

# PROPOSED RULEMAKING

## ENVIRONMENTAL QUALITY BOARD

[ 25 PA. CODE CHS. 92 and 92a ]

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

The Environmental Quality Board (Board) proposes to rescind 25 Pa. Code Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) and replace it with a new Chapter 92a of the same name. This chapter describes the process that the Department of Environmental Protection (Department) uses to issue National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of treated wastewater and stormwater, to meet 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). The primary goal of the proposed rulemaking is to reorganize the existing Chapter 92 so that it will be consistent with the organization of the companion Federal regulations as set forth in 40 CFR Part 122 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System). This general reorganization is extensive, and it requires that Chapter 92 be replaced with a new chapter, Chapter 92a, to avoid confusion. A new NPDES permit fee structure designed to cover the Commonwealth's share of the cost of running the NPDES program is being proposed. Several new provisions to incorporate recent new requirements in the Federal program are also proposed. Certain treatment requirements are proposed to be added or reorganized to standardize the Department's approach to discharges of treated sewage and industrial wastewater.

This proposal was adopted by the Board at its meeting of November 17, 2009.

#### A. Effective Date

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

#### 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 (e-mail: [wcumings@state.pa.us](mailto:wcumings@state.pa.us)). Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling (800)-654-5984 (TDD users) or (800)-654-5988 (voice users). This proposal is available electronically through the DEP Web site at [www.depweb.state.pa.us](http://www.depweb.state.pa.us).

#### C. Statutory Authority

The proposed rulemaking is being made 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 provides 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 to implement the provisions of The Clean Streams Law.

#### D. Background and Purpose

This proposed rulemaking rescinds Chapter 92 and creates a new Chapter 92a of the same name. The NPDES is the primary means by which pollution from point sources is controlled to protect the water quality of this Commonwealth's rivers and streams, to achieve the requirements of the Federal Clean Water Act and The Clean Streams Law.

The primary goal of the proposed rulemaking is to reorganize the existing NPDES regulations outlined in Chapter 92 so that the organization of the regulations is consistent with the organization of the companion Federal regulations in 40 CFR Part 122. By aligning the State and Federal regulations, it becomes clear where the regulations are identical and where they differ. This will help both Department staff and the regulated community understand the requirements of the program, and where additional or more stringent provisions apply in this Commonwealth. Every effort has been made to revert to the baseline Federal requirements except where additional or more stringent requirements in Chapter 92 were clear, well understood, and have an appropriate basis in The Clean Streams Law or other appropriate basis.

The proposed rulemaking includes a new NPDES permit fee structure that is designed to cover the cost to the Commonwealth for the administration of the NPDES program. The existing \$500 application fee, payable every 5 years would be replaced by a sliding scale of application fees and annual fees based primarily on the size of the point source discharge. The proposed fee structure is projected to produce \$5 million annually, which is the Commonwealth's share of the total estimated annual cost of running the program, compared to the \$0.75 million that is collected per year under the existing fee structure. Also, certain treatment requirements have been added or reorganized to standardize the Department's approach to discharges of treated sewage and industrial wastewater.

The proposed rulemaking also includes new provisions designed to keep the program current with changes at the Federal level. Some of these provisions are needed to ensure continued Federal approval of Pennsylvania's program by the Environmental Protection Agency (EPA). Approval of the final regulation by the EPA is required. These new provisions include requirements related to:

- Stormwater Phase II Final Rule requirements (MS4s and small construction activities)
- Cooling water intake structures—316(b)
- NPDES provisions for applications of pesticides

These new provisions generally are designed to achieve the Federal requirements without any more stringent requirements.

At the July and October 2008 meetings of the WRAC (Water Resources Advisory Committee), the proposal was reviewed, and comments received were resolved. At the October 2008 meeting, the WRAC recommended the proposal for advancement to the Board. At the meeting of the Agricultural Advisory Board on June 17, 2009, the provisions related to Concentrated Animal Feeding Operations (CAFOs), and Concentrated Aquatic Animal Production (CAAP) facilities were considered. Several con-

cerns related to fees for CAFOs were raised, and the fee structure was adjusted in response to these comments.

#### *E. Summary of Regulatory Requirements*

Proposed Chapter 92a is organized by subchapters that generally mirror the organization of 40 CFR Part 122 by subparts, and describe each functional step in the permitting process:

##### *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, Termination, Reissuance of Permits.*

##### *F. Public Participation.*

##### *G. Permit Coordination with the Administrator.*

##### *H. Civil Penalties for Violations of NPDES Permits.*

The following is a summary of the substantive proposed revisions to the content of the regulations, other than those that are wholly new Federal regulations incorporated by reference.

#### *Detailed Description of Proposed Revisions to Chapter 92 Transferred to the Chapter and New Additions*

##### *§ 92a.2. Definitions.*

This section contains a number of new definitions which do not appear in existing Chapter 92. Among the newly defined terms are: "aquaculture project," "authority," "BOD<sub>5</sub>—Biochemical oxygen demand, 5-day," "BTA—Best technology available," "CBOD<sub>5</sub>—Carbonaceous biochemical oxygen demand, 5-day," "DMR—Discharge Monitoring Report," "disturbed area," "EHB—Environmental Hearing Board," "EPA," "earth disturbance activity," "entrainment," "expanding facility or activity," "GPD - Gallons per day," "immediate," "impingement," "major amendment," "major facility," "mining activity," "minor amendment," "minor facility," "monthly average discharge limitation," "municipality," "no exposure," "nonpoint source," "permit-by-rule," "privately owned treatment works," "significant biological treatment," "small flow treatment facility," "TMDL—Total Maximum Daily Load," "TSS—Total Suspended Solids," "treatment works" and "weekly average discharge limitation."

A number of definitions in existing § 92.2 will not be transferred. Among the terms proposed not being transferred are: "industrial user," "log sorting and log storage facilities," "minor discharge," "NPDES primary industry categories," "NPDES reporting form," "primary industrial facility," "rock crushing and gravel washing facilities" and "silvicultural point source." Some of the definitions not being transferred are defined in 40 CFR 122.2 (relating to definitions) which would be incorporated by reference under proposed § 92a.3(b)(1).

A small number of definitions from § 92.2 which will be retained in § 92a.2 are revised. These include "BMP—Best management practices," "discharge," "POTWs" and "pollution prevention."

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

Existing § 92.2 contains a listing of all Federal regulations relating to the administration of the NPDES program which have been incorporated by reference. This

proposal places the incorporated regulations in the sections of Chapter 92a which correspond to the applicable Federal provision.

For example, the Federal provisions of 40 CFR 122.4 (relating to prohibitions applicable to State NPDES programs, see 123.25) are incorporated by reference in § 92a.5 which also relates to prohibitions. The remaining regulations incorporated into existing § 92.2 will be retained in § 92a.3(a).

##### *§ 92a.4. Exclusions.*

Existing § 92.4 outlines the exclusions from permit requirements. Some of those exclusions have no counterpart in the applicable Federal regulation, 40 CFR 122.3(a)—(g) (relating to exclusions), which would be incorporated by reference. The existing Federal exclusion relating to the application of pesticides, 40 CFR 122.3(h) would not be incorporated by reference. Pesticide application requirements would be covered by a permit-by-rule being proposed in § 92a.25. Current exclusions in § 92.4(a)(4) regarding oil and gas activities and conditions relating to indirect discharges in § 92.4(a)(6) will be deleted from the exclusion provisions since they are not included in the Federal exclusion regulation.

##### *§ 92a.5. Prohibitions.*

Existing § 92.73 outlines situations where an NPDES permit may not be issued. All but one of the prohibitions are identical to or closely parallel the Federal prohibitions set forth in 40 CFR 122.4. The prohibition which has no Federal counterpart relates to sanitary sewer overflows, § 92.73(8). This provision provides that no permit may be issued for a sanitary sewer overflow, except as provided for in the Federal regulations. This provision has been transferred to § 92a.5(b), except that the qualifier providing for exceptions as provided for in Federal regulations has been deleted.

##### *§ 92a.10. Pollution prevention.*

Existing § 92.2b establishes a hierarchy for measures for the environmental management of wastes, in descending order of preference. That hierarchy consists of reuse, recycling, treatment and disposal. This proposal changes this hierarchy by encouraging the consideration of two new measures, process change and materials substitution prior to the consideration of those listed herein.

##### *§ 92a.11. Other chapters applicable.*

Existing § 92.17 provides that whenever the application of certain enumerated chapters produces a more stringent effluent limitation than would be produced by application of Federal requirements, the more stringent limitation would apply. This proposal amends this section by adding Chapters 16, 77 and 87—89 which relate to mining activities to the list of chapters to which this section would apply.

##### *§ 92a.12. Treatment requirements.*

Provisions of existing § 92.2a and § 92.8a are transferred to this section. The treatment requirements set forth in existing § 92.2a remain largely unchanged except that new Chapters, 16, 77, 87—90 and 102 are being added to the list of chapters to which treatment requirements are applicable. Thus, permittees would be subject to the more stringent of the treatment requirements applicable to activities covered by those chapters, particularly mining activities and erosion and sediment control activities.

Provisions relating to changes in treatment requirements set forth in existing § 92.8a are transferred to

subsections (d)—(f). In subsection (d), the language of existing § 92.8a(a) has been revised by adding a number of chapters to the list of chapters to which revisions may be made which would trigger a notice from the Department to a permittee to respond to those changes. The revision also makes it clearer that it applies to plans or determinations approved by the Department as opposed to whenever the Department adopts a plan or makes a determination which would change or impose additional water quality criteria or treatment requirements.

Existing § 92.8a(c) provides, in part, that whenever a point of projected withdrawal for a new potable water supply not previously considered is identified by “an update to the State Water plan or a river basin commission plan, or by the application for a water allocation permit from the Department,” the Department will notify a discharger of total dissolved solids, nitrite-nitrate nitrogen and fluoride of more stringent effluent limitation needed to protect the point of withdrawal. The quoted language is deleted and replaced with simply “the Department.”

§ 92a.24. *Permit-by-rule for SRSTPs.*

The Department requires that SRSTPs (Single-Residence Sewage Treatment Plants) be designed and constructed consistent with robust technology-based requirements, and these systems inherently have little potential to malfunction or cause environmental harm. The permit-by-rule provision is designed to maximize the effectiveness of the Department’s resources while at the same time minimizing the paperwork burden on permittees without reducing the design, operation, inspection, sampling or reporting requirements for SRSTPs. (Certain effluent quality and sampling and reporting requirements will be moved from the NPDES general permit to a new water quality management general permit for SRSTPs.) The Department does not encourage the installation of SRSTPs, but in some cases they may be the only environmentally-sound option. SRSTPs are expensive, and the permit-by-rule provision is unlikely to result in increased use of these systems. The provision also reduces the time and effort required of the homeowners who own and maintain these systems. The proposed provisions allow the Department to require coverage under a general or individual permit if a noncompliant discharge requires more rigorous controls.

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

Applications of pesticides on or near surface waters had previously been considered by the EPA as an activity that does not require coverage under an NPDES permit, as provided in 40 CFR 122.3(h). However, based on recent legal developments, the Federal exclusion may no longer be applicable. The United States Court of Appeals for the Sixth Circuit issued a ruling last year vacating the EPA rule exempting pesticide application from NPDES permitting requirements. *National Cotton Council et al. v. EPA* (C.A. 6, No. 06-4630)(Jan. 7, 2009). The EPA has requested the Court to grant it a 2-year stay. The requested stay was granted on June 8, 2009. In the meantime, an industry group has petitioned the court for an *en banc* rehearing of the case. That petition was denied. The industry group then filed a petition for review with the United States Supreme Court. The Supreme Court has yet to determine whether it will accept the petition. In view of the fact that a final rule would become effective near the expiration of the stay, the Board is proposing to provide for such coverage in the Commonwealth’s program. The Board is especially interested in public comment on this issue.

Application of pesticides has the potential to have adverse effects on water quality, and the source could reasonably be described as a point source, so coverage under an NPDES permit is appropriate from that standpoint. The potential adverse, unintended effects of pesticides have long been recognized, and the use and application of pesticides are controlled under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C.A. §§ 136—136y). FIFRA requires registration of pesticides, and regulates all aspects of the proper use of restricted-use pesticides. An important goal of FIFRA is to minimize potential impacts on the environment during application. A label instructing the final user on the proper usage of the pesticide is attached to the final product, and if the instructions are not followed, users are liable for any negative consequences.

