewal shall provide, on the renewal application, a signed statement certifying that the continuing education requirements have been met and information to document their certification, including the following:

(1) The date attended.

(2) The clock hours claimed.

(3) The title of the course or program and description of content.

(4) The provider which sponsored the course or program.

(5) The location of the course or program.

(d) The licensee shall retain attendance certificates to document completion of the prescribed number of clock hours for 5 years following the completion of each course, which shall be produced upon demand by the Board or its auditing agents.

§ 29.63a. (Reserved).

[Pa.B. Doc. No. 10-1928. Filed for public inspection October 8, 2010, 9:00 a.m.]

STATE BOARD OF LANDSCAPE ARCHITECTS

[49 PA. CODE CH. 15]

Fees—Landscape Architect

The State Board of Landscape Architects (Board) amends § 15.12 (relating to fees). The final-form rulemaking increases the biennial license renewal fees for landscape architects from $125 to $194.

Effective Date

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The new biennial renewal fees will take effect for the biennial period beginning June 1, 2011.

Statutory Authority

Section 5(a) of the Landscape Architects' Registration Law (act) (63 P. S. § 905(a)) requires the Board to increase fees by regulation to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to match expenditures over a 2-year period.

Background and Need for Amendment

Under section 5(a) of the act, the Board is required by law to support its operations from the revenue it generates from fees, fines and civil penalties. In addition, the act provides that the Board will increase fees if the revenue raised by fees, fines and civil penalties is not sufficient to meet expenditures over a 2-year period. The Board raises virtually all of its revenue through biennial renewal fees. The biennial renewal fee has not been increased since 1983.

At the March 12, 2009, Board meeting the Department of State's Bureau of Finance and Operations (BFO) staff presented a summary of the Board's revenue and expenses for Fiscal Years (FY) 2006-2007 and 2007-2008 and projected revenue and expenses through FY 2017-2018. BFO projects that, without an increase to the biennial renewal fee, the Board will incur significant deficits. BFO recommended that the Board raise fees to meet or exceed projected expenditures, in compliance with section 5(a) of the act. As a result, the Board voted to increase the biennial renewal fee from $125 to $194. BFO anticipates that the new biennial renewal fees will enable the Board to avoid the projected deficits and meet its estimated expenditures for years to come. The Board has a stable population base of just under 1,000 landscape architects and a low adjudicatory docket.

Notice of the proposed rulemaking was published at 40 Pa.B. 623 (January 30, 2010), requesting public comments within 30 days. No public comments were received. On March 10, 2010, the House Professional Licensure Committee (HPLC) submitted a comment to the Board. The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not submit comments. On March 31, 2010, the Board received a letter from the Independent Regulatory Review Commission (IRRC) indicating that it did not have objections, comments or recommendations to offer on the proposed rulemaking.

Comment and the Board's Response

The HPLC asked for the Board's rationale for the 55% increase in the biennial renewal fee for landscape architects when there has not been change in the amount of the fee in 27 years. The Board's response is simply that until now, a fee increase was not necessary because the Board has consistently had a positive balance in its account at the end of each FY which was adequate to fund the Board's operations for the next FY, even without considering the projected revenue for the next FY. At the end of FY 2007-2008, the balance was $99,650.67; and at the end of FY 2008-2009, the balance was $99,150.67. The Board's annual budget is approximately $90,000, so an increase was not indicated in that at the end of each of the 3 years; there was enough money to operate for the next FY without a fee increase. However, at the end of FY 2009-2010, BFO is projecting a balance of only $10,150.67. Further, BFO is projecting that without a fee increase, the Board is facing a deficit of $37,850 at the end of FY 2011-2012. This amount is significant given the Board's annual budget of approximately $90,000. Thus, it is necessary to have a fee increase in effect by FY 2011-2012 to avoid a deficit situation.

The Board voted to adopt a one-time increase from $125 to $194 to be effective with the 2011 renewal because it would avoid the projected deficit and put the Board back on firm financial ground with projected positive balances in its account for the foreseeable future. Going forward, the Board estimates biennial revenue of approximately $212,000 ($189,000 in renewal years and $23,000 in nonrenewal years). This amount will be sufficient to fund the Board's biennial expenditures, which are projected to be approximately $180,000 to $200,000. These amounts are in keeping with the Board's legislative mandate that revenues received from fees, fines and civil penalties be sufficient to cover expenditures over a 2-year period.

