Regulatory Analysis Form

(Completed by Promulgating Agency)

IRRC
Independent Regulatory Review Commission

SECTION I: PROFILE

(1) Agency:
Department of Environmental Protection

(2) Agency Number:

Identification Number: #7-440

IRRC Number: 2783

(3) Short Title:
Chapter 102 – Erosion and Sediment Control and Stormwater Management

(4) PA Code Cite:
25 Pa. Code Chapter 102

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact:
Michele Tate, 783-8727; fax: 783-8926; mtate@sate.pa.us; RCSOB 16th Fl., Harrisburg, PA 17105

Secondary Contact:
Kelly Jean Heffner, 787-4686; fax: 783-8926; kheffner@state.pa.us; RCSOB 16th Fl., Harrisburg, PA 17105

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:
EQB
P.O. Box 8477
Harrisburg, PA 17105-8477
regcomments@state.pa.us

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- ☒ Proposed Regulation
- ☐ Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation;

☐ Certification by the Governor
☐ Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The existing erosion and sediment (E&S) control regulations found at Title 25, Chapter 102 describe the requirements for controlling accelerated erosion and preventing sediment pollution from various earth disturbance activities. Since 1972, earth disturbance activities related to agricultural plowing and tilling, as well as, non-agricultural earth disturbance activities have been regulated under this Chapter by requiring persons to develop, implement, and maintain best management practices (BMPs).

The proposed amendments: enhance requirements related to agriculture; clarify existing requirements for accelerated E&S control; incorporate updated federal requirements; update permit fees; codify PCSM requirements; add requirements related to riparian forest buffers; and introduce a permit-by-rule option.

(9) Include a schedule for review of the regulation including:

A. The date by which the agency must receive public comments:	90 days after publication in PA Bulletin
B. The date or dates on which public meetings or hearings will be held:	To be determined
C. The expected date of promulgation of the proposed regulation as a final-form regulation:	October 2010
D. The expected effective date of the final-form regulation:	Effective upon final publication in PA Bulletin
E. The date by which compliance with the final-form regulation will be required:	Effective upon final publication in PA Bulletin
F. The date by which required permits, licenses or other approvals must be obtained:	Effective upon final publication in PA Bulletin

(10) Provide the schedule for continual review of the regulation.

The Department will review the adequacy of the fees established in this proposed rulemaking at least

once every 3 years and provide a written report to the Environmental Quality Board. The report must identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and it must contain recommendations to adjust fees to eliminate the disparity, including recommendations for regulatory amendments.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The proposed rulemaking is being made under the authority of Sections 5 and 402 of the Clean Streams Law (35 P.S. §§691.5 and 691.402); Section 1920-A of the Administrative Code of 1929 (71 P.S. §§510-20); and Section 11 of the Conservation District Law (3 P.S. §859(2)).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

Yes, in part. The proposed rulemaking includes updated provisions to meet federal Clean Water Act requirements (33 U.S.C.A § 1342) related to the federal Phase II requirements for NPDES permits for stormwater discharges associated with construction activities found at 40 CFR Part 122. The 1999 "Phase II" federal rulemaking for NPDES Stormwater Discharges Associated with Construction Activities became effective in 2002. These federal rules added smaller construction activities to the regulatory program by specifically including construction activities disturbing between 1 and 5 acres in the category of activities requiring NPDES permit coverage. The existing requirements of Chapter 102 only include the category of larger construction activities that were included in the NPDES Phase I rulemaking effective in 1989. In order to maintain delegation of the federal NPDES program, Pennsylvania must amend the Chapter 102 regulations to incorporate the Phase II rulemaking.

Additionally, the proposed rulemaking codifies the PCSM requirements mandated primarily by the Environmental Hearing Board decision *Valley Creek Coalition v. DEP*, 1999 EHB 935 and the federal regulations, 40 CFR Part 122. The rulemaking also includes clarifications to implementation of the Title 25, Chapter 93 antidegradation requirements in this regulatory program in response to the Environmental Hearing Board decision in *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Compelling public interest and public benefit

The nature of earth disturbance activities is to change, often significantly, many elements of the natural environment. Earth disturbances, including construction activities, typically include clearing the land of

vegetation, excavating earth, and compacting soil, all of which lead to increased stormwater runoff and higher erosion rates (EPA 2008). Construction activities permitted under Chapter 102 currently affect approximately 60,000 acres in Pennsylvania each year.

The proposed rulemaking ensures consistency with federal NPDES regulatory requirements for stormwater discharges associated with construction activities. The revisions clarify existing requirements, provide for a new permitting option for low impact, low risk projects that incorporate riparian forest buffers, include riparian forest buffer criteria, and clarify Chapter 93 antidegradation implementation requirements.

The proposed rulemaking will directly benefit all Pennsylvania citizens with a reduction in costs associated with reduction in flooding and damage resulting from flooding, turbidity levels in drinking water supplies, enhanced fisheries resources and associated recreational opportunities, permit applications, and the use of a flexible and protective BMP approach to E&S control and stormwater management.

Additionally, minimizing accelerated erosion and sedimentation and controlling stormwater volume and rate is a key part of the Commonwealth's Nutrient Reduction Strategy necessary to reduce associated nutrients from entering the Chesapeake Bay, Delaware Estuary, Lake Erie, and other Commonwealth waters.

Compelling public interest – E&S control during earth disturbance

The Department and EPA have documented increased loadings of pollutants to surface waters from discharges during and after earth disturbance activities. The most prominent and widespread pollutant is sediment. The level of sediment is often identified through the measurement of other pollutants in the water body, most notably turbidity, suspended solids, total suspended solids (TSS), suspended sediment concentration (SSC), or settleable solids (EPA, 2008). Other documented pollutants include metals, nutrients, and polycyclic aromatic hydrocarbons (PAHs) (EPA, 2008). These pollutants can derive from construction equipment and materials or from contamination of a site prior to the start of any earth disturbance activity. Other possible pollutants include pesticides, other toxic organics, and materials that exert biological oxygen demand (BOD) in surface waters. Earth disturbance and post construction discharges have the potential to mobilize these pollutants when the soil is disturbed and stormwater runoff within and from a site is increased, making the pollutants available for discharge to surface waters.

Increases in sediment and other pollutant discharges during and after earth disturbance activities have the potential to increase pollutant levels in waters of this Commonwealth which may in turn result in adverse impacts on aquatic ecosystems and on human uses of aquatic resources. Ecological impacts from pollutant discharges range from temporary to permanent and include both physical impacts on water bodies and biological impacts on aquatic ecosystems. Increased sediment and turbidity levels from earth disturbance and post construction stormwater discharges can also impact human uses of water resources, including drinking water supply, recreation, navigation, and fishing, as well as impair proper functioning of stormwater management systems (EPA 2008).

Compelling public interest – PCSM following earth disturbance

Permanent changes to the surface of the land resulting from earth disturbance activities also have the potential to cause pollution. In many watersheds throughout the state, flooding problems from rain events, including the smaller storms, have increased over time due to changes in land use and ineffective stormwater management. This additional flooding is a result of an increased volume of stormwater runoff being discharged throughout the watershed. This increase in stormwater volume is the direct result of more extensive impervious surface areas, combined with substantial tracts of natural landscape being converted to lawns on highly compacted soil or agricultural activities. The problems are not limited to flooding. Stormwater runoff carries significant quantities of pollutants washed from the impervious and altered land surfaces. The mix of potential pollutants ranges from sediment to varying quantities of nutrients, organic chemicals, petroleum hydrocarbons, and other constituents that cause water quality degradation.

Improperly managed stormwater causes increased flooding, water quality degradation, stream channel erosion, reduced groundwater recharge, and loss of aquatic species. But these and other impacts can be effectively avoided or minimized through better site design. This proposed rulemaking codifies existing PCSM requirements needed to prevent pollution from improperly managed stormwater, and requires utilization of stormwater management techniques that achieve stormwater runoff volume reduction, pollutant reduction, groundwater recharge and stormwater runoff rate control for all storms.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

Riparian Forest Buffers:

- Stroud Research Center; http://www.stroudcenter.org/

E&S Control; PCSM:

- National Resources Council "Urban Stormwater Management in the United States" (Oct. 2008); http://www.epa.gov/npdes/stormwater
- Villanova Urban Stormwater Partnership; http://www.villanova.edu/vusp
- Pennsylvania Stormwater Best Management Practices Manual (PADEP # 363-0300-002) http://www.depweb.state.pa.us/watershedmgmt/cwp/view.asp?a=1437&q=518836&watershedmgmtNav=|
- Erosion and Sediment Control Program Manual (PADEP # 363-2134-008) http://www.depweb.state.pa.us/watershedmgmt/cwp/view.asp?a=1437&q=518836&watershedmgmtNav=|
- EPA Phase I and II Rulemaking; (55 FR 47990 and 64 FR 68722 respectively)
- PADEP Water Quality Standards Triennial Review: http://www.depweb.state.pa.us/watersupply/cwp/view.asp?a=1261&Q=531653&watersupplyNav=|

Environmental Hearing Board (EHB) Decisions:

- *Valley Creek Coalition v. DEP*, 1999 EHB 935

http://ehb.courtapps.com/corpus/12%2D15%2D1999.98228.html

- *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589 http://ehb.courtapps.com/corpus/50119072005077.pdf

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The proposed revisions are not expected to adversely affect persons proposing or conducting earth disturbance activities since many of the revisions are a codification of current requirements. The additional flexibility provided by the permit-by-rule option, and the clarification of regulatory requirements will benefit persons conducting earth disturbance activities.

The PCSM section is a new addition to the existing regulations, but codifies existing permit requirements and therefore does not create new or additional burdens on the regulated community. Operation and maintenance of PCSM facilities is critical to water quality and flood protection. Although this obligation currently exists, the existing regulatory framework does not adequately ensure that this obligation is met. There are costs associated with operation and maintenance, but the costs are variable dependent on the PCSM facilities utilized. This proposed rulemaking has added provisions to identify a responsible party and a framework to provide the long-term operation and maintenance function.

The Department is proposing mandatory buffers for activities permitted under Chapter 102 when the project is located along Exceptional Value waters. This may require additional upfront planning and consideration prior to the application of a permit. Exceptional Value waters are afforded the greatest degree of protection under the Department's existing regulations at Chapter 93 (Water Quality Standards). Based on the scientific data, buffers are one of the most effective stormwater management BMPs for protecting aquatic resources. Of the approximately 91,000 miles of streams in Pennsylvania, approximately 3,300 are classified as Exceptional Value waters.

An increase in permit application fees is being established to ensure that the fees cover the cost to administer the program.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

Any person or entity that conducts earth disturbance activities is required to comply with these regulations. Examples of activities that are regulated include agricultural plowing and tilling, agricultural animal heavy use areas, residential and commercial development, highway construction and maintenance, utility construction, timber harvesting, and mineral resource development.

The Department also receives approximately 2,540 permit applications annually from entities that are required to comply with permit obligations under Chapter 102.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures that may be required. Explain how the dollar estimates were derived.

This rulemaking is primarily a codification of existing requirements and therefore only costs associated with increased permit fees are anticipated for the regulated community.

From 2003 to 2007, the average number of projects requiring a NPDES Permit for stormwater discharges associated with construction activities was 2,540 per year. This average is a reasonable figure to assess future costs. Based on the past permit average the regulated community may incur increased costs associated with permit fees estimated at $6,615,000.

Although the mandatory riparian forest buffer requirement for permitted projects located in exceptional value watersheds or when using the permit-by-rule option is new, this requirement will not necessarily result in new or increased costs to the regulated community. This requirement may not represent a new or increased cost because the riparian forest buffer is utilized as a nondischarge alternative and a PCSM BMP that can be used to meet existing requirements. Costs to implement a riparian forest buffer are estimated to be $700 to $4,723 dollars per acre to establish a new buffer and $0 to $2,725 per acre to enhance an existing buffer. It is not practical to quantify how many acres of riparian forest buffers will be established as a result of this proposed rulemaking.

Riparian forest buffers may result in a savings when compared to structurally engineered BMPs. It is also anticipated that if an individual chooses to use the permit-by-rule, they may in fact realize a cost savings by having greater predictability to start the project on a timeframe to meet their budget and construction commitments. Additionally, the installation of riparian forest buffers has been shown to increase property values by 5% to 25%, increase and protect water quality and decrease the necessity and cost of restoring impaired waters.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures that may be required. Explain how the dollar estimates were derived.

This proposed rulemaking is a codification of existing requirements and therefore only minimal costs associated with increased permit fees are anticipated for local government.

Local governments may realize reduced water treatment costs (as a result of reduced sediment and in-stream pollutant loadings); reduced infrastructure maintenance costs (due to reduced stormwater volumes); and reduced costs associated with flooding potential (due to stormwater management practices that reduce or eliminate flood potential); however, specific cost savings to be realized as a result of this rulemaking are difficult to establish with any certainty and are therefore not identified in this analysis.

Additionally, local governments with state Stormwater Management Act (Act 167) or NPDES MS4 regulatory obligations may rely on the regulatory structure provided by this proposed rulemaking. This reliance on existing state stormwater programs represents a significant savings to local governments.

The proposed rulemaking should not impose any new costs on local government. Requirements to notify the Department or county conservation district of projects affecting five or more acres remain the same. It is anticipated that there will be a reduction of time conservation district staff will allocate to review E&S Plan, however, this should be offset by an increased field presence for the permit-by-rule projects. The proposed rulemaking otherwise should not change the costs and/or savings to local governments.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures that may be required. Explain how the dollar estimates were derived.

The proposed rulemaking ensures protection and maintenance of environmental quality and should reduce costs to the state and local governments as a result of savings from reduced sediment loadings, reduced in-stream pollutant concentrations, and reduced pollution associated with changes to stream flow volume, and velocity. The proposed rulemaking may also result in savings from practices that reduce flooding potential and associated damage. Because the proposed rulemaking affects the private sector that conducts earth disturbance activities that directly influence sediment discharges, the potential savings are driven by regulated community compliance with the proposal.

Human uses of the affected resource values are those values where there is a direct dependence on the water resource and dependence on water quality. The value of changes in sediment discharges is determined by its impact on water quality. Water quality, in turn, influences human uses of the affected resources, leading to changes in use values. It may also lead to changes in ecosystem functions that generate nonuse values. Water quality is often characterized based on its suitability for recreational activities such as fishing, or its ability to support specified uses such as a public drinking water supply (EPA 2008).