The Board believes that the application of pesticides has little potential for adverse environmental effects, provided that the pesticides are properly registered, controlled, and applied by trained and certified applicators as per the requirements of FIFRA. Under these conditions, and considering the expected sources as well as the fate and transport profiles of restricted-use pesticides, there should be minimal overlapping or cumulative effects from multiple sources. The Board proposes to authorize the Department to regulate the application of pesticides under a permit-by-rule, as long as the requirements of FIFRA are achieved in full. The proposed provisions would allow the Department to require coverage under a general or individual permit if a noncompliant applicator requires more rigorous controls for any reason.

§ 92a.26 *New or increased discharges, or change of waste streams.*

The appropriate action of a permittee whose wastewater or process change will result in a change in the pollution profile of the treated effluent is clarified. Increases in discharges of permitted pollutants that have no potential to exceed effluent limitations may be initiated without prior approval of the Department, but must be reported within 60 days. Any change in the pollution profile of the effluent that may exceed effluent limitations, or require new effluent limitations, requires prior notification of the Department. The Department determines whether to require a new application from the permittee, depending on the nature of the process change. Under the existing regulation, a new application is required automatically under some conditions. The revised language in proposed subsection (a) allows more flexibility, and limits the burden on both the permittee and the Department by requiring a new application only for the reasons specified in this section.

Proposed subsection (b) requires that a permittee with coverage under a stormwater permit associated with construction activities will notify the Department before excavating or otherwise disturbing land areas that were not identified in the permit application. The Department determines whether to require a new application from the permittee, depending on whether the new earth disturbance is substantial enough to require new or amended permit conditions.

§§ 92a.28 and 92a.62. *Application fees and annual fees.*

The existing \$500 application fee for individual NPDES permits which is payable once every 5 years at the time an application for a new or reissued permit is submitted is proposed to be replaced by a sliding scale of both application and annual fees based primarily on the size of the point source discharge (see Table 1 and Table 2). The

maximum allowable application fee for the 5-year term of a general permit is proposed to be raised from \$500 to \$2,500. Any increase in the fee for a general permit, however, would require a revision to the general permit, and would be subject to public notice and comment separate from this rulemaking.

The Commonwealth has long subsidized the costs of administering the NPDES program and the associated regulation of point source discharges of treated wastewater, but this is no longer financially feasible or environmentally appropriate. The proposed fee structure will cover only the Commonwealth's share of the cost of administering the NPDES permit program (about 40% of the total cost, with the other 60% covered by Federal grant). The proposed fees are still only a minor cost element compared to the cost of operating a sewage or industrial wastewater treatment facility. The artificially low fees that have been charged have been increasingly at odds with the Department's emphasis on Pollution Prevention and nondischarge alternatives. The proposed fee structure will better align the revenue stream with the true cost of point source discharges to surface waters, from both management and environmental standpoints. The sliding-scale fee structure assures that smaller facil-

ities, which may be more financially constrained and also have a lower potential environmental impact, are assessed the lowest fees. The Department's proposal to provide for a permit-by-rule for discharges from SRSTPs, and the application of pesticides under §§ 92a.24 and 92a.25 relieves some permittees of any fee.

The proposed fee structure generally requires application fees for new permits that are twice the fees for reissuance applications and for annual fees, reflecting the greater initial cost of processing a new permit. The annual fees are designed to cover the lesser ongoing costs associated with maintaining the permit coverage, including the cost of compliance inspections, sampling and reports. Setting application fees higher also better compensates the Department for processing applications for new permits that are submitted on a contingency basis, and that may or may not result in a facility being built. Integrating annual fees into the process spreads the cost of the permit over the 5-year permit cycle, and avoids penalizing facilities that may suspend or terminate permit coverage during the cycle. Setting the permit reissuance fee the same as the annual fee means that permittees generally can count on a uniform fee every year when producing the annual budget.

Table 1. Summary of NPDES Application Fees

Applications fees for individual NPDES permits for 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

Applications fees for individual NPDES permits for 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
Stormwater .....	\$2,000 for new; \$1,000 for reissuance

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
Mining activity .....	\$1,000 for new; \$500 for reissuance

Table 2. Summary of NPDES Annual Fees

Annual fees for individual NPDES permits for discharges of domestic 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
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
Stormwater .....	\$1,000
Annual fees for individual NPDES permits for other facilities or activities are:	
CAFO.....	\$0
CAAP.....	\$0
MS4 .....	\$500
Mining activity .....	\$0

**NOTES:**

- AEU Animal Equivalent Unit
- CAAP Concentrated Aquatic Animal Production
- CAFO Concentrated Animal Feeding Operation.
- CSO Combined Sewer Overflow
- GPD Gallons per Day
- MGD Million Gallons per Day
- MS4 Municipal Separate Storm Sewer System
- SRSTP Single-residence Sewage Treatment plant

The proposed rulemaking provides for a general review of the permit fee structure every 3 years, to assure that the fees continue to cover the cost of maintaining the program.

*§ 92a.34. Stormwater discharges.*

Under subsection (b), stormwater discharges associated with industrial facilities may qualify for a conditional exclusion from the need for permit coverage under some conditions, including that the discharge of stormwater associated with industrial activities is composed entirely of stormwater uncontaminated by industrial pollutants. This conditional exclusion is not new, and is provided for under Federal regulations at 40 CFR 122.26(g) (relating to stormwater discharges applicable to State NPDES programs, see 123.25). However, under the proposal the Board clarifies that a stormwater discharge to a surface water classified as High Quality Water or Exceptional Value Water under Chapter 93 is not eligible for the conditional exclusion. This clarification is appropriate to assure that any discharges to High Quality Waters or Exceptional Value Waters are nondegrading as per the requirements of Chapter 93.

*§ 92a.36. Cooling water intake structures.*

Section 316(b) of the Clean Water Act (33 U.S.C.A. § 1326) sets design criteria for cooling water intake structures. The implementation requirements of section 316(b) are still being developed at the Federal level. The Board believes that under the section 316(b) process, the permittee is obligated to have the 316(b)-mandated Best Technology Available (BTA) for any cooling water intake structure, and the Department is required to perform a BTA determination in all cases where the permittee has a cooling water intake structure. The Board, therefore, regards the proposed provisions in § 92a.36 as the minimum requirements of section 316(b) at this point, and it is consistent with what at least one other state has incorporated into its regulations. Section 92a.36 is subject

to revision pending developments at the Federal level as the proposed rulemaking progresses. The Board is particularly interested in receiving comment on this issue.

*§ 92a.38. Department action on permit applications.*

The Board proposes to list the conditions that would prevent the Department from issuing an NPDES permit to an applicant. These conditions generally are not new or more stringent than provided for in the existing Chapter 92—they are simply organized in one section. However, the Department would now consider Local and County Comprehensive Plans and zoning ordinances when reviewing permit applications, which is not specifically provided for in the existing Chapter 92. This proposed provision is designed to better assure an integrated approach to water resources management. No new specific requirement applies to applicants, but applicants should be motivated to consider how their proposed discharge fits with all applicable plans and ordinances before submitting an application to the Department.

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

This section generally incorporates all permit conditions applicable to NPDES permits as set forth in 40 CFR 122.41(a)—(m) (relating to conditions applicable to all permits applicable to State programs, see 123.25), which were incorporated into existing § 92.2(b). This section would replace existing § 92.51 (relating to standard conditions in all permits) except as noted.

Existing § 92.51(6) provides “that the discharger may not discharge floating materials, oil, grease, scum, foam, sheen and substances which produce color, taste, turbidity, or settle to form deposits in concentrations or amounts sufficient to be, or creating a danger of being, inimical to the water uses to be protected or to human, animal, plant, or aquatic life.” This language paraphrases the requirements of the general water quality criteria in § 93.6 (relating to general water quality criteria). The

qualifier that refers to "amounts sufficient to be . . . inimical to the water uses . . ." is thought to be too cryptic and nebulous to be useful, with the result that even substantial visual or odiferous indicators of problems with effluent quality may be overlooked during an inspection. An unqualified prohibition on most of these listed conditions is appropriate, but minor, transient foaming in effluent is not necessarily an indication of problems with the treatment process. The revised provision prohibits all of these conditions except for foam. "Floating materials" refers to floating solid materials, and foaming would still be considered an unacceptable condition if the foaming is visually objectionable, or persists for any distance away from the immediate vicinity of the discharge. The language of § 92.51(6) is proposed to be clarified in subsection (c).

*Section 92a.47. Sewage permit.*

Subsection (a) outlines a process requiring that sewage, except that discharged from a CSO, be given a minimum of secondary treatment. By streamlining the technology-based secondary treatment standard (STS) for discharges of treated sewage, and inserting the STS into Chapter 92a, permitting requirements for these facilities would be clarified and standardized. Both 40 CFR Part 133 (relating to secondary treatment regulations) and this proposed subsection define the STS as treatment that will achieve a 30-day average discharge concentration of 25 mg/L Carbonaceous Biochemical Oxygen Demand, 5-day (CBOD<sub>5</sub>) and 30 mg/L Total Suspended Solids (TSS), so the basic requirements of the STS would be unchanged and consistent between the Federal and State requirements. Certain exemptions and adjustments provided for in 40 CFR Part 133 would no longer be applicable, because these exemptions and adjustments are outdated and have been misinterpreted in some cases. The STS is 40 years old, and represents a bare bones standard of treatment for sewage treatment facilities. Any competent sewage treatment operation can readily achieve the STS. Under the proposed rulemaking, all discharges of treated sewage would be required to meet the STS.

Two other recurring issues are resolved with the proposed STS:

1. Permit conditions that assure effective disinfection of treated sewage, and implement the water quality criteria for fecal coliform bacteria in Chapter 93 (relating to water quality standards), are standardized.

2. Only facilities that are defined as Publicly-owned Treatment Works (POTWs) are required to meet the 85% pollutant removal efficiency for CBOD<sub>5</sub> and TSS. Certain industrial facilities have very weak influent and, in these cases, removal efficiency is not a valid measure of treatment effectiveness.

The proposed STS requires:

1. Monthly average discharge limitation for CBOD<sub>5</sub> may not exceed 25 mg/L and TSS may not exceed 30 mg/L.

2. Weekly average discharge limitation for CBOD<sub>5</sub> may not exceed 40 mg/L and TSS may not exceed 45 mg/L.

3. On a concentration basis, the monthly average percent removal of CBOD<sub>5</sub> 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 2000/100 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.

7. pH: 6 to 9 standard units.

8. Total residual chlorine: 0.5 mg/L.

Subsections (b) and (c) outline a new technology-based tertiary treatment standard (TTS) for discharges of treated sewage. The TTS would apply to all new or expanding discharges of treated sewage to impaired waters where the impairment has been attributed to discharges of treated sewage, or to surface water designated as a High Quality or an Exceptional Value (antidegradation) water. Existing facilities would not be affected until such time as the permittee proposes to expand the facility. The requirement to implement the TTS would be triggered by a proposed expansion of an existing facility that would result either in an increased hydraulic capacity of the facility, or an increase in loading of any pollutant of concern to the affected surface water, or both.

In all cases for point sources, the more stringent of the applicable technology-based effluent limit and the water quality-based effluent limit (WQBEL) is applied. For discharges to impaired or antidegradation waters, the WQBEL is expected to be the governing factor in determining the appropriate effluent limits. However, technology-based requirements should be developed and applied independent of water quality-based requirements. The TTS is a more stringent treatment standard than the secondary treatment standard, and a more stringent technology-based treatment standard is appropriate in water quality-limited surface water segments for several reasons:

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

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

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

In addition to all the requirements of the STS, the proposed TTS provides that:

1. Monthly average CBOD<sub>5</sub> and TSS may not exceed 10 mg/L.

2. Monthly average total nitrogen may not exceed 8 mg/L.

3. Monthly average ammonia nitrogen may not exceed 3 mg/L.
4. Monthly average total phosphorus may not exceed 1 mg/L.
5. Dissolved oxygen must be 6 mg/L or greater at all times.
6. Seasonal modifiers may not be applied for tertiary treatment.

These effluent treatment requirements are sufficiently stringent to require advanced treatment as compared to secondary treatment for sewage, but are not state-of-the-art. In impaired or antidegradation waters, treatment at least this stringent will be required.