In addition, the Board felt strongly that an increase that amounts to $34.50 per year would not be overly burdensome for landscape architects. A survey of 47 other states' renewal fees for landscape architects indicates a range from a low of $60 (Illinois, $30 annual renewal fee) to a high of $610 (Texas, $305 annual renewal fee), with an average of $220 for biennial renewal. Therefore, the Board does not believe a $194 biennial renewal fee will put landscape architects in this Commonwealth at a competitive disadvantage, while it will provide the Board sufficient revenue to fund its activities without the need for another increase for years to come.

Fiscal Impact

The final-form rulemaking will increase the biennial renewal fee for landscape architects by $69 or $34.50 per year. There are currently 989 actively licensed landscape architects that will be expected to pay the increased biennial renewal fee. The final-form rulemaking should not have other fiscal impact on the private sector, the general public or political subdivisions.

Paperwork Requirements

The final-form rulemaking requires the Board to alter some of its forms to reflect the new biennial renewals fees; however, the final-form rulemaking should not create additional paperwork for the private sector.

Sunset Date

The act requires the Board to monitor its revenue and costs on a FY and biennial basis. Therefore, a sunset date has not been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 14, 2010, the Board submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 623, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on September 15, 2010, the final-form rulemaking was approved by the HPLC and the SCP/PLC. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved effective September 15, 2010.

Contact Person

Further information may be obtained by contacting Teresa Lazo, Board Counsel, State Board of Landscape Architects, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

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 the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and no public comments were received.

(3) This final-form rulemaking is necessary and appropriate for administering and enforcing the act.

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 15, are amended by amending § 15.12 to read as set forth at 40 Pa.B. 623.

(b) The Board shall submit this order and 40 Pa.B. 623 to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Board shall certify this order and 40 Pa.B. 623 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on publication in the *Pennsylvania Bulletin*.

JAMES W. BARNES, LA,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 5655 (October 2, 2010).)

Fiscal Note: Fiscal Note 16A-619 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 10-1929. Filed for public inspection October 8, 2010, 9:00 a.m.]

Title 67—TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 71]

School Bus Drivers

The Department of Transportation (Department), under 75 Pa.C.S. § 1509 (relating to qualifications for school bus driver endorsement), amends Chapter 71 (relating to school bus drivers) to read as set forth in Annex A.

Purpose of Chapter

The purpose of Chapter 71 is to define more fully the requirements of 75 Pa.C.S. § 1509 by listing minimum medical requirements for school bus drivers, formulated by the Medical Advisory Board (Board). In addition to their use by the Department in connection with its responsibilities under 75 Pa.C.S. (relating to Vehicle Code), these licensing standards for school bus drivers are to be used by medical providers when conducting physical examinations of applicants for a school bus learner's permit, as well as annual school bus driver physical examinations.

Summary of Comments and Changes in Final-Form Rulemaking

Notice of proposed rulemaking was published at 38 Pa.B. 3503 (June 28, 2008). The proposed rulemaking was also submitted to the Independent Regulatory Review Commission (IRRC) and the House and Senate Transportation Committees.

IRRC submitted several comments on the proposed rulemaking regarding clarity and consistency of the language. The first comment noted that the Regulatory Analysis Form indicated that the proposed rulemaking should not have additional costs to school bus drivers or healthcare providers. However, IRRC noted that Lynn Foltz, a commentator, commented that the amendments would lead to additional costs, including a fee for an appointment with physician to review the results of the required tests, as well as for the Hemoglobin A1C (HbA1C) test itself. The Department notes that these amendments do not require tests that are over and above what is required for normal diabetic care. Board members have confirmed that insurance companies encourage physicians to do quarterly checks of an individual's HbA1C. In fact, physicians are audited by insurance companies to ensure compliance.

IRRC also sought clarity in § 71.3(b)(4)(i) (relating to physical examination) regarding the removal of the term "oral hypoglycemic medication" and its replacement with the term "diabetic medications." IRRC recommended that a listing of specific types of examples of diabetic medications be included in the final-form rulemaking. Diabetic medications can either be in the form of an insulin injection or an oral medication. The Department believes that a listing of specific medications could lead to confu-

sion and misinterpretation of the regulation to only allow those medications listed and leaving no room for other medications developed for the treatment of diabetes in the future.

