

# **DELAWARE RIVER BASIN COMMISSION**

## **COMMENT AND RESPONSE DOCUMENT**

### **RULE ESTABLISHING POLLUTANT MINIMIZATION PLAN (PMP) REQUIREMENTS FOR POINT AND NON-POINT SOURCE DISCHARGERS OF TOXIC POLLUTANTS FOLLOWING ISSUANCE OF A TMDL OR ASSIMILATIVE CAPACITY DETERMINATION**

**May 13, 2005**

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**LIST OF WRITTEN COMMENTERS\* AND ABBREVIATIONS**

<b>Organization</b>	<b>Signatory</b>	<b>Letter Date</b>	<b>Abbreviation</b>
Conectiv Energy	Marilyn M. Booth, Senior Environmental Consultant	11/19/04	<b>Conectiv</b>
Delaware Estuary TMDL Coalition	Marc E. Gold, Esq. Manko, Gold, Katcher & Fox, LLP	11/18/04	<b>DETC</b>
Delaware Estuary TMDL Coalition	Marc E. Gold, Esq. Manko, Gold, Katcher & Fox, LLP	08/13/04	
Delaware Riverkeeper Network	Maya K. van Rossum Delaware Riverkeeper	07/20/04	<b>DRKN</b>
Federal Water Quality Coalition	Fredric P. Andes, Coordinator	11/19/04	<b>FWQC</b>
Citizens for Pennsylvania's Future	Matthew B. Royer, Staff Attorney	08/30/04	<b>PennFuture</b>
Citizens for Pennsylvania's Future	Matthew B. Royer, Staff Attorney	11/19/04	
Philadelphia Water Department	Bruce Aptowicz	08/11/04	
US EPA Region 2	Walter E. Mugdan	11/16/04	<b>EPA R2</b>
U.S. Fish and Wildlife Service	Richard O. Bennett, Ph.D., Deputy Regional Director	07/12/04	<b>U.S. F&amp;WS</b>
Utility Water Act Group	Keith Hanson, Chairman UWAG Water Quality Committee	11/19/04	<b>UWAG</b>

**PUBLIC HEARING TRANSCRIPT**

Citations to the transcript of the public hearing held by the Commission on October 27, 2004 are denoted by the abbreviation “**HRG. TR.**” and the page number.

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\* Written comments received prior to the commencement of the comment period and based upon earlier drafts of the rule receive responses in this document only if (1) the written comment was still relevant to the draft of the rule posted for comment in October 2004; and (2) the earlier comment was not superseded by the commenter's later submission.

## INTRODUCTION

This rule establishing pollutant minimization plan (PMP) requirements for point and non-point dischargers of certain toxic pollutants is a part of the Delaware River Basin Commission's Estuary Toxics Management Program, which was initiated by the Commission in 1987 to address the problem of toxic contamination in fish caught in the Delaware Estuary. The program was to have three parts: 1) the development of appropriate water quality standards for toxic substances; 2) the development of water quality based effluent limitations (WQBELs) including total maximum daily loads (TMDLs), in accordance with the Clean Water Act obligations of the member states; and 3) policies and methods for achieving the standards and WQBELs. The Commission adopted stream quality objectives for toxic pollutants in 1996, and since then, has developed estuary TMDLs for volatile organic chemicals (VOCs) and polychlorinated biphenyls (PCBs). Consistent with the third part of the Estuary Toxics Management Program, the PMP rule is an instrument for implementing the water quality standards and WQBELs.

The rule is applicable to any toxic pollutant for which a TMDL has been established by a signatory state or the EPA in accordance with the Clean Water Act or for which an assimilative capacity determination (similar to a TMDL) has been established by the Commission in accordance with its Water Quality Regulations. The rule is needed at this time to help to implement the Estuary TMDL for PCBs, which was established by EPA Regions 2 and 3 in a report issued on December 15, 2003 ("TMDL Report"). The NPDES permitting authorities have not yet determined whether numeric effluent limits should be used to implement the PCB TMDL, but they, the Commission and the regulated community agree that best management practices applied in a systematic way through the development and implementation of PMPs may be effective in reducing loadings of PCBs and other toxic pollutants to the Delaware. The Stage 1 TMDL for PCBs in the Estuary recommends that minimization plans be required in the NPDES permits for certain point source dischargers listed in Groups 1 and 2 of Appendix 3 of EPA's TMDL Report. However, the states will not impose the requirement until permits are reissued, in some cases several years into the future.

In 2003, the Delaware Estuary TMDL Coalition (DETC), a group of large municipal and industrial dischargers, informed regulators that its members would voluntarily develop pollutant minimization plans for PCBs. Approximately one dozen plans were submitted to the DRBC in late 2003 and early 2004. These cover a fraction of the 142 dischargers listed in Groups 1 and 2 of EPA's TMDL Report. The PMPs varied greatly in their level of detail. In nearly all cases, however, the authors provided no mechanisms for either (a) ensuring that the plans would be implemented, or (b) measuring their effectiveness in achieving PCB reductions. Dischargers and regulators agreed more definition was needed to ensure that minimization planning would be effective, notwithstanding the acknowledged need for flexibility to tailor best management practices to the conditions of each facility.

In the spring of 2004, an ad hoc group of state environmental agency and DRBC staff worked together to develop PMP guidance documents for industrial and municipal wastewater treatment plant dischargers. When one of the Estuary states attempted to incorporate the guidance as a NPDES permit requirement for a DETC member, however, the permittee objected on grounds

that the requirement was not a part of any rule. In light of this history, the Commission determined that a DRBC rule could fill two important needs by: 1) establishing the minimum elements of a PMP; and 2) implementing effective PMP requirements sooner. The rule ensures at a minimum that all dischargers for which the TMDL Report recommends pollutant minimization are required to develop PMPs without further delay. It further ensures that these plans contain minimum components, including measures of progress, while allowing sufficient flexibility for dischargers to tailor their management practices to the conditions of their sites.

The Commission's PMP rule serves another important purpose, by providing an additional tool for addressing toxic releases from contaminated sites. All interested parties agree that the Estuary's water quality cannot be restored without addressing toxic pollution from nonpoint sources. Point source dischargers and environmentalists alike have urged that PMPs be required for contaminated sites whenever possible in instances where releases from the sites are not being fully addressed by state or federal programs.

The Commission's PMP rule has benefited from extensive public input. Representatives from industry, municipal wastewater treatment plants, environmental organizations, and regulatory agencies all have expressed support for the approach to reducing toxic contamination in the Delaware River. In fact, PMPs are expected to be the centerpiece of a set of recommendations to be issued in a report by the Commission's TMDL Implementation Advisory Committee later this year. The measurement and reporting provisions of the DRBC rule will ensure that the efficacy of different reduction strategies can be evaluated, helping to increase the ability of the Basin community collectively to address the problem of toxic contamination as we gain in experience.

## NEUTRAL ASSERTIONS, QUERIES

**1. FWQC REFERS TO ITS INTEREST IN “REGULATORY DECISIONS MADE UNDER THE FEDERAL CLEAN WATER ACT.” FWQC, P.1**

The rule is being promulgated under the authority granted the Commission by the *Delaware River Basin Compact*, not under the Clean Water Act.

**2. CONECTIV SUPPORTS CONTINUED VOLUNTARY REDUCTION EFFORTS TO REDUCE PCBs AND ASKS WHETHER THE VOLUNTARY PROGRAM IS NOT PROCEEDING IN A TIMELY MANNER. CONECTIV, P. 3**

The Stage 1 TMDL for PCBs in the Estuary recommends that minimization plans be required in the NPDES permits for certain point source dischargers listed in Groups 1 and 2 of Appendix 3 of EPA’s TMDL Report of December 15, 2003, establishing a TMDL for PCBs in the Delaware Estuary. However, the states will not impose the requirement until permits are reissued, in some cases several years into the future.

In 2003, the Delaware Estuary TMDL Coalition (DETC), a group of large municipal and industrial dischargers, informed regulators that its members would voluntarily develop pollutant minimization plans for PCBs. Approximately one dozen plans were submitted to the DRBC in late 2003 and early 2004. These represent a fraction of the 142 dischargers listed in Groups 1 and 2 of EPA’s TMDL Report. The PMPs varied greatly in their level of detail. In nearly all cases, however, the authors provided no mechanisms for either (a) ensuring that the plans would be implemented, or (b) measuring their effectiveness in achieving PCB reductions. Dischargers and regulators agreed more definition was needed to ensure that minimization planning would be effective, notwithstanding the acknowledged need for flexibility to tailor best management practices to the conditions of each facility.

In the spring of 2004, an ad hoc group of state environmental agency and DRBC staff worked together to develop PMP guidance documents for industrial dischargers and municipal wastewater treatment plant dischargers. When one of the Estuary states attempted to incorporate the guidance as a NPDES permit requirement for a DETC member, however, the permittee objected on grounds that the requirement was not a part of any rule. In light of this history, the Commission determined that a DRBC rule could fill two important needs by: 1) establishing the minimum elements of a PMP; and 2) implementing effective PMP requirements sooner. The rule ensures at a minimum that all dischargers for which the PCB TMDL recommends pollutant minimization are required to develop PMPs without further delay. It further ensures that these plans contain minimum components, including measurements of progress, while allowing sufficient flexibility for dischargers to tailor their management practices to the conditions of their sites. Thus, the rule provides for a higher degree of uniformity and fairness and ensures that the efficacy of each PMP can be evaluated.

The Commission’s PMP rule serves another important purpose, by providing an additional tool for addressing toxic releases from contaminated sites. All interested parties agree that the Estuary’s water quality cannot be restored without addressing toxic pollution from nonpoint

sources. Point source dischargers and environmentalists alike have urged that PMPs be required for contaminated sites whenever possible in instances where releases from the sites are not being fully addressed by state or federal programs.

The PMP approach to reducing toxic contamination in the Delaware River is one that all interested parties have embraced. In fact, it is expected to be the centerpiece of a set of recommendations to be issued in a report by the Commission's TMDL Implementation Advisory Committee later this year. Development of the rule, which has benefited from extensive public input from dischargers, environmentalists and regulators, has helped to forge this hard-earned consensus.

### **SUPPORT FOR THE CONCEPT OF PMPS OR THE RULE**

**3. ADOPTION OF THIS RULE WILL ACCELERATE THE REQUIREMENT FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT HOLDERS TO HAVE WASTE MINIMIZATION PLANS IN PLACE. EPA R2, P. 1**

This statement, offered in the context of a letter supporting the rule, is true. The TMDL for PCBs issued by the EPA in December 2003 provides that minimization plan requirements will be incorporated into the NPDES permits of contributing point source dischargers. The states will not impose the requirement, however, until permits are reissued. Because NPDES permits ordinarily are reissued only once every five years, and because renewals frequently are delayed beyond five years, it was proposed that the DRBC should establish the requirements earlier. Doing so will help to ensure that steps to improve the estuary's water quality begin sooner.

**4. THE RULE WILL PROVIDE A MECHANISM FOR REQUIRING WASTE MINIMIZATION PLANS FOR NON-POINT SOURCE DISCHARGES WHERE ADDITIONAL ACTIONS BEYOND EXISTING STATE OR FEDERAL PROGRAMS ARE NEEDED TO IMPLEMENT THE TMDL. EPA R2, P.1**

The Commission recognizes that because contaminated sites contribute to the total load of PCBs, it would be useful for the Commission to address such sites when they are not currently being addressed through other state or federal regulatory programs. Although the rule does not authorize the imposition of PMP requirements on any specific sites at this time, it provides a framework for the Commission to impose the requirement on specific sites.

**5. WE BELIEVE THAT THE PROPOSED RULE COMPLEMENTS STATE AUTHORITY AND FILLS A VACUUM THAT EXISTS TO THE DETRIMENT OF THE DELAWARE RIVER. PA CLEAN WATER ACTION, HRG. TR., PP. 66-74**

Noted.

6. **EPA R2 SUPPORTS THE PROPOSED AMENDMENT TO DRBC’S WATER QUALITY REGULATIONS. EPA R2, P.1**

Noted.

7. **“THE COALITION SUPPORTS THE CONCEPT OF USING PMPS, RATHER THAN NUMERIC EFFLUENT LIMITS, TO REDUCE AND PREVENT RELEASES OF CERTAIN TOXIC POLLUTANTS TO IMPAIRED WATERS. ” FWQC, P.2; UWAG, P. 2**

**“PMPS, WHICH INCLUDE AN ITERATIVE PROCESS OF ASSESSING SOURCES, EVALUATING CONTROL MEASURES, AND IMPLEMENTING FEASIBLE, COST-EFFECTIVE SOLUTIONS, ARE A FAR BETTER PROCESS TO FOLLOW [THAN IMPOSITION OF NUMERIC EFFLUENT LIMITATIONS] IN REDUCING DISCHARGES OF PCBs AND OTHER TOXICS.” FWQC P.2**

**“[T]HE [DELAWARE ESTUARY TMDL] COALITION STRONGLY ENDORSES THE USE OF PMPS TO HELP ACHIEVE REDUCTIONS OF PCBs IN CASES SUCH AS THIS WHERE NUMERIC EFFLUENT LIMITATIONS, AS PRESCRIBED BY THE PCB TMDLS, ARE UNACHIEVABLE.” DETC P. 2**

The preference of the Federal Water Quality Coalition, the Utility Water Act Group and the Delaware Estuary TMDL Coalition is noted. The Commission acknowledges that the TMDL will take decades to achieve, but it has not accepted the assertion that the wasteload allocations are unachievable.

8. **“WE ARE CONFIDENT THAT WITH THE REVISIONS DISCUSSED [IN OUR COMMENT LETTER] THE PROPOSED RULE WILL HELP ACHIEVE THE GOALS SET FORTH BY THE DRBC, AND WILL HELP ENSURE PROTECTION OF WATER QUALITY IN AN EFFICIENT AND COST-EFFECTIVE MANNER.” FWQC, P. 6**

Noted.

9. **PMPS ARE “IMPORTANT, NECESSARY AND NEEDED” TO SUPPORT STATE AUTHORITY AND STATE ACTION. DRKN, HRG. TR. P. 51**

Noted.

