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DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY

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November 29, 2010

Mr. Kim Kaufman
Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Mr. Kaufman:

I am writing with respect to the Environmental Quality Board's (EQB) Rulemaking No. 7-443: National Pollutant Discharge Elimination System (NPDES) Permitting, Monitoring and Compliance (25 *Pa Code*, Chapter 92a). IRRC had approved this rulemaking as final on August 19, 2010, and the regulation was published as final in the *Pennsylvania Bulletin* on October 9, 2010.

Five public comments were received by EQB regarding this rulemaking, but were not fully processed for timely consideration by EQB prior to the adoption of Rulemaking No. 7-443 as final. This includes not forwarding them to IRRC or the standing committees, and not including them in the final Comment and Response Document accompanying the final regulation. The Department of Environmental Protection (DEP) regrets this error, and has taken the steps described below to address it.

DEP has reviewed these comments. As a result, DEP has prepared a Supplement to the Comment and Response Document that I am enclosing for your records. Most of the comments were similar to comments received, considered and responded to as a part of the original Comment and Response Document. For these comments, the Department has responded to the comments accordingly and where appropriate, has explained how the rulemaking was amended to address those concerns. However, there were also comments that were uniquely raised by the five comment letters. While none of those comments were of a nature that would have led to a change to the rulemaking, DEP has reviewed them and provided a response in the enclosed Supplement to the Comment and Response Document.

This supplement is also being forwarded to each of the commentators affected, EQB, the Office of General Counsel, the Office of Attorney General, and the House and Senate Environmental Resources and Energy Committees. Should you have any questions, please feel free to contact Duke Adams, Acting Director, DEP Policy Office by e-mail at ranadams@state.pa.us or by telephone at 717-783-8727.

Sincerely,

John Hanger

John Hanger
Secretary

Enclosure

25 *Pa Code* Chapter 92a

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

The Department of Environmental Protection's Supplement to Comment and Response Document

November 16, 2010

PURPOSE

The purpose of this Supplemental Comment Response Document is to address the comments received from five commentators, listed below, that were not fully processed as part of the finalization of the Environmental Quality Board's (Board) Rulemaking No. 7-443 (IRRC No. 2819) representing the revision and reorganization of Chapter 92 into Chapter 92a. The regulation was published as final in the *Pennsylvania Bulletin* on October 9, 2010.

After review by the Department, the comments fall into three categories. The first category was comments that were similar to other comments submitted and which were responded to in the Comment Response Document accompanying the final regulation. Several of these comments involved issues of significant interest to many commentators, and the final regulation included changes consistent with the comments. Another category was comments that were similar to other public comments that were considered, but that the Department feels should be addressed in this document by revising those previous responses. Finally, there were comments that were completely or substantially new comments. The Department provides responses to each one of those below in this document. The Department believes no changes would be appropriate based on the comments in these final two categories.

COMMENTATOR LIST

ID Number	Name/Address
43.	Mr. Herbert E. MacCombie, P.E. Mr. Dennis F. O'Neill, P.E. Consulting Engineers and Surveyors, Inc. P.O. Box 118 Broomall, PA 19008
44.	Electric Power Generation Association 800 North Third Street, Suite 303 Harrisburg, PA 17102
45.	Mr. Jeffrey G. Wendle, P.E., BCEE CET Engineering Services 1240 N. Mountain Road Harrisburg, PA 17112
46.	Mr. Steven A. Hann Hamburg, Rubin, Mullin, Maxwell, & Lupin 375 Morris Road Lansdale, PA 19446
47.	Ms. Brenda H. Gotanda Manko, Gold, Katcher & Fox, LLP 401 City Avenue, Suite 500 Bala Cynwyd, PA 19004

1. Comments Previously Raised—Response Unchanged

Each of the Commentators made comments that were also made to the Board by others during the public comment period. The Board responded to those comments in the Comment Response Document. Those comments are as follows:

