Regulatory Analysis Form

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INDEPENDENT REGULATORY REVIEW COMMISSION

(1) Agency

Environmental Protection

(2) I.D. Number (Governor's Office Use)

7-323

Mizner

IRRC Number: 1876

(3) Short Title

Wastewater Management

(4) PA Code Cite

25 PA Code Chapter 91
25 PA Code Chapter 97
25 PA Code Chapter 101

(5) Agency Contacts & Telephone Numbers

Primary Contact: Sharon Freeman, 717-783-1303

Secondary Contact: Barbara Sexton, 717-783-1303

(6) Type of Rulemaking (Check One)

____Proposed Rulemaking
__√__Final Order Adopting Regulation
____Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

__√__ No
____ Yes: By the Attorney General
____ Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

These regulations relate to the administration and enforcement of The Clean Streams Law including pollution prevention, compliance conferences, basin-wide sewage facilities compliance, the permitting process for Water Quality Management Permits including newly created general permits and management of other wastes including wells other than oil and gas, underground injection wells, wastewater impoundments and agricultural wastes including Concentrated Animal Feeding Operation (CAFO) manure.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The statutory authority for these changes is the Clean Streams Law, the Act of June 22, 1937 (P.L. 1987, No. 394) (35 P.S. §691.5)

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The regulations are based on and implement the provisions of the Clean Streams Law. The final amendments are not mandated by any federal or state law or court order or federal regulation.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The Department initiated the Regulatory Basics Initiative on August 4, 1995 which established criteria to be used to determine if regulatory amendments were required in all Department programs. Chapters 91, 97, and 101 were identified as having some provisions which were either non-supportive of a pollution prevention approach, imposing disproportionate economic costs, discouraging emerging technologies, more restrictive than federal regulations without a compelling articulable Pennsylvania interest or were required by State laws, or were obsolete. The final regulatory amendments correct these identified problems. In addition, the Department recently published a final Concentrated Animal Feeding Operation Strategy, the implementation of which required regulatory amendments.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Non-regulation of sewage would result in the risk of public health hazards due to the potential exposure to untreated or partially treated wastewater containing pathogens. Non-regulation would also impose environmental risks associated with the degradation of water quality in surface and ground water. Non-regulation of CAFO manure storage facilities would pose environmental risks associated with the overflow or breaching of manure storage facilities.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The regulated community - including about 4,000 permittees of wastewater treatment facilities, consultants and Pennsylvania industries (builders, commercial enterprises, etc.) should benefit from the pollution prevention provision, experimental system provisions and compliance provisions. These provisions provide new options to these entities in the area of available system alternatives, attaining compliance with permitting requirements and pursuing pollution prevention as an option to systems expansion or upgrade. The new general permit process will benefit applicants for certain Water Quality Management permits by providing an abbreviated permitting process. The Regulatory Basics Initiative documented the total cost saving for the regulated community as $2,812,500.

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(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

There will be a financial impact on applicants for Water Quality Management Part II permits for new or modified CAFOs over 1,000 Animal Equivalent Units (AEUs). This classification of applicant must provide an additional one foot of freeboard for manure storage facilities and must apply for a permit. This year there has been five applicants.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Compliance with this amended regulation will be required by the same persons, groups or entities as is required by the existing regulations. Applicants for Water Quality Management Part II permits, coverage under a general Water Quality Management permit and current permittees will continue to be impacted by the regulations. In addition, individuals involved with wastewater impoundments, wells other than oil and gas wells, underground injection wells and agricultural activities will also continue to be impacted by these regulations as they were previously. CAFOs with over 1,000 AEUs are more closely regulated under these regulations than previous regulations.

(16) Describe the communications with and inputs from the public in the development and drafting of the regulation. List the persons and/or groups who where involved, if applicable.

The Department requested input from general public through the Regulatory Basics Initiative. The Water Resources Advisory Committee also reviewed and provided comments on the rulemaking. The Agricultural Advisory Board, Nutrient Management Subcommittee and an adhoc CAFO Workgroup helped DEP develop the CAFO strategy that formed the basis for the final-form amendments to Chapter 91 related to manure storage facilities and land application of manure.

(17) Provide a specific estimate of the cost and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Applicants qualifying for coverage under a specific class of general permit will experience a 25 percent cost saving because of reduced paperwork requirements and lower consulting fees. Wastewater treatment facilities in non-compliance may experience cost savings of $2,812,500 associated with the use of pollution prevention alternatives in lieu of mandatory facility expansion or upgrade. The savings for these applicants who pursue innovative technologies could be as high as 30 percent depending on the type of system selected. New or modified CAFOs with greater than 1,000 AEUs may experience an additional cost to construct manure storage facilities with two-feet free of freeboard of about $15,000 per facility. An additional fee of $500 would be assessed to these facilities as a permit application fee.

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(18) Provide a specific estimate of the cost and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Local governments managing facilities will experience the percentage of savings described in item 17.

(19) Provide a specific estimate of the cost and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

There will be no new savings to state government associated with the implementation of these proposed amendments. There will be a cost associated with the processing and review of Water Quality Management Part II permit applications for new or modified manure storage facilities serving CAFOs greater than 1,000 animal equivalent units. There is no way to estimate this cost because the number of potential applicants is not known.

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(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:						
Regulated Community	$2,812,500	$2,812,500	$2,812,500	$2,812,500	$2,812,500	$2,812,500
Local Government						
State Governments						
Total Savings						
COSTS:						
Regulated Community	$77,500	$77,500	$77,500	$77,500	$77,500	$77,500
Local Government						
State Governments						
Total Cost						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Governments						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

The Regulatory Basics Initiatives estimated the cost savings which would result from the proposed compliance options for treatment facilities and elimination of detailed plans. There are about 75 orders issued to treatment plant operators each year. It is estimated that about one-fourth of these facilities will choose to pursue pollution prevention as an option to the preparation of detailed plans. The cost associated for each of these facilities would be about $15,000. The cost savings for all the facilities choosing pollution prevention would be $2,812,500. The regulated community proposing manure storage facilities to serve CAFOs greater than 1,000 AEUs will experience a cost increase of $15,500 per facility. The $15,000 is an estimate that was provided by an industry representative as the additional cost of excavation and liners for additional one-foot of freeboard required by the new regulations. The $500 is the permit review fee charged by the Department. There have only been five proposals this year for this type of CAFO. The actual number of applicants per year is unknown.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
The Department	does not	track separate	program costs	for this program.

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and cost.

The additional cost of $15,500 per manure storage facility will result in additional one-foot of freeboard in the facility for large CAFOs. This additional freeboard will provide a safeguard to the potential for these facilities to overflow or breach due to overfilling during times of the year when manure can't be safely applied to farmland.

(22) Describe the nonregulatory alternative considered and the cost associated with those alternatives. Provide the reasons for their dismissal.

None considered. See response to item (12).

(23) Describe alternative regulatory schemes considered and the cost associated with those schemes. Provide the reasons for their dismissal.

None considered. See response to item (12).

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Section 91.33 (relating to incidence causing or threatening pollution) is more stringent than federal requirements because it requires incident reporting "immediately", while federal regulations as 40 CFR 122.41 allowed 24 hours. This more stringent requirement has been in place for years as Section 101.2 of Chapter 101 (relating to special water pollution control regulations) and has prevented hazards to downstream drinking water supplies and other water users and has prevented property damage.

The freeboard requirement in Section 91.36(a) is one-foot greater than the Natural Resources Conservation Service Standards for manure storage facilities. This additional freeboard is intended to prevent overflow of manure storage facilities into Waters of the Commonwealth.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The proposed regulations are comparable to other state regulation. The amended regulation will not put Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

Yes. These proposed regulations are closely associated with Chapter 92 (relating to the National Pollutant Discharge Elimination System) and Chapter 95 (relating to wastewater treatment requirements) which are also being amended as a result of the Regulatory Basics Initiative. The regulations are also associated with Chapter 94 (relating to Municipal Wasteload Management) which have also been revised under the Regulatory Basics Initiative.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

A public hearing was held on May 25, 1999 to address the Advance Notice of Final Rulemaking. There was no testimony presented at this hearing.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The proposed rulemaking will reduce paperwork requirements related to permit applications where the applicant chooses to pursue a general permit. A new permit has been developed for CAFOs over 1,000 AEUs proposing manure storage facilities. A copy of the permit document is attached as required.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

Small businesses and individuals may benefit from the general permit process by the cost savings associated with a reduced amount of paperwork and consulting fees.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The amendments will be effective upon publication as final rulemaking.

(31) Provide the schedule for continual review of the regulation.

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

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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INDEPENDENT REGULATORY
REVIEW COMMISSION

#1876

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Copy below is hereby approved as to form and legality. Attorney General (DEPUTY ATTORNEY GENERAL) DATE OF APPROVAL Check if applicable Copy not approved. Objections attached.	Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by: DEPARTMENT OF ENVIRONMENTAL PROTECTION ENVIRONMENTAL QUALITY BOARD (AGENCY) DOCUMENT/FISCAL NOTE NO. 7-323 DATE OF ADOPTION: BY: TITLE: JAMES M. SEIF, CHAIRMAN (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)	Copy below is hereby approved as to form and legality. Executive or Independent Agencies. BY: 9/21/99 DATE OF APPROVAL (Deputy General Counsel) ~~(Chief Counsel, Independent Agency)~~ (Strike inapplicable title) ☐ Check if applicable. No Attorney General approval or objection within 30 days after submission.

ORDER ADOPTING REGULATIONS

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

Wastewater Management

25 PA Code Chapters 91, 97 & 101

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
25 *Pa. Code* Chapters 91, 97 and 101
General Provisions

Order

The Environmental Quality Board (Board), by this order, amends the rules and regulations of the Department of Environmental Protection by amending 25 *Pa. Code* Chapter 91 (relating to general provisions), deleting portions of Chapter 97 (relating to industrial wastes) and deleting Chapter 101 (relating to special water pollution regulations) entirely. As part of the proposal and an Advance Notice of Final Rulemaking (more fully described below), certain provisions of Chapters 97 and 101 were proposed to be transferred to Chapter 91. A notice of proposed rulemaking regarding these amendments was published in the *Pennsylvania Bulletin* on August 23, 1997 (27 *Pa. B.* 4343) and an Advance Notice of Final Rulemaking was published in the *Pennsylvania Bulletin* on April 24, 1999 (29 *Pa. B.* 2145).

This Order was adopted by the Board at its meeting of September 21, 1999.

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 Milt Lauch, Chief, Division of Wastewater Management, P.O. Box 8465, Rachel Carson State Office Building, Harrisburg, PA 17105-8465, (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, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This final rulemaking is available electronically through the Department's Web site (http://www.dep.state.pa.us).

C. Statutory Authority

The final rulemaking is being made under the authority of Section 5 of the Clean Streams Law (35 P.S. §691.5), which provides for the promulgation of rules and regulations for the implementation of the Clean Streams Law, and Section 1920-A of the Administrative Code of 1929 (71 P.S. §510.20), which provides for the promulgation of rules and regulations of the Department of Environmental Protection (the Department) by the Board.

D. Background and Summary

At a meeting held on June 17, 1997, the Board adopted a proposal to amend Chapter 91, delete portions of Chapter 97 and to delete Chapter 101. As part of that regulatory proposal, certain provisions of Chapters 97 and 101 were proposed to be transferred to Chapter 91.

The purpose of the proposed amendments was to support the Department's pollution prevention strategies, make the application of new green technologies easier and eliminate obsolete regulations. The changes outlined in the proposed rulemaking were designed to assist industries and individuals proposing new or innovative ways to prevent pollution through modifications to waste streams or wastewater processes and those proposing new technologies to treat wastewater by eliminating regulatory barriers to these activities. The elimination of obsolete regulations simplifies and clarifies the existing regulations for those applying for permits for wastewater treatment facilities. The consolidation of Chapter 101 into Chapter 91 and the transfer of several sections of Chapter 97 to Chapter 91 provide a single source of regulations regarding related wastewater issues. A notice of proposed rulemaking regarding these amendments was published in the *Pennsylvania Bulletin* on August 23, 1997 (27 *Pa. B.* 4343).

Subsequent to the publication of the notice of proposed rulemaking, the Department undertook an initiative to control the water quality impacts of manure from agricultural operations mandated by the concentrated animal feeding operation (CAFO) requirements of the federal Clean Water Act. The Department convened a stakeholder group consisting of representatives from various groups to assist in developing a CAFO strategy.

On June 16, 1998, a notice was published in the *Pennsylvania Bulletin* regarding the development of a proposed strategy and related permit documents to regulate CAFOs within the Commonwealth. *See*, 28 *Pa. B.* 2728. Following publication of the notice of the proposed CAFO strategy, the Department held four public meetings/hearings throughout the Commonwealth. Over 125 people

attended the public meetings/hearings. In addition, the Department received written comments from over 100 commentators on the proposed CAFO strategy. In response to the comments, the Department made a number of revisions to the proposed CAFO strategy. These revisions were outlined, further revised and adopted at a meeting of the stakeholders held on February 4, 1999. A notice of the availability of the "Final Strategy for Meeting Federal Requirements for Controlling the Water Quality Impacts of Concentrated Animal Feeding Operations" (the CAFO Strategy) was published in the *Pennsylvania Bulletin* on March 13, 1999 (29 *Pa. B.* 1439).

The intent of the CAFO Strategy "is to ensure that all concentrated animal feeding operations are constructed and managed in an environmentally sound manner, while ensuring agricultural producers an opportunity to pursue agricultural production which is profitable, economically feasible and based on sound technology and practical production techniques." (*See*, CAFO Strategy p. 1).

With respect to the construction and operation of animal manure storage facilities, the CAFO Strategy outlines a requirement for a Part II Water Quality Management Permit for such facilities where a CAFO of more than 1,000 animal equivalent units is proposed. Animal equivalent units are calculated in accordance with the provisions of the Nutrient Management Act (3 P.S. §§1701-1718) and the regulations promulgated thereto at 25 *Pa. Code* Chapter 83. It was specifically acknowledged in the CAFO Strategy that some elements of the strategy would ". . . . require new regulations to create Water Quality Management Part II permit . . . . requirements."

Accordingly, the Department prepared an Advance Notice of Final Rulemaking (ANFR) to provide the public an opportunity to comment on revisions to the proposed rulemaking necessary to implement the CAFO Strategy, particularly with respect to wastewater impoundments at agricultural operations. The ANFR also invited comment on certain proposed pollution prevention measures and other changes resulting from comments and suggestions submitted during the public comment period for the proposed amendments to Chapter 91. Notice of the ANFR was published in the *Pennsylvania Bulletin* on April 24, 1999 (29 *Pa. B.* 2145).

A draft of the ANFR was reviewed and approved by the Water Resources Advisory Committee at a meeting held on May 12, 1999. A draft of the ANFR was also reviewed by the Agricultural Advisory Board at a meeting held on April 21, 1999. Comments made by these groups at these and other meetings resulted in several amendments which were incorporated into the final rule.

E. Summary of Comments and Responses on the Proposed Rulemaking and the Advance Notice of Final Rulemaking

Section 91.1 (relating to definitions).

This section of the proposal outlined new or revised definitions related to the Department's wastewater program intended to clarify previously undefined terms used in Chapter 91.

The Board received a number of comments on the proposed definitions of "industrial waste" and "sewage". The commentators believe that the proposed definitions are inconsistent with the terms as defined in the Clean Streams Law. To avoid confusion, terms defined in the Clean Streams Law have been deleted in the final rulemaking. Thus, the definitions of "industrial waste", "person", "sewage", and "waters of this Commonwealth" have been deleted.

As noted in Section D above, the ANFR outlined proposed amendments related to wastewater impoundments at agricultural operations and pollution prevention measures in certain sections of the regulations. Appropriate definitions are being added to complement those amendments. Thus, the terms "agricultural operations", "animal equivalent unit", and "manure storage facility" are added. These definitions are based on definitions of those terms as defined in the Nutrient Management Act (3 P.S. §1701 *et seq.*) and the regulations promulgated thereto. In addition, definitions of the terms "pollution prevention" and "pollution prevention measures" are added.

The proposal included a definition of NPDES Permit. Two commentators suggested that the proposed definition was unclear because it did not explain what the term "requirements" as used in the definition connotes. Since the phrase NPDES Permit is not used elsewhere in the final rule, the definition has been deleted in the final rule.

The ANFR outlined requirements applicable to wastewater impoundments at agricultural operations. Section 91.35 outlines certain requirements related to freeboard. One commentator suggested that the term be defined. This term is defined in the "Pennsylvania Technical Guide" published by the Natural Resources Conservation Service of the U.S. Department of Agriculture. Since the term is defined therein, the Board does not believe it is necessary to define the term in this regulation.

The proposed definition of "stormwater" defined that term as "stormwater runoff, snow melt runoff and surface runoff and drainage." It was suggested that this definition was somewhat circuitous and not very useful. The definition has been revised to read "Runoff from precipitation, snow melt runoff, and surface runoff and drainage."

The proposal contained a definition of "wastewater impoundment." The Board received comments on this definition which indicated that the definition describes what an impoundment is, but does not address the wastewater component of the term being defined. The definition has been clarified by adding a phrase at the end of the definition to indicate that it applies to a depression, excavation or facility "used to store wastewater including sewage, animal waste or industrial waste."

The definition of "water quality management permit" has been slightly modified in response to a concern that the location of a reference to "Part II permit" in the proposal created an ambiguity. The phrase "or requirements" was also deleted to eliminate uncertainty as to its meaning.

Section 91.6 (relating to pollution prevention).

The proposal noted that the language of existing Section 97.14 (relating to measures to be used) was proposed to be moved to this section with slight modification. The ANFR indicated language of this section was proposed to be revised to include a tie-in to the definitions of "pollution prevention" and "pollution prevention measures" outlined in the ANFR. The ANFR also outlined a hierachy of pollution prevention measures for environmental management to be considered by a permittee. In addition, the identity of persons doing the pollution prevention such as the permittee or the industrial discharger to a POTW would be indicated. The practice involving "segregation of strong wastes" where the strong waste is then treated is not true pollution prevention. If, however, the strong waste is separated for reuse within a process, then it is pollution prevention. Finally, the ANFR indicated that the last part of the existing section, which provides that the ". . . . term 'practical' is not limited to that which is profitable or economical" might actually hinder pollution prevention efforts and would, therefore, be deleted.

The final rule has been revised to provide that the Department will encourage pollution prevention by providing assistance to permittees and users of the permittee's facilities in the consideration of pollution prevention measures. The Department will encourage the consideration of the following measures, in descending order of preference, for the environmental management of wastes: reuse, recycling, treatment and disposal.

The Department received comments regarding other pollution prevention provisions in the ANFR. One commentator suggested that the Department provide

some basis for the statement in the ANFR that the sentence referring to the term "practical" would actually hinder pollution prevention efforts. The Department believes that the sentence limits the scope of considerations regarding pollution prevention. There are pollution prevention remedies that are implemented through modified housekeeping practices that may result in little or no economic consequences, but have positive environmental ones.

One commentator noted that the ANFR added language listing the preferred order in which measures for waste management should be considered. The commentator further stated the new language also states that "pollution prevention measures used currently or proposed shall be encouraged and acknowledged in the water quality management permit applications." It is asserted the new provisions are not written in regulatory language and would be more appropriately placed in a guidance document or policy statement. One commentator suggested that the use of the words "considered" and "encouraged" lack force and, therefore, is a "waste of words." The commentator believes the language should be rewritten to give it force.

The Department does not agree with these comments. As noted previously, the language has been revised to indicate the Department will be encouraging and providing assistance in the consideration of pollution prevention measures. It is the Department's policy to achieve integration of pollution prevention and resource recovery practices through a voluntary effort and not by mandating controls through regulatory requirements. The Department believes that by approaching pollution prevention in this manner, the regulated community will strive to go beyond compliance, thereby resulting in greater benefit to the public and the environment. The provision providing that information regarding pollution prevention measures is to be submitted with the Water Quality Management permit application has been deleted.

Section 91.11 (relating to compliance conferences).

This section provides, in part, that the Department will provide advice and suggestions to those required to abate pollution of the waters of the Commonwealth. Among other things, the advice may include measures for the treatment or prevention of pollution. The ANFR clarified this section to provide a tie-in to the definition of "pollution prevention measures". Thus, this portion of the regulation provides that the Department will provide advice regarding possible means for abatement of the pollution in question through pollution prevention measures or treating the waste if prevention is not possible.

Section 91.15 (relating to basin-wide compliance).

This section, as proposed by the Environmental Quality Board, provided that the Department would require sources of pollutants in a basin, watershed or surface water to concurrently comply with the standards set forth in Chapters 93

and 95 as well as the Statement of Policy outlined in Chapter 16. Some commentators did not believe the reference to the Statement of Policy was clear enough to indicate that the Statement of Policy is non-binding. The ANFR added language making it clear that Chapter 16 relates to a Statement of Policy and not a regulation. That language has been retained in the final rule in slightly modified form. Statements of Policy are by their very nature non-binding.

Section 91.27 (relating to general permits).

The proposal outlined requirements applicable to Water Quality Management General Permits. One commentator provided extensive comments challenging the legal and policy basis for the issuance of such permits. The commentator asserted that the Clean Streams Law provides no authority for the issuance of Water Quality Management General Permits; unlike certain other laws administered by the Department which contain specific authority for the issuance of general permits, the Clean Streams Law has no such provision; the general permit provisions do not provide adequate opportunity for public review and participation; the provisions are lacking in detail as to the terms and conditions of the permit; the review of notices of intent is inadequate; and the compliance history review provisions are allegedly inadequate. The commentator's comments are outlined in more detail in the Comment and Response Document prepared for this rulemaking and are available upon request.

The Board and the Department believe the Clean Streams Law provides authority for the issuance of Water Quality Management General Permits. Section 5(b)(1) of the Clean Streams Law, 35 P.S. §691.5(b)(1), provides authority for the Board to "formulate, adopt, promulgate and repeal such rules and regulations . . . as are necessary to implement the provisions of [the Clean Streams Law]." This authority is sufficiently broad to authorize the issuance of general permits. The NPDES general permit program was established under the authority of this section of the Clean Streams Law.

With respect to opportunity for public comment, Section 91.27(b)(1) clearly requires public notice and an opportunity to comment. That section provides that the Department will publish a notice in the *Pennsylvania Bulletin* of its intent to issue or amend a general permit. Interested persons are given an opportunity to provide written comments on the proposed general permit.

Insofar as the terms and conditions of the permit are concerned, they must be activity specific. It is not possible to outline the terms and conditions applicable to every Water Quality Management general permit. In any event, the public will be provided an opportunity to give comments and suggestions on any general permit proposed to be issued by the Department.

