FINAL RULEMAKING
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 91 AND 92A]

Water Quality Management (WQM) and
National Pollution Discharge Elimination System (NPDES)
Permit Application and Annual Fees

The Environmental Quality Board (Board) by this order amends Chapter 91 (relating to general provisions) and Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) as set forth in Annex A. The amendments to Chapter 91 address permit application and Notice of Intent (NOI) fee requirements for Water Quality Management (WQM) permits and include other clarifications under 25 Pa. Code §§ 91.1, 91.22, 91.27, 91.36, and 91.52. The amendments to Chapter 92a address permit application, NOI, and annual fee requirements for National Pollutant Discharge Elimination System (NPDES) permits and include other clarifications under 25 Pa. Code §§ 92a.26, 92a.32, and 92a.62.

This final-form rulemaking was adopted by the Board at its meeting of _____.

A. *Effective Date*

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

B. *Contact Persons*

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C. *Statutory Authority*

This final-form rulemaking is authorized under sections 5(b)(1) and 6 of the Clean Streams Law (35 P.S. §§ 691.5(b)(1) and 691.6)) and section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20), which authorize the Board to promulgate rules and regulations necessary for the Department to perform its work, including the charging and collecting of reasonable filing fees for applications filed and for permits issued under the Clean Streams Law (CSL).

D. *Background and Purpose*

Water resources of this Commonwealth are among the most abundant in the nation and protecting the quality of these waters requires significant Department resources to administer the

NPDES and WQM programs (collectively, "Clean Water Program"). Among all the states in the nation, this Commonwealth ranks in the top five for number of NPDES-permitted facilities and in the top ten for surface water miles. This Commonwealth has more municipal separate storm sewer system (MS4) NPDES permits and more combined sewer overflows (CSOs) than any other state in the country. The Department receives over 2,600 applications and NOIs for NPDES and WQM permits annually for: discharges of sewage, industrial waste, industrial stormwater, and municipal stormwater; operation of concentrated animal feeding operations (CAFOs); utilization of pesticides; land application of sewage and industrial wastes; and construction of sewage and industrial waste pollution control facilities.

The Department continuously works to improve business processes to reduce the cost of administering the Clean Water Program while maintaining the Department's core responsibility of serving the public by protecting public health and the environment. However, as development needs within this Commonwealth continue to expand, the Department's workload also increases over time.

Under the CSL, Department permits are required for any discharge of sewage or industrial waste or for any other activity that creates a danger of pollution of waters of this Commonwealth (35 P.S. §§ 691.202, 691.307 and 691.402(a)). The CSL also requires approval from the Department prior to the construction of infrastructure that is used to treat or convey sewage and industrial wastes (35 P.S. §§ 691.207 and 691.308).

The Board has promulgated regulations in Chapters 91 and 92a for the Department to administer the programs authorized by the CSL. Chapter 91 establishes a WQM program for sewage and industrial waste construction projects, discharges to groundwater through the land application of sewage and industrial wastes, and the use of pesticides in surface waters. Section 91.22 provides a fee schedule for WQM permit applications. Most of these fees have not been updated since 1971.

Chapter 92a establishes a permit, monitoring, and compliance program for discharges to surface waters of this Commonwealth under the CSL, consistent with the NPDES permitting requirements of section 402 of the Federal Clean Water Act (33 U.S.C.A. § 1342). The Department has been delegated the authority to administer the Federal NPDES permitting program in this Commonwealth by the United States Environmental Protection Agency (EPA) since 1978.

Chapters 91 and 92a authorize the Department to issue individual WQM and NPDES permits with terms and conditions specific to the project, discharge, or activity described in the permit application, and to issue general permits for categories of projects, discharges, and activities that can be regulated by a standard set of terms and conditions. Persons seeking individual permits submit permit applications, while persons seeking coverage under a general permit submit NOIs.

The Board has established fees for permit applications and NOIs in §§ 91.22 and 92a.26. In addition, in 2010 the Board established an annual NPDES permit fee to aid in funding the cost of the Department's administration of the NPDES program. 40 Pa.B. 5767 (October 9, 2010). The Chapter 91 permit fees were initially promulgated by the Board in 1971 and subsequently

amended in 1980 and 2000. *See* 1 Pa.B. 1804 (September 2, 1971); 10 Pa.B. 4294 (November 7, 1980); and 30 Pa.B. 521 (January 29, 2000).

The NPDES fee schedule for individual NPDES permits remained the same from 1978 until 2010. In 2010, the Board promulgated an updated fee schedule reflecting increased fees for most categories of individual NPDES permits in § 92a.26 and promulgated new annual fees in § 92a.62. 40 Pa.B. 5767 (October 9, 2010). These fee increases provided needed revenue to administer the NPDES program and reduced reliance on general tax revenue to support the NPDES program.

Under both §§ 92a.26 and 92a.62, the Department is required to report to the Board every three years on the adequacy of the fees to administer the NPDES program. The report analyzes the fiscal solvency of programs by comparing program funding sources, including fees, with the costs to administer the program. Fee reports may contain recommendations to increase fees to eliminate any identified funding disparities.

