



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

COMMENT AND RESPONSE DOCUMENT

National Pollutant Discharge Elimination System (NPDES) Schedules of Compliance

25 Pa. Code Chapter 92a
52 Pa.B. 361 (January 15, 2022)
Environmental Quality Board Regulation #7-563
(Independent Regulatory Review Commission #3327)

National Pollutant Discharge Elimination System (NPDES) Schedules of Compliance

On January 15, 2022, the Environmental Quality Board (Board or EQB) published a *Pennsylvania Bulletin* notice of a public hearing and comment period, at [52 Pa.B. 361](#), on a proposed rulemaking to amend 25 Pa. Code Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance). Specifically, the Board proposed to amend 25 Pa. Code § 92a.51(a) to provide an exception to the 5-year limit on a compliance schedule for combined sewer overflow (CSO) dischargers. Section 92a.51(a) authorizes schedules of compliance for existing NPDES discharges that are not in compliance with water quality standards or effluent limitations or standards. Prior to the finalization of this rulemaking, § 92a.51(a) was more stringent than equivalent Federal regulations because the regulation established a maximum period of time to come into compliance of 5 years (unless a court of competent jurisdiction issues an order allowing a longer time for compliance), while Federal regulations do not. CSO dischargers, however, typically require more than 5 years to implement Long-Term Control Plans (LTCPs) to achieve compliance with State water quality standards due to the scale of infrastructure modifications and financial commitments needed to implement LTCPs, and the Department has approved many LTCPs with implementation schedules exceeding 5 years. This final-form rulemaking amends § 92a.51(a) to allow compliance schedules for CSO dischargers to exceed 5 years, but not exceed the period of implementation specified in an approved LTCP.

The Board held one virtual public hearing on February 16, 2022, for the purpose of accepting testimony on this proposed rulemaking. No testimony was offered by the public at this hearing. The 45-day public comment period closed on March 1, 2022.

This document presents the written comments received during the public comment period and the Department's responses to those comments. The Board received four sets of written comments during the public comment period, including comments from the United States Environmental Protection Agency's (EPA) Region 3 office.

The Board received no comments from the House of Representatives, the Senate, the House and Senate Environmental Resources and Energy (ERE) Committees or the Independent Regulatory Review Commission (IRRC).

Copies of Comments

Copies of all comments received by the Board during the public comment period are posted on the Department's eComment website at:

<https://www.ahs.dep.pa.gov/eComment/ViewComments.aspx?enc=DN064MT8R38NKyiRv2iU7DrOfnH1TYDXd5YgHv9%2b9QQ%3d>.

Additionally, copies of all comments are available on IRRC's website at <http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=3338> or at <http://www.irrc.state.pa.us> (search for Regulation # 7-563 or IRRC # 3327).

List of Commentators

The ID of the commentators listed below is presented in parentheses following each comment.

ID	Name/Affiliation
1	Shannon GORITY Chesapeake Bay Foundation Harrisburg, PA
2	Heather Hulton VanTassel, PhD Three Rivers Waterkeeper Pittsburgh, PA
3	Steven A. Hann Hamburg, Rubin, Mullin, Maxwell & Lupin, PC Harrisburg, PA
4	Jennifer Fulton U.S. Environmental Protection Agency Region 3 Philadelphia, PA

Comments and Responses

- 1. Comment:** Pennsylvania is currently in the process of implementing the final Phase 3 Watershed Implementation Plan (WIP3) to achieve nitrogen, phosphorus, and sediment reductions to our local waters and ultimately the Chesapeake Bay. Pennsylvania has made great progress to date; but substantial work remains, and the state is eagerly searching for opportunities to reduce nutrient and sediment pollution across the bay watershed.

In 2020 CSOs within the Pennsylvania's portion of the Chesapeake Bay Watershed (PACBW) constituted 0.88 percent of the nitrogen load (927,495 lbs), 3 percent of the phosphorus load (112,983 lbs), and 0.33 percent of the sediment load (9,421,540 lbs) while impairing 117 miles of streams in the state. In order to meet the WIP3, Pennsylvania forecasts implementing practices that will reduce CSO nitrogen loads by 787,369 pounds, phosphorus loads by 95,937 pounds, and sediment loads by 8,000,789 pounds by the end of 2025.