The provisions regarding commencement of coverage in subsection (b)(3) have been substantially revised. The proposal outlined four scenarios for the commencement of coverage under a general permit. Subparagraphs (ii) and (iv), which would have authorized commencement of coverage on a date specified in the general permit or upon receipt of a notice of intent by the Department, have been deleted in the final rule. Subparagraph (i) of the proposal would have provided that coverage could begin after a waiting period specified in the general permit. This language has been revised to provide that coverage could begin "after a waiting period following receipt of the notice of intent by the Department as specified in the general permit." The language of proposed subparagraph (iii), which provides that coverage could begin upon receipt of notification of coverage by the Department is being retained in the final rule, but renumbered as subparagraph (ii).

Subsection (b)(4) of the proposal was entitled "Coverage Under a General Permit." One commentator suggested that the title be clarified to make it clear that the subsection applies to notices of intent for coverage under a general permit. This suggestion has been incorporated into the final rule. The commentator also questioned why there was qualifying language at the end of the subsection which appeared to provide an exception for notices of intent since the qualification related to criteria for denial of coverage. The qualifying language has been deleted from the final rule.

The proposal also indicated the Department would review the information provided in a notice of intent to determine if the wastewater treatment facility qualified under the provisions of the general permit. This language has been revised in the final rule to indicate the Department will review the information for completeness or to determine whether such a facility qualifies under the provisions of the general permit.

Subsection (c) of the proposal provided that coverage under a general permit could be denied if certain conditions were met. Subsection (2) of the proposal provided that coverage under a general permit may be denied if an applicant has not first obtained NPDES permits required by Chapter 92. One commentator suggested that the requirement that an applicant for a general permit "first" obtain an NPDES permit be revised to provide, at a minimum, for concurrent submittal of an NPDES permit application. This suggestion has been incorporated into the regulation by deleting the word "first". In addition, the reference to "NPDES" has been deleted while still retaining the reference to permits required under Chapter 92. Finally, a phrase has been added at the end of the subsection to indicate that this subsection applies when NPDES permits are required. This change is intended to allow the issuance of Water Quality Management general permits where an NPDES permit is not required.

Subsection (c)(4) of the proposal provided that coverage would be denied if an applicant has a "significant history of noncompliance with a prior permit issued by the department." Some commentators questioned the meaning of "significant history of noncompliance." To ensure that the compliance review criterion is consistent with the standard set forth in Section 609(2) of the Clean Streams Law, 35 P.S. §691.609(2), the language has been revised in the final rule to provide that coverage under a general permit may be denied if the applicant "has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a prior permit issued by the department."

It was suggested that publishing notices of applications for general permits in local newspapers and the *Pennsylvania Bulletin* would help to ensure that affected parties are aware of and have the opportunity to comment on a pending general permit. One commentator suggested that the Board explain why it is not in the public interest to require such notice if it chooses not to adopt the recommendation.

The Board does not believe it would be helpful to require publication of all applications for general permits in the *Bulletin* and in local newspapers as suggested by the commentators. To adopt the suggestion made by the commentators would affect all other general permits administered by the Department. Wastewater facilities which would qualify for coverage under a general permit are expected to have little or no impact on the environment. For example, the construction of a small flow treatment facility to repair a malfunctioning on-lot sewage system would improve environmental quality and have no measurable impact on the receiving stream. Imposing additional costs and delays for local newspaper publication would exacerbate an environmental problem which needs to be corrected. However, the Department will publish notices of actions by the Department regarding general permit applications in the *Pennsylvania Bulletin*. Actions of the Department granting or denying coverage under a general permit will be published, thus providing an opportunity to appeal such actions.

Subsection (e) of the proposal was entitled "Termination of general permit". One commentator noted that the subsection describes when the applicability of a general permit to a specific facility is terminated and suggested that the title be changed to reflect this. Accordingly, the title has been revised to read "termination of coverage under a general permit".

Section 91.34 (relating to activities utilizing pollutants).

This section requires persons engaged in an activity involving the use of a pollutant to submit a report or plan to the Department outlining measures to be taken to prevent the pollutant from reaching waters of the Commonwealth upon

notice from the Department. The ANFR clarified this section to suggest that the use of pollution prevention measures is preferable to treatment. The language proposed in the ANFR is clarified in the final rule. Thus, subsection (b) provides that the Department may require a person to submit a report or plan for activities such as the impoundment, production, processing, transportation, storage, use, application or disposal of polluting substances to prevent pollutants from reaching the waters of the Commonwealth. Subsection (b) has also been clarified to provide that the Department will encourage the use of pollution prevention measures in much the same manner as provided in Section 91.6 and outlines a hierarchy for the consideration of the environmental management of wastes consisting of reuse, recycling, treatment and disposal.

One commentator asserted that these provisions are not written in regulatory language and would be more appropriately placed in a policy statement or guidance document. It is the Department's policy to achieve integration of pollution prevention and source recovery practices through a voluntary effort and not by mandating controls through regulatory requirements. It is believed that by approaching pollution prevention in this manner that the regulated community will strive to go beyond compliance, thereby resulting in greater benefit to the public at large and the environment.

Subsection (b) of the proposal also indicated that reports submitted to the Department regarding pollution prevention measures are to include such other information as the Department may require. One commentator asserted that the meaning of "other information the Department may require" is unclear. The quoted language has been deleted in the final rule.

Section 91.35 (relating to wastewater impoundments).

The proposal indicated that the Department's regulations relating to wastewater impoundments, currently found in Section 101.4 (relating to impoundments) would be transferred to this section, with slight editorial changes. Section 101.4 regulates the proper operation, maintenance and use of impoundments used for the production, processing, storage, treatment or disposal of polluting substances.

As indicated elsewhere in this order, subsequent to the publication of the proposed rulemaking, the Department developed a "Final Strategy for Meeting Federal Requirements for Controlling Water Quality Impacts of Concentrated Animal Feeding Operations". It was specifically acknowledged in the CAFO Strategy that some elements of that strategy would require new regulations regarding Water Quality Management Part II permits. In light of the CAFO Strategy and comments concerning the original proposal, the ANFR outlined new requirements applicable to wastewater impoundments at certain agricultural operations concerning freeboards for waste storage ponds and waste structures.

The ANFR outlined a proposed revision to subsection (c) relating to a requirement for a Water Quality Management Permit for an impoundment at a new or expanded manure storage facility at an agricultural operation with more than 1,000 animal equivalent units, regardless of the capacity of the impoundment. This requirement is retained in the final rule.

The language proposed in subsection (d) of the ANFR provided that if an agricultural operation contains less than 1,001 animal equivalent units, the operation is not subject to the reporting or permit requirements of Section 91.35(b) or (c), but must provide either a 12-inch freeboard for all waste storage ponds or a 6-inch freeboard for all waste storage structures. One commentator suggested that imposing the two-foot freeboard requirement outlined in Section 91.35(a) would be an unfair economic burden if there are no problems with overtopping at the facility since the facility was constructed in accordance with standards in effect at the time of construction. In light of this comment, a change has been made to subsection (d) exempting facilities in existence prior to the effective date of the regulations and in compliance with the "Pennsylvania Technical Guide" from the permitting requirements. Thus, subsection (d) is amended to provide that an agricultural operation which contains less than 1,001 animal equivalent units or an agricultural operation in existence prior to the effective date of the final rule and designed in accordance with the "Pennsylvania Technical Guide" is not subject to the requirements of subsections (b) or (c) or the freeboard requirements of subsection (a), but shall provide a 12-inch freeboard for all waste storage ponds and a 6-inch freeboard for all waste storage structures (as defined in the "Pennsylvania Technical Guide") at all times. Proposed subsection (d) is renumbered as subsection (e).

As was the case with the provisions relating to general permits, one commentator provided extensive comments asserting that the proposal to require Water Quality Management permits for some animal manure storage facilities and not others fails to comply with the Clean Streams Law. The commentator also asserts that the proposed permit exemption for impoundments or facilities at agricultural operations with less than 1,001 animal equivalent units is unreasonable because it is asserted the Department requires other types of facilities of similar size to obtain a permit from the Department.

As explained previously, Section 5(b)(1) of the Clean Streams Law provides authority for the Board to "formulate, adopt, promulgate and repeal such rules and regulations . . . as are necessary to implement the provisions of [the Clean Streams Law]." This authority is sufficiently broad to allow promulgation of appropriate rules and regulations of the Department. In addition, a representative of the commentator was a member of, and actively participated in, the stakeholder's group which formulated the CAFO Strategy. That group reached a consensus that a Water Quality Management permit should not be required for smaller agricultural

operations. This consensus was based, in part, on the track record of the agricultural community in meeting the Natural Resources Conservation Service standards and the proper operation of these facilities.

Section 91.36 (relating to pollution control and prevention at agricultural operations).

The proposed amendments provided for the transfer of the regulations relating to pollution control and prevention at agricultural operations currently outlined in Section 101.8 to this section with minor changes. The proposal also proposed language to better identify the relationship between this section and the regulations under Chapter 83 relating to nutrient management.

As noted above, the Department adopted a CAFO Strategy. That strategy contained three elements which necessitated revisions to proposed Section 91.36. These revisions were outlined in the ANFR. First, all manure storage facilities are to be designed in a manner consistent with the publications entitled "Manure Management for Environmental Protection" and the "Pennsylvania Technical Guide" and Section 83.351, where applicable. Section 83.351 outlines minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities. Second, all manure storage facilities are to be designed to prevent any discharges to surface waters during a storm event of less than a 25-year/24-hour storm. Finally, an engineer's certification would be required for all existing facilities with greater than 1,000 animal equivalent units. These requirements are retained in the final rule.

One commentator agreed with the intent of the provision of subsection (a) related to engineer certification of the adequacy of existing manure storage facilities on agricultural operations with over 1,000 animal equivalent units. However, the commentator believes the requirement for consistency with the "Pennsylvania Technical Guide" raises the question of whether the freeboard criteria outlined in the Guide or the 2-foot freeboard requirement in Section 91.35(a) applies. The commentator believes imposing the 2-foot freeboard requirement on existing facilities would be an unfair economic burden. As noted above, Section 91.35(d) has been revised to address this concern. If these facilities are permitted under a CAFO NPDES permit, the permit requirement will assure proper operation and maintenance of the existing facility within the design specifications under which it was constructed.

A number of commentators suggested that the "Manure Management Manual for Environmental Protection" is outdated. Some commentators also suggested that that manual doesn't reflect the more recently updated guidelines in the "Pennsylvania Technical Guide." The comments are valid. The "Manure Management Manual for Environmental Protection" is currently being revised and

updated to, among other things, ensure consistency with the "Pennsylvania Technical Guide." It is anticipated that a draft of the revised manual will be distributed for public comment in the near future and will be placed on the DEP website.

One commentator noted that subsection (a)(2) in the ANFR outlines requirements for a permit in the event a person chooses to design a manure storage facility using criteria other than those described in the "Manure Management Manual for Environmental Protection" or the "Pennsylvania Technical Guide." The commentator noted that the use of the word "or" in that subsection was inconsistent with subsection (a) which refers to design standards meeting the requirements of both documents. The word "and" has been added to replace "or".

One commentator noted that the Manure Management Manual and its supplements is currently undergoing revision to incorporate requirements outlined in the CAFO Strategy. The commentator believes that the field application supplement to the manual indicates that nutrient management is to be based on phosphorous. The commentator believes it appears to conflict with Section 4 of the Pennsylvania Nutrient Management Act which indicates that "there shall be a presumption that nitrogen is the nutrient of primary concern."

The Board does not believe there is a conflict with the Nutrient Management Act. The intent of the Manure Management Manual and the field application supplement is to provide guidance addressing manure related water pollution concerns. These guidelines are designed to assist farmers in their efforts to minimize water pollution which will assist them in meeting the requirements of the Clean Streams Law. It is the Department's intent to make the guidelines in the Manual consistent with the "Pennsylvania Technical Guide", the CAFO Strategy and the requirements of the Nutrient Management Act. The Chapter 91 permit requirements for land application of manure apply only when there is a pollution incident directly related to polluting surface or ground water.

One commentator asserted the Department cannot exclude land application of manure from the permit requirements of the Clean Streams Law for the same reasons the commentator objects to the provisions authorizing general permits and those relating to impoundments. As noted in response to comments raised by the commentator regarding those issues, the Clean Streams Law provides sufficient authority for the Board to exercise some discretion is establishing permitting requirements by regulation. Moreover, the existing permit exemption for the land application of manure, as outlined in existing Section 101.8(b), has been in effect since at least 1990. Finally, land application of manure is regulated under the Nutrient Management Act. The Board does not believe it is necessary to complicate the Nutrient Management Act requirements with a second layer of regulations for farmers.

The ANFR noted that an engineer's certification would be required for all existing facilities with over 1,000 animal equivalent units. The Department sought comment on whether there should be a lower threshold of animal equivalent units for new facilities located in special protection waters to precipitate the requirement for a Water Quality Management permit. The Department received one comment in response to this issue. The commentator did not agree with establishing this threshold because he believed it went beyond the consensus of the CAFO stakeholders' group. The commentator suggested, however, that requiring an engineer's certification of existing manure storage facilities on concentrated animal operations with more than 300 animal equivalent units in special protection waters would be appropriate.

The Board believes the Natural Resources Conservation Service provides appropriate engineering supervision for the siting, design and installation of manure storage facilities at smaller agricultural operations. To require a second certification for existing facilities appears to be duplicative and an unnecessary expense for the agricultural community. Therefore, a lower threshold has not been established in this final rule.

Section 91.37 (relating to private projects).

The language of this section, currently found at Section 91.32, describes the Department's policy in reviewing permit applications in that it will look with disfavor upon private sewerage projects in built-up areas. One commentator suggested that it would be more appropriate to provide regulatory language. Accordingly, regulatory language has been added to subsection (a) providing that the Department will not approve applications for private sewerage projects in built-up areas unless the applicant can demonstrate a compelling public need for the project. Subsection (b) has been clarified to reflect this change. Subsection (b) contained a reference to "proper" private sewerage projects. The reference to "proper" has been deleted in this final rule.

Section 91.41 and 91.42 (relating to underground disposal).

The proposed amendments adopted by the Environmental Quality Board would have deleted the provisions of existing Sections 97.71 through 97.76 relating to underground disposal of wastes such as discharges into mines, abandoned wells, underground horizons and new wells and replace these provisions with a provision at proposed Section 91.32 requiring compliance with 40 CFR Part 144 relating to underground injection control. The Department has not accepted delegation from the Environmental Protection Agency for the administration of the underground injection control program. Subsequent to the proposal the Department received

comments indicating that the Federal underground injection control program might be inadequate to address situations unique to the Commonwealth, particularly with respect to underground disposal to abandoned mines and abandoned wells. Accordingly, it was proposed in the ANFR to reinstate the provisions and requirements of existing Sections 97.71-91.76 in new Sections 91.41 and 91.42 with slight modifications in the text and renumber existing Sections 91.41 and 91.42 as Sections 91.51 and 91.52 respectively. In addition, the ANFR indicated proposed Section 91.32 would be deleted and reserved. This final rulemaking adopts the changes proposed in the ANFR with a slight change indicating that an NPDES permit would be required for underground disposal when applicable, rather than in all cases.

F. Benefits, Costs and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the final regulation. It also requires a statement of the need for, and a description of, forms, reports or other paperwork required as a result of the final rule.

These final regulations are necessary to implement the Department's Regulatory Basics Initiative and the goals of Executive Order 1996-1. The amendments will result in the promotion of pollution prevention strategies, eliminate regulations which inhibit the application of green technologies and eliminate obsolete regulations.

Benefits

Individuals, consultants, sewage treatment plant permittees and the public will benefit from the final amendments without reductions in protection of public health or the environment. The amendments will allow the Department staff more flexibility to recommend innovative remediation measures to attain compliance. In addition, the provisions regarding pollution prevention will provide new options when considering sewage treatment operational alternatives to achieve compliance. The amendments to the provisions of Section 91.25 regarding experimental projects will allow the consideration of new innovative technologies used in other states for use in this Commonwealth. In addition, the incorporation of appropriate provisions of Chapter 101 into Chapter 91 eliminates confusion among the regulated community as to which regulations are applicable. There are about 75 orders issued to treatment plant operators each year. It is estimated that about one-fourth of these facilities will choose to pursue pollution prevention as an option to the preparation of detailed plans. The cost associated for each of these facilities would

be about $15,000. The cost savings for all facilities choosing pollution prevention as outlined in the final rule is estimated to be approximately $2,812,500 per year.

Compliance Costs

Except for the provisions of Section 91.35 relating to wastewater impoundments at agricultural operations, the amendments do not create any substantive new regulatory requirements. Rather, they eliminate unnecessary existing requirements, combine related regulations from several different chapters into one chapter and clarify existing text.

With respect to the provisions relating to wastewater impoundments at agricultural operations with over 1,000 animal equivalent units, it is estimated that the cost of compliance will be $77,500 per year. Agricultural operations proposing manure storage facilities to serve CAFOs greater than 1,000 AEUs will experience a cost increase of $15,500 per facility. The $15,000 is an estimate that was provided by an industry representative as the additional cost of excavation and liners for additional one-foot of freeboard required by the new regulations. The $500 is the permit review fee charged by the Department. There have only been five proposals this year for this type of CAFO. The actual number of applicants per year is unknown.

Compliance Assistance Plan

The Department is developing a compliance assistance plan for Concentrated Animal Feeding Operations to bring existing operations into compliance with the Department's CAFO Strategy. A draft of this compliance plan will be published for public comment prior to finalization.

Paperwork Requirements

The paperwork requirements might be reduced for activities which would be covered by general permits which could be issued under the provisions of Section 91.27. Additional paperwork might be required in the case of applicants for a water quality management permit being required to submit information regarding pollution prevention activities under Section 91.6. A new CAFO Water Quality Management Part II permit has been developed for new or modified CAFOs housing more than 1,000 AEUs. It is estimated that less than 10 facilities per year would use these forms. A copy of this document is available from the contact persons listed in Section B of this Order.

G. Pollution Prevention

Pollution prevention approaches to environmental management often provide environmentally sound and longer-term solutions to environmental protection because pollution is prevented at the source. Pollution prevention is defined by the United States Environmental Protection Agency as measures taken to avoid or reduce the generation of all types of pollution - solid/hazardous waste, wastewater discharges and air emissions - at their point of origin; however, it does not include activities undertaken to treat, control, or dispose of pollution once it is created. The Federal Pollution Prevention Act of 1990 established a national policy and environmental management hierarchy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The hierarchy is as follows:

a. Pollution should be prevented or reduced at the source.

b. Pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible.

c. Pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible to render it less hazardous, toxic or harmful to the environment.

d. Disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

The short- and long-term health of the Pennsylvania economy depends on clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania spends over one billion dollars per year in efforts to control pollutants through regulation of both industrial point discharges and nonpoint sources. In order to meet the Commonwealth's economic development and environmental protection goals successfully, the Commonwealth needs to adopt programs that not only protect the environment, but also significantly reduce costs and increase the competitiveness of the regulated community. When pollution is prevented up front, it can reduce a company's bottom line costs and overall environmental liabilities often by getting the company out of the regulatory loop. It can also get DEP out of the business of regulating pollution that may not need to be generated in the first place.

In keeping with Governor Ridge's interest in encouraging pollution prevention solutions to environmental problems, these final regulations incorporated the following provisions and incentives to meet that goal:

Definitions of "pollution prevention" and "pollution prevention measures" were added to Section 91.1.

Regulations currently in Section 97.14 (relating to measure to be used) were transferred to new Section 91.6 and was renamed "pollution prevention" to more clearly identify its intent. In addition, language was added to provide some guidance regarding the consideration of pollution prevention measures.

Section 91.11 (relating to compliance conferences) was revised to include a discussion of pollution prevention as an alternative to treating wastes.

Section 91.13 (relating to abatement or treatment required) was revised to emphasize that pollution prevention is a key factor to be used when options to abate pollution are being considered by a permittee.

Section 91.34 requires any person engaged in an activity involving the use of a pollutant to submit a report or plan describing the nature of the preventative measures to be taken to keep these pollutants from the waters of the Commonwealth. It also provides management for the use of pollution prevention measures.

H. Sunset Review

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

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), the Department submitted a copy of the proposed amendment on August 12, 1997, to the Independent Regulatory Review Commission and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with Section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received as well as other documentation.

In preparing this final-form regulation, the Department has considered the comments received from the Commission and the public. These comments are addressed in the comment and response document and Section E of this Order. The Committees did not provide comments on the proposed rulemaking.

This final-form regulation was (deemed) approved by the House Environmental Resources and Energy Committee on _____, 1999 and was (deemed) approved by the Senate Environmental Resources and Energy Committee on _____, 1999. The Commission met on _____, 1999 and approved the regulation in accordance with Section 5.1(e) of the Act.

J. Findings of the Board

The Board finds that:

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

(2) A public comment period was provided as required by law, and all comments received during the public comment period for the proposed regulation were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 27 *Pennsylvania Bulletin* 4343 (August 23, 1997).

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

K. Order of the Board

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

(a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code,* Chapter 91 are amended by amending the Chapter to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The regulations of the Department of Environmental Protection are further amended by deleting Sections 97.14, 97.61 and 97.71-76 and all of Chapter 101.

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

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

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

(f) This Order shall take effect immediately.

BY:

James M. Seif
Chairman
Environmental Quality Board

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 91. GENERAL PROVISIONS

GENERAL

§91.1. Definitions.

The definitions set forth in section 1 of the act of June 22, 1937 (P.L. 1987, No. 394) (35 P.S. §691.1) [applies] APPLY to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

AGRICULTURAL OPERATIONS-THE MANAGEMENT AND USE OF FARMING RESOURCES FOR THE PRODUCTION OF CROPS, LIVESTOCK OR POULTRY AS DEFINED IN SECTION 3 OF THE NUTRIENT MANAGEMENT ACT (3 P.S. §1703).

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 SECTION 3 OF THE NUTRIENT MANAGEMENT ACT (3 P.S. §1703).

APPLICATION–THE DEPARTMENT'S FORM FOR REQUESTING APPROVAL TO CONSTRUCT AND OPERATE A WASTEWATER COLLECTION, CONVEYANCE OR TREATMENT FACILITY UNDER A NEW WATER QUALITY MANAGEMENT PERMIT, OR THE MODIFICATION, REVISION OR TRANSFER OF AN EXISTING WATER QUALITY MANAGEMENT PERMIT.

