Responses to Comments from July 22, 2008 WRAC Meeting

- 92a.8 Confidentially of Information (NOTE: The comment refers to provisions carried over from the existing regulation.)
  Comment: D. Bluedorn recommends that we revert to federal requirements only regarding handling of Confidential Business Information (CBI), deleting 92a.8(b). We should not incorporate 40 CFR 122.7 in 92a.8(a), and then go on to say something different in the next subsection 92a.8(b).
  Analysis and action: 40 CFR 122.7 allows the permittee to claim essentially any information as CBI. However, Clean Streams Law (CSL) section 607 defines all papers and documents of the Department, and applications before the Department, as public records, and requires that all public records be made available for public inspection. Only coal analysis information specifically is identified as not a public record. For other records claimed as CBI by the applicant or permittee, it is incumbent upon the Department to evaluate the claim of CBI, while considering the requirements of section 607. 92a.8(b) implements section 607 requirements, and tracks the 607 language closely in part. The comment cannot be accepted because it is inconsistent with the CSL section 607. We do not propose any action based on this comment.

- 92a.10 Pollution prevention (NOTE: The comment refers mostly to provisions carried over from the existing regulation, as the proposed regulation is changed only slightly from existing language, adding the "process change" option to the hierarchy)
  Comment: D. Bluedorn: Remove all Pollution Prevention provisions from NPDES regulations, and place elsewhere. It doesn't really belong in 92a. R. Cavett: The order of preference for environmental management of wastewater is too prescriptive. It can lead to the Department inappropriately prescribing fundamental process changes that may not be practical, instead of focusing on better options lower in the hierarchy.
  Analysis and action: This comment is being considered by the Policy Office, and no resolution is available at this time.

- 92a.12 Treatment requirements (NOTE: The comment refers mostly to provisions carried over from the existing regulation, as the proposed language is changed only slightly to improve readability.)
  Comment: D. Bluedorn commented regarding subsections (d), (e), and (f), which refer to the need for permittees, upon notice from the Department, to take action to meet new requirements that may become active as a result of new standards. Comment #1: These are new provisions and inappropriate, intended to eliminate the need for the Department to reopen permits to insert updated requirements. Delete (d) and (e) and rely on the reopener section of the regulations. Comment #2: The 180 day limit is possibly burdensome, when compliance could take much longer. Comment #3: The reference to the State Water Plan in (f) is inappropriate, since it's just a database. (The comments were stated several ways,

and evolved as the discussion progressed.) E. Stevens and J. Jackson thought that these provisions mostly are appropriate.
Analysis and action: These provisions are not new – they exist at 92.8a (slightly reworded). There is no action required by the permittee until notice of the new requirement or Public Water Supply has been transmitted to the permittee by the Department. The burden is on the Department to notify the permittee of any new requirements. The 180-day time frame refers only to the need for the permittee to inform the Department of whether the facility is capable of meeting the new requirements, or a schedule to that end, rather than a deadline to implement the new requirements. Additionally, it would not be good policy to require that the Department should have to formally reopen a permit, or wait until the next permit cycle, to implement a new requirement. Therefore, we do not propose any action based on these aspects of the comment. Regarding the reference to the State Water Plan, this matter is being considered by the Policy Office, and no resolution is available at this time.

- 92a.21(d) Additional Information required to support application : Waterbody Assessment (NOTE: The comment refers to provisions carried over from the existing regulation)
  Comment: D. Bluedorn commented that it is unreasonable for the Department potentially to require waterbody assessments as part of the application process. Permit writers may use this provision to require expensive studies unrelated to development of the effluent limits. If waterbody assessments by the permittee are needed, they should not be required before the Department has issued the permit. Delete this subsection. J. Jackson and others disagreed that this provision is unnecessary or inappropriate.
  Analysis and action: This provision is not new – it exists at 92.21. We do not agree that this provision involves a potentially inappropriate burden on the applicant. The applicant or permittee may only discharge consistent with the available assimilative capacity of the receiving water, and the Department may require additional information to decide on appropriate action related to the application. Waterbody assessments may be required to assess the ability of the receiving water to assimilate any existing, new, or expanding source. Fundamentally, these assessments would be used to support development of the WQBEL (water quality-based effluent limit) as required by regulation, and we are not aware that the Department has abused its discretion in applying this provision. We do not propose any action based on this comment.