In addition to the sediment and nutrients targeted in the WIP3, the estimated total annual discharge of 25,882 million gallons by PACBW CSOs can also contain a myriad of pollutants which have ecological and human health impacts, such as fecal coliforms, pharmaceuticals and their byproducts, antimicrobial compounds, insecticides, flame-retardants, polycyclic aromatic hydrocarbons, metals, and anything else that enters the sanitary or storm sewer system. Many of these compounds are known or suspected endocrine disruptors. In fact, a study in Vermont found endocrine disrupting compounds were ten times greater in CSO discharges than in treated wastewater.

The ecological and human health impacts of CSOs are likely to intensify due to the impacts of climate change. Pennsylvania's projected increases in total annual precipitation and intensification of events promise to add greater strain on these systems. In fact, the Chesapeake Bay Program projects that by 2055 annual nitrogen and phosphorus loads to the Bay by PACBW CSOs may increase by 3.2 percent and 3.1 percent from the 1991-2000 mean load, respectfully. CBF appreciates the unique and complicated situation of CSOs in Pennsylvania. Our Commonwealth has one of the most numbers of CSOs in the country that scored a "D-" in the condition of the state's wastewater infrastructure, according to the American Society of Civil Engineers. It does not appear that the proposed revision will impact the Commonwealth's ability to meet the WIP3 or further prolong the CSO's ecological and human health impacts by extending the implementation schedules of Long-Term Control Plans. However, should this occur, it would be of significant concern. **(1)**

Response: The Department agrees that the amendment to § 92a.51(a) to allow for a period of time exceeding five years to implement LTCPs will neither impede the Commonwealth's ability to meet the goals of Pennsylvania's Phase 3 Chesapeake Bay Watershed Implementation Plan nor extend the implementation schedules of CSO LTCPs; conversely, the Department believes that finalizing this rulemaking will assist in those efforts because, once this rulemaking is finalized, EPA will allow DEP to reissue NPDES permits for CSO discharges, which will help in ensuring that LTCP implementation remains on track.

2. **Comment:** Furthermore, this regulatory change should not be a stepping stone for all water quality discharge violators to request longer compliance schedules. The proposed regulation change to §92a.51(a) is concerning for the potential precedent it may create with other NPDES dischargers that are not in compliance with water quality standards and need to implement schedules of compliance under the regulations. These non-CSO discharge violators may easily claim that they too need compliance schedules longer than five years due to technical and financial needs. This regulatory change may create an equity argument for others not in compliance to receive the same treatment and subsequent regulatory change as CSOs.

For these reasons, we recommend considering additional options and tools to assist CSOs in reaching the milestones in their compliance schedules more efficiently. Tools such as consent decrees, legislative support for CSO infrastructure investments and more may be other options that don't create precedent for other dischargers violating water quality standards. (1)

Response: The Department does not intend for this regulatory amendment to serve as a stepping stone or precedent for other classes of dischargers. The Department and the EPA worked for several years to identify an alternative solution that would be feasible to implement statewide but both agencies ultimately determined that the regulatory amendment was the most feasible alternative.

3. **Comment:** Combined sewage overflow (CSO) discharges cause serious impacts to the environment and human health. They also impact Pittsburgh's tourism and economy. These impacts are likely to become more frequent with Pittsburgh's population growth and the weather effects from climate change. The proposed amendment to remove the time frame to reach compliance will set a precedent that will create an environmental practice of extending and eliminating compliance schedules and will only exasperate our environmental pollution in our waterways – perpetually kicking the preverbal can to our next generation, only to continually accumulate pollution and violating our rights to clean water as outline by the Clean Water Act. We understand DEP's concerns that the current regulation does not align with current practices as the economic struggle to meet regulations our older sewage systems is daunting. However, eliminating compliance schedules will have serious consequences to our environment and does not guarantee our right to clean water. We recognize the difficulty and cost of replacing Pittsburgh's CSO infrastructure; nevertheless, public and environmental health are at risk with continued allowable violations to the Clean Water Act. (2)

Response: The regulatory amendment will not result in the extension or elimination of any compliance schedules. Please also see the response to Comment #6 regarding the use of LTCPs and timeframe requirements to achieve compliance.