ID Number	Comment Number
43.	23
44.	59, 151, 173
45.	1, 8, 9, 11,12, 17, 19, 20, 35, 37, 38, 39, 43, 44, 47, 50, 51, 52, 53, 59, 60, 66, 68, 69, 71, 75, 76, 77, 81, 85, 89, 93, 97, 98, 99, 100, 106, 118, 124, 133, 134, 136, 142, 145, 154, 159, 179, 180, 183, 188, 195, 196
46.	9, 11, 35, 37, 39, 44, 47, 53, 67, 76, 77, 85, 89, 99, 100, 106, 118, 124, 133, 136, 154, 159, 179, 195
47.	1, 5, 9, 16, 22, 58, 59, 65, 66, 76, 77, 118, 119, 125, 150, 151, 159, 169, 170, 183

2. Comments Previously Raised—Response Amended

Additions are in underlined text, deletions appear in brackets [ ].

105. Comment

It appears that deleting the exclusions in existing § 92.4(a)(4) and (6) could have an impact on certain facilities, but no information is provided regarding the impact on those facilities, or the overall practical effect of this change. This should be addressed in the final rulemaking proposal. (11) (16) (27) (45) (46)

Response

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

175. Comment

Section 92a.53 does not address the provisions of §124.8(b)(5) and (6) or the requirements for fact sheets set forth in 40 C.F.R. § 124.56. The DEP regulation should be amended to be consistent with the minimum requirements set forth in the federal regulations, or those regulations should be incorporated by reference. Commentator 47 feels that a Fact Sheet is not the appropriate place to discuss compliance with water quality standards. (30) (32) (34) (47)

Response

The Department believes that § 92a.53 (3)—(5) effectively covers the requirements of 40 CFR 124.56 and 40 CFR 124.8. All relevant determinations and calculations must be included in the fact sheet. The Fact Sheet is the appropriate place to demonstrate how permit conditions, including those based on water quality standards, are designed to

achieve water quality standards. This has been a long-standing practice by the Department as part of its EPA-approved NPDES permit program.

3. Comments Not Previously Raised—Response Included

The following comments were not previously raised. Responses to those comments are included.

NPDES PERMIT FEES

33a. Comment

While we don't disagree in principle with a tiered fee structure based on permit class (major/minor) and flow, we find the extreme variation in fees to be unsupported and unfair. The Board presents no supporting basis that a major industrial discharge with flow > 250 MGD costs 50 times more to administer than a minor permitted facility, or 5 times more to administer than a major industrial facility with flow < 250 MGD. The fee must reflect the true cost of administering the NPDES program. (44)

Response

fees are designed to reflect the Commonwealth's share of the true cost of administering the NPDES program. Facilities with flow > 250 MGD are a particular concern, as these legacy facilities are very resource-intensive for the Department to permit and administer in comparison to any other class of facilities. For an industrial facility to discharge 250 MGD or more, the wastewater is cooling water, and the federal Clean water Act sections 31) (Standards for Thermal Discharges) and 316(b) (Standards for Cooling Water Intake Structures) are applicable. The Department must assign resources from both Central Office and the region to manage the 316(a) processes. For facilities that meet this 250 MGD flow criterion, the Department typically would involve between 6 and 8 professional staff for extended periods of time. Permittees typically hire consultants to perform field studies and issue reports supporting their case. The Department must evaluate the quality of the consultant's work and the conclusions; and rather then being a routine office exercise, this has proved to be resource-intensive. Instead of just reviewing the consultant's work and report, the Department may decide that it is necessary to perform a parallel, independent effort to analyze the raw data. These efforts may take 1-3 years and normally involve extensive meetings and negotiation. Additionally, the Department may perform its own field studies and produce its own conclusions, based on:

- Site inspections
- Field fish surveys
- Field habitat evaluations
- Field benthic surveys
- *In situ* temperature monitoring, extending over years
- Intake/discharge temperature analyses
- Thermal plume mapping
- Thermal imaging overflights

These issues and reviews by Department staff are very resource intensive. Consequently, the Department expends effort and resources disproportionate to those typically expended

on other industrial major facilities. Based on these considerations, the proposed annual fee of $25,000 per facility is reasonable and proportionate to the cost of issuing NPDES permits to these facilities.