[*Department*–The Department of Environmental Resources of the Commonwealth or, where appropriate, the Sanitary Water Board, Environmental Quality Board or Environmental Hearing Board of the Commonwealth.

EPA–The United States Environmental Protection Agency.]

FACILITY–A STRUCTURE BUILT TO COLLECT, CONVEY OR TREAT WASTEWATER WHICH REQUIRES COVERAGE UNDER A WATER QUALITY MANAGEMENT PERMIT.

FEDERAL ACT-THE FEDERAL WATER POLLUTION CONTROL ACT (33 U.S.C.A. §§1251-1387).

GENERAL WATER QUALITY MANAGEMENT PERMIT OR *GENERAL PERMIT*–A WATER QUALITY MANAGEMENT PERMIT THAT IS ISSUED FOR A CLEARLY DESCRIBED CATEGORY OF WASTEWATER TREATMENT FACILITIES, WHICH ARE SUBSTANTIALLY SIMILAR IN NATURE.

[*INDUSTRIAL WASTE*–A LIQUID, GASEOUS, RADIOACTIVE, SOLID OR OTHER SUBSTANCE RESULTING FROM MANUFACTURING OR INDUSTRY, OR FROM ANY 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. THE TERM INCLUDES ALL SUBSTANCES WHETHER OR NOT GENERALLY CHARACTERIZED AS WASTE. THE TERM DOES NOT INCLUDE SEWAGE.]

MANURE STORAGE FACILITY-A PERMANENT STRUCTURE OR FACILITY OR A PORTION OF A STRUCTURE OR FACILITY, UTILIZED FOR THE PURPOSE OF CONTAINING MANURE AS DEFINED AT 25 *PA. CODE* §83.201 (RELATING TO DEFINITIONS).

[*NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT*–A PERMIT OR EQUIVALENT DOCUMENT OR REQUIREMENTS ISSUED BY THE ADMINISTRATOR OF THE EPA OR, WHEN APPROPRIATE, BY THE DEPARTMENT TO REGULATE THE DISCHARGE OF POLLUTANTS UNDER SECTION 402 OF THE FEDERAL ACT (33 U.S.C.A. §1342).]

NOTICE OF INTENT (NOI)–A COMPLETE FORM SUBMITTED AS A REQUEST FOR GENERAL WATER QUALITY MANAGEMENT PERMIT COVERAGE.

OPERATOR–A PERSON OR OTHER LEGAL ENTITY RESPONSIBLE FOR THE OPERATION OR MAINTENANCE OF A FACILITY OR ACTIVITY SUBJECT TO THIS CHAPTER.

OWNER–THE PERSON OR OTHER LEGAL ENTITY HOLDING LEGAL TITLE TO A FACILITY OR ACTIVITY SUBJECT TO THIS CHAPTER.

[*PERSON*–AN INDIVIDUAL, PUBLIC OR PRIVATE CORPORATION, PARTNERSHIP, ASSOCIATION, MUNICIPALITY, POLITICAL SUBDIVISION OF THE 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 EMPLOYE THEREOF, OR ANY OTHER LEGAL ENTITY.]

POLLUTANT–A CONTAMINANT OR OTHER ALTERATION OF THE PHYSICAL, CHEMICAL OR BIOLOGICAL PROPERTIES OF SURFACE WATER WHICH CAUSES OR HAS THE POTENTIAL TO CAUSE POLLUTION AS DEFINED IN SECTION 1 OF THE CLEAN STREAMS LAW (35 P.S. §691.1).

***POLLUTION PREVENTION*-SOURCE REDUCTION AND OTHER PRACTICES (E.G. DIRECT REUSE OR IN-PROCESS RECYLCING) THAT REDUCE OR ELIMINATE THE CREATION OF POLLUTANTS THROUGH INCREASED EFFICIENCY IN THE USE OF RAW MATERIALS, ENERGY, WATER OR OTHER RESOURCES, OR PROTECTION OF NATURAL RESOURCES BY CONSERVATION.**

***POLLUTION PREVENTION MEASURES*-PRACTICES THAT REDUCE THE USE OF HAZARDOUS MATERIALS, ENERGY, WATER OR OTHER RESOURCES AND THAT PROTECT NATURAL RESOURCES AND HUMAN HEALTH THROUGH CONSERVATION, MORE EFFICIENT USE, OR EFFECTIVE POLLUTANT RELEASE MINIMIZATION PRIOR TO REUSE, RECYCLING, TREATMENT OR DISPOSAL.**

SCHEDULE OF COMPLIANCE–A SCHEDULE OF REMEDIAL MEASURES INCLUDING AN ENFORCEABLE SEQUENCE OF ACTIONS OR OPERATIONS LEADING TO COMPLIANCE WITH EFFLUENT LIMITATIONS, OTHER LIMITATIONS, PROHIBITIONS OR STANDARDS.

[*SEWAGE*–A SUBSTANCE THAT CONTAINS WASTE PRODUCTS OR EXCREMENTITIOUS OR OTHER DISCHARGE FROM THE BODIES OF HUMAN BEINGS OR ANIMALS.]

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 WHICH COLLECTS, DISPOSES AND TREATS SOLELY DIRECT OR INDIRECT SEWAGE DISCHARGES FROM THE RESIDENCES INTO WATERS OF THIS COMMONWEALTH.

STORMWATER–**[STORMWATER]** RUNOFF **FROM PRECIPITATION,** SNOW MELT RUNOFF, AND SURFACE RUNOFF AND DRAINAGE.

WASTEWATER IMPOUNDMENT–A DEPRESSION, EXCAVATION OR FACILITY SITUATED IN OR UPON THE GROUND, WHETHER NATURAL OR ARTIFICIAL AND WHETHER LINED OR UNLINED, **USED TO STORE WASTEWATER INCLUDING SEWAGE, ANIMAL WASTE OR INDUSTRIAL WASTE.**

WATER QUALITY MANAGEMENT PERMIT–A PERMIT OR EQUIVALENT DOCUMENT **[OR REQUIREMENTS] (PART II PERMIT)** ISSUED BY THE DEPARTMENT TO AUTHORIZE ONE OF THE FOLLOWING:

(i) THE CONSTRUCTION, ERECTION AND LOCATION OF A WASTEWATER COLLECTION, CONVEYANCE OR TREATMENT FACILITY.

(ii) A DISCHARGE OF WASTEWATER TO GROUNDWATERS OF THIS COMMONWEALTH. **[THIS PERMIT IS ALSO KNOWN AS A "PART II" PERMIT.]**

[*WATERS OF THIS COMMONWEALTH*–RIVERS, STREAMS, CREEKS, RIVULETS, IMPOUNDMENTS, DITCHES, WATER COURSES, STORM SEWERS, LAKES, DAMMED WATER, PONDS, SPRINGS AND ALL OTHER BODIES OR CHANNELS OF CONVEYANCE OF SURFACE AND UNDERGROUND WATER, OR PARTS THEREOF, WHETHER NATURAL OR ARTIFICIAL, WITHIN OR ON THE BOUNDARIES OF THIS COMMONWEALTH. THE TERM INCLUDES SURFACE WATERS AS DEFINED IN CHAPTER 93 (RELATING TO WATER QUALITY STANDARDS).]

§91.6. Pollution prevention.

[THE POLLUTANT LOADING OF WASTES SHOULD BE REDUCED TO THE MAXIMUM EXTENT PRACTICAL] 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, [SEGREGATION OF STRONG WASTES,] REDUCTION IN VOLUME OF WATER USE, IN-PROCESS RECYCLING AND REUSE OF WATER, AND BY GENERAL MEASURES OF "GOOD HOUSEKEEPING" WITHIN THE PLANT OR FACILITY. THE DEPARTMENT WILL ENCOURAGE CONSIDERATION OF THE FOLLOWING MEASURES, IN DESCENDING ORDER OF PREFERENCE, FOR ENVIRONMENTAL MANAGEMENT OF WASTES: REUSE, RECYCLING, TREATMENT AND DISPOSAL. [THE TERM "PRACTICAL" IS NOT LIMITED TO THAT WHICH IS PROFITABLE OR ECONOMICAL.]

ADMINISTRATION AND ENFORCEMENT

§91.11. [Conferences] COMPLIANCE CONFERENCES [with violators].

(a) The Department will confer with the representatives of organizations required to abate their pollution of the waters of this Commonwealth and offer advice and suggestions regarding possible means for **[the]** abatement, **[or treatment** OR PREVENTION**]** of the pollution in question THROUGH POLLUTION PREVENTION MEASURES OR TREATING THE WASTE IF POLLUTION PREVENTION IS NOT POSSIBLE. [The staff shall interpret the orders of the Department.]

* * * * *

§91.12. Conference procedure.

[(a) The staff may not select or recommend specific measures or methods to be adopted by the party attempting to comply with the requirements of the Department.

(b)] (a) [The staff] EMPLOYES OF THE DEPARTMENT may not act as [a] consulting [engineer] ENGINEERS for a party or recommend the employment of a particular consultant, gather the data for the design of his treatment plant, prepare plans or act as an inspector on the construction of the project.

[(c)] (b) [The Department and the staff] EMPLOYES OF THE DEPARTMENT will not guarantee directly or by implication the efficacy of a proposed method of pollution abatement.

[(d)] (c) [The staff] EMPLOYES OF THE DEPARTMENT shall exercise their best judgment in assisting the party and his engineers, but the responsibility for abating pollution shall rest entirely upon the one causing the pollution.

§91.13. Abatement or treatment required.

The Department will require either abatement of the pollution or the submission of a [report with detailed construction plans and specifications for a proposed treatment works] PLAN AND SCHEDULE FOR BRINGING THE SOURCE'S POLLUTANTS INTO COMPLIANCE THROUGH POLLUTION PREVENTION MEASURES, TREATMENT OR OTHER MEANS by a specific date, and shall require progress reports thereon, usually at monthly or bimonthly intervals as the Department will deem appropriate.

§91.14. Time for constructing treatment works.

(a) If, in lieu of abatement, a notified party elects to provide waste treatment works and submits plans therefore, the Department, upon approving the plans, will set a time within which the treatment works shall be constructed and placed in operation or will notify the party to be prepared to construct the plant upon notice from the Department, depending upon the status of the Department's program of construction for the basin in which the receiving stream lies as specified in §91.15 (relating to basin-wide [plans] COMPLIANCE).

* * * * *

§91.15. Basin-wide [plans] compliance.

(a) In general, the Department will require [submission of plans and construction of plants concurrently for a whole stream basin] SOURCES OF POLLUTANTS IN A BASIN, WATERSHED OR SURFACE WATERS AS DEFINED IN CHAPTER 93 (RELATING TO WATER QUALITY STANDARDS) TO CONCURRENTLY COMPLY WITH THE WATER QUALITY STANDARDS AND PROTECTION LEVELS SET FORTH IN CHAPTER 93 **[AND CHAPTERS 16]** AND **CHAPTER 95** (RELATING TO **[WATER QUALITY TOXICS MANAGEMENT STRATEGY; AND]** WASTEWATER TREATMENT REQUIREMENTS) **AND IN CHAPTER 16 (RELATING TO WATER QUALITY TOXICS MANAGEMENT STRATEGY-STATEMENT OF POLICY).**

(b) [If] NOTWITHSTANDING SUBSECTION (A), IF certain sources of [pollution] POLLUTANTS especially affect the public interests, [however,] the Department may act to require the abatement of the sources of pollution individually in the general order of degree of adverse effect upon the public interest.

* * * * *

APPLICATIONS AND PERMITS

§91.21. Applications for permits.

* * * * *

(c) Applications and their accompanying papers shall be submitted to the [Department through the regional engineer in whose region] DEPARTMENT'S REGIONAL OFFICE COVERING THE AREA WHERE the project will be located.

(d) TO QUALIFY FOR COVERAGE UNDER A GENERAL WATER QUALITY MANAGEMENT PERMIT UNDER THIS CHAPTER, AN ADMINISTRATIVELY COMPLETE NOTICE OF INTENT (NOI) SHALL BE SUBMITTED TO AND APPROVED BY THE DEPARTMENT IN ACCORDANCE WITH §91.27 (RELATING TO GENERAL WATER QUALITY MANAGEMENT PERMIT).

§91.22. Fees.

(a) * * *

(b) A NOTICE OF INTENT (NOI) FOR COVERAGE UNDER A GENERAL WATER QUALITY MANAGEMENT PERMIT SHALL BE ACCOMPANIED BY A CHECK PAYABLE TO THE "COMMONWEALTH OF PENNSYLVANIA," IN THE AMOUNT NO GREATER THAN $500 AS SET FORTH IN THE PUBLIC NOTICE FOR THE GENERAL WATER QUALITY MANAGEMENT PERMIT AS DESCRIBED IN § 91.27(b)(1) (RELATING TO GENERAL WATER QUALITY MANAGEMENT PERMIT).

* * * * *

§91.25. Experimental projects.

If the suitability of a proposed device or method of treatment has not been demonstrated by actual field use IN THIS COMMONWEALTH OR ANOTHER STATE WITH SIMILAR CLIMATIC CONDITIONS, only conditional approval will be given to it until such time as the effectiveness of the device or treatment has been demonstrated to the satisfaction of the Department by ample field experience.

* * * * *

§91.27. General water quality management permit.

(a) *COVERAGE AND PURPOSE.* THE DEPARTMENT MAY ISSUE A GENERAL WATER QUALITY MANAGEMENT PERMIT, IN LIEU OF ISSUING INDIVIDUAL WATER QUALITY MANAGEMENT PERMITS, FOR A SPECIFIC CATEGORY OF WASTEWATER TREATMENT FACILITIES IF THE WASTEWATER TREATMENT FACILITIES MEET THE FOLLOWING:

(1) INVOLVE THE SAME, OR SUBSTANTIALLY SIMILAR, TYPE OF OPERATIONS.

(2) TREAT THE SAME TYPES OF WASTES.

(3) REQUIRE THE SAME OPERATING CONDITIONS.

(4) ARE, IN THE JUDGMENT OF THE DEPARTMENT, MORE APPROPRIATELY MANAGED UNDER A GENERAL PERMIT THAN UNDER INDIVIDUAL PERMITS.

(b) *ADMINISTRATION OF GENERAL PERMITS.*

(1) *PROPOSED GENERAL PERMITS AND AMENDMENTS.* THE DEPARTMENT WILL PUBLISH A NOTICE IN THE *PENNSYLVANIA BULLETIN* OF ITS INTENT TO ISSUE OR AMEND A GENERAL PERMIT, INCLUDING THE TEXT OF THE PROPOSED GENERAL PERMIT OR AMENDMENT, PROPOSED REVIEW FEES AND AN OPPORTUNITY FOR INTERESTED PERSONS TO PROVIDE WRITTEN COMMENTS ON THE PROPOSED GENERAL PERMIT OR AMENDMENT IN ACCORDANCE WITH §91.16 (RELATING TO NOTIFICATION OF ACTIONS).

(2) *ISSUANCE OF GENERAL PERMITS.* GENERAL PERMITS, SUBSEQUENTLY ISSUED, WILL BE PUBLISHED IN THE *PENNSYLVANIA BULLETIN* AND INCLUDE THE EFFECTIVE DATE OF THE GENERAL PERMIT AND REVIEW FEES.

(3) *EFFECTIVE DATE OF A GENERAL PERMIT.* THE DEPARTMENT WILL SPECIFY IN THE GENERAL PERMIT THAT AN APPLICANT WHO HAS SUBMITTED A TIMELY AND COMPLETE NOTICE OF INTENT FOR COVERAGE IS AUTHORIZED TO CONSTRUCT, ERECT AND LOCATE A WASTEWATER TREATMENT FACILITY OR DISCHARGE TO GROUNDWATERS OF THIS COMMONWEALTH, IN ACCORDANCE WITH THE

TERMS AND CONDITIONS OF THE GENERAL PERMIT **[COVERAGE]. COVERAGE UNDER [T]t**HE GENERAL PERMIT SHALL **[COMMENCE ACCORDING TO ONE OF THE FOLLOWING] BECOME EFFECTIVE:**

(i) AFTER A WAITING PERIOD **FOLLOWING RECEIPT OF THE NOTICE OF INTENT BY THE DEPARTMENT AS** SPECIFIED IN THE GENERAL PERMIT.

[(ii) ON A DATE SPECIFIED IN THE GENERAL PERMIT.]

[(iii)] (ii) UPON RECEIPT OF NOTIFICATION OF COVERAGE BY THE DEPARTMENT.

[(iv) UPON RECEIPT OF THE NOTICE OF INTENT BY THE DEPARTMENT.]

(4) ***NOTICE OF INTENT FOR*** *COVERAGE UNDER A GENERAL PERMIT.* A PERSON WHO DESIRES TO HAVE A WASTEWATER TREATMENT FACILITY COVERED UNDER A GENERAL PERMIT SHALL SUBMIT A NOTICE OF INTENT TO THE DEPARTMENT IN ACCORDANCE WITH §§91.21 AND 91.22 (RELATING TO APPLICATIONS FOR PERMITS; AND FEES) AND THE WRITTEN INSTRUCTIONS OF THE NOTICE OF INTENT. THE DEPARTMENT WILL REVIEW THE INFORMATION PROVIDED IN THE NOTICE OF INTENT **FOR COMPLETENESS OR** TO DETERMINE IF THE WASTEWATER TREATMENT FACILITY QUALIFIES UNDER THE PROVISIONS OF THE GENERAL PERMIT **EXCEPT AS PROVIDED IN SUBSECTION (c)(1), (2) or [(4)] (5)].**

(c) *DENIAL OF COVERAGE.* THE DEPARTMENT MAY DENY COVERAGE UNDER THE GENERAL PERMIT WHEN ONE OR MORE OF THE FOLLOWING CONDITIONS EXIST:

(1) THE NOI IS NOT COMPLETE OR TIMELY.

(2) THE APPLICANT HAS NOT **[FIRST]** OBTAINED **[NPDES]** PERMITS REQUIRED BY CHAPTER 92 (RELATING TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM) **WHEN REQUIRED.**

(3) THE APPLICANT IS NOT, OR WILL NOT BE, IN COMPLIANCE WITH ONE OR MORE OF THE CONDITIONS OF THE GENERAL PERMIT **[OR].**

(4) THE APPLICANT HAS FAILED AND CONTINUES TO FAIL TO COMPLY OR HAS [A SIGNIFICANT HISTORY OF NONCOMPLIANCE] SHOWN A LACK OF ABILITY OR INTENTION TO COMPLY WITH A PRIOR PERMIT ISSUED BY THE DEPARTMENT.

[(4)] (5) THE TREATMENT FACILITY PROPOSED FOR COVERAGE UNDER THE GENERAL PERMIT IS NOT CAPABLE OF TREATING WASTEWATER TO A DEGREE WHICH WILL RESULT IN COMPLIANCE WITH APPLICABLE EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS AS DESCRIBED IN CHAPTER 93 (RELATING TO WATER QUALITY STANDARDS).

[(5)] (6) THE DEPARTMENT DETERMINES THAT THE ACTION IS NECESSARY TO ENSURE COMPLIANCE WITH THE FEDERAL ACT, THE ACT OR THIS TITLE.

(d) *REQUIRING AN INDIVIDUAL PERMIT.* THE DEPARTMENT MAY REVOKE, OR SUSPEND COVERAGE UNDER A GENERAL WATER QUALITY MANAGEMENT PERMIT, AND REQUIRE THAT AN INDIVIDUAL WATER QUALITY MANAGEMENT PERMIT BE OBTAINED WHEN THE PERMITTEE HAS VIOLATED ONE OR MORE OF THE CONDITIONS OF THE GENERAL PERMIT OR HAS VIOLATED A PROVISION OF THIS TITLE. UPON NOTIFICATION BY THE DEPARTMENT THAT AN INDIVIDUAL WATER QUALITY MANAGEMENT PERMIT IS REQUIRED FOR THE FACILITY, THE OWNER SHALL SUBMIT A COMPLETE WATER QUALITY MANAGEMENT PERMIT APPLICATION, IN CONFORMANCE WITH THE REQUIREMENTS OF THIS CHAPTER, WITHIN 90 DAYS OF RECEIPT OF THE NOTIFICATION, UNLESS THE OWNER IS ALREADY IN POSSESSION OF A VALID INDIVIDUAL WATER QUALITY MANAGEMENT PERMIT FOR THE APPLICABLE FUNCTIONS. FAILURE TO SUBMIT THE APPLICATION WITHIN 90 DAYS SHALL RESULT IN AUTOMATIC TERMINATION OF COVERAGE UNDER THE GENERAL PERMIT. TIMELY SUBMISSION OF A COMPLETE APPLICATION SHALL RESULT IN CONTINUATION OF COVERAGE OF THE APPLICABLE FACILITIES UNDER THE GENERAL PERMIT, WHEN THE FACILITY DEMONSTRATES THAT IT HAS UNDERTAKEN EFFORTS TO ADDRESS THE REASONS FOR THE REVOCATION OR SUSPENSION OF COVERAGE, UNTIL THE DEPARTMENT TAKES FINAL ACTION ON THE PENDING INDIVIDUAL PERMIT APPLICATION.

(e) *TERMINATION OF COVERAGE UNDER A GENERAL PERMIT.* WHEN AN INDIVIDUAL WATER QUALITY MANAGEMENT PERMIT IS ISSUED FOR A FACILITY WHICH IS COVERED UNDER A GENERAL WATER

QUALITY MANAGEMENT PERMIT, THE APPLICABILITY OF THE GENERAL PERMIT TO THAT FACILITY IS AUTOMATICALLY TERMINATED ON THE EFFECTIVE DATE OF THE INDIVIDUAL PERMIT.

[STANDARDS FOR APPROVAL] MANAGEMENT OF OTHER WASTES

§91.31. [Comprehensive water quality management.] WELLS OTHER THAN OIL AND GAS.

[(a) The Department will not approve a project requiring the approval under the act or the provisions of this article unless the project is included in and conforms with a comprehensive program of water quality management and pollution control provided, however, that the Department may approve a project which is not included in a comprehensive program of water quality management and pollution control if the Department finds that the project is necessary and appropriate to abate existing pollution or health hazards and that the project will not preclude the development or implementation of the comprehensive program.

(b) The determination of whether a project is included in and conforms to a comprehensive program of water quality management and pollution control shall be based on the following standards:

(1) Appropriate comprehensive water quality management plans approved by the Department.

(2) Official Plans for Sewage Systems which are required by Chapter 71 (relating to administration of sewage facilities planning program).

(3) In cases where a comprehensive program of water quality management and pollution control is inadequate or nonexistent and a project is necessary to abate existing pollution or health hazards, the best mix of all the following:

(i) Expeditious action to abate pollution and health hazards.