4. **Comment:** CSOs cause serious harm to our waterways, to human health and safety, and they affect our tourism industry and economy. CSO discharges can contain untreated domestic, commercial, and industrial wastes, as well as surface runoff – all of which can contain many different types of contaminants that are toxic to human and environmental health. Contaminants may include bacteria, pathogens, oxygen-demanding pollutants, suspended solids, nutrients, toxics, and floatable matter. These contaminants have a variety of adverse

impacts on Pennsylvania waterbodies and public health. Specifically, CSOs pose a threat to our drinking water supplies as the rivers supply the main source of drinking water to 90% of Allegheny County residents. Additionally, CSOs have contributed to shellfish harvesting restrictions, water use closures, and fish kills. Runoff, containing raw sewage, contaminates the water with bacteria and viruses, and increases the risk of E. Coli exposure to swimmers and boaters. This is a particular problem in the Pittsburgh region, where at least nine billion gallons of untreated sewage and storm water discharge from the sewer system into the Allegheny, Ohio, and Monongahela rivers every year.

CSOs place both the environment and human health at risk, and many individuals may not know that they are putting their health at risk during an overflow event. When overflows occur, the Allegheny County Sanitary Authority (ALCOSAN) issues alerts in the form of orange flags placed at designated points along the waterways, via the ALCOSAN Sewer Overflow Advisory line, the ALCOSAN website, and through an opt-in text or email service notification program. These alerts warn individuals to limit their contact with contaminated water, and to avoid submerging their eyes, face, or any open wounds in the water. Apart from the orange flags placed along the waterways, the public only learns of the alerts if they actively seek them out. Further, these alerts only serve as a caution, they do not prohibit the public from recreational river activities. Individuals who do not understand the serious health risks, or are not adequately warned, risk illness and infection when interacting with Pennsylvania waterways during alert periods.

CSOs impact recreational activities, tourism and, thus, Pennsylvania's economy. There are eleven alerts, on average per year, which average seven days in length, however they can vary from one to forty-five days. The river advisories are in effect for around 50%, or seventy days, of each recreational season. Therefore, during the average recreational season, people are either discouraged from engaging in recreational river activities altogether for half the season or potentially engage in river activities that expose themselves to harmful bacteria. The three rivers and their watersheds provide valuable ecosystem services, outdoor recreational activities such as fishing and kayaking, and contribute to tourism. Pittsburgh citizens and tourists cannot take full advantage of our three rivers and their watersheds under our current CSO problem. Eliminating the five-year requirement for long term control plans (LTCP) will prolong these environmental and public health problems and dissuade the public and tourists from using our rivers. (2)

Response: DEP understands and agrees that CSO discharges pose risks to the environment and to public health and safety. However, as stated in the response to Comment #3, this rulemaking will not result in the extension or elimination of any compliance schedules, or result in prolonged implementation of CSO LTCPs. To the contrary, and as noted in the response to Comment #1, by addressing an EPA objection that prevented the Department from reissuing CSO NPDES permits, this rulemaking will help ensure that LTCP implementation remains on track by allowing the Department to reissue CSO NPDES permits with updated LTCP implementation milestones.

5. **Comment:** CSOs cause serious harm to our waterways, to human health and safety, and they affect our tourism industry and economy. Combined sewer systems collect rainwater, runoff, and sewage through one system and direct it to a wastewater treatment center. For example, ALCOSAN manages Allegheny County, covering Pittsburgh and eighty-two other municipalities. Originally dedicated in 1959, the ALCOSAN treatment center is currently not large enough to receive all the runoff during wet weather periods because it is old infrastructure built before any environmental regulations were put in place. Additionally, it does not account for today's much larger population. While the current state of Pennsylvania's water quality is an urgent environmental and public health issue, in the Pittsburgh area it becomes even more so when considering population growth and the probability of increased wet weather due to climate change.