92a.2 DEFINITIONS

72a. Comment

BTA – In defining BTA, the Board has paraphrased 316(b) of the Clean Water Act in a way that changes its meaning. Section 316 (b) requires standards to reflect the best technology available for "minimizing adverse environmental impact." The broad concept of "adverse environmental impact" is inappropriately narrowed to considering only impingement and entrainment. Other important adverse environmental impacts, including non-water quality environmental impacts and energy impacts, should be considered as per the federal statute. The definition should be identical to the federal statute. (44)

Response

The definition of BTA is based on the CWA §316(b), federal guidance and court rulings, and best professional judgment. EPA used the metric of impingement-mortality and entrainment as the basis for minimizing adverse environmental impact in the Phase I and Phase II. The Department agrees with EPA's position that "impingement and entrainment are the primary, harmful effects of cooling water intake structures that can be reduced by using specific technologies" and/or operational measures and therefore are the adverse environmental impact that requires minimization (69 Federal Register page 41600). The only technology or operational measure that EPA has specifically acknowledged as BTA is reducing flow to a level commensurate with that which can be attained by closed-cycle recirculating cooling and an intake velocity of 0.5 feet per second. However, closed-cycle recirculating cooling may not be available at or applicable to every facility with a cooling water intake structure. The proposed definition of BTA is flexible in that it recognizes that not all technologies or operational measures may be applicable to a facility, and the Department will consider other potential non-water quality environmental impacts when determining whether or not a technology or operational measure is applicable to a facility.

80a. Comment

Major Facility – The phrase "and any other facility classified as such by the Department in conjunction with the Administrator" in this definition is too broad, especially considering that the fee structure depends greatly upon whether a facility is classified as a major facility or not. (47)

Response

The process to determine whether a facility is a major facility or not, depends on a joint determination by the Department and the Administrator (EPA) as a condition of the Memorandum of Agreement between the Commonwealth and the EPA. The Department does not have sole control over the process, and it may change without any revision to Chapter 92a. Therefore, while the Department agrees that the language of the definition is broad, in this case it is appropriate. Although the fee tables refer to major and minor facilities in places, those permit fee categories ultimately are based on the facility flow.

86a. Comment

New discharger – This definition should use the phrase "will be a discharge of pollutants" instead of "may be a discharge of pollutants." It should not be the case that someone who may discharge, but never actually does so, is considered a new discharger. (47)

Response

One major goal of the proposed rulemaking is to standardize definitions and terminology between Chapter 92a and the equivalent terms in the companion Federal regulation at 40 CFR Part 122. The Department should maintain consistency with the Federal terminology in this case.

94a. Comment

Stormwater discharge associated with industrial activity – This definition is ambiguous and should be deleted. Use the Federal definition at 122.26(b). (47)

Response

The definition is identical to the definition of "stormwater discharge associated with industrial activity" in existing Section 92.1 which was reviewed and approved by EPA during its review of the 2000 amendments to Chapter 92. No change to this definition was made, except as described in comment 94

97a. Comment

TMDL –You should either use the Federal definition or explain why "natural quality" is used instead of "natural background" in this definition. (47)

Response

See comment 97. "Natural quality" is a defined term in Chapter 96.

97b. Comment

Toxic pollutant –You should use the Federal definition of this term. (47)

Response

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

92a.4 EXCLUSIONS

105a. Comment

We support reverting to the Federal provisions related to exclusions. (47)

Response

The Department appreciates the comment.