On February 18, 2014, the Department presented its first report to the Board under the NPDES permit fee schedules promulgated in 2010. The report documented that the primary sources of revenue to fund the NPDES program were general tax revenue (50%), federal grants (33%), and permit fees (17%). The analysis also highlighted that NPDES permit fees in this Commonwealth are 50% to 90% lower than surrounding and comparable states for most categories of NPDES permits. On August 21, 2018, the Department presented its second report to the Board, which illustrated similar conditions as the 2014 report.

Based on current staffing and activities, the Department spends approximately $20 million per year to administer the NPDES program. These funds cover the following activities:

- Inspection and compliance monitoring of NPDES-permitted facilities – 36%;
- NPDES permit application/NOI reviews – 29%;
- Assessment of surface waters throughout this Commonwealth, including development of Total Maximum Daily Loads to support permitting activities – 28%;
- Program management – 5%; and
- Program administration – 2%.

The Department spends approximately $1.4 million per year to administer the WQM program, which involves activities similar to the NPDES program, except for surface water assessment. The primary sources of revenue to fund the WQM program are general tax revenue (90%) and permit fees (10%).

The benefits and justifications for the permit fee increases are further explained in Section F of this Preamble.

The Department's Bureau of Clean Water (BCW), which is responsible for the administration of the Clean Water Program, presented proposed changes to the fees in Chapters 91 and 92a to the Department's Agricultural Advisory Board (AAB) at meetings on: April 28, 2016; June 23,

2016; October 26, 2017; and August 29, 2019. The Department presented the final-form rulemaking to AAB on January 27, 2020 and October 22, 2020.

BCW presented proposed changes to the fees in Chapters 91 and 92a to the Department's Water Resources Advisory Committee (WRAC) at meetings on: March 24, 2016; September 21, 2016; and October 25, 2017. The final-form rulemaking was also presented to WRAC on January 30, 2020 and November 19, 2020.

E. *Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking*

The final-form rulemaking is summarized below, including modifications the Board has made compared to the proposed rulemaking published in the *Pennsylvania Bulletin* on March 30, 2019 (49 Pa.B. 1518) and April 6, 2019 (49 Pa.B. 1665).

§ 91.1. Definitions

This final-form rulemaking adds definitions for the terms "major facility," "minor facility," and "small flow treatment facility," which are used in the revisions to § 91.22. The definitions are consistent with the definition of these terms in Chapter 92a. In addition, the reference to 25 Pa. Code § 92.1 in the definition of "CAFO" is updated to 25 Pa. Code § 92a.2 (relating to definitions). No change is made to these definitions from proposed to final-form rulemaking.

§ 91.22. WQM permit fees

Subsection (a) currently identifies WQM permit application fees for single residence sewage treatment plants ($25), sewer extensions ($100), and other WQM permits ($500). The existing regulation does not indicate whether these fees apply to different types of permit applications (that is, new, amendment, renewal, and transfer). This rulemaking amends subsection (a) to expand the categories of WQM permit applications from three to 12, and clarify the fees for the various types of permit applications. These categories are based on an analysis conducted by the Department of the typical complexity and amount of time necessary to review the various WQM permit applications received. These fee categories were also based on the need for the Department to conduct inspections during or following construction of the facilities.

The fee schedule in subsection (a) is amended from the proposed to final-form rulemaking to reduce the fees for new joint pesticide WQM permits and new manure storage and wastewater impoundment WQM permits. The fee for a new joint pesticide permit has been reduced from the proposed rulemaking from $500 to $250. The fee for a new manure storage and wastewater impoundment permit has been reduced from the proposed rulemaking from $2,500 to $1,000. The Board understands the need to balance concerns of the regulated community with the need for a robust program to protect water resources within this Commonwealth. Accordingly, the final-form rulemaking has reduced fees from the proposed rulemaking for the previously mentioned WQM permit categories that include or are likely to include large numbers of small businesses and farmers. These revisions were made in response to comments that fees in the proposed rulemaking would negatively impact small businesses and agricultural operations, and the fact that the types of permit applications submitted to the Department by small businesses

and agricultural operations are generally less complex and require less effort to process than applications submitted by larger businesses and other applicants. Similarly, inspections of agricultural operations and facilities operated by small businesses to evaluate compliance with permit terms and conditions typically require less time compared with facilities operated by larger businesses or other applicants.

Subsection (b) currently establishes a ceiling of $500 for general WQM permit NOI fees. The Board is amending this subsection to remove this ceiling and replace it with a requirement that NOI fees for general WQM permits may not exceed the amount established for individual WQM permit application fees for equivalent projects. No change is made to this subsection from proposed to final-form rulemaking.

Subsection (c) in the proposed rulemaking provided authorization to the Department to adjust WQM permit application fees every two years based on the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation (ECI), as necessary to meet the costs of administering the statewide Clean Water Program. The Board received numerous comments questioning the statutory authority for this provision and offering concerns that the public would not have an opportunity to comment on fee increases in the future. While the Department maintains it has statutory authority for this provision, the Board has elected to remove the provision from the final-form rulemaking.