§ 92a.48. *Industrial waste permit.*

This section outlines requirements for industrial waste permits. Much of existing § 92.2d (relating to technology-based standards) would be transferred to this section. A new proposed provision would require that industrial discharges of conventional pollutants be assigned technology-based limits of no greater than 50 mg/L CBOD<sub>5</sub> and 60 mg/L TSS. This provision is intended to address situations where the application of certain outdated technology-based requirements for industrial sources may result in inappropriately permissive technology-based effluent limits. For industrial sources, the Federal Effluent Limitation Guideline (ELG) often is the applicable technology-based requirement. In some cases, the Federal ELG is based on units of mass pollutant loading per unit of production, such that a production operation might be assigned a permissible number of pounds of CBOD<sub>5</sub> that may be discharged per unit of production. When converted into concentration units, the effluent limits may be inappropriately permissive (over 100 mg/L CBOD<sub>5</sub>). Consequently, proposed subsection (a)(4) would require that all discharges of conventional pollutants from industrial discharges achieve 50 mg/L CBOD<sub>5</sub> and 60 mg/L TSS. Since the great majority of industrial sources of conventional pollutants already meet these treatment requirements, this requirement will affect few industrial facilities. The Board is especially interested in public comment on this issue, and expects to address any concerns from individual facilities in the public notice process.

§ 92a.50. *CAAP.*

Concentrated aquatic animal production (CAAP) facilities are fish hatcheries or fish farms. The discharge from CAAPs normally is of a high quality with low pollutant concentrations, but the high discharge flows can offset the low concentrations, and still result in high pollutant loadings to the receiving stream. Also, CAAPs may be located on streams designated as High Quality Water in Chapter 93, which sets a higher standard for water quality. Based on experience, the Department has determined that it is less effective to regulate CAAP discharge flows with strict, concentration-based limits for conventional pollutants (CBOD<sub>5</sub> and TSS). Concentration-based limits are assigned for all pollutants of concern, but a Pollution Prevention-based approach is most effective in controlling the primary source of the pollutants in the discharge. The proposed rulemaking requires that all CAAPs develop a Best Management Practice (BMP) plan with the primary goal of minimizing excess fish feed in the system. This has proven to be the best way to mitigate the environmental impact of these facilities, and has other benefits to the facility in terms of reductions in

feed, maintenance, and treatment costs. BMP plans have become established as good practice within the CAAP industry in recent years.

CAAPs may use therapeutic drugs such as antibiotics and fungicides to control disease in the fish population. The proposed rulemaking requires that CAAPs report the use of these drugs at established intervals, and places strong restrictions on the use of therapeutic drugs that may be carcinogenic. The use of these therapeutic drugs generally is 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.

§ 92a.53. *Documentation of permit conditions.*

This section outlines the minimum content requirements for fact sheets prepared for NPDES permits. A fact sheet is a synopsis of the basis for the issuance of an NPDES permit. It provides information about the facility and the receiving water, describes any technology-based treatment requirements that were applied, and describes how the permit conditions will assure that water quality standards will be achieved in the receiving water. The proposed rulemaking explicitly describes the minimum required content of fact sheets, and makes it clear that these fact sheets are available to the public and other interested agencies upon request.

The existing regulation in § 92.61(c) (relating to public notice of permit application and public hearing) describes a fact sheet that the Department will produce and forward on request. This provision was limited to discharges of 500,000 gallons per day or greater and does not include all of the information that a fact sheet produced under applicable Federal requirements must include. It is not clear that this provision is intended to fulfill the requirements of a fact sheet produced under applicable Federal requirements. To eliminate this confusion and consistent with the overall goal of the reorganized regulation, the proposed rulemaking requires that the Department produce a fact sheet for all discharges. The required contents of the fact sheet more closely tracks the Federal requirements, and is produced in support of the draft permit, the final permit, or both.

§ 92a.75. *Reissuance of expiring permits.*

The existing provisions in § 92.13 (relating to reissuance or renewal of permits) do not provide adequate guidance regarding administrative extensions of existing permits. The proposed rulemaking limits administrative extensions of existing permits to minor facilities with good compliance histories, and for a period not to exceed 5 years.

§§ 92a.82 and 92a.87. *Public notice of permit applications and draft permits; and notice of reissuance of permits.*

The requirements for public notice and applications outlined in existing § 92.61 and § 92.67 are being reorganized to describe clearly the information that must be included in public notice postings for applications and draft permits. In the existing regulation, the public notice requirements for applications and draft permits are intermingled and less clearly described. As a result of the proposed amendments, it is now clear that there will be a 30-day period following public notice of draft permits during which persons may submit written comments before the Department makes final determinations. The optional 15-day extension period that is provided for in the existing regulation is retained.

§§ 92a.82(c), 92a.83 and 92a.84(b). *Public notice of permit applications and draft permits; public notice of public hearing; and public notice of general permits.*

The proposed rulemaking more clearly defines the public hearing process. Public hearings can be requested by any interested persons during the public comment period for any draft individual permit or proposed general permit. A hearing will be held if there is significant public interest in a draft or proposed permit and public notice of the hearing will be published at least 30 days in advance.

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

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

##### *Compliance Costs*

No new requirements are proposed in this proposed 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 cost of securing and maintaining an NPDES permit to discharge to surface waters is small compared to the cost of operating these facilities.

The proposed rulemaking addresses wastewater treatment facilities, including industrial wastewater treatment

facilities, POTWs, and other facilities that treat sanitary wastewater. The treatment requirements of the NPDES regulation affect operational costs to some extent, but the proposed rulemaking does not include any new broad-based treatment requirements that would apply to most facilities. The compliance costs of the proposed rulemaking for most facilities is limited to the revised application and annual fees. Current annual income from NPDES application fees is estimated at \$750,000, with no annual fees, versus a cost of running the program estimated at \$5 million. The new proposed 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. (A summary of the proposed application and annual fee structure is listed in Tables 1 and 2, as presented within this preamble.)

##### *Compliance Assistance Plan*

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

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

##### *Paperwork Requirements*

Most permittees will be required to submit annual fees to the Department.

No other new forms, reports or other paperwork are required in this proposed rulemaking, except for certain new requirements for CAAP facilities. CAAPs are fish hatcheries or fish farms. Under this proposed 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 (that is, 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 any discharge of any therapeutic drug that may be detectable in the effluent. The Department generally considers the use of these therapeutic drugs as safe and of low environmental concern, but tracking use



rates will support investigation of any potential environmental impact of the drugs, or allegation of same.

*G. 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 permanently achieve or move beyond compliance.

The proposed rulemaking commits the Department to encourage 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. Lesser permit fees are assessed on smaller facilities (facilities with lower hydraulic capacity), which effectively motivates permittees to pursue source reduction by reducing the volume of wastewater that requires treatment. The regulations incorporate the established hierarchy for pollution prevention, in descending order of preference, for environmental management of wastes:

- (1) Process change.
- (2) Materials substitution.
- (3) Reuse.
- (4) Recycling.
- (5) Treatment.
- (6) Disposal.

The requirement that CAAPs implement a BMP plan to manage fish feed rates is a good example of source reduction, or process change, to prevent pollution before it is produced, and to reduce the cost of the operation.

*H. Sunset Review*

These regulations 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.

*I. 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 these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees). In addition to submitting the proposed amendments, the Department provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed amendments within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Regulatory

Review Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

*J. Public Comments*

*Written Comments*—Interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. The Board must receive any comments, suggestions or objections by March 15, 2010. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by March 15, 2010. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

*Electronic Comments*—Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by March 15, 2010. A subject heading of the proposal and a return name and address must be included in each transmission. If the sender does not receive an acknowledgement of electronic comments within 2 working days, the comments should be retransmitted to ensure receipt.

JOHN HANGER,  
*Chairperson*

**Fiscal Note:** 7-443. No fiscal impact; (8) recommends adoption.

**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)**

*(Editor’s Note:* As part of this proposed rulemaking, the EQB is proposing to rescind Chapter 92 which appears in 25 Pa. Code pages 92-1—92-54, serial pages (271955), (271956), (315447)—(315454), (324877), (324878), (315457)—(315462), (324879)—(324882), (271977), (271978), (336593), (336594), (271981)—(271984), (313603), (313606), (271989)—(271992), (313607), (313608), (343929)—(343932) and (271999)—(272008).)

- Sec.
- 92.1. (Reserved)
- 92.2. (Reserved)
- 92.2a—92.2d. (Reserved)
- 92.3—92.5. (Reserved)
- 92.5a. (Reserved)
- 92.6. (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)

Sec.  
 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.	Sec.
A. DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS.....	92a.1
B. PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS.....	92a.21
C. PERMITS AND PERMIT CONDITIONS .....	92a.41
D. MONITORING AND ANNUAL FEES .....	92a.61
E. TRANSFER, MODIFICATION, REVOCATION AND REISSUANCE, TERMINATION OF PERMITS, REISSUANCE OF EXPIRING PERMITS AND CESSATION OF DISCHARGE .....	92a.71
F. PUBLIC PARTICIPATION.....	92a.81
G. PERMIT COORDINATION WITH THE ADMINISTRATOR .....	92a.91
H. CIVIL PENALTIES FOR VIOLATIONS OF NPDES PERMITS .....	92a.101

**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.1. Purpose and scope.**

(a) *Purpose.* The regulatory provisions contained in this chapter implement the NPDES Program by the Department under the Federal Act.

(b) *Scope.* A person may not discharge pollutants from a point source into surface waters except as authorized under an NPDES permit.

**§ 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<sub>5</sub>—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.

(iii) The term 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.

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

**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 in regulations 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<sub>5</sub>—Carbonaceous biochemical oxygen demand, 5-day**—The 5 day measure of the pollutant parameter carbonaceous biochemical oxygen demand.

**CSO—Combined Sewer Overflow**—Any 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.

**Expanding facility or activity**—Any expansion, modification, process change, or other change to an existing facility or activity which will result in an increased discharge of wastewater flow, or an increased loading of pollutants.

**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.

**Immediate**—As soon as possible, but not to exceed 4 hours.

**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 stormwater 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 municipal separate storm sewer system.

*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, 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.

*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.

*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 decision making) 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 meshes 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.

*Permit-by-rule*—An NPDES permit which a person is deemed to have for the operation of an SRSTP or for the application of pesticides upon compliance with the requirements of § 92a.24 or § 92a.25 (relating to permit-by-rule for SRSTPs; and permit-by-rule for application of pesticides), as applicable.

*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*—Any 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*—Any 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*—Any 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*—Any 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<sub>5</sub>.

*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)—(18).

*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, including clearing and grubbing, grading and excavation activities involving:

(i) Equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters of this Commonwealth, or an earth disturbance on any portion, part or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 to less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters of this Commonwealth over the life of the project

(ii) Five acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance 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).

*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 sum of individual waste load allocations for point sources, load allocations for nonpoint sources and natural quality and a margin of safety expressed in terms of mass per time, toxicity or other appropriate measures.

*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 listed in subsection (b), including all appendices, future amendments and supplements thereto, are incorporated by reference to the extent that these provisions are applicable and not contrary to the law of the Commonwealth. In the event of a conflict between Federal and regulatory provisions of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent.

(b) The following Federal regulatory provisions in 40 CFR Parts 122, 124 and 125 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination System; procedures for decision making; and criteria and standards for the National Pollutant Discharge Elimination system) 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).

(c) The Federal NPDES regulations listed in §§ 92a.4—92a.6, 92a.8, 92a.21, 92a.22, 92a.32—92a.37, 92a.41—92a.45, 92a.55, 92a.61, 92a.71—92a.74 and 92a.92, including all appendices, future amendments and supplements thereto, 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 Federal and regulatory provisions of the Commonwealth, the provision expressly set out in this chapter shall be applied unless the Federal provision is more stringent.

**§ 92a.4. Exclusions.**

The provisions of 40 CFR 122.3(a)—(g) (relating to exclusions) are incorporated by reference.

**§ 92a.5. Prohibitions.**

(a) The provisions of 40 CFR 122.4 (relating to prohibitions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

(b) A permit may not be issued, modified or reissued for a sanitary sewer overflow.

**§ 92a.6. Effect of a permit.**

The provisions of 40 CFR 122.5 (relating to effect of a permit) are incorporated by reference.

**§ 92a.7. Duration of permits and continuation of expiring permits.**

(a) NPDES permits must have a fixed term not to exceed 5 years.