- 92a.24 Permit-by-Rule for SRSTPs (NOTE: The comment refers to a new proposed provision in 92a)
  Comment: G. Merritt was concerned that 92a.24(a)(2) refers to a Single Residence Sewage Treatment Plant (SRSTP) as a facility that treats less than 1000 GPD. This may be inconsistent with the definition of SRSTP in other regulations.
  Analysis and action: The definition of SRSTP is contained in 92a.2 (Definitions), and is the same as in other related regulations. The design flow is not integral to the definition of SRSTP, and the design flow can vary. The provision in

92a.24(a)(2) does not alter the definition of SRSTP, but states that the permit-by-rule provisions of 92a.24 are applicable only for SRSTPs with a design flow of 1000 GPD or less. (SRSTPs with design flow rates higher than 1000 GPD are not anticipated, but any such SRSTP would need coverage under a general permit or an individual permit.) We do not propose any action based on this comment.

- 92a.25 Changes in Wastestream (NOTE: The comment refers mostly to provisions carried over from the existing regulation, as the proposed language is changed only slightly to improve readability.)
  Comment: D. Bluedorn commented that the first sentence should make it clearer that permittees may make changes in their facility or wastestream that do not have the potential to exceed effluent limits or other permit conditions, with subsequent notification to the Department.
  Analysis and action: This provision is not new – it exists at 92.7. However, we agree that the comment is appropriate. The language will be clarified to make it clear that such expansions or changes may proceed without notification or approval of the Department, but that the Department must subsequently be notified within 60 days of the change in the facility or the wastestream.

- 92a.35 Cooling Water Intakes and 316(b) (NOTE: The comment refers to a new proposed provision in 92a)
  Comment: D. Bluedorn commented that subsections (b) and (c) are premature, and only the Phase I regulations should be incorporated as per subsection (a). Delete subsections (b) and (c). G. Merritt asked about facilities that draw their cooling water from public water supplies.
  Analysis and action: Our best interpretation of the current state of the 316(b) process is that the Department currently is obligated to make a Best Technology Available (BTA) determination in all cases where the permittee has a cooling water intake structure. Section 92a.35 almost certainly will change as new information on developments at the federal level become available. However, we regard the current language as the minimum required scope for 316(b) at this point, and it is consistent with what we have seen at least one other state incorporate into regulation. Regarding facilities that may draw their cooling water from a public water supply -- no decision is available at this time, pending further developments at the federal level. We do not propose any action at this time based on this comment.

- 92a.37 Department action on applications (NOTE: The comment refers to a new proposed provision in 92a)
  Comment: D. Bluedorn and S. Rhoads expressed concerns regarding 92a.37(2) and (3), provisions which require applicants to assure that their applications are consistent with Local and County Comprehensive Plans, and the State Water Plan. (The comments were stated several ways, and evolved as the discussion progressed.) Specific options discussed were referring to consistency with zoning ordinances rather than the Local and County Comprehensive Plans, and referring to critical area resource planning developed under a State Water Plan, rather than

the State Water Plan. In any case, D. Bluedorn stated that, while it is appropriate for the Department to consider these plans in the application review process, the burden should not be on the applicant to demonstrate consistency with Local and County Comprehensive Plans, and the State Water Plan. The counties don't even follow their own plans reliably. Some members expressed support for the need to assure that NPDES permits are issued consistent with water resource planning, which is the overall intent of these provisions.
Analysis and action: This matter is being considered by the Policy Office, and no resolution is available at this time.