This proposed rulemaking is a codification of existing requirements and therefore no new costs are anticipated for the Department or other state agencies. The increase in permit fees does not apply to state agencies.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with

implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community						
Local Government						
State Government						
Total Savings	None	None	None	None	None	None
COSTS:						
Regulated Community	$6,615,000	$6,615,000	$6,615,000	$6,615,000	$6,615,000	$6,615,000
Local Government						
State Government						
Total Costs	$6,615,000	$6,615,000	$6,615,000	$6,615,000	$6,615,000	$6,615,000
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	None	None	None	None	None	None

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Environmental Program Mgmt. #161-10382	$37,049,000	$36,868,000	$39,909,000	$41,800,000
Environmental Program Operations #160-10381	$87,897,000	$89,847,000	$98,582,000	$102,149,000

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The effects of accelerated sedimentation and improperly managed stormwater in streams have been well documented, causing increased costs associated with more frequent flooding, diminished water quality and, biological and physical impacts to the waters in Pennsylvania. Biological impacts include loss of habitat for fish and aquatic macroinvertabrates (the primary food source for fish and other aquatic organisms). A recent study on Turkey Creek, in OH (Hunt and Grow, 2001), as outlined in the EPA *Environmental Impact and benefits Assessment for Proposed Effluent Guidelines and Standards for the Construction and Development Category, November 2008* noted significant reduction of fish species downstream of construction activities that were not noncompliant. The study determined significant reduction of overall fish present (26 upstream reduced to 19 downstream), reduction of size of fish and increase of pollutant tolerant species (237%), reduction of pollution intolerant species (33%). Physical impacts require dredging of accumulated sediment to maintain water storage volume in reservoirs and to maintain transportation in navigational routes. Additionally, the costs associated with treatment of drinking water are increased.

Annual instream damage from sediments costs between $3.2 and $13 billion nationwide (in 1980 dollars) [Clark, Haverkamp, and Chapmen, 1985] [Waddell, 1986]*. In addition, offstream damages associated with the erosion of roads, drainage ditches and other structures, and the loss of viable, productive topsoil are difficult to quantify. Using these estimates for instream and off stream damages nationwide, it is estimated that between $64 and $260 million in environmental damage occurs to Pennsylvania's land and water resources annually from sediment pollution. The benefits of protecting water quality and the environment from accelerated erosion and sedimentation far outweighs the cost of administering the program and costs to the private sector for implementation.

*Edwin H. Clark II, Jennifer A. Haverkamp; and William Chapmen, Eroding Soils: The Off- Farm Impacts
(Washington, DC: The Conservation Foundation, 1985), and Thomas Waddell, The Off-Site Costs of Soil Erosion
(Proceedings of a symposium held in May 1985 (Washington D.C.: The Conservation Foundation, 1986).

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

In developing this proposed rulemaking the Department undertook extensive outreach efforts to meet with stakeholders including: conservation districts, builders, agriculture, other industry groups, environmental groups, legislators and advisory committees.

Outreach efforts by DEP Secretary Hanger and Executive Staff on permit-by-rule and riparian forest buffers included meetings with the following groups during 2008-2009:

- Department of Community and Economic Development
- Governor's Action Team

- Interested legislators
- Pennsylvania Association of Conservation Districts (PACD)
- PA Builder's Association and building industry representatives
- PA Campaign for Clean Water (Coalition of environmental groups including: Chesapeake Bay Foundation, Clean Water Action, Delaware River Keepers, Sierra Club, Trout Unlimited PA Chapter, Penn Future)
- PA Chamber of Business and Industry
- POGAM, IOGA, and oil & gas industry representatives
- State Conservation Commission

Outreach efforts by DEP staff on Chapter 102 revisions, permit-by-rule and buffers included meetings with the following groups during 2007-2009:

- Conservation district directors, managers, and staff
- Department of Conservation & Natural Resources
- PACD
- PA Builders Association
- PA Campaign for Clean Water (Coalition of environmental groups including: Chesapeake Bay Foundation, Clean Water Action, Delaware River Keepers, Sierra Club, Trout Unlimited PA Chapter, Penn Future)
- PennAg Industries, PA Farm Bureau and agricultural representatives
- State Conservation Commission
- USDA, NRCS

Advisory Committee Meetings:

- Citizen's Advisory Council:
  - March 17, 2009 (permit-by-rule)
  - April 21, 2009

- Agricultural Advisory Board (AAB) :
  - February 21, 2007 Overview of proposed revisions
  - October 10, 2007 Overview of proposed revisions
  - December 19, 2007 Discussion of proposed draft language for agricultural activities
  - April 15, 2009 Consideration of Proposed Chapter 102 rulemaking

- Water Resources Advisory Committee (WRAC):
  - January 10, 2007 Overview of proposed revisions
  - January 9, 2008 Overview of proposed revisions
  - July 22, 2008 Overview of riparian forest buffers
  - February 25, 2009 Overview of proposed permit-by-rule
  - April 8, 2009 Consideration of Proposed Chapter 102 rulemaking
  - April 23, 2009 Special Meeting – continuation of proposed Chapter 102

- April 29, 2009 Second Special Meeting – continuation of proposed Chapter 102 (No quorum of WRAC)

(23) Include a description of any alternative regulatory provisions that have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The Department did evaluate a complete rewrite of the Chapter with extension revisions, reorganization and restructuring. After input from many stakeholders and WRAC, the Department determined a more limited rulemaking based upon the existing regulatory framework was more appropriate.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Yes. Agricultural activities are not regulated by the federal NPDES regulations, but are regulated under the Pennsylvania Clean Streams Law (35 P.S. § 691.1 et. seq.). The Chapter 102 provisions related to agricultural activities are necessary to implement the requirements of state law.

The provisions mandating use of a riparian forest buffer for projects located along Exceptional Value watersheds is more stringent than the federal requirements which do not specify the use of any particular BMP.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

The requirements are similar to those imposed by the federal regulations and used by other states. Some neighboring states have regulations that are more restrictive or prescriptive in nature. For example, New Jersey has a more restrictive riparian forest buffer requirement of 300 feet for special protection waters, and Maryland requires PCSM for all activities regardless of permit applicability. Therefore, the proposed regulations should not affect Pennsylvania's economic competitiveness relative to other states.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The proposed rulemaking is not expected to affect existing or proposed regulations of this Department or any other state agency.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The majority of the revisions to this proposed rulemaking are codifications of existing requirements,

therefore only minor changes to forms, fact sheets, and technical guidance are anticipated.
(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers. There are no special provisions in this rulemaking.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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INDEPENDENT REGULATORY REVIEW COMMISSION

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Copy below is hereby approved as to form and legality.
Attorney General

By: Amy M. Elliott
(Deputy Attorney General)

AUG 13 2009
DATE OF APPROVAL

☐ Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-440

DATE OF ADOPTION JUNE 16, 2009

BY John Hanger

TITLE JOHN HANGER
CHAIRMAN

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form and legality
Executive or Independent Agencies

BY Andrew C. Clark
(Deputy General Counsel)
~~(Chief Counsel - Independent Agency)~~
(Strike inapplicable title)

DATE OF APPROVAL
JUN 30 2009

☐ Check if applicable. No Attorney General Approval or objection within 30 days after submission.

NOTICE OF PROPOSED RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

EROSION AND SEDIMENT CONTROL AND STORMWATER MANAGEMENT

25 *Pa. Code,* Chapter 102

NOTICE OF PROPOSED RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
25 Pa. Code Chapter 102
Erosion and Sediment Control and Stormwater Management

Preamble

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code Chapter 102 (relating to Erosion and Sediment Control and Stormwater Management). The amendments update agricultural planning and implementation requirements, update erosion and sediment (E&S) control requirements, incorporate the federal Clean Water Act "Phase II" NPDES permit requirements for stormwater discharges associated with construction activities, include post construction stormwater management (PCSM) requirements, establish forest riparian buffer provisions, and include provisions for a permit-by-rule option.

This proposal was adopted by the Environmental Quality Board at its meeting of June 16, 2009.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Kenneth F. Murin, Chief, Division of Waterways, Wetlands, and Stormwater Management, P. O. Box 8775, Rachel Carson State Office Building, Harrisburg, PA 17105-8775, (717) 787-6827, or Margaret O. Murphy, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This proposal is available electronically through the DEP Web site (http://www.depweb.state.pa.us).

C. Statutory Authority

The proposed rulemaking is being made under the authority of Sections 5 and 402 of the Clean Streams Law (35 P. S. §§ 691.5 and 691.402), which authorize the Department to formulate, adopt and promulgate rules and regulations that are necessary to implement the provisions of the act, specifically, to regulate accelerated erosion, sedimentation and stormwater runoff from earth disturbance activities in order to protect, maintain, reclaim and restore waters of the Commonwealth by requiring that accelerated erosion, sedimentation during construction, and volume, rate and quality of post construction stormwater runoff, be minimized and controlled; and Section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Environmental Quality Board (EQB) to promulgate rules and regulations that may be determined by the EQB to be for the proper performance of the work of the Department; and Section 11 of the Conservation District Law (3 P.S. §859(2).

D. Background and Purpose

The existing E&S control regulations found at Title 25, Chapter 102 describe the requirements for controlling accelerated erosion and preventing sediment pollution from various earth disturbance activities. The purpose of Chapter 102 is to protect surface waters of the Commonwealth from sediment and stormwater pollution by requiring the use of best management practices (BMPs) that minimize accelerated erosion and sedimentation and manage post construction stormwater runoff, both during and after earth disturbance activities.

Since 1972, earth disturbance activities related to agricultural plowing and tilling, as well as, non-agricultural earth disturbance activities have been regulated under this Chapter by requiring persons to develop, implement, and maintain BMPs.

The proposed amendments elaborated below, incorporate specific language which: enhance requirements related to agriculture; clarify existing requirements for accelerated E&S control; incorporate updated federal requirements; update permit fees; codify PCSM requirements; add requirements related to riparian forest buffers; and introduce a permit-by-rule option.

Enhanced requirements related to agriculture

The scope of the agricultural section (§102.4 (a)) is being enhanced beyond "agricultural plowing and tilling" to also include "animal heavy use areas". The requirements related to plowing and tilling are also being more clearly defined. The animal heavy use area provisions of the proposed rulemaking require responsible parties to develop and implement an E&S Control Plan (E&S Plan) that minimizes accelerated erosion and sedimentation.

Clarification of existing requirements for accelerated E&S control

Revisions to existing language are included in the proposed rulemaking to clarify: definitions, plan requirements, Chapter 93 antidegradation implementation requirements, permitting, and site stabilization.

Incorporation of updated federal requirements

The federal Clean Water Act, NPDES Program includes regulatory requirements for stormwater discharges associated with construction activities. Pennsylvania is delegated administration of the NPDES program by EPA. Chapter 102 provides the regulatory framework for the stormwater construction portion of the NPDES program in Pennsylvania. The federal requirements for stormwater construction were promulgated by EPA in two phases (Pennsylvania compliance required by 1992 and 2002 respectively). The Chapter 102 amendments in 2000 included the first phase "Phase I" of these NPDES requirements. In order to maintain delegation of the NPDES program and to be compliant with federal law, Pennsylvania is incorporating the second phase "Phase II" of the federal requirements in this proposed rulemaking.

Updated permit fees

In the proposed rulemaking DEP includes the NPDES permit fees specific to the stormwater construction program, and updates the fees for other (non-NPDES) permits that may be required under Chapter 102.

Codification of PCSM requirements
Permanent changes to the surface of the land resulting from earth disturbance activities also have the potential to cause pollution as that term is defined under both the federal Clean Water Act as well as the Pennsylvnaia Clean Streams Law. This rulemaking proposes to include specific PCSM requirements, as a codification of existing practices in Pennsylvania. Since 2002, DEP has included PCSM requirements in the NPDES stormwater permitting program in response to the need for enhanced water quality protection, long term stormwater management, streambed and streambank protection and as a flood control measure. The inclusion of PCSM requirements in this program is driven by the federal NPDES stormwater construction requirements, Environmental Hearing Board decisions, and is necessary to support implementation of stormwater management planning requirements for the Municipal Separate Storm Sewer System (MS4) NPDES program and the Pennsylvania Stormwater Management Act.

Addition of requirements related to riparian forest buffers
Riparian forest buffers are one of the most effective and efficient BMPs for preventing pollution both during and after earth disturbance activities, and provide natural, long-term sustainability for aquatic resource protection and water quality enhancement. This proposed rulemaking includes new requirements for protecting existing riparian forest buffers and for establishing new buffers. The rulemaking also proposes mandatory riparian forest buffers for projects permitted under Chapter 102 that contain or are located along or within 150 feet of an Exceptional Value (EV) rivers, perennial and intermittent streams, or lakes, ponds, or reservoirs. Requirements for buffer conservation, construction and maintenance are included.

Introduction of a permit-by-rule option
The proposed amendments include a new permitting option for low impact, low risk projects that incorporate riparian forest buffers. This permit-by-rule could be used to authorize qualifying projects that require either an NPDES permit or E&S control permit under this Chapter. The proposed permit-by-rule balances environmental protection for the Commonwealth with predictability in permitting for the applicant. The permit-by-rule includes eligibility criteria to limit applicability to "low-risk" projects and conditions requiring the use of riparian forest buffers, "low impact design" techniques, more prescriptive plan and implementation requirements, mandatory oversight by a professional engineer, geologist, or landscape architect registered in the commonwealth of Pennsylvania, and a 30-day review timeframe.

E. <u>Public Participation and Outreach</u>
In developing this proposed rulemaking the Department undertook extensive outreach efforts to meet with stakeholders including: conservation districts, builders, agriculture, other industry groups, environmental groups, legislators and advisory committees.

Outreach efforts by DEP Secretary Hanger and Executive Staff on permit-by-rule and riparian forest buffers included meetings with the following groups during 2008-2009:

- Department of Community and Economic Development
- Governor's Action Team
- Interested legislators
- Pennsylvania Association of Conservation Districts (PACD)
- PA Builder's Association and building industry representatives

- PA Campaign for Clean Water (Coalition of environmental groups including: Chesapeake Bay Foundation, Clean Water Action, Delaware River Keepers, Sierra Club, Trout Unlimited PA Chapter, Penn Future)
- PA Chamber of Business and Industry
- POGAM, IOGA, and oil & gas industry representatives
- State Conservation Commission

Outreach efforts by DEP staff on Chapter 102 revisions, permit-by-rule and buffers included meetings with the following groups during 2007-2009:

- Conservation district directors, managers, and staff
- Department of Conservation & Natural Resources
- PACD
- PA Builders Association
- PA Campaign for Clean Water (Coalition of environmental groups including: Chesapeake Bay Foundation, Clean Water Action, Delaware River Keepers, Sierra Club, Trout Unlimited PA Chapter, Penn Future)
- PennAg Industries, PA Farm Bureau and agricultural representatives
- State Conservation Commission
- USDA, NRCS

Advisory Committee Meetings:

- Citizen's Advisory Council:
  - March 17, 2009 (permit-by-rule)
  - April 21, 2009

- Agricultural Advisory Board (AAB) :
  - February 21, 2007 Overview of proposed revisions
  - October 10, 2007 Overview of proposed revisions
  - December 19, 2007 Discussion of proposed draft language for agricultural activities
  - April 15, 2009 Consideration of Proposed Chapter 102 rulemaking

- Water Resources Advisory Committee (WRAC):
  - January 10, 2007 Overview of proposed revisions
  - January 9, 2008 Overview of proposed revisions
  - July 22, 2008 Overview of riparian forest buffers
  - February 25, 2009 Overview of proposed permit-by-rule
  - April 8, 2009 Consideration of Proposed Chapter 102 rulemaking
  - April 23, 2009 Special Meeting – continuation of proposed Chapter 102
  - April 29, 2009 Second Special Meeting – continuation of proposed Chapter 102 (No quorum of WRAC)

In the proposed rulemaking the Department has incorporated many revisions suggested by the various groups listed above. The Department acknowledges that the Water Resources Advisory Committee would like the Environmental Quality Board to solicit input during the public comment period on the following three issues:

- Scope of the permit-by-rule: Should the proposed rulemaking limit or expand the availability of the proposed permit-by-rule?