Subsection (c) of the final-form rulemaking (subsection (d) of the proposed rulemaking) requires the Department to review the adequacy of WQM permit fees every three years and provide to the Board a written report identifying disparities between the amount of program income generated by the fees and the costs to administer the program, along with recommendations to increase fees to eliminate any disparities. This provision is similar to an existing provision for NPDES permit fees in § 92a.26(h). The only change from proposed to final-form rulemaking is the subsection designator.

Subsection (d) of the final-form rulemaking (subsection (e) of the proposed rulemaking) allows the Department to enter into an agreement with any Federal or Commonwealth agency or independent Commonwealth commission to provide an alternative funding mechanism for the WQM program rather than the payment of the fees established in § 91.22. This subsection has been amended from the proposed rulemaking to provide the opportunity for financially distressed municipalities, as determined by the Department of Community and Economic Development (DCED) under the Municipalities Financial Recovery Act, Act of 1987, P.L. 246, No. 47 (Act 47 of 1987), to be exempted from WQM permit application fees.

§ 91.27. General WQM permit

The reference to Chapter 92 is updated to Chapter 92a. No change is made to this section from proposed to final-form rulemaking.

§ 91.36. Pollution control and prevention at agricultural operations

The references to § 92.5a and § 92.5a(e)(1)(i) are updated to § 92a.29 and § 92.29(e)(1)(i), respectively. No change is made to this section from proposed to final-form rulemaking.

§ 91.52. Procedural requirements for underground disposal

The reference to Chapter 92 is updated to Chapter 92a. No change is made to this section from proposed to final-form rulemaking.

§ 92a.26. NPDES permit application fees

Subsection (a) is amended to require payment of NPDES permit application fees to the "Commonwealth of Pennsylvania" rather than the "Clean Water Fund" consistent with the Commonwealth's fiscal management policies. This subsection is further modified to clarify that for fees based on the annual average design flow of a facility, the design flows of all discharges from the facility are totaled. No change is made to this subsection from proposed to final-form rulemaking.

Subsection (b) is amended to combine the provisions currently in subsections (b)—(d). This subsection addresses permit application fees for new individual NPDES permits and the reissuance of individual NPDES permits associated with mining activity. Due to corresponding amendments to the annual fee provisions in § 92a.62 (discussed further as follows), subsection (b) removes reissuance fees for all NPDES permits except for mining permits. The facility categories remain the same except that a new category for "pesticides" is added. The fees are based on an analysis of the Department's costs to review the various types of permit applications and the Department resources required for ongoing inspections and compliance monitoring of permitted facilities.

The fee schedule for new NPDES permit applications in subsection (b) has been modified from the proposed rulemaking to the final-form rulemaking in response to concerns from small businesses and agricultural operations. The Board understands the need to balance concerns of the regulated community with the need for a robust program to protect water resources within this Commonwealth. Accordingly, the final-form rulemaking has reduced fees from the proposed rulemaking for categories of NPDES permits that include or are likely to include large numbers of small businesses and farmers. The fees for new individual NPDES permit applications have decreased for the following fee categories:

- Small Flow Treatment Facility – from $1,000 to $500;
- Minor Sewage Facility < 0.05 MGD – from $1,500 to $1,000;
- Minor Industrial Waste Facility not covered by ELG – from $5,000 to $3,000;
- Minor Industrial Waste Facility covered by ELG – from $7,500 to $6,000;
- Industrial Stormwater – from $5,000 to $3,000; and
- CAFO – from $3,000 to $500.

These revisions were made in response to comments that fees in the proposed rulemaking would negatively impact small businesses and agricultural operations, and the fact that the types of permit applications submitted to the Department by small businesses and agricultural operations are generally less complex and require less effort to process than applications submitted by larger businesses and other applicants. Similarly, inspections of agricultural operations and facilities

operated by small businesses to evaluate compliance with permit terms and conditions typically require less time compared with facilities operated by larger businesses or other applicants.

Subsection (e) is redesignated as subsection (c) and continues to address fees associated with individual NPDES permit transfers. The rulemaking does not change the fees for the transfer of most individual NPDES permits. This subsection clarifies that transfer fees apply to individual NPDES permits for CAFOs, MS4s, and Concentrated Aquatic Animal Production (CAAP) facilities, as well as other types of individual NPDES permits.

In the proposed rulemaking, subsection (c) included a $500 fee for an application to transfer an individual NPDES CAFO permit; in the final-form rulemaking, this fee has been reduced to $200. This revision was made in response to comments that fees in the proposed rulemaking would negatively impact small businesses and agricultural operations, and the fact that the types of permit applications submitted to the Department by small businesses and agricultural operations are generally less complex and require less effort to process than applications submitted by larger businesses and other applicants. Similarly, inspections of agricultural operations and facilities operated by small businesses to evaluate compliance with permit terms and conditions typically require less time compared with facilities operated by larger businesses or other applicants.