(b) The terms and conditions of an expiring permit are automatically continued when the following conditions are met:

(1) The permittee has submitted a timely application for reissuance of an existing permit in accordance with § 92a.75 (relating to reissuance of expiring permits).

(2) The Department is unable, through no fault of the permittee, to reissue or deny a permit before the expiration date of the previous permit.

(c) Permits continued under subsection (b) remain effective and enforceable against the discharger until the Department takes final action on the pending permit application.

**§ 92a.8. Confidentially 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.9. NPDES permit satisfies other permit requirements.**

An NPDES permit issued for a discharge pursuant to this chapter is the Department permit for purposes of sections 202 and 307 of the State Act (35 P.S. §§ 691.202 and 691.307).

**§ 92a.10. Pollution prevention.**

(a) The Department will encourage 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.

(b) The Department will encourage consideration of the following measures, in descending order of preference, for environmental management of wastes:

- (1) Process change.
- (2) Materials substitution.
- (3) Reuse.
- (4) Recycling.
- (5) Treatment.
- (6) Disposal.

**§ 92a.11. Other chapters applicable.**

To the extent that Chapters 16, 77, 87—91, 93, 95, 96, 102 and 105 pertain to a discharge for which an NPDES permit is required, those chapters govern whenever their application produces a more stringent effluent limitation than would be produced by application of Federal requirements. Effluent limitations resulting from the application of those chapters must be expressed in an NPDES permit issued under this chapter.

**§ 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 that are required 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 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.
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92a.38.	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, except as required by the Department.

(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. Persons are not required to submit an application for an individual permit for SRSTPs or for the application of pesticides that are subject to permit-by-rule, provided the requirements of §§ 92a.24 and 92a.25 (relating to permit-by-rule for SRSTPs; and permit-by-rule for application of pesticides) are met.

(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.28 (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.22. Signatories to permit applications and reports.**

The provisions of 40 CFR 122.22 (relating to signatories to permit applications and reports (applicable to State programs, see 123.25)) are incorporated by reference.

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

(a) 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 result in 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, primary industrial facilities, and stormwater discharges associated with industrial activities must require that an NOI be submitted for each reissuance of coverage under the general permit. A general permit for any other category of discharges may be designed to allow discharges to continue to be authorized to discharge without submitting a NOI for each reissuance of coverage under the general permit. The Department will consider the following in deciding whether an NOI must be submitted for each reissuance of coverage under the general permit: the type of discharge; the potential for toxic and conventional pollutants in the discharge; and the estimated number of discharges to be covered by the permit. The public notice of the general permit will provide the reasons for not requiring the NOI.

**§ 92a.24. Permit-by-rule for SRSTPs.**

(a) *Coverage.* A person is deemed to have an NPDES permit authorizing discharge from an SRSTP provided the following requirements are met:

(1) The person has obtained coverage under the water quality management general permit for small flow treatment facilities under Chapter 91 (relating to water quality provisions).

(2) The SRSTP is designed to adequately treat sewage flows of not greater than 1,000 GPD.

(3) The discharge is not to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards).

(4) The person maintains and operates the SRSTP in compliance with the standards and requirements of the Department contained in approvals issued under Chapter 71 (relating to administration of sewage facilities planning program) and the water quality management general permit issued under Chapter 91.

(b) *Administration of permit-by-rule for SRSTPs.*

(1) *Requiring an individual or general permit.* The Department may revoke or suspend coverage under a permit-by-rule, and require that NPDES permit coverage be obtained under an individual or general NPDES permit, when the permittee has violated one or more

provisions of this title or otherwise is ineligible for coverage under the water quality management general permit for small flow treatment facilities. Upon notification by the Department that coverage under an individual or general NPDES permit is required, the permittee shall submit a complete application or NOI, in conformance with this chapter, within 90 days of receipt of the notification. Failure to submit the required application or NOI within 90 days automatically terminates coverage under the permit-by-rule.

(2) *Termination of coverage under permit-by-rule for SRSTPs.* When an individual permit or approval for coverage under a general NPDES permit is issued for an SRSTP, coverage under the permit-by-rule for SRSTPs is automatically terminated.

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

(a) *Coverage.* A person is deemed to have an NPDES permit authorizing application of a pesticide provided the following requirements are met:

(1) The pesticide is registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C.A. §§ 136—136y), and applied consistent with all applicable requirements of FIFRA.

(2) The pesticide application meets at least one of the following conditions:

(i) The pesticide is applied directly to surface water to control pests. An example is an aquatic pesticide applied to surface water to control mosquito larvae or aquatic weeds.

(ii) The pesticide is applied over or near surface waters to control pests, where a portion of the pesticide will unavoidably be deposited to surface waters in order to target the pests effectively. An example is a pesticide applied over surface water to control insects, or to a field or forest canopy near surface water to control insects or terrestrial vegetation.

(3) The discharge of the pesticide is not associated with any facility or activity related to the manufacture, storage or disposal of the pesticide.

(b) *Administration of permit-by-rule for application of pesticides.*

(1) *Requiring an individual or general permit.* The Department may revoke or suspend coverage under a permit-by-rule, and require that permit coverage be obtained under an individual or general NPDES permit, when the permittee has violated one or more provisions of this title or otherwise is ineligible for coverage under the permit-by-rule. Upon notification by the Department that coverage under an individual or general NPDES permit is required, the permittee shall submit a complete application or NOI, in conformance with this chapter, within 90 days of receipt of the notification. Failure to submit the required application or NOI within 90 days automatically terminates coverage under the permit-by-rule.

(2) *Termination of coverage under permit-by-rule for application of pesticides.* When an individual permit or approval for coverage under a general NPDES permit is issued for a pesticide application, coverage under the permit-by-rule for pesticide application is automatically terminated.

**§ 92a.26. New or increased discharges, or change of waste streams.**

(a) *Sewage discharges and industrial waste discharges.* Facility expansions or process modifications, which may

result in increases of permitted pollutants that do not have the potential to exceed ELGs or violate effluent limitations specified in the permit, may be initiated by the permittee without the approval of the Department, but shall be reported by submission to the Department of notice of the increased discharges within 60 days. Facility expansions or process modifications, which may result in increases of pollutants that have the potential to exceed ELGs or violate effluent limitations specified in the permit, or which 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 commencing 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 initiating the new or expanded disturbed area.

**§ 92a.27. 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.28. Application fees.**

(a) The application fee is payable to the Commonwealth according to the fee schedule set forth in this section. All flows listed in this section are 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
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
Mining activity .....	\$1,000 for new; \$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, and may not exceed \$2,500. 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.

#### § 92a.29. Sewage discharges.

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

(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.30. 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.34 (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.34, 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.34, 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.31. 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 pursuant to § 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 by 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.32. CAAP.

The provisions of 40 CFR 122.24 (relating to concentrated aquatic animal production facilities) are incorporated by reference.

#### § 92a.33. 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.34. Stormwater discharges.

(a) The provisions of 40 CFR 122.26(a), (b), (c)(1), (d), (e)(1), (3)—(9) and (f)—(g) (relating to stormwater 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 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).

#### § 92a.35. 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.36. 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 Federal 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)).

(c) The 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.

**§ 92a.37. New sources and new discharges.**

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

**§ 92a.38. Department action on NPDES permit applications.**

(a) 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 statutes 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 procedured for decision making) and the Federal Act.

(b) The Department will consider local and county comprehensive plans and zoning ordinances developed pursuant to the Pennsylvania Municipalities Planning Code (53 P. S. § 10101—70105) when evaluating NPDES permit applications, provided that the plans are not preempted by State law. The Department may use the plans and ordinances as a basis to support actions on applications, including determining appropriate permit conditions and limitations, and whether or not to issue an NPDES permit.

**Subchapter C. PERMITS AND PERMIT CONDITIONS**

Sec.	
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**§ 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 immediate notification requirements of § 91.33 (relating to incidents causing or threatening pollution) supersedes the reporting requirements of 40 CFR 122.41 (l)(6).

(c) The discharger may not discharge floating materials, oil, grease, scum, sheen and substances that produce color, taste, odors, turbidity or settle to form deposits.

**§ 92a.42. Additional conditions applicable to specific categories of NPDES permits.**

The provisions of 40 CFR 122.42 (relating to additional conditions applicable to specific categories of NPDES permits (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

**§ 92a.43. Establishing permit conditions.**

The provisions of 40 CFR 122.43 (relating to establishing permit conditions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

**§ 92a.44. Establishing limitations, standards, and other permit conditions.**

The provisions of 40 CFR 122.44 (relating to establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

**§ 92a.45. Calculating NPDES permit conditions.**

The provisions of 40 CFR 122.45 (relating to calculating NPDES permit conditions (applicable to State NPDES programs, see 123.25)) are incorporated by reference.

**§ 92a.46. Site-specific permit conditions.**

The Department may establish and include in an NPDES permit, any permit condition, as needed on a case-by-case basis, to assure protection of surface waters. These conditions may include a requirement to identify and implement the following:

- (1) BMPs reasonably necessary to achieve effluent limitations or standards or to carry out the purpose and intent of the Federal Act.
- (2) Toxic reduction activities, effluent limitations based on WETT, and other measures that eliminate, or substantially reduce releases of pollutants at their source.

**§ 92a.47. Sewage permit.**

(a) Sewage, except that discharged from a CSO that is in compliance with subsection (d), 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<sub>5</sub> and TSS may not exceed 30 milligrams per liter. If CBOD<sub>5</sub> is specified instead of BOD<sub>5</sub> the limitation may not exceed 25 milligrams per liter.

(2) Weekly average discharge limitation for BOD<sub>5</sub> and TSS may not exceed 45 milligrams per liter. If CBOD<sub>5</sub> is specified instead of BOD<sub>5</sub> the limitation may not exceed 40 milligrams per liter.

(3) On a concentration basis, the monthly average percent removal of BOD<sub>5</sub> or CBOD<sub>5</sub>, 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 2000/100 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)–(3) (relating to quality standards and oil-bearing wastewaters).

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

(b) Sewage, except that discharged from a CSO that is in compliance with subsection (d), or that discharged from a small flow treatment facility, shall be given a minimum of tertiary treatment if either of the following apply:

(1) The discharge from a new source, new discharger, or expanding facility or activity is to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards), or to a surface water or location for which the first intersected perennial stream is classified as a High Quality Water or an Exceptional Value Water.

(2) The discharge from a facility or activity affects surface waters of this Commonwealth not achieving water quality standards, with the impairment attributed at least partially to point source discharges of treated sewage.

(c) Tertiary treatment for sewage is that treatment that meets all of the requirements of secondary treatment, and also accomplishes the following:

(1) Monthly average discharge limitation for CBOD<sub>5</sub> and TSS may not exceed 10 milligrams per liter.

(2) Monthly average discharge limitation for total nitrogen may not exceed 8 milligrams per liter.

(3) Monthly average discharge limitation for ammonia nitrogen may not exceed 3 milligrams per liter.

(4) Monthly average discharge limitation for total phosphorus may not exceed 1 milligram per liter.

(5) Dissolved oxygen must be 6 milligrams per liter or greater at all times.

(6) Seasonal modifiers may not be applied for tertiary treatment.

(d) 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.

(e) Discharges from an SSO are prohibited.

(f) 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.

(g) 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)).

#### § 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 quality standards and oil-bearing wastewater standards).

(3) For those industrial categories for which no effluent limitations have been established under paragraph (1), Department-developed technology-based limitations established in accordance with 40 CFR 125.3 (relating to technology-based treatment requirements in permits).

(4) For facilities discharging conventional pollutants in industrial waste, the monthly average discharge limitation for BOD<sub>5</sub> and TSS may not exceed 60 milligrams per liter. If CBOD<sub>5</sub> is specified instead of BOD<sub>5</sub>, the limitation may not exceed 50 milligrams per liter. More stringent limits may apply based on the requirements of § 92a.12 (relating to treatment requirements).

(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.49. CAFO.**

NPDES permits for each CAFO must include, but are not limited to, conditions requiring the following:

(1) Compliance with the Nutrient Management Plan, the Preparedness, Prevention and Contingency Plan and the Erosion and Sediment Control Plan.

(2) A separate NPDES permit for stormwater discharges associated with a construction activity meeting the requirements of Chapter 102 (relating to erosion and sediment control) when applicable.

(3) Compliance with 3 Pa.C.S. Chapter 23 (relating to the Domestic Animal Law).

(4) Compliance with § 91.36 (relating to pollution control and prevention at agricultural operations).