  The permit by rule is proposed to be used for low risk projects with riparian forest buffers in High Quality and all waters other than special protection. Some of the members recommended that the permit-by-rule be available for all waters (including Exceptional Value); while others recommended that it be available for use in only waters other than special protection.

- Responsibility for long-term PCSM operation and maintenance (O&M): How should the propsed rulemaking address responsibility for long-term operation and maintenance of PCSM BMPs?

  Assignment of the long-term O&M responsibility for PCSM has been and continues to be a challenging issue for the Department and regulated community. The proposed rulemaking requires the permit applicant to identify a party with long-term responsibility for operation and maintenance of PCSM BMPS, and includes a default provision that obligates either the landowner or permittee to provide that O&M function. Some members of WRAC voiced concern that the Department should be more detailed and prescriptive on how this function will be carried out.

- Mandatory Riparian Forest Buffers: Should the proposed rulemaking include a provision for mandatory riparian forest buffers?

  The rulemaking proposes 150-foot riparian forest buffers for permitted activities along Exceptional Value (EV) streams. Some of the members recommended that riparian forest buffers be mandatory for not only EV, but all waters, while others recommended that riparian forest buffers be used voluntarily.

F. Summary of Regulatory Requirements

Several changes are proposed in this regulatory package and are described below. The descriptions include a reference to the section or subsection proposed to be changed, the nature of the change, and the effect of the change.

SECTION 102.1. DEFINITIONS:

Specific amendments include the following:

New definitions: Act 167, Agricultural Operation, Along, Animal heavy use areas, Antidegradation Best Available Combination of Technologies, Forest stewardship plan, Intermittent stream, K Factor, Licensed professional, Nondischarge alternative, Normal pool elevation, Notice of Termination, Oil and gas activities, Perennial stream, Point source, Pollutant, Post construction stormwater, PCSM, PCSM Plan, PPC Plan, Riparian forest buffer, Soil loss tolerance, Stormwater, Surface waters, Top of streambank.

Revised definitions: Agricultural plowing or tilling activity, BMPs, Conservation district, Conservation plan, Diversion, Earth Disturbance Activity, E&S Permit, E&S Plan Municipality, NPDES, Notice of Intent, NPDES Permit for Stormwater Discharges Associated with Construction Activities, Operator, Person, Project site, and Sediment.

Definitions proposed to be deleted: Dewatering zone, Permanent pool, Principal spillway, and Skim.

SECTIONS 102.2 SCOPE AND PURPOSE:

This section is revised to reflect the codification of existing PCSM requirements.

SECTION 102.4. GENERAL:

Agricultural Activities
This section incorporates new terms and establishes general requirements for animal heavy use areas. The revisions clarify planning requirements for agricultural activities and soil loss tolerance values or "T", and identify the conservation plan requirements that satisfy the E&S Plan requirements of this Chapter.

Non-agricultural Activities
This section provides clarity by codifying the Department's current policy and guidelines that have been established to meet federal requirements and to comply with court decisions. Persons proposing or conducting earth disturbance activities must limit the extent and duration of the earth disturbance; protect existing drainage features and vegetation; minimize soil compaction; utilize measures or controls that prevent or minimize the generation of stormwater; and protect, maintain, reclaim and restore waters of the Commonwealth. Additionally an E&S Plan must be consistent with the PCSM Plan; must identify naturally occurring geologic formations, or soil conditions that may have the potential to cause pollution during earth disturbance activities and include BMPs to avoid or minimize potential pollution and its impacts from such formations; utilize Chapter 93 nondischarge and ABACT BMPs in special protection waters, evaluate the potential for thermal impacts; and identify and protect existing and proposed forest riparian buffers when applicable.

SECTION 102.5. PERMIT REQUIREMENTS:

This section adds the federal NPDES "Phase II" permit requirements for earth disturbance activities between 1 and 5 acres with a point source discharge; and incorporates the antidegradation implementation requirements related to NPDES Permits in special protection waters as required by Chapter 93 and *Blue Mtn. Preservation Assn. v. DEP*, 2006 EHB 589. Permitting requirements are included for oil & gas activities to obtain an E&S permit for 5 acres or more of earth disturbance. Additionally, a permit requirement is included for activities involving 5 acres or more of earth disturbance not otherwise specified in this section as requiring permit coverage. Additional requirements have been included for a preconstruction meeting for all permitted activities; a general requirement that a permittee must ensure long term operation and maintenance requirements for PCSM facilities identified in §102.8; and a provision to clarify that operators who are not the permittee shall be identified as co-permittees. Finally, the Clean

Water Act NPDES permit exemption for activities covered by a Clean Water Act §404 dredge and fill permit is clarified.

SECTION 102.6 PERMIT APPLICATION AND FEES:

This section introduces the registration requirements for coverage under the permit-by-rule option; clarifies the existing requirement to include a PCSM Plan with a permit application, as well as the existing requirement to prepare a preparedness, prevention and contingency (PPC) plan when necessary. Fees for E&S permits are updated to meet program expenses. The fees for NPDES Permits for Stormwater Discharges Associated with Construction Activities from Chapter 92 are incorporated and updated. Language is added to clarify the Department's obligation to review fees at least once every 3 years and to clearly define complete applications and an applicant's responsibility to provide additional information to the Department within 60 days. Additionally, the ability of conservation districts to charge additional fees pursuant to Conservation District Law is clearly outlined.

SECTION 102.7. PERMIT TERMINATION:

This section adds an obligation to identify the person responsible for operation and maintenance of PCSM BMPS and PCSM Plans and clarifies the obligation of the permittee to operate and maintain the PCSM BMPS and PCSM Plan until the Notice of Termination is acknowledged.

SECTION 102.8. POST CONSTRUCTION STORMWATER MANAGEMENT:

This new Section is added to codify provisions for PCSM for all activities that require an NPDES permit for stormwater discharges from construction activities or an E&S Permit. The goals for which PCSM Plans should be designed and implemented are outlined. The components of a written PCSM Plan that includes drawings and a narrative portion are also identified. Additional requirements are also established including, the performance criteria for the PCSM BMPs; the need for a licensed professional to certify "Record Drawings" that ensure the PCSM Plan was implemented properly prior to termination of the permit; and a requirement to ensure there is a long-term operation and maintenance plan and that a responsible party is identified.

SECTION 102.11. GENERAL REQUIREMENTS:

This section has been revised to include additional references.

SECTION 102.14. RIPARIAN FOREST BUFFER REQUIREMENTS:

This section was added to describe requirements associated with the establishment of new riparian forest buffer and the protection of existing buffers along surface waters in Pennsylvania when required by Chapter 102 or which may be required by other Department rules regulations, permits, orders, or other authorizations. General requirements are added to identify a certain size, composition, quality, management, reporting, and permanent protection of riparian forest buffers when utilized to meet regulatory requirements. Finally, this section establishes a mandatory 150

foot riparian forest buffer requirement for projects permitted under Chapter 102 that are located along certain specified Exceptional Value waters.

SECTION 102.15. PERMIT-BY-RULE FOR LOW IMPACT PROJECTS WITH RIPARIAN FOREST BUFFERS:

This section provides a new permit-by-rule option in addition to existing individual and general permits. The permit-by-rule includes the following eligibility criteria: discharges to waters other than Exceptional Value; Pennsylvania Natural Heritage Program requirements must be met; applicants must satisfy compliance history requirements; lands that are currently contaminated are excluded; and sensitive geologic formations, soils with steep slopes, wetlands and floodplains are excluded.

The permit-by-rule conditions for use include: a pre-submission meeting; inclusion of a riparian forest buffer (meeting the requirements of §102.14); limit of 15 acres of disturbance at any one time during development of a project; and the retention of services of a professional engineer, geologist, or landscape architect registered in the commonwealth of Pennsylvania to prepare and certify E&S and PCSM Plans, oversee critical stages of construction, and provide "record drawings" upon project completion.

The permit-by-rule option includes a requirement for municipal notification; prescriptive planning requirements for E&S and PCSM; a 30-day review and eligibility verification and determination for coverage; and an obligation for the Department to verify the effectiveness and level of environmental protection that the permit-by-rule provides. Additionally, the permit-by-rule includes additional requirements for projects in High Quality waters and waters impaired for stormwater or sediment.

SECTION 102.22. SITE STABILIZATION:
This section is revised to incorporate and to clarify existing requirements for permanent and temporary stabilization.

SECTION 102.31. APPLICABILITY:

No revisions proposed.

SECTION 102.32. COMPLIANCE AND ENFORCEMENT PROVISIONS:

This section adds a new provision to include an opportunity to request an informal hearing with Department after action by a conservation district and a new provision for cost recovery by the Department or conservation district.

SECTION 102.41. ADMINISTRATION BY CONSERVATION DISTRICTS:

No revisions proposed.

SECTIONS 102.42. NOTIFICATION FOR APPLICATIONS OF PERMITS:

This section is revised to reference the federal NPDES "Phase II" permit requirements and to be consistent with the change in §102.5.

SECTION 102.43. WITHHOLDING PERMITS:

This section clarifies language to include references to local stormwater approvals and authorizations.

F. Benefits, Costs and Compliance

Benefits

The citizens of the Commonwealth, the regulated community, and state and local governments will benefit from the recommended changes in this rulemaking because surface waters will be protected, maintained and improved through requirements that minimize accelerated erosion and sedimentation and strengthen PCSM.

The proposed rulemaking provisions related to E&S control and PCSM will improve water quality and mitigate flooding potential by controlling increases in sediment and other pollutant discharges during and after earth disturbance activities. Controlling such discharges through this rulemaking will limit the risk for increased pollutant levels to waters of this Commonwealth, and protect against adverse impacts on aquatic ecosystems. To ensure protection against adverse impacts from stormwater runoff, the proposed rulemaking includes provisions for long-term operation and maintenance of PCSM facilities. In support of the federal NPDES Stormwater Construction rulemakings EPA also cited: benefits to navigation in the reduced sediment loads requiring dredging; benefits to water storage in reservoirs – again as a result of regained capacity from reduced sediment build-up; benefits to drinking water treatment – in terms of reduced costs for treatment for sediment in turbidity; as well as water quality.

The Commonwealth will benefit from increased permit fees that are based in part on the estimated cost of administering the program. Revisions to Chapter 92 in 1999 and Chapter 102 in 2000 included modifications to permit fees, but these were administrative filing fees and did not cover cost of program operations. This proposed rulemaking is the first effort by the Department to cover the Chapter 102 program costs through permit fees.

The regulated community is expected to benefit from these regulatory revisions through the restructuring and clarification of planning and permit application requirements, as well as the codification of the existing PCSM requirements. This rulemaking reflects a continuing commitment to integrate regulatory obligations for stormwater management including requirements pursuant to Act 167, the NPDES Municipal Separate Storm Sewer Systems (MS4) program and permitting of earth disturbance activities. Local governments with state Act 167 or NPDES MS4 regulatory obligations may rely on the regulatory structure provided by this proposed rulemaking. This reliance on existing state stormwater programs represents a significant cost savings to local governments.

Finally, these regulatory revisions are beneficial because they continue to support the delegation of the E&S control and stormwater management programs to local county conservation districts. County conservation districts and the Department have had a successful and effective partnership that allows the Commonwealth to meet the federal requirements of the NPDES program. Additionally, the Delegation to the local government provides more accessibility to the community and regulated parties and ensures local involvement in oversight of the program.

Compliance Costs

These regulatory revisions should not result in significant increased compliance costs for persons proposing or conducting earth disturbance activities. Moderate increased costs may be incurred due to: increased permit application fees for activities requiring permits; PCSM Plan licensed professional oversight and preparation of record drawings; and long-term operation and maintenance of PCSM facilities.

Generally, there may be cost savings as a result of the eliminating outdated and unnecessary requirements, while increasing the protection of Pennsylvania's valuable water resources. Additionally, the emphasis in the proposed rulemaking on non-structural "low-impact" stormwater management approaches should result in lower long-term operation and management costs. The permit-by-rule may provide the regulated community cost savings through a new permitting option that provides a definitive timeframe for review and determination of coverage.

Compliance Assistance Plan

The Department assists the regulated community in complying with these regulations through technical and educational assistance, largely provided in partnership with county conservation districts. These efforts have resulted in local community based initiatives that stimulate awareness and achieve regulatory compliance. Department staff have worked with conservation districts to develop and enhance their professional abilities. The development of compliance strategies that focus on negotiation, total quality management, mediation, and professional development, has greatly enhanced the Department's ability to protect the Commonwealth's water resources. County conservation district staff provide an efficient and effective local source of assistance as well as an efficient mechanism for the protection of valuable resources. Evaluations of district performance have shown that district staff can provide a quick response to process, review, and acknowledge permit applications.

By involving various advisory committees in the development of these regulations, and pursuing initiatives with the regulated community and other stakeholders, the Department's outreach efforts have allowed stakeholders to work together with regulators to work towards the goal of protecting water quality and the aquatic environment through E&S control and stormwater management efforts. Involvement of the public and the regulated community in the development of these regulations fosters subsequent compliance with standards and practices developed as a result of these efforts, and are an important form of compliance assistance.

The Department assists the regulated community with compliance by its development of standard checklists, worksheets and permit review letters to aid plan designers in developing sound pollution prevention plans. The Department also assists compliance by assuring that Department and district reviews are timely, effective, and consistent. Finally, the regulations incorporate a performance-based approach, which allows persons conducting earth disturbance broad latitude and flexibility in designing BMPs to achieve compliance.

Paperwork Requirements

The majority of the revisions to this proposed rulemaking are codifications of existing requirements, therefore only minor changes to forms, fact sheets, and technical guidance are anticipated.

G. Pollution Prevention

Chapter 102 prevents sediment and stormwater pollution to surface waters of the Commonwealth from earth disturbance activities through a tiered regulatory framework built upon BMP requirements. The Chapter covers both agricultural and non-agricultural earth disturbance activities, with distinct regulatory requirements for these two broad categories. Regardless of the category, all earth disturbance activities must utilize BMPs to minimize accelerated erosion and sedimentation for the duration of earth disturbance activities. Additionally, some earth disturbance activities require preparation of a written E&S Plan. Finally, earth disturbance activities exceeding specified acreage thresholds may trigger the requirement to obtain permit coverage, which in turn includes the obligation to prepare and implement a written PCSM Plan.

The proposed rulemaking will improve protection from earth disturbance activities not only through the inclusion of PCSM requirements, but also through the addition of the riparian forest buffer provisions, which are one of the most effective and sustainable BMPs for protecting, maintaining, reclaiming and restoring surface waters of this Commonwealth.