- 92a.52 Variances (NOTE: The comment refers to provisions carried over from the existing regulation)
  Comment: D. Bluedorn suggested that the Department should automatically incorporate by reference any new variance enacted under Federal regulation.
  Analysis and action: The Department should perform an independent evaluation of variances enacted at the federal level to ensure that they are appropriate for the Commonwealth under both the Clean Water Act and the Clean Streams Law. We do not propose any action based on this comment.

- 92a.55 Watershed permits (NOTE: The comment refers to a new proposed provision in 92a)
  Comment: There was extensive discussion from members regarding the scope, advantages, disadvantages, and terminology of watershed permits. Some members supported the concept of watershed-based planning and permitting, but overall, most members thought that the concept may be premature or insufficiently developed.
  Analysis and action: After reviewing the discussion, and based on a reevaluation of program priorities, we will reserve this section pending further developments in other regulations to support an integrated approach to watershed restoration. The Department remains committed to watershed-based planning and permitting, both for prevention of impairments and restoration of existing impairments. But we agree that this may not be the best first step in implementing watershed-based planning and permitting. For now, the program will plan to implement wasteload allocations in Total Maximum Daily Loads (TMDLs) through individual permits in affected watersheds. The link between a watershed permit and a requirement for tertiary treatment for new discharges in 92a.47(b)(2) will be removed. Section 92a.85, dealing with public notice of watershed permits, also will be reserved.

- 92a.76 Cessation of discharge (NOTE: The comment refers to the provisions carried over from the existing regulation)
  Comment: D Bluedorn: If a permittee ceases their discharge, they should be able to continue to submit DMRs and hold their permit.
  Analysis and action: This provision is not new – it exists at 92.72a. The comment reflects some concern that the options of the permittee may be constrained by this provision, but we do not feel that this is the case. If the permittee intends to cease operations permanently, the permittee loses nothing by

informing the Department that this is the case. The Department gains by terminating the permit: tracking and efficiency improves, costs are reduced, and assimilative capacity is recovered for reallocation. If the permittee plans only a temporary discontinuance of operation or discharge for some valid business reason, we do not believe that this section applies. On the other hand, it would be poor policy for the Department to allow permittees to "hold" permanently a permit that is not being actively applied. We do not propose any action based on this comment.

- 92a.82 Public Notice of applications and draft permits (NOTE: The comment refers to provisions carried over from the existing regulation)
  Comment: D Bluedorn: The Department should provide greater flexibility for the process of soliciting public comment, and not limit the public comment period to 30 days plus an optional 15-day extension. Other states allow longer periods, or no time limit at all.
  Analysis and action: This provision is not new – it exists at 92.61. Based on our investigations, 30 days is the standard time period to solicit public comment on NPDES actions, both at the federal and state levels. Providing for the optional 15-day extension already adds a substantial element of flexibility. Considering the interests of both the Department and the applicant or the permittee, there is no policy advantage that we can discern in extending these time periods further. We do not propose any action based on this comment.

  Comment: E. Stevens: Explicit provision should be made for an informal conference between the Department, the applicant or the permittee, and interested members of the public, as part of the application or reissuance process. This would be most appropriate when substantive comments have been received on the Department's proposed action, and would help to avoid appeals and litigation. (Chapter 92 used to contain such a provision in the 1970s)
  Analysis and action: This is widely recognized in the Department as good practice to resolve issues before an appeal is initiated. However, regulation is not normally an appropriate place to list good practices, and we would not include such a provision unless a compelling case has been made to support the need for this explicit provision. We do not propose any action based on this comment.

- Subchapter H - Civil Penalties for Violations of NPDES Permits (NOTE: The comment refers to provisions carried over from the existing regulation)
  Comment: D. Bluedorn: Based on my experience, these provisions are not routinely complied with by the regions, and should be reconsidered.
  Analysis and action: We are unaware of any systemic problem with the application of these provisions, and compliance issues are distinct from consideration of whether these provisions are appropriate. We do not propose any action based on this comment.