### **OBJECTIONS TO THE RULE**

10. **“THE PROPOSED RULE . . . CONTRADICTS THE POLICY SET FORTH IN THE COMMISSION’S REGULATIONS TO ENCOURAGE RELIANCE ‘TO THE MAXIMUM PRACTICAL EXTENT’ ON THE REGULATORY AUTHORITY OF THE SIGNATORY AGENCIES TO THE COMPACT ‘TO AVOID UNNECESSARY DUPLICATION AND ACHIEVE MAXIMUM EFFICIENCY.’” CONECTIV, P. 2**

**“CONECTIV BELIEVES THAT PMP IMPLEMENTATION SHOULD BE THE RESPONSIBILITY OF THE AFFECTED ESTUARY STATES THROUGH THE NPDES PERMIT RENEWAL PROCESS. THE COMMISSION’S PROPOSED RULE ADDS AN ADDITIONAL UNNECESSARY REGULATORY LAYER FOR POINT SOURCES.” CONECTIV, P. 4**

The Commission disagrees that the rule duplicates state or federal regulations. On the contrary, the rule is a gap-filling measure. The states have concluded that they will not reopen the nearly 100 NPDES permits potentially requiring PMPs in connection with the Estuary PCB TMDL and thus cannot impose the PMP requirements prior to the permit expiration dates. Because NPDES permits ordinarily are reissued only once every five years, and because reissuance frequently is delayed beyond five years, using DRBC authority to establish the requirements earlier will help to ensure that steps to improve the estuary’s water quality begin sooner. Permittees will not be subject to overlapping regulations, because the rule provides expressly at Section 4.30.9.I that

[u]pon issuance of an initial, renewed or modified NPDES permit by the State in which the discharger is located or the U.S. Environmental Protection Agency to a discharger that has been made subject to Section 4.30.9, which permit contains the requirements to develop, submit to the permitting authority and implement a PMP consistent with that Section, then as to that discharger:

1. the Commission shall cease to administer Section 4.30.9 with respect to the discharge of the pollutant to which the PMP requirements of the permit relate, upon the date such requirements become effective; and
2. the NPDES permitting authority shall apply the more stringent of Section 4.30.9 or other applicable state or federal requirements with respect to the discharge of the pollutant to which the PMP requirements of the permit relate.

The Commission also recognizes that in light of the importance of contributions to the problem of toxic contamination from another category of sources – contaminated sites – it would be useful to provide the DRBC with a mechanism for addressing such sites when they are not currently being addressed through other state or federal regulatory programs. The rule provides such a mechanism. The rule would not result in duplicative regulation of contaminated sites, because the Commission’s intention is to apply it only where existing state and federal programs will not ensure implementation of the TMDL or assimilative capacity determination.

The rule advances other express purposes of the *Delaware River Basin Compact*, which created the Commission. First, by establishing one set of criteria and standards for pollutant minimization plans to be applied in all three estuary states, the rule advances the purpose of applying “equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.” *Compact*, §1.3(e). Second, the *Compact* acknowledges that the water resources of the basin are “subject to the sovereign right and responsibility of the signatory parties,” and provides that “it is the purpose of this compact to provide for a joint exercise of such powers of sovereignty in the common interest

of the people of the region.” *Id.* The rule is an appropriate exercise of joint sovereignty through the Commission, since no single state acting alone can correct water quality impairments in shared waters such as the Delaware Estuary.

**11. “[THE RULE’S] FOCUS [ON POINT SOURCES] IS COUNTERPRODUCTIVE TO ACHIEVING THE LARGE LOADING REDUCTIONS THAT ARE THE OBJECTIVE OF THE PROPOSED RULE.” CONECTIV, P. 2**

Importantly, the Commission’s rule has the potential to reach tributary dischargers and contaminated sites that investigators believe are contributing more to exceedences of the PCB water quality criteria in the Estuary than are point sources discharging directly to Estuary waters. Although application of the rule initially is limited to point sources, the rule thus provides an additional tool for addressing the non-point sources that Conectiv asserts federal and state programs currently fail to reach.

A problem as widespread and complex as PCB contamination in the Delaware Estuary will not be resolved through the application of a single strategy or rule. The Commission’s rule authorizing the imposition of PMP requirements for certain point and non-point dischargers will contribute to the reduction of active and potential PCB loadings and thus to achievement of the water quality standards and restoration of the designated uses of the Estuary. Other regulatory and non-regulatory approaches for reducing loads from point and non-point sources will be used as well. The limited objectives of the rule are set forth in the response to No. 10, above. The Commission’s TMDL Implementation Advisory Committee currently is working on a comprehensive set of recommendations to achieve PCB reductions from all sources.

Please also see response to No. 26, below.

**12. THE RULE WILL SUPPLANT THE STATES’ AUTHORITY. DETC, P. 4**

**“[T]HE COALITION . . . BELIEVES THAT THE PROPOSED RULE REPLACES FUNCTIONS RESERVED TO THE STATES UNDER FEDERALLY DELEGATED NPDES PERMIT PROGRAMS. . . . [T]HE PROPOSED RULE ATTEMPTS TO EFFECTIVELY TRANSFER VIRTUALLY UNFETTERED CONTROL OVER POINT AND NON-POINT DISCHARGES OF TOXIC POLLUTANTS WITHIN A BASIN STATE TO THE COMMISSION AND, BY EXTENSION, TO THE OTHER BASIN STATES. BECAUSE EACH BASIN STATE IS ENTITLED TO ONLY ONE VOTE ON ALL MATTERS BEFORE THE COMMISSION, THE COMMISSION’S SELF-CREATED, NEWLY FOUNDED [SIC] ROLE DOES NOT ADEQUATELY PRESERVE STATE POLLUTION CONTROL AUTHORITY. AS A RESULT, THE COMMISSION’S AUTHORITY AND DISCRETION WOULD BE EXERCISED WITH LITTLE OR NO STATE CONTROL.” DETC, PP. 2-3**

The Coalition’s belief that the rule replaces functions reserved to the states under federally delegated NPDES permit programs is incorrect. The functions of the rule – control of future pollution and abatement of existing pollution – are within the Commission’s authority as established by the *Delaware River Basin Compact*. Section 5.2 of the *Compact* provides in relevant part that “the commission may assume jurisdiction to control future pollution and abate existing pollution in the waters of the basin, whenever it determines after investigation and

public hearing upon due notice that the effectuation of the comprehensive plan so requires.” Either one of the pre-conditions for application of the rule – adoption of an assimilative capacity determination by the Commission or the issuance of a TMDL by the EPA or a Basin state – establishes the need for pollution abatement to effectuate the Estuary stream quality objectives that are part of the Commission’s Comprehensive Plan. *See e.g.* Sections 3.30.2C.14, 3.30.3.C.15, 3.30.4.C.12, and 3.30.5.C.11, of the *Administrative Manual Part III – Water Quality Regulations*, promulgated and added to the Comprehensive Plan by Resolution No. 96-12.

The notions that the rule “does not adequately preserve state pollution control authority,” and that if the rule were approved, “the Commission’s authority and discretion would be exercised with little or no state control,” are also incorrect. The members of the Commission are the governors of the four states and a federal member appointed by the president, who typically vote through their appointed alternates. Thus, the Commission does not substitute its authority for that of the states. Rather, an action of the Commission constitutes a joint action of the states and the federal government. The five sovereigns act jointly through the Commission when the independent actions of any one or all of them could not as effectively accomplish a common public purpose. *See, e.g., Compact § 1.3(b).* The states thus augment rather than diminish their power when they act through the Commission. The objective of the rule – abating toxic pollution in the shared waters of the Estuary – is precisely the type of purpose for which the Commission was created.

Furthermore, following issuance of a permit by a state or the EPA in accordance with Section 4.30.9.I of the rule, that section provides, “the Commission shall cease to administer Section 4.30.9 with respect to the discharge of the pollutant to which the PMP requirements of the permit relate, upon the date such requirements become effective.”

13. **“THE [DELAWARE ESTUARY TMDL] COALITION URGES THAT THE COMMISSION REFRAIN FROM ADOPTING THE PROPOSED RULE, AND FOCUS ITS EFFORTS INSTEAD ON REFINING THE CURRENT PMP GUIDANCE DOCUMENT, DEVELOPED BY THE COMMISSION TOGETHER WITH EPA AND THE BASIN STATES, TO FACILITATE CONSISTENCY AMONG ALREADY EXISTING BMP PROGRAMS ADMINISTERED BY THE STATES THROUGH THEIR NPDES PROGRAMS.”**  
**DETC, P. 4**

Please see full response to No. 2, above. Notably, when one of the Estuary states attempted to incorporate the draft guidance as a NPDES permit requirement for a DETC member, the permittee, a major industrial discharger, objected on grounds that the requirement was not a part of any rule. The DRBC’s rule would ensure at a minimum that all dischargers for which waste minimization and reduction plans are recommended in the EPA’s December 15, 2003 TMDL develop PMPs containing essential elements, including measures of progress, and that the plans are implemented sooner rather than later.

## SUGGESTED CHANGES TO THE RULE

### Definitions, Clarity

14. **“ADVERSE EFFECT’ IS NOT CLEARLY DEFINED IN RELATION TO THE CONDITION OF THE RECEIVING WATER, OR THE LEVEL OF CONTAMINANTS IN THE DISCHARGE . . . .” FWQC P. 2**

**“THE PROPOSED RULE OFFERS NO CRITERIA FOR DETERMINING WHAT CONSTITUTES AN ‘ADVERSE AFFECT’ ON BASIN WATERS.” DETC, P. 9**

**“THE FWQC RECOMMENDS THAT FOR EACH POLLUTANT INCLUDED IN THE RULE, THE COMMISSION ESTABLISH SOME DE MINIMIS DISCHARGE LEVEL BELOW WHICH DISCHARGES ARE DETERMINED TO HAVE NO ADVERSE IMPACT ON THE BASIN. IT RECOMMENDS REVISING THE RULE TO INDICATE ADDITIONAL DISCHARGERS OTHER THAN THOSE LISTED IN THE TMDL MAY BE SUBJECT TO THE PMP IF THERE IS DATA SHOWING THAT THE DISCHARGE EXCEEDS THE DE MINIMIS LEVEL.” FWQC P. 2**

A definition of “adverse effect” has been added to the rule at Section 4.30.9.C.1. For the purposes of Section 4.30.9 of the Commission’s *Water Quality Regulations*, it provides,

A point or non-point source of a toxic pollutant has an “adverse effect” on the water resources of the Basin if it is causing or contributing to a violation of applicable stream quality objectives or water quality standards in Basin waters for which, in accordance with Section 4.30.9.A., a TMDL or assimilative capacity determination has been established.

15. **“MAXIMUM PRACTICABLE REDUCTION’ IS TOO VAGUE AND NEEDS TO BE MORE SPECIFICALLY AND PRECISELY DEFINED.” UWAG, P. 2**

**WE DO ALSO ENCOURAGE GREATER CLARITY ON THE TERMS IN THE PLANS, PARTICULARLY THE MAXIMUM PRACTICAL REDUCTION CONCEPT. CLEAN WATER ACTION, HRG. TR., PP. 66-74**

**THE TERM “MAXIMUM PRACTICABLE REDUCTION” MUST BE DEFINED, “AND IN SUCH A WAY THAT ENSURES STRONG, AGGRESSIVE REDUCTIONS. [FOR EXAMPLE:] . . . THE HIGHEST DEGREE OF REDUCTION POSSIBLE ACHIEVED BY EMPLOYING THE BEST AVAILABLE COMBINATION OF TECHNOLOGICALLY FEASIBLE METHODS OF TREATMENT, REMEDIATION, POLLUTION PREVENTION AND OTHER ACTIVITIES THAT REDUCE POLLUTANT DISCHARGES.” PENNFUTURE, P. 4**

**“MAXIMUM PRACTICABLE REDUCTION [IS] FUNDAMENTALLY IMPORTANT LANGUAGE THAT NEEDS TO BE DEFINED. [DRN IS] CONCERN[ED] THAT IF THIS TERM IS DEFINED AS IT’S CURRENTLY USED FOR OTHER REGULATORY REGIMES, THAT IT ACTUALLY IS TOO LENIENT OF A REQUIREMENT AND THAT IT ALLOWS TOO MUCH OF AN OPPORTUNITY FOR AN OUT AS A RESULT OF ECONOMIC ARGUMENTS AND ASSERTIONS. . . . WE THINK IT SHOULD BE**

**MADE CLEAR THAT THIS IS A STRONG REQUIREMENT AND THAT IT IS A TECHNOLOGY FORCING REQUIREMENT. DRKN, HRG. TR. P. 60**

**“THE ‘MAXIMUM PRACTICABLE REDUCTION’ STANDARD IS TOO BROAD. THE RULE SHOULD IDENTIFY FACTORS TO BE CONSIDERED, SUCH AS TECHNOLOGICAL FEASIBILITY, COST, COST-EFFECTIVENESS, NEGATIVE IMPACTS OF ADDITIONAL CONTROL MEASURES ON PUBLIC HEALTH OR THE ENVIRONMENT (E.G., GENERATING NEW WASTE STREAMS IN DIFFERENT MEDIA).” FWQC P. 3**

**THE RULE SHOULD “EXPRESSLY DEFINE THE ‘MAXIMUM PRACTICABLE REDUCTION’ STANDARD BY REFERENCE TO THE IMPLEMENTATION OF FEASIBLE, APPROPRIATE AND COST-EFFECTIVE POLLUTANT MINIMIZATION MEASURES FOR A PARTICULAR FACILITY COVERED BY THE PMP RULE. EXISTING INTERPRETATIONS OF SIMILAR CONCEPTS UNDER THE CWA ENTAIL SOME CONSIDERATION OF FEASIBILITY AND COST-EFFECTIVENESS. SINCE NO PRECISE DEFINITION OF THE MEP STANDARD EXISTS, EPA AND STATE PERMITTING AUTHORITIES HAVE INTERPRETED THE STANDARD TO ALLOW FOR MAXIMUM FLEXIBILITY FOR MS4s AS THEY DEVELOP AND IMPLEMENT APPROPRIATE AND COST-EFFECTIVE BMP PROGRAMS. PMPs MUST INCLUDE ‘IMPLEMENTATION OF APPROPRIATE, COST-EFFECTIVE CONTROL MEASURES CONSISTENT WITH THE CONTROL STRATEGY’ OR ‘[I]MPLEMENTATION OF APPROPRIATE COST-EFFECTIVE CONTROL MEASURES FOR THE REPORTABLE PRIORITY POLLUTANT(S), CONSISTENT WITH THE CONTROL STRATEGY’. BECAUSE 40 C.F.R. § 122.44(D)(1)(VII)(B) REQUIRES THAT THE PMP RULE BE CONSISTENT WITH THE TMDLS, THE ‘MAXIMUM PRACTICABLE REDUCTION’ STANDARD IN THE PROPOSED RULE, AS APPLIED TO PCB DISCHARGES, MUST INCORPORATE CONCEPTS OF FEASIBILITY AND COST-EFFECTIVENESS. DETC, PP. 23-24**

A definition has been added at Section 4.30.9.C.2, providing that for purposes of Section 4.30.9 of the *Water Quality Regulations*,

[t]he “maximum practicable reduction” of releases of a toxic pollutant is the maximum degree of reduction in releases of the pollutant to the air, soil and water (including elimination of such releases where achievable), taking into account economic and technological feasibility and any new environmental impacts that would result, that is achievable for a given site or facility through the application of equipment, technology, process or procedure modifications; reformation or redesign of products; substitution of raw materials; or changes in management practices, materials handling, inventory control, or other general operational phases of the site or facility, either alone or in combination. If the pollutant is present within a site or facility but is contained, maximum practicable reduction includes the implementation of measures to prevent its future release. For municipal wastewater treatment plants, maximum practicable reduction shall include system trackdown and analysis and may include, among other things, reductions achieved through education and outreach and coordination with other local, state, and federal regulatory agencies.