(ii) Consistency with long-range development.

(iii) Economy should be considered in the evaluation of alternatives and in justifying proposals.

(c) In making determinations under the provisions of subsection (b)(3), the Department will consider available and relevant information including, but not limited to, applicable studies and plans prepared by the following:

(1) The applicant.

(2) The Department.

(3) Federal agencies.

(4) Approved planning agencies.

(5) Political subdivisions.]

(a) EACH WELL-DRILLING OPERATION SHALL HAVE A SUMP OR OTHER RECEPTACLE LARGE ENOUGH TO RECEIVE ALL DRILL CUTTINGS, SAND BAILINGS, WATER HAVING A TURBIDITY IN EXCESS OF 1,000 NEPHELOMETRIC TURBIDITY UNITS (NTU) OR OTHER POLLUTANT RESULTING FROM THE WELL DRILLING OPERATIONS.

(b) SURFACE WATER SHALL BE EXCLUDED FROM THE SUMP OR RECEPTACLE BY MEANS OF DIVERSION DITCHES ON THE UPHILL SIDES, OR BY OTHER APPROPRIATE MEASURES.

(c) AFTER COMPLETION OF THE WELL, THE SUMP OR RECEPTACLE SHALL BE COVERED OVER OR OTHERWISE PROTECTED OR THE CONTENTS OF THE RECEPTACLE DISPOSED OF, SO THAT THE CONTENTS WILL NOT BE WASHED INTO THE WATERS OF THIS COMMONWEALTH.

(d) WASTE OIL, COAL, SPENT MATERIALS OR OTHER POLLUTANTS SHALL BE DISPOSED OF SO THAT THEY WILL NOT BE WASHED INTO THE WATERS OF THIS COMMONWEALTH.

§91.32. [Private projects] **[UNDERGROUND INJECTION OF WASTES.] RESERVED.**

[(a) The Department will look with disfavor upon applications for sewerage permits for private sewerage projects to be located within the built-up parts of cities, boroughs and first and second class townships.

(b) Generally, issuance of the sewerage permits will be limited to proper private sewerage projects located in the rural parts of first and second class townships, and for which areas there appears to be no present necessity for public sewerage.]

[Underground injection of waste shall comply with 40 CFR Part 144 (relating to underground injection control program).]

§91.33. [Permit requirements] INCIDENTS CAUSING OR THREATENING POLLUTION.

[A permit may not be required for the discharge of sewage or industrial wastes into a sewer, sewer system or treatment plant which has been approved by a permit from the Department, provided that the sewer, sewer system or treatment plant is capable of conveying and treating the discharge and is operated and maintained in accordance with the permit and applicable orders, rules and regulations.]

(a) IF, BECAUSE OF AN ACCIDENT OR OTHER ACTIVITY OR INCIDENT, A TOXIC SUBSTANCE OR ANOTHER SUBSTANCE WHICH WOULD ENDANGER DOWNSTREAM USERS OF THE WATERS OF THIS COMMONWEALTH, WOULD OTHERWISE RESULT IN POLLUTION OR CREATE A DANGER OF POLLUTION OF THE WATERS, OR WOULD DAMAGE PROPERTY, IS DISCHARGED INTO THESE WATERS–INCLUDING SEWERS, DRAINS, DITCHES OR OTHER CHANNELS OF CONVEYANCE INTO THE WATERS–OR IS PLACED SO THAT IT MIGHT DISCHARGE, FLOW, BE WASHED OR FALL INTO THEM, IT SHALL BE THE RESPONSIBILITY OF THE PERSON AT THE TIME IN CHARGE OF THE SUBSTANCE OR OWNING OR IN POSSESSION OF THE PREMISES, FACILITY, VEHICLE OR VESSEL FROM OR ON WHICH THE SUBSTANCE IS DISCHARGED OR PLACED TO IMMEDIATELY NOTIFY THE DEPARTMENT BY TELEPHONE OF THE LOCATION AND NATURE OF THE DANGER AND, IF REASONABLY POSSIBLE TO DO SO, TO NOTIFY KNOWN DOWNSTREAM USERS OF THE WATERS.

(b) IN ADDITION TO THE NOTICES SET FORTH IN SUBSECTION (A), A PERSON SHALL IMMEDIATELY TAKE OR CAUSE TO BE TAKEN STEPS NECESSARY TO PREVENT INJURY TO PROPERTY AND DOWNSTREAM USERS OF THE WATERS FROM POLLUTION OR A DANGER OF POLLUTION AND, IN ADDITION THERETO, WITHIN 15 DAYS FROM THE INCIDENT, SHALL REMOVE FROM THE GROUND AND FROM THE AFFECTED WATERS OF THIS COMMONWEALTH TO THE EXTENT REQUIRED BY THIS TITLE THE RESIDUAL SUBSTANCES CONTAINED THEREON OR THEREIN.

(c) COMPLIANCE WITH THIS SECTION DOES NOT AFFECT THE CIVIL OR CRIMINAL LIABILITY TO WHICH THE PERSON OR MUNICIPALITY MAY BE SUBJECT AS A RESULT OF AN ACTIVITY OR INCIDENT UNDER THE ACT, 30 PA.C.S. §§101-7314 (RELATING TO THE FISH AND BOAT CODE) OR ANOTHER STATUTE, ORDINANCE OR REGULATION.

§91.34. Activities utilizing pollutants.

(a) PERSONS ENGAGED IN AN ACTIVITY WHICH INCLUDES THE IMPOUNDMENT, PRODUCTION, PROCESSING, TRANSPORTATION, STORAGE, USE, APPLICATION OR DISPOSAL OF POLLUTANTS SHALL TAKE NECESSARY MEASURES TO PREVENT THE SUBSTANCES FROM DIRECTLY OR INDIRECTLY REACHING WATERS OF THIS COMMONWEALTH, THROUGH ACCIDENT, CARELESSNESS, MALICIOUSNESS, HAZARDS OF WEATHER OR FROM ANOTHER CAUSE.

(b) **THE DEPARTMENT MAY REQUIRE A PERSON TO SUBMIT A REPORT OR PLAN FOR ACTIVITIES DESCRIBED IN SUBSECTION (a).** UPON NOTICE FROM THE DEPARTMENT AND WITHIN THE TIME SPECIFIED IN THE NOTICE, THE PERSON SHALL SUBMIT TO THE DEPARTMENT **[A] THE** REPORT OR PLAN SETTING FORTH THE NATURE OF THE ACTIVITY**[,] AND** THE NATURE OF THE PREVENTATIVE MEASURES TAKEN TO COMPLY WITH SUBSECTION (a) **[AND OTHER INFORMATION THE DEPARTMENT MAY REQUIRE]. THE DEPARTMENT WILL ENCOURAGE THE USE OF POLLUTION PREVENTION MEASURES THAT MINIMIZE OR ELIMINATE THE GENERATION OF THE POLLUTANT OVER MEASURES WHICH INVOLVE POLLUTANT HANDLING OR TREATMENT. THE DEPARTMENT WILL ENCOURAGE CONSIDERATION OF THE FOLLOWING POLLUTION PREVENTION MEASURES, IN DESCENDING ORDER OF PREFERENCE, FOR ENVIRONMENTAL MANAGEMENT OF WASTES: REUSE, RECYCLING, TREATMENT AND DISPOSAL.**

§91.35. Wastewater impoundments.

(a) EXCEPT AS OTHERWISE PROVIDED UNDER SUBSECTIONS (c), **[AND]** (d) **AND (e)**, A PERSON MAY NOT OPERATE, MAINTAIN OR USE OR PERMIT THE OPERATION, MAINTENANCE OR USE OF A WASTEWATER IMPOUNDMENT FOR THE PRODUCTION, PROCESSING, STORAGE, TREATMENT OR DISPOSAL OF POLLUTANTS UNLESS THE WASTEWATER IMPOUNDMENT IS STRUCTURALLY SOUND, IMPERMEABLE, PROTECTED FROM UNAUTHORIZED ACTS OF THIRD PARTIES, AND IS MAINTAINED SO THAT A FREEBOARD OF AT LEAST 2 FEET REMAINS AT ALL TIMES. THE PERSON OWNING, OPERATING OR POSSESSING A WASTEWATER IMPOUNDMENT SHALL HAVE THE BURDEN OF SATISFYING THE DEPARTMENT THAT THE WASTEWATER IMPOUNDMENT COMPLIES WITH THESE REQUIREMENTS.

(b) A PERSON OWNING, OPERATING OR IN POSSESSION OF AN EXISTING WASTEWATER IMPOUNDMENT CONTAINING POLLUTANTS, OR INTENDING TO CONSTRUCT OR USE A WASTEWATER IMPOUNDMENT, SHALL PROMPTLY SUBMIT TO THE DEPARTMENT A REPORT OR PLAN SETTING FORTH THE LOCATION, SIZE, CONSTRUCTION AND CONTENTS OF THE WASTEWATER IMPOUNDMENT AND OTHER INFORMATION AS THE DEPARTMENT MAY REQUIRE.

(c) EXCEPT WHEN A WASTEWATER IMPOUNDMENT IS ALREADY APPROVED UNDER AN EXISTING PERMIT FROM THE DEPARTMENT, A PERMIT FROM THE DEPARTMENT IS REQUIRED APPROVING THE LOCATION, CONSTRUCTION, USE, OPERATION AND MAINTENANCE OF A WASTEWATER IMPOUNDMENT SUBJECT TO SUBSECTION (a) IN THE FOLLOWING CASES:

(1) IF A VARIANCE IS REQUESTED FROM THE REQUIREMENTS IN SUBSECTION (a).

(2) IF THE CAPACITY OF ONE WASTEWATER IMPOUNDMENT OR OF TWO OR MORE INTERCONNECTED WASTEWATER IMPOUNDMENTS EXCEEDS 250,000 GALLONS.

(3) IF THE TOTAL CAPACITY OF POLLUTING SUBSTANCES CONTAINED IN WASTEWATER IMPOUNDMENTS ON ONE TRACT OR RELATED TRACTS OF LAND EXCEEDS 500,000 GALLONS.

(4) IF THE IMPOUNDMENT IS A NEW OR EXPANDED MANURE STORAGE FACILITY AT AN AGRICULTURAL OPERATION WITH MORE THAN 1,000 ANIMAL EQUIVALENT UNITS, REGARDLESS OF THE CAPACITY OF THE IMPOUNDMENT.

[(4)] (5) IF THE DEPARTMENT DETERMINES THAT A PERMIT IS NECESSARY FOR EFFECTIVE REGULATION TO INSURE THAT POLLUTION WILL NOT RESULT FROM THE USE, OPERATION OR MAINTENANCE OF THE WASTEWATER IMPOUNDMENT.

(d) [AN] THE FOLLOWING TYPES OF AGRICULTURAL OPERATIONS ARE NOT SUBJECT TO THE REQUIREMENTS OF SUBSECTIONS (b) AND (c) OR THE FREEBOARD REQUIREMENTS OF SUBSECTION (a), BUT SHALL PROVIDE A 12-INCH FREEBOARD FOR ALL WASTE STORAGE PONDS AS DEFINED IN THE "PENNSYLVANIA TECHNICAL GUIDE" AND A 6-INCH FREEBOARD FOR ALL WASTE STORAGE STRUCTURES AT ALL TIMES:

(1) AN AGRICULTURAL OPERATION WHICH CONTAINS LESS THAN 1,001 ANIMAL EQUIVALENT UNITS.

(2) AN AGRICULTURAL OPERATION IN EXISTENCE PRIOR TO _____ (THE BLANK REFERS TO THE EFFECTIVE DATE OF THE FINAL RULE.) AND DESIGNED IN ACCORDANCE WITH "THE PENNSYLVANIA TECHNICAL GUIDE" AND ADDENDA OR AMENDMENTS THERETO.

[(d)] (e) THIS SECTION DOES NOT APPLY TO RESIDUAL WASTE PROCESSING, DISPOSAL, TREATMENT, COLLECTION, STORAGE OR TRANSPORTATION.

§91.36. Pollution control and prevention at agricultural operations.

(a) *ANIMAL MANURE STORAGE FACILITIES.* EXCEPT AS PROVIDED IN PARAGRAPHS (1) AND (2), [A]ANIMAL MANURE STORAGE FACILITIES DO NOT REQUIRE A WATER QUALITY MANAGEMENT PERMIT FROM THE DEPARTMENT IF THE DESIGN AND OPERATION OF THE STORAGE FACILITIES ARE IN ACCORDANCE WITH THE DEPARTMENT APPROVED MANURE MANAGEMENT PRACTICES AS DESCRIBED IN THE PUBLICATION ENTITLED "MANURE MANAGEMENT FOR ENVIRONMENTAL PROTECTION" AND ADDENDA OR AMENDMENTS THERETO PREPARED BY THE DEPARTMENT, "THE PENNYLVANIA TECHNICAL GUIDE" AND ADDENDA OR AMENDMENTS THERETO, AND, WHERE APPLICABLE, SECTION 83.351 (RELATING TO MINIMUM STANDARDS FOR THE DESIGN, CONSTRUCTION, LOCATION, OPERATION, MAINTENANCE AND REMOVAL FROM SERVICE OF MANURE STORAGE FACILITIES) AND EACH ANIMAL MANURE STORAGE FACILITY IS DESIGNED TO PREVENT ANY DISCHARGES TO SURFACE WATERS DURING A STORM EVENT OF LESS THAN A 25-YEAR/24-HOUR STORM. IN ADDITION, IN THE CASE OF ANIMAL MANURE STORAGE FACILITIES LOCATED AT ANIMAL OPERATIONS WITH OVER 1,000 ANIMAL EQUIVALENT UNITS ON OR BEFORE _____ (THE BLANK REFERS TO THE EFFECTIVE DATE OF THE FINAL RULE.) NO WATER QUALITY MANAGEMENT PERMIT IS REQUIRED IF A REGISTERED PROFESSIONAL ENGINEER CERTIFIES THAT THE DESIGN AND CONSTRUCTION OF EACH MANURE STORAGE FACILITY IS CONSISTENT WITH THE "PENNSYLVANIA TECHNICAL GUIDE".

(1) A PERMIT SHALL BE REQUIRED UNDER §91.35 FOR THE DESIGN, CONSTRUCTION AND OPERATION OF ANY NEW OR EXPANDED ANIMAL MANURE STORAGE FACILITY AT AN

AGRICULTURAL OPERATION WITH MORE THAN 1,000 ANIMAL EQUIVALENT UNITS. IN ADDITION TO THE REQUIREMENTS OF §91.35, THE PERMIT SHALL INCORPORATE THE REQUIREMENTS OF THIS SECTION.

(2) IF A PERSON CHOOSES TO DESIGN OR CONSTRUCT MANURE STORAGE FACILITIES USING CRITERIA OTHER THAN THOSE DESCRIBED IN "MANURE MANAGEMENT FOR ENVIRONMENTAL PROTECTION" **PREPARED BY THE DEPARTMENT [OR] AND THE "PENNSYLVANIA TECHNICAL GUIDE"** AND ADDENDA OR AMENDMENTS **[THERETO] TO THOSE PUBLICATIONS [PREPARED BY THE DEPARTMENT]**, APPROVAL OF THE DEPARTMENT OR A PERMIT UNDER §91.35 (RELATING TO WASTEWATER IMPOUNDMENTS) WILL BE REQUIRED. OPERATIONS WHICH ARE REQUIRED TO OR VOLUNTEER TO SUBMIT NUTRIENT MANAGEMENT PLANS SHALL COMPLY WITH THE NUTRIENT MANAGEMENT REGULATIONS IN CHAPTER 83 (RELATING TO STATE CONSERVATION COMMISSION).

(b) *LAND APPLICATION OF ANIMAL MANURE.* THE LAND APPLICATION OF ANIMAL MANURES DOES NOT REQUIRE A PERMIT FROM THE DEPARTMENT IF THE **[DESIGN AND OPERATION OF THE]** LAND APPLICATION **OF MANURE IS [SYSTEM ARE]** IN ACCORDANCE WITH THE DEPARTMENT APPROVED MANURE MANAGEMENT PRACTICES AS DESCRIBED IN THE PUBLICATION ENTITLED "MANURE MANAGEMENT FOR ENVIRONMENTAL PROTECTION" AND ADDENDA OR AMENDMENTS THERETO PREPARED BY THE DEPARTMENT. IF A PERSON CHOOSES TO **[DESIGN OR CONSTRUCT A]** LAND **[APPLICATION SYSTEM] APPLY ANIMAL MANURE** USING CRITERIA OTHER THAN THOSE DESCRIBED IN "MANURE MANAGEMENT FOR ENVIRONMENTAL PROTECTION" AND ADDENDA OR AMENDMENTS THERETO PREPARED BY THE DEPARTMENT, APPROVAL OF THE DEPARTMENT OR A PERMIT WILL BE REQUIRED. OPERATIONS WHICH ARE REQUIRED TO OR VOLUNTEER TO SUBMIT NUTRIENT MANAGEMENT PLANS SHALL COMPLY WITH CHAPTER 83.

§91.37. Private projects.

(a) THE DEPARTMENT WILL **[LOOK WITH DISFAVOR UPON] NOT APPROVE** APPLICATIONS FOR SEWERAGE PERMITS FOR PRIVATE SEWERAGE PROJECTS TO BE LOCATED WITHIN THE BUILT-UP PARTS OF CITIES, BOROUGHS AND FIRST AND SECOND-CLASS TOWNSHIPS **UNLESS THE APPLICANT CAN DEMONSTRATE A COMPELLING PUBLIC NEED FOR THE PROJECT.**

(b) [GENERALLY,] ISSUANCE OF THE SEWERAGE PERMITS WILL BE LIMITED TO [PROPER] PRIVATE SEWERAGE PROJECTS LOCATED IN THE RURAL PARTS OF FIRST AND SECOND CLASS TOWNSHIPS, AND FOR WHICH AREAS THERE APPEARS TO BE NO PRESENT NECESSITY FOR PUBLIC SEWERAGE.

§91.38. ALGICIDES, HERBICIDES AND FISH CONTROL CHEMICALS.

EXCEPT WHERE THE USE OF AN ALGICIDE, HERBICIDE OR FISH CONTROL CHEMICAL WOULD BE IN VIOLATION OF A SPECIFIC ORDER OR PERMIT, THE USE IS AUTHORIZED ONLY IN THE FOLLOWING INSTANCES:

(1) COPPER SULFATE REQUIRED TO CONTROL ALGAE IN A SOURCE OF PUBLIC WATER SUPPLY WHERE THE USE IS UNDER AND IN ACCORDANCE WITH APPROVAL GIVEN BY THE DEPARTMENT.

(2) CHEMICALS REQUIRED TO CONTROL AQUATIC PLANTS IN SURFACE WATERS AND CHEMICALS REQUIRED FOR THE MANAGEMENT OF FISH POPULATIONS WHERE THE USE IS UNDER AND IN ACCORDANCE WITH JOINT APPROVAL GIVEN BY THE DEPARTMENT AND THE FISH AND BOAT COMMISSION.

UNDERGROUND DISPOSAL

§91.41. POTENTIAL POLLUTION RESULTING FROM UNDERGROUND DISPOSAL

(a) THE DEPARTMENT WILL, EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, CONSIDER THE DISPOSAL OF WASTES, INCLUDING STORM WATER RUNOFF, INTO THE UNDERGROUND AS POTENTIAL POLLUTION, UNLESS THE DISPOSAL IS CLOSE ENOUGH TO THE SURFACE SO THAT THE WASTES WILL BE ABSORBED IN THE SOIL MANTLE AND BE ACTED UPON BY THE BACTERIA NATURALLY PRESENT IN THE MANTLE BEFORE REACHING THE UNDERGOUND OR SURFACE WATERS.

(b) THE FOLLOWING UNDERGROUND DISCHARGES ARE PROHIBITED:

(1) DISCHARGE OF INADEQUATELY TREATED WASTES, EXCEPT COAL FINES, INTO THE UNDERGROUND WORKINGS OF ACTIVE OR ABANDONED MINES.

(2) DISCHARGE OF WASTES INTO ABANDONED WELLS.

(3) DISPOSAL OF WASTES INTO UNDERGROUND HORIZONS UNLESS SUCH DISPOSAL IS FOR AN ABATEMENT OF POLLUTION AND THE APPLICANT CAN SHOW BY THE LOG OF THE STRATA PENETRATED AND BY THE STRATIGRAPHIC STRUCTURE OF THE REGION THAT IT IS IMPROBABLE THAT THE DISPOSAL WOULD BE PREJUDICIAL TO THE PUBLIC INTEREST AND IS ACCEPTABLE TO THE DEPARTMENT. ACCEPTANCES BY THE DEPARTMENT SHALL NOT RELIEVE THE APPLICANT OF RESPONSIBILITY FOR ANY POLLUTION OF THE WATERS OF THIS COMMONWEALTH WHICH MIGHT OCCUR. IF ANY POLLUTION OCCURS, THE DISPOSAL OPERATIONS SHALL BE STOPPED IMMEDIATELY.

(c) NEW WELLS CONSTRUCTED FOR WASTE DISPOSAL SHALL BE SUBJECT TO THE PROVISIONS OF THIS SECTION.

§91.42. PROCEDURAL REQUIREMENTS FOR UNDERGROUND DISPOSAL

A PERMIT ISSUED UNDER §91.41 (RELATING TO POTENTIAL POLLUTION RESULTING FROM UNDERGROUND DISPOSAL) SHALL BE ISSUED IN ACCORDANCE WITH THE REQUIREMENTS OF CHAPTER 92 (RELATING TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM) WHEN APPLICABLE.

MISCELLANEOUS PROVISIONS

91.[41] 51. ***

91.[42] 52. ***

CHAPTER 97. INDUSTRIAL WASTES

(*Editor's Note*: Sections 97.14, 97.61 and 97.71-97.76 as they currently appear in the *Pennsylvania Code* at pages 97-5, 97-10, 97-11 and 97-14-97.16 (serial pps. (139009), (139014), (139015) and (126050)-(126052)) are deleted.)

§97.14. (Reserved)

§97.61. (Reserved)

§§97.71-97.76. (Reserved)

(*Editor's Note*: Chapter 101 as it currently appears in the *Pennsylvania Code* at pages 101-1–101-7 (serial pps. (194071)-(194074) and (170117)-(170119)) is deleted.)

CHAPTER 101. (Reserved)

§§101.1-101.6. (Reserved)

§101.8. (Reserved)

Comment and Response
Chapters 91, 97 and 101 Proposed Rulemaking
June 30, 1999

Re: Proposed Rulemaking: Chapters 91, 97 and 101 - Wastewater Management (#7-323)

This is a list of corporations, organizations and interested individuals from whom the Environmental Quality Board has received comments regarding the above referenced regulation.