(5) Recordkeeping and reporting requirements as described in the permit.

(6) When applicable, effluent limitations and other conditions as required under § 92a.12 (relating to treatment requirements) to meet water quality standards, for treated wastewater discharges.

(7) Measures necessary to prevent the discharge to surface water from storage of raw materials such as feed and supplies, which are not otherwise included in the nutrient management plan.

**§ 92a.50. CAAP.**

(a) For discharges from a CAAP into a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93 (relating to water quality standards), the requirements of § 93.4c (relating to implementation of antidegradation requirements) apply.

(b) 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 bio-residual solids (sludge).

(c) 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.

(d) 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 most sensitive analytic method available.

**§ 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 3 years, unless the EHB or any other 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. 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.52. Variances.**

Any new or amended Federal regulation enacted after November 18, 2000, which creates a variance to existing NPDES permitting requirements is not incorporated by reference.

**§ 92a.53. Documentation of permit conditions.**

The Department will prepare a fact sheet on the derivation of the effluent limitations or other conditions and the reasons for the conditions of the draft or final permit, or both. The fact sheet will include:

(1) A brief description of the type of facility or activity being permitted.

(2) The type and quantity of wastewater or pollutants evaluated in the permit.

(3) Documentation that the applicable effluent limitations and standards including a citation of same are considered in development of the draft permit.

(4) Documentation that applicable water quality standards will not be violated.

(5) A brief summary of the basis for the draft permit limitations and conditions including references to applicable statutory or regulatory provisions.

**§ 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 substantial 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 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 (relating to water quality standards).

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

(2) 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.

**§ 92a.55. Disposal of pollutants into wells, into POTW or by land application.**

The provisions of 40 CFR 122.50 (relating to disposal of pollutants into wells, into publicly owned treatment works or by land application) are incorporated by reference.



**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 intake and discharge flow 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 that is not a minor discharge 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 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 Commonwealth. 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. All flows listed in this section are design flows.

(b) Annual fees for individual NPDES permits for discharges of domestic 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
Stormwater .....	\$1,000

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

CAFO.....	\$0
CAAP.....	\$0
MS4 .....	\$500
Mining activity .....	\$0

(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.

**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.71. Transfer of permits.**

(a) The provisions of 40 CFR 122.61 (relating to transfer of permits (applicable to State programs, see 123.25)) are incorporated by reference.

(b) A new permittee shall be in compliance with existing Department issued permits, regulations, orders and schedules of compliance, or demonstrate that any non-compliance with the existing permits 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 appropriate Department regulations.

**§ 92a.72. Modification or revocation and reissuance of permits.**

The provisions of 40 CFR 122.62 (relating to modification or revocation and reissuance of permits (applicable to State programs, see 123.25)) are incorporated by reference.

**§ 92a.73. Minor modification of permits.**

The provisions of 40 CFR 122.63 (relating to minor modification of permits) are incorporated by reference.

**§ 92a.74. Termination of permits.**

The provisions of 40 CFR 122.64 (relating to termination of permits (applicable to State programs, see 123.25)) are incorporated by reference.

**§ 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.28 (relating to application fees) apply.

(b) Upon completing review of the application, the Department may administratively extend a permit for a minor facility for a maximum of 5 years if, based on up-to-date information on the permittee's waste 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) No changes in Department regulations have occurred since the permit was issued or reissued that would affect the effluent limitations or other terms and conditions of the existing permit.

(c) Alternatively, the Department may reissue a permit if, based on up-to-date information on the permittee's waste treatment practices and the nature, contents and frequency of the permittee's discharge, the Department determines that:

(1) The permittee is in compliance with all 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.

**§ 92a.76. Cessation of discharge.**

If a permittee intends to cease operations or cease a discharge for which a permit has been issued under this chapter, the permittee shall notify the Department in writing of its intent at least 90 days prior to the cessation of operations or the cessation of the discharge, unless permission has been granted for a later date by the Department. The 90-day notice is not required to cease mining activities and related discharges that are termi-

nated in accordance with procedures for mine reclamation and bond release established in §§ 86.170—86.175 (relating to release of bonds) or §§ 77.241—77.243 (relating to release of bonds).

### Subchapter F. PUBLIC PARTICIPATION

Sec.

92a.81.	Public access to information.
92a.82.	Public notice of permit application 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.81. Public access to information.

(a) NPDES forms and public comments will be available to the public for inspection and copying.

(b) Information relating to NPDES permits, not determined to be confidential under § 92a.8 (relating to confidentiality of information), may be inspected at the Department office processing the information. Copying facilities and services will be available for a reasonable fee, or other arrangements for copying may be made with the Department office.

#### § 92a.82. Public notice of permit applications and draft permits.

(a) Public notice of every complete application for an NPDES permit will be published in the *Pennsylvania Bulletin*. The contents of public notice of applications for NPDES permits will include at least the following:

(1) The name and address, including county and municipality, of each applicant.

(2) The permit number and type of permit applied for.

(3) The stream name of the waterway to which each discharge is proposed.

(4) The address of the State or interstate agency premises at which interested persons may obtain further information, request a copy of the NPDES forms and related documents.

(b) A public notice of every new draft individual permit, or major amendment to an individual permit, will be published in the *Pennsylvania Bulletin*. This public notice will also be posted by the applicant near the entrance to the premises of the applicant, and at the facility or location where the discharge exists, if the facility or location is remote from the premises of the applicant. The contents of public notice for draft NPDES permits will include at least the following in addition to those specified in subsection (a):

(1) A brief description of each applicant's activities or operations that result in the discharge described in the application.

(2) The name and existing use protection classification of the receiving surface water under § 93.3 (relating to protected water uses) to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether the discharge is a new or an existing discharge.

(3) A statement of the tentative determination to issue or deny an NPDES permit for the discharge described in the application. If there is a tentative determination to issue a permit, the determination will include proposed effluent limitations for those effluents proposed to be limited, a proposed schedule of compliance including interim dates and requirements for meeting the proposed effluent limitations and a brief description of any pro-

posed special conditions that will have a significant impact upon the discharge described in the application.

(4) The rate or frequency of the proposed discharge; if the discharge is continuous, the average daily flow in GPD or MGD.

(5) A brief description of the procedures for making final determinations, including the 30-day comment period required by subsection (d) and any other means by which interested persons may influence or comment upon those determinations.

(c) The provisions of 40 CFR 124.57(a) (relating to public notice) shall be followed when there is a Section 316(a) request for a thermal discharge.

(d) There will be a 30-day period following publication of notice under subsection (b) 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 the applicant, any affected State, any affected interstate agency, the Administrator or any interested agency, person or group of persons to request or petition for a public hearing with respect to the application. The request or petition for public hearing 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. Instances of doubt should be resolved in favor of holding the hearing. Any hearing brought under this subsection will be held in the geographical area of the proposed discharge or other appropriate area and may, as appropriate, consider related groups of permit applications.

(e) The Department will prepare and send to any person, upon request, following public notice of draft permit, a fact sheet with respect to the draft permit described in the public notice. The contents of the fact sheet will include at least the information contained in § 92a.53 (relating to documentation of permit conditions).

#### § 92a.83. Public notice of public hearing.

Notice of a public hearing will be published in the *Pennsylvania Bulletin*, and in at least one newspaper of general circulation within the geographical area of the discharge and will be sent to all persons or government agencies that received a copy of the fact sheet for the draft permit. All of the notices of a public hearing will be published at least 30 days before the hearing. Notice of a public hearing will include at least the following:

(1) The name, address and phone number of the agency holding the public hearing.

(2) The name and address of each applicant whose application will be considered at the hearing.

(3) The name of the waterway to which each discharge is proposed and a short description of the location of each discharge on the waterway.

(4) A brief reference to the public notice published in the *Pennsylvania Bulletin* for each application, including identification number and date of issuance.

(5) Information regarding the time and location for the hearing.

(6) The purpose of the hearing.

(7) A concise statement of the issues raised by the persons requesting the hearing.

(8) The address and phone number of the premises at which interested persons may obtain further information, request a copy of each fact sheet prepared under 92a.53 (relating to documentation of permit conditions), and inspect and copy NPDES forms and related documents.

(9) A brief description of the nature of the hearing, including the rules and procedures to be followed.

**§ 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, shall 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 whether it will provide one of the following:

(1) Notice in the *Pennsylvania Bulletin* of each NOI under an applicable general permit, and of each approval for coverage under a general permit.

(2) Notice of every approval of coverage only.

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

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 application and draft permits), transmit to any 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 must have the same opportunity to submit recommendations and to receive explanations in paragraph (2).

**§ 92a.86. Notice of issuance or final action on a permit.**

Following the 30-day comment period described in § 92a.82(d) (relating to public notice of permit applications and draft permits), and any public hearing, on the permit application and draft permit, the Department will take action on the permit. Comments received during the comment period will be addressed and documented by the Department, and made available for public review. Final action will be published in the *Pennsylvania Bulletin*.

**§ 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. Notice of administrative extensions will be accomplished under § 92a.82(a) (relating to public notice of permit applications and draft permits).

**§ 92a.88. Notice of appeal.**

When the determination of the Department to issue or deny an NPDES permit is appealed to the EHB, notice of the appeal, and notice of the hearing date, if any, will be published in the *Pennsylvania Bulletin*. In addition, notice of the Department's final action, arrived at either through settlement or as the result of a decision of the EHB, will be published in the *Pennsylvania Bulletin*.

### Subchapter G. PERMIT COORDINATION WITH THE ADMINISTRATOR

Sec.

- 92a.91. NPDES forms.  
 92a.92. Decision on variances.  
 92a.93. Administrator's right to object to issuance or modification of certain permits.  
 92a.94. Reports of violations.

#### § 92a.91. NPDES forms.

The Department will transmit to the Administrator complete copies of all NPDES forms, draft and final permits and other documentation or information as agreed to by the Department and the Administrator. If the Administrator requests additional information, the Department may require the applicant to provide this additional information requested by the Administrator.

#### § 92a.92. Decision on variances.

The provisions of 40 CFR 124.62(a)(3), (e)(1) and (f) (relating to decision on variances) are incorporated by reference.

#### § 92a.93. Administrator's right to object to the issuance or modification of certain permits.

The Administrator has a right to review or object to issuance of certain permits. The scope of EPA review and the procedures for its exercise are described in a Memorandum of Agreement that was incorporated in the Program Description submitted to the EPA by the Department. A copy of the Memorandum of Agreement is on file with the Department and with the Administrator of EPA Region III.

#### § 92a.94. Reports of violations.

The Department will prepare a quarterly report listing permittees who have violated final or interim requirements in their NPDES permits, stating the nature of the violation, describing any enforcement action that is proposed or has been taken, and giving a brief description, if appropriate, of any circumstances that explain the violation. A copy of the report will be forwarded on the last day of the months of February, May, August and November to the Administrator.

### Subchapter H. CIVIL PENALTIES FOR VIOLATIONS OF NPDES PERMITS

Sec.

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

#### § 92a.101. Applicability.

Sections 92a.102—92a.104 (relating to method of seeking civil penalty; procedure for civil penalty assessments; and disbursement of funds pending resolution of appeal) apply to civil penalty assessments by the Department under section 605(a) of the State Act (35 P. S. § 691.605(a)).

#### § 92a.102. Method of seeking civil penalty.

The Department may do either one of the following:

- (1) File a complaint for civil penalties before the EHB.
- (2) Assess a civil penalty, after hearing under § 92a.103 (relating to procedure for civil penalty assessments).

#### § 92a.103. Procedure for civil penalty assessments.

(a) The Department, if it assesses a civil penalty for a State Act violation, will serve a copy of the proposed civil penalty assessment on the alleged violator. Service will be by registered or certified mail, or by personal service. If the mail is tendered at the address in the permit, or at an address where the person is located, and delivery is refused, or mail is not collected, the requirements of this section will be deemed to have been complied with upon the tender.

(b) The person who has been served with a proposed assessment in accordance with subsection (a) has 30 days to request that the Department hold an informal hearing on the proposed assessment by serving the Department by registered or certified mail with the request. If no timely request for an informal hearing is submitted, the failure to submit a timely request will operate as a waiver of the opportunity for a hearing, and the proposed assessment will become a final assessment of the Department upon the expiration of the 30-day period unless the Department determines to hold a hearing on the proposed assessment under the procedures in subsection (c).