IRRC also questioned whether drivers shall meet the requirements in § 71.3(b)(4)(i)(A)—(D) before being granted a waiver to drive a school bus. If so, IRRC recommended that clarifying language be added. The clarifying language has been added.

Regarding § 71.3(b)(4)(i)(A), IRRC asked how the Department determined that the 12 months required for being free from various types of hypoglycemia or hypoglycemic reactions to grant an individual a waiver to drive is an appropriate amount of time, and if this time frame protects the health, safety and welfare of children being driven in school buses by drivers with these types of conditions. The Department consulted closely with the physicians on the Board who advised that an individual can readily demonstrate his ability to manage diabetes within a 12-month period. Requiring an individual to demonstrate control for 2 years rather than 1 year doesn't provide an additional degree of safety.

Peter S. Lund, MD, FACS, President of the Pennsylvania Medical Society commented that requiring school bus drivers in § 71.3(b)(4)(i)(B) to have an average HbA1C of 8% is too restrictive. Doctor Lund relayed the opinion of Dr. Robert Gabbay, MD, PhD, Executive Director of the Penn State Institute for Diabetes and Obesity that impairment of cognitive ability is not demonstrated until HbA1C of 9%. A number of factors were used to determine what HbA1C demonstrates the individual is managing their diabetes. Physicians typically use 6.5% as a target; however, the Department also considered that both health insurance companies, as well as the American Diabetes Association (ADA) give a target HbA1C of 7%. Research shows that keeping blood sugar close to the target range lowers the risk for complications. An HbA1C of 8% translates to an average blood sugar reading of 205 mg/dl and demonstrates reasonable control. The Department concluded that a cut off at a point below, rather than at, the 9% level where cognitive impairment has been demonstrated is appropriate to safeguard the well being of students being transported by school bus in this Commonwealth.

Also with regard to the use of the HbA1C test, the ADA objected to the use of the test result number as a standard to measure an individual's ability to operate a vehicle safely. After consultation with the ADA, the final-form rulemaking provides that the HbA1C test will not be used as a measurement to determine a driver's level of safety for driving a school bus. Rather, the HbA1C results will instead be used as a tool to identify school bus drivers that require more frequent monitoring by their health care provider to ensure that their blood glucose levels are not suggestive of hypoglycemic or hyperglycemic driving impairment.

The ADA also commented that that the inclusion of a standard of "hyperglycemic unawareness" was inappropriate. It was pointed out that a driver who tends not to be sensitive to the triggers of onset of a hyperglycemic episode can nevertheless drive safely with more frequent testing before driving or at regular interval during long trips. The term has been deleted from the final-form rulemaking.

IRRC also asked for information regarding what the new forms will look like. Unfortunately, the Department does not have draft copies of the forms available. Once this rulemaking has been vetted and close to final-form, the Diabetic Waiver and Report of Eye Examination forms will be updated with the applicable questions. The forms will not be available on the Department's web site. They will only be mailed to school bus drivers that have diabetes mellitus and require the waiver.

IRRC also asked for clarification in § 71.3(b)(4)(v) regarding submissions to the Department and what professions are included under the term "other health care providers." The Department included a definition of "health care provider" in the final-form rulemaking. Further clarification has also been provided by use of the term "school transportation medical practitioner" instead of "school transportation physician." The former, "school transportation medical practitioner," is defined in the existing regulation to include the same array of medical professionals as has been included in the definition of "health care provider."

Finally, regarding § 71.3(b)(4)(i)(D), IRRC asked how the self-monitoring provisions of this subsection protects the driver, students and other passengers. The comment goes not to the specific amendments made in this subsection by this rulemaking, but to the effectiveness of the existing subsection generally. The safety of the students and other passengers is protected by the requirement in the subsection that, if self testing reveals an unacceptable blood glucose level, the individual "may not drive." If a driver tests outside the range prior to departure, the driver may not embark; if a driver stopped to test at a required interval during a drive tests outside the range, the driver may not resume driving until appropriate measures are taken and the individual retests within the acceptable range.

Persons and Entities Affected

This final-form rulemaking affects persons qualified or wishing to be qualified to drive a school bus, employers of school bus drivers and health care providers.