16. **“A DEFINITION OF ‘TOXIC POLLUTANT’ IS NEEDED. THE DETC RECOMMENDS USING THE DEFINITION USED BY EPA IN THE NPDES REGULATIONS AT 40 C.F.R. §122.2; 33 U.S.C. §1317(A)(1).” DETC, P. 9**

A definition has been added at Section 4.30.9.C.4, providing that for purposes of Section 4.30.9 of the Water Quality Regulations, a “toxic pollutant” is “any pollutant defined as toxic in a federal or Basin state statute or a regulation issued by the Commission, the U.S. EPA or a Basin state.”

17. **“THE RULE DOES NOT DEFINE ‘GOOD FAITH COMMITMENT TO REDUCING DISCHARGES.’ THIS TERM NEEDS TO BE DEFINED, AND IN SUCH A WAY THAT ENSURES STRONG, AGGRESSIVE REDUCTIONS.” PENNFUTURE, P. 4**

“Good faith” is described in the Restatement of Contracts (Second) as “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” In the Uniform Commercial Code, it is broadly defined as “honesty in fact” in the matter at issue. In the context of the Commission’s PMP regulation, the meaning of “good faith” encompasses the concepts contained in both of these definitions. Defining the term within the regulation is not necessary.

18. **“‘SOURCE’ IN SECTION 4.30.9.C.10 APPEARS TO MEAN ‘SOURCE OF A TARGETED POLLUTANT’ AND SHOULD BE CLARIFIED ACCORDINGLY.” CONECTIV, P.7**

**“CONSISTENT USE OF THE TERM ‘TARGET POLLUTANT’ WOULD BE PREFERABLE. CONECTIV, P.7**

The Commission does not deem the use of the term “target pollutant” to be necessary for clarity.

19. **“THE COALITION PROPOSES THAT THE PMP RULE DEFINE THE TERM ‘MATERIAL MODIFICATIONS’ TO INCLUDE ONLY THOSE MODIFICATIONS THAT MUST BE REPORTED UNDER THE NPDES PERMIT PROGRAM. FURTHER, THE TERM SHOULD INCLUDE ONLY THOSE MODIFICATIONS THAT INVOLVE A TOXIC POLLUTANT COVERED BY THE RULE AND WHICH ARE LIKELY TO HAVE AN ADVERSE EFFECT ON THE WATERS FOR WHICH AN ASSIMILATIVE CAPACITY DETERMINATION OR TMDL HAS BEEN ISSUED.” DETC, P. 29**

The requirement at former Section 4.30.9.C.14 that a discharger make appropriate revisions to its PMP and notify the Commission within 30 days of any material modifications to a facility’s operations, site boundary, service area or waste streams has been replaced with a new requirement at section 4.30.9.F. “Annual Report,” providing that the annual report must describe “any material modifications to a facility’s operations, site boundary, service area, or waste streams in the course of the preceding year that might affect releases of the pollutant, along with appropriate revisions made to the PMP.”

20. **“DETC WOULD LIKE THE REFERENCE TO ‘SERVICE AREA’ TO BE DELETED ON GROUNDS THAT THE REFERENCE IS VAGUE AND THAT THE COMMISSION LACKS THE AUTHORITY TO CONTROL A DISCHARGER’S SERVICE AREA.” DETC, P. 29**

A definition has been added at Section 4.30.9.C.3, providing that for purposes of Section 4.30.9 of the Water Quality Regulations, “[a] ‘service area’ is the area served by a municipal or industrial wastewater treatment plant. It includes the geographic area served by the plant’s collection system, plus any sites or facilities outside the collection system that transport waste to the plant for treatment.”

The part of the comment referring to the extent of the Commission’s authority is incorrect. The *Delaware River Basin Compact* provides the Commission with broad authority to “control future pollution and abate existing pollution in the waters of the basin.” *Compact*, §5.2. The *Compact* further provides that “[t]he standard of such control shall be that pollution by sewage or industrial or other waste originating within a signatory state shall not injuriously affect waters of the basin as contemplated by the comprehensive plan.” *Id.* Thus, as long as a service area is located within a signatory state, the Commission has the authority to control pollution originating within it. This is so, even if the pollution originates from a site outside of the Basin, provided that the Commission has the consent of the state in which it proposes to act. *See id.*, §2.7.

21. **“THE PHRASE ‘FACILITIES WITHIN A FACILITY’ IN SECTION 4.30.9.C.4.A IS UNCLEAR. IT WOULD APPEAR TO MEAN ‘EQUIPMENT WITHIN A FACILITY.’ CONECTIV, P.7**

The phrase has been deleted.

22. **“THE PHRASE ‘THAT IS NOT DEEMED A SOURCE’ IN SECTION 4.30.9.C.5.A SHOULD BE CLARIFIED TO READ ‘THAT HAS NOT BEEN DETERMINED TO BE A SOURCE.’” CONECTIV, P.7**

The complete phrase (at Section 4.30.9.E.5.a. in the final rule) includes a clause defining “that is not deemed a source” and is unambiguous. It reads, “that is not deemed a source *because it is not known to be releasing the pollutant or because no known pathway to surface water or groundwater exists.*” (Emphasis added).

23. **“THE REFERENCE TO ‘PRESENCE AND TYPE OF PCB CONTAINING EQUIPMENT’ IN SECTIONS 4.30.9.C.10 AND 12 APPEARS TO BE INCONSISTENT WITH THE GENERIC (AS OPPOSED TO PCB-SPECIFIC) NATURE OF THE PROPOSED REGULATION.” CONECTIV, P.7**

The reference at Section 4.30.9.E.10 (numbering is per the final rule) has been revised to read “presence and type of equipment containing the pollutant.” The reference at Section 4.30.9.E.12 has been deleted.

24. **“IN SECTION 4.30.9.C.3.A (THIRD LINE) THE TERM ‘GENERATE’ SHOULD BE ‘GENERATED.’” CONECTIV, P.7**

A correction has been made. The section in the final rule is Section 4.30.9.E.3.a.

### **Use of Numeric Targets**

25. **NUMERIC TARGETS MAY BE APPROPRIATE IN THE PLANS. U.S. F&WS, P. 1**

The Commission views pollutant minimization plans (a type of non-numeric effluent limitation) as an alternative to numeric effluent limitations in permits. Thus, in the view of the Commission, numeric effluent limits are not an appropriate plan element. Other types of numeric targets, such as percentage reductions or mass loading reductions might be appropriate at some future date, but the Commission is not including such requirements at this time.

### **Applicability: Asymmetrical Application of the Rule to Point Sources and Non-Point Sources**

26. **“IT APPEARS THAT [NON-POINT] SOURCES WILL GENERALLY NOT BE SUBJECT TO THE REQUIREMENTS OF THE PROPOSED RULE AT THIS TIME. INSTEAD, IT IS POINT SOURCE DISCHARGERS THAT ARE TARGETED FOR ADDITIONAL REGULATION AND POSSIBLE ENFORCEMENT ACTIONS EVEN THOUGH MANY OF THEM HAVE ALREADY ACHIEVED ZERO-DISCHARGE STATUS FOR PCBs (OR ARE EXTREMELY LOW QUANTITY DISCHARGERS).” CONECTIV, P.3**

**THE PROPOSED RULE “ARBITRARILY FOCUSES ON POINT SOURCES DESPITE THE INDISPUTABLE FACT THAT NON-POINT SOURCE DISCHARGES ARE FAR MORE SIGNIFICANT SOURCES OF PCB LOADING TO THE DELAWARE RIVER.” CONECTIV, P. 2**

**“WE JUST THINK THAT THE LANGUAGE IN SECTION A.2 NEEDS TO CLARIFY, TO MAKE VERY CLEAR THAT THAT SECTION TWO APPLIES FOR THE POINT SOURCES AND NON-POINT SOURCES. THERE ARE NUMEROUS SOURCES, SOME VERY LARGE SOURCES OF PCBs TO THE ESTUARY ARE NON-POINT SOURCES AND ARE AS A CLASS VERY IDENTIFIABLE, SUCH AS CONTAMINATED SITES IN THE AREA. WE WOULD LIKE TO SEE THIS RULE MODIFIED TO INCLUDE THOSE SOURCES. IF IT’S NOT TIMELY TO REVISE THIS RULE TO INCLUDE THOSE SOURCES AT THIS TIME, WE WOULD ASK THAT DRBC IMMEDIATELY EMBARK ON RULE REVISION AFTER THIS RULE IS PASSED TO INCLUDE THOSE OTHER SOURCES SO WE CAN START CHECKING IN ON THAT BECAUSE THAT’S AN IMPORTANT PART OF THE SOLUTION.” DRKN, HRG. TR., PP. 54-55**

**THE RULE “MUST ADDRESS BOTH POINT AND NON-POINT SOURCES OF PCBs. [PA CLEAN WATER ACTION WOULD] ENCOURAGE THE COMMISSION TO MOVE FORWARD QUICKLY, TO EXPAND THE AUTHORITY BEYOND WHAT IS SPECIFICALLY DESIGNATED IN THE RULE AND TO REQUIRE NON-POINT SOURCES TO DEVELOP THESE PLANS AS WELL. CLEAN WATER ACTION, HRG. TR, PP. 66-74**

**“IF MINIMIZATION PLANS ARE TO BE EFFECTIVE, THEY NEED TO BE IN FORCE FOR ALL SOURCES OF A POLLUTANT, ESPECIALLY SUCH AS IN THE CASE WHERE THE SOURCES ARE NOT COVERED BY, BUT CAN GREATLY INFLUENCE TMDLS.” U.S. F&WS, P. 2**

**“PMPS DEVELOPED BY POINT SOURCE DISCHARGERS UNDER THE PROPOSED RULE WILL BE INEFFECTIVE IN ACHIEVING THE DESIRED RESULT IF THE RULE DOES NOT REQUIRE THAT PMPS BE DEVELOPED FOR NONPOINT SOURCES AS WELL.” DETC, P. 11**

**“IT IS A VIRTUAL CERTAINTY THAT EXISTING FEDERAL AND STATE PROGRAMS FOR NON-POINT SOURCE DISCHARGES WILL NOT ENSURE IMPLEMENTATION OF THE DECEMBER 2003 TMDL.” CONECTIV, P.3**

The rule provides the Commission with the authority to require PMPs of both point and non-point source dischargers. The point source dischargers subjected to the PMP requirement at this time are those identified in Tables 3-2 through 3-5 of the TMDL issued by the EPA in December 2003 as contributing to the exceedence of the estuary water quality criteria for PCBs. The water quality criteria cannot be achieved without reducing loads from point sources. Thus, the imposition of pollutant minimization obligations on point sources is necessary and appropriate. Non-point sources also may be subject to PMP requirements in accordance with the DRBC rule or other regulations at a future date.

A problem as widespread and complex as PCB contamination in the Delaware Estuary will not be resolved through the application of a single strategy or rule. The Commission’s rule requiring PMPs for certain point and non-point dischargers will contribute to the reduction of active and potential PCB loadings and thus to achievement of the water quality standards and restoration of the designated uses of the Estuary. Other regulatory and non-regulatory approaches for point and non-point sources will be used as well. The Commission’s TMDL Implementation Advisory Committee currently is working on a comprehensive set of recommendations to achieve PCB reductions from all sources.

**27. “IT IS BEYOND THE COMMISSION’S AUTHORITY TO REQUIRE DISCHARGERS TO REDUCE RELEASES TO AIR AND SOIL. THE PMP REQUIREMENT SHOULD BE LIMITED TO RELEASES TO WATER.” FWQC, P. 4**

**“CONECTIV DOES NOT BELIEVE IT IS THE DRBC’S INTENT TO ADDRESS MEDIA OTHER THAN WATER AND THIS SHOULD BE CLARIFIED ACCORDINGLY.” CONECTIV, P.7**

**“UNDER THE EXPRESS LANGUAGE OF THE COMPACT, THE COMMISSION’S POLLUTION CONTROL AUTHORITY IS LIMITED TO REGULATING POLLUTANTS THAT ARE DISCHARGED TO BASIN WATERS (I.E., WATERS THAT DRAIN INTO THE DELAWARE RIVER AND ITS TRIBUTARIES).” THUS, THE COMMISSION LACKS THE AUTHORITY TO REQUIRE THE “MAXIMUM PRACTICABLE REDUCTION OF DISCHARGES TO THE AIR, SOIL OR WATER.” DETC, P. 6-7**

The commenters' assertions relating to the extent of the DRBC's authority under the *Delaware River Basin Compact* are incorrect. The *Compact* authorizes the Commission to:

assume jurisdiction to control future pollution and abate existing pollution in the waters of the basin, whenever it determines after investigation and public hearing upon due notice that the effectuation of the comprehensive plan so requires. The standard of such control shall be that pollution by sewage or industrial or other waste originating within a signatory state shall not injuriously affect waters of the basin as contemplated by the comprehensive plan.