Effective pollution prevention also requires robust inspection, oversight, and enforcement authority, which are retained and enhanced in this rulemaking. The proposed rulemaking adds requirements such as: mandatory pre-construction meetings; licensed professional documentation requirements; and a program audit provision to verify the environmental protection and effectiveness of the permit-by-rule.

H. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), the Department submitted a copy of the proposed rulemaking on August 18, 2009, to the Independent Regulatory Review Commission (IRRC), and the Chairpersons of the Senate and House Environmental Resources

and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

J. Public Comments

Written Comments – Interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by November 30, 2009. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by November 30, 2009. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments – Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by November 30, 2009. A subject heading of the proposal and a return name and address must be included in each transmission.

K. Public Meetings and Public Hearings

The Board will hold three public meetings to explain the proposed rulemaking and to respond to questions from meeting participants. In addition to the public meetings, the Board will hold three public hearings for the purpose of accepting comments on the proposed rulemaking. The public meetings and hearings will be held as follows:

September 29, 2009	Cranberry Township Municipal Building 2525 Rochester Road Cranberry Township, PA 16066-6499 Public Meeting: 4:00 p.m. Public Hearing: 5:00 p.m.
October 1, 2009	Department of Environmental Protection Southcentral Regional Office Susquehanna Room A 909 Elmerton Avenue Harrisburg, PA 17110 Public Meeting: 4:00 p.m. Public Hearing: 5:00 p.m.

October 5, 2009

Salisbury Township Municipal Building
2900 South Pike Avenue
Allentown, PA 18103
Public Meeting: 4:00 p.m.
Public Hearing: 5:00 p.m.

Persons wishing to present testimony at a hearing are requested to contact the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477, (717) 787-4526, at least 1 week in advance of the hearing to reserve a time to present testimony. Oral testimony is limited to 10 minutes for each witness. Witnesses are requested to submit three written copies of their oral testimony to the hearing chairperson at the hearing. Organizations are limited to designating one witness to present testimony on their behalf at each hearing.

Persons in need of accommodations as provided for in the Americans With Disabilities Act of 1990 should contact the Board at (717) 787-4526 or through the Pennsylvania AT&T Relay Service at (800) 654-5984 (TDD) to discuss how the Board may accommodate their needs.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board

Annex A

CHAPTER 102. EROSION AND SEDIMENT CONTROL AND STORMWATER MANAGEMENT

GENERAL PROVISIONS

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GENERAL PROVISIONS

§ 102.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

***ABACT—Antidegradation best available combination of technologies*—Treatment, land disposal, pollution prevention, and stormwater reuse BMPs that will individually or collectively manage the difference in the net change from preexisting stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm that is not fully managed by nondischarge alternative BMPs and that will maintain and protect the existing quality of the receiving surface water.**

Accelerated erosion—The removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone.

***Act 167* – The Pennsylvania Storm Water Management Act, act of October 4, 1978 (P.L. 864, No. 167), known as the Storm Water Management Act or Act 167.**

***Agricultural operation*—The management and use of farming resources for the production of crops, livestock, or poultry, or for equine activity.**

Agricultural plowing or tilling activity—Earth disturbance activity involving the preparation and maintenance of soil for the production of agricultural crops. **The term includes no-till cropping methods.**

***Along*—Touching or contiguous; to be in contact with; to abut upon.**

***Animal heavy use area*—Barnyard, feedlot, loafing area, exercise lot, or other similar area on an agricultural operation where because of the concentration of animals it is not possible to establish and maintain vegetative cover of a density capable of minimizing accelerated erosion and sedimentation by usual planting methods.**

BMPs—Best management practices—Activities, facilities, measures, **planning,** or procedures used to minimize accelerated erosion and sedimentation **and manage stormwater** to protect, maintain, reclaim, and restore the quality of waters and the existing and designated uses of waters within this Commonwealth **before, during, and after earth disturbance activities.**

Channel—A natural or manmade water conveyance.

Collector—A channel, dike or other conveyance, constructed downslope of an earth disturbance activity for the purpose of collecting **stormwater** runoff from **[an existing or proposed disturbed] that** area and conveying it to facilities for sediment retention or removal.

[*County]* *Conservation district*—A conservation district, as defined in section 3(c) of the Conservation District Law (3 P. S. § 851(c)), **as amended,** which has the authority under a delegation agreement executed with the Department to administer and enforce all or a portion of the erosion**, [and]** sediment**, and stormwater management [control]** program in this Commonwealth.

Conservation Plan—A plan that identifies conservation practices and includes site specific BMPs **[which minimize the potential for accelerated erosion and sediment from] for** agricultural plowing or tilling activities **and animal heavy use areas**.

[(i) BMPs for agricultural plowing or tilling activities, including soil loss tolerance values (T), are identified in the *Pennsylvania Soil and Water Conservation Technical Guide*, United States Department of Agriculture, Natural Resources Conservation Service, 1991.

(ii) The Conservation Plan shall include a schedule for the implementation of the BMPs.

***Dewatering zone*—The zone within a sediment basin where stormwater runoff is held and released in a controlled manner.]**

Disturbed area—Unstabilized land area where an earth disturbance activity is occurring or has occurred.

Diversion—A facility, including a channel, **[terrace or dike] or a conveyance** constructed up-slope of **[an earth disturbance activity for the purpose of diverting] the disturbed area to divert clean offsite** runoff away from **[an existing or proposed disturbed area] the earth disturbance activity.**

Earth disturbance activity—A construction or other human activity which disturbs the surface of the land, including **[but not limited to,] land** clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, **operation of animal heavy use areas,** timber harvesting activities, road maintenance activities, **oil and gas activities, well drilling,** mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

Erosion—The natural process by which the surface of the land is worn away by water, wind or chemical action.

E&S Permit—*Erosion and Sediment Control Permit*—A permit required for earth disturbance activities **[of 25 acres (10 hectares) or more]** where the earth disturbance is associated with timber harvesting**, [or]** road maintenance activities**, or oil and gas activities.**

E&S Plan—*Erosion and Sediment Control Plan*—A site-specific plan **consisting of both drawings and a narrative that** identif**[ying]ies** BMPs to minimize accelerated erosion and sedimentation **before, during, and after earth disturbance activities**. **[For agricultural plowing or tilling activities, the Erosion and Sediment Control Plan is that portion of a conservation plan identifying BMPs to minimize accelerated erosion and sedimentation.]**

Forest Stewardship Plan **–A written plan that provides an overview of a woodland property in the context of a landowner's needs and objectives and serves as a means of communicating technical information in a concise form that is useful to the landowner.**

Intermittent stream**—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing water, which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges.**

K factor**—The soil erosion factor used for determining the level of potential erosion based upon soil characteristics.**

Licensed professional**—Professional engineers, landscape architects, geologists, and land surveyors licensed to practice in Pennsylvania.**

Municipality—**[(i)]** A county, city, borough, town, township, school district, institution or authority **[created by any one or more of the foregoing.] or another public body created by or pursuant to state law. [(ii)]** For purposes of this definition, town includes an incorporated town.

NOI—Notice of Intent—A request, on a form provided by the Department **[or county conservation district]**, for coverage under a General NPDES Permit for Stormwater Discharges Associated With Construction Activities.

Nondischarge alternative**—Environmentally sound and cost-effective BMPs that individually or collectively eliminate the net change from preexisting stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm.**

Normal pool elevation**—**

(i) For bodies of water which have no structural measures to regulate height of water, the height of water at ordinary stages of low water unaffected by drought.

(ii) For structurally regulated bodies of water, the elevation of the spillway, outlet control, or dam crest which maintains the body of water at a specified height.

(iii) This term does not apply to wetlands.

NOT—Notice of Termination**—A request, on a form provided by the Department, to terminate coverage under a permit-by-rule, General or Individual NPDES Permit for Stormwater Discharges Associated With Construction Activities or other permits under this chapter.**

NPDES—National Pollutant Discharge Elimination System—The National system for the issuance of permits under section 402 of the Federal Clean Water Act (33 U.S.C.A. § 1342) including a state or interstate program which has been approved in whole or in part by the EPA**[.]**, **including the regulations codified at 25 Pa. Code Chapter 92 (relating to National**

Pollutant Discharge Elimination System permitting, monitoring and compliance), as amended and updated, and as specified herein.

NPDES Permit for Stormwater Discharges Associated With Construction Activities—A permit required for the discharge or potential discharge of stormwater **[into waters of this Commonwealth]** from construction activities, including clearing and grubbing, grading and excavation activities involving**:**

(i) Equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters of this Commonwealth, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre to less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters of this Commonwealth over the life of the project.

(ii) 5 acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project.

***Oil and gas activities*—Earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities.**

Operator—A person who has one or more of the following:

(i) Oversight responsibility of earth disturbance activity on a project site or a portion thereof **[which]** **who** has the ability to make modifications to the **E&S** **[Erosion and Sediment Control]** Plan**, PCSM Plan,** or site specifications.

(ii) Day-to-day operational control over earth disturbance activity on a project site or a portion thereof to ensure compliance with the **[Erosion and Sediment Control]** **E&S** Plan **or PCSM Plan**.

***Perennial stream*—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing waters and capable, in the absence of pollution or other manmade stream disturbances, of supporting a benthic macroinvertebrate community which is composed of two or more recognizable taxonomic groups of organisms which are large enough to be seen by the unaided eye and can be retained by a United States Standard No. 30 sieve (28 meshes per inch, 0.595 mm openings) and live at least part of their life cycles within or upon available substrates in a body of water or water transport system.**

Perimeter BMPs—BMPs placed or constructed along the perimeter of an earth disturbance area to prevent runoff from entering the disturbed area, or to capture and treat sediment runoff prior to leaving a disturbed area.

Person—Any operator, **[natural person, partnership, association or corporation or an agency, instrumentality or entity of Federal or State government, including a municipality]** **individual, public or private corporation, partnership, association, municipality or political**

subdivision of this Commonwealth, institution, authority, firm, trust, estate, receiver, guardian, personal representative, successor, joint venture, joint stock company, fiduciary; Department, agency or instrumentality of state, federal or local government, or an agent or employee thereof; or any other legal entity.

Permanent stabilization—Long-term protection of soil and water resources from accelerated erosion.

[Permanent *pool*—The area within a sediment basin which is designed to be inundated with water at all times.

***Principal spillway*—The structure within a sediment basin which controls the discharge of water from the facility.]**

***Point source*—**

(i) Any discernible, confined and discrete conveyance, including any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged.

(ii) This term includes concentrated or channelized flow associated with stormwater.

(iii) This term does not include sheet flow associated with stormwater.

***Pollutant*—Any contaminant or other alteration of the physical, chemical, biological, or radiological integrity of surface water which causes or has the potential to cause pollution as defined in section 1 of the Clean Streams Law (of 35 P.S. § 691.1).**

***Post Construction Stormwater*—Stormwater associated with a project site after earth disturbance activity has been completed and the project site is permanently stabilized.**

***PCSM*—Post construction stormwater management.**

***PCSM Plan*—A site-specific plan identifying BMPs to manage changes in stormwater runoff volume, rate, and water quality after earth disturbance activities have ended and the project site is permanently stabilized.**

***PPC Plan—Preparedness, Prevention and Contingency Plan*—A written plan that identifies an emergency response program, material and waste inventory, spill and leak prevention and response, inspection program, housekeeping program, security and external factors, developed and implemented at the construction site to control potential discharges of pollutants other than sediment into waters of this Commonwealth.**

Project site—The entire area of activity, development**, lease,** or sale including:

(i) The area of an earth disturbance activity.

(ii) The area planned for an earth disturbance activity.

(iii) Other areas which are not subject to an earth disturbance activity.

***Riparian forest buffer*—A BMP that is an area of permanent vegetation consisting of predominantly native trees, shrubs and forbs along surface waters that is maintained in a natural state or sustainably managed to protect and enhance water quality, stabilize stream channels and banks, and buffer land use activities from surface waters.**

Road maintenance activities—Earth disturbance activities within the existing road cross-section, such as grading and repairing existing unpaved road surfaces, cutting road banks, cleaning or clearing drainage ditches and other similar activities.

Sediment—Soils or other **erodible** materials transported by surface water as a product of erosion.

Sedimentation—The action or process of forming or depositing sediment in waters of this Commonwealth.

[Skim—To remove the uppermost portion of water within a sediment basin.]

***Soil loss tolerance (T)*—The maximum amount of soil loss, in tons/acre/year, that a given soil type can tolerate and still permit a high level of crop production to be sustained economically and indefinitely. Values for T for various soil types may be obtained from the *Pennsylvania Soil and Water Conservation Technical Guide*, USDA NRCS, 1991 (as amended and updated).**

Stabilization—The proper placing, grading, constructing, reinforcing, lining, and covering of soil, rock or earth to **[i]e**nsure their resistance to erosion, sliding or other movement.

***Stormwater*—Runoff from precipitation, snowmelt, and surface runoff and drainage.**

***Surface waters*—Perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps, and estuaries, excluding water at facilities approved for wastewater treatment such as wastewater treatment impoundments, cooling water ponds, and constructed wetlands used as part of a wastewater treatment process.**

Timber harvesting activities—Earth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices.

***Top of streambank*—First substantial break in slope between the edge of the bed of the stream and the surrounding terrain. The top of streambank can either be a natural or constructed (i.e., road or railroad grade) feature, lying generally parallel to the watercourse.**

Waters of this Commonwealth—Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or

channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.

§ 102.2. Scope and purpose.

(a) This chapter requires persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation **and to manage post construction stormwater**.

(b) The BMPs shall be undertaken to protect, maintain, reclaim and restore water quality and the existing and designated uses of waters of this Commonwealth.

§ 102.3. [Reserved].

§ 102.4. Erosion and sediment control requirements.

(a) For agricultural plowing or tilling activities **or for animal heavy use areas**, the following erosion and sediment control requirements apply:

(1) The implementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet (464.5 square meters).

(2) Written **[Erosion and Sediment Control]** **E&S** Plans are required for agricultural plowing or tilling activities **or for animal heavy use areas** that disturb 5,000 square feet (464.5 square meters) or more of land.

(3) The landowner, and any lessee, renter, tenant or other land occupier, conducting or planning to conduct agricultural plowing or tilling activities**, or operating an animal heavy use area,** are jointly and individually responsible for developing a written **[Erosion and Sediment Control]** **E&S** Plan and implementing and maintaining BMPs, including those identified in the **[Erosion and Sediment Control]** **E&S** Plan.

(4) The **[Erosion and Sediment Control]** **E&S** Plan shall **[be]** **include cost-effective and reasonable BMPs** designed to minimize the potential for accelerated erosion and sedimentation from agricultural plowing or tilling activities **and animal heavy use areas**.

(i) For agricultural plowing or tilling activities, the E&S Plan shall, at a minimum, limit soil loss from accelerated erosion to the soil loss tolerance (T) over the planned crop rotation.

(ii) For agricultural plowing and tilling activities that will occur on fields with less than 25% cover and within 100 feet of a river, or perennial or intermittent stream, additional BMPs shall be implemented to minimize accelerated erosion and sedimentation.