92a.10 POLLUTION PREVENTION

115a. Comment

Chapter 92a is not the place for the encouragement of voluntary pollution prevention activities, as it may take on regulatory implications during the permit writing process, which would not be appropriate. Therefore, this section should be deleted. If not deleted, then "process change" and "materials substitution" should be deleted from the hierarchy, as these may not be technically or economically feasible in many cases. This section should also be

clarified to confirm that the Department will not require the listed pollution prevention activities. (47)

Response

The Department disagrees. The language that the commentator takes issue with is established Department policy and has been used for over ten years. The Department is committed to integrate Pollution Prevention into its everyday practices, and to encourage and assist permittees in implementing Pollution Prevention practices, wherever possible. The only revision between existing § 92.2b and proposed § 92a.10 is the addition of Pollution Prevention source reduction measures (process change and materials substitution) to the top of the hierarchy, where they belong. Finally, § 92a.10 is unchanged from § 92.2b in that it provides only for the Department to encourage Pollution Prevention measures, not to establish them as permit conditions.

92a.11 OTHER CHAPTERS APPLICABLE

116a. Comment

The wholesale cross-referencing of other regulations in this section does not serve the goals of clarifying when State and Federal regulations differ. Chapters 87 through 90 have no applicability to point source discharges. The Board should clearly explain which particular regulatory provisions may produce more stringent limits or, failing that, the Board should make it clear that only applicable provisions of those chapters may apply (suggested: "To the extent that *applicable provisions* of Chapters..."). These comments also apply to § 92a.12. (47)

Response

See the response to comment 116. Provisions of Chapters 87 through 90 do have applicability to point source discharges. The suggested revision to the first sentence of this section does not add value or clarity.

92a.21 APPLICATION FOR A PERMIT

127a. Comment

Section 92a.21(c)(1) includes the requirement to provide the Department with one original and two copies of the complete permit application. We believe that this section should provide for the use of electronic submission of application materials in lieu of multiple paper copies. (47)

Response

The Department agrees that there is merit to the comment. It is a priority to incorporate electronic processes in monthly Discharge Monitoring Report reporting by permittees, and permit issuance by the Department, for cost and paperwork reduction. A logical extension of this is that applicants should be able to submit applications for individual NPDES permits, or Notice of Intent for coverage under general permits. At this time, however, the Department does not have the ability to support electronic submitting of permit applications.

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

132a. Comment

EPGA supports the Board's proposed provision to provide permit coverage for the application of pesticides under a permit-by-rule provision. (44)

Response
See comment 129 and the response.

132b. Comment
The Board should delete the permit-by-rule provision for application of pesticides, and bring back the existing exclusion for pesticide application. (47)
Response
Applications of pesticides on or near surface waters had previously been considered by EPA as an activity that does not require coverage under an NPDES permit, as provided in 40 CFR 122.3(h) (relating to exclusions). However, the U.S. Court of Appeals for the Sixth Circuit issued a ruling vacating the EPA rule exempting pesticide application from NPDES permitting requirements. *National Cotton Council et al. v. EPA* (C.A. 6, No. 06-4630)(Jan. 7, 2009). Based on other concerns, the permit-by-rule provision in Chapter 92a has been deleted, but the exclusion has not been reinstated at this time as EPA and the Department will develop a general permit regarding pesticide application.

92a.26 NEW OR INCREASED DISCHARGES

141a. Comment
The clarification in this section of facility expansions is an improvement and EPGA is in favor of the language. (44)
Response
The Department appreciates the comment. However, note that revisions to this section have been made based on other comments.

141b. Comment
This section is not needed because 40 CFR §122.41(l), incorporated by reference, contains similar provisions. Section 92a.26 is more stringent than §122.41(l) in that it requires reporting even when an effluent limitation will not be exceeded, and sets a 60-day time limit on reporting. (47)
Response
Section 92a.26 has been revised to address the concern regarding the 60-day time period. Section 92a.26 is not inconsistent with or more stringent than 40 CFR 122.41(l), because both provisions require reporting of significant changes to the wastestream of a facility, and neither is limited to reporting only changes that may violate an effluent limit. The value of §92a.26 is that it is more specific and informative about the types of changes to a wastestream that should be reported, and the sequence of events that will follow (viz., the Department will determine if the change is significant enough to merit a new application or a permit amendment).