*Compact* § 5.2. Because the comprehensive plan includes the stream quality objectives for toxic pollutants in the Delaware Estuary, effectuation of the comprehensive plan requires the control and abatement of such pollutants when the stream quality objectives are violated, as they are in all cases in which Section 4.30.9. may be imposed. The *Compact* does not limit the Commission to controlling and abating pollution that is discharged directly to basin waters. If, for example, the pollution affecting basin waters is caused by air deposition or soil runoff, then these sources fall within the Commission's jurisdiction under the *Compact*.

#### **Applicability: Additional Concerns**

28. **“THE LANGUAGE OF THE PROPOSED RULE, AND THE PMP REQUIREMENTS PRESCRIBED BY THE RULE, MUST BE REVISED TO CLARIFY THE INTENDED JURISDICTIONAL SCOPE. [FOR EXAMPLE,] ‘APPLICABILITY. FOLLOWING (I) A DETERMINATION OF ASSIMILATIVE CAPACITY BY THE COMMISSION FOR A TOXIC POLLUTANT IN ACCORDANCE WITH SECTION 4.30.7 OF THESE REGULATIONS, OR (II) THE ISSUANCE OF A TMDL BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY OR A BASIN STATE FOR A TOXIC POLLUTANT, THE COMMISSION MAY REQUIRE, OR IN ACCORDANCE WITH SECTION 4.30.9.A.2. BELOW, MAY AUTHORIZE THE EXECUTIVE DIRECTOR TO REQUIRE, CLASSES OF POINT OR NON-POINT DISCHARGERS OR INDIVIDUAL DISCHARGERS TO PREPARE POLLUTANT MINIMIZATION PLANS (“PMP”) TO REDUCE OR PREVENT RELEASES OF THE TOXIC POLLUTANT TO THOSE BASIN WATERS SUBJECT TO THE SPECIFIC ASSIMILATIVE CAPACITY DETERMINATION OR TMDL.” DETC, P. 8**

The language of the first paragraph of Section 4.30.9.A, the “Applicability” section of the rule, has been modified to read as follows (emphasis added).

Applicability. Following either (i) a determination of assimilative capacity by the Commission for a toxic pollutant in accordance with Section 4.30.7 of these regulations or (ii) the issuance of a total maximum daily load (TMDL) by the U.S. Environmental Protection Agency or a Basin State for a toxic pollutant in accordance with Section 304(d)(1)(C) of the Clean Water Act, the Commission may add such pollutant to the list established at Section 4.30.9A.1, and in accordance with Section 4.30.9.A.2., may require classes of point or non-point dischargers or individual dischargers to prepare pollutant minimization plans (PMPs) to reduce or prevent releases of the toxic pollutant to Basin waters.

Restricting the rule's applicability to sources discharging directly to the waters subject to the specific TMDL or assimilative capacity determination as the commenter recommends, would exclude from the rule's reach additional discharges known to contribute to an exceedence of stream quality objectives that are not yet subject to appropriate permit limitations, and that could effectively be addressed through the DRBC's PMP requirement. Such discharges may include releases to tributaries to the subject waters, to the air or to soils or groundwater. Safeguards of the rule against overinclusiveness include: (1) the requirement that a TMDL or assimilative capacity determination be issued before the rule can be applied; (2) the requirement that the rule be applied only to dischargers contributing to the impairment that is the subject of the TMDL or assimilative capacity determination; (3) the right of a discharger to seek a waiver from certain requirements of the rule; and (4) the right of a discharger to contest a determination of adverse effect under Sections 4.30.9.A.2 and 4.30.9.C.1 of the rule in accordance with the Commission's *Rules of Practice and Procedure*.

**29. THE PROPOSED RULE SHOULD APPLY ONLY TO SIGNIFICANT NET DISCHARGERS. FWQC, P. 2**

**“THE DEFINITION OF ‘ADVERSE EFFECT’ SHOULD BE BASED ON NET DISCHARGE OF A POLLUTANT.” DETC, P. 9**

**“[E]VEN IF A FACILITY WERE TO ELIMINATE ALL INTERNAL SOURCES OF PCBs, ITS LOADINGS COULD THEORETICALLY INCREASE IN ANY GIVEN SAMPLING PERIOD SIMPLY BECAUSE THE AMOUNT OF PCBs IN THE AMBIENT ENVIRONMENT HAS INCREASED. PLACING A BURDEN OF THIS SORT ON A GROUP OF COMPARATIVELY SMALL CONTRIBUTORS WITHOUT FIRST ADDRESSING THE SIGNIFICANT LOADINGS FROM OTHER POLLUTANT SOURCES IS BOTH ARBITRARY AND UNREASONABLE. LIMIT THE SCOPE OF THE PROPOSED RULE TO ONLY THOSE DISCHARGERS WHO DISCHARGE THE POLLUTANT OF CONCERN ON A NET BASIS, ABOVE LEVELS ATTRIBUTABLE TO AMBIENT CONDITIONS, AND AT CONCENTRATIONS THAT CAN BE EXPECTED TO BE REDUCED THROUGH FEASIBLE, APPROPRIATE AND COST-EFFECTIVE POLLUTANT MINIMIZATION MEASURES.” DETC, PP. 5 – 6**

**“MANY OF THE IDENTIFIED DISCHARGERS GENERATE NO NET ADDITION OF PCBs TO THE DELAWARE ESTUARY. THE SCOPE OF THE PROPOSED RULE MUST BE MODIFIED TO REFLECT THE FACT THAT THE POLLUTANT MINIMIZATION MEASURES DESCRIBED IN THE RULE WILL BE EFFECTIVE ONLY IF DISCHARGERS CAN BOTH IDENTIFY AND CONTROL ACTUAL SOURCES OF A COVERED POLLUTANT. SUCH A DISCHARGER MAY NOT EVEN BE ABLE TO IDENTIFY THE SOURCES OF ITS LOADINGS—MUCH LESS CONTROL THOSE SOURCES—NO MATTER WHAT LEVEL OF EFFORT IS EXPENDED. INDEED, EVEN IF A FACILITY WERE TO ELIMINATE ALL INTERNAL SOURCES OF PCBs, ITS LOADINGS COULD THEORETICALLY INCREASE IN ANY GIVEN SAMPLING PERIOD SIMPLY BECAUSE THE AMOUNT OF PCBs IN THE AMBIENT ENVIRONMENT HAS INCREASED. PLACING A BURDEN OF THIS SORT ON A GROUP OF COMPARATIVELY SMALL CONTRIBUTORS WITHOUT FIRST ADDRESSING THE SIGNIFICANT LOADINGS FROM OTHER POLLUTANT SOURCES IS BOTH ARBITRARY AND UNREASONABLE. LIMIT THE SCOPE OF THE PROPOSED RULE TO ONLY**

**THOSE DISCHARGERS WHO DISCHARGE THE POLLUTANT OF CONCERN ON A NET BASIS, ABOVE LEVELS ATTRIBUTABLE TO AMBIENT CONDITIONS, AND AT CONCENTRATIONS THAT CAN BE EXPECTED TO BE REDUCED THROUGH FEASIBLE, APPROPRIATE AND COST-EFFECTIVE POLLUTANT MINIMIZATION MEASURES.” DETC, PP. 5 – 6**

**“THE COALITION BELIEVES THAT ANY DEFINITION OF ‘ADVERSE EFFECT’ SHOULD REST ON WHETHER A FACILITY DISCHARGES THE POLLUTANT OF CONCERN ON A NET BASIS, ABOVE LEVELS ATTRIBUTABLE TO AMBIENT CONDITIONS, AND AT CONCENTRATIONS THAT CAN BE EXPECTED TO BE REDUCED THROUGH APPROPRIATE AND COST-EFFECTIVE POLLUTANT MINIMIZATION MEASURES. [DEFINITION SUGGESTION:] COVERED POLLUTANT SHALL BE DEEMED TO HAVE AN ‘ADVERSE EFFECT’ ONLY WHERE THE DISCHARGE, AT A MASS RATE (I.E., MASS/TIME), RESULTS IN A FULLY MIXED RECEIVING WATER CONCENTRATION THAT EXCEEDS THE NUMERICAL WATER QUALITY STANDARDS ASSUMING AN APPROPRIATE DILUTION FLOW. FOR PURPOSES OF THIS RULE, A DISCHARGE SHALL BE DEEMED TO HAVE AN ADVERSE EFFECT ONLY WHERE A TOXIC POLLUTANT COVERED BY THIS RULE IS DISCHARGED ON A NET BASIS, ABOVE LEVELS ATTRIBUTABLE TO AMBIENT CONDITIONS, AND AT CONCENTRATIONS THAT CAN BE EXPECTED TO BE REDUCED THROUGH APPROPRIATE AND COST-EFFECTIVE POLLUTANT MINIMIZATION MEASURES. THE COMMISSION SHALL MAKE THIS DETERMINATION BY EVALUATING WHETHER THE DISCHARGE, AT A MASS RATE (I.E., MASS/TIME), RESULTS IN A FULLY MIXED RECEIVING WATER CONCENTRATION THAT EXCEEDS THE NUMERICAL WATER QUALITY STANDARDS FOR THE COVERED POLLUTANT ASSUMING AN APPROPRIATE DILUTION FLOW. “ DETC, PP. 9-11.**

**“USE THE CONCEPT OF ‘ADVERSE EFFECT.’ THUS, THOSE DISCHARGERS WHO ARE DETERMINED TO HAVE AN ‘ADVERSE EFFECT’ ON BASIN WATERS WOULD DEVELOP AND IMPLEMENT PMPs AS PRESCRIBED BY THE RULE, WHEREAS THOSE WHO DO NOT, BUT WHO ARE NONETHELESS IDENTIFIED IN THE PCB TMDLS, WOULD IMPLEMENT ONLY THOSE BEST MANAGEMENT PRACTICES FOCUSED ON MORE TRADITIONAL POLLUTION PREVENTION STRATEGIES (SUCH AS REMOVAL OF PCB-CONTAINING EQUIPMENT, SPILL CONTROL AND CONTAINMENT, AND OTHER ENVIRONMENTAL MANAGEMENT PRACTICES).” DETC, P. 6**

**“[S]ECTION [4.30.9.A.2] SHOULD BE REVISED TO STATE THAT DISCHARGERS WILL BE SUBJECT TO THE RULE ONLY UPON AN EXPRESS DETERMINATION THAT THEIR DISCHARGERS HAVE AN ‘ADVERSE EFFECT’ ON THOSE BASIN WATERS SUBJECT TO THE ASSIMILATIVE CAPACITY DETERMINATION OR TMDL.” DETC, P. 9**

In general, the rule is intended to reach, at a minimum, any discharger to which the Commission has assigned an individual wasteload allocation in accordance with revised Section 4.30.9.A.2.(a) or that has received an individual wasteload allocation in a TMDL in accordance with revised Section 4.30.9.A.2.(b). With respect to PCBs, the rule will reach, at a minimum, dischargers for which PMPs are recommended by the U.S. EPA in its report establishing a TMDL for PCBs in the Delaware Estuary, issued in December of 2003. The same group of dischargers will have

PMP requirements added to their NPDES permits upon renewal by the permitting authorities (the state environmental agencies). New Section 4.30.9.A.2.(c) further provides that the rule shall apply to “any discharger or class of dischargers of a pollutant listed at Section 4.30.9.A.1. that the Commission determines after public notice and a hearing, has an adverse effect on the water resources of the Basin. Such a determination is subject to a right of appeal under Article 6 of the *Rules of Practice and Procedure*. A definition of “adverse effect” has been added to the rule at Section 4.30.9.C.1. It provides:

A point or non-point source of a toxic pollutant has an “adverse effect” on the water resources of the Basin if it is causing or contributing to a violation of applicable stream quality objectives in Basin waters for which, in accordance with Section 4.30.9.A., a TMDL or assimilative capacity determination has been established.

With respect to net discharges, Section 4.30.7.B.2.d. of the *Commission’s Water Quality Regulations* establishes the conditions under which credit is allowed for pollutants in a discharger’s intake water in the context of a DRBC pollutant load allocation procedure following an assimilative capacity determination. However, when a PMP is imposed to satisfy requirements of a TMDL under the Clean Water Act, the more restrictive federal regulations at 40 C.F.R. §122.45(g) or state regulations, will apply.

A discharger that has been made subject to the PMP requirement but demonstrates that it is contributing no net discharge of the pollutant for which the PMP is imposed, can nevertheless advance pollution prevention goals through the PMP process. In accordance with the definition of “maximum practicable reduction” at Section 4.30.9.C.2., potential releases as well as existing releases must be addressed. The Commission is thus exercising its authority “to control future pollution and abate existing pollution in the waters of the basin.” *Compact*, § 5.2 (emphasis added).

A provision has been added to the rule at Section 4.30.9.C., authorizing the Commission to relieve a discharger from the requirements of the rule if the discharger has “(a) achieved the maximum practicable reduction of releases of the pollutant to the air, soil or water in accordance with Section 4.30.9.E.9; and (b) is not having or has ceased to have an adverse effect on the water resources of the Basin.”

**30. “THE RULE IS BROAD, BUT ONLY IDENTIFIES PCBs AS A TARGET. THE RULE SHOULD BE WRITTEN TO BE SPECIFIC TO PCBs.” CONECTIV, P. 7**

Interstate waters within the Delaware River Basin and some species of fish found in these waters are contaminated with toxic pollutants other than PCBs, including, for example, dioxin, DDT and mercury. These pollutants are slated for TMDL development by one or more of the Estuary states. Because the Commission may determine that pollutant minimization plans are an appropriate strategy for addressing these and other toxic pollutants, it is efficient for the Commission to adopt a rule that is not limited to PCBs. Notably, the addition of a pollutant to Section 4.30.9.A.1. can only be effected by notice and comment rulemaking.