ID	Name/Address	Zip	Submitted 1 pg Summary	Provided Testimony	Req Final Rulemaking
1	Mr. Randall G. Hurst, EQP 37 S. Linden St. Manheim, PA	17545	S		
2	Ms. Janet L. Oertly United States Department of Agriculture Suite 340 One Credit Union Place Harrisburg, PA	17110-2993	S		X
3	Mr. Robert W. Sweppenheiser, II District Engineer Bradford County Conservation District Stoll Natural Resource Center R.R. 5, Box 5030C Towanda, PA	18848			
4	Mr. Corey A. Richmond Nutrient Management Technician Sullivan County Conservation District R.R. 4, Box 4181 Dushore, PA	18614			
5	Mr. Turner R. Odell, Jr. PA Staff Attorney Chesapeake Bay Foundation The Old Waterworks Building 614 North Front Street, Suite G Harrisburg, PA	17101	S		
6	Lyle Forer, Director Bureau of Plant Industry Department of Agriculture 2301 North Cameron Street Harrisburg, PA	17110-9408			
7	Mr. James Gemmell, III Chairman Bucks County Conservation District 924 Town Center New Britain, PA	18901-5182			
8	Ms. Brenda J. Shambaugh Chairman DEP Ag Advisory Committee 1604 North Second Street Harrisburg, PA	17102			

ID	Name/Address	Zip	Submitted 1 pg Summary	Provided Testimony	Req Final Rulemaking
9	Mr. William Adams Director, Natural Resources Pennsylvania Farm Bureau 510 South 31st Street P.O. Box 8736 Camp Hill, PA	17001-8736			
10	Mr. Donald M. Robinson Administrator Lancaster County Conservation District 1383 Arcadia Road, Room 6 Lancaster, PA	17601-3149			
11	Mr. Robert E. Nyce Executive Director Independent Regulatory Review Commission 333 Market Street, 14th Floor Harrisburg, PA	17101			

Comment and Response
Chapters 91, 97 and 101 Proposed Rulemaking
June 30, 1999

General Comments

Comment: I applaud the Pennsylvania Department of Environmental Protection (DEP) for its regulatory basics initiative and the concept of streamlining regulations while continuing to protect Pennsylvania's environment. I have to take exception, however, with some of the proposed changes and the way in which they are presented for review and comment. Several specific comments may have been avoided if the full text of the proposed Chapter 91 were presented, or at least an introductory section describing the scope, purpose, and applicability of the chapter. (2)

Response: The Legislative Reference Bureau has a specific format which normally allows only those sections that are being amended to be published in the *Pennsylvania Bulletin.* Your suggestion regarding the need for an introductory section is a good one.

Comment: On behalf of the Pennsylvania Department of Agriculture, I have reviewed the proposed revisions to Chapter 91 in regards to how these revisions, and the consolidation of these wastewater regulatory requirements, will impact the agricultural community. I believe that combining the state's wastewater regulatory requirements into one Chapter, that being Chapter 91, makes sense in that it will be easier for the regulated community, and those assisting the regulated community, to find and understand their requirements related to addressing wastewater issues. (6)

Response: Thank you for your support.

Comment: I feel that the combining of regulatory requirements is a good move on the part of the Department. I think that as this is being accomplished it affords an excellent opportunity to revisit the requirements in these regulations to assure that they are still appropriate. I think it is of critical importance in the development of these regulations for the Department to work with agricultural community representatives, agricultural advisory boards, agricultural organizations, the State Conservation Commission, and the Pennsylvania Department of Agriculture to assure that these regulations appropriately address the issues related to agriculture. Without this important input these regulations will not provide for the maximum participation and understanding of this major industry of Pennsylvania. Since these regulations address agricultural issues, the entire field of how these relate to the agricultural industry should be discussed and, where these requirements are found to be deficient, vague, or inappropriate, they should be corrected or clarified. In order to assure that agriculture, Pennsylvania's number one industry, is appropriately addressed in these regulations, I would strongly recommend that the Department work closely with its own Agricultural Advisory Board as well as

agricultural industry representatives, agricultural organizations, other agricultural advisory groups, the State Conservation Commission, and the Pennsylvania Department of Agriculture, in the revision of these regulations. This communication with the agricultural community would assist you in developing a more complete and usable revision to this regulation. (6)

Response: During the development of the strategy regarding Concentrated Animal Feeding Operations (CAFOs), the Department interacted with a cross section of agricultural and environmental interest groups. Many of the issues related to the Chapter 91 regulation package were discussed during those workgroup meetings. In addition, an Advance Notice of Final Rulemaking was published in order to assure that sufficient input was received from all interested parties regarding the changes needed to make the proposed rulemaking consistent with the subsequently developed CAFO strategy. DEP feels that these efforts have improved the quality of Chapter 91 and its consistency with the Act 6 nutrient management regulations.

Comment: Several members of the Agricultural Advisory Board expressed concern regarding the timing of their review of proposed rulemaking. They felt there should have been an opportunity for this Board to review the draft Chapter 91 regulations prior to publication as proposed rulemaking. (8, 9)

Response: The proposed amendments to Chapter 91 were part of the Department's Regulatory Basics Initiative that received wide distribution and publication across the Commonwealth. One of the reasons the sections of the regulations related to agriculture activities were proposed for amendment was to make them consistent with recently enacted Chapter 83 regulations promulgated under Act 6 (The Nutrient Management Act) and the CAFO Strategy. DEP included several member organizations from the Agricultural Advisory Board as members of the CAFO Workgroup. Many of the issues related to proposed Chapter 91 were discussed during the numerous CAFO Workgroup meetings. In addition, DEP staff discussed the CAFO Strategy and a draft of the Advance Notice of Final Rulemaking (ANFR) with the Agricultural Advisory Board on April 21, 1999 as well as the Nutrient Management Subcommittee on May 18, 1999 at formal meetings of those groups to obtain additional input. As a result of these meetings, a number of changes were made to the draft ANFR regulations. DEP thanks the members for their continued assistance.

Specific Comments:

Comment: Section 91.1 - The selection of terms for inclusion in the definition section of the regulation invites confusion. The existing regulation invokes by reference the definitions in the Clean Streams Law (35 P.S. § 691). See existing § 91. 1. The text goes on to state "in addition, the following words and terms, when used in this article, have the following meanings." This indicates that the defined terms provided in § 91.1 are either not included in the statute or are intended to have a different meaning than that in the statute. This is an acceptable way to add new terms or to make it clear that the Department, in its discretion, intends to use a term differently than the General Assembly

intended. However, several terms included in the proposal are in exact paraphrases of the Clean Streams Law definition. It appears that the Department intends to change the definitions to the slightly different wording it provides. However, in doing so, the result is uncertainty about the intended meaning. The preamble, at *Pa. Bull.* 4344, indicates the proposed definitions are "new or revised." This further complicates any attempt to determine the meaning of the terms. Are the proposed definitions intended to merely restate the Clean Streams Law terms, or are they intended to be "new or revised" and so have a different meaning than the same terms in the statute? If DEP intends that the definitions provided by the Assembly in the Clean Streams Law are to be retained, then the addition of definitions in the regulation is unnecessary. If, however, it is merely access to the terminology that is intended, then the definitions in the regulation should be the same as those in the statute. On the other hand, if the Department intends to revise the statutory definitions (i.e., to change their meaning so as to be different than the same terms in the statute), then the results require further clarification, as the new text is far from clear.

Attempts to redefine common terms in unusual ways do not comport with the objectives of the Regulatory Basics Initiative. The relevant terms regarding forms of wastewater have been in use for the last twenty-five years and have been generally accepted by regulators and permittees. Specifically, the term "sewage" (or "wastewater") generally means the combined wastes conveyed by collection systems to sewage treatment works. Thus, "sewage" includes "sanitary sewage," "industrial wastes," and (for combined systems) "stormwater". The term "Industrial wastes" generally has the meaning ascribed in the proposed definition; "sanitary sewage" is defined as, e.g., "normal household wastes and other wastes having the same characteristics as those generated by domestic activity, including- cleaning, laundering, and toilet wastes," thus, toilet wastes from hotels, offices and other similar facilities as well as so-called "graywater" wastes from dishwashing and laundering are all considered "sanitary sewage".

The definition proposed for "sewage" is an inexact re-wording definition in the Clean Streams Law at 35 P. S. § 691.1, and appears to be an attempt to define "sewage," as what is commonly called "sanitary sewage," thus creating a dichotomy with common usage, and creating the opportunity for confusion among dischargers.

The term "sewage" as defined in the Clean Streams Law ("any substance that contains excrementitious ... discharge from the bodies of human beings or animals") is more restrictive than the term "sanitary sewage" as defined above, since it does not, by its terms, encompass graywater. The statute's definition is unchanged from when it was originally enacted in 1937. At that time, the nature of sanitary sewage service to households was rudimentary and the variety of appliances that generated wastewater were not as extensive as they are today. Thus, the statute's definition of sewage which essentially is restricted to toilet wastes, was adequate and descriptive in 1937. However, it is reasonable to assume that the intent of the Assembly even then, was to differentiate sanitary, domestic wastes from industrial wastes, not to narrowly restrict the definition to toilet wastes alone. Thus, updating the terminology to reflect current usage, by provision and definition of the term "sanitary sewage," does not flout the law, but clarifies it.

Further, the definition in the statute, and the one proposed, by omitting references to domestic-type wastes that are not "excrementitious discharges from the bodies of human beings" leaves the status of graywater uncertain. Placed in juxtaposition with the definition or industrial waste, which includes all substances that are not "sewage," the discharge of, e.g., cleaning water from the office cafeteria in a factory becomes an industrial waste. It is difficult to believe that this is the intended result. Thus, it would be appropriate for the regulation to update the terminology to reflect current usage. This is easily done by defining a new term "sanitary sewage," to include all normal domestic type wastes, whether generated by residential or commercial activities. The definition of "industrial waste" should be modified to exclude "sanitary sewage" rather than excluding "sewage."

A second concern with the proposed definition of sewage is that, as proposed, it can be parsed in two ways, leading to uncertainty about how it is to be applied. One way is to assume that the definition is intended to be the same as the one in the Clean Streams Law (35 P. S. § 691.1). In this case, the text would limit the definition of sewage to that condition, only human bodily wastes. As discussed above, this leads to the reclassification of some graywater wastes as "industrial waste." Alternatively assuming that DEP intends by its rewording and inclusion in the regulation to adopt a new and different term-the definition could be read as follows: "a substance that contains waste products, or [a substance that] contains excrementitious or other discharge from the bodies of human beings or animals." This would essentially mean that sewage is any substance containing wastes. Since "industrial waste" is defined as including everything except sewage, the result is that industrial waste must contain no wastes and the term "industrial waste" would only apply to non-contact cooling water. Thus, each of these possible readings of the proposed regulation leads to an unacceptable result. The substitution of the definition suggested above-sanitary sewage-would alleviate any confusion in this regard.

Third, the proposed definition does not exclude biosolids (stabilized sanitary sewage sludge) from regulation as "sewage." By adopting the definition of "sanitary sewage" proposed above, confusion as to whether biosolids are regulated by Chapter 91 would be avoided.

The proposed modification defines "sanitary sewage," re-defines "industrial waste" to exclude sanitary sewage, and avoids the use of the term "sewage" to avoid confusion by using commonly accepted terminology. It would not conflict with the Clean Streams Law since it merely updates the terminology to reflect the intent of the Assembly. And, importantly it would achieve the objective of the Regulatory Basics Initiative to clarify and simplify the regulations. (1)

Response: In order to avoid any confusion, the final-form regulations have been amended to delete any definitions already contained in the Pennsylvania Clean Streams Law. The commentator, while expressing concern that the lack of more specific definitions could cause problems with interpretations, provided no documentation that

such problems have occurred. Since this language has been in the act and/or regulations for a long time without causing problems and there is a general understanding of the terms by the wastewater industry and regulators, there does not appear to be a reason to add more definitions.

Comment: Section 91.1 - The definition of "industrial waste" uses the term "establishment" but does not define this term. We recommend that "establishment" be defined in the final-form regulation. In addition, we note that the term "animal manure storage facilities" is used in Section 91.36 of the regulation but is not defined. We recommend that this term be defined in the final-form regulation. Section 91.1 - It is also important that the regulations be consistent in the use of terminology, especially defined terms. The Chapter 91 definitions of "facility" and "wastewater impoundment" and the undefined term "animal manure storage facility" need to be reconciled with the Chapter 83 definition of "manure storage facility." The latter is a much more inclusive as it relates to manure management systems. Application of the proposed Chapter 91 freeboard criteria to manure storage facilities as defined in Chapter 83 would create the ludicrous situation of the standard two feet deep manure collection pit under a hog building now needing to be four feet deep. (2, 11)

Response: A definition for "manure storage facility" has been added to the final-form regulation. The "manure storage facility" definition is consistent with the definition for the same term in Title 25 Chapter 83 (relating to nutrient management). Since "industrial waste" is defined in the Clean Streams Law, this definition has been deleted from the regulations. The accompanying definition for "establishment" is also in the Clean Streams Law, so the confusion caused by the lack of this definition in the regulations has been eliminated.

Comment: Section 91.1– Definition of NPDES Permit - The definition is unclear because it does not explain under what circumstances the Administrator of the EPA or the Department would issue "requirements" and what these requirements would be if they are not a permit. We recommend that the EQB clarify the definition to explain the meaning of "requirements" and when these documents would be issued in lieu of a permit. (1, 11)

Response: This definition has been deleted since it is no longer used in the text of the regulation except as part of the title of a regulation referenced in the text.

Comment: Section 91.1 - definition of sewage - I am concerned about the ramifications of including animal manure in the definition of sewage. Animal manures have significantly different constituents than the wastewater coming from human communities and therefore animal manures should not fall within the same definition as the wastewater from humans. I would recommend that sewage be defined as that waste stream coming from humans and their associated communities and industries, and that animal manures be defined separately (if needed) as those excrements and their associated bedding and washwater coming from animals raised on an agricultural operation. (6)

Response: The definition of sewage is a direct quote from the Pennsylvania Clean Streams Law. This law was written to include authority to regulate both human and animal waste. Since this term is defined in the Clean Streams Law and appears to have caused confusion regarding its content (i.e. use of the word "establishment" and distinction between "sewage" and "industrial waste" as discussed in other comments), it has been deleted from the regulations.

Comment: Section 91.1 - The proposed regulation defines "stormwater" as "Stormwater runoff, snow melt runoff, and surface runoff and drainage." Defining "stormwater" as "stormwater runoff" is a circular definition which is not very useful. We agree that, where possible, circular definitions should be avoided and recommend that the EQB revise the definition to more meaningfully define "stormwater." (1, 11)

Response: The definition has been amended by removing the word "stormwater" and inserting the phrase "from precipitation" after the word "runoff".

Comment: Section 91.1 - definition of Wastewater Impoundment: This definition describes what an impoundment is, and does not address the wastewater component of the term being defined. As proposed, any pond, depression, or other natural low point in a farm field would be considered a wastewater impoundment. I would recommend that the definition be expanded to include a description of wastewater. (6, 11)

Response: This definition has been amended by adding the phrase ", used to store wastewater including sewage, animal waste or industrial waste" to better define the purpose of such facilities and eliminate confusion between such facilities and ponds or depressions.

Comment: Section 91.1 – Water Quality Management Permit - The last sentence of the proposed definition-rcferring to "Part II Permits" applies to both parts (i) and (ii) of the definition and should be displayed as "flush text" at the left margin, indicating that it is part of the whole definition, not a clarification of part (ii) only. Alternatively, the last sentence could be added as a parenthetical to the beginning of the definition. As written, the text is ambiguous because of its physical location. (1)

Response: The phrase "Part II Permit" has been added directly following the phrase "Water Quality Management Permit". The last sentence in the definition has been deleted.

Comment: Section 91.1 - It is unclear what "requirements" would be considered the equivalent of a water quality management permit. We recommend the EQB clarify the meaning of "requirements" in the final-form regulation. (11)

Response: The phrase "or requirements" has been deleted from the definition.

Comment: Section 91.15(a) states that the Department of Environmental Protection (DEP) will require concurrent compliance with Chapters 93, 95, and 16 relating to water

quality standards; treatment requirements; and water quality toxics management strategy. In his comments, Mr. Hurst points out that Chapter 16 is a policy statement which, by definition, is not binding and cannot be made binding merely by incorporating it into a regulation. Mr. Hurst asserts that the reference to Chapter 16 must acknowledge that policy statements are not made binding by referencing them in a regulation. He recommends that the Section 91.15(a) be revised to state that DEP will consider the water quality criteria in Chapter 16 in determining if the water quality standards in Chapters 93 and 95 being met. We agree that the regulation should clearly state that the policy statement in Chapter 16 contains non-binding guidelines. We recommend that the EQB clarify this point in the final-form regulation. (1, 11)

Response: The proposal adopted by the Environmental Quality Board clearly stated Chapter 16 relates to a statement of policy. However, the Legislative Reference Bureau deleted this language when the proposal was published in the ***Pennsylvania Bulletin***. The text of the section has been rewritten to clearly identify Chapter 16 as a "statement of policy".

Comment: Section 91.27 - The [Chesapeake Bay] Foundation has concerns with the provisions of the proposed rulemaking that purport to establish an authority and a process for the Department to issue general water quality management permits. Under many circumstances, it is not possible to adequately judge the appropriateness of a treatment facility in advance of specific information about the facility or the site at which it is to be installed. For example, it would be entirely inappropriate for a general water quality permit to be used to permit facilities for the management of waste from large confined animal operations. It is the very nature and particular location of the systems themselves (lagoons, waste pits, spreading equipment, practices, etc.) that can cause serious problems - especially for those citizens that live, work, recreate or obtain their drinking water in the vicinity of the proposed facility. The pollution problems and risks could be different every time even if the basic facilities were similar in construction.

In addition, the general permit provisions lack adequate requirements for public notice or opportunity for public participation with respect to a general permit's use to authorize specific projects. This is especially problematic in situations where a separate discharge permit will not be issued, including where discharge is to groundwater under the new definition of "water quality management permit" under this proposed rulemaking. (Under the Clean Streams Law, groundwaters are waters of the Commonwealth in the same manner and degree as surface waters and are subject to the same permitting requirements and other protections under the Act.) To preserve the ability of the public to raise important issues of concern prior to construction of facilities, notice of all applications to use general permits should be printed in the Pennsylvania Bulletin and local newspapers. Actual construction should not be authorized under any circumstances until such notice has been printed and sufficient time has elapsed to allow for concerns to be aired. Similarly, construction should not be permitted under any general permit prior to an explicit acknowledgment to the applicant from the Department.

Finally, the Foundation questions the authority of the Department to issue general water quality management permits under the Clean Streams Law. Although the issuance of general permits for discharges is not uncommon, with respect to water quality management permits, the requirement for actual submission and review of plans as well as for the issuance of written permits is quite explicit in the Act. Furthermore, there is no explicit authority elsewhere in the Act for issuing general permits. (This is in sharp contrast to other statutes, like the Dam Safety and Encroachments Act which specifically authorizes and establishes a procedure for issuing general permits).

In short, the Foundation believes that the use of a general water quality management permit may be inappropriate in many circumstances. Nearly equivalent improvements in efficiency of the individual permit process could be obtained simply by publishing technical guidelines for facilities that are likely to be quickly approved. This will lead to quicker permitting without reduced public participation. (5)

Response: As the commentator acknowledged, the issuance of general permits is not uncommon. Section 5(b)(1) of the Clean Streams Law, 35 P.S. 691.5(b)(1), provides authority for the Department to "[f]ormulate, adopt, promulgate and repeal such rules and regulations and issue such orders as are necessary to implement the provisions of this act." Under this authority, the Department established a general permit program in Chapter 92, which was approved for legality and form by the Attorney General of the Commonwealth.

The Department intends to use the general permit authority for relatively small activities that would have little or no effect on the environment. With respect to the concerns expressed regarding public notice, please refer to the response to the following comment.

Comment: Section 91.27(b)(1) provides that DEP will publish a notice in the *Pennsylvania Bulletin* of its intent to issue or amend a general permit and will provide an opportunity for interested parties to file comments. The Chesapeake Bay Foundation (CBF) commented that notice of all applications to use general permits should be printed in the *Pennsylvania Bulletin* and in local newspapers in the affected area to give the public the opportunity to raise issues of concern prior to construction of the facility. Publishing applications for general permits in local newspapers and the *Pennsylvania Bulletin* would help to ensure that affected parties are aware-of and have the opportunity to comment on a pending general permit. We recommend that the EQB adopt CBF's suggestion or explain why it is not in the public interest to do so. (5, 11)

Response: Wastewater facilities that qualify for coverage under a general Water Quality Management permit, by their very nature, are small facilities with limited potential adverse impact to the environment. The construction of a small flow treatment facility to repair a malfunctioning onlot system, for example, improves the existing environmental quality while having no measurable impact on receiving waters after construction. Imposing additional costs and administrative delays on these applicants is definitely not consistent with the goals of the RBI. This would result in circumstances such as a repair to the malfunctioning onlot system being further delayed while the property owner

advertises in a local newspaper the fact that he has a malfunctioning system and intends to repair it using a general Water Quality Management Permit. For some citizens the stigma attached to such a requirement might discourage them from pursuing a repair. If there were concerns expressed by neighbors regarding the proposed system, the only time DEP could take a denial action would be if one of the provisions of the originally published general permit were not planned to be met. In most cases, concerned citizens are not interested in whether or not the proposed system meets standards, but, rather if it meets their sense of aesthetics. It is the Board's position that such notification is often unnecessary and an unsupportable burden on the applicant. Thus the Board believes there should be some flexibility in the application of the public notification provisions.

Comment: Section 91.27(b)(3) states, in part, "The general permit shall commence according to one of the following..." This language is vague and confusing. It appears that the intent is to allow construction to commence under a general permit if one of four conditions is met. We recommend the EQB revise the language to more clearly reflect this intent. (11)

Response: The final-form regulation has been modified to make the language more understandable.

Comment: Section 91.27(b)(3)(i) - (iv) lists the conditions under which general permit coverage becomes effective. Condition (i) states. "After a waiting period specified in the general permit." It is unclear if this condition means that an application is deemed approved if the applicant does not receive a response from DEP within a certain timeframe. We recommend that the meaning of this condition be clarified in the final-form regulation. (11)

Response: This provision has been rewritten to state that the waiting period follows receipt of the notice of intent by DEP. The period of time between receipt by DEP and the effective date of the permit will be clearly stated in each general permit issued for statewide use.