(c) If a timely request for hearing on the proposed assessment is received by the Department, the Department will assign a representative to hold an informal hearing regarding the assessment. The informal hearing will not be governed by requirements for formal adjudicatory hearings. The Department will establish a hearing date and notify the person requesting the hearing in accordance with the service procedures in subsection (a) and post notice of the time and place of the hearing at the Department office where the hearing is to be held at least 5 days prior to the hearing. The person requesting the hearing has the right to attend and participate in the hearing and to be represented by counsel. The Department will consider the relevant information presented and either affirm, raise, lower or vacate the proposed assessment. The Department representative's decision will constitute the Department's final assessment.

(d) The person subject to a final assessment by the Department may contest the penalty assessment by filing a timely appeal with the EHB.

#### § 92a.104. Disbursement of funds pending resolution of appeal.

(a) If the person subject to a final assessment fails to file a timely appeal to the EHB as provided in the Environmental Hearing Board Act (35 P. S. §§ 7511—7516), the penalty assessed is due and payable upon expiration of the time allowed to file an appeal. If the person fails to pay, the amount will be collected in the manner provided under section 605 of the State Act (35 P. S. § 691.605). The Department may preclude persons who fail to pay in full from obtaining or renewing any Department permits.

(b) If the final decision in the administrative and judicial review process results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the amount specified in the final decision to the Department within 30 days after the order is mailed to the person. If the person fails to pay the amount specified in the final decision, the amount will be collected in the manner provided by law. The Department may preclude persons who fail to pay in full from obtaining any new or reissued Department permits.

(c) Upon completion of the administrative and judicial review process, any funds collected under this subchapter will be deposited into the Clean Water Fund.

[Pa.B. Doc. No. 10-276. Filed for public inspection February 12, 2010, 9:00 a.m.]

## [ 25 PA. CODE CH. 96 ]

### Water Quality Standards Implementation

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code Chapter 96 (relating to water quality standards implementation) to read as set forth in Annex A. The amendments would codify 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"). That policy provides a cost-effective means for facilities subject to meet new limits for nitrogen, phosphorus and sediment to meet those limits by working with other facilities or with nonpoint sources, or both. It helps the Commonwealth achieve its Chesapeake Bay nutrient reduction goals from the agriculture sector, 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 proposal was adopted by the Board at its meeting of November 17, 2009.

#### A. Effective Date

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

#### B. Contact Persons

For further information contact Ann Smith, Program Analyst, Water Planning Office, P. O. Box 2063, 2nd Floor, Rachel Carson State Office Building, Harrisburg, PA 17105-2063, (717) 772-4785, or Douglas Brennan, Director, Bureau of Regulatory Counsel, P. O. Box 2063, 9th Floor, Rachel Carson State Office Building, Harrisburg, PA 17105-2063, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or 800 654-5988 (voice users). This proposal is available electronically through the Department of Environmental Protection (Department) web site (<http://www.dep.state.pa.us>).

#### C. Statutory Authority

The proposed rulemaking is being made under the authority of The Clean Streams Law (35 P. S. §§ 691.1—691.1001; the Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387); and 40 CFR Part 122 (relating to EPA administrative permit programs: the National Pollutant Discharge Elimination System).

#### D. Background and Purpose

The Chesapeake Bay is polluted from nutrients (and sediment) and in 2005, new water quality standards under the Federal Clean Water Act to address this pollution came into effect. To meet these new requirements under Federal law, the 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 related to these new 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. This 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 new legal mandate. The plan included new permitting requirements for sewage treatment plants and other "point sources" governed by the Federal National Pollutant Discharge Elimination System (NPDES), new regulations controlling agricultural run-off and the Nutrient Credit Trading Policy.

The Nutrient Credit Trading Policy was actually 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: 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%. 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 but in order to reach their cap loads an additional upgrade would increase the price to about \$12 per pound. Instead, Mount Joy 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.

The Department's nutrient credit trading program is built upon the core elements prescribed for any 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 beyond those needed to meet compliance goals.

Since the publication of the interim final policy and as of August 2009, the Department has received 73 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, 45 have been approved, for a total of 1,651,336 nitrogen credits and 174,086 phosphorous credits. After subtracting the credits that have already been purchased or those that were generated in a previous compliance year, a total of 1,536,597 nitrogen credits and 171,541 phosphorous credits are available for sale.

The Department and its partners continue to seek enhancements to its nutrient trading program. For example, 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. It recently approved a \$7 million loan to a technology provider for a project at a large dairy and poultry farm in Lancaster County. PENNVEST is also studying the possibility of providing 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 has consulted with a number of boards and committees throughout the process of developing the Nutrient Credit Trading Policy, and most recently, this proposed rulemaking. The Department has also presented the proposed rulemaking to the Water Resources Advisory Committee (WRAC), once in June and again in July with a revised draft in response to comments. The WRAC endorsed, with provisions, the proposed rulemaking package at its July meeting and it was presented to the Agricultural Advisory Board (AAB) at the meeting on August 19th where very few comments or concerns were raised. The proposed rulemaking and preamble reflect the comments made by the WRAC during the July meeting. At the request of AAB, the Department will provide an additional presentation during the public comment period.

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 has 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 any statutory or regulatory obligations.

The proposed 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.

#### E. Summary of Regulatory Requirements

*Definitions* (§ 96.8(a)). The proposal adds a number of definitions to Chapter 96 to clarify various new terms. Most of the definitions were taken from the Nutrient Credit Trading Policy, with slight revision in some cases based on the Department's experience in implementing the program since the policy was finalized, and also based on comments from stakeholders.

*General provisions* (§ 96.8(b), (h) and (j)). The proposal contains several subsections with overarching provisions. Subsection (b) sets forth the core concepts and basic requirements of the trading program. Subsection (h) contains provisions regarding the interaction of this section and important provisions elsewhere in this title regarding protection of water quality. Subsection (j) makes it clear that this proposed rulemaking is not intended to foreclose the use of credits or offsets in other contexts outside of their use to comply with the nutrient and sediment cap loads for the Chesapeake Bay.

*Methodology for calculating credits and offsets* (§ 96.8(c)). 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 that 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 subsequent versions of the models and more current research.

An important provision in this subsection is paragraph (2), which allows the Department to use pollutant removal efficiencies, edge of segment ratios and delivery ratios that are approved by the EPA, in calculating credits. The removal efficiencies represent average nutrient and sediment reduction performance capabilities for various "best management practices" (BMPs) at farms. 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. Current BMP efficiencies are accessible on the Department's Nutrient Credit Trading web site: (<http://www.dep.state.pa.us/river/Nutrient%20Trading.htm>).

The edge of segment 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 to cropland 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.

At the WRAC meeting in July, the Department was asked to solicit comment on the application of delivery ratios to permit limits, when used in the trading program. Therefore, the Department is soliciting comments on whether delivery ratios should be applied to permit limits when trading is chosen as the compliance option.

*Eligibility requirements* (§ 96.8(d)). This subsection describes the various requirements for a source to be able to generate credits for use under the proposed regulation. There are two components. First, the generator shall meet "baseline" requirements, which essentially are the legal requirements that apply to that operation.

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 reductions 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 (1) compliance with the applicable legal requirements (baseline); and (2) achieving an additional set of pollutant reductions (threshold), can a person begin to generate credits or offsets (by further reductions) under this proposal. The Department has received numerous proposals for the generation of credits that achieve these requirements and has approved many of them.

*Certification, verification and registration* (§ 96.8(e) and (f)). These subsections describe the procedural require-

ment that the Department has in place to ensure that credits and offsets are calculated correctly and accomplish pollutant reductions.

The first step is “certification,” which is typically done in advance of any pollutant reduction activities. In reviewing these requests, the Department evaluates detailed requests for approval of credit and offset-generation activities, for the purpose of assigning a specific number of credits to the activity. A person may want to have his proposed pollutant activities certified to obtain from the Department the number of credits or offsets which can be expected prior to completing the activity.

The number of credits assigned would have applied all appropriate adjustments such as the reserve and delivery ratios with particular attention being paid to the requirements of subsection (c) (methodology). The result is a letter from the Department indicating the amount and types of certified credits or offsets, which in the case of credits the generator can then use to market them.

A second important procedural requirement and a key component of the certification decision is a review of the “verification” plan submitted by the proponent of the credits or offsets, followed by actual verification. This plan is required by § 96.8(e)(4), and it is also a condition of “registration,” the final step, under § 96.8(f)(2)(iii). Verification can take a number of forms, but it must demonstrate that the pollutant reduction activities were implemented as described in the proposal that was certified. The Department may also conduct other verification activities, in addition to those in the plan submitted by the generator, under § 96.8(f)(2)(iv).

The final procedural step in these subsections is “registration,” under § 96.8(f). This is the Department’s accounting mechanism to track verified credits and offsets before they are used to comply with the NPDES permit effluent limits for the Bay.

The Department will not register credits or offsets for persons who demonstrate a lack of ability or intention to comply with the requirements of this section, Department regulations or other relevant requirements. *See*, § 96.8(d)(4) and (6) and (f)(3).

*Use of credits and offsets* (§ 96.8(g)). The provisions described within this Preamble apply to persons generating credits and offsets. This subsection addresses the obligations of persons who use them 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*, § 96.8(g)(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* § 96.8(j).

Credit and offset failure is addressed in § 96.8(g)(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, the 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.

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.” Examples of these

are the use of the credit reserve, a dedicated credit reserve for a particular project, financial guarantees under legal instruments such as escrows, and a Clean Streams Law “credit generation” permit.

*Water quality and TMDLs* (§ 96.8(h)). This proposal 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 proposal.

*Public participation* (§ 96.8(i)). The Department is committed to a transparent process in the implementation of its trading program. Therefore, the proposal would codify the current process of publishing notice in the *Pennsylvania Bulletin* whenever (1) a credit or offset proposal is submitted and is administratively complete; and (2) whenever the Department makes a final decision on certification.

#### F. 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 proposal 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.

##### *Compliance Costs*

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

##### *Compliance Assistance Plan*

While there are no new compliance requirements in this proposal, the Department has an active and comprehensive outreach and education effort. For example, the Department meets with a core group of stakeholders periodically to update them on recent developments and to discuss ways to improve the program. 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, because this is a voluntary program. The proposal does contain requirements for submittal of certain information, as seen in § 96.8(e). However, the cost of these requirements would 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.

#### G. Pollution Prevention

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



means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This proposal is essentially a pollution prevention incentive program, as described previously in this preamble.

#### H. *Sunset Review*

This proposal when final 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.

#### I. *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 this proposal to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees). In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposal within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

#### J. *Public Comments*

*Written Comments*—Interested persons are invited to submit comments, suggestions or objections regarding the proposal to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by March 15, 2010. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by March 15, 2010. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

*Electronic Comments*—Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by March 15, 2010. A subject heading of the proposal and a return name and address must be included in each transmission.

JOHN HANGER,  
*Chairperson*

**Fiscal Note:** 7-451. No impact; (8) recommends adoption.

### 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 which 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 similar allocation, for those pollutants.

*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 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.

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

*Certification*—Written approval by the Department of the use of a proposed or implemented pollutant reduction activity to generate credits or offsets, before those credits and offsets are verified and registered by the Department 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 by the Department, 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, and to provide liquidity in the market.

*DMR*—Discharge monitoring report.

*Delivery ratio*—A ratio that compensates for the natural attenuation of pollutants as they travel in water before they reach a defined compliance point.

*Edge of segment ratio*—A ratio that identifies the amount of land-applied pollutants expected to reach the surface waters at the boundary of a Chesapeake Bay Watershed Model segment through surface runoff and groundwater flows from nonpoint sources within a watershed segment.

*Nutrient*—Nitrogen and phosphorus.

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

*Pollutant*—Nutrients and sediment.

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

*Reserve ratio*—A 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 by the Department before credits or offsets will be certified.

*Tradable load*—The amount of pollutant reductions determined to be the projected future pollutant load which is the difference between the total reductions theoretically possible from maximum implementation of reduction activities, and the reductions associated with a level of 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 by the Department.

*Trading ratios*—Ratios applied by the Department to adjust pollutant reductions when certifying credits or offsets for a pollutant reduction activity, to address uncertainty, water quality, reduction failures or other considerations. These ratios may include a delivery ratio, an edge of segment ratio and a reserve ratio.