(iii) For animal heavy use areas, the E&S Plan shall identify BMPs to minimize accelerated erosion and sedimentation. BMPs and their design standards are listed in the

current amended and updated version of the appropriate NRCS conservation practice standards such as Heavy Use Area Protection, Critical Area Planting, Fencing, Wastewater Treatment Strip, Constructed Wetland, Use Exclusion, Animal Trails and Walkways, Diversions, and Roof Runoff Structure.

(5) The **[Erosion and Sediment Control]** **E&S** Plan shall contain plan maps**[, soils maps,]** **that show** the location of **features including surface** waters **[of this Commonwealth,]** **and** drainage patterns**, field and property boundaries, buildings and farm structures, animal heavy use areas, roads and crossroads, and BMPs; soils maps;** and a description of BMPs including **animal heavy use area practices and procedures,** tillage systems, schedules**, and crop rotations[, and cost effective and technically practical conservation measures]**. **The plan must be consistent with the current conditions and activities on the agricultural operation.**

(6) The E&S Plan must contain an implementation schedule. The plan must be implemented according to the schedule, and the BMPs shall be operated and maintained as long as there are agricultural plowing or tilling activities or animal heavy use areas, on the agricultural operation.

(7) The portion of a conservation plan that identifies BMPs to minimize accelerated erosion and sedimentation from agricultural plowing or tilling activities, or from operation of animal heavy use areas, may be used to satisfy the E&S Plan requirements of this subsection if it meets the requirements of subsections (4)–(6).

[6](8) The **[Erosion and Sediment Control]** **E&S** Plan shall be available for review and inspection at the **[project site during each stage of the agricultural plowing or tilling activity]** **agricultural operation**.

(9) Nothing in this section negates the requirements under other provisions of this chapter, such as those applicable to construction activities.

(b) For earth disturbance activities other than agricultural plowing or tilling **or animal heavy use areas**, the following erosion and sediment control requirements apply:

(1) The implementation and maintenance of **[erosion and sediment control]** **E&S** BMPs are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet (464.5 square meters).

(2) A person proposing earth disturbance activities shall develop **and implement** a written **[Erosion and Sediment Control]** **E&S** Plan under this chapter if one or more of the following criteria apply:

(i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more.

(ii) The person proposing the earth disturbance activities is required to develop an **[Erosion and Sediment Control]** **E&S** Plan pursuant to this chapter under Department regulations other than those contained in this chapter.

(iii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water pursuant to Chapter 93 (relating to water quality standards).

(3) The **[Erosion and Sediment Control]** **E&S** Plan shall be prepared by a person trained and experienced in **[erosion and sediment]** **E&S** control methods and techniques **[, and shall be designed to minimize the potential for accelerated erosion and sedimentation]**.

(4) **[Earth disturbance activities shall be planned and conducted to minimize the extent and duration of the disturbance.]** **Unless otherwise authorized by the Department or conservation district after consultation with the Department, all earth disturbance activities shall be planned and implemented to the extent practicable in accordance with the following:**

(i) Minimize the extent and duration of the earth disturbance.

(ii) Maximize protection of existing drainage features and vegetation.

(iii) Minimize soil compaction.

(iv) Utilize other measures or controls that prevent or minimize the generation of increased stormwater runoff.

(v) Protect, maintain, reclaim, and restore the quality of water and the existing and designated uses of waters within this Commonwealth.

(5) The **[Erosion and Sediment Control]** **E&S** Plan shall contain **drawings and narrative which describe** the following:

(i) The existing topographic features of the project site and the immediate surrounding area.

(ii) The types, depth, slope, locations and limitations of the soils.

(iii) The characteristics of the earth disturbance activity, including the past, present and proposed land uses and the proposed alteration to the project site.

(iv) The **[amount]** **volume and rate** of runoff from the project **[area]** **site** and its upstream watershed area.

(v) The location of **all surface** waters **[of this Commonwealth]** which may receive runoff within or from the project site and their classification pursuant to Chapter 93 **(relating to water quality standards)**.

(vi) A **[written depiction]** **narrative description** of the location and type of perimeter and onsite BMPs used before, during and after the earth disturbance activity.

(vii) A sequence of BMP installation and removal in relation to the scheduling of earth disturbance activities, prior to, during and after earth disturbance activities **that ensure the proper functioning of all BMPs.**

(viii) Supporting calculations **and measurements**.

(ix) Plan drawings.

(x) A maintenance program which provides for **the operation and maintenance of BMPs and the** inspection of BMPs on a weekly basis and after each **[measurable rainfall] stormwater** event, including the repair of the BMPs to ensure effective and efficient operation. **The program shall provide for completion of a written report documenting each inspection and all BMP repair and maintenance activities.**

(xi) Procedures which ensure that the proper measures for the recycling or disposal of materials associated with or from the project site will be undertaken in accordance with this title.

(xii) Identify naturally occurring geologic formations or soil conditions that may have the potential to cause pollution during earth disturbance activities and include BMPs to avoid or minimize potential pollution and its impacts from such formations.

(xiii) Evaluate the potential for thermal impacts to surface waters from the earth disturbance activity and include BMPs to avoid, minimize, or mitigate potential pollution from thermal impacts.

(xiv) The E&S Plan shall be planned, designed, and implemented to be consistent with the PCSM Plan pursuant to § 102.8 (relating to PCSM requirements). Unless otherwise approved by the Department, the E&S Plan must be separate from the PCSM Plan and labeled "E&S" or "Erosion and Sediment Control Plan" and be the final plan for construction.

(xv) Identify existing and proposed forest riparian buffers.

(6) Where an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value pursuant to Chapter 93 **(relating water quality standards)**, the person proposing the activity shall, as applicable, use **[the following Special Protection] nondischarge alternatives and ABACT** BMPs to maintain and protect the water from degradation**[:]**. **Nondischarge alternatives and ABACT BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), as amended and updated.**

[(i) Special sediment basin requirements.

(A) Principal spillways shall be designed to skim water from the top 6 inches (15 centimeters) of the dewatering zone, or shall have permanent pools greater than or equal to 18 inches (46 centimeters) deep.

(B) The basin shall be designed with a flow length to basin width ratio of 4:1 or greater.

(C) The basin shall be designed so that it dewaters in at least 4 days and no more than 7 days when at full capacity.

(ii) Channels, collectors and diversions shall be lined with permanent vegetation, rock, geotextile or other nonerosive materials.

(iii) BMPs that divert or carry surface water shall be designed to have a minimum capacity to convey the peak discharge from a 5-year frequency storm.

(iv) Upon completion or temporary cessation of the earth disturbance activity, or any stage thereof, the project site shall be immediately stabilized.]

(v) The Department **[or county conservation district]** may approve alternative BMPs which will maintain and protect existing water quality and existing and designated uses.

(7) The **[Erosion and Sediment Control]** **E&S** Plan**, inspection reports, and monitoring records** shall be available for review and inspection by the Department or the **[county]** conservation district at the project site during all stages of the earth disturbance activity.

(8) Upon complaint or site inspection, the Department or **[county]** conservation district may require that the **E&S** Plan be submitted for review and approval to ensure compliance with this chapter.

(c) The Department **may require,** or **[county]** conservation district **[may require]** **after consultation with the Department** may require**,** other information necessary to adequately review a plan, or may require additional BMPs, on a case-by-case basis, when necessary to ensure the maintenance and protection of water quality and existing and designated uses.

(d) A person proposing or conducting an earth disturbance activity shall obtain all other necessary permits and authorizations from the Department or conservation district, related to the earth disturbance activity, before commencing with the earth disturbance activity.

(e) Persons proposing an earth disturbance activity that requires permit coverage under § 102.5 (relating to activities requiring a permit, and relating to types of permit coverage) must have permit coverage prior to commencing the earth disturbance activity.

§ 102.5. Permit requirements.

(a) ***NPDES Permit Stormwater Discharges Associated with Construction Activities.***

(1) Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of

development sale that involves equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters over the life of the project, shall obtain an individual NPDES Permit or coverage under a general NPDES permit or NPDES permit–by-rule for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity.

[(a)](2) Other than agricultural plowing or tilling **activities, animal heavy use areas,** timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves 5 acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project, shall obtain a**n [general or]** individual NPDES Permit for Stormwater Discharges Associated With Construction Activities **or coverage under a general NPDES permit or NPDES permit–by-rule for Stormwater Discharges Associated with Construction Activities** prior to commencing the earth disturbance activity.

(3) In addition to other applicable requirements, persons required to obtain an Individual NPDES Permit for Stormwater Discharges Associated with Construction Activities for projects proposed in special protection watersheds shall evaluate and use BMPs in accordance with the antidegradation requirements of Chapter 93 (relating to water quality standards) regardless of whether the discharge is new, additional, or increased.

(b) A person proposing a timber harvesting or road maintenance activity involving 25 acres (10 hectares) or more of earth disturbance shall obtain an **[Erosion and Sediment Control Permit] E&S** Permit under this chapter prior to commencing the earth disturbance activity.

(c) A person proposing oil and gas activities that involve 5 acres (2 hectares) or more of earth disturbance over the life of the project shall obtain an E&S Permit under this chapter prior to commencing the earth disturbance activity.

(d) Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting or road maintenance activities, a person proposing earth disturbance activities that involve 5 acres (2 hectares) or more of earth disturbance over the life of the project that do not require a permit under subsections 102.5(a), (b), (c), (g), and (i) shall obtain an E&S Permit under this chapter prior to commencing the earth disturbance activity..

(e) For earth disturbance activities authorized by a permit under this chapter, a preconstruction meeting is required unless the permittee has been notified otherwise in writing by the Department or conservation district. The permittee must contact the Department or conservation district at least 7 days but not more than 30 days prior to the commencement of construction. Permittee(s), co-permittee(s), operator(s), and licensed professional or designee responsible for critical stages of construction must attend a preconstruction meeting along with the Department or conservation district.

(f) A person proposing earth disturbance activities requiring a permit or permit coverage under this chapter shall be responsible to ensure implementation and long-term operation and maintenance of the PCSM Plan.

[(c)](g) A person proposing or conducting an earth disturbance activity approved under a Department permit issued under a chapter other than Chapter 92 (relating to **[National Pollutant Discharge Elimination System]** NPDES permitting, monitoring and compliance) or this chapter, which includes requirements to comply with Chapter 92 and this chapter, need not obtain an additional **[Erosion and Sediment Control]** E&S Permit or NPDES Permit for Stormwater Discharges Associated With Construction Activities.

(h) Operators who are not the permittee shall be co-permittees.

(i) A person proposing or conducting an earth disturbance activity associated with discharging dredged or fill material to waters of the United States which is required to obtain a permit or coverage under a permit pursuant to § 404 of the Clean Water Act (33 U.S.C.A. § 1344) need not obtain an additional E&S Permit or NPDES Permit for Stormwater Discharges Associated with Construction Activities for the area of disturbance covered by the Clean Water Act § 404 permit.

[(d)](j)A person proposing or conducting agricultural plowing or tilling activities **or animal heavy use areas** is not required to obtain an **[Erosion and Sediment Control]** E&S Permit, or an NPDES Permit for Stormwater Discharges Associated With Construction Activities, for these activities under this chapter.

[(e)](k) A person proposing or conducting an earth disturbance activity who is not required to obtain a Permit under this chapter shall comply with the other provisions of this chapter.

§ 102.6. Permit applications and fees.

(a) *Permit requirements*. A person proposing or conducting an earth disturbance activity which requires **[an Erosion and Sediment Control Permit or an NPDES Permit for Stormwater Discharges Associated with Construction Activities]** **a permit** under § 102.5 (relating to permit requirements), shall:

(1) Submit to the Department or a **[county]** conservation district a complete application, **[or]** notice of intent, **or Registration of Coverage (ROC)**, an **[Erosion and Sediment Control]** E&S Plan meeting the requirements of § 102.4 (relating to erosion and sediment control requirements), **a PCSM Plan meeting the requirements of § 102.8 (relating to PCSM requirements),** and other information the Department may require.

(2) Provide proof of consultation with the Pennsylvania Natural **Heritage Program** **[Diversity Inventory (PNDI)]** (PNHP) regarding the presence of a State or Federal threatened or endangered species on the project site. If the Department or **[county]** conservation district determines, based upon **[PNDI]** PNHP data or other sources, that the proposed earth disturbance activity may adversely impact the species or critical habitat, the person proposing the earth disturbance activity shall consult with the Department or **[county]** conservation district to avoid or prevent the impact. If the impact cannot be avoided or prevented, the person proposing the activity shall demonstrate how the impacts will be minimized in accordance with State and Federal laws pertaining to the protection of threatened or endangered flora and fauna and its habitat.

(3) Prepare and implement a PPC Plan when storing, using, or transporting materials including: fuels, chemicals, solvents, pesticides, fertilizers, lime, petrochemicals, wastewater, wash water, core drilling wastewater, cement, sanitary wastes, solid wastes, or hazardous materials onto, on, or from the project site during earth disturbance activities. The PPC Plan must be available upon request by the Department or conservation district.

(b) *Permit fees.*

[(1) Erosion and Sediment Control Permit applications for timber harvesting and road maintenance activities shall be accompanied by an application fee of $500.

(2) Applications and Notices of Intent for an NPDES Permit for Stormwater Discharges Associated with Construction Activities shall be submitted and accompanied by the fee established pursuant to Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance).]

(1) A person submitting a permit application, NOI, or ROC shall submit a fee as follows:

(i) NPDES permit-by-rule $2500.

(ii) General NPDES Permit $2500.

(iii) Individual NPDES Permit $5000.

(iv) General E&S Permit $2500.

(v) Individual E&S Permit $5000

(2) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the Environmental Quality Board. The report must identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and it must contain recommendations to adjust fees to eliminate the disparity, including recommendations for regulatory amendments.

(3) Conservation districts may charge additional fees in accordance with the Conservation District Law (3 P.S. § 857(13)) as amended and updated.

(c) *Complete applications or Notices of Intent.*

(1) An application or NOI for a permit is not complete until the necessary information and requirements under the Clean Streams Law (35 P.S. § 691.1 *et seq.*) and this chapter have been satisfied by the applicant.

(2) When the Department determines that an application or NOI is incomplete or contains insufficient information to determine compliance with this chapter, it will notify the applicant in writing. The applicant shall then have 60 days to complete the application or NOI, or the Department will consider the application to be withdrawn by the applicant. Requests for a specific extension may be sought by the applicant in writing. The applicant will be notified in writing when an application or NOI is considered withdrawn. When an application or NOI is considered withdrawn, the Department will close the application file and take no further action to review the file.

(3) **If the incomplete or deficient application is returned or withdrawn, the fees associated with filing the application will not be refunded.**

§ 102.7. Permit termination.

(a) Upon permanent stabilization of the earth disturbance activity under § 102.22**[(c)]**(a)(2) (relating to permanent stabilization), the person who obtains permit coverage under this chapter shall submit a notice of termination to the Department or **[county]** conservation district.

(b) The notice of termination shall include:

(1) The facility name, address and location.

(2) The operator name and address.

(3) The permit number.

(4) The reason for permit termination.

(5) Identify the person(s) who will be responsible for operation and maintenance of the PCSM BMPs in accordance with the approved PCSM Plan.