Comment: Section 91.27(b)(3) - Condition (ii) states "On a date specified in the general permit." The meaning of this condition is unclear. We recommend that the EQB clarify the meaning of this condition in the final-form regulation. (11)

Response: This provision has been deleted.

Comment: Section 91.27(b)(3) - Condition (iv) states "Upon receipt of the notice of intent by the Department." This condition is confusing because it could be interpreted to mean that as soon as DEP receives the notice of intent, coverage under the general permit becomes effective, regardless of the outcome of DEP's review of the notice of intent. We do not believe this interpretation accurately reflects DEP's intent because Section 91.27(b)(4) provides that DEP will review the notice of intent to determine if the facility qualifies for a general permit. Consequently, we recommend that DEP clarify condition (iv) in the final-form regulation. (11)

Response: This provision has been deleted.

Comment: Section 91.27(b)(4) is entitled "Coverage under a general permit." This section, however, describes the application process for a general permit. Therefore, we suggest the title of this section be changed to "Application process for a general permit" to more accurately reflect the content of this section. In addition, the phrase "... except as provided in subsection (c)(1), (2) or (4)." appears to be unnecessary since Section 91.27(c) addresses the conditions under which a general permit will be denied. (11)

Response: The title has been changed to "Notice of Intent for Coverage under a General Permit" since this describes the "application process". The phrase "except as provided in subsection (c), (1), (2) or [(4)](5) has been deleted from the final-form regulations.

Comment: Section 91.27(c)(1) - (5) lists the conditions under which a general permit will be denied. We note that condition (3) actually lists two different circumstances which could lead to denial. To improve the clarity of the regulation, we recommend that condition (3) be separated into two separate conditions. (11)

Response: This change has been made.

Comment: Section 91.27(e) is entitled "Termination of general permit." This section describes when the applicability of a general permit to a specific facility is terminated. Consequently, we suggest the title of this section be changed to "Termination of coverage under a general permit" to more clearly reflect the provisions of this section. (11)

Response: This change has been made.

Comment: Section 91.32 provides that injection of waste must comply with 40 CFR Part 144. To improve the clarity of the regulation, DEP should explicitly state that the provisions of 40 CFR, Part 144 are incorporated by reference. Also, the bracket after "program" is a typographical error which should be corrected in the final-form regulation. (11)

Response: This section has been rewritten to delete the reference to these federal regulations and revert back to the original language of § 97.71 through § 97.76 as modified in §§ 91.41 and 91.42.

Comment: Section 91.33 (a): This portion of the regulation was discussed at some length with the Nutrient Management Advisory Board during the development of the Nutrient Management Act regulations. The Board thought that this provision in the regulations was difficult to read and to objectively implement. The Board discussed that this provision in the Department's regulations should be rewritten to be more readable and understandable. The Board was also concerned about implementing this subsection because of the lack of ability of the Department to objectively enforce the provision in the regulations requiring the person in charge of the substance to, "when reasonably

possible to do so," notify "known downstream users" of the waters (one mile away, ten miles away, is there a limit to this notification requirement?). (6)

Response: This provision has been in the regulations at § 101.2(a) since September 3, 1971 and has never, to our knowledge, caused a problem. Most wastewater facilities, including manure storage facilities serving over 1,000 AEUs, must have a spill contingency plan or a Preparedness, Prevention and Contingency Plan. These plans would normally include some simple instructions regarding who should be contacted in the case of a spill. If the permittee or facility operator has any questions regarding the extent of notification, they should discuss this with the Department's regional office staff. The extent of the notification is site specific and therefore impossible to quantify more in a regulation.

Comment: Section 91.34(b) - It is unclear if a report will be required in every instance or if DEP will use its discretion to determine when a report or plan is necessary. The timeframe for the notice is also unclear, as is the meaning of "other information the Department may require." We recommend that the EQB address these clarity issues in the final-form regulation. (11)

Response: The language has been modified as requested to indicate that reports will be required at the discretion of DEP rather than in every instance. The phrase "other information the Department may require" has been deleted.

Comment: Section 91.35 - The "Manure Management for Environmental Protection" manual is outdated and needs to be revised to be consistent with Chapter 91 and the PA Technical Guide. I feel that Section 91.35 should be applied to manure storage only where the PA Technical Guide or "updated" "Manure Management for Environmental Protection" is not used for the storage design. (3, 4, 11)

Response: The Manure Management for Environmental Protection is under revision to make it consistent with Chapter 83 and the PA Technical Guide. The revised language of this section requires permits only for those manure storage facilities that are proposed to be constructed using standards not consistent with the PA Technical Guide or the Manure Management Manual for Environmental Protection and those facilities within animal populations greater than 1000 AEUs.

Comment: Section 91.35 - DEP needs to consider the costs involved to the farmer if these regulations are implemented. Additionally, I wonder about the workload for those who will have to inspect for compliance with these new regulations. Approximately 200 farmers install manure storage facilities annually and there are literally thousands of existing facilities. That is a sizable number of farmers who will have to either change their storage facilities or their plans for a facility. Again, if the topping of these pits were a problem, I could understand but not with the absence of a problem. Finally, I firmly believe that the Natural Resources Conservation Service (NRCS), who is the primary designer of manure storage facilities in PA, uses nationally accepted design criteria published in the PA Technical Guide for Soil and Water Conservation as I referenced

earlier. These criteria require one foot of freeboard on earthen manure storage ponds, and six inches of freeboard on concrete or steel structures. We also have a DEP Manure Management Guide which waives the freeboard requirement. Confusion is going to abound within the agricultural community with these proposed regulations to the point that a farmer will have no idea what he has to construct to remain in compliance. (8)

I question if the provisions of this section should be imposed on animal manure storage facilities when the Manure Management Manual was developed for that purpose. The provisions in this section, especially the freeboard requirement in subsection (a), are more stringent than the federal standards without justification to support the more stringent requirement. The federal manure storage standards, as approved by the USDA Natural Resources Conservation Service and adopted in Pennsylvania and published in the PA Technical Guide, have proven to be effective and justifiable to the agricultural community for years. These standards outlined in this PA Technical Guide have been, and continue to be, used by numerous water quality programs implemented within Pennsylvania. The freeboard provision outlined in this revised Chapter 91 will render the current and past efforts of Pennsylvania's Chesapeake Bay Program, current and past 319 program efforts, and all other financial and technical assistance programs for farmers operated by the state and federal government, to be inadequate to meet these standards. The Nutrient Management Advisory Board specifically discussed manure storage construction criteria extensively in developing nutrient management and manure storage requirements, and they specifically state that the federal standards contained in the PA Technical Guide are to be followed in designing, constructing, and operating manure storages for operations falling under the Nutrient Management Act. This provision in Section 91.35 will make these two programs inconsistent and cause significant difficulty in implementing either one. Reword (d) to say "This section does not apply to residual waste processing, disposal treatment, collection, storage or transportation; nor does it apply to animal manure storage facilities as they are addressed below in § 91.36 (a) (related to Animal manure storage facilities)." The Department can then address the freeboard issue by either revising the Manure Management Manual or subsection 91.36 (a) to require that operators of new manure storage facilities follow PA Technical Guide standards, including freeboard criteria. Require that operators of <u>existing</u> manure storage facilities built based upon PA Technical Guide standards maintain these facilities (including freeboard criteria) as per the design. And lastly to require that those operators of animal manure storage facilities not built to PA Technical Guide standards maintain these facilities with a minimum of 2 feet of freeboard at all times. One other concern is that in item F, it appears that the additional costs to agricultural operations have not been addressed. If the 2-foot freeboard requirement in § 91.35 is going to be enforced, it will cost farmers several thousand dollars more than current facilities which are being prepared using the PA Technical Guide. For many farmers, this additional cost could mean the difference between installing a project or continuing to manage manure as is done currently. The more stringent freeboard requirements will not increase protection against overtopping as might be thought. The management of the facility will determine whether a tank or earthen storage will overtop. My concerns focus on the items which will impact agricultural operations. As you know, I am responsible for the USDA programs which provide technical and financial assistance for manure storage facilities

and land application of manure, including the design of manure storage facilities. Our agency is the primary provider of designs and construction over-sight of manure storages in Pennsylvania, including the DEP-funded Chesapeake Bay Program. We also develop and maintain the design criteria in the PA Technical Guide for Soil and Water Conservation (PA Technical Guide) which is incorporated by reference into the Chapter 83 Nutrient Management Regulations.

The freeboard requirement proposed for Section 91.35 has been a point of debate between DEP and NRCS for several years, but in practical terms has been ignored by mutual agreement. The debate revolves around the requirement that the two feet of freeboard be available at all times.

As called for in the PA Technical Guide, manure storage ponds (earthen impoundments) are designed with one foot of freeboard, plus the 25 year/24 hour rainfall (which varies from 4.1 to 5.8 inches across the state), plus the normal rainfall minus evaporation during the storage period (which is about 1 8 inches for the most severe six-month period, the typical storage duration), plus at least six inches for solids accumulation unless provisions are included to totally empty the storage, plus the design volume of manure to be stored.

A waste storage structure (any storage facility other than an earthen impoundment) is designed with the same criteria, with the exception of the freeboard which is six inches, according to the PA Technical Guide.

In the event that there is a contributing drainage area to the waste storage pond or structure, the design volume is increased to include the 25 year/24 hour runoff, the rainfall runoff during the storage period, and the volume of manure and/or sediment expected to be carried with the runoff.

In the operation and maintenance plan, which is provided to the farm operator with the design, it is explained that the freeboard plus the 25 year/24 hour storage volume must remain available at all times (about 11 inches for structures and 17 inches for ponds).

These criteria are adopted directly from the NRCS National Handbook of Conservation Practices (NHCP). While they do not carry the weight of "Federal rules," the NHCP standards are recognized across the nation as state-of-the-art criteria for these types of facilities. The NHCP and PA Technical Guide freeboard and design volume criteria are very similar to the American Society of Agricultural Engineers' standard EP393.2, "Manure Storages."

In the spirit of eliminating excessively stringent regulations as described in item D. of the PA Bulletin notice, the applicability of Section 91.35 to manure storage impoundments should be limited to those not designed according to PA Technical Guide or "Manure Management for Environmental Protection" criteria. Another acceptable option is to scale back the freeboard requirement for manure storage facilities to be consistent with

state-of-the-art practice as described above. Either of these options would also achieve consistency between Chapters 83 and 91.

Section 91.36(a) raises a number of questions as it is worded. I interpret this section to mean that a permit and all the other provisions of Chapter 91 (including the freeboard requirement in Section 91.35) do not apply if a manure storage facility is designed and operated in accordance with "Manure Management for Environmental Protection." In the past, some DEP staff members have wanted to apply the freeboard requirement to all manure storage facilities regardless of their adherence to "Manure Management for Environmental Protection." This point needs to be clarified in the regulations, and not left to interpretation.

The use of "Manure Management for Environmental Protection" in lieu of a permit is of questionable value in its present form. Freeboard is not mentioned in the document. In the dairy, swine, and veal supplements, freeboard is described at six locations in three distinctly different ways with depths of six inches, one foot, and two feet which includes the rainfall, 25-year storm, and solids accumulation (as described in the PA Technical Guide). In the interest of consistency, "Manure Management for Environmental Protection" should be revised to be compatible with Chapter 91 and with Chapter 83, which is referenced at the end of section 91.36(a) and (b).

Chapter 83 requires that manure storage facilities be designed and operated according to the PA Technical Guide. The freeboard criteria in the PA Technical Guide is acceptable to the Nutrient Management Advisory Board which represents a wide range of agricultural, governmental, environmental, and private interests. The advisory board provided diligent assistance to the State Conservation Commission. to develop workable and effective regulations. It seems appropriate that Chapter 91 acknowledge this effort and consensus, and adopt the same criteria for manure storage facilities.

In the absence of such consistency between Chapters 83 and 91, it is unclear what freeboard criteria will be applied to a farm operation that is required to or volunteers to submit a nutrient management plan under the Chapter 83 regulations. This needs to be explained in the regulations. The reasonable explanation is that the PA Technical Guide criteria applies, as explained in Chapter 83. (2, 3, 4, 6, 7, 8, 9, 10, 11)

Response: The final-form regulations have been modified to include freeboard requirements consistent with those found in the PA Technical Guide authorized under the Nutrient Management Act for the majority of manure storage facilities in Pennsylvania. The only manure storage facilities with the more stringent 2-foot freeboard requirement are new or expanded manure storage facilities serving an animal population of more than 1,000 animal equivalent units. This decision was made in consultation with the Natural Resources Advisory Committee, the Agriculture Advisory Board and the CAFO Workgroup.

Comment: Section 91.36(a) and (b) - It is appropriate to address the linkage between these wastewater regulations and those requirements found in the new Chapter 83

regulations (related to the State Conservation Commission's Nutrient Management Regulations) in subsections 91.36 (a) and (b). The new wording added to subsections (a) and (b) appear to give no additional clarification to this issue, as well as it appears to allow this Chapter (Chapter 91) to enforce Chapter 83 requirements. I would suggest the following wording may be more descriptive as well as not allow for double enforcement of the Chapter 83 requirements:

a) Replace the last sentence of § 91.36 (a) with: "Operations participating under the State Conservation Commission's Nutrient Management Regulations (found in Chapter 83) do not require a permit or other Departmental requirements for the design or operation of the animal manure storage facility."

b) Replace the last sentence of § 91.36 (b) with: "Operations participating under the State Conservation Commission's Nutrient Management Regulations (found in Chapter 83) do not require a permit or other Departmental requirements for the design or operation of the land application system for the animal manure." (6)

Response: The Department worked with a broad range of individuals to redraft the language in these sections. Revised language was included in the Advanced Notice of Final Rulemaking for additional comment. The final-form regulations have resolved the issue of conflicts between the provisions of Chapter 83 and the final regulations.

Comment: Section 91.36 (b) – This section appears to require all animal manure storages to be promptly reported to the Department. It was my understanding that the purpose of the Manure Management Manual was to eliminate the need for the agricultural community to permit or report animal manure activities unless they are in conflict with the Department's Manure Management Manual. This provision seems to exceed the requirements that the Department has been implementing for years. I see no reason to revise this subsection or the Manure Management Manual to require the reporting of all animal manure storage facilities in the state. (6)

Response: There is no language in the referenced section that would require all manure storage facilities to be reported to the Department. This was not the intent of the regulations.

Comment: Section 91.36 - The changing structure of the animal production industry in Pennsylvania, in terms of its rapid growth and potential water quality impacts, highlights weaknesses in the Commonwealth's water quality protection program. The proposed rulemaking contains provisions that will result in inadequate oversight of this potentially serious source of water pollution. The Foundation specifically objects to the exemption of animal waste storage facilities and disposal practices from the permit requirements of the Clean Streams Law.

The Foundation strongly objects to the re-codification of the permit exemption for animal manure storage facilities and for land application of animal manure currently proposed at § 91.36 (formerly at § 101.8). The exemption applies so long as such systems are designed and operated in accordance with the Department of Environmental Protection's

manure management manual. The manual, however, is a poor substitute for regulation by permit. Published in the 1980's, it contains recommendations and guidelines, but generally lacks clear requirements necessary for regulating the larger animal confinement operations that are locating in the Commonwealth.

The fact that this exemption is simply a re-codification of an existing exemption under Chapter 91 does not make it any more acceptable. In the vacuum created by these inadequate controls, the animal industry is changing and very large animal feeding operations are becoming even larger and more numerous. Around the state, large chicken, dairy and hog operations are already producing thousands of tons of raw animal waste that is being spread primarily on agricultural land. Recently, the state has also seen a boom in the construction of large hog production facilities. It is clear that Pennsylvania is experiencing dramatic growth in large-scale animal production.

Large animal operations can and do have severe impacts on water and air quality. Breached lagoons, leaching lagoons and waste piles, and excessive or inappropriate application of manure can all lead to severe nutrient or microbial pollution of surface and groundwater. Events over the last several years and months have demonstrated the extremely dire consequences that can result from the improper control and regulation of large animal operations. The horror stories of unchecked expansion of hog production in North Carolina are well known and demonstrate that even though some producers act responsibly, others are unlikely to voluntarily implement sufficiently protective technology and management practices. In addition, the frightening appearance of *Pfiesteriapiscicida* in the waters of North Carolina and the Chesapeake Bay watershed (and possibly the Delaware watershed) has been linked to high levels of nutrient pollution in the proximity of large scale animal agriculture. These circumstances sound an urgent warning that the impacts of large animal operations and the wholesale import of nutrients into a watershed demand closer scrutiny.

The Clean Streams Law provides clear authority for the Department and the Board to implement a program to protect the waters of the Commonwealth from the danger of pollution from large-scale animal operations. Section 691.402 states that ... "[w]henever the department finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the department may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted ..."

It is hard to imagine a stronger case for intervention by the Department and the Board to ensure protection of the Commonwealth's waters. The provisions of the current proposal fall far short of what is needed and thereby risk serious harm to those waters.

In addition, the current and proposed regulatory exemption may be inconsistent with the existing permit requirements of the Clean Streams Law. The Clean Streams Law defines

sewage as including any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals. Therefore, animal manure is considered sewage under the Act and must be handled and treated as required thereunder. Article 11 of the Act applies to sewage pollution. Section 691.207 of that article states that "[a]ll plans, designs, and relevant data ... for the erection, construction, and location of any treatment works ... shall be submitted to the department for its approval before the same are constructed or erected or acquired."

That section further states that

> [a]ny such construction or erection which has not been approved by the department by written permit... is hereby also declared to be a nuisance and abatable as herein provided.

The language quoted makes very clear that the Department has no authority to exempt the construction of treatment works for animal waste, including lagoons, waste storage pits, and manure spraying or spreading equipment, from the Clean Streams Law requirements for advance review and permitting (the so-called water quality management, or Part 11 permit).

The Foundation is aware that the Department is currently revising other water quality regulations to include language that tracks minimum federal requirements for regulating "concentrated animal feeding operations," but because of the inherent weaknesses in the federal authorities, these revisions will likely result in little or no practical improvements. Pennsylvania law imposes different duties and responsibilities on the Department than related provisions of federal law. Here, the Department's proposal is inadequate to meet either their responsibilities under Pennsylvania law or the growing threat of large-scale animal production.

The Foundation has developed a detailed analysis of what principles should shape an adequate strategy for protecting against the potential water quality impacts associated with large-scale animal production. While it is too cumbersome to include in these comments, we would be willing to present these principles to the Board at an appropriate time. We will be conveying our detailed suggestions to the Department within the next few weeks. (5)

Response: The final-form regulations have been modified to incorporate a requirement for a Water Quality Management Part II permit for those animal-feeding operations with animal populations exceeding 1,000 animal equivalent units. The permit exemption, which was based on compliance with existing technical design standards, was retained for smaller operations. The Chesapeake Bay Foundation was involved in the workgroup formed to develop the CAFO Strategy and was supportive of the end product. The Manure Management Manual for Environmental Protection is currently under revision to make it consistent with the Pennsylvania Technical Guide. This approach was discussed at several CAFO Strategy Workgroup meetings at which both agricultural and environmental groups, including the Foundation, were represented. The Department

believes the final-form regulation will protect the environment and remain a practical approach for smaller farms.

Comment: Sections 91.37(a) and (b) contain language which describes DEP's policy in reviewing permit applications. These provisions are not written in regulatory language and would be more appropriately placed in a policy statement. If the EQB decides to keep these provisions in the regulation, we recommend that the language be revised to read as follows:

a) The Department will disapprove applications for sewerage permits for private sewerage projects to be located within the built-up parts of cities, boroughs and first and second class townships, unless the applicant can demonstrate a compelling public need for the project.

b) Issuance of the sewerage permits will be limited to private sewerage projects located in the rural parts of first and second class townships, and for which areas there is no present necessity for public sewerage. (11)

Response: The requested changes have been made.

Comment: Item F. in the PA Bulletin notice is an incomplete discussion of benefits, costs, and compliance. The agricultural community will not benefit in any way under the proposed regulations. The two feet freeboard requirement would provide no benefit beyond the perception of increased safety and protection against overtopping. In all likelihood, many farm operators would encroach on the added freeboard, negating its intended purpose and increasing the potential hazard in the unlikely event of a catastrophic failure.

There will be an unjustifiable cost increase to add the extra freeboard on every manure storage facility. These cost increases will be in the range of 12 percent to 15 percent above the national cost of new manure storage facilities. This would amount to an economic burden of several thousand dollars for every farmer who installs a new facility. For many farmers, who operate on very tight profit margins, this could spell financial disaster.

The cost of retrofitting several thousand existing manure storages to comply with the two feet freeboard requirement would be an even greater economic burden. Due to poor economies of scale and the difficulties in modifying existing structures, a typical retrofit would cost at least 20 percent on top of the initial installation cost.

DEP needs to consider the costs to the department and the regulated community that will be associated with the 150 to 200 farmers who install manure storage facilities annually, and the thousands with existing facilities, few of whom will voluntarily provide the proposed freeboard. There will be a massive workload in dealing with the compliance conferences, variance requests, and permit applications if the proposed regulations are applied to agriculture.

In addition, it is unlikely that NRCS will be able to accommodate the engineering workload, especially for retrofits, that will result from this regulation. This will force farmers to incur the additional expense of hiring engineering firms to provide the designs and construction over-sight.

In closing, let me say that we have never had a manure storage facility fail due to overtopping. Adequate freeboard is provided using the PA Technical Guide criteria. The key to successful operation of manure storage facilities is management. The operator must understand how the facility is to be used, and draw down the storage volume according to a schedule included in a nutrient management plan. These management tools are provided in "Manure Management for Environmental Protection" and in the PA Technical Guide (and Chapter 83 when applicable). (2, 3, 4, 6, 7, 8, 9, 10, 11)

Response: The Department worked with the NRCS and others to come to an agreement to apply the 2 foot freeboard requirement only to new or modified manure storage facilities serving Concentrated Animal Feeding Operations that are larger than 1,000 Animal Equivalent Units. Smaller operations and existing operations will be under the freeboard requirements of the PA Technical Guide. While this change will involve an increased cost to these larger facilities, the Department believes this additional cost has the benefit of providing an additional buffer of storage for large facilities in the event of unexpected storm events.