Subsection (f) is redesignated as subsection (d). This subsection continues to address fees associated with amendments of individual NPDES permits, and includes new, lower fees for minor amendments to individual NPDES permits for single residence sewage treatment plants (SRSTPs) and small flow treatment facilities (SFTFs), as the current fee for minor amendments to these permits exceeds or is not in proportion with the fees for SRSTP and SFTF permit applications for new permits. This subsection also establishes that major amendment fees are the same as the annual fees for corresponding facility or activity categories in § 92a.62. Currently, major amendment fees are the same as permit reissuance fees, but with the elimination of reissuance fees from § 92a.26(b) (except for mining activity permits), major amendment fees are set equivalent to annual fees for the corresponding facility or activity categories. No change is made to this subsection from proposed to final-form rulemaking.

As part of the proposed rulemaking, the Board proposed to modify subsection (e) (formerly subsection (g)) by removing the cap of $2,500 on NPDES general permit NOI fees and specifying that NOI fees cannot exceed application fees and annual fees associated with individual permits for the equivalent activity. Upon review of this provision in the proposed rulemaking, the Board determined that this change would likely cause confusion and present difficulties in implementation because of the differences in fee structures for individual and general permits. To simplify this subsection, the Board is reverting the final-form rulemaking to the original language, as promulgated in 2010, whereby NOI fees are capped at a specific dollar amount, but the Board is increasing the cap from $2,500 to $5,000. This change does not, in itself, increase any NPDES general permit NOI fees. NOI fees are established as part of a general permit. Any changes to NPDES general permit NOI fees are subject to public comment as required under § 92a.86, and will be considered as NPDES general permits come up for renewal. This subsection also requires payment of the annual increment of the NOI fee to obtain coverage under a general permit when the general permit allows payment of the NOI fee in

annual increments; this provision is unchanged from the proposed to final-form rulemaking. For example, if an NOI fee is $1,000 and the general permit allows annual incremental payments of $200 over a five-year term of the general permit, a person seeking coverage under the general permit would be required to submit a payment of $200 with the NOI.

Subsection (f) in the proposed rulemaking provided authorization to the Department to adjust NPDES permit application fees every two years based on the United States Bureau of Labor Statistics ECI as necessary to meet the costs of administering the statewide Clean Water Program. While the Department maintains it has statutory authority for this provision, the Board has elected to remove this subsection from the final-form rulemaking.

Subsection (g) of the final-form rulemaking (subsection (h) of the proposed rulemaking) has been amended from the proposed rulemaking, similar to § 91.22(d) of the final-form rulemaking, to provide the opportunity for financially distressed municipalities, as determined by DCED under Act 47 of 1987, to be exempted from NPDES permit application fees.

§ 92a.32. Stormwater discharges

Subsection (b) codifies and clarifies the existing process of how to submit a "No Exposure Certification" application and fee, wherein an applicant is required to submit the appropriate permit application or NOI, including the appropriate application or NOI fee, and a "No Exposure Certification" on forms available from the Department at least once every five years. No change is made to this subsection from proposed to final-form rulemaking.

Subsection (c) codifies and clarifies the existing process for how to submit a waiver from NPDES permit requirements for small MS4 operators, wherein an applicant is required to submit to the Department the appropriate permit application or NOI, the appropriate permit application or NOI fee, and an application for the waiver on forms available from the Department at least once every five years. No change is made to this subsection from proposed to final-form rulemaking.

By specifying what information applicants must include in permit applications and NOIs, the amendments to § 92a.32 aim to support more timely permit decisions by improving the quality of applications and NOIs submitted to the Department. Specifically, the rulemaking clarifies which forms must be completed and which fees must be submitted by those seeking No Exposure Certification and waivers for MS4 NPDES permits.

§ 92a.62. NPDES annual fees

Similar to § 92a.26(a), subsection (a) is amended: to require payment of NPDES permit annual fees to the "Commonwealth of Pennsylvania" rather than the "Clean Water Fund" consistent with the Commonwealth's fiscal management policies; and to clarify that for fees based on the annual average design flow of a facility, the design flows of all discharges from the facility are totaled. This subsection is also amended to change the due date of the annual fee for individual NPDES permits, such that the annual fee is the effective date of the last permit issuance or reissuance for permits issued before this rulemaking becomes effective and is the effective date of the initial

permit for permits issued after this rulemaking becomes effective. For example, if an individual NPDES permit was last reissued with an effective date of June 1, 2017, as of the effective date of this rulemaking, the annual fee for the permit would be due each year on June 1, regardless of the effective date of future reissued permits. If an individual NPDES permit is issued on September 1, 2021, the annual fee for the permit would be due each year on September 1. In conjunction with this amendment, and as previously discussed for § 92a.26(b), permit reissuance fees are deleted for all NPDES permits that had annual fees. This subsection currently provides that annual fees for NPDES permits are due on the anniversary of the effective date of the permit, a date which often changes each permit renewal cycle. The amendment to this subsection should ease the administrative burden on permittees and on the Department by setting one annual fee due date for the life of each individual NPDES permit. The amendment to this subsection also makes reissuance fees unnecessary for most individual NPDES permits. No change is made to this subsection from proposed to final-form rulemaking.