*Verification*—Implementation of the verification plan contained in a certification as required by the Department, prior to registration of the credits or offsets 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 and offsets must be generated only from pollutant reduction activity that has been certified, verified and registered by the Department 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), spe-

cifically for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(4) The use of credits and offsets must involve comparable pollutants. 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 by Federal regulations administered by the EPA.

(c) *Methodology.*

(1) The Department may use any of the methods contained in this subsection when calculating and certifying credits and offsets.

(2) Credits and offsets may be calculated by use of pollutant removal efficiencies for BMPs, and edge of segment and delivery ratios addressing fate and transport of pollutants, approved by the EPA Region III Chesapeake Bay Program Office for use with the Chesapeake Bay Watershed Model Version 4.3 or any subsequent versions.

(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 (Cercio and Cole 1993, 1995a, 1995b; Thomann et al. 1994; Cercio and Meyers 2000; Cercio 2000; Cercio and Moore 2001; Cercio 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) *Chesapeake Bay Program Analytical Segmentation Schemes: Revision, decisions and rationales, 1983-2003.* EPA 903-R-04-008. CBP/TRS 268/04. Chesapeake Bay Program Office, Annapolis, Maryland (2004).

(iv) *Chesapeake Bay Program Analytical Segmentation Schemes: Revision, 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 Loads: The Collaborative Process, Technical Tools and Innovative Approaches.* 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. Boynlén, 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 credits and offsets generated from point sources, the Department may rely on the information supplied by permittees in the DMR when calculating and certifying credits and offsets.

(6) When calculating and certifying credits and offsets, the Department may rely on additional 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 and offsets, the generator shall demonstrate a reduction in pollutant loads beyond those that are allowed under applicable baseline requirements, and any threshold established by the Department.

(2) *Baseline requirements to generate credits or offsets*.

(i) For nonpoint sources, baseline shall be the current requirements in regulations applicable to the sources at the location where the credits or offsets are generated, and the pollutant load associated with that location. For agricultural operations, this 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) and the requirements for agricultural operations under Chapter 83 Subchapter D (relating to nutrient management), as applicable.

(ii) For point sources, the baseline shall be the pollutant effluent load associated with effluent limitations contained in an 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 or offsets*.

(i) An agricultural operation must meet one of the following threshold requirements at the location where the credits or offsets are generated. For the purpose of this subparagraph the term "surface water" means a perennial or intermittent stream with a defined bed or bank, a lake or a pond.

(A) Manure is not mechanically applied within 100 feet of surface water. This threshold can be met through one of the following:

(I) There are no surface waters 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 surface water. The area may be grazed or cropped under a specific management plan provided that permanent vegetation is maintained at all times.

(C) The overall amount of pollution reduction is adjusted by at least 20%, which is to be applied during the calculation of the reduction amount when the credits are certified by the Department.

(ii) The Department may establish other threshold requirements necessary 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.

(4) *Compliance status*. Persons currently not in compliance with, or who lack the ability or intention to comply with, any of the following are not eligible to generate credits or offsets, or to use credits or offsets to meet permit effluent limits:

(i) Department regulations, permits, schedules of compliance or orders.

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

(iii) Contracts 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 the Department determines that a person no longer meets the eligibility requirements under this section, it may take appropriate action such as prohibiting the person from participating in any trading under this section and denial of requests for certification and registration of any credits and offsets.

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

(1) *General*. All credits and offsets must be certified by the Department before they may be applied to meet permit effluent limitations. Certification will serve as the Department's final determination of the appropriate amount of credits approved by the Department. Certification must be followed by verification and registration of the credits and offsets prior to their use to meet permit effluent limits.

(2) *Request for certification*. Persons who wish to have credits or offsets certified by the Department shall submit a request in the format required by the Department.

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

(A) 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 period of time described in the request.

(B) The pollutant reduction activity must meet acceptable standards for construction and performance, including operation and maintenance, for the applicable period of time described in the request.

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

(D) The implementation of the pollutant reduction activity must be verified to the extent acceptable to the Department, as described in a verification plan that meets the requirements of paragraph (4).

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

(A) A detailed description of how the credits or offsets will be generated, including calculations, assumptions and photos.

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

(C) Details on the timing of credits or offsets, such as generation and delivery, any phase-in period and the time frame for sale and use towards 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 nearest receiving stream segment.

(E) Information on any source 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 those funds towards the generation or sale of credits or offsets.

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

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

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

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

(J) Professional qualifications of the persons who completed the calculations, conducted the baseline and threshold determinations and otherwise contributed to the technical merit of the request.

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

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

(i) All calculations must be approved by the Department.

(ii) The calculations must demonstrate that the pollutant reductions will be achieved from the activity proposed or implemented to generate credits and offsets for the applicable period of time.

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

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

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

(vi) The annual sum of all credits certified from nonpoint sources may not exceed the applicable tradable load calculated by the Department. The tradable load for the Chesapeake Bay Watershed is 5.7 million pounds of nitrogen per year and 396,800 pounds of phosphorus per year, unless otherwise revised by the Department.

(vii) 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 restrictions have been placed on the funds by the provider of the funds.

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

(i) The verification plan must include the methods for credit and offset verification, such as the documentation of the implemented pollutant reduction activity, sufficient to allow the Department to verify that the qualifying reduction efforts approved were properly implemented during the applicable compliance period.

(ii) Verification plans may include the following methods, subject to approval by the Department:

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

(B) Third-party verification.

(5) *Certification by the Department.* The Department will certify credits and offsets when it has determined that the requirements of paragraphs (1)—(4) have been met.

(i) Certifications may be made contingent on conditions that will ensure that the requirements of this chapter will be satisfied.

(ii) Credits and offsets must only be used to meet permit effluent limits for the compliance period for which they are certified, verified and registered by the Department under this section.

(iii) Requests for certification for multiple compliance periods may be approved by the Department, but they must be verified and registered separately for each compliance period.

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

(1) *General.* All credits and offsets used to comply with effluent limitations in NPDES permits must be registered by the Department before they may be applied to a permit to meet the effluent limitations.

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

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

(ii) Credits must be addressed in a valid contract which ensures that the requirements of this section will be met. The Department may require submittal of trade contracts, establish basic contract elements and require approval of trade contracts before registration.

(iii) The credits and offsets must be verified prior to registration. The following applies to verification:

(A) Verification must be conducted as described in the verification plan as approved by the Department in the certification.

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

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

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

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

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

(1) Permittees will only be authorized to use credits and offsets through the provisions of their 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 the Potomac basins may only be used in the same basin unless otherwise approved by the Department.

(3) Permittees shall ensure that the credits and offsets that they apply to their permits for compliance purposes are certified, verified and registered by the Department under this section for the compliance period in which they are used.

(4) The Department may authorize a period not to exceed 60 days 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 and offsets were registered during that compliance period.

(5) Permittees are responsible for enforcing the terms of their credit and offset contracts, when needed to ensure

compliance with their 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 calculating the certified credits, the existence of an approved legal mechanism that is enforceable by the Department, and the use of a credit reserve.

(5) The use of credits and offsets must be identified in DMR forms, which will be submitted at the end of each compliance year or as otherwise provided by the Department in the permit. Registered credits and offsets shall only be used to meet permit effluent limits for the compliance period for which they are certified, verified and registered by the Department under this section.

(h) *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 and Chapter 93, Department permits and 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.

(i) *Public participation.* The Department will publish a notice in the *Pennsylvania Bulletin* of the receipt of administratively complete requests for certifications of credits and offsets, and the Department's final determinations regarding those requests. This notice is not required to follow the requirements of § 92.61 (relating to public notice of permit application and public hearing).

(j) *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 in areas other than those established for restoration, protection and maintenance related to the water quality of the Chesapeake Bay.

[Pa.B. Doc. No. 10-277. Filed for public inspection February 12, 2010, 9:00 a.m.]

# STATE BOARD OF MEDICINE

[ 49 PA. CODE CHS. 16 AND 18 ]

## Behavior Specialist

The State Board of Medicine (Board) proposes to amend §§ 16.11 and 16.13 (relating to licenses, certificates and registrations; and licensure, certification, examination and registration fees) and to add §§ 18.521—18.527 (relating to behavior specialists), to read as set forth in Annex A.

### *Effective date*

The amendments will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

### *Statutory Authority*

The amendments are authorized under sections 8 and 25 of the Medical Practice Act of 1985 (act) (63 P.S. §§ 422.8 and 422.25) and under section 635.2(g) of The Insurance Company Law of 1921 (Insurance Law) (40 P.S. § 764h(g)).

### *Background and Need for the Amendment*

Section 3 of the act of July 9, 2008 (P.L. 885, No. 62) amended the Insurance Law to provide for autism spectrum disorders coverage. In general, an insurer is required to provide covered individuals under 21 years of age coverage for the diagnostic assessment and treatment of autism spectrum disorders. An insurer shall contract with and accept as a participating provider any autism service provider that is licensed or certified in this Commonwealth. Section 635.2(g)(1) of the Insurance Law requires the Board, in consultation with the Department of Public Welfare, to promulgate regulations to provide for licensure or certification of behavior specialists. Section 635.2(f)(4) of the Insurance Law defines “behavior specialist” as “an individual who designs, implements or evaluates a behavior modification intervention component of a treatment plan, including those based on applied behavior analysis, to produce socially significant improvements in human behavior or to prevent loss of attained skill or function, through skill acquisition and the reduction of problematic behavior.” This proposed rulemaking would implement certification of behavior specialists under the Insurance Law as amended.

### *Description of the Proposed Amendments*

The Board’s regulation in § 16.11(b) identifies those nonmedical doctor licenses and certificates that the Board issues, and in § 16.11(c) identifies those registrations that the Board issues. The proposed rulemaking would first add to § 16.11(b) certification as behavior specialist and add to § 16.11(c) biennial registration of behavior specialist certification. The proposed rulemaking would also add § 16.13(k) to set forth the fees associated with behavior specialist certification to be charged by the Board. To recover the costs of processing those applications, the fee for initial application for certification as behavior specialist and for reactivation of a previously-issued behavior specialist certification would each be \$70. To provide for an appropriate share of the general costs of operating the Board, the renewal fee for a behavior specialist would be \$75.

The proposed rulemaking would add Subchapter I. Proposed § 18.521 (relating to purpose) would identify the purpose of the subchapter as providing for the

certification of behavior specialists. Proposed § 18.522 (relating to definitions) would provide the statutory definitions of “applied behavioral analysis,” “autism spectrum disorders,” “behavior specialist,” and “diagnostic assessment of autism spectrum disorders” as used in the subchapter.

Proposed § 18.523 (relating to application for certification as behavior specialist) would address the application for certification as a behavior specialist. Under proposed § 18.523(a), an applicant shall submit a completed application form, including any necessary supporting documents, and pay the required application fee. Section 635.2(g)(2) of the Insurance Law sets five criteria for certification as a behavior specialist, and as discussed within this preamble, these are identified in proposed § 18.524 (relating to criteria for certification as behavior specialist). Accordingly, proposed § 18.523(b) provides that the Board will certify as a behavior specialist an applicant who demonstrates that the applicant satisfies the requirements of section 635.2(g)(2) of the Insurance Law for certification as a behavior specialist as set forth in § 18.524. Because as discussed within this preamble the Board is also setting forth in its proposed rulemaking grounds for disciplinary action in proposed § 18.527 (relating to disciplinary action for behavior specialist), proposed § 18.523(c) provides that the Board may deny an application for certification as behavior specialist upon those grounds for disciplinary action. Also, section 635.2(g)(3) of the Insurance Law prohibits the Board from certifying an applicant who has been convicted of a drug felony unless it has been at least 10 years, the applicant has demonstrated significant progress in personal rehabilitation since the conviction that certification should not be expected to create a substantial risk of harm to the health and safety of patients or the public or a substantial risk of further criminal violations, and the applicant otherwise satisfies the requirements for certification. Accordingly, proposed § 18.523(d) provides that the Board will not grant certification unless these requirements have been met.

The five criteria for certification as a behavior specialist set forth in section 635.2(g)(2) of the Insurance Law are: good moral character; receipt of a master’s or higher degree in school, clinical or counseling psychology, special education, social work, speech therapy, occupational therapy or another related field; at least 1 year of experience involving functional behavior assessments, including development and implementation of behavioral supports or treatment plans; at least 1,000 hours in direct clinical experience with individuals with behavioral challenges or at least 1,000 hours experience in a related field with individuals with autism spectrum disorders; and completion of relevant training programs, including professional ethics, autism-specific training, assessments training, instructional strategies and best practices, crisis intervention, comorbidity and medications, family collaboration and addressing specific skill deficits training. Accordingly, proposed § 18.524 recites these criteria (other than good moral character) in subsections (a)—(d).