Fiscal Impact

Implementation of this final-form rulemaking will not require the expenditure of additional funds by the Commonwealth or local municipalities. This final-form rulemaking will not impose additional costs on the medical community. It should not impose additional costs on school bus drivers because the final-form rulemaking does not require tests that are over and above what is required for normal diabetic care.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 28, 2008, the Department submitted a copy of the notice of proposed rulemaking, published at 38 Pa.B 3503, to IRRC and the Chairpersons of the House and Senate Transportation 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 public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on August 18, 2010, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 19, 2010, and approved the final-form rulemaking.

Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

Sunset Provisions

The Department is not establishing a sunset date for these regulations, since these regulations are needed to administer provisions required under 75 Pa.C.S. The Department, however, will continue to closely monitor these regulations for their effectiveness.

Contact Person

The contact person for technical questions about this final-form rulemaking is R. Scott Shenk, Manager, Driver Safety Division, Bureau of Driver Licensing, 1101 South Front Street, 4th Floor, Harrisburg, PA 17104, (717) 772-2119.

Order

The Department orders that:

(a) The regulations of the Department, 67 Pa. Code Chapter 71, are amended by amending §§ 71.2 and 71.3 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Secretary of the Department shall submit this order and Annex A to the office of General Counsel and the Office of Attorney General for approval as to legality and form, as required by law.

(c) The Secretary shall certify this order and Annex A and deposit the same with the Legislative Reference Bureau, as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

ALLEN D. BIEHLER, P. E.,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 5106 (September 4, 2010).)

Fiscal Note: Fiscal Note 18-411 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart A. VEHICLE CODE PROVISIONS

ARTICLE IV. LICENSING

CHAPTER 71. SCHOOL BUS DRIVERS

§ 71.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

CRNP—Certified registered nurse practitioner—A registered nurse licensed in this Commonwealth who is certified by the State Board of Nursing in a particular clinical specialty area and who, while functioning in the expanded role as a professional nurse, performs acts of medical diagnosis or prescription of medical therapeutic or corrective measures in collaboration with and under the direction of a physician licensed to practice medicine in this Commonwealth.

Chiropractor—A practitioner of chiropractic as defined in 75 Pa.C.S. § 1508.1(b) (relating to physical examinations).

Department—The Department of Transportation of the Commonwealth.

Driver's examination—An examination to establish the ability of a person to drive, maneuver and control a school bus with safety and knowledge of the laws and regulations relating to the operation of school buses.

HbA1C test—A Hemoglobin A1C test monitors the long-term control of diabetes mellitus.

Health care provider—A licensed physician, a CRNP, a physician assistant or a licensed psychologist, as described in 75 Pa.C.S. § 1519 (relating to determination of incompetency).

Hyperglycemia—When the level of glucose (sugar) in the blood is too high based on current guidelines established by the American Diabetes Association.

Hypoglycemic reactions—Different degrees of hypoglycemia which are classified as follows:

Mild—Hypoglycemia that signals a blood glucose drop, which the individual can self-correct with oral carbohydrates.

Severe—Hypoglycemia that requires outside intervention or assistance of others or that produces confusion, loss of attention or a loss of consciousness.

Physical examination—An examination, including an eye examination, given to determine the physical and mental fitness of a person to drive a school bus safely.

Physician—A licensed physician as defined in § 83.2 (relating to definitions).

Physician assistant—A person certified by the State Board of Medicine to assist a physician or group of physicians in the provision of medical care and services and under the supervision and direction of the physician or group of physicians.

Pupil Transportation Section—The Pupil Transportation Section of the Bureau of Driver Licensing of the Department.

S endorsement—An endorsement which is added to a commercial driver's license and which authorizes the driver to operate a school bus.

School bus driver—A person who drives a school bus as defined in 75 Pa.C.S. § 102 (relating to definitions) or Chapter 171 (relating to school buses and school vehicles) except an owner or employee of an official inspection station driving the vehicle for the purpose of inspection.

School transportation medical practitioner—A licensed physician, physician assistant, certified registered nurse practitioner or chiropractor appointed or approved by a school board, or by the authorities responsible for operation of a private or parochial school. The same person may be appointed or approved as both school transportation medical practitioner and school medical practitioner.

Symptomatic hyperglycemia—High glucose levels in the blood that have caused a loss of consciousness or an altered state of perception, including, but not limited to, decreased reaction time, impaired vision or hearing, or both, or confusion.