(c) Until such time as the permittee has received written acknowledgement of a notice of termination, the permittee will remain responsible for compliance with all permit terms and conditions including operation and maintenance of all PCSM BMPs on the project site and is responsible for violations occurring on the project site.

§ 102.8. PCSM requirements.

(a) A person proposing an earth disturbance activity that requires NPDES permit coverage under this chapter or other Department permit that requires compliance with this chapter shall be responsible to ensure that a written PCSM Plan is developed, implemented, operated, and maintained.

(b) All management of post construction stormwater shall be planned and conducted to the extent practicable in accordance with the following:

(1) Preserve the integrity of stream channels and protect the physical, biological, and chemical qualities of the receiving stream.

(2) Prevent an increase in the rate of stormwater runoff.

(3) Minimize any increase in stormwater runoff volume.

(4) Minimize impervious areas.

(5) Maximize the protection of existing drainage features and existing vegetation.

(6) Minimize land clearing and grading.

(7) Minimize soil compaction.

(8) Utilize other measures or controls that prevent or minimize the generation of increased stormwater runoff and pollutants.

(9) Protect, maintain, reclaim, and restore the quality of water and the existing and designated uses of waters within this Commonwealth.

(c) The PCSM Plan must be planned, designed, and implemented to be consistent with the E&S Plan pursuant to § 102.4(b) (relating to E&S requirements for earth disturbance activities other than agricultural plowing or tilling activities or animal heavy use areas).

(d) Unless otherwise approved by the Department, the PCSM Plan must be separate from the E&S Plan and labeled "PCSM" or "Post Construction Stormwater Management Plan" and be the final plan for construction.

(e) The PCSM Plan must be prepared by a person trained and experienced in PCSM design methods and techniques.

(f) The PCSM Plan must contain drawings and narrative requirements as described within this chapter and other supporting documentation. The PCSM Plan must be designed to minimize the threat to human health, safety, and the environment to the greatest extent practicable. All PCSM Plans must contain at a minimum the following:

(1) The existing topographic features of the project site and the immediate surrounding area.

(2) The types, depth, slope, locations, and limitations of the soils and geologic formations.

(3) The characteristics of the project site, including the past, present, and proposed land uses and the proposed alteration to the project site.

(4) Identify the net change in volume and rate of stormwater from preconstruction hydrology to post construction hydrology for the entire project site and each drainage area.

(5) Identify the location of surface waters, which may receive runoff within or from the project site and their classification pursuant to Chapter 93 (relating to water quality standards).

(6) A written description of the location and type of PCSM BMPs including construction details for permanent stormwater BMPs including permanent stabilization specifications and locations.

(7) A sequence of PCSM BMP implementation or installation in relation to earth disturbance activities of the project site and a schedule of inspections for critical stages of PCSM BMP installation.

(8) Supporting calculations.

(9) Plan drawings.

(10) A long-term operation and maintenance schedule, which provides for inspection of PCSM BMPs, including the repair, replacement, or other routine maintenance of the PCSM BMPs to ensure effective and efficient operation. The program shall provide for completion of a written report documenting each inspection and all BMP repair and maintenance activities and how access to the PCSM BMPs will be provided.

(11) Identification of the person(s) responsible for long-term operation and maintenance of the PCSM BMPS.

(12) Procedures, which ensure that the proper measures for the recycling or disposal of materials associated with or from the PCSM BMPs, are in accordance with Department laws, regulations, and requirements.

(13) Identify natural occurring geologic formations or soil conditions that may have the potential to cause pollution after earth disturbance activities are completed and PCSM BMPs are operational, and develop a management plan to avoid or minimize potential pollution and its impacts.

(14) An evaluation of potential thermal impacts from post construction stormwater to surface waters and include BMPs to avoid, minimize, or mitigate potential pollution from thermal impacts.

(15) Riparian Forest Buffer Management Plan when required under § 102.14 (relating to buffer requirements).

(16) Additional information requested by the Department.

(g) PCSM Plans for proposed activities requiring a permit under this chapter require the following additional information:

(1) Analytical testing and assessment of soil, geology, and other predevelopment site characteristics including infiltration and geotechnical studies that identify location and depths of test sites and method(s) used.

(2) Analysis demonstrating that the PCSM BMPs will: meet the volume reduction and water quality requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality. The analysis for the 2-year/24-hour storm event must be conducted using the following minimum criteria:

(i) Existing predevelopment nonforested pervious areas must be considered meadow in good condition or its equivalent.

(ii) When the existing project site contains impervious area, 20% of the existing impervious area to be disturbed must be considered meadow in good condition or better, except for repair, reconstruction, or restoration of roadways or utility infrastructure when the site will be returned to existing condition.

(3) Analysis demonstrating that the PCSM BMPs will: meet the rate requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change in peak rate for the 2-, 5-, 10-, 25-, 50-, and 100-year/24-hour storm events in a manner not to exceed preconstruction rates.

(i) Hydrologic routing analysis is required to demonstrate this requirement is met.

(ii) Exempt from this requirement are Department approved direct discharges to tidal areas or Department approved no detention areas.

(4) Identify the methodologies for calculating the total runoff volume and peak rate of runoff and provide supporting documentation and calculations.

(5) Construction techniques or special considerations to address soil and geologic limitations.

(6) The Department may require, or after consultation with the Department a conservation district may require, additional information necessary to adequately review a PCSM Plan or may require additional BMPs, on a case-by-case basis, when necessary to ensure the maintenance and protection of water quality and existing and designated uses.

(h) Where a PCSM Plan is being developed for an activity that may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value pursuant to Chapter 93 (relating to water quality standards), the person proposing the activity shall use nondischarge and ABACT BMPs to maintain and protect the water from degradation. Specifically, the person proposing the activity shall use PCSM BMPs that collectively

achieve no net change when compared to preconstruction discharges, in stormwater runoff volume, rate and water quality during storm events up to and including the 2-year/24-hour storm event. Nondischarge alternatives and ABACT BMPs and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual* Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(i) Upon complaint or site inspection, the Department or conservation district may require that the PCSM Plan be submitted for review and approval to ensure compliance with this chapter.

(j) The PCSM Plan, inspection reports and monitoring records shall be available for review and inspection by the Department or the conservation district.

(k) A licensed professional or their designee shall be present on site and be responsible during critical stages of implementation of the approved PCSM Plan including underground treatment or storage BMPs, structurally engineered BMPs, or other BMPs as deemed appropriate by the Department.

(l) The permittee shall include with their notice of termination "Record Drawings" with a final certification statement from a licensed professional, which shall read as follows:

"I (name) do hereby certify pursuant to the penalties of 18 Pa. C.S.A. § 4904 to the best of my knowledge, information and belief, that the accompanying record drawings accurately reflect the redline drawings, are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environment Protection and that the project site was constructed in accordance with the approved PCSM Plan and accepted construction practices."

(1) The permittee shall retain a copy of the record drawings as a part of the approved PCSM Plan.

(2) The permittee shall provide a copy of the record drawings as a part of the approved PCSM Plan to the person identified in this section as being responsible for the operation and maintenance of the PCSM BMPs.

(m) *Operation and maintenance requirements.* Unless a different person is approved in writing by the Department, operation and maintenance of PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMP is located. The deed for any property containing a PCSM BMP shall identify the PCSM BMP and provide notice that the responsibility for operation and maintenance of the PCSM BMP is a covenant that runs with the land and that is enforceable by subsequent grantees. Any grantor that fails to comply with this requirement shall remain jointly responsible with the landowner for operation and maintenance of the PCSM BMPs located on the property.

(n) The portion of a site reclamation or restoration plan that identifies PCSM BMPs to manage stormwater from oil and gas activities or mining activities permitted in accordance with 25 Pa. Code Chapters 77 and 86-90, or a plan for abandoned mine land reclamation

activities may be used to satisfy the PCSM Plan requirements of this section if the reclamation plan meets the requirements of subsections (b),(c), (e), (f), (h), (i), and (m).

EROSION AND SEDIMENT CONTROL AND POST CONSTRUCTION STORMWATER MANAGEMENT BMPs

§ 102.11. General requirements.

(a) A person conducting or proposing to conduct an earth disturbance activity shall:

(1) Design, implement and maintain **E&S** BMPs to minimize the potential for accelerated erosion and sedimentation in order to protect, maintain, reclaim and restore water quality and existing and designated uses. Various **E&S** BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual* (Manual), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 **[(January 1996)] (April 2000)**, as amended and updated.

(2) If required to develop a PCSM Plan, design, implement, and maintain PCSM BMPs to mimic preconstruction stormwater runoff conditions in order to protect, maintain, reclaim, and restore water quality and existing and designated uses. Various PCSM BMPs and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual* (Stormwater BMP Manual), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(3) If required to develop a riparian forest buffer, design, implement, and maintain the buffer in accordance with § 102.14 (relating to riparian forest buffer requirements). Various design, construction, and maintenance standards are listed in the *Riparian Forest Buffer Guidance,* (Buffer Guidance), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 395-5600-001 (2009), as amended and updated.

(b) BMPs and design standards other than those listed in the Manuals **or Buffer Guidance** may be used when a person conducting or proposing to conduct an earth disturbance activity demonstrates to the Department **[or a county conservation district]** that the alternate BMP or design standard minimizes accelerated erosion and sedimentation **or manages stormwater during and after the completion of earth disturbance activities** to achieve the regulatory standards in subsection (a).

§ 102.12. [Reserved].

§ 102.13. [Reserved].

§ 102.14 Riparian forest buffer requirements.

(a) *General requirements.*

(1) Persons proposing or conducting earth disturbance activities shall incorporate a riparian forest buffer within the boundaries of the project site in accordance with this section if:

(i) The activity requires a permit under this chapter, is located within an Exceptional Value watershed, and the project site contains, is along or within 150 feet of a river, stream, creek, lake, pond, or reservoir;

(ii) The activity is authorized utilizing the permit-by-rule under this chapter; or

(2) A riparian forest buffer may be required to be incorporated within the boundaries of a project site in accordance with this section by other rules, regulations, order, permit, or other approval of the Department.

(3) Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with subsections 102.4(b)–(e) and § 102.8 (relating to PCSM requirements).

(4) An existing riparian forest buffer must: meet the width requirements of § 102.14(d) (relating to average minimum widths); consist predominantly of native trees and shrubs that provide at least 60% uniform canopy cover; noxious weeds and invasive species must be removed or controlled to the extent possible.

(5) Existing sites that consist of predominantly native woody vegetation that do not meet all of the criteria in § 102.14(a)(3) must be enhanced and/or widened by additional plantings in open spaces around existing native trees and shrubs to establish a riparian forest buffer. Noxious weeds and invasive species must be removed or controlled to the extent possible.

(6) On sites with no native woody vegetation, a riparian forest buffer must be established in accordance with this chapter.

(7) Wetlands located in the riparian forest buffer must be protected and maintained consistent with the requirements in Chapter 105 (relating to dam safety and waterway management).

(8) Applicant shall prepare and submit a plan for riparian forest buffer management to the Department or conservation district as part of the PCSM Plan. The riparian forest buffer management plan must describe how the management requirements of this section will be met.

(b) *Composition.*

(1) At a minimum, newly established riparian forest buffers must be composed of two distinct zones, Zones 1 and 2 (§ 102.14(b)(2) relating to zones). Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with subsections 102.4(b) - (e) and § 102.8 (relating to PCSM requirements).

(2) *Zones.*

(i) *Zone 1.* Undisturbed forest (trees) must begin at the top of the streambank or normal pool elevation of a lake, pond, or reservoir and occupy a strip of land measured horizontally on a line perpendicular from the top of streambank or normal pool elevation of a lake, pond, or reservoir. Predominant vegetation must be composed of a variety of native riparian tree species.

(ii) *Zone 2.* Managed forest (trees and shrubs) must begin at the landward edge of Zone 1 and occupy an additional strip of land measured horizontally on a line perpendicular from the top of streambank or normal pool elevation of a lake, pond, or reservoir. Predominant vegetation must be composed of a variety of native riparian tree and shrub species.

(c) *Measurements.* Riparian forest buffers must be measured horizontally with no more than a 10% variation below the minimum width from the normal pool elevation for lake, pond, or reservoir and from top of streambank or top of slope for streams.

(d) *Average minimum widths.*

(1) *All waters.* 100 feet (50 feet Zone 1 and 50 feet Zone 2 for newly established riparian forest buffers) along all rivers, perennial or intermittent streams (both sides), lakes, ponds or reservoirs. Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with subsections 102.4(b)–(e) and § 102.8 (relating to PCSM requirements).

(2) *Impaired waters.* 150 feet (75 feet Zone 1 and 75 feet Zone 2 on newly established riparian forest buffers) along all rivers, perennial or intermittent streams (both sides), lakes, ponds, or reservoirs. Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with subsections 102.4(b)–(e) and § 102.8 (relating to PCSM requirements).

(3) *Special protection waters.* 150 feet (75 feet Zone 1 and 75 feet Zone 2 on newly established riparian forest buffers) in special protection waters (High Quality and Exceptional Value designations) on all rivers, perennial or intermittent streams (both sides), and the shoreline of lakes and ponds. Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with subsections 102.4(b)–(e) and § 102.8 (relating to PCSM requirements).

(4) Existing riparian forest buffers must meet minimum aggregate widths of this chapter.

(5) The average riparian forest buffer width must be calculated based upon the entire lengths of stream bank or shoreline that is located within the boundaries of the project site when calculating the buffer length the natural streambank or shoreline shall be followed.

(e) *Management requirements.*

(1) Both existing and newly established riparian forest buffers, including wetlands and floodplains, must be managed and maintained to enhance and maximize the unique value of these resources.

(2) Newly established riparian forest buffers and sites with existing woody vegetation must be managed in accordance with the riparian forest buffer management plan and until established vegetation consists of predominantly native trees and shrubs that provide at least 60% uniform canopy cover and noxious weeds and invasive species have been removed or controlled to the extent possible for a period of not less than five years.

(3) The following practices and activities are prohibited within the riparian forest buffer:

(i) Soil disturbance by grading, stripping of topsoil, plowing, cultivating, or other practices.

(ii) Draining by ditching, underdrains, or other drainage systems.

(iii) Housing, grazing, or otherwise maintaining animals.

(iv) Storing or stockpiling materials.

(v) Off road vehicular travel.

(4) The following practices and activities are acceptable in the riparian forest buffer when permitted by the Department:

(i) Construction or placement of roads, bridges, trails, storm drainage, utilities, or other structures.

(ii) Water obstructions or encroachments.

(5) The following practices and activities are allowable within the riparian forest buffer:

(i) Activities or practices used to maintain the riparian forest buffer including the disturbance of existing vegetation, tree removal, shrub removal, clearing, mowing, burning, or spraying in accordance with the long-term operation and maintenance plan.

(ii) Restoration projects, facilities, emergency response, and other activities approved by the Department.

(iii) Scientific studies approved by the Department, including water quality monitoring and stream gauging.

(iv) Timber harvesting operations only in Zone 2, as described in this section, that maintain at least 60% uniform canopy cover of predominantly native trees and shrubs and are identified in a Forest Stewardship Plan approved by the Department of Conservation and Natural Resources.