Because all licenses and certifications issued by the Board within the Bureau of Professional and Occupational Affairs expire after 2 years and must be renewed biennially, proposed § 18.525 (relating to renewal of certification as behavior specialist) addresses renewal of certification as behavior specialist. Proposed § 18.525(a) provides that all behavior specialist certifications expire December 31 of each even-numbered year, the expiration date for all other licenses and certifications issued by the Board. Proposed § 18.525(b) provides that the Board will

forward to the certificateholder's last known address on file with the Board those biennial renewal forms and other forms and literature that are to be distributed to certificateholders. In addition to paper applications for renewal, the Board now permits online renewal for its existing Board-regulated practitioners. Under proposed § 18.525(c), a certificateholder must renew the certification in the manner provided by the Board, that is either online or by paper application, and pay the required renewal fee by the expiration date to renew the certification. As part of that renewal process, proposed § 18.525(d) requires the certificateholder to fully answer all questions and pay the required fee.

Proposed § 18.526 (relating to inactive status of certification as behavior specialist) addresses inactive status of behavior specialist certification. Proposed § 18.526(a) provides that certification may become inactive either by the certificateholder's request or by expiration at the end of the biennial renewal period. To minimize the opportunity or consequence of a certificate being incorrectly placed on inactive status at what appears to be the request of the certificateholder, proposed § 18.526(a)(1) provides that the Board will provide written notice to the certificateholder. Proposed § 18.526(c) provides the general requirement for reactivation of an inactive certification as behavior specialist that the certificate holder must apply on forms supplied by the Board, answer all questions fully, and pay the required fee. Throughout the Bureau of Professional and Occupational Affairs, whenever a license has expired and has not yet been reactivated, the holder may not continue to practice until the license is reactivated prospectively. This rulemaking breaks with that practice for behavior specialists. The purpose of amending the Insurance Law to provide for behavior specialists was to increase the availability of diagnostic assessment and treatment of autism spectrum disorders by providing that insurance companies must pay for those services when provided by licensed or certified persons. The Insurance Law has no prohibition on practice as a behavior specialist by one not certified by the Board. Accordingly, proposed § 18.526(b) provides only that a behavior specialist whose certificate is inactive is not considered to be a certificate holder unless the certificate has been reactivated retroactively. The obvious consequence is that an insurance company need not reimburse the behavior specialist for services provided during the period that the certificate was inactive. However, because the purpose is to increase the availability of services by allowing behavior specialists to be paid by insurance companies, the Board proposes to permit a behavior specialist to retroactively reactivate certification as provided in proposed § 18.526(d). Under that proposed section, in addition to the requirements of subsection (c), the behavior specialist must pay the renewal fee for past renewal periods and a late fee of \$5 per month. This late fee is the standard late renewal fee of section 225 of the Bureau of Professional and Occupational Affairs Fee Act (63 P.S. § 1401-225).

Finally, proposed § 18.527 (relating to disciplinary action for certified behavior specialist) addresses disciplinary action. Section 635.2(g)(1) of the Insurance Law provides that a certified behavior specialist is subject to all disciplinary provisions applicable to medical doctors under the act. Section 41 of the act (63 P.S. § 422.41) authorizes the Board to take disciplinary action against a medical doctor based upon any of a list of grounds, including unprofessional conduct. In § 16.61 (relating to unprofessional conduct), the Board has previously set forth examples of "unprofessional conduct" for which disciplinary action may be taken against a medical doctor.

Accordingly, proposed § 18.527 provides that the Board may impose any corrective action of section 42 of the act (63 P.S. § 422.42) upon a certified behavior specialist who has committed any act for which the Board would be authorized to take disciplinary action against a medical doctor under section 41 of the act.

*Fiscal Impact and Paperwork Requirements*

The proposed amendments will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The amendments will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

*Sunset Date*

The Board continuously monitors the effectiveness of its regulations. Therefore, no sunset date has been assigned.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 2, 2010, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final-form publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

*Public Comment*

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Regulatory Unit Counsel, Department of State, P. O. Box 2649, Harrisburg, PA 17105-2649, or e-mail st-medicine@state.pa.us, within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference No. 16A-4929 (behavior specialist), when submitting comments.

OLLICE BATES, Jr., M.D.,  
*Chairperson*

**Fiscal Note:** 16A-4929. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 16. STATE BOARD OF MEDICINE— GENERAL PROVISIONS**

**Subchapter B. GENERAL LICENSE, CERTIFICATION AND REGISTRATION PROVISIONS**

**§ 16.11. Licenses, certificates and registrations.**

\* \* \* \* \*

(b) The following nonmedical doctor licenses and certificates are issued by the Board:

\* \* \* \* \*

**(6) Certification as behavior specialist.**

(c) The following registrations are issued by the Board:

\* \* \* \* \*

**(12) Biennial registration of a behavior specialist certification.**

**§ 16.13. Licensure, certification, examination and registration fees.**

\* \* \* \* \*

**(k) Behavior Specialist Certification:**

<b>Application for certification as behavior specialist.....</b>	<b>\$ 70</b>
<b>Biennial renewal of behavior specialist certification.....</b>	<b>\$ 75</b>
<b>Application for reactivation of behavior specialist certification.....</b>	<b>\$ 70</b>

**CHAPTER 18. STATE BOARD OF MEDICINE—PRACTITIONERS OTHER THAN MEDICAL DOCTORS**

*(Editor’s Note: The following subchapter is new and has been printed in regular type to enhance readability.)*

**Subchapter I. BEHAVIOR SPECIALISTS**

**§ 18.521. Purpose.**

This subchapter implements section 635.2(g) of The Insurance Company Law of 1921 (40 P. S. § 764h(g)), as amended by section 3 of the act of July 9, 2008 (P. L. 885, No. 62) to provide for the certification of behavior specialists.

**§ 18.522. Definitions.**

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

*Applied behavioral analysis*—As defined in section 635.2(f)(1) of The Insurance Company Law of 1921 (40 P. S. § 764h(f)(1)), the design, implementation and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior or to prevent loss of attained skill or function, including the use of direct observation, measurement and functional analysis of the relations between environment and behavior.

*Autism spectrum disorders*—As defined in section 635.2(f)(3) of The Insurance Company Law of 1921, any of the pervasive developmental disorders defined by the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), or its successor, including autistic disorder, Asperger’s disorder and pervasive developmental disorder not otherwise specified.

*Behavior specialist*—As defined in section 635.2(f)(4) of The Insurance Company Law of 1921, an individual who designs, implements or evaluates a behavior modification intervention component of a treatment plan, including those based on applied behavioral analysis, to produce socially significant improvements in human behavior or to prevent loss of attained skill or function, through skill acquisition and the reduction of problematic behavior.

*Diagnostic assessment of autism spectrum disorders*—As defined in section 635.2(f)(5) of The Insurance Company Law of 1921, medically necessary assessments,

evaluations or tests performed by a licensed physician, licensed physician assistant, licensed psychologist or certified registered nurse practitioner to diagnose whether an individual has an autism spectrum disorder.

**§ 18.523. Application for certification as behavior specialist.**

(a) An applicant for certification as a behavior specialist shall submit, on forms supplied by the Board, a completed application, including all necessary supporting documents, for certification as a behavior specialist and pay the fee in § 16.13(k) (relating to licensure, certification, examination and registration fees) for application for certification as behavior specialist.

(b) Except as otherwise provided in subsections (c) and (d), the Board will certify as a behavior specialist an applicant who demonstrates that the applicant satisfies the requirements of section 635.2(g)(2) of The Insurance Company Act of 1921 (40 P. S. § 764h(g)(2)) for registration as a behavior specialist, as provided in § 18.524 (relating to criteria for certification as behavior specialist), and otherwise complies with this subchapter.

(c) The Board may deny an application for certification as a behavior specialist upon the grounds for disciplinary action as set forth in § 18.527 (relating to disciplinary action for certified behavior specialist).

(d) The Board will not grant an application for certification as a behavior specialist of an applicant who has been convicted of a felony offense as provided in section 635.2(g)(3) of The Insurance Company Act of 1921, unless at least 10 years have elapsed from the date of conviction and the applicant has satisfactorily demonstrated to the Board that the applicant has made significant progress in personal rehabilitation since the conviction that licensure of the applicant should not be expected to create a substantial risk of harm to the health and safety of the applicant’s patients or the public or a substantial risk of further criminal violations.

**§ 18.524. Criteria for certification as behavior specialist.**

(a) As required under section 635.2(g)(2)(ii) of The Insurance Company Act of 1921 (40 P. S. § 764h(g)(2)(ii)), an applicant for certification as a behavior specialist shall have received a master’s or higher degree from a Board-approved, accredited college or university, including a major course of study in school, clinical or counseling psychology, special education, social work, speech therapy, occupational therapy or another related field.

(b) As required under section 635.2(g)(2)(iii) of The Insurance Company Act of 1921, an applicant for certification as a behavior specialist shall have at least 1 year of experience involving functional behavior assessments, including the development and implementation of behavioral supports or treatment plans.

(c) As required under section 635.2(g)(2)(iv) of The Insurance Company Act of 1921, an applicant for certification as a behavior specialist shall have completed at least 1,000 hours in direct clinical experience with individuals with behavioral challenges or at least 1,000 hours of experience in a related field with individuals with autism spectrum disorders.

(d) As required under section 635.2(g)(2)(v) of The Insurance Company Act of 1921, an applicant for certification as a behavior specialist shall have completed relevant training programs, including professional ethics, autism-specific training, assessments training, instructional strategies and best practices, crisis intervention,



comorbidity and medications, family collaboration, and addressing specific skill deficits training.

**§ 18.525. Renewal of certification as behavior specialist.**

(a) A certification issued under this subchapter expires on December 31 of the even-numbered year unless renewed for the next biennium.

(b) Biennial renewal forms and other forms and literature to be distributed by the Board will be forwarded to the last address on file with the Board.

(c) To retain certification as a behavior specialist, the certificateholder shall renew certification in the manner prescribed by the Board and pay the required biennial renewal fee specified in § 16.13(k) (relating to licensure, certification, examination and registration fees) prior to the expiration of the current biennium.

(d) To renew certification as a behavior specialist, the certificateholder shall apply on forms supplied by the Board, fully answer all questions, and pay the current renewal fee specified in § 16.13(k).

**§ 18.526. Inactive status of certification as behavior specialist.**

(a) Certification as a behavior specialist will become inactive upon either of the following:

(1) The certificateholder in writing affirmatively requests the Board to place certification on inactive status. Written confirmation of inactive status will be forwarded to the certificate holder.

(2) The certificateholder fails to renew the certificate by the expiration of the renewal period.

(b) Unless reactivated retroactively as provided for in this section, a person previously certified as a behavior

specialist is not considered to be a certificateholder during any period when the certification was inactive.

(c) To reactivate an inactive certification, the certificateholder shall apply on forms supplied by the Board, answer all questions fully, and pay the current renewal fee, if not previously paid, and the reactivation application fee specified in § 16.13(k) (relating to licensure, certification, examination and registration fees).

(d) A certificateholder may reactivate an expired certification retroactive to the beginning of the current or a previous biennial renewal period by complying with subsection (c) and paying the renewal fee for each previous biennial renewal period and a late fee of \$5 per month for each month or part of month that the certificate was expired subsequent to the retroactive effective date of reactivation.

**§ 18.527. Disciplinary action for certified behavior specialist.**

Under section 635.2(g)(1) of The Insurance Company Act of 1921 (40 P. S. § 764h(g)(1)), a certificateholder is subject to all disciplinary provisions applicable to medical doctors as set forth in the act. Following a final determination subject to the right of notice, hearing and adjudication and the right of appeal therefrom in accordance with 2 Pa.C.S. (relating to administrative law and procedure), the Board may impose any of the corrective actions of section 42 of the act (63 P. S. § 422.42) upon a certified behavior specialist who commits any act for which the Board would be authorized to take disciplinary action against a medical doctor under section 41 of the act (63 P. S. § 422.41), including unprofessional or immoral conduct as defined in § 16.61 (relating to unprofessional and immoral conduct).

[Pa.B. Doc. No. 10-278. Filed for public inspection February 12, 2010, 9:00 a.m.]