**31. “WHERE CONGENER CONCENTRATIONS ARE ESTIMATED FOR NON-DETECTED VALUES, IS THE PRESENCE OF PCB CONGENERS ‘CONFIRMED?’” DETC, P. 12**

No. Non-detect results do not confirm the presence of PCBs. Notably, however, for those dischargers made subject to Section 4.30.9. by application of Section 4.30.9.A.2.(a)., (b)., or (c)., non-detect results for effluent samples are not sufficient to demonstrate maximum practicable reduction, one of the two criteria that must be satisfied in order for the Commission to relieve a discharger of the obligations of Section 4.30.9. In addition, notwithstanding non-detect results for effluent samples, a discharger that continues to have the potential to discharge PCBs may be required in accordance with other DRBC, state or federal authority to conduct additional or periodic monitoring, and may be subject to permit or docket conditions intended to prevent potential releases.

**32. “THE PROPOSED RULE IS ALSO UNCLEAR IN THAT IT MAY, BUT DOES NOT SPECIFICALLY, INCLUDE STATE OR FEDERAL PERMITS ISSUED PURSUANT TO SECTION 404 OF THE CLEAN WATER ACT (33 U.S.C. 1251 ET SEQ., AS AMENDED) (E.G., IN NEW JERSEY, THE STATE EQUIVALENT OF WATERFRONT DEVELOPMENT PERMITS). INCORPORATION OF THESE PERMIT TYPES INTO THE RULE IS IMPORTANT AND WARRANTED, SINCE SEDIMENTS ACT AS MAJOR RESERVOIRS OF CONTAMINANTS SUCH AS POLYCHLORINATED BIPHENYLS (PCBs), AND THEIR REINTRODUCTION THROUGH DREDGING AND DISPOSAL SHOULD BE COVERED IN MINIMIZATION PLANS SPECIFIC TO A ‘DRBC ASSIMILATIVE CAPACITY DETERMINATION’ POLLUTANT OR A POLLUTANT SUBJECT TO AN EPA-APPROVED TMDL.” U.S. F&WS, P. 2**

Section 4.30.9.E.4.a. (Description and Map of Known Sources) has been revised to include sediment areas. It now reads,

Description of all materials, equipment, processes, soil areas *or sediment areas* within a facility, site, or service area, from which the pollutant is released directly or indirectly into a wastewater treatment system, sewage collection system, stormwater collection system, stream or river, including a description of the pathways if known.

(Emphasis added). Sections 4.30.9.E.5.a. and b. (List of Potential Sources) have been similarly revised.

**33. “[THE RULE SHOULD] REQUIRE STATES TO INCLUDE ALL KNOWN PCB-IMPAIRED SEGMENTS ON THEIR 303(d) LISTS, TO SEEK OUT SOURCES OF THOSE IMPAIRMENTS, AND TO SUPPORT THIS DRBC RULE TO REQUIRE IMMEDIATE DEVELOPMENT OF MINIMIZATION PLANS WHEN SOURCES ARE IDENTIFIED THAT CONTRIBUTE TO IMPAIRMENT AND/OR INCREASE POLLUTANT REDUCTION REQUIREMENTS OF OTHER SOURCES, REGARDLESS OF THE STATUS OF A TMDL.” U.S. F&WS, P. 3**

The Clean Water Act requires states to include PCB-impaired segments on their Section 303(d) lists. The *Compact* provides that the signatories will “cooperate faithfully in the control of future pollution and abatement of existing pollution from the rivers, streams, and waters in the basin

which flow through, under, into or border upon any of [the] signatory states . . . .” *Compact*, §5.3. The Basin states are aware of their obligations under both statutes and are making the necessary listings and developing TMDLs in accordance with schedules that each state environmental agency has adopted. Because the rule authorizes the Commission to require a PMP of any discharger that is contributing to a water quality impairment for which a TMDL or assimilative capacity determination has been issued, the Commission may, in accordance with Section 4.30.9.A.2., apply the rule to upstream sources not discharging directly to the waters for which a TMDL has been developed, where qualified data and modeling demonstrate that the discharge is contributing to the impairment of those waters.

### **Plan Submission and Performance Deadlines**

**34. THREE MONTHS IS NOT SUFFICIENT TIME TO DEVELOP A PMP. A PERIOD OF SIX MONTHS IS RECOMMENDED. THIRTY DAYS IS NOT SUFFICIENT TIME TO REMEDY A DEFICIENCY IN A PMP. A PERIOD OF 60 DAYS IS RECOMMENDED. FWQC P. 3**

**CONECTIV SUGGESTS A LONGER PERIOD FOR PMP SUBMISSIONS, SUCH AS 180 DAYS. CONECTIV, P. 5**

**IT IS UNREASONABLE TO REQUIRE A DISCHARGER TO PREPARE A PMP, DETAILING, AMONG OTHER THINGS, ALL KNOWN AND POTENTIAL SOURCES OF A COVERED POLLUTANT AND A DESCRIPTION OF THE MEASURES TO BE TAKEN TO ACHIEVE THE MAXIMUM PRACTICABLE REDUCTION OF DISCHARGES OF THAT POLLUTANT, WITHIN THREE MONTHS OF THE DISCHARGERS FIRST BECOMING SUBJECT TO THE PMP REQUIREMENTS. THE COALITION PROPOSES A SIX-MONTH TIME PERIOD FOR SUBMISSION OF A PMP AND SUGGESTS THAT THIS SECTION BE REVISED TO STATE THAT A DISCHARGER MUST SUBMIT A PMP WITHIN SIX MONTHS OF RECEIPT OF WRITTEN NOTICE FROM THE COMMISSION. DETC, P. 12**

**THE COALITION PROPOSES THAT THE RULE ALLOW A DISCHARGER TO SUBMIT A REVISED PMP WITHIN SIXTY (60) DAYS OF RECEIPT OF A COMPLETENESS DETERMINATION IDENTIFYING ADMINISTRATIVE DEFICIENCIES IN THE PMP. DETC, P. 13**

In the Commission’s view, the time periods established by the rule are sufficient. The dischargers initially affected by the rulemaking are point source dischargers listed in Tables 3-2 through 3-5 of Appendix 3 of the TMDL for PCBs that was issued by EPA in December 2003. These dischargers have been on notice since well before December 2003 that they must reduce PCB loadings from their sites. Developing a PMP merely requires them to do what they already should be doing to fulfill this obligation – conduct a thorough analysis of their site and operation in order to identify any actual and potential sources of PCBs and take steps to contain or remove them. Some dischargers voluntarily developed PMPs, albeit without including all elements required by this rule, as early as 2003.

35. **FOR CLARITY AND CONSISTENCY, [THE TIME PERIOD FOR PLAN SUBMISSION] SHOULD BE SPECIFIED IN DAYS, WHICH WILL ACCOUNT FOR THE FACT THAT THE PUBLICATION DATE OF THE FINAL RULE COULD BE DURING A MONTH THAT HAS EITHER 28, 30 OR 31 DAYS. CONECTIV, P. 5**

The time period for plan submission has been changed from months to days for consistency. See Section 4.30.9.D.1 of the final rule.

36. **“PLEASE CLARIFY WHETHER THERE ARE SUBMISSION TIMING DIFFERENCES BETWEEN GROUP 1 AND GROUP 2.” CONECTIV, P.6**

Revisions to the draft rule make clear that all dischargers made subject to the rule must submit their plans within 90 days of receipt of written notification of the PMP requirement from the Executive Director.

Specifically, a clause has been added to Section 4.30.9.A.2. of the rule, providing that each discharger made subject to Section 4.30.9 shall be so notified in writing by the Executive Director. Section 4.30.9.D.1 “Time of Submission” (numbering is per final rule) has been revised to read, “[e]ach discharger that is made subject to the PMP requirements of this rule in accordance with Section 4.30.9.A.2. shall submit a PMP to the Commission and the permitting agency (if any) within 90 days of receipt of notice from the Executive Director.”

37. **“PMPs SHOULD ALSO INCLUDE A DEADLINE FOR COMPLETION OF THE ACTIVITIES OUTLINED IN THE PLAN. WE ENCOURAGE THE COMMISSION TO BE VIGILANT IN INSURING THAT DISCHARGERS ADHERE TO THESE SCHEDULES AND IMPLEMENT THEIR PLANS IN A TIMELY FASHION.” CLEAN WATER ACTION, HRG. TR., PP. 66-74**

**“[F]AILURE TO REQUIRE AN END DATE FOR IMPLEMENTATION LEAVES THE SUBSTANTIVE ELEMENTS OF PLANS VERY OPEN-ENDED, AND ALLOWS DISCHARGERS TO DELAY IMPLEMENTATION INDEFINITELY WITHOUT FEAR OF REPRISAL.” IT IS A SIGNIFICANT FLAW, ONE THAT MAY PREVENT THIS RULE FROM ACHIEVING ACTUAL AND SUBSTANTIAL REDUCTIONS IN PCB LOADINGS. CLEAR, AGGRESSIVE DEADLINES FOR COMPLETION OF IMPLEMENTATION MEASURES SHOULD BE ADDED TO THE PROPOSED RULE. [ALL IMPLEMENTATION MEASURES SHOULD BE COMPLETED] WITHIN THE FIVE YEAR PERMIT TERM, UNLESS A LONGER TIME IS SPECIFIED IN THE PMP.” PENNFUTURE, P. 3**

The rule provides that PMPs must include a schedule and measures of progress. Because of the unique circumstances of each facility or site, the variety of reduction strategies expected to be used, and the general lack of experience on the part of both regulators and dischargers in reducing loadings of toxic pollutants, the Commission has decided not to include enforceable deadlines, but instead to require good faith implementation of plans. With advances in technology and understanding by dischargers and regulators as to which measures are most effective under which circumstances, more prescriptive regulatory approaches may eventually be considered.

## **Term of a PMP**

38. **“IF IT IS INTENDED THAT A PMP WOULD REMAIN IN EFFECT [AFTER RENEWAL OF A NPDES PERMIT] ON THAT SAME BASIS, THE PROPOSED RULE SHOULD BE CLARIFIED TO CONFIRM SUCH INTENT.” CONECTIV, P. 6**

The section of the rule explaining the relationship between the DRBC’s PMP regulation and a NPDES permit has been clarified and moved to new Section 4.30.9.I. The latter section now provides that

[u]pon issuance of an initial, renewed or modified NPDES permit by the State in which the discharger is located or the U.S. Environmental Protection Agency to a discharger that has been made subject to Section 4.30.9, which permit contains the requirements to develop, submit to the permitting authority and implement a PMP consistent with that Section, then as to that discharger:

1. the Commission shall cease to administer Section 4.30.9 with respect to the discharge of the pollutant to which the PMP requirements of the permit relate, upon the date such requirements become effective; and
  2. the NPDES permitting authority shall apply the more stringent of Section 4.30.9 or other applicable state or federal requirements with respect to the discharge of the pollutant to which the PMP requirements of the permit relate.
39. **“BECAUSE THE PROPOSED RULE SPECIFICALLY PROVIDES THAT A NPDES PERMIT WILL SUPERSEDE THE PROVISIONS OF A PMP DEVELOPED UNDER THE RULE ONCE THE PERMIT IS ISSUED OR RENEWED, SEE § 4.30.9.B.6, THERE IS NO NEED FOR A PREDETERMINED TERM OF A PMP FOR THOSE DISCHARGES SUBJECT TO A NPDES PERMIT. THERE IS NO REASON WHY PMP REQUIREMENTS IN A NPDES PERMIT ISSUED PRIOR TO THIS RULE SHOULD NOT GOVERN IN LIEU OF THOSE THAT WOULD OTHERWISE BE REQUIRED UNDER THE RULE.” DETC, P. 14**

Since PMPs must be designed to be implemented over some period of time, it is appropriate to establish a common initial term for these plans. When a PMP developed in accordance with the Commission’s regulations is superseded by a NPDES permit, the permitting agency can establish the term it deems appropriate. Importantly, the Commission’s five-year term is likely to run in its entirety for any non-point sources subject to the PMP requirements.

40. **“THERE ARE NO CRITERIA ON THE EXERCISE OF THE EXECUTIVE DIRECTOR’S DISCRETION UNDER THIS PROVISION, AND THERE IS APPARENTLY NO RIGHT TO CONTEST OR OTHERWISE OBJECT TO THE EXECUTIVE DIRECTOR’S DETERMINATION THAT AN ADDITIONAL TERM IS WARRANTED.” DETC, P. 15**

A Section 4.30.9.A.3 has been added to the rule, establishing the criteria for a determination by the Commission that a discharger may be relieved of the requirements of the rule. It provides,

Until such time, if any, as the NPDES permitting authority issues a permit in accordance with Section 4.30.9.I, the Commission may relieve a discharger of the requirements of Section 4.30.9 for a pollutant, effective upon written notice to the discharger, if the Commission determines, in consultation with the State in which the discharger is located, that the discharger has (a) achieved the maximum practicable reduction of releases of the pollutant to the air, soil or water in accordance with Section 4.30.9.E.9; and (b) is not having or has ceased to have an adverse effect on the water resources of the Basin,. Notice of a determination in accordance with this section shall be published by the Commission in the applicable state register and on the Commission's website.

Actions of the Executive Director are appealable in accordance with the Commission's *Rules of Practice and Procedure*.

41. **“WE DON'T THINK THAT THE PMP REQUIREMENT SHOULD CEASE TO APPLY TO A POINT SOURCE DISCHARGE WHEN THE NEW PERMIT IS ISSUED.” DRKN, HRG. TR. P. 62**

To avoid unnecessary duplication, the PMP requirements of Section 4.30.9. should be administered by the permitting authority or the DRBC but not by both. Thus, in accordance with new Section 4.30.9.I., the DRBC will cease to administer Section 4.30.9 with respect to the discharge of a pollutant that has been made subject to that section, when a NPDES permit is issued that contains requirements consistent with those of Section 4.30.9. for the same discharge of the pollutant. In other cases, the Commission will continue to administer the rule.