Type I Diabetes mellitus—A chronic disease caused by the pancreas producing too little insulin to regulate blood sugar levels.

Type II Diabetes mellitus—A chronic disease marked by high levels of sugar in the blood caused by the body failing to respond correctly to natural insulin.

§ 71.3. Physical examination.

* * * * *

(b) *Requirements of physical examination.* A person is physically qualified to drive a school bus if the person:

(1) Meets the following visual requirements:

(i) Has distant visual acuity of at least 20/40 in the better eye without corrective lenses or visual acuity corrected to 20/40 or better.

(ii) Has at least 20/50 in the poorer eye without corrective lenses or visual acuity corrected to 20/50 or better.

(iii) Has distant binocular acuity of at least 20/40 in both eyes with or without corrective lenses.

(iv) Has a combined field of vision of at least 160° in the horizontal meridian, excepting the normal blind spots.

(v) Has the ability to determine the colors used in traffic signals and devices showing standard red, green, or amber.

(2) Has no loss of a foot, a leg, a hand, or an arm; or has been granted a waiver by the Department after competency has been demonstrated through a driving examination administered in accordance with § 71.4(b)(2)(ii) and (iii) (relating to driver's examination).

(3) Has no impairment of:

(i) A hand or finger likely to impair prehension or power grasping, or has been granted a waiver by the Department after competency has been demonstrated through a driving examination administered in accordance with § 71.4(b)(2)(ii) and (iii).

(ii) One of the following:

(A) An arm, foot, or leg likely to impair the ability to perform normal tasks associated with driving a school bus.

(B) Another significant limb defect or limitation likely to impair the ability to perform normal tasks associated with driving a school bus.

(C) Has been granted a waiver by the Department after competency has been demonstrated through a driving examination.

(4) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring use of insulin or other hypoglycemic medication.

(i) A waiver may be granted to an individual requiring the use of diabetic medications provided the individual meets all of the following:

(A) The individual's health care provider verifies in writing that there has been no incident of a severe hypoglycemic reaction or symptomatic hyperglycemia and the individual has been free from insulin reaction resulting in loss of consciousness, attention or awareness or the requirement of assistance from another person, for the preceding 12 months.

(B) The driver submits to a diabetic examination every 6 months, and submits the results of the examination and the results of an HbA1C test on a form provided by the Department. The healthcare provider reviewing the diabetic examination shall be familiar with the individual's past diabetic history for 24 months or have access to that history and certify that the individual is under good diabetic control.

(I) An individual who has had two consecutive HbA1C test results of greater than 8% as required in this clause shall undergo additional diabetic examinations every 3 months. The health care provider shall review the self monitoring blood glucose logs and report the highest and lowest blood glucose levels for that 3-month period and certify that the observed blood glucose levels are not suggestive of hypoglycemic or hyperglycemic driving impairment on a form provided by the Department.

(II) Once the results of two consecutive HbA1C tests required in this clause are 8% or less, the individual may discontinue the additional examinations and reporting required in subclause (I).

(C) The driver submits to an annual dilated eye examination and submits the results of the examination on a form provided by the Department.

(D) Individuals, upon hire to drive a school bus, shall manage their diabetes by complying with the following requirements:

(I) Self-monitor blood glucose 1 hour before driving, and at least every 4 hours while driving or while otherwise on duty, by using a portable blood glucose monitoring device with a computerized memory. If blood glucose is below 80 mg/dL or above 350 mg/dL the individual may not drive until appropriate measures are taken and the individual retests within this acceptable range.

(II) Submit the computerized glucometer results of blood glucose self-monitoring for review by the treating health care provider or a school transportation medical practitioner. The results shall also be submitted to the health care provider conducting the diabetic examination required by clause (B).

(III) Maintaining a manual blood glucose monitoring log and submitting it, together with the glucose monitoring device's computerized log, every 6 months to the health care provider conducting the 6-month diabetic examination.

(IV) Carrying a source of rapidly absorbable glucose at all times while driving a school bus.

(ii) Notwithstanding the provisions in subparagraph (i), a waiver may be granted to an individual who has recently suffered from a severe hypoglycemic reaction or symptomatic hyperglycemia as long as the individual has been free from severe hypoglycemic reactions or symptomatic hyperglycemia for the preceding 12 months and the subsequent severe hypoglycemic reaction or symptomatic hyperglycemia occurred while the individual was under the care of a treating health care provider, during or concurrent with a nonrecurring transient illness, toxic ingestion or metabolic imbalance. This waiver will only be granted if the treating physician submits written certification indicating it is a temporary condition or isolated incident not likely to recur.