141c. Comment
There is no definition of "facility expansion" or "process modification." (47)
Response
As per the *Pennsylvania Code & Bulletin Style Manual*, definitions are not appropriate for terms used according to the dictionary meaning.

92a.45 CALCULATING NPDES PERMIT CONDITONS

161a. Comment

This section incorporates by reference the Federal provisions at 40 CFR §122.45, including the Federal provision at §122.45 (g)(1) that allows technology-based effluent limits to be calculated on a net basis when the discharger demonstrates that the quality of its intake water prevents compliance. We request that the Board revise §92a.46, and also Chapter 96, to provide that WQBELs may also be calculated on a net basis. (47)

Response

The Commonwealth's NPDES program cannot be any less stringent than that provided for in Federal regulations, and it is unclear what would constitute a net basis for a WQBEL. It seems as though all other sources, natural and manmade, would be discounted, and that would be inconsistent with the purpose of a WQBEL. The Department should maintain consistency with Federal requirements in this case.

92a.46 SITE-SPECIFIC PERMIT CONDITONS

161b. Comment

This section mirrors the existing §92.52a, providing that the Department "may establish and include in an NPDES permit, any permit condition, as needed on a case-by-case basis, to assure protection of surface waters..." This language is far too broad. In addition, the provision covering toxic reduction activities should be deleted because it could be read to provide the Department with the discretion to include as an enforceable permit condition an obligation on the part of the permittee to undertake significant business changes without adequate basis. (47)

Response

This provision is identical to existing § 92.52a, and no new or more stringent requirements are proposed, nor has the Department encountered any of the potential issues described by the commentator.

92a.54 GENERAL PERMIT

178a. Comment

This section is vague, unduly broad, or too stringent in that it 1) provides the Department unfettered discretion to provide an individual permit instead of a general permit; 2) should, but does not, set a higher standard to revoke coverage under a general permit than to deny coverage when initially issued; and 3) does not allow general permit coverage for discharges to HQ or EV waters. (47)

Response

See the response to comment 178. The provisions that the commentator refers to are existing provisions and no new or more stringent requirements have been proposed, nor has the commentator provided any rationale for why these provisions are inappropriate.

92a.61 MONITORING

182a. Comment

The Department should be able to impose reasonable monitoring requirements for discharge sampling only, because it is the point source discharge, and nothing else, that is regulated under the NPDES program. Alternatively, revisions should be performed to clarify and

narrow the phrase "surface waters adjacent to or associated with" a facility or activity, and "for other reasons that the Department determines are appropriate." The Board should incorporate by reference all of 40 CFR §122.44 to capture important provisions related to analytical methods. (47)

Response

Point source discharges are dependent on the ability of the receiving water to assimilate their pollutant loading without violating water quality standards in the receiving water. The remaining assimilative capacity of receiving waters cannot be ascertained without sampling the receiving waters, and it is reasonable to require the permittee to sample receiving waters to determine the remaining assimilative capacity of the receiving water. The language is appropriate and generally restricts sampling and monitoring to the surface waters in the immediate vicinity of the point source; and additional, short-term data collection that may be necessary to support water quality analyses or to react to sudden developments. Any new, long-term monitoring requirements proposed to be incorporated into an NPDES permit would be subject to public notice and comment. The provisions of 40 CFR §122.44 already are incorporated by reference at §92a.44.

92a.76 CESSATION OF DISCHARGE

187a. Comment

The Board should add a provision requiring that when a permittee eliminates its point source discharge and provides the required notice to the department, the Department shall terminate the permit within 30 days, and if the Department does not respond, then the permit shall be deemed to be terminated. The Department should not be permitted to reject a notice of termination and require that a permit remain in effect when no point source discharge is present. (47)

Response

The Department does not intend to extend point source discharges unnecessarily, nor is it clear what possible consequences could extend to the permittee. If a permittee wishes to have the permit terminated, it can request the Department to do so and the Department will make a decision once all of the required information has been submitted.