Subsection (b) is amended to combine current subsections (b)—(d), which address annual fees for facilities with individual NPDES permits. The facility and activity categories associated with NPDES permit annual fees remain the same as the existing regulation, except that a new category for "pesticides" is added. The amended annual fees are based on the typical complexity and amount of effort necessary for the Department to review NPDES permit applications for each category of facility or activity and the resources the Department dedicates to ongoing inspections and compliance monitoring of permitted facilities and activities.

The NPDES permit annual fees for some categories of facilities in subsection (b) of the final-form rulemaking have been amended from the proposed rulemaking in response to concerns from small businesses and agricultural operations. Annual fees have decreased for the following categories of facilities:

- Small Flow Treatment Facility – from $500 to $250;
- Minor Sewage Facility < 0.05 MGD – from $750 to $500;
- Minor Industrial Waste Facility not covered by ELG – from $2,500 to $1,500;
- Minor Industrial Waste Facility covered by ELG – from $3,750 to $3,000;
- Industrial Stormwater – from $2,500 to $1,500; and
- CAFO – from $1,500 to $500.

These revisions were made in response to comments that fees in the proposed rulemaking would negatively impact small businesses and agricultural operations, and the fact that the types of permit applications submitted to the Department by small businesses and agricultural operations are generally less complex and require less effort to process than applications submitted by larger businesses and other applicants. Similarly, inspections of agricultural operations and facilities operated by small businesses to evaluate compliance with permit terms and conditions typically require less time compared with facilities operated by larger businesses or other applicants.

Subsection (c) in the proposed rulemaking provided authorization to the Department to adjust NPDES permit annual fees every two years based on the United States Bureau of Labor Statistics ECI as necessary to meet the costs of administering the statewide Clean Water Program. While

the Department maintains it has statutory authority for this provision, the Board has elected to remove this subsection from the final-form rulemaking.

Subsection (d) of the final-form rulemaking (subsection (e) of the proposed rulemaking) has been amended from the proposed rulemaking, similar to § 91.22(d) and § 92a.26(g) of the final-form rulemaking, to provide the opportunity for financially distressed municipalities, as determined by DCED under Act 47 of 1987, to be exempted from NPDES permit annual fees.

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

The Board received comments and questions from 157 different individuals and organizations during the comment period, including testimony from one organization at a public hearing held on May 1, 2019. Comments and questions received included collective comments from two groups: 69 state legislators and 55 individuals representing the agricultural sector. The following summarizes the overarching comments and the Board's actions in response. A comment and response document has been developed for the final-form rulemaking that provides a full account of public comments and the Department's responses.

Legislative commenters believe that the draft rulemaking deviates from the legislative intent of the CSL and the regulatory authority granted to EQB to allow for reasonable fees for applications filed and permits issued. They state it was never the intent of the legislature to fund a sizeable portion of the Clean Water Program from these fees.

The Board disagrees. The General Assembly gave the Board the power and duty to adopt regulations to, among other things, implement the declaration of policy set forth in section 4 of the CSL. 35 P.S. § 691.5. The General Assembly expressly stated that the "objective of the [CSL] [is] not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore … every stream in Pennsylvania …." 35 P.S. § 691.4(3). Moreover, the General Assembly found that "[t]he prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth." 35 P.S. § 691.4(4). The fee regulations fit directly within the statutory grant of authority given to the Board and Department. Without adequate financial resources, the Department's mission is at risk and the requirements of the CSL cannot be fulfilled. The legislature provided the Department the authority to charge "reasonable filing fees for applications filed *and for permits issued.*" 35 P.S. § 691.6 (emphasis added). The plain language of the statute authorizes the Department to charge fees designed to cover the costs associated with 1) applications for permits and 2) permits that have been issued. This authorization allows the Department to meet its statutory obligations in relation to permits issued, including, but not limited to, inspection and enforcement activities.

The Board believes that the interpretation advanced by the commenters would relegate DEP to an administrator of permits without any responsibility to monitor compliance or take enforcement action. That was not the intent of General Assembly when the CSL was passed. Section 5 of the CSL gives DEP explicit statutory duties and authority to modify, suspend, limit, renew or revoke permits as well as act on complaints, conduct inspections, and issue orders. 35 P.S. § 691.5. The General Assembly intended for the CSL to be a comprehensive statute to address water pollution throughout this Commonwealth. Many of those activities go beyond the

mere issuance of permits and includes enforcement, monitoring activities, and the abatement of nuisances after permits are issued.

The Board promulgated annual fees for NPDES permits for the first time under Chapter 92a in 2010. 40 Pa.B. 5767 (October 9, 2010). These annual fees were established pursuant to section 6 of the CSL (i.e., fees for permits issued), and support the activities of the Department to uphold its other responsibilities under the CSL related to permits issued and not solely for the processing of permit applications filed. Additionally, the Administrative Code of 1929 (71 P.S. § 510-20) authorizes the Board to promulgate rules and regulations necessary for the proper performance of the work of the Department.

The Board has not modified the final-form rulemaking based on comments of this nature.