Allegheny County grew by 27,230 residents in the 2020 census. While this represents a seemingly marginal increase of only 2.2%, it is the first time the county has grown in population since 1960. This growth not only outperformed estimates by 3%, but it also represents one of the largest outperformances in the entire country. This data indicates a general population growth trend. Pittsburgh has many impermeable surfaces, clay soils, and steep topography. Pittsburgh's geography means rainwater flows quickly and accumulates in valleys. As Pittsburgh continues to grow, the city will build more concrete surfaces and thus, fewer permeable areas such as trees and green spaces can be expected. This means the region will likely experience increased overflows in the future and increased pressure on the already stressed wastewater treatment system, creating the potential for even more overflow than the area currently experiences. This data and its effects on wastewater infrastructure should be considered when promulgating the proposed rule. Additionally, this data should be considered in combination with the data on likely increased precipitation caused by climate change.

Climate change is expected to result in more frequent storm events and more frequent wet weather. This means there will be more frequent CSO discharges, larger volumes of water and more contaminants discharging into our waterways. The CSO problem currently has significant impacts on the environment, however, the combination of climate change impacts and population growth will make this problem exponentially worse. Considering these future impacts, it is not rational to amend the five-year compliance schedule for LTCP and delay fixing this problem. (2)

Response: As noted in the responses to Comment #3 and Comment #4, this rulemaking will not result in the extension or elimination of any compliance schedules, or result in prolonged implementation of CSO LTCPs. To the contrary, this rulemaking will help ensure that LTCP implementation remains on track by allowing the Department to reissue CSO NPDES permits with updated LTCP implementation milestones. In fact, prior to this rulemaking, the EPA's objection to allowing the Department to reissue CSO NPDES permits based on the prior regulatory language caused delays in the Department's reissuance of NPDES permits, which may have had the effect of delaying LTCP implementation for some CSO dischargers. The regulatory amendment in this rulemaking will address EPA's objection, which will allow the Department to resume reissuing NPDES permits with updated milestones to ensure permittees stay on track with LTCP implementation.

The Department also acknowledges the effects of climate change noted by the commentator and acknowledges that – in response to and anticipation of these effects – some CSO dischargers may need to adjust the solutions in their LTCPs in order to achieve long-term performance standards such as the elimination or capture for treatment of at least 85% by volume of combined sewer system flows during precipitation events on a system-wide annual average basis.

6. **Comment:** The five-year compliance schedule was implemented to limit future CSO impacts, and that reasoning has not changed. When the current rule was promulgated over a decade ago, it set a meaningful five-year term for LTCPs. Pennsylvania has one of the most serious overflow issues in the country with estimated yearly CSO and sanitary sewer overflows (SSO) exceeding nine billion gallons. This is particularly true for Allegheny County, which has 448 outfalls with CSO/SSO potential. Additionally, DEP has classified nearly half of all Pittsburgh area waterways, more than 940 miles, as impaired. Storm water runoff is one of the most frequent contributors to stream impairments. Because the area's wastewater system capacity can be overwhelmed by rainfall volumes as low as 0.1 inches, the issue of how long it takes permittees to mitigate CSOs is one of great urgency for environmental integrity as well as public health and safety.

It is therefore important that the regulations concerning CSOs are more stringent in Pennsylvania and that they pressure municipalities to prioritize funding realistic CSO reduction strategies and infrastructure. A five-year implementation period for LTCPs is necessary because Pennsylvania's environment and citizens require it to protect our health and environment. The proposed rule should not replace the original regulation simply because permittees will not prioritize adhering to a deadline and DEP will not enforce adherence to that deadline. The proposed rule, allowing for individual LTCP compliance periods on a case-by-case basis, will eliminate the pressure inherent in a short, fixed period and will increase the likelihood that Pennsylvania water quality will remain among the worst in the nation. (2)

Response: The Department disagrees with the assertion that the current regulation was promulgated to force total LTCP implementation within a single permit term. Such an interpretation would undermine the very notion of an LTCP as established by the EPA to bring CSO discharges into compliance. LTCP compliance schedules have always been proposed by permittees and reviewed by the Department on a case-by-case basis. The Department needs to ensure that the alternative selected by the permittee is reasonable and will be implemented in the shortest feasible period of time. Frequently, the shortest feasible period of time exceeds five years due to the scale of infrastructure modifications and financial commitments needed to implement LTCPs. Also see the responses to Comments #3, 4, and 5 regarding the effect of this rulemaking on implementation of LTCPs.