(iii) A reviewing health care provider finding that the individual previously qualified for a waiver is not complying with the requirements in subsection (b)(4)(i), or is otherwise no longer qualified for the waiver shall promptly report these findings to the Department and the waiver will be rescinded.

(iv) If the individual requiring the use of oral hypoglycemic medication or insulin does not qualify for a waiver, that individual may request an independent review of the individual's medical records. The review will be conducted by a member of the Medical Advisory Board or by another physician designated by the Department.

(v) Submissions to the Department by physicians or other health care providers, including physician verifications and the results of diabetic examinations, shall be made on forms provided by the Department.

* * * * *

[Pa.B. Doc. No. 10-1930. Filed for public inspection October 8, 2010, 9:00 a.m.]

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 83]

Physical and Mental Criteria, Including Vision Standards Relating to the Licensing of Drivers

The Department of Transportation (Department), under 75 Pa.C.S. §§ 1517, 1518 and 6103 (relating to Medical Advisory Board; reports on mental or physical disabilities or disorders; and promulgation of rules and regulations by department), amends Chapter 83 (relating to physical and mental criteria, including vision standards relating to the licensing of drivers) to read as set forth in Annex A.

Purpose of Chapter

The purpose of Chapter 83 is to set forth physical and mental criteria, including vision standards, for the licensing of drivers, formulated by the Medical Advisory Board (Board) under 75 Pa.C.S. §§ 1517 and 1518. In addition to their use by the Department in connection with its responsibilities under 75 Pa.C.S. (relating to Vehicle Code), these physical and mental criteria are to be used by medical providers in conducting physical examinations of applicants for learner permits and driver licenses and by physicians and other persons authorized to diagnose and treat disorders and disabilities covered in Chapter 83 to determine whether a person should be reported to the Department as having a disorder affecting the ability of the person to drive safely.

Summary of Comments and Changes in Final-Form Rulemaking

Notice of proposed rulemaking was published at 38 Pa.B. 3501 (June 28, 2008). The proposed rulemaking was also submitted to the Independent Regulatory Review Commission (IRRC) and the House and Senate Transportation Committees (Committees).

IRRC submitted several comments on the proposed rulemaking regarding clarity and consistency of the language in the regulations. The first comment noted that in § 83.2 (relating to definitions), the Department missed a cross-reference to 75 Pa.C.S. § 1518. In response to the comment, the definition of "chiropractor" in the final-form rulemaking has been clarified to state that a chiropractor is "a practitioner of chiropractic as defined in 75 Pa.C.S. § 1508.1(b) (relating to physical examinations) and 75 Pa.C.S. § 1518(g) (relating to reports on mental or physical disabilities or disorders)."

IRRC also recommended that the definition include a definition of "provider" as the term is used in several places throughout Chapter 83. The Pennsylvania Society of Physicians Assistants also submitted comments seeking clarification in the regulation as to which health care provider professionals were authorized to perform examinations and issue related reports. The Department included a definition of "health care provider" consistent with 75 Pa.C.S. § 1519, which includes licensed physicians, physician's assistants and registered nurse practitioners. The final-form rulemaking also uses the newly defined term throughout § 83.5 (relating to other physical and medical standards).

With respect to § 83.5(a)(1), IRRC noted that the subsection required the submission of the results of a Hemoglobin A1C (HbA1C) test and vision screening, but that the subsection did not indicate to what end the submission was required or what standards for the test results would be applicable. With respect to subsection (a)(1)(i), IRRC commented that the table which lists the ongoing examination requirements for drivers who experience a disqualifying diabetic episode was confusing. The Department agreed that the table was confusing and difficult to interpret as was the placement of the requirement for the submission of HbA1C and vision screening results. The table has been deleted from the final-form rulemaking and the entire subsection has been rewritten. The American Diabetes Association (ADA) also commented that results of an HbA1C test should not be established as a standard for disqualification of a driver. The ongoing examination requirements for drivers who have experienced a disqualifying diabetic episode are in narrative form in the final-form rulemaking and the submission of the HbA1C and vision screening results are more clearly identified as components of the examination. The significance of those results is determined by the treating health care provider who is charged with the certification that the individual has been episode free for the requisite period of time.