Some legislative commenters say that the amount of the fee increases is inconsistent with the legislative directive that fees be reasonable and will impose a hardship particularly on small businesses and farmers.

The Board believes that the fees are reasonable and similar to the fees charged by other state environmental agencies for equivalent permits. The Regulatory Analysis Form (RAF) and comment and response document for the final-form rulemaking provide comparisons that show most of this Commonwealth's fees under Chapters 91 and 92a will continue to be less than those of neighboring and comparable states for similar permits. Nevertheless, the Board understands the need to balance concerns of the regulated community with the need for a robust program to protect water resources within this Commonwealth. Accordingly, the final-form rulemaking has reduced fees from the proposed rulemaking for categories of WQM and NPDES permits that include or are likely to include large numbers of small businesses and farmers. The changes in the WQM and NPDES permit fee schedules for the final-form rulemaking will result in a maximum possible increase in annual revenue of $6.5 million, as compared with the $8 million maximum possible increase in the proposed rulemaking.

Legislative commenters say that if the Department wants the source and method of their funding to be changed, they must present to the Legislature their proposal to change the statute. Until then, the program must abide by the current fee structure designed by the statute.

The Board disagrees. The assertion that the legislature only intended the fees authorized by Section 6 of the CSL to cover a fraction of the program's costs is unsupported. The statutory language is not limited to establishing fees to cover the cost of processing permit applications alone. The General Assembly gave DEP comprehensive authority to protect public health and the environment under the CSL. This authority not only includes the issuance of permits, but monitoring compliance, and enforcement of those permit limits. Nevertheless, under the proposed rulemaking, fees would have continued to constitute only a fraction of the program's costs. Under the proposal, fees would have contributed approximately 39% of the program's needs, up from approximately 18%. With the permit fee decreases made as part of the final rulemaking that fraction from the fees will decrease.

Some legislative commenters believe the fee increase amounts to a tax.

The Board disagrees. The courts of this Commonwealth describe taxes as "revenue-producing measures authorized under the taxing power of the government" and fees as "regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of the government." *City of Philadelphia v. Southeastern Pennsylvania Transp. Auth.*, 303 A.2d 247, 251 (1973). Based on Pennsylvania Supreme Court case law, this rulemaking is raising fees to cover the costs of a regulatory program and not revenue producing measures that go into the General Fund.

The Independent Regulatory Review Commission (IRRC) asks the Board to work with all parties with an interest in this rulemaking, particularly the Committee and members of the Legislature, to create a regulatory environment that is consistent with the intent of the General Assembly, fair to the regulated community and protective of this Commonwealth's natural resources.

The Board appreciates this comment and has attempted to resolve concerns of those having an interest in this rulemaking. The Board understands concerns about the impact of increased permit fees on the regulated community. The fee increases in this rulemaking aim to ensure that DEP has sufficient resources to protect the health and safety of the public, to protect the state's water resources, and to meet other state and federal obligations while fairly and equitably distributing the cost to administer the Clean Water Program among the regulated community.

IRRC is concerned that instead of fulfilling government's role of supporting local businesses and communities in this Commonwealth, this regulation would hurt many of those who can least afford it.

The Board reduced fees in the final rulemaking for categories of permits that include or are likely to include large numbers of small businesses and farmers. However, without the fee increases in this rulemaking, DEP will be less able to issue businesses in this Commonwealth timely permits that are required to conduct their business in a manner protective of public health and the environment. The lack of adequate resources will also reduce enforcement and monitoring activities that may result in more polluted waterways thereby impacting the quality of life in the state, which may make this Commonwealth a less attractive place to start and run a business or raise a family. Finally, insufficient resources may result in DEP losing federal approval to issue certain permits, which would likely also result in longer delays for business operations.

Commenters say that the Department does not have the statutory authority to automatically adjust fees every two years and doing so would circumvent the public participation process for fee increases.

While the Department maintains it has statutory authority for the provision in the proposed rulemaking to automatically adjust fees to account for inflation, the Board has elected to remove this provision from the final-form rulemaking.

Some commenters are concerned that the fiscal impact to municipalities would be significant with local governments bearing an estimated $2 million of the $8 million of new fees.

The Board has established an additional exemption to fees under Chapters 91 and 92a in the final rulemaking. Municipalities that are designated as financially distressed by the Department of Community and Economic Development under the Municipalities Financial Recovery Act, Act of 1987, P.L. 246, No. 47 (Act 47), may be exempted from fees. Municipalities that provide evidence of this current designation will be exempted.

One commenter says that as it relates to the sufficiency of existing resources and staff, it is not clear how the Board arrived at its desired increase of staff complement that would be hired with the finalization of this proposal.

The Board notes that the workload analysis that was completed by DEP to justify the proposed fee increases was included as an attachment to the RAF submitted for the proposed rulemaking. Following completion of the workload analysis, an evaluation of the fiscal health of the Clean Water Fund has revealed that it is unlikely that DEP will be able to support all of the positions necessary to fulfill all of the Clean Water Program's responsibilities. In other words, the new revenues under the final rulemaking will primarily go toward ensuring DEP is able to maintain its current level of activities and staffing. DEP has and will continue to investigate and implement procedures to streamline reviews when authorized under state and federal law.