7. **Comment:** The proposed rulemaking sets a dangerous precedent by delaying remedies for environmental problems. 3RWK recognizes and appreciates that the goal of this proposed rulemaking is to bring permittees into compliance and mitigate Pennsylvania's dire CSO issue. However, we do not believe that this proposed rulemaking provides the best path

forward for achieving this goal. Amending a regulation rather than changing agency practices sets a dangerous precedent for future environmental regulations. The proposed rule is only delaying the inevitable and causing environmental degradation during the delay. This is not a suitable solution. We have environmental laws and regulations for a reason, to improve the quality of our environment. If agencies stop embracing complicated problems and simply kick the problem down the road, our environment will never improve, and ecosystems and human health will suffer indefinitely. (2)

Response: As detailed in the responses to Comments #3–6, the Department believes that this regulatory amendment will eliminate a source of delay in abating CSO discharges in Pennsylvania and will bring CSO dischargers in Pennsylvania into compliance sooner.

8. **Comment:** The proposed rule raises procedural concerns, in its IRRC Regulatory Analysis Form, and substantive concerns, in the text of the rule. The proposed rule raises several concerns. First, the IRRC Regulatory Analysis Form for this proposed rule does not include any data nor reference to the water quality achievable by adhering to the current five-year LTCP compliance schedule. This lack of data is concerning because the proposed rule will likely increase the volume of overflow as opposed to the current five-year LTCP. DEP should consider all available data to accurately understand the costs and benefits of this proposed rule to the environment.

Second, we are disappointed that in query (26) of the IRRC Regulatory Analysis Form, DEP did not specifically describe the “alternative regulatory provisions” that DEP and EPA explored. The IRRC Regulatory Analysis Form merely states that alternatives had been explored, but it would be beneficial for affected individuals to have a description of any alternative regulatory provisions which were considered and rejected. Additionally, it would be beneficial to have an explanation as to why the option selected is the least burdensome or most beneficial option.

Third, the proposed rule does not embrace pollution prevention that it is necessary for preserving our Nation’s waters – and protecting our drinking water source. Pollution prevention must be considered under the Clean Water Act. Specifically, the Clean Water Act puts forth a goal of restoring and preserving the chemical, physical, and biological integrity of our Nation’s waters. This rule runs counter to the Act’s goal because the proposed rule extends the time that our waterways will be out of compliance with water quality standards. Lastly, the proposed rule states that there will be no negative impacts to human health or the environment, however, the proposed rule does not explain how it will achieve this. As will be discussed in Section VI the proposed rule will prolong Pennsylvania’s CSO issues. CSOs have many negative effects on our waterways. Thus, it is unclear how prolonging the problem will not negatively affect the environment. (2)

Response: The regulatory amendment will not result in an increase in the volume of overflows and, as detailed in the responses to Comments #3–7, will help ensure that LTCP implementation remains on track by allowing the Department to reissue CSO NPDES permits with updated LTCP implementation milestones. As such, this rulemaking helps support the goals of the Federal Clean Water Act and Pennsylvania’s Clean Streams Law. On

a practical level, the only thing this rulemaking will change is that the Department will again be able to reissue NPDES permits for CSO dischargers with LTCP implementation schedules longer than 5 years, which will allow updated compliance schedules to be established in those reissued permits. DEP explored a number of alternatives with EPA Region 3 and EPA Headquarters that did not involve modifying the Chapter 92a regulations, including but not limited to decoupling LTCP approvals from NPDES permit issuance and executing enforcement actions simultaneously with NPDES permit issuance, but none of the alternatives were considered feasible.

- 9. Comment:** There are other solutions to Pennsylvania’s CSO problem beside extending the compliance schedule and we urge DEP to consider alternatives. 3RWK recognizes that upgrading the infrastructure in the Pittsburgh region alone is expensive, and that many individual municipalities may not have the funding available or the political will to fund such upgrades. However, Pennsylvania is receiving \$240,000,000 from the federal government specifically for clean water issues. While insufficient to cover the entire cost of all permittees’ LTCP implementations, some may be allocated for such use. Additionally, DEP should explore regional approaches to the overflow problem as a cost-saving mechanism and include all avenues of green infrastructure in that exploration.