The ADA also commented that the inclusion of a standard of "hyperglycemic unawareness" was inappropriate. It was pointed out that a driver who tends not to be sensitive to the triggers of onset of a hyperglycemic episode can nevertheless drive safely with more frequent testing before driving or at regular intervals during long trips. The term has been deleted in the final-form rulemaking.

An additional letter of comment was received from the Pennsylvania Chiropractic Association lauding the inclusion of chiropractors in § 83.1 (relating to purpose) and offering no objection to the proposed rulemaking.

Persons and Entities Affected

This final-form rulemaking affects persons qualified or wishing to be qualified to drive, health care providers and the Pennsylvania State Police.

Fiscal Impact

Implementation of this final-form rulemaking will not require the expenditure of additional funds by the Commonwealth or local municipalities. This final-form rulemaking will not impose additional costs on the medical community. It should not impose additional costs to drivers because these examinations are part of normal diabetic care.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 28, 2008, the Department submitted a copy of the notice of proposed rulemaking, published at 38 Pa.B. 3501, to IRRC and the Chairpersons of the 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 public comment period, as well as other documents when requested. In preparing the 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 (71 P. S. § 745.5a(j.2)), on August 18, 2010, the final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 19, 2010, and approved the final-form rulemaking.

Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

Sunset Provisions

The Department is not establishing a sunset date for these regulations, since these regulations are needed to administer provisions required under 75 Pa.C.S. The Department, however, will continue to closely monitor these regulations for their effectiveness.

Contact Person

The contact person for technical questions about this final-form rulemaking is R. Scott Shenk, Manager, Driver Safety Division, Bureau of Driver Licensing, 1101 South Front Street, 4th Floor, Harrisburg, PA 17104, (717) 772-2119.

Order

The Department orders that:

(a) The regulations of the Department, 67 Pa. Code Chapter 83, are amended by amending §§ 83.1, 83.2 and 83.5 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the office of General Counsel and the Office of Attorney General for approval as to legality and form, as required by law.

(c) The Secretary shall certify this order and Annex A and deposit the same with the Legislative Reference Bureau, as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

ALLEN D. BIEHLER, P. E.,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 5106 (September 4, 2010).)

Fiscal Note: Fiscal Note 18-410 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart A. VEHICLE CODE PROVISIONS

ARTICLE IV. LICENSING

CHAPTER 83. PHYSICAL AND MENTAL CRITERIA, INCLUDING VISION STANDARDS RELATING TO THE LICENSING OF DRIVERS

§ 83.1. Purpose.

Section 1517(b) of the act (relating to medical advisory board) authorizes the Department to adopt physical and mental criteria, including vision standards, for licensing of drivers under Chapter 15 of the act (relating to licensing of drivers). These physical and mental criteria have been formulated by the Medical Advisory Board under the authority of sections 1517 and 1518 of the act (relating to medical advisory board and reports on mental or physical disabilities or disorders). In addition to their use by the Department in connection with its responsibilities under Chapter 15 of the act, these physical and mental criteria shall be used by physicians, chiropractors, CRNPs and physician assistants in conducting physical examinations of applicants for learner's permits and driver's licenses and by physicians and other persons authorized to diagnose and treat disorders and disabilities covered in this chapter in determining whether a person examined by the provider should be reported to the Department as having a disorder affecting the ability of the person to drive safely.

§ 83.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—75 Pa.C.S. § 101—9910 (relating to Vehicle Code).

Aura—An epileptic episode, sometimes experienced before or in lieu of a seizure, which does not alter an individual's ability to think clearly or interfere with an individual's mechanical or sensory ability to operate a motor vehicle.

CRNP—Certified registered nurse practitioner—A registered nurse licensed in this Commonwealth who is certified by the State Board of Nursing in a particular clinical specialty area and who, while functioning in the expanded role as a professional nurse, performs acts of medical diagnosis or prescription of medical therapeutic or corrective measures in collaboration with and under the direction of a physician licensed to practice medicine in this Commonwealth.

Chiropractor—A practitioner of chiropractic as defined in 75 Pa.C.S. § 1508.1(b) (relating to physical examinations) and 75 Pa.C.S. § 1518(g) (relating to reports on mental or physical disabilities or disorders).