Another commenter believes that before expanding an already inefficient system, any changes to the administration of the NPDES and WQM programs should instead prioritize efficiency gains within the existing program framework.

The Board finds that DEP's workload analysis determined that DEP has most of the permit application reviewers that it needs to effectively and timely review permit applications but is lacking primarily in other positions such as inspectors, compliance specialists and biologists. As a result of DEP's Permit Decision Guarantee/Permit Review Process policy, the development of standard operating procedures, and other streamlining measures, DEP has improved its permit review times for NPDES and WQM permits over the past decade.

G. *Benefits, Costs and Compliance*

Benefits

The fee increases proposed in this rulemaking are necessary for the Department to administer the WQM and NPDES programs in Chapters 91 and 92a, respectively, and to implement the CSL as well as the federal NPDES program delegated to the Department under the Clean Water Act. These programs are essential to the compelling public interest of preventing and eliminating pollution of the waters of this Commonwealth, promoting both public health and economic benefits.

WQM and NPDES permits help lower rates of acute and chronic illnesses in citizens by reducing the occurrence of pathogens, nutrients, and other contaminants in the waterways of this Commonwealth. Citizens may come into contact with these pollutants through drinking improperly treated water, recreational activities, or consuming tainted food sources. High levels of some pathogens like E. coli can cause illness if accidentally consumed during recreational

activities, by eating contaminated food, or from drinking improperly treated water. Nutrient pollution can facilitate the occurrence of harmful algal blooms, which may produce toxic compounds that harm recreational water users and render drinking water sources unusable during the duration of a bloom. Nutrient pollution is also known to impact downstream waters such as the Chesapeake Bay. Other contaminants like heavy metals can accrue in fish tissue and cause sickness in people who consume the contaminated fish. This list of examples is not exhaustive of the types and causes of illnesses that can be associated with polluted waters. Preservation of public health is a standalone benefit of environmental regulation, but it also provides economic benefits. While it is difficult to assign a specific monetary value to the prevention of acute and long-term illnesses or disease by improving and protecting water quality, healthier citizens are able to work, are more productive, and live longer lives, all of which provide positive economic effects.

This Commonwealth derives other economic benefits from the proper administration of the WQM and NPDES programs, including reduced costs to treat drinking water, increased property values, job creation, increased fishery resources and recreation, and enhanced aquatic habitat available to support the diverse species that depend on clean water. Additionally, healthy watersheds help to avoid expensive restoration activities, reduce vulnerability to natural disasters, and maintain natural ecosystems that provide water treatment at far lower costs than can be achieved through human-engineered services. For more information about the economic benefits of effectively managing water resources, please see the EPA document, "The Economic Benefits of Protecting Healthy Watersheds," available on EPA's "Benefits of Healthy Watersheds" website at www.epa.gov/hwp/benefits-healthy-watersheds.

The WQM and NPDES permit fees in this final-form rulemaking will provide the Department with resources to effectively administer the Clean Water Program in service of protecting the quality of water resources within this Commonwealth without any increases in the appropriation of general tax revenue to the Department. The Board acknowledges that the fees in this final-form rulemaking impose costs on some regulated entities, but the Board also notes that the Department's effective administration of the Clean Water Program comprises an important part of the social contract that regulated entities rely on to operate in a way that minimizes negative impacts to public health and the environment. The Board also notes that instead of collecting a large up-front fee to support the Department's water pollution control efforts, this final-form rulemaking is structured to fairly spread WQM and NPDES permit fees among permit applications and annual fees, as applicable, to ease the burden on the regulated community. The Board also underscores that, despite the fee increases in this final-form rulemaking, the Commonwealth's WQM and NPDES permit fees will still be less than the fees in many comparable states for similar permits.

The administration of the Clean Water Program involves many activities including permit application reviews, inspections, enforcement, surface water assessments, and related activities such as the development and implementation of federally required Total Maximum Daily Loads (TMDLs).

Under the Federal Clean Water Act, the Department is required to develop and maintain the Commonwealth's water quality standards. 33 U.S.C.A. § 1313. Water quality standards are

established to protect human health, aquatic life, and to ensure protection of water uses as defined in Chapter 93 including water supply and recreational uses. Department-issued permits must ensure adherence to water quality standards and to state and federal technology-based standards. Department-issued WQM permits assure that appropriate engineering standards are applied to prevent pollution to waters of this Commonwealth.

As part of its grant agreement under section 106 of the Clean Water Act, 33 U.S.C.A. § 1256, EPA requires the Department to monitor and assess surface waters to determine if the waters are meeting their designated uses. The Department performs this monitoring and assessment in a variety of ways including biological sampling, chemical sampling, and evaluation of aquatic habitats. Monitoring and assessment of this Commonwealth's surface waters helps the Department assure that this Commonwealth has appropriate water quality standards in place and has issued effective permits to protect public health and the environment. Water quality monitoring and assessment are foundational components of the water resource management programs implemented by the Department.