ALCOSAN has developed multiple plans targeting the region’s CSO problem under an EPA consent decree. The first in 2012, the “Wet Weather Plan,” cost \$3.6 billion and was criticized for its lack of “green technology,” nature-based solutions that aim to decrease runoff such as permeable green spaces, rain gardens, green roofs, and its heavy reliance on “grey technology,” such as constructing pipes, pumps, and holding facilities. While grey technology increases capacity, green technology controls excess storm water. ALCOSAN later released its “Clean Water Plan” in 2019, which integrated green technology projects with plans to expand capacity, and with a projected cost of \$2 billion. Under this new plan, ALCOSAN now has a deadline of 2036 to reduce sewage overflows by seven billion gallons.

The projected cost of the Clean Water Plan was reduced by \$1.6 billion by incorporating runoff mitigation methods with plans to expand the pipes and treatment plants. Studies have shown that green space can reduce the operating and capital costs of storm water management. Further, other cities have successfully employed creative technologies such as biodigesters to curb the costs of running treatment plants. The biodigesters convert the fecal sludge from wastewater treatment plants into energy, which offsets the cost of running the plants. Solutions are within reach, however they won’t be realized when we do not set compliance schedules. (2)

Response: The Department supports the utilization of green infrastructure where it is able to reduce inflows into combined sewer systems. The Department also recognizes that increased funding may be available to address CSO discharges through the Federal Infrastructure Investment and Jobs Act. As noted in the response to Comment #5, the prior regulatory language caused delays in the Department’s reissuance of NPDES permits, which may have had the effect of delaying LTCP implementation for some CSO dischargers. With the regulatory amendment, the Department can resume utilizing NPDES permits to ensure permittees stay on track with LTCP implementation.

10. Comment: According to the Proposed Rule and the above-referenced DEP presentations, it is PMAA's understanding that EPA has expressed concerns that the existing language in 25 Pa. Code § 92a.51 is inconsistent with DEP's practice of approving LTCP implementation schedules greater than five (5) years for Combined Sewer Systems. Accordingly, the Proposed Rule would address this issue by allowing DEP to approve NPDES permits with compliance schedules greater than the five (5) year period currently provided for in 25 Pa. Code § 92a.51 (but not longer than the implementation schedule provide in an approved LTCP). Therefore, based upon its review of the Proposed Rule and the aforementioned documents, PMAA supports adoption of the Proposed Rule to amend 25 Pa. Code § 92a.51 as published in the January 15, 2022 Pennsylvania Bulletin.

PMAA would also like to make one recommendation not directly germane to the Proposed Rule. PMAA believes that the concept embodied in the Proposed Rule regarding schedules of compliance greater than five (5) years should also apply, if applicable, to sewer systems other than Combined Sewer Systems. PMAA understands the narrow nature of the Proposed Rule and, to reiterate, supports the Proposed Rule in its current form. PMAA is not suggesting that the Proposed Rule be amended to address non-Combined Sewer Systems; rather, PMAA requests that DEP consider a similar amendment for systems other than Combined Sewer Systems. In fact, PMAA understand from its review of the July 28, 2021 WRAC minutes that DEP has already internally discussed whether a non-Combined Sewer System permittee's particular circumstances could warrant a timeframe for compliance of greater than five (5) years. PMAA is willing to work with DEP on such an amendment. (3)

Response: The Department appreciates the commentator's support for this rulemaking. As noted in the response to Comment #2, the Department has no plans for a separate amendment to extend compliance schedules for non-combined sewer systems.

11. Comment: The EPA provided comments in support of the rulemaking, noted that the rulemaking was in accordance with agreements between the EPA and the Department on how to address the issue, and discussed the procedural steps necessary to seek approval of the modified § 92a.51(a) as part of the Commonwealth's approved water quality standards. (4)

Response: The Department appreciates the EPA's support for the rulemaking and will ensure the Federal procedural requirements are followed and all necessary documentation is included when the final regulation is submitted to the EPA for review.