#### **Plan Elements: Descriptions and Maps**

42. **“IT IS OVERLY BURDENSOME AND NOT REASONABLY RELATED TO ACCOMPLISHING THE GOALS OF THE PROPOSED RULE TO REQUIRE DESCRIPTIONS OF ALL RAW MATERIALS AND INDUSTRIAL PROCESSES, REGARDLESS OF WHETHER THE MATERIALS AND PROCESSES ARE RELEVANT TO DISCHARGE OF THE POLLUTANT IN QUESTION. THE RULE SHOULD BE LIMITED TO ONLY THAT INFORMATION NECESSARY TO ASSESS AND CONTROL DISCHARGES OF THE POLLUTANT THAT IS THE SUBJECT OF THE PMP.” FWQC, P. 4**

**SINCE THE PLAN MUST CONTAIN ALL KNOWN SOURCES OF PCBs, PROCESSES AND AREAS CONTAINING PCBs AND A STRATEGY FOR IDENTIFYING UNKNOWN SOURCES, THERE IS NO NEED TO COMPOUND THE PAPERWORK BY REQUIRING LISTS OF ALL RAW MATERIALS, WASTES AND SOURCES OF ALL OTHER POLLUTANTS. UWAG, P. 2**

**DESCRIPTION OF ALL RAW MATERIALS AND PROCESS MAY BE DUPLICATIVE OF INFORMATION THAT HAS ALREADY BEEN PROVIDED IN REGULATORY FILINGS UNDER OTHER PROGRAMS. FWQC, P. 4**

The requirement for industrial facilities, at Section 4.30.9.E.2.a. in the final rule has been limited to “raw materials and industrial processes used, and products generated *that either contain the pollutant or that may be related to the generation or release of the pollutant*” (emphasis added).

- 43. ANOTHER CONCERN ABOUT THE INFORMATION REQUIREMENTS IN THE PROPOSED RULE IS THE MAGNITUDE AND DIFFICULTY OF THE WORK INVOLVED IN COLLECTING THE REQUESTED INFORMATION, PARTICULARLY FOR INDIVIDUAL WWTPs WITH LARGE SERVICE AREAS OR DRAINAGE AREAS TO COVER. IT MAY BE PRUDENT TO PROMOTE POOLING OF RESOURCES TO COLLECT THIS INFORMATION ON A REGIONAL BASIS, WHICH CAN THEN BE USED BY ALL OF THE DISCHARGERS IN THE AREA. FWQC, P. 4**

The most onerous obligation imposed by proposed Section 4.30.9.E.2.b. (Description and Maps of Facility) for municipal WWTPs was the requirement that PMPs include “a list of all industrial users of the collection system and pretreatment permit numbers if any.” This requirement has been limited in the final rule to “all *known* industrial users of the collection system and pretreatment numbers if any.” The other information requested should not be difficult to assemble. The Commission has no objection to the pooling of resources on a regional basis, and encourages dischargers to work cooperatively if doing so will improve results.

- 44. “A DESCRIPTION OF ALL RAW MATERIALS AND PROCESSES MAY INCLUDE PROPRIETARY INFORMATION THAT SHOULD NOT BE DISCLOSED TO THE PUBLIC. THE PROPOSED RULE SHOULD THEREFORE INCLUDE PROVISIONS FOR DESIGNATING PROPRIETARY INFORMATION AS CONFIDENTIAL.” FWQC, P. 4**

**THE NPDES REGULATIONS ALREADY SPECIFY THE LEVEL OF DETAIL NEEDED TO PROPERLY CHARACTERIZE A FACILITY’S POTENTIAL DISCHARGE. THESE REQUIREMENTS PROVIDE AN APPROPRIATE INFORMATION BENCHMARK FOR THE PMP RULE BECAUSE THE PMP IS INTENDED TO BE INCORPORATED INTO NPDES PERMITS. ACCORDINGLY, INFORMATION SOUGHT BY THE COMMISSION AS PART OF A PMP SHOULD BE CONSISTENT WITH, AND SHOULD NOT IMPOSE AN OBLIGATION THAT EXTENDS BEYOND, EXISTING REQUIREMENTS SET FORTH IN THE NPDES REGULATIONS. INFORMATION UNDER THE RULE SHOULD BE LIMITED TO DISCHARGES OF A COVERED POLLUTANT TO THOSE BASIN WATERS FOR WHICH AN ASSIMILATIVE CAPACITY DETERMINATION OR TMDL HAS BEEN ESTABLISHED. DETC, P. 17**

The rule requires dischargers to assemble information the Commission deems critical to the analysis necessary in its view for development of a PMP that achieves “maximum practicable reduction” of the pollutant. In most instances, dischargers will describe processes in a way consistent with the rule but that will not disclose confidential business information. If good faith would require the disclosure of such information, however, appropriate arrangements should be made with the Commission.

Article 8, Section 2.8.12 of the Commission’s *Rules of Practice and Procedure* provides for the Commission to withhold from public disclosure trade secrets and privileged or confidential commercial or financial information. The section contains a definition of such information.

45. **“[A]N INVENTORY OF PCB-CONTAINING EQUIPMENT IN A SERVICE AREA WOULD BE A MASSIVE UNDERTAKING, UNLESS THERE IS SOME WAY TO FOCUS THE INQUIRY AND LIMIT IT TO THOSE ITEMS THAT ARE MOST LIKELY TO BE SIGNIFICANT SOURCES.” FWQC, P. 6**

The definition of “maximum practicable reduction” does not require dischargers to accomplish impracticable feats. Methods for focusing the inquiry on sources likely to be significant could be appropriate. Municipal WWTPs should consider requiring industrial users to provide the requested inventory of PCB-containing equipment.

46. **“ADD ‘TO THE EXTENT PRACTICABLE’ AFTER ‘FOR MUNICIPAL WWTPs,’ IN SECTION 4.30.9.C.5. “ DETC, P. 22.**

This provision, which calls for information about potential sources of the pollutant, contains the phrases “known to contain the pollutant” and “if known.” Further qualification is unnecessary. Note that in the final rule, the provision is at Section 4.30.9.E.5.

### **Pollutant Minimization Measures**

47. **“PMPs SHOULD INCLUDE A THOROUGH ANALYSIS OF THE SOURCE OF PCBs IN A NEIGHBORHOOD AND A COMPREHENSIVE PLAN TO REDUCE THEM TO THE MAXIMUM EXTENT PRACTICABLE.” CLEAN WATER ACTION, HRG. TR., PP. 66-74**

Identification of actual and potential sources and maximum practicable reduction are objectives of the PMP rule as promulgated. The rule does not require pollutant minimization planning on a neighborhood by neighborhood basis, but it encourages municipal wastewater treatment plants and other dischargers to be creative in developing PCB trackdown and load reduction strategies. Thus, the neighborhood approach the commenter recommends is possible under the rule, but not required.

48. **“THE COALITION RECOMMENDS THAT THIS SECTION [4.30.9.C.9] REQUIRE THE INITIAL PMP TO INCLUDE THE MEASURES TO BE TAKEN TO REDUCE KNOWN SOURCES TO THE MAXIMUM EXTENT PRACTICABLE BASED ON EXISTING INFORMATION. ADDITIONAL MEASURES CAN BE IDENTIFIED IN LATER PLANS, AS THE EFFECTIVENESS OF THE ONGOING MEASURES IS EVALUATED, ADDITIONAL MEASURES ARE CONSIDERED AND IMPLEMENTED, AND ADDITIONAL SOURCES ARE FOUND THROUGH THE PMP PROCESS.” FWQC, P. 5**

The rule is intended to compel dischargers to conduct a thorough analysis of their facilities and processes to ensure that the pollutant is not inadvertently generated or released. Municipal WWTPs are required to conduct trackdown efforts as a part of a PMP. For industrial dischargers, the relevant information about materials and processes should be readily available. If it is not, then the discharger should explain why and outline what steps it will take to assemble the information.

49. **“REQUIRING DISCHARGERS TO INCLUDE ‘RECOMMENDATIONS FOR REMEDIATION ACTIVITIES’ IMPLIES THAT THE WWTP MUST IDENTIFY CONTAMINATED SITES WITHIN ITS SERVICE AREA AND MAKE RECOMMENDATIONS FOR CLEANUP. THAT GOES BEYOND THE RESPONSIBILITIES OF A WWTP, LEGALLY AND FROM A POLICY PERSPECTIVE. OTHER AGENCIES ARE ENTRUSTED WITH THAT RESPONSIBILITY.” FWQC, P. 5**

It is appropriate to require dischargers to identify sources of a pollutant found in their discharge. In order to do so, municipal WWTPs must conduct trackdown studies. The Commission does not expect the municipality to remediate contaminated sites within its service area. However, the municipality can require the site owner or operator to reduce the level of a pollutant in its discharge or eliminate an unauthorized discharge to the municipal collection system. The municipality also can refer the user to a federal or state regulatory agency with independent authority to compel the user to clean up contamination and/or cease an illegal discharge from its site.

50. **“[THE PLANS SHOULD INCLUDE] A JUSTIFICATION FOR THE MINIMIZATION PROCESS PROPOSED BY A DISCHARGER, AS WELL AS WHY ALTERNATIVES THAT COULD PERHAPS PRODUCE FURTHER REDUCTIONS WERE NOT PROPOSED.” U.S. F&WS, P. 1**

At this time, the Commission requires that minimization strategies selected by dischargers be tailored to conditions of their sites and that the dischargers fulfill all requirements of the rule in good faith. If in the Commission’s judgment a PMP is materially deficient, the Commission may require the discharger to explain why specific alternative approaches were not proposed. With advances in technology and understanding by dischargers and regulators as to which measures are most effective under which circumstances, more prescriptive regulatory approaches may eventually be considered.

51. **THE LIST OF POSSIBLE POLLUTANT MINIMIZATION MEASURES SHOULD BE EXPANDED TO SPECIFICALLY IDENTIFY, FOR EXAMPLE, CONTAINMENT AND POLLUTION PREVENTION AS APPROPRIATE MINIMIZATION MEASURES. DETC, P. 24**

**“A REQUIREMENT THAT PROGRESS BE MEASURED BY END-OF-PIPE LOAD REDUCTION APPEARS TO DISCOURAGE POLLUTION PREVENTION MEASURES.” DETC, P. 27**

The Commission wholeheartedly endorses the use of pollution prevention measures to control toxic pollution in Basin waters. A definition of “maximum practicable reduction,” containing examples of appropriate measures, has been added to the rule at Section 4.30.9.C.2. Pollution prevention measures are among those listed.

52. **[THE RULE] “SHOULD BE REVISED TO PROVIDE THAT TRACKDOWN MAY BE NECESSARY ONLY WHERE A FACILITY HAS A CONTINUING DISCHARGE OF A COVERED POLLUTANT AT LEVELS THAT ARE NOT BEING REDUCED BY OTHER POLLUTANT MINIMIZATION MEASURES. DETC, P. 22**

**”RANKING SHOULD ONLY BE REQUIRED WHEN A FACILITY CONTINUALLY DISCHARGES A COVERED POLLUTANT AT LEVELS INDICATING THAT OTHER POLLUTANT MINIMIZATION MEASURES (ADDRESSED TO KNOWN SOURCES) ARE NOT EFFECTIVE IN REDUCING POLLUTANT LOADINGS.” DETC, P. 24**

The Commission believes that trackdown and prioritization are important elements of a PMP. If these approaches were to be employed only after the discharger were somehow to demonstrate that other measures were ineffective, the advantage of imposing the PMP requirement now could be largely negated.

### **Establishing a Baseline, Biennial Sampling, & Other Measurements of Progress**

53. **“INITIAL AND FUTURE LOAD REDUCTIONS AS A RESULT OF IMPLEMENTING THE PMP CANNOT ALWAYS BE DEMONSTRATED BECAUSE, FOR EXAMPLE, ACTUAL POLLUTANT CONCENTRATIONS ARE LESS THAN ANALYTICAL QUANTIZATION [SIC]LIMITS, OR MEASURES UNDERTAKEN PURSUANT TO THE PMP ARE AIMED AT POLLUTION PREVENTION OBJECTIVES. ALTERNATE METRICS SHOULD BE PERMITTED TO MEET THIS CONDITION.” DETC, P. 30**

**“THE COALITION IS CONCERNED THAT THE PROPOSED RULE PLACES TOO MUCH EMPHASIS ON MEASURING CHANGES TO BASELINE MASS LOADINGS AS THE STANDARD FOR PROGRESS. AT CERTAIN FACILITIES, THE ANNUAL PCB MASS DISCHARGED WILL BE EXTREMELY SMALL – AND DIFFICULT TO MEASURE PRECISELY, DUE TO SUBSTANTIAL ANALYTICAL VARIABILITY – MAKING IT UNLIKELY THAT SUCH MEASUREMENTS WILL ACCURATELY DEMONSTRATE PROGRESS. THE PROPOSED RULE SHOULD BE REVISED TO INDICATE THAT WHEN ANY MEASURED CHANGES IN LOADINGS ARE WITHIN THE RANGE OF ANALYTICAL VARIABILITY, PROGRESS SHOULD BE MEASURED THROUGH OTHER MEANS, SUCH AS THE EXTENT TO WHICH PLANNED PMP MEASURES HAVE BEEN IMPLEMENTED. INDEED, THIS ALTERNATIVE – MEASURING PROGRESS MADE TO IMPLEMENT THE MEASURES IDENTIFIED IN THE PMP SUBMISSION – SHOULD BE GENERALLY AVAILABLE AS A CHOICE FOR DISCHARGERS. ANOTHER ALTERNATIVE THAT SHOULD BE AVAILABLE, FOR THOSE DISCHARGERS THAT CHOOSE TO USE IT, IS TO ALLOW THE DISCHARGER TO CONDUCT, OR HAVE CONDUCTED, TESTING (FISH OR WATER COLUMN) FOR THE RELEVANT WATERWAY.” FWQC, P. 5**