Daylight—Hours between sunrise and sunset.

Department—The Department of Transportation of the Commonwealth.

HbA1C test—A Hemoglobin A1C test monitors the long-term control of diabetes mellitus.

Health care provider—A licensed physician, a CRNP, a physician assistant or a licensed psychologist, as described in 75 Pa.C.S. § 1519 (relating to determination of incompetency).

Hyperglycemia—When the level of glucose (sugar) in the blood is too high based on current guidelines established by the American Diabetes Association.

Hypoglycemia—When the level of glucose (sugar) in the blood is too low based on current guidelines established by the American Diabetes Association.

Hypoglycemic reactions—Different degrees of hypoglycemia which are classified as follows:

(i) *Mild*. Hypoglycemia that signals a blood glucose drop, which the individual can self correct with oral carbohydrates.

(ii) *Severe*. Hypoglycemia that requires outside intervention or assistance of others or that produces confusion, loss of attention or a loss of consciousness.

Licensed optometrist—A doctor of optometry licensed by the State Board of Optometry.

Licensed physician—A doctor of medicine licensed by the State Board of Medicine or a doctor of osteopathy licensed by the State Board of Osteopathic Medical Examiners.

Nocturnal—As used in relation to seizures, the term means occurring during sleep.

Seizure—A paroxysmal disruption of cerebral function characterized by altered consciousness, altered motor activity or behavior identified by a licensed physician as inappropriate for the individual.

Seizure disorder—Condition in which an individual has experienced a single seizure of electrically diagnosed epilepsy, or has experienced more than one seizure not including seizures resulting from an acute illness, intoxication, metabolic disorder, or trauma.

Symptomatic hyperglycemia—High glucose levels in the blood that have caused a loss of consciousness or an altered state of perception, including, but not limited to, decreased reaction time, impaired vision or hearing, or both, and confusion.

Telescopic lens—A telescopic low vision device.

Type I Diabetes mellitus—A chronic disease caused by the pancreas producing too little insulin to regulate blood sugar levels.

Type II Diabetes mellitus—A chronic disease marked by high levels of sugar in the blood caused by the body failing to respond correctly to natural insulin.

§ 83.5. Other physical and medical standards.

(a) *General disqualifications.* A person who has any of the following conditions will not be qualified to drive:

(1) Unstable diabetes mellitus leading to severe hypoglycemic reactions or symptomatic hyperglycemia unless there has been a continuous period of at least 6 months free from a disqualification in this paragraph. Once the diabetic condition has stabilized, and as long as the individual has not had another disqualifying episode within the last 6 months, the driving privilege may be restored. The individual shall submit to a diabetic examination, which includes an HbA1C test as well as a vision screening, and the treating health care provider shall certify on a completed form provided by the Department that the individual has been free from a disqualifying episode. Thereafter, the individual shall submit to a diabetic examination, which includes an HbA1C test as well as a vision screening, in accordance with the following schedule:

(i) Six months after the diabetic examination required in this paragraph, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(ii) Twelve months after the previous diabetic examination, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(iii) Twenty-four months after the previous diabetic examination, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(iv) Forty-eight months after the previous diabetic examination, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(v) Diabetic examination may be required more frequently if recommended by the treating health care provider.

(vi) Providing the condition of the individual remains under good control, the individual will not be required to submit to additional diabetic examinations.

(2) A waiver may be granted if an individual has been previously free from severe hypoglycemic reactions or symptomatic hyperglycemia for the preceding 6 months and the subsequent severe hypoglycemic reaction or symptomatic hyperglycemia occurred while the individual was under the treating health care provider's care, during or concurrent with a nonrecurring transient illness, toxic ingestion or metabolic imbalance. This waiver will only be granted if the treating health care provider submits written certification indicating it is a temporary condition or isolated incident not likely to recur.

(3) Cerebral vascular insufficiency or cardiovascular disease which, within the preceding 6 months, has resulted in one or more of the following:

(i) Syncopal attack or loss of consciousness.

(ii) Vertigo, paralysis or loss of qualifying visual fields.

(4) Periodic episodes of loss of consciousness which are of unknown etiology or not otherwise categorized, unless the person has been free from episode for the year immediately preceding.

* * * * *

[Pa.B. Doc. No. 10-1931. Filed for public inspection October 8, 2010, 9:00 a.m.]