(v) Passive recreational activities.

(f) *Permanent protection of riparian forest buffers.*

(1) Existing and newly established riparian forest buffers including access easements must be protected in perpetuity through deed restriction, conservation easement, local ordinance, or permit conditions.

(2) For any existing or newly established riparian forest buffer, the boundary limits of the riparian forest buffer must be identified and clearly marked.

(g) *Reporting.*

Permittees shall complete data form(s) provided by the Department for newly established and existing riparian forest buffers and submit it to the Department or conservation district as part of the PCSM Plan.

§ 102.15. Permit-by-rule for low impact projects with riparian forest buffers.

(a) Persons proposing or conducting an earth disturbance activity requiring a permit authorization under this chapter shall qualify for permit coverage under this rule if they meet the requirements of this Section, which supersede any requirements of Chapter 92 (relating to NPDES permitting, monitoring and compliance), as amended and updated. An earth disturbance activity that requires a permit authorization under this chapter that is not consistent with this Section shall obtain coverage under a general or individual NPDES Permit for Discharges Associated with Construction Activities or other E&S control permit under this chapter prior to commencing the earth disturbance activity.

(b) *Permit-by-rule exclusions.* The following sites or the activities associated with the project are not eligible for coverage under the permit-by-rule:

(1) Projects located in or with the potential to discharge to waters that have a designated or existing use of Exceptional Value pursuant to Chapter 93 (relating to water quality standards);

(2) Earth disturbance activities conducted in or on the following sensitive areas:

(i) Highly erodible conditions (soils in combination with percent slope) as follows:

(A) 3% to 8% slope with soil K factor greater than 0.37;

(B) 8% to 15% slope with soil K factor greater than 0.28; or

(C) 15% slope with soil K factor greater than 0.18.

(ii) Geological formations that present a risk to public health, safety and the environment including:

(A) Sinkhole development;

(B) Land sliding; or

(C) With the significant potential to cause or contribute to pollution when disturbed including acid, radioactive, and arsenic bearing formations.

(iii) Wetlands or floodplains, unless earth disturbance in these areas is required for access and utilities and is authorized under Chapters 105 or 106 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance; and floodplain management);

(3) Lands that are currently contaminated from a spill or release of a hazardous material, or hazardous, toxic, or other regulated substance, as these terms are defined in Pa. Code 25 of the Pennsylvania Code, that pose a risk or threat to public health, safety, or the environment;

(4) The earth disturbance is being proposed or conducted by a person who has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, and schedule of compliance or order issued by DEP; or

(5) The earth disturbance activities or potential discharges will adversely affect a Pennsylvania or federal endangered or threatened species.

(c) *Permit Conditions.* Persons conducting earth disturbance activities under this permit shall meet all of the following:

(1) All persons seeking coverage under permit-by-rule must first schedule a presubmission meeting with the Department or the conservation district prior to submitting a ROC. The meeting shall also be attended by, the professional engineer, geologist or landscape architect registered in the commonwealth of Pennsylvania that will be responsible for project design and the operator when known. At the presubmission meeting, the registrant must provide:

(i) A site location map (usgs or equivalent) including:

(A) All waters of this Commonwealth and water quality classifications pursuant to Chapter 93 (relating to water quality standards);

(B) Existing site conditions;

(C) Limits of earth disturbance activities;

(D) Preliminary site design;

(E) Total project acres and boundaries;

(ii) Presubmission meeting checklist using form provided by the Department.

(2) When the project site contains, is along, or within 100 feet of a river, stream, creek, lake, pond, or reservoir, the registrant shall:

(i) Establish new or preserve existing riparian forest buffers at least 100 feet in width between the top of streambank or normal pool elevation of a lake, pond, or reservoir and areas of earth disturbance.

(ii) Establish new or preserve existing riparian forest buffers at least 150 feet in width between the top of streambank or normal pool elevation of a lake, pond, or reservoir and disturbed areas for projects located in high quality or impaired watersheds.

(iii) Design and/or maintain a riparian forest buffer in accordance with *Riparian Forest Buffer Guidance*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 395-5600-001 (2009), as amended and updated.

(3) The earth disturbance shall not exceed 15 acres at a time. If the total disturbed area will exceed 15 acres over the life of the project, earth disturbance shall be sequenced in a manner that provides for stabilization prior to disturbance of subsequent phases.

(4) All earth disturbance activities on any portion, part, or during any stage of, a larger common plan of development or sale over the life of the project shall meet the requirements and be covered under a single ROC.

(i) Any significant new or increased changes to the earth disturbance activities that are not included in the original ROC must be submitted to the Department or conservation district through an amended ROC in accordance with this section.

(ii) The new or increased earth disturbance activities shall not commence until receipt of written verification of coverage.

(5) Analysis demonstrating that the PCSM BMPs will: meet the volume reduction and water quality requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality. The analysis for the 2-year/24-hour storm event must be conducted using the following minimum criteria:

(i) Existing predevelopment nonforested pervious areas must be considered meadow in good condition or its equivalent.

(ii) When the existing project site contains impervious area, 20% of the existing impervious area to be disturbed must be considered meadow in good condition or better, except for repair, reconstruction, or restoration of roadways or utility infrastructure when the site will be returned to existing condition.

(6) Analysis demonstrating that the PCSM BMPs will: meet the rate requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change in peak rate for the 2-, 5-, 10-, 25-, 50-, and 100-year/24-hour storm events in a manner not to exceed preconstruction rates.

(i) Hydrologic routing analysis is required to demonstrate this requirement is met.

(ii) Exempt from this requirement are Department approved direct discharges to tidal areas or Department approved no detention areas.

(7) Retain the services of a professional engineer, geologist, or landscape architect registered in the Commonwealth of Pennsylvania who shall:

(i) Prepare and seal E&S and PCSM Plans to be submitted with the ROC which shall contain the following certification:

"I (name) do hereby certify, pursuant to the penalties of 18 Pa. C.S.A. § 4904, to the best of my knowledge, information and belief that the ROC, E&S and PCSM Plans are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environmental Protection."

(ii) Identify in the E&S and PCSM Plans a schedule of inspections for critical stages of E&S and PCSM BMP installation and provide oversight responsibility during construction of those critical stages.

(iii) Oversee and seal any necessary modifications to E&S and PCSM Plans; and submit copies of modified plans to the Department or conservation district; and

(iv) Prepare and seal record drawings and provide certification that the E&S and PCSM BMPs were installed consistent with E&S and PCSM Plans submitted with the ROC.

(8) *Preconstruction notification*. Upon receipt of the Verification of Coverage, the registrant shall notify the Department or conservation district at least 7 business days before commencing construction.

(9) The registrant or co-registrant shall have the E&S Plan, PPC Plan, PCSM Plan, and other documents required by this permit-by-rule available at the site for review by the Department, conservation district, or other authorized local, state, or federal government official.

(10) The registrant must implement the plans developed and verified in accordance with this section.

(11) The registrant or their agent shall notify the Department or conservation district no less than 3 days prior to critical stages of E&S and PCSM BMP installation.

(d) *Projects located in High Quality watersheds or watersheds impaired for sediment or stormwater.*

(1) Permit-by-rule registrants proposing projects that are located in watersheds that have a designated or existing use of high quality, or nonspecial protection waters impaired for sediment or stormwater must demonstrate that all construction and post construction discharges will not degrade the physical, chemical or biological characteristics of the surface waters and may not utilize the social or economic justification process established pursuant to § 93.4c(b)(iii) (relating to social or economic justification (SEJ) in High Quality waters). In addition to the 150-foot riparian forest buffer, registrants shall utilize solely nondischarge alternative BMPs in their E&S and PCSM Plans.

(2) *Public notice.*

(i) The registrant shall provide a public notice once a week for 3 consecutive weeks in at least 1 newspaper of general circulation within the geographical area of the project site prior to submission for the ROC. The contents of every public notice must include the following:

(A) The name, address, and phone number of the registrant.

(B) The notice must include a 30-day period following publication of the notice during which written comments may be submitted by interested persons to the applicant.

(C) A brief description of each registrant's activities and project location which result in the discharge proposed for the permit-by-rule.

(D) The name of the receiving water and watershed to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether the discharge is a new or an existing discharge.

(E) The location of the nearest downstream potable water supply, or a finding that no potable water supply will be affected by the proposed discharge.

(F) The means by which interested persons may comment upon the proposed project.

(G) Contact information including the name, address, and phone number where interested persons may obtain further information regarding the project.

(H) The existing or designated use of the receiving surface water pursuant to Chapter 93 (relating to water quality standards).

(ii) Registrant shall provide proof that public notice has been published in a newspaper of general circulation covering the locality or localities in which the activity is or will be

located. The proof of public notice, along with any comments and responses, shall be submitted with the ROC.

(e) *Municipal notification.* At least 30 days prior to submission of the ROC, the registrant shall provide written notification to every municipality in which the proposed earth disturbance activity will be located pursuant to Act 14 of 1984, 71 P.S. § 510-5, (Administrative Code § 1905-A). Proof of this notification shall be submitted with the complete ROC.

(f) *Written E&S Plan, PCSM Plan, and PPC Plan.* The registrant shall develop an E&S Plan, PCSM Plan, and PPC Plan in accordance with the requirements of this chapter and the following:

(1) The E&S BMPs required by this section shall be designed and implemented to meet the standards and specifications identified in the Department's *Erosion and Sediment Pollution Control Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), as amended and updated.

(2) PCSM BMPs shall be designed and implemented to meet the standards and specifications identified in the *Pennsylvania Stormwater Best Management Practices Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(3) Both the E&S Plan and the PCSM Plan shall include a riparian forest buffer designed in accordance with § 102.14 (relating to riparian forest buffer requirements) and this section.

(4) Both the E&S Plan and PCSM Plan shall minimize the accelerated erosion and sedimentation and shall use PCSM BMPs that collectively achieve no net change when compared to preconstruction discharges in stormwater runoff volume, rate, and water quality. This shall be accomplished first through the use of site design and nonstructural BMP approaches, and if necessary, structural filtration, infiltration, and runoff control BMPs in accordance with *Erosion and Sediment Pollution Control Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), and *Stormwater Best Management Practices Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(5) Both the E&S Plan and PCSM Plan shall be prepared and sealed by a professional engineer, geologist, or landscape architect registered in the Commonwealth of Pennsylvania.

(6) Prepare a PPC Plan in accordance with *Guidelines for the Development and Implementation of Environmental Emergency Response Plans*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 400-2200-001 (April 2001).

(g) *E&S Plan for the permit-by-rule.* The E&S Plan submitted under this section shall meet the requirements of § 102.4 (relating to erosion and sediment control requirements)

and must also include the following categories of E&S BMPs to be installed and maintained. The installation of practices shall be conducted in the following sequence:

(1) *Site preparation, sensitive area and buffer protection.* Prior to commencement of any earth disturbance activity including clearing and grubbing, the registrant shall clearly delineate sensitive areas, riparian forest buffer boundaries, areas proposed for infiltration practices, the limits of clearing, and trees that are to be conserved within the project site and shall install appropriate barriers where equipment may not be parked, staged, operated, or located for any purpose.

(2) *Site access.* This is the first land-disturbance activity to take place at the site and the registrant should provide BMPs to minimize accelerated erosion and sedimentation from the following areas: entrance to the site, construction routes, and areas designated for equipment or other use at the site including parking areas and soil stockpiles.

(3) *Sediment barriers.* Install perimeter BMPs after the construction site is accessed, keeping associated clearing and grubbing limited to only that amount required for installing perimeter BMPs.

(4) *Diversion.* Including outlet protection are constructed to divert upslope clean water runoff around the disturbed area (when necessary).

(5) *Sediment basins and traps.* Including outlet protection shall be constructed prior to the remaining clearing/grubbing and other earth disturbance activities.

(6) *Sediment laden water channels or other conveyance.* Used to divert stormwater runoff water to the appropriate BMPs such as traps and ponds should be installed prior to the remaining clearing/grubbing and other earth disturbance activities.

(7) *Land clearing and grading.* Implement clearing and grading only after all downslope E&S BMPs have been constructed and stabilized.

(8) *Surface stabilization.* Apply temporary or permanent stabilization measures immediately to any disturbed areas where work has reached final grade, has been delayed or otherwise has been temporarily suspended.

(9) *Construction of buildings, utilities, and paving.* During construction, install and maintain any additional E&S BMPs that may be required and implement structural PCSM BMPs.

(10) *Landscaping and final stabilization, topsoiling, trees, and shrubs.* After construction is completed, install stabilization BMPs including: permanent seeding, mulching, sodding and riprap, and complete implementation of PCSM BMPs in this last construction phase. Stabilize all open areas, including borrow and spoil areas, and remove all temporary BMPs and stabilize any disturbances associated with the removal of the BMP.

(h) ***PCSM Plan for the permit-by-rule.*** **The PCSM Plan submitted under this section shall meet the requirements of § 102.8 (relating to PCSM requirements), and shall also include the following categories of BMPs to be installed and maintained:**

(1) ***Nonstructural BMPs.*** **Which promote the treatment, infiltration, evaporation, and transpiration of stormwater runoff shall be used.**

(2) ***Low impact, conservation, and green infrastructure designs.*** **Shall be used to minimize the generation of runoff by preserving open space, preserving natural areas, reducing the amount of impervious surface, and other green infrastructure design principles that utilize or mimic infiltration or evapotranspiration.**

(3) ***Volume reduction and infiltration practices.*** ***S*****hall include either engineered structures or landscape features designed to capture, reuse, recycle and manage, or infiltrate runoff that mimic preconstruction conditions.**

(4) ***Runoff practices.*** **Shall be designed and constructed to convey runoff, increase evaporation, and manage rate. Such practices are to also promote infiltration, filtration, and biological uptake of pollutants.**

(5) ***Filtration practices.*** **Shall be used to treat runoff through filter media that are designed to capture pollutants through the processes of physical filtration of solids or cation exchange of dissolved pollutants.**

(i) ***ROC under the permit-by-rule.*** **Registrants seeking coverage under this permit-by-rule shall prepare and submit a complete ROC to the Department or conservation district. The ROC shall demonstrate eligibility under and compliance with the requirements of this section and shall include:**

(1) ROC checklist.

(2) E&S Plan prepared by a professional engineer, geologist, or landscape architect registered in the Commonwealth of Pennsylvania.

(3) PCSM Plan prepared by a professional engineer, geologist, or landscape architect registered in the Commonwealth of Pennsylvania.

(4) Proof of municipal notice.

(5) For projects in High Quality watersheds or watersheds impaired for sediment or stormwater, provide proof of public notice along with all comments and responses.

(6) Provide proof of consultation with the PNHP regarding the presence of a state or federal threatened or endangered species on the project site.

(7) All applicable fees.

(j) *Eligibility verification.* Upon submission of the ROC, the Department or the conservation district will review the ROC for consistency with the eligibility criteria, conditions and other requirements of this section, and make a determination of coverage within 30 days. Upon determination of eligibility, the Department or the conservation district will provide written verification of coverage for a period of 5 years. The registrant may apply for other permit coverage as referenced in this section if coverage under this permit-by-rule is denied.