Other benefits associated with this final-form rulemaking include:

- Increased Department staff and resources to provide the regulated community with more timely permit application reviews, which will be beneficial to owners and operators of new facilities desiring permits as expeditiously as possible.

- Increased Department staff and resources to support more thorough reviews of impacts proposed and existing permitted facilities and activities may have on public health and the environment, and a greater presence of Department staff in the field to conduct inspections and compliance monitoring of permitted facilities and activities. These Department services benefit the public by providing a greater level of protection for waters of this Commonwealth. The regulated community benefits from these Department services through enhanced compliance assistance before enforcement is considered. The Department prefers to work with the regulated community to promote compliance. Compliance assistance can reduce expenses for permittees while ensuring adequate protection of human health and the environment.

- Increased Department staff and resources to evaluate existing programs, policies, guidance, and regulation to assess what is and what is not working well for the public, the regulated community, and the Department, and to make necessary changes more expeditiously. The Department is aware of some areas of the Clean Water Program that could be improved or enhanced in order to, for example, make permit processes less onerous and save applicants time and money. A staffing increase in the Department's BCW is necessary to complete this work.

- Increased revenue to support the Department's efforts to expand electronic solutions to improve business efficiency.

The Department believes that these benefits will result in cost savings to the regulated community although such savings are difficult to quantify.

Compliance costs

The operators of approximately 4,000 facilities in this Commonwealth with individual NPDES permits will be affected by this final-form rulemaking. Certain categories of facilities will be subject to little or no fee increase, while other categories of facilities would be subject to more significant increases, based on the nature and complexity of these facilities and the permit applications they submit to the Department.

On average, between 500 and 600 owners and operators of water pollution control facilities (e.g., persons proposing to construct or modify sewage treatment facilities, sewer lines, or wastewater pump stations) apply to the Department each year for a WQM permit; these persons will be subject to WQM permit application fee increases under this final-form rulemaking.

The total increase in WQM and NPDES permit fees for these facilities is anticipated to be approximately $4.5 million in the first year following the effective date of this final-form rulemaking. Persons applying for new NPDES and WQM permits will be subject to the amended fees immediately. Persons with existing NPDES permits will not be subject to the amended fees until an annual fee is due. Persons with existing WQM permits will not be subject to the amended fees unless an amendment, transfer, or renewal of the WQM permit is desired.

Not included in the preceding cost estimates are costs associated with coverage under general WQM and NPDES permits. The Department could propose increased NOI fees for general permits in the future: for WQM general permits, to a level not to exceed the application fee for an equivalent WQM individual permit; and, for NPDES general permits, not to exceed $5,000. If the Department were to increase NOI fees for general WQM and NPDES permits, these fees could affect up to 5,700 additional facilities with general permit coverage and collectively cost the owners or operators of these facilities up to an additional $2 million annually. Any increase in NOI fees for general NPDES or WQM permits would be proposed at the time each general permit is drafted for renewal. Each draft general permit is published in the *Pennsylvania Bulletin* for public comment, as required by § 91.27 for WQM general permits and § 92a.84 for NPDES general permits.

While the costs to comply with this final-form rulemaking could total up to $6.5 million annually across 10,300 NPDES-permitted and WQM-permitted facilities, the Board expects that the net costs will be much lower considering the benefits described above and the fact that NOI fees for every general permit may not increase to the maximum amount allowable under this final-form rulemaking.

Compliance assistance plan

The Department will develop and post to its website information describing changes to the WQM and NPDES fee schedules and include information on these changes within annual fee invoices mailed to permittees.

Paperwork requirements

The final-form amendments to Chapters 91 and 92a clarify existing processes but do not add to or change the existing paperwork requirements for the submission of WQM and NPDES permit applications and NOIs or the submission of annual fee payments to the Department. It is noted that the Department has launched an electronic payment system for annual fees, which reduces paperwork.

H. *Pollution Prevention* (if applicable)

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This regulation has incorporated the following pollution prevention incentives:

Certain sectors of facilities may be able to avoid paying annual fees when pollution prevention measures are employed. For example, industrial sites that are required to apply for and obtain NPDES permits for stormwater discharges associated with industrial activity may qualify for a No Exposure Certification approval in lieu of a permit, if most products and materials are stored in storm-resistant shelters.

I. *Sunset Review*

The Board is not establishing a sunset date for these regulations, because they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 12, 2019, the Department submitted a copy of the notice of proposed rulemaking, published at 49 Pa.B. 1518 (March 30, 2019) and 49 Pa.B. 1665 (April 6, 2019), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act, on _____, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved the final-form rulemaking.

K. *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 Pa. Code §§ 7.1 and 7.2.

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

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 49 *Pennsylvania Bulletin* 1518 and 1665 (March 30, 2019 and April 6, 2019).

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

L. *Order of the Board*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 91 and 92a, are amended to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this final-form regulation to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this final-form regulation to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this final-form regulation and deposit it with the Legislative Reference Bureau, as required by law.

(e) This final-form regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin.*

Patrick McDonnell,
Chairperson