**“THE COMMISSION SHOULD CONFIRM THAT PROGRESS CAN BE MEASURED BY MEANS OTHER THAN QUANTIFICATION OF MASS LOADINGS.” CONECTIV, P. 6**

**“HOWEVER A DISCHARGER MAY NOT BE ABLE TO REDUCE PCBs TO THEIR [WASTE LOAD ALLOCATION] IF THE SOURCE IS NOT EASILY IDENTIFIED OR IS UBIQUITOUS. IN THIS CASE, HOW WOULD COMPLIANCE BE ASSESSED? CONECTIV BELIEVES CLARIFICATION OF A FLEXIBLE COMPLIANCE APPROACH IS NECESSARY.” CONECTIV, P. 7**

**A REQUIREMENT THAT DISCHARGERS MEASURE AND ANNUALLY REPORT CHANGES TO MASS LOADINGS OF PCBS IS UNREASONABLE GIVEN THE INITIAL LEVELS DETECTED BY MOST POINT SOURCE DISCHARGERS AND THE EXPECTED PACE OF PROGRESS IN ACHIEVING LOAD REDUCTIONS, WHICH ALL PARTIES INVOLVED PROJECT TO BE MANY DECADES. DETC, P. 26**

**“[SECTION 4.30.9.C.12 MUST BE REVISED TO CLARIFY THAT] IN SOME CIRCUMSTANCES IT WILL BE INAPPROPRIATE TO SET A LOADING BASELINE AND MEASURE CHANGES TO MASS LOADINGS ANNUALLY. FOR PCBS, THE EPA HAS CONCLUDED THAT, “[D]UE TO THE WIDE VARIATION IN POSSIBLE INDUSTRIAL AND MUNICIPAL SOURCES OF PCBS AND THE UNKNOWN LEVELS OF CONTAMINATION OF THESE SOURCES, IT IS NOT APPROPRIATE TO ASSIGN A SET REDUCTION IN A MINIMIZATION PLAN.” DETC, P. 26**

**“PCBS ARE UBIQUITOUS, ARE PRESENT AT CONCENTRATIONS THAT ARE HIGHLY VARIABLE AND ARE ATTRIBUTABLE IN LARGE PART TO SIGNIFICANT NON-POINT SOURCES THAT CANNOT BE CONTROLLED BY THE DISCHARGER. AS A RESULT, THE CONCEPT OF A BASELINE, OR MEASURING PROGRESS AGAINST A BASELINE, BECOMES HIGHLY PROBLEMATIC, AS ANY DATA GATHERED BY A DISCHARGER WILL LARGELY REFLECT THE NATURAL VARIABILITY OF THESE EXTERNAL SOURCES.” DETC P. 26-27**

**“[SECTION 4.30.9.C.12] MUST BE AMENDED TO ACKNOWLEDGE THAT METHODS FOR MEASURING PROGRESS CAN VARY BASED UPON TYPES OF PMPs PURSUED, AND THAT MEASURING LOAD REDUCTIONS IS NEITHER APPROPRIATE NOR REQUIRED IN EVERY INSTANCE. THIS WILL REQUIRE THE DELETION OF THE PROVISION STATING THAT A PMP WILL BE DEEMED INCOMPLETE IF A LOADING BASELINE HAS NOT BEEN ESTABLISHED, AS WELL AS THE ADDITION OF LANGUAGE EXPRESSLY RECOGNIZING THAT OTHER MEASURES OF PROGRESS, INCLUDING POLLUTION PREVENTION MEASURES, MAY BE USED IN LIEU OF (NOT JUST IN ADDITION TO) THE ESTABLISHMENT OF A LOADING BASELINE. ONLY WITH A FLEXIBLE STRUCTURE WILL THE RULE ACHIEVE ITS STATED OBJECTIVES. DETC, P. 27**

**THE FOLLOWING ADDITION TO SECTION 4.30.9.C.12 DESCRIBING PROCEDURES FOR MEASUREMENT OF PROGRESS IS SUGGESTED: “REMOVING EQUIPMENT CONTAINING THE COVERED POLLUTANT; ADDRESSING PATHWAYS OF THE COVERED POLLUTANT; IMPLEMENTING EDUCATIONAL PROGRAMS DESCRIBING WAYS TO REDUCE POTENTIAL AND ACTUAL DISCHARGES OF THE COVERED POLLUTANT; AND FOR MUNICIPAL WWTPS, TARGETING AREAS OF THE COLLECTION SYSTEM THAT CONTAIN THE COVERED POLLUTANT THROUGH TRACKDOWN.” DETC, P. 28**

The Commission recognizes that mass loadings alone are not an appropriate method for measuring the efficacy of a PMP, especially since it has defined “maximum practicable reduction” to include pollution prevention measures. In addition to measuring reductions in mass loadings, the final rule at Section 4.30.9.E.12.b. requires additional methods to be used to measure progress. The provision expressly acknowledges that “such measures must reflect the approaches to be taken to achieve maximum practicable reduction.”

Although mass loadings will not provide the sole measure of pollutant minimization, progress cannot effectively be measured without a baseline estimate and subsequent estimates of mass loadings. Dischargers may include the variability or degree of certainty of their baseline and loading reduction measurements in their PMPs if they wish.

### **Reporting Progress**

54. **IT WOULD BE MORE APPROPRIATE FOR DISCHARGERS TO SUBMIT THESE PROGRESS REPORTS EVERY TWO YEARS, RATHER THAN ANNUALLY. DETC, P. 30**

**SUFFICIENT FLEXIBILITY SHOULD BE INCORPORATED INTO [THE ANNUAL REPORT] PROVISION TO ALLOW FOR AN EXTENSION OF THE REPORTING FREQUENCY AND FOR EVENTUAL CESSATION OF REPORTING AS POLLUTANT MINIMIZATION MEASURES ARE COMPLETED. DETC, P. 30**

The frequency of analytical sampling has been reduced from annually to biennially. However, the requirement for reporting on an annual basis is retained. Annual reporting is particularly important as pollutant minimization planning is initiated, when regulators and dischargers have the most to learn about the efficacy of different pollution prevention and reduction strategies for toxics.

55. **“THIS [ANNUAL REPORTING] PROVISION SHOULD NOT PRESCRIBE A SPECIFIC DATE ON WHICH THE PMP REPORTS ARE TO BE SUBMITTED; ALLOWING SOME FLEXIBILITY IN THIS REGARD WILL ENABLE DISCHARGERS TO INCORPORATE, WHERE APPROPRIATE, THE CONTENTS OF THEIR PMP REPORTS INTO OTHER REPORTS (E.G., ANNUAL WASTELOAD MANAGEMENT REPORTS).” DETC, P. 30**

Regardless of the report submittal date, dischargers can use information they have compiled for other reports in the PMP annual report as appropriate and vice versa.

56. **“[IT] NEEDS TO BE MADE CLEAR THAT THOSE ANNUAL REPORTS ARE OPEN TO PUBLIC REVIEW AND ARE AVAILABLE FOR PUBLIC REVIEW UPON REQUEST.” DRKN, P. 62**

PMPs submitted to the Commission will be public records. The Commission’s policy on disclosure of public records is set forth at Article 8 of the *Rules of Practice and Procedure*. It provides, “The Commission will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the property rights of persons in trade secrets and confidential commercial or financial information, and the need for the commission to promote frank internal policy deliberations and to pursue its regulatory activities without disruption.” *Rules of Practice and Procedure*, Art. 8, § 2.8.1. All documents will be made available to the public, subject to the conditions of Article 8.

## **Method 1668A For PCBs**

57. **“BECAUSE METHOD 1668 REVISION A HAS NOT HAS NOT BEEN VALIDATED AND APPROVED BY EPA, IT IS NOT APPROPRIATE FOR USE IN A COMPLIANCE AND ENFORCEMENT CONTEXT, SUCH AS MEASURING THE ADEQUACY OF POLLUTANT MINIMIZATION MEASURES.” THE COMMENTER RECOMMENDS THAT THE COMMISSION “ALLOW DISCHARGERS TO USE THE MOST SENSITIVE TEST METHOD APPROVED BY EPA AND INCLUDED IN 40 CFR 136. IF SUCH METHODS ARE NOT ADEQUATE TO MEASURE CHANGES IN A FACILITY’S DISCHARGE, THE PMP MEASURES SHOULD BE EVALUATED USING THE ADDITIONAL MEASURES OF PROGRESS IDENTIFIED IN THE RULE.” FWQC, P. 6**

**UWAG OBJECTS TO THE REQUIREMENT FOR USE OF METHOD 1668A, “BECAUSE IT HAS NOT BEEN VALIDATED OR APPROVED AND IS KNOWN TO BE HIGHLY VARIABLE AT LOW LEVELS.” UWAG, P. 2**

**“METHOD 1668A HAS NOT YET BEEN PROPERLY VALIDATED OR FORMALLY APPROVED UNDER 40 C.F.R. PART 136 OR ANY OTHER REGULATION AS AN OFFICIAL TEST METHOD . . . SUCH CONCERNS INCREASE SUBSTANTIALLY WHEN ENFORCEMENT SANCTIONS ARE THE POSSIBLE RESULT OF FALSE POSITIVES OR OTHER CONSEQUENCES OF UNSOUND DATA ANALYSIS TECHNIQUES.” CONECTIV, PP. 4 – 5**

**“BECAUSE IT IS NOT YET APPROVED, PCB SAMPLING RESULTS OBTAINED THROUGH THE USE OF METHOD 1668A SHOULD NOT BE USED FOR COMPLIANCE MONITORING OF ANY SORT.” DETC, P. 28**

**“THE PMP RULE SHOULD BE CLEAR THAT THE ANALYTICAL METHOD SPECIFIED IS A DRAFT METHOD THAT CAN ONLY BE USED FOR LIMITED PURPOSES, AND NOT FOR DETERMINING COMPLIANCE WITH ANY NUMERIC LIMITS OR LOAD REDUCTION REQUIREMENTS.” DETC, P. 29**

The federal regulations contain conflicting provisions as to the use of analytical methods other than those listed in 40 CFR Part 136 for NPDES and other permit programs. Whereas certain sections provide that an approved method must be used, others provide that the permitting authority may use an alternative method if it has valid scientific and technical reasons for doing so. The scientific and technical reasons for using Method 1668A to measure PCBs have been recognized by the EPA, the states, the Commission, the regulated community and a panel of scientific experts engaged by the Commission to assist it in development of the PCB TMDL for the Delaware Estuary. These parties generally agree that the most sensitive method listed at 40 CFR Part 136, the Aroclor method, is not sensitive enough to detect PCBs at levels even well in excess of the applicable water quality criteria. Using the approved Aroclor method would be a waste of resources, since Method 1668A has shown that Aroclors are for the most part absent from Estuary PCB discharges. However, in recognition of the fact that sampling results obtained through the use of Method 1668A will not alone provide a reliable measure of loading reductions, Section 4.30.9.E.12.b. requires the use of additional methods to measure and report progress toward achieving maximum practicable reduction of the pollutant.

58. **THE REQUIREMENT FOR THE USE OF METHOD 1668A SHOULD BE CLARIFIED TO ALLOW FOR REPORTING ON A NET BASIS. NET REPORTING IS ESPECIALLY IMPORTANT FOR POINT SOURCES THAT ARE SITUATED AT DOWNSTREAM LOCATIONS ON THE DELAWARE. CONECTIV, P. 6**

Section 4.30.7.B.2.d. of the Commission's Water Quality Regulations establishes the conditions under which credit is allowed for pollutants in a discharger's intake water, in the context of a DRBC pollutant load allocation procedure following an assimilative capacity determination. However, when a PMP is imposed to satisfy requirements of a TMDL under the Clean Water Act, the federal regulations at 40 C.F.R. §122.45(g) or state regulations if more restrictive, will apply.

### **Substantive Review of PMPs**

59. **“THE RULE STILL DOES NOT HAVE ENOUGH TEETH TO MAKE IT EFFECTIVE. THERE IS STILL NO AFFIRMATIVE REQUIREMENT THAT THE COMMISSION CONDUCT A SUBSTANTIVE, TECHNICAL REVIEW OF EVERY PMP. WHETHER TO CONDUCT MORE THAN JUST A COMPLETENESS REVIEW IS, APPARENTLY, LEFT ENTIRELY AT THE COMMISSION'S DISCRETION. AS WE STATED IN OUR AUGUST 30, 2004 LETTER, ‘[F]AILURE TO REQUIRE TECHNICAL REVIEW AND FAILURE TO PROVIDE THE COMMISSION WITH THE AUTHORITY TO REJECT PLANS ON THE BASIS OF TECHNICAL DEFICIENCIES SUBJECTS THE WASTE MINIMIZATION PLAN PROCESS TO ABUSE BY THOSE THAT MAY SEEK TO SUBMIT MEANINGLESS PLANS THAT MEET THE ‘ON PAPER’ REQUIREMENTS OF THE RULE, BUT DO NOT RESULT IN ‘ON THE GROUND’ POLLUTION REDUCTIONS.’” PENNFUTURE, P. 2**

**THE RULE “EXCLUDES FROM THE COMPLETENESS DETERMINATION A DETERMINATION OF THE ADEQUACY OF THE SUBSTANCE OF THE PMP AND WHETHER WE'RE ABLE TO ACHIEVE THE REQUIRED PCB REDUCTIONS. IT'S A MISTAKE TO [PUT THIS SUBSTANTIVE REVIEW] OFF TO SOME FUTURE UNKNOWN TIME. [WE] NEED A REQUIRED DATE AND TIME. IT'S REALLY IMPORTANT THAT THE REVIEW AND APPROVAL OF THE SUBSTANCE BE PART OF THE UPFRONT DETERMINATION OF COMPLETENESS. [THIS] OPENS THE DOOR FOR INEFFECTIVE PLANS TO SLIP THROUGH AND GO UNREVIEWED AND UNADDRESSED FOR A PROLONGED PERIOD OF TIME. WE WOULD REQUIRE THAT THE LAST SENTENCE IN [4.30.9.]B.1 BE DELETED. WE WOULD LIKE TO SEE A POSITIVE STATEMENT THAT REVIEW OF SUBSTANCE AND APPROVAL OF SUBSTANCE IS THE REQUIRED PART OF A COMPLETENESS DETERMINATION. DRKN, HRG. TR. PP. 56-57**

**DRBC MUST HAVE THE AUTHORITY TO REVIEW THE PMPS NOT JUST FOR COMPLETENESS BUT ALSO FOR SUBSTANTIVE CONTENT. WE BELIEVE THAT WE OUGHT TO HAVE IT UPFRONT AS PART OF THE ORIGINAL REVIEW BY THE COMMISSION TO GIVE BOTH EARLY GUIDANCE TO THE DISCHARGERS AND THE FACILITY THAT SUBMITS THE PLAN, AND ALSO TO INSURE THAT THE PLANS THAT GET APPROVED ARE IN EFFECT GOING TO MOVE US TO THE MAXIMUM PRACTICAL REDUCTIONS. CLEAN WATER ACTION, HRG. TR., PP. 66-74**

**THE PROPOSED RULE DOES NOT, BUT SHOULD, INDICATE THAT THESE PLANS MAY BE REOPENED BY THE DRBC OR THE APPROPRIATE PERMITTING AGENCY AND CHANGES MADE DURING THE 5-YEAR PERIOD, IF NECESSARY. U.S. F&WS, P. 1**

Section 4.30.9.D.8. of the rule establishes the Commission's authority to review the substance of the plans and provides that if the Commission at any time finds that a PMP is not likely to achieve the maximum practicable reduction of pollutant discharges to the air, soil and water, then the Commission may require the discharger to submit a revised PMP to more aggressively reduce pollutant loading. The Commission will conduct a substantive review of some but not all of the plans submitted.. In all cases, including those in which the Commission does not perform a substantive review, it will conduct a completeness review to ensure that all plan components required by the PMP rule are included. In cases where a PMP is incorporated into a NPDES permit, the PMP will receive a substantive review prior to issuance of the permit by the state or EPA.