Comment and Response
Advanced Notice of Final Rulemaking
June 30, 1999

List of Commentators
Advance Notice of Final Rulemaking
Chapters 91, 97 and 101
PA Bulletin, Vol. 29, No. 17, April 23, 1999

1. Turner R. Odell, Jr.
   Pennsylvania Staff Attorney
   Chesapeake Bay Foundation
   Old Waterworks Building
   614 North Front Street
   Harrisburg, PA 17101

2. Walter N. Peechatka
   Executive Vice-President
   PennAg Industries Association

3. Karl J. Novak
   R.D. 2, Box 132
   Clearville, PA 15535

4. Janet L. Oertly
   State Conservationist
   Natural Resources Conservation Service
   Suite 340, One Credit Union Place
   Harrisburg, PA 17110-2993

5. William Adams
   Director, Natural Resources
   Pennsylvania Farm Bureau

6. Robert E. Nyce, Executive Director
   Independent Regulatory Review Commission
   333 Market Street – 14th Floor
   Harrisburg, PA 17101

Comment and Response
Advanced Notice of Final Rulemaking
June 30, 1999

General Comments

Comment: As you develop your final regulations, we urge DEP to consider these issues:

- We need to continue to maximize use of and production from every acre of suitable land to meet increasing consumer demand and population growth.
- It is essential that the rules are as consistent as possible with the federal regulations to reduce the burden of red tape and associated costs
- Rules should reward those who do the right thing - that's the vast majority and punish those who ignore them.
- We must ensure that public hearings on permits are conducted in a fair, scientific and professional manner.

All too frequently information related to location and expansion of local farms is focused far more on myth than on fact. When balance does not exist, this accentuates the public's lack of understanding and does a disservice to everyone. (2)

Response: The Department has involved the agricultural community in the development of the Concentrated Animal Feeding Operation Strategy, supporting permit documents and regulations. DEP has consistently offered to work with the agricultural community to achieve compliance with environmental standards while keeping requirements reasonable and achievable. The Department is committed to continuing to help agriculture meet both state and federal requirements through education, outreach and, where necessary, compliance actions.

Comment: The Chesapeake Bay Foundation believes the current advance notice of final rulemaking is still fundamentally flawed and inconsistent with statutory authority. We recommend the Department substantially revise the proposal and re-publish the revision for public comment. (1)

Response: The Department disagrees that the final rulemaking is fundamentally flawed and inconsistent with statutory authority. DEP provided an explanation of the statutory basis for the regulations where such authority was challenged. No testimony was presented at the public hearing held on May 25, 1999 to receive public comment. This is a strong indication that sufficient opportunity for public comment has been provided.

Specific Comments:

Comment: Add a definition: "Freeboard - the vertical distance between the water surface elevation experienced as the result of the 25-year/24-hour storm on top of the maximum design wastewater storage volume including net precipitation that accumulates during the maximum storage period, and the crest elevation of the storage facility." (4)

Response: This change has not been made. This term is defined in the "Pennsylvania Technical Guide."

Comment: Pollution Prevention - This definition *must* be rewritten, as one can never prevent pollution by reducing the creation of pollutants. This is not prevention but a blatant attempt to sanitize practices that have been conjured up to spread pollutants by dilution rather than isolate them from the air and the water. The unfortunate outcome of the definition as stated in the proposed regulations will be that the producer of the pollutant gains the automatic release from liability and pushes the tab of this expense onto the public. This is in the public interest and should not be condoned by any rational citizen or governmental body of Pennsylvania. (3)

Response: The central principle of pollution prevention is eliminating pollution at the source. The definition of Pollution Prevention incorporates this thinking to encourage the evaluation of waste streams to reduce, reuse and recycle resource commodities, thereby preventing unused or incorrectly used resources from being converted to waste and/or pollutants, requiring treatment and/or disposal. The Federal Pollution Prevention Act of 1990 established a national policy and an environmental management hierarchy that promotes pollution prevention as the preferred means for achieving state environmental protection goals.

Comment: Sewage - This definition completely omits all the other industrial, home, farm and toxic wastes that are an acknowledged part of sewage. Why has this been sanitized in this manner? (3)

Response: The definition of sewage in proposed rulemaking was a quote from the Pennsylvania Clean Streams Law. The proposed changes to Chapter 91.1 originally incorporated a definition for industrial waste that includes all pollutants that are not sewage. Because of the confusion created by including a definition already included as part of the Clean Streams Law, the final-form regulation does not include any definitions from the statute. The definition of "Waters of this Commonwealth" has been retained in the regulation in a modified form from the Clean Streams Law to clarify that the definition includes wetlands.

Comment: Section 91.1 - The definition of "industrial waste" remains unclear because it references "establishment" but does not define the term. (Comments, Issue 1, page 2.) The EQB should clarify the definition of "industrial waste" in the final regulation. (6)

Response: The proposed changes to Chapter 91 included a number of definitions also contained in the Pennsylvania Clean Streams Law. The definition of "industrial waste" was originally included in Chapter 91proposed rulemaking, but the definition of "establishment" was not included. To avoid confusion, all definitions in Chapter 91 that are also in the statute have been deleted from the final-form regulation. The deletions include the definition of "industrial waste."

Comment: Section 91.1 - The definitions of "National Pollutant Discharge Elimination System (NPDES) Permit" and "water quality management permit" remain unclear because the meaning of "requirements" is not explained. It is unclear when "requirements" would be considered the equivalent of a permit. (Comments, Issue 1, pages 1-2.) The EQB should clarify these definitions in the final regulation. (6)

Response: The definition of "NPDES Permit" has been deleted from the final-form regulation because it is no longer used in the chapter except in a description of Title 25, Chapter 92. The words "or requirements" has been deleted from the definition of Water Quality Management Permit.

Comment: Wastewater Impoundment - Why has "sewage" been included here? This is repugnant, as it would give license to dumping human excrement anywhere and everywhere. This has been the practice at the Wide Awake hog factory in Bedford County, but is this alarmingly unsanitary practice to become the norm in Pennsylvania? (3)

Response: Sewage and industrial wastes have been stored and treated in wastewater impoundments for years in Pennsylvania. Both aerated and facultative sewage lagoons are an accepted method of treating sewage. Disposal of the treated sewage is either through discharge to surface waters or via land application using spray irrigation or other approved and environmentally sound practices.

Comment: Section 91.1 - The proposed definition of "agricultural operations" provides consistency with that used in the Nutrient Management Program. However, it is still unclear how it will be interpreted in determining the size of a particular operation to decide which parts of the regulations apply. There are many instances where a farmer or farm family (including parents and adult children, siblings, cousins, etc.) jointly or separately own different farms that might share facilities, equipment, and crop fields. They might cooperate in housing livestock or poultry at different growth or production stages as part of a total enterprise even though they are owned separately and may be on separate and non-contiguous tracts of land.

An example might be a dairy farmer who maintains only lactating cows. His daughter raises the calves and heifers on a nearby farm, and his brother houses only dry and infirm cows that are temporarily not producing milk. They may share field equipment, and may spread manure on each other's land. Is each a separate "operation" for the purposes of counting animal units?

Another example is the dairy farmer whose son puts up a poultry house on a separate farm. To get proper distribution of the nutrient-rich chicken manure, some of it is spread on the parent's crop fields. Are the two farms to be considered one "operation"?

My last example is of the hog farmer who owns several farrowing facilities in locations that are several counties apart. Will all of these facilities be considered as one "operation"?

This is a difficult issue that will have to be addressed. It has come up in the PA Nutrient Management Program. I understand that in that program, each situation is now being evaluated as it comes up. A uniform set of criteria could be developed that would be applicable to both the Nutrient Management and Water Quality programs. (4)

Response: Determinations regarding the classification of an animal feeding operation related to DEP's CAFO Strategy and permitting requirements will be based on the CAFO Strategy and federal CAFO regulations. The federal regulations at 40 CFR 122.23 (b) definitions describes the circumstances under which an "animal feeding operation" would be considered to be under common ownership for the purposes of determining if that "operation" is large enough to constitute a CAFO. It states "Two or more animal feeding operations under common ownership are considered for the purposes of these regulations, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes." In the first example, if the three operations are owned by separate individuals, they are counted as separate "operations". In the second example, if the two operations are not owned by one of the individuals, they are counted as separate "operations". In the third example, the two operations are owned by one individual, but do not adjoin, so they are separate "operations". This is only related to the definition of CAFOs and has no impact on the Nutrient Management Act or regulations regarding Concentrated Animal Operations.

Comment: Section 91.6 - The Department is deleting the sentence which reads, "The term 'Practical' is not limited to that which is profitable or economical." The Department's basis for the deletion is that this sentence might hinder pollution prevention efforts. We request the EQB explain how this sentence would hinder pollution prevention efforts. (6)

Response: The phrase quoted in the comment above is being deleted so as not to limit the scope of considerations regarding pollution prevention. For instance, there are pollution prevention remedies that are implemented *via* modified housekeeping practices or improved materials handling or accounting procedures. The implemented pollution prevention practices may result in little or no economic/profit effect, but have positive environmental consequences.

Comment: Section 91.6 - The Department has made several revisions to Section 91.6. The Department added language listing the preferred order in which measures for waste management should be considered. New language also states that "Pollution prevention measures used currently or proposed shall be encouraged and acknowledged in the water

quality management permit application." The new provisions are not written in regulatory language; they provide guidance on waste management measures. These provisions would be more appropriately placed in a guidance document or policy statement and should be deleted from the regulation. (6)

Response: The language of this section has been modified to provide that the Department will encourage pollution prevention by providing assistance to permittees and users of the permittee's facilities in the consideration of pollution prevention measures. The Department believes that this approach to pollution prevention will achieve integration of pollution prevention and resource recovery practices through voluntary effort and not by mandating controls.

Comment: Section 91.6 - Pollution Prevention - The use of the words "considered" and "encouraged" in this paragraph lack force and are, therefore, a waste of words. This paragraph must be rewritten to give it force, direction and expected concrete outcomes, thus correcting the limp and easily manipulated language noted above. (3)

Response: It is the Department's policy to achieve integration of pollution prevention and source recovery practices through a voluntary effort and not by mandating controls through regulatory requirements. It is believed that by approaching pollution prevention in this manner that the regulated community will strive to go beyond compliance, thereby resulting in greater benefit to the public at large and the environment.

Comment: Section 91.15(a) - In response to our Comments on Section 91.15(a), the Department added language which clarifies that Chapter 16 is a policy statement. (Comments, Issue 2, page 2.) We have a remaining concern, however, because Subsection (a) requires compliance with Chapters 93, 95 and 16. A policy statement is an announcement that provides guidance to regulated entities, but does not constitute a binding norm. Consequently, if the EQB wants to require compliance with Chapter 16, it should be promulgated as a regulation. If Chapter 16 is intended only to provide guidance, the EQB should clearly state in the regulation that Chapter 16 contains non-binding guidelines. (6)

Response: The commentator correctly described a "policy statement" as an announcement that provides guidance to regulated entities. Given this generally accepted description and the clear identification of Chapter 16 as a "statement of policy" in the regulation, there is no need to further clarify this term in the regulations.

Comment: Section 91.27 - The Foundation believes that the Department's proposal to provide regulatory authority to issue general water quality permits is without authority under the Clean Streams Law ("CSL"). Even if there were authority under the CSL, the Department's proposal is too broad and represents a bad policy decision that will create unhelpful incentives for the management and treatment of wastewater. The plain language of the Clean Streams Law precludes the issuance of general water quality management permits. With respect to sewage (which the CSL defines to include the excrementitious waste of both humans and animals) the Act provides as follows:

All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing sewer system, except as provided in section (b), by a person or municipality, or for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality, shall be submitted to the department for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance and abatable as herein provided.

35 P.S. § 691.207 (emphasis added). With respect to industrial wastewater treatment, § 691.308 is virtually identical: All plans, designs, and relevant data for the erection and construction of any treatment works by a person or municipality for the treatment of industrial wastes shall be submitted to the department for its approval before the works are constructed or erected. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance. 35 P.S. § 691.308 (emphasis added).

In both cases, the cited language clearly requires the submission of actual plans, designs and data on an individual basis in advance of construction. Submission of a Notice of Intent for coverage ("NOI") under a general permit does not meet this requirement. The CSL also requires the issuance of a written permit, and the construction of the requirement implies that such a permit will be issued subsequent to the Department's individual review of plans, not in advance as with a general permit. There is no provision for the advance approval of certain designs or structures by rule of the Department or by general permit.

By contrast, other legislation administered by the Department contains specific authorization for the issuance of general permits. For example, the Dam Safety and Encroachments Act ("DSEA") regulates by permit the design and construction of dams and other water obstructions and encroachments, in a manner closely analogous to the water quality management permit process of the Clean Streams Law. Section 7 of the DSEA includes the following provisions relating to general permits:

(b) The Department may, in accordance with rules adopted by the Environmental Quality Board, issue general permits on a regional or Statewide basis for any category of dam, water obstruction or encroachment if the Department determines that the projects in such category are similar in nature and can be adequately regulated utilizing standardized specifications and conditions.

(c) General permits shall specify such design, operating and monitoring conditions as are necessary to protect life, health, property and the environment, under which such projects may be constructed and maintained without applying for and obtaining individual permits.

35 P.S. § 693.7(b)-(c). This language demonstrates that when the legislature intends to allow the Department to issue general permits governing an area of its regulatory authority, the legislature does so with clarity and specificity. No such authorization exists with respect to water quality management permits in the Clean Streams Law.

A similar distinction can be found within the Clean Streams Law itself. The Department does issue general permits for certain discharges subject to the CSL, but this is done pursuant to statutory language that is distinctly different from that governing water quality management permits. With respect to discharges, the CSL provides:

No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.

35 P.S. § 691.202 (emphasis added); see also 35 P.S. § 691.307 (for substantially similar language applicable to industrial wastewater). Thus the CSL provides two distinct mechanisms for authorizing discharges. The underscored language regarding authorization under the "rules and regulations" of the Department specifically empowers the Department to allow discharges by mechanisms or processes other than individual permits. Language offering such a choice is notably absent from the provisions governing water quality management permits. 1

((1 It also bears note that the use of general permits for discharges is an element of the federal permitting scheme under the National Pollutant Discharge Elimination System ("NPDES") program for which the Commonwealth has accepted delegation to administer.))

Furthermore, the sections governing discharge permits and authorizations (§ 691.202 and § 691.307) do not include the additional requirement under sections 691.207 and 691.'08 that specific materials be "submitted to the department for its approval" prior to the applicant proceeding with the construction or discharge. Thus the fact that general permits are used to regulate discharges under the Act does not support the use of general water quality management permits. On the contrary, the absence of any alternative language in sections 691.207 and 691.308 emphasizes the intent of the Act to require individual Departmental review and approval of "all plans, designs and relevant data ... for the erection, construction, and location of any treatment works" with no exceptions.

B. Issuing General Water Quality Management Permits Is Inconsistent with the Intent of the Clean Streams Law to Create a Higher Degree of Regulatory Oversight, Is Impractical and Creates Undesirable Incentives

The structure of the Clean Streams Law permitting system illuminates a clear purpose behind the water quality management permit process. The so called "Part 11" permits provide a second tier of protection whereby the Department has an opportunity to ensure that a particular facility of a particular design in a particular location will be sufficient to

meet the requirements of the "Part I" discharge permit (the NPDES permit in most cases). This is an important element of quality control in the overall regulatory scheme - an element that the Department essentially relinquishes by creating general permits. Issuing a general permit in advance of actual review of plans and designs provides little more oversight or protection than the effluent limitations in the discharge permit itself. A general permit affords no actual review or oversight of the quality, care or attention given by an applicant to the design and construction of the treatment facility despite a clear intent in the legislation to require such oversight.

As a practical matter, review and approval of certain aspects of design, construction and particularly location (as required in § 691.207 with respect to sewage facilities) cannot be well accomplished in advance. Take, for example, the location and design of a large wastewater facility and impoundment for a concentrated animal feeding operation. There are so many site specific variables that could collectively determine whether a chosen design and location are adequately protective (e.g., slope, water table, nearby surface waters, local seasonal rainfall, etc.) that a simple NOI and general permit process simply cannot adequately assure the facility will be safe.

In many cases it seems likely there will be sharp debate over what technology or practices should be approved for use in a general water quality management permit. In addition, the creation of a water quality management permit for a particular type of waste management facility will have the undesirable effect of locking in that existing technology and stifling innovation or improvement in that type of facility. It has been demonstrated in numerous state and federal permit programs (and is simple common economic sense) that if a general permit is available, applicants will do all that they can to stay within the scope of that permit. Even if new technologies or management practices become available, unless they are markedly more cost effective, applicants will tend to use what they know will be quickly and easily permitted. Few will be willing to risk the individual permit process. The existence of the "approved technology" thus creates a bias against new techniques even if they are better. On the other hand, if each proposed facility will have to undergo the same individual review - whether the proposed technology is well worn or novel - then there is comparatively little disincentive to seeking acceptance of new ideas or technologies.

C. The Proposed Authority to Issue General Permits Is Too Broad in Scope and Has Other Deficiencies as Drafted

Even if the proposed authority to issue general water quality management permits were not inconsistent with the clear language and intent of the Clean Streams Law and was not otherwise bad policy as outlined above, the proposed authority is too broad and suffers other problems as drafted.

In particular, if general water quality management permits were to be used they should never be available in situations where a general permit for discharges cannot be used. As proposed the regulations set no specific limits on what facilities in what locations might be eligible for general permits. This is in sharp contrast to discharge general permits

under the CSL/NPDES permitting program. Such permits are subject to significant additional limitations on use (beyond the simple and largely subjective limits outlined in proposed section 91.27(a)). For example, general discharge permits may not be used where the proposed category of facilities will discharge toxic substances (or any other substance in toxic amounts), or where individually or cumulatively the described category of facilities have the potential to cause significant adverse environmental impact, or where facilities would discharge into waters classified as special protection waters under 25 Pa. Code Chapter 93. If the logic behind these restrictions is to foreclose the use of a general permit in areas or situations where, because of the high risk or need for protection, individual review of proposed discharges is warranted, then it would be arbitrary and unreasonable to allow the use of general water quality management permits to avoid individual scrutiny of the means of achieving the effluent limitations needed in such circumstances. The authority to issue general water quality management permits must be restricted to at least the same degree as the authority to issue general discharge permits.

In addition to being unduly broad, the proposed authority to issue general permits, as currently drafted, has a variety of other deficiencies that are outlined below.

Permit Terms and Conditions

The provisions governing the general permit process are notably lacking in any detail as to the terms and conditions that must be included in a general permit or indeed as to any substance for the permit at all outside of the effective date. The regulations should include a list of the types of terms and conditions that should be included (e.g., a specific description of the technologies and/or practices covered by the permit; a specific set of engineering and/or construction techniques or standards that must be used or met; inspection or construction approval requirements if appropriate; etc.).

Basis for Categories

There is no indication of how the department will demonstrate that the facilities proposed to be covered by a general permit will meet the requirements of §91.27(a). The Department at a minimum should be required to make a written finding and provide its rationale for concluding that a particular category of facilities meets the requirements for issuance of a general permit.

Review of NOI

The review specified under § 91.27(b)(4) is inadequate - the Department at a minimum should be required to review both for completeness and to determine if the facility qualifies for coverage under a general permit. And even if approval by general permit is permissible, there must be at least some review by the Department of the NOI prior to authorization (see, e.g., the discussion of need for compliance history review, below). Consequently, the proposals to allow coverage under a general permit to become effective automatically after a waiting period following submission of a NOI (§

91.27(b)(3)(i)) or simply upon submission of a NOI to the Department (§ 91.27(b)(3)(iv)) are not acceptable.

Public Notice

The public notice provisions are inadequate. At a minimum, the public notice of proposed general permits should include all the information required to be included in the public notice for a proposed general NPDES permit (see 25 Pa. Code § 92.82), including, for example, a description of the reasons for the Department's determination that the proposed category of facilities is suitable for regulation by general permit. The Department has proposed to include the text (presumably the full text) of the permit. This is certainly helpful, although such a permit would likely be so technically detailed with respect to the prescribed treatment system as to be a bit cumbersome for inclusion in the bulletin. In any event, a clear explanation of the terms and conditions of the permit would likely be of equally great value to interested citizens (and non-engineers).

Compliance History Review

The provisions describing the proposed Notice of Intent for coverage under a general water quality management permit and the provisions dealing with denial of coverage under a general permit do not require adequate consideration of an applicant's compliance history. First, the proposal describes no requirement that the NOI include any information as to compliance history. Second, the proposed language addressing denial of coverage suggests only that the Department may deny coverage under a general permit if the *applicant* has a significant history of non-compliance with a *prior permit* issued by the Department. This language does not meet the requirements of section 609 of the Clean Streams Law (35 P.S. §691.609). CBF and others have made similar arguments to the Department with respect to several other proposals over the last year. The discussion below echoes concerns raised by CBF in our comments (dated October 28, 1998) on the proposed rulemaking addressing 25 Pa. Code Chapters 92, 93 and 95-97.

Section 609 prohibits the Department from issuing, renewing, or amending any permit required by the act "if it finds, after investigation and an opportunity for informal hearing" that the applicant or any related party currently is not in compliance with certain statutes or has shown by past or continuing violations, a lack of ability or intention to comply with the law. 35 P.S. §691.609 (emphasis added). The "Investigation" into the discharger's compliance history that must becompleted before issuing a permit must include whether the discharger or any related party has engaged in "unlawful conduct" as defined in Section 611 of the CSL, 35 P.S. §691.611. Under Section 611, unlawful conduct includes the violation of any rule or regulation administered by the Department, or any order, permit, or license issued by the Department, in any regulatory program. See 35 P.S. § 691.611.

The law is clear that the Department must investigate compliance history prior to authorizing coverage under a general permit. Consequently, the NOI should include information as to compliance history and the proposed regulations should reflect that

requirement. In addition, the plain language of the statute makes clear that the compliance review is not limited to *permitted* facilities or permit requirements as is suggested by proposed § 91.27(c). The review must consider compliance history with all of the rules and regulations of the Department regardless of whether the activity in question was governed by a permit. Furthermore, the review is not limited to a review of just the *applicant's* compliance history as stated in § 91.27(c). The review must include a whole range of affiliated parties as specified in the CSL. The Department must deny coverage under a general water quality management permit if the applicant or any affiliated party has a history of non-compliance with any rule, regulation or permit administered by the Department, and the proposed regulations should so state. The proposal should be revised to comply with the compliance history requirements of the Clean Streams Law. (1)

Response: As the commentator acknowledged, the issuance of general permits is not uncommon. Section 5(b)(1) of the Clean Streams Law, 35 P.S. 691.5(b)(1), provides authority for the Department to "[f]ormulate, adopt, promulgate and repeal such rules and regulations and issue such orders as are necessary to implement the provisions of this act." Under this authority, the Department established a general permit program in Chapter 92 on July 21, 1984, which was approved for legality and form by the Attorney General of the Commonwealth.