60. **“[SECTION 4.30.9.B.8] PURPORTS TO AUTHORIZE THE COMMISSION TO REQUIRE A DISCHARGER TO REVISE A PMP AT ‘ANY TIME’ IT DETERMINES THAT THE PMP IS ‘NOT LIKELY TO ACHIEVE THE MAXIMUM PRACTICABLE REDUCTION OF POLLUTANT DISCHARGES TO THE AIR, SOIL AND WATER.’ [THIS] SIGNIFICANTLY AND IMPERMISSIBLY EXPANDS THE COMMISSION’S LEGAL AUTHORITY, AND WOULD APPEAR TO DEPRIVE THE DISCHARGER OF ITS DUE PROCESS RIGHTS TO CONTEST OR OTHERWISE OBJECT TO THE COMMISSION’S DETERMINATION. CONCEPTS OF ADMINISTRATIVE FINALITY AND FAIRNESS SHOULD PRECLUDE THE COMMISSION FROM HAVING THE UNFETTERED RIGHT ‘AT ANY TIME’ TO DECLARE THIS PLAN DEFICIENT. AT THE VERY LEAST [THIS SECTION SHOULD BE MODIFIED] TO AUTHORIZE THE COMMISSION TO DETERMINE THAT A PMP IS SUBSTANTIVELY DEFICIENT ONLY WHEN IT IS INITIALLY SUBMITTED TO THE COMMISSION FOR REVIEW. IT IS INAPPROPRIATE TO REQUIRE THE DISCHARGER TO SUBMIT A REVISED PMP BASED ON THE COMMISSION’S DETERMINATION, UNINFORMED BY THE STATE PERMITTING AUTHORITY, WHEN THE STANDARD IS INTRINSICALLY SUBJECTIVE. THERE IS NO OPPORTUNITY TO CONTEST OR OTHERWISE OBJECT TO THE COMMISSION’S DETERMINATION. THIS PROVISION SHOULD BE LIMITED TO THE TOXIC POLLUTANT(S) THAT ARE COVERED BY THE RULE AND THAT A PMP MUST DESCRIBE MEASURES TO ACHIEVE THE MAXIMUM PRACTICAL REDUCTION OF DISCHARGES OF A COVERED POLLUTANT, NOT SIMPLY OF ‘POLLUTANT DISCHARGES.’” DETC, P. 15-16**

**“A DETERMINATION TO REQUIRE A REVISED PMP “TO MORE AGGRESSIVELY REDUCE POLLUTANT LOADING” SHOULD BE SUBJECT TO THE RIGHT OF A DISCHARGER TO CONTEST THE DETERMINATION PURSUANT TO ARTICLE 6 OF THE COMMISSION’S RULES OF PRACTICE AND PROCEDURE.” CONECTIV, P. 6**

The rule authorizes the Commission to require a discharger to revise its PMP at any time for two important reasons. First, the Commission will perform a substantive review of only a portion of the PMPs upon their initial submission. All plans, including those that receive no substantive review, will receive a completeness review in order to ensure expeditious implementation of the

program. Plans initially reviewed only for completeness may be reviewed later for substance. Second, it is expected that regulators and dischargers will learn from experience as a variety of reduction strategies are used to reduce loadings of toxic pollutants. As they do, adjustments to PMPs may be requested to take advantage of more effective methods for reducing loadings or preventing future releases. The Commission requires the flexibility to ask more from dischargers if knowledge and experience make greater pollutant reductions possible.

In response to the commenters' concerns about due process, all actions of the Commission are subject to appeal in accordance with the *Rules of Practice and Procedure*.

With respect to concerns about the applicability of pollutant reduction plans, the rule makes clear that the pollutant addressed by the requirements is the pollutant for which the PMP is imposed.

**61. THE PROPOSED RULE SHOULD INCLUDE A PROVISION ALLOWING FOR ADEQUATE PUBLIC NOTICE AND COMMENT ON ALL PROPOSED PMPs SUBMITTED TO THE COMMISSION FOR APPROVAL. PENNFUTURE, P. 5**

**IT'S IMPORTANT TO ALLOW THE OPPORTUNITY FOR PUBLIC REVIEW AND COMMENTS ON SUBMITTED PMPs PRIOR TO COMPLETENESS DETERMINATION BEING ISSUED. DRKN, P. 58**

**THE PROPOSED RULE DOES NOT EXPLAIN HOW THE PLANS WOULD BE APPROVED OR BY WHOM AND WHETHER THERE WOULD BE OPPORTUNITY FOR PUBLIC REVIEW AND COMMENT BY ANY INTERESTED PARTY, INCLUDING THE [FISH AND WILDLIFE] SERVICE . . . . THE AUTHORIZATION OF THE PLANS WOULD LIKELY INVOLVE THE SPECIFIC APPROVAL OF FEDERAL AGENCIES SUCH AS THE DRBC OR EPA REGIONS 2 AND 3. U.S. F&WS, P. 2**

PMPs submitted in accordance with the rule are public records that will be available for review consistent with Article 8 of the *Rules of Practice and Procedure*. Providing for public comment on all PMPs would defeat an important purpose of the rule, which is to ensure dischargers develop and begin to implement PMPs in the short term. Moreover this degree of procedure is not consistent with the gap-filling function of the rule. PMPs may be subject to additional public scrutiny at the time of permit issuance.

### **Enforcement**

**62. "THE LAST SENTENCE OF [SECTION 4.30.9.B.3] ADDRESSES ENFORCEMENT ACTIONS FOR PERSISTENT OR BAD FAITH FAILURE TO COMPLY. THAT SENTENCE IS REDUNDANT OF SECTION 4.30.9.B.9 AND SHOULD BE DELETED." CONECTIV P.6**

**"SECTIONS 4.30.9.B.3 AND 4.30.9.B.9 BOTH PROVIDE THAT THE EXECUTIVE DIRECTOR'S ENFORCEMENT AUTHORITY IS LIMITED TO RESPONDING TO PERSISTENT OR BAD FAITH FAILURE ON THE PART OF A DISCHARGER TO COMPLY WITH PMP REQUIREMENTS. HOWEVER, PART OF SECTION 4.30.9.B.3 AUTHORIZES THE EXECUTIVE DIRECTOR, IN HER DISCRETION, TO SEEK PENALTIES AGAINST A DISCHARGER WHO SUBMITS A SECOND, REVISED PMP THAT IS STILL INCOMPLETE. THIS SECTION SHOULD BE REVISED TO**

**ELIMINATE THE LANGUAGE AUTHORIZING THE EXECUTIVE DIRECTOR TO SEEK PENALTIES ANY TIME A REVISED PMP IS DETERMINED TO BE INCOMPLETE. [DETC SUGGESTS THE FOLLOWING LANGUAGE – DISCHARGERS SHALL SUBMIT A PMP CURING ANY DEFICIENCY] IDENTIFIED IN THE DETERMINATION. IF THE REVISED PMP IS SATISFACTORY, THE EXECUTIVE DIRECTOR SHALL ISSUE A SECOND DETERMINATION OF COMPLETENESS STATING THAT THE DEFICIENCY HAS BEEN CURED. IF THE REVISED PMP IS STILL INCOMPLETE, BUT THE EXECUTIVE DIRECTOR DETERMINES THAT THE DISCHARGER HAS MADE A GOOD FAITH EFFORT, ADDITIONAL TIME WILL BE GRANTED TO CURE THE DEFICIENCY UNLESS FOR CAUSE SHOWN THE EXECUTIVE DIRECTOR GRANTS A WAIVER IN ACCORDANCE WITH SECTION 4.30.9.E. THE EXECUTIVE DIRECTOR MAY SEEK PENALTIES IN ACCORDANCE WITH SECTION 14.17 OF THE COMPACT AND SECTION 4.30.9.B.9 BELOW, IN THE EVENT OF PERSISTENT OR BAD FAITH FAILURE BY THE DISCHARGER TO SUBMIT A COMPLETE PMP.” DETC, PP. 13-14**

Section 4.30.9.B.3 addresses curing deficiencies in a PMP identified by the Commission in conjunction with a completeness determination. It is appropriate to inform the dischargers of the possibility that the Commission may impose penalties for failure to make a complete submission that satisfies the requirements of the rule. The rule therefore states clearly in this section that the Executive Director has the option to seek penalties if the second or any subsequent submission constitutes a persistent or bad faith failure to submit a complete PMP. Although a deficient second submission will result in an enforcement action only if the Executive Director finds the failure to submit an adequate PMP to be persistent or in bad faith, it is appropriate to provide a consistent standard regardless of whether the submission at issue is a second or a subsequent submission.

The provisions of sections 4.30.9.B.3 and 4.30.9.B.9 are overlapping but not coextensive. Section 4.30.9.B.3 applies only when a plan submission is deficient and provides notice to dischargers submitting plans of the Executive Director's enforcement options. Section 4.30.9.B.9 applies to the failure to submit a complete plan, to modify a plan deemed non-compliant or to implement a plan.

**63. “THE PROVISION TO TAKE ACTION AGAINST DISCHARGERS FOR ‘PERSISTENT OR BAD FAITH FAILURE TO SUBMIT A COMPLETE PLAN...’ SHOULD BE STRENGTHENED . . . . AS PROPOSED, ENFORCEMENT FOR FAILURE TO IMPLEMENT A PMP IS ENTIRELY OPEN-ENDED, WITHOUT GUIDELINES ESTABLISHING WHEN ENFORCEMENT ACTION IS REQUIRED. WE WOULD LIKE TO SEE A MANDATORY ENFORCEMENT PROVISION THAT DOVETAILS WITH IMPLEMENTATION DEADLINES (AS RECOMMENDED IN COMMENT 2, ABOVE). PENNFUTURE, P. 3**

**“WE THINK THAT [4.30.9.]B.9, AS IT’S CURRENTLY DRAFTED IS TOO LENIENT, AND WE THINK THAT IT NEEDS TO BE REVISED TO MAKE ENFORCEMENT MANDATORY WHEN THERE’S A FAILURE TO SUBMIT A COMPLETE PLAN OR TO MODIFY A NON-COMPLIANT PLAN OR TO IMPLEMENT A PLAN.” DRKN, HRG. TR., P. 59**

**“THESE RULES AND PROVISIONS SHOULD BE EXPANDED SO THAT IT SPECIFICALLY INCLUDES AN ENFORCEMENT REQUIREMENT WHEN THERE’S A FAILURE TO MEET IDENTIFIED MILESTONES AND/OR IF THERE’S A FAILURE TO FULFILL THE REPORTING REQUIREMENTS THAT ARE INCLUDED IN THE RULE.” DRKN, HRG. TR., PP. 59-60**

**“NEED TO ENHANCE THE LANGUAGE ON ENFORCEMENT AND TO MAKE ENFORCEMENT MORE OF A MANDATORY ACTIVITY IF A FACILITY FAILS TO IMPLEMENT THE COMPONENTS OF ITS PLAN IN A TIMELY FASHION.” CLEAN WATER ACTION, HRG. TR., PP. 66-74**

Promulgating regulations that provide for mandatory enforcement would unnecessarily restrict the Executive Director's and Commission's ability to exercise enforcement discretion based upon the particular facts and circumstances presented by a discharger's noncompliance with PMP requirements. Particularly when the Commission is first implementing and gaining experience with a new program that seeks to marshal the knowledge and creativity of the regulated community to provide prompt water quality improvements, it is appropriate for the Commission to retain enforcement flexibility.

**64. “DISCHARGERS MUST BE REQUIRED TO IMPLEMENT THEIR PMPS IN A TIMELY FASHION AND DRBC MUST HAVE THE AUTHORITY TO TAKE ENFORCEMENT ACTION AGAINST DISCHARGERS THAT FAIL TO IMPLEMENT THE PLAN.” CLEAN WATER ACTION, HRG. TR., PP. 66-74**

Section 4.30.9.B.4 requires the discharger to commence implementation of its PMP as submitted within 60 days of receipt of a determination of completeness. Section 4.30.9.B.9 authorizes the Executive Director to commence an enforcement action against a discharger for, among other things, a persistent or bad faith failure to implement a plan. Consequently, the substance of this comment is incorporated into the rule.