The Department intends to use the general permit authority for relatively small activities that would have little or no effect on the environment. With respect to the concerns expressed regarding public notice, please refer to the response to the following comment.

Comment: Section 91.27(b)(1) states that the Department will publish a notice in the *Pennsylvania Bulletin* of its intent to issue or amend a general permit and will provide an opportunity for interested parties to file comments. In our comments, we noted that publishing notice of applications for general permits in local newspapers and the *Pennsylvania Bulletin* would help to ensure that affected parties are aware of and have the opportunity to comment on a pending general permit. (Comments, Issue 3, page 2.) We suggest the EQB add this requirement or explain why it is not in the public interest to do so. (6)

Response: Wastewater facilities that qualify for coverage under a general Water Quality Management permit, by their very nature, are of little consequences to environmental protection. The construction of a small flow treatment facility to repair a malfunctioning onlot system, for example, improves the existing environmental quality while having no measurable impact on receiving waters after construction. Imposing additional costs and administrative delays on these applicants is definitely not consistent with the goals of the RBI. This would result in absurd circumstances such as a repair to the malfunctioning onlot system being further delayed while the property owner advertises in a local newspaper the fact that he has a malfunctioning system and intends to repair it using a general Water Quality Management Permit. For some citizens the stigma attached to such a requirement would discourage them from pursuing a repair. If there were concerns expressed by neighbors regarding the proposed system, the only time DEP

could take a denial action would be if one of the provisions of the originally published GP were not planned to be met. In most cases, concerned citizens are not interested in whether or not the proposed system meets standards, but rather whether it meets their sense of aesthetics. It is the Department's position that such notification is unnecessary and an unsupportable burden on the applicant.

Comment: Section 91.27(b)(4) provides that the Department will review a notice of intent for completeness or to determine if the wastewater treatment facility qualifies under the provisions of the general permit except as provided in Subsection (c)(1), (2) or [(4)] (5). Subsection (c) lists five conditions that may result in the denial of coverage under a general permit. The EQB should explain why conditions (3) and (4) are not included in the list of exceptions in Section 91.27(b)(4). (6)

Response: The phrase "except as provided in subsection (c), (1), (2) or [(4)] (5)" has been deleted to eliminate the problem identified.

Comment: Section 91.27(c)(2) - Revise to read "The applicant has not first or concurrently obtained NPDES permits required by Chapter 92 ..." (4)

Response: The language in this section has been modified by deleting the word "first" to allow for concurrent submittal of applications for permits. In addition, the phrase "when required" has been inserted at the end of this subsection to allow a Water Quality Management permit to be issued where no NPDES permit is required.

Comment: Section 91.27(c)(4) - How is "significant" history of non-compliance defined? What if the applicant is not the operator? Why is the history of non-compliance limited to permits issued by Pennsylvania? Why is the performance history of the applicant and/or operator in other states omitted from this paragraph? (3)

Response: The language regarding non-compliance has been changed by deleting "a significant history of noncompliance" and inserting in lieu thereof "failed or continues to fail to comply or has shown a lack of ability or intention to comply". This new language is derived from Section 609 of the Clean Streams Law.

Comment: Section 91.34(b) - The Department has added language to Section 91.34(b) which states that certain pollution prevention measures are preferred and that measures for pollutant handling or treatment should be considered in a certain order of preference. As previously discussed, the new provisions are not written in regulatory language. They would be more appropriately placed in a policy statement or guidance document and should be deleted from the regulation. (6)

Response: The language of this section has been modified to provide that the Department will encourage the use of pollution prevention measures that minimize or eliminate the generation of a pollutants over measures which involve pollutant handling or treatment. The Department believes that this approach to pollution prevention will

achieve integration of pollution prevention and resource recovery practices through voluntary effort and not by mandating controls.

Comment: Sections 91.35 and 91.36(a) - The Foundation believes that the Department's proposal to require water quality management permits for some animal manure storage facilities and some wastewater impoundments and not for others fails to comply with the Clean Streams Law. Wastewater impoundments and manure storage facilities are essential elements of wastewater treatment facilities and therefore must be covered by water quality management permits. As discussed above, the mandate to the Department is simple and direct:

All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing sewer system, except as provided in section (b), by a person or municipality, or for the erection, construction, and location of *any* treatment works or intercepting sewers by a person or municipality, shall be submitted to the department for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance and abatable as herein provided.

As we have done in our prior comments to the Department on this issue, CBF notes that the Environmental Hearing Board recently confirmed the importance of the compliance history investigation requirement in Belitskus v. DEP, EHB Docket No. 96-196-MR (Adjudication issued August 20, 1998).

3 5 P. S. § 691.207 (emphasis added). With respect to industrial wastewater treatment, § 691.308 is virtually identical:

All plans, designs, and relevant data for the erection and construction of *any* treatment works by a person or municipality for the treatment of industrial wastes shall be submitted to the department for its approval before the works are constructed or erected. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance.

35 P.S. § 691.308 (emphasis added). The cited language leaves no room for the Department to create categories of facilities that are exempt from the permit requirement based on operation size, storm water storage capacity, compliance with external, non-regulatory documents or any other criteria.

Thus, the Department is without authority under the CSL to exempt waste impoundments or animal manure storage facilities at agricultural operations with less than 1001 animal equivalent units ("AEUs") from the requirement to obtain a water quality management permit, regardless of the size of the impoundments or other components, as it purports to do in proposed § 91.35(d) and § 91.6(a). This proposed exemption appears exceptionally

unreasonable because the Department requires other types of facilities of comparable size (e.g., a non-agricultural facility with impoundments larger than 250,000 or 500,000 gallons, depending on the circumstances to obtain a permit from the Department. Given the plain language of the statute, there is no justification for exempting agricultural facilities with wastewater facilities of a size comparable to other non-agricultural facilities that are required to obtain a permit.

Similarly, the Department cannot exempt certain facilities from the permit requirement based on compliance with certain standards or regulations (including the ability to hold the runoff from a 25-year/24-hour storm event or consistency with the state manure management manual). This amounts to issuing permits or approvals by rule and is not available to the Department for the same reasons the general water quality management permits discussed above are not available. The provisions of the CSL that mandate water quality management permits do not contain language, present in provisions covering discharge permits, that authorize the Department to use mechanisms other than written permits for approving plans for wastewater facilities. (See prior discussion at section I.A above.)

With respect to discharges, the CSL provides:

> No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.

35 P.S. § 691.202 (emphasis added); see also 35 P.S. § 691.307 (for substantially similar language applicable to industrial wastewater). Thus the CSL provides two distinct mechanisms for authorizing *discharges*. The underscored language regarding authorization under the "rules and regulations" of the Department specifically empowers the Department to allow discharges by mechanisms or processes other than individual permits. Language offering such a choice is notably *absent* from the provisions governing water quality management permits. Thus the Department is without authority to approve plans and designs for facilities (or exempt certain facilities from the permit requirement) based solely on compliance with standards or regulations.

Even if the Department could exempt certain facilities from a permit requirement simply by requiring compliance with certain standards or regulations, the reliance of the proposed regulations on requiring consistency with the publication entitled "Manure Management for Environmental Protection" and the supplements thereto (collectively, the "Manual") is inappropriate. The Manual simply does not contain enforceable directives as to proper technologies or practices. The document is largely precatory in that it describes what *should be* used or *should* be done. The Department proposes that no permit be required if the design and operation of the storage facilities is "in accordance with the Department approved manure management practices as described in [the Manual]." Unless that language means everything *that should* be done according to the Manual must be done, that language makes for a virtually meaningless regulation. (1)

Response: Section 5(b)(1) of the Clean Streams Law, 35 P.S. 691.5(b)(1), provides authority for the Department to "[f]ormulate, adopt, promulgate and repeal such rules and regulations and issue such orders as are necessary to implement the provisions of this act." Under this authority, the Department established a general permit program in Chapter 92 on July 21, 1984, which was approved for legality and form by the Attorney General of the Commonwealth.

The Concentrated Animal Feeding Operations Strategy Workgroup (a member of which represented the commentator's organization) agreed that a Water Quality Management Permit should not be required for the smaller operations. This was based, in part, on the excellent track record of the agricultural community in assuring the manure storage facilities for this class of operation meet the NRCS standards and that these facilities are operated properly. Many of these smaller manure storage facilities were funded with money intended to protect the Chesapeake Bay. The Department does not believe the argument presented by the commentator provides a legal basis to declare these and all future facilities of this size to be in violation of the Clean Streams Law if they did not receive a Water Quality Management permit.

Comment: Section 91.35 Freeboard Requirements - There is also no defensible reason that agricultural impoundments should be subject to less stringent freeboard requirements than those applied to other wastewater impoundments. In fact, because the wastewater source (live animals) cannot simply be shut down in the event of a problem that threatens overflow (such as excess precipitation or insufficient disposal) as could some other industrial sources, it would make better sense for agricultural operations to have higher freeboard requirements. The fact that the Natural Resources Conservation Service ("NRCS") "Pennsylvania Technical Guide" has lower freeboard requirements is not persuasive and does not outweigh the CSL's mandate to protect against potential pollution. The standard applicable to other industries in Pennsylvania should apply to industrial scale animal production as well. (1)

Response: Section 91.35 - The 2-foot freeboard requirement in Chapter 91 addresses various types of materials with high toxicity and greater risk in the event of overtopping or failure. The federal manure storage standards as provided in the PA Technical Guide are specifically designed for the potential hazards of animal manure and they appear to be adequate. There appears to be a misconception on how we arrived at these lower standards for agricultural operations. The PA Technical Guide requires storages for the 25-year, 24-hour rainfall which varies from 4.1 inches to 5.8 inches across the state plus the normal rainfall during the storage period which is normally six months, plus at least six inches for accumulated solids, plus 1-foot freeboard for earthen impoundments which comes very close to the 2-foot requirement for other waste impoundments. Chapter 91 regulations recognize that smaller operations will have limited risk and potential for mismanagement and limited damage as compared to the larger operations.

Comment: Section 91.35(d) - Revise to read "An agricultural operation which contains less than 1001 animal equivalent units is not subject to the requirements of subsections

(b) and (c) or the freeboard requirements in subsection (a), (but shall provide a 12-inch freeboard for all waste storage ponds (as defined in the PA Technical Guide) and a 6-inch freeboard for all waste storage structures (as defined in the PA Technical Guide) at all times." (4)

Response: This change has been made.

Comment: Section 91.36(a) - We agree with the intent of the last sentence of this section related to engineers certifying the adequacy of existing manure storage facilities on animal operations with over 1,000 AEUS. However, in saying that these facilities must be consistent with the PA Technical Guide, it raises the question of whether the PA Technical Guide freeboard criteria or the two foot freeboard requirement in Section 91.35(a) applies. Imposing the two foot requirement on existing facilities will be an unfair economic burden if they do not have a problem with overtopping of the facility. A reasonable solution would be to have an operation and maintenance plan that addresses the need to maintain freeboard consistent with the PA Technical Guide criteria on the existing facility. This would provide the assurance of adequate capacity and management to prevent overtopping at the 25year/24-hour storm. (4)

Response: A change has been made to Section 91.35 (d) exempting facilities in existence prior to the effective date of the regulations and in compliance with the Pennsylvania Technical Guide from the permitting requirements. If these facilities are permitted under a CAFO NPDES permit, the permit requirement will assure proper operation and maintenance of the existing facility within the design specifications under which it was constructed.

Comment: Section 91.36(a) is being revised to require certain animal manure storage facilities to comply with the publication entitled "Manure Management for Environmental Protection" and "The Pennsylvania Technical Guide." At the proposed rulemaking stage, some commentators asserted that the "Manure Management for Environmental Protection)" is outdated and doesn't reflect the more recently updated guidelines in "The Pennsylvania Technical Guide". (Comments, Issue 4, page 3.) Do these two publications contain overlapping requirements? Are the requirements in these publications consistent so that a facility will be able to comply with both? (6)

Response: The comment is valid and the "Manure Management for Environmental Protection" manual is being revised to address the concerns. DEP is currently updating the construction section in the manual as well to assure consistency through referencing the PA Technical Guide. The revised draft will be distributed for public comments and will be placed on the DEP website in the near future. Both the Manure Management Manual and the PA Technical Guide address similar concerns and will be consistent.

Comment: Section 91.36(a)(2) references the "Manure Management for Environmental Protection" prepared by the Department or the "Pennsylvania Technical Guide" (Emphasis added.) To be consistent with Section 91.36(a) which requires compliance with both documents, "or" should be changed to "and." (6)

Response: This change has been made.

Comment: Section 91.36(b) - After reviewing the revisions to Chapter 91, an issue of concern has surfaced for Farm Bureau. Chapter 91.36(b) LAND APPLICATION OF ANIMAL MANURE stipulates that the land application of animal manures does not require a permit from the Department if the application is in accordance with Pennsylvania's Manure Management Manual. The manual and its supplements is currently going under revision to insert the various requirements of Pennsylvania's CAFO strategy. One supplement to the manual is entitled Field Application of Manure. The revised Preface section of this supplement indicates that the Manure Management Manual and its supplements provide guidelines that comply with DEP regulations concerning animal manures. Some farmers may have operations that are concentrated animal operations (CAOs) under Pennsylvania's Nutrient Management Act or concentrated animal feeding operations (CAFOs) under DEP's CAFO strategy for meeting federal requirements. According to this supplement farmers are to follow these requirements "in addition to those found in this manual." Careful reading of the field application supplement indicates that nutrient management is to be based on phosphorus. This requirement raises a serious question. Section 4 of Pennsylvania's Nutrient Management Act indicates that when we look at nutrient management planning "there shall be a presumption that nitrogen is the nutrient of primary concern." The Manure Management Manual appears to be in conflict with the planning directive in Act 6. Farm Bureau believes that in regard to this issue, Act 6 should supercede this regulatory requirement. This issue will be discussed at the June 16 Agricultural Advisory Board. Your comments regarding this issue would be appreciated. (5)

Response: The intent of the Manure Management Manual and the Field Application Supplement is to provide guidance to the farmers in addressing manure related water pollution concerns. These guidelines are provided to assist farmers in their efforts to minimize water pollution which will bring them into the legal requirements of the Clean Streams Law. These guidelines do not supercede the regulatory requirements, and since our intent is to make them consistent with the PA Technical Guide, the PA CAFO Strategy and the PA Nutrient Management Act requirements, there should not be a conflict. Chapter 91 requirements for a permit for land application of manure will apply only when an operator will have a pollution incident related to directly polluting surface or ground water.

Comment: Section 91.31(b) - The "Manure Management for Environmental Protection Manual" is strikingly outdated and inaccurate and does not represent current best practices in the industry. For example, in the "Field Application of Manure" supplement to the Manual, there are no guidelines or recommendations for proper irrigation of liquid manures. Liquid manure irrigation is a practice commonly used in the swine and dairy industry and is very dependent upon soil hydraulic load capacities, as well as nutrient values. This is a glaring inadequacy. As another example, manure production rates and manure characteristics as set forth in the Manual (Table 1) are grossly different from the manure production and nutrient value table in the Penn State Agronomy Guide (PSAG).

This latter document is the document required by the Nutrient Management Program Regulations and reflects much more recent and accurate testing data. Use of the Manual's data can result in gross under-calculation of nutrient content information essential to proper waste management. For example, the Manual states that the nitrogen nutrient value for pig manure is 14 lb/ton. The PSAG states the nitrogen nutrient value for pig manure to be 52 lb/ton. So for one finishing house of 300 pigs, the nutrient values would be 7,000 pds. of nitrogen per year according to the Manual and 26,000 pds. of nitrogen per year according to the Agronomy Guide. It is not possible to provide a comprehensive critique of the Manual in these comments, but it will suffice to say that the Manual is grossly inadequate. If the Department's answer to these criticisms is that the Manual will be revised sometime soon, that raises issues of appropriate opportunity for public participation in the formulation of what amounts to a regulation. This sort of prospective incorporation presents fundamental problems of fairness and curtails public participation. (1)

Response: The comments refer to an outdated version of the Field Application Supplement. This manual supplement was updated in September 1998. The new supplement addresses all mentioned concerns.

Comment: Section 91.36(b) - For the same reasons set forth above with respect to animal manure storage facilities and impoundments, the Department cannot exempt land application of animal manure from the permit requirements of the Clean Streams Law based on an operation's compliance with specified standards or regulations. (See the discussion at section II.A, above.) As stated above, there is no authority in the Clean Streams Law that would permit the Department to approve such activities by any mechanism other than individual review and written approval.

Land application activities must be approved under a water quality management permit because such activities are an integral component of the overall facility for management and treatment of the sewage wastewater. As discussed at length above, the Department has no authority to exempt facilities for the treatment and disposal of animal waste from the Part II permitting requirements of the CSL. And, in assessing the ability of an agricultural operation to handle its waste in a manner that will protect the waters of the Commonwealth, the time, place and manner of the land application of manure is an essential element of an agricultural operation's treatment facility. If done properly, land application can remove nutrients and other contaminants from wastewater. On the other hand, the misapplication of manure can result in the pollution of surface and ground waters of the Commonwealth. It makes no difference whether the application takes place on land under the ownership or control of the agricultural operation or not. Either way it is an essential element of the treatment and disposal of sewage under the CSL, and the Department must review locations and designs under the water quality management permit process.

There is clear precedent for DEP to address details of land application of liquid sewage wastes in the context of a water quality management permit. Small municipal and private sewage treatment plants sometimes land apply treated sewage to complete secondary

treatment of wastewater during appropriate times of year when the plants may be unable to treat discharges to a level that adequately protects water quality in the usual receiving stream. Such facilities must obtain a water quality management permit authorizing the construction and operation o a spray irrigation system. Terms of such permits may typically address groundwater monitoring requirements, discharge monitoring and reporting requirements, hydraulic loading limitations as well as effluent quality limitations, and restrictions on application on frozen soil or during or after heavy precipitation. See e.g., Water Quality Management Permit No. 4356, Amendment 1, Delaware County Prison, Thornbury Twp., Delaware Co., (WWTP with Spray Irrigation - Interim Spray System).

In short, the Department cannot exempt land application activities from individual review and approval under a water quality management permit. (1)

Response: The final-form regulations have been modified to incorporate a requirement for a Water Quality Management Part II permit for those animal-feeding operations with animal populations exceeding 1,000 animal equivalent units. The permit exemption, which was based on compliance with existing technical design standards, was retained for smaller operations. The Chesapeake Bay Foundation was involved in the workgroup formed to develop the CAFO Strategy and was supportive of the end product. The Manure Management Manual for Environmental Protection is currently under revision to make it consistent with the Pennsylvania Technical Guide. This approach was discussed at several CAFO Workgroup meeting at which both agricultural and environmental groups, including the Foundation, were represented. The Department believes the final-form regulation will protect the environment and remain a practical approach for smaller farms.

Land application of manure in Pennsylvania is regulated under Act 6. The Department believes that the nutrient management act and regulations provide sufficient safeguards to assure manure is applied to the land in an environmentally safe manner.

Comment: Item 8. In the Summary of Proposed Amendments that accompanies the ANFR asks for comments on whether a threshold lower than 1000 animal equivalent units should be applied to new facilities located in special protection watersheds to require Part II permits. We do not agree with this additional requirement, which would go beyond the consensus of the CAFO stakeholders' group. The possible lower threshold discussed in the CAFO Strategy (bottom of p. 5) concerns the engineer's certification of existing facilities in special protection watersheds. Requiring an engineer's certification of existing storage facilities on CAOs with more than 300 AEUs in special protection watersheds would be appropriate, and could be tied to their required NPDES permit. This certification should verify consistency with the PA Technical Guide as described above to assure that overtopping will not occur at the 25-year/24-hour storm. (4)

Response: The Department is confident that the Natural Resources Conservation Service provides appropriate engineering supervision for the siting, design and installation of manure storage facilities serving smaller farming operations. This engineering oversight

includes verification that the design and installation of the manure storage facility is consistent with the Pennsylvania Technical Guide and that facility capacities are such that overtopping will not occur at the 25-year/24-hour storm event. To require a second certification for existing facilities appears to be duplicative and an unnecessary expense for the farming community. This change was not made.

Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063
September 21, 1999

The Secretary **717-787-2814**

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown II
Harrisburg, PA 17101

RE: Final Rulemaking – Wastewater Management (Chapters 91, 97 and 101)
(#7-323)

Dear Bob:

Pursuant to Section 5.1(a) of the Regulatory Review Act, enclosed is a copy of a final-form regulation for review by the Commission. This rulemaking was approved by the Environmental Quality Board (EQB) for final rulemaking on September 21, 1999.

Amendments to the wastewater management provisions were initiated as a result of the RBI to support pollution prevention strategies, make the application of new green technologies easier and eliminate obsolete regulations. The final rulemaking eliminates Chapters 97 and 101 by deleting obsolete sections and incorporating remaining sections into Chapter 91. This consolidation will provide easy reference to related water pollution control requirements. The rulemaking also provides the regulated community and DEP greater flexibility in implementing pollution prevention measures and improves the permitting program by providing authority for issuing general water quality management permits.

The proposed rulemaking was published on August 23, 1997, with a 30-day public comment period. There were 11 commentators to the proposal. Prior to developing the final rulemaking, DEP finalized its Concentrated Animal Feeding Operation (CAFO) Strategy in March 1999. The content of some elements of the Strategy necessitated new regulations applicable to the water quality management Part II permit requirements. To allow for public notice of these revisions, DEP published an Advance Notice of Final Rulemaking (ANFR) on April 24, 1999. There were six commentators to the ANFR, and their issues are addressed in a separate comment and response document that is attached to the final rulemaking.

The Agricultural Advisory Board and the Water Resources Advisory Committee reviewed and supported drafts of the final rulemaking.

The Department will provide the Commission with any assistance required to facilitate a thorough review of this final-form regulation. Section 5.1(e) of the Act provides that the Commission shall, within ten days after the expiration of the committee review period, approve or disapprove the final-form regulation.

For additional information, please contact Sharon Freeman, Regulatory Coordinator, at 783-1303.

Sincerely,

James M. Seif
Secretary

Enclosure

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

RECEIVED
1999 SEP 21 PM 2:36
INDEPENDENT REGULATORY REVIEW COMMISSION

I.D. NUMBER: 7-323

SUBJECT: Wastewater Management

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
9-21-99	Cindy Zeun	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
9.21.99	Bonnie Castella	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
9/21/99	Kim C. Gaumer	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU

September 21, 1999