(k) *Bulletin notice.* The Department will provide notice in the *Pennsylvania Bulletin* of every approval of coverage under this permit-by-rule.

(l) *Requiring coverage under an individual permit or general permit.*

(1) The Department may deny coverage under this permit-by-rule, or may amend, revoke, suspend or terminate previously issued coverage under this permit-by-rule and require the registrant to apply for and obtain either a general or an individual NPDES permit for failure to meet the requirements of this section. An interested person may petition the Department to take action under this subsection. If a permittee is notified by the Department that previously authorized coverage under this permit is revoked, terminated, or suspended and that a general or individual NPDES permit is required, the registrant shall submit a complete NPDES NOI or application, in conformance with this chapter, within 90 days of receipt of the notification, unless the discharger is already in possession of a valid general or individual NPDES permit. Failure to submit the NOI or application within 90 days shall result in automatic termination of coverage under the permit-by-rule. If the project site is in compliance with this chapter, a timely submission of a complete NOI or application shall result in continuation of coverage under the permit-by-rule until the Department takes final action on the pending NOI or permit application.

(2) An action of the Department or the conservation district denying coverage under this permit-by-rule, or requiring a general or an individual NPDES permit, is not a final action of the Department until the registrant submits and the Department takes final action on an individual permit application.

(m) *ROC.* Persons requesting a renewal of coverage under this permit-by-rule shall submit to the Department or Conservation District an administratively complete and acceptable ROC at least 30 days prior to the expiration date of the coverage. In the event that a timely, administratively complete, and acceptable application for renewal of coverage has been submitted and the Department or conservation district is unable, through no fault of the permittee, to reissue the approval for coverage before the expiration date of the approved coverage, the terms and conditions of the approved coverage will be automatically continued and will remain fully effective and enforceable pending the issuance or denial of the renewal of coverage, provided the permittee is, and has been, operating in compliance with the terms and conditions of the permit-by-rule.

(n) Nothing in this permit-by-rule relieves the registrant of the obligation to obtain any other applicable permits, or of complying with all federal, state, or local laws, regulations or standards for the construction, operation, and maintenance of the project.

(o) ***Termination of coverage.*** **Permit-by-rule registrant covered under this section shall comply with § 102.7 (relating to permit termination) to terminate permit coverage.**

(p) ***Program audit.***

(1) The Department shall audit the permit-by-rule to verify the effectiveness and the level of environmental protection that the permit provides. The audit shall include:

(i) Evaluation of whether the objectives of riparian forest buffers, conservation design, and permittee compliance are being met;

(ii) Whether the professional engineer, geologist, or landscape architect registered in the Commonwealth of Pennsylvania plan certifications are accurate and effective;

(iii) The adequacy of permittee plan development and BMP implementation and maintenance; and

(iv) The effectiveness of achieving the desired environmental results.

(2) This audit process shall not only report noncompliance and corrective actions, but also highlight areas of good practices and favorable results. Such information will be used to develop policy or amend regulations for enhanced and continual improvement.

§ 102.21. [Reserved].

§ 102.22. [Permanent] Site stabilization.

(a) ***Permanent stabilization.*** Upon **final** completion of an earth disturbance activity or any stage or phase of an activity, the site shall **[be]** immediately **have topsoil restored, replaced, or amended**, seeded, mulched or otherwise **permanently stabilized and** protected from accelerated erosion and sedimentation.

(1)[(b)] [Erosion and sediment control] E&S BMPs shall be implemented and maintained until the permanent stabilization is completed. **Once permanent stabilization has been established, all temporary E&S BMPs must be removed. Any areas disturbed in the act of removing temporary E&S BMPs must be permanently stabilized upon completion of the temporary E&S BMP removal activity.**

(2)[(c)] For an earth disturbance activity or any stage or phase of an activity to be considered permanently stabilized, the disturbed areas shall be covered with one of the following:

(i)[(1)] A minimum uniform 70% perennial vegetative cover, with a density capable of resisting accelerated erosion and sedimentation.

(ii)[(2)] An acceptable BMP which permanently minimizes accelerated erosion and sedimentation.

(b) *Temporary stabilization.* Upon temporary cessation of an earth disturbance activity or any stage or phase of an activity where a cessation of earth disturbance activities will exceed 3 days, the site shall be immediately seeded, mulched, or otherwise protected from accelerated erosion and sedimentation pending future earth disturbance activities.

(1) For an earth disturbance activity or any stage or phase of an activity to be considered temporarily stabilized, the disturbed areas shall be covered with one of the following:

(i) A minimum uniform coverage of mulch and seed, with a density capable of resisting accelerated erosion and sedimentation.

(ii) An acceptable BMP which temporarily minimizes accelerated erosion and sedimentation.

§ 102.23. [Reserved].

§ 102.24. [Reserved].

ENFORCEMENT

§ 102.31. Applicability.

The Department or a **[county]** conservation district may enforce this chapter under The Clean Streams Law (35 P. S. § § 691.1—691.1001).

§ 102.32. Compliance and enforcement provisions.

(a) Compliance and enforcement actions under this chapter which may be pursued include the following. The actions listed are cumulative and the exercise of one action does not preclude the exercise of another. The failure to exercise an action will not be deemed to be a waiver of that action:

(1) Investigations and inspections.

(2) Response to complaints.

(3) Orders (including orders to remediate or restore).

(4) Civil penalty proceedings, except as provided in subsection (b).

(5) Summary proceedings.

(6) The suspension, revocation, withholding or denial of permits or approvals.

(7) Notices of violation.

(8) Actions in a court of competent jurisdiction, including requests for injunctive relief.

(9) Other administrative, civil, criminal or equitable action authorized by law.

(b) If the Department finds that pollution or a danger of pollution results from an act of God in the form of sediment from land for which a complete Conservation Plan has been developed by the **[county]** conservation district and the Natural Resource Conservation Service, and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of the **[act]** **Clean Streams Law (35 P.S. § 691.1 *et seq.*)**

(c) Any person aggrieved by an action of a conservation district under this chapter may request an informal hearing with the Department within 30 days following the notice of the action. Any final determination by the Department pursuant to the informal hearing may be appealed to the Environmental Hearing Board in accordance with established administrative and judicial procedures.

(d) For enforcement action taken under this subchapter, the Department or conservation district may collect or recover, from the responsible party, costs and expenses involved in taking enforcement action in accordance with this subchapter and initiating cost recovery actions under this subchapter. The Department or conservation district may collect the amount in the same manner as civil penalties are collected under Section 605 of the Clean Streams Law (35 P. S. 691.1 *et seq.*).

RESPONSIBILITIES OF LOCAL GOVERNING BODIES

§ 102.41. Administration by [county] conservation districts.

(a) The Department may delegate by written agreement the administration and enforcement of this chapter to **[county]** conservation districts if they have adequate and qualified staff, and are or will be implementing the program identified in the delegation agreement.

(b) An acceptable program shall have the concurrence and approval of the governing body of the county in which the **[county]** conservation district operates.

(c) The Department will retain program administration and enforcement over projects which cross the political boundaries of **[county]** conservation districts unless otherwise authorized by the Department.

§ 102.42. Notification of application for permits.

A municipality or county which issues building or other permits shall notify the Department or **[county]** conservation district within 5 days of receipt of an application for a permit involving an earth disturbance activity consisting of **[5]** **1** acre**[s]** (**[2]** **0.4** hectares) or more.

§ 102.43. Withholding permits.

With the exception of local stormwater approvals or authorizations, **[A]** **a** municipality or county may not issue a building or other permit or final approval to those proposing or

conducting earth disturbance activities requiring a Department permit until the Department or a **[county]** conservation district has issued the **[Erosion and Sediment Control]** **E&S** or individual NPDES Permit, or approved coverage under the general NPDES Permit for Stormwater Discharges Associated With Construction Activities under § 102.5 (relating to permit requirements).

§ 102.51. [Reserved].

FEE REPORT FORM

Department of Environmental Protection
Agency

May 4, 2009
Date

Kenneth F. Murin
Contact Person

717-787-6827
Phone Number

	Prior Year	Current Year	First Future Year Projected	Second Future Year Projected
FEE COLLECTIONS:	FY 2006	FY 2007	FY 2011	FY 2012
Current	$705,750	$635,750		
Proposed			$7,350,000	$7,350,000

FEE TITLE AND RATE:	NPDES Stormwater Construction Permit	Erosion & Sediment Control Permit
Current:		
General Permit:	$250	$500
Individual Permit:	$500	$500
Proposed		
General Permit:	$2500	$2500
Individual Permit:	$5000	$5000
Permit-by-rule:	$2500	$2500

FEE OBJECTIVE:

The fees established in the proposed rulemaking are calculated to cover the reasonable costs to the Department and conservation districts to administer the Chapter 102 Program and related training, permit reviews, inspections, program oversight and compliance. Currently, the permit filing fee does not cover the costs of program implementation for the Department or the conservation districts.

FEE RELATED ACTIVITIES AND COSTS:

Examples of Chapter 102 program activities supported by the fees include:

Training – The Department conducts at a minimum annual training for regional staff and conservation district staff. Additionally, the Department conducts localized training and regional meetings to address specific needs of the conservation districts and DEP regions.

Permit Review – The Department and conservation districts conduct erosion control plan and post construction stormwater management plan reviews for the issuance of E&S Permits and NPDES Permits. Reviews include an administrative completeness review and a technical review to ensure the plans have been designed in accordance with Chapter 102.

Inspections – The Department and conservation districts conduct reviews at the beginning and end of earth disturbance activities, as well as periodic inspections throughout the term of permit coverage. Inspections require the completion of an inspection report and follow up to ensure any violations were addressed.

Program oversight – The Department delegates many responsibilities of the Chapter 102 program to the conservation districts. In order to ensure that districts are meeting the obligations of the delegation agreement, the Department conducts periodic reviews of district operations. This involves a file review of issued permits and the accompanying plans along with site visits to conduct field inspections that verify plan implementation.

Compliance – The Department seeks compliance with Chapter 102 through plan reviews and site inspections. The Department first seeks to gain compliance through voluntary participation by permittees, as this is the most cost effective and expedient approach. When this is not achievable the Department takes increasing steps towards compliance from issuing Notices of Violation to taking penalty action.

ANALYSIS:

For the Department and conservation districts to implement the Chapter 102 program, the costs will vary depending upon the number of permitted projects submitted in a given year. Under the Conservation District Law (3 P.S. §859(2)), districts can charge additional fees to meet their increasing costs and have been charging review fees above and beyond the permit filing fee. The fee increase is an attempt to better meet the needs of the districts and the Department. While the permit fees have been chosen to assume the cost of implementation from application submittal to permit termination, the increase may not meet the needs of all districts throughout the state. Those conservation districts may still need to charge an additional review fee.

It is estimated that the proposed fees will cover the cost for program activities identified above. There are two categories of permits: NPDES permits (administered by DEP to meet federal Clean Water Act) and state erosion and sediment control permits that are required under the Pennsylvania Clean Streams Law. The vast majority of activities regulated by this Chapter are permitted under the NPDES Stormwater Construction Permitting program. Currently the fees are $250 for a general permit and $500 for an individual permit. These fees have not been increased since 2000.

The estimated cost to administer the Chapter 102 program for the first full year, fiscal year 2011/2012 is $7,100,000 and the projected revenue is $7,350,000. Thus the projected amount collected in revenue covers the estimated cost of the program

RECOMMENDATION AND COMMENT:

This proposed rulemaking for Chapter 102 sets forth the requirements for earth disturbance activities to minimize erosion and sedimentation and manage stormwater. The Department is proposing an increased fee for activities requiring a permit.

At least every three years, the Department will recommend regulatory changes to the fees in this section to the Environmental Quality Board to address any disparity between program income generated by the fees and program costs. The regulatory amendment will be based upon an evaluation of the accreditation program fees income and the Department's costs of administering the accreditation program.

The Agriculture Advisory Board (AAB) and the Water Resources Advisory Committee (WRAC) held meetings on the dates listed below to review the Department's proposed drafts of the Chapter 102 regulations. Both committees provided invaluable advice and insight to the Department during these meetings. The Department considered all and agreed to many of the recommendations made by the AAB and WRAC. Neither advisory committee voiced any concern over the increase in fees.

- Agricultural Advisory Board (AAB) :
  - February 21, 2007 Overview of proposed revisions
  - October 10, 2007 Overview of proposed revisions
  - December 19, 2007 Discussion of proposed draft language for agricultural activities
  - April 15, 2009 Consideration of Proposed Chapter 102 rulemaking

- Water Resources Advisory Committee (WRAC):
  - January 10, 2007 Overview of proposed revisions
  - January 9, 2008 Overview of proposed revisions
  - July 22, 2008 Overview of riparian forest buffers
  - February 25, 2009 Overview of proposed permit-by-rule
  - April 8, 2009 Consideration of Proposed Chapter 102 rulemaking
  - April 23, 2009 Special Meeting – continuation of proposed Chapter 102
  - April 29, 2009 Second Special Meeting – continuation of proposed Chapter 102 (No quorum of WRAC)

Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063
August 18, 2009

Policy Office 717-783-8727

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

Re: Proposed Rulemaking: Erosion and Sediment Control and Stormwater Management (25 *Pa. Code*, Chapter 102) (#7-440)

Dear Mr. Kaufman:

Enclosed is a copy of a proposed rulemaking for review and comment by the Independent Regulatory Review Commission pursuant to Section 5(a) of the Regulatory Review Act. The proposed rulemaking is scheduled for publication in the *Pennsylvania Bulletin* on August 29, 2009, with a 90-day public comment period and three public meetings and hearings. The Environmental Quality Board (EQB) adopted this proposed rulemaking on June 16, 2009.

This proposed rulemaking includes amendments to 25 *Pa Code*, Chapter 102 to enhance and supplement existing erosion and sediment and stormwater management pollution control regulations and best management practices in order to prevent sediment pollution from entering the surface waters of the Commonwealth during and after various earth disturbance activities. The proposed amendments incorporate specific language which: enhances requirements related to agriculture; clarifies existing requirements for accelerated erosion and sediment control; incorporates updated federal requirements; updates permit fees; codifies post-construction stormwater management requirements; adds requirements related to riparian forest buffers; and introduces a permit-by-rule option for low impact, low risk projects that incorporate riparian forest buffers.

Since 2007, the Department of Environmental Protection (Department) has undertaken extensive outreach to discuss the Chapter 102 regulations, including the Permit-By-Rule and the Riparian Buffers provisions. These included discussions with the PA Conservation Districts, PA Builders Association, Professional Engineers Association, State Conservation Commission, PA Campaign for Clean Water, the Agriculture Advisory Board, and the Water Resources Advisory Committee (WRAC).

The proposed rulemaking was presented to WRAC over the course of several meetings, including most recently on April 29, 2009. WRAC recommended forwarding the regulations to the EQB for adoption as a proposed rulemaking, but with the caveat that the EQB solicit comments from the public, as identified in the Preamble, on the following questions:

- Should the Permit-by-Rule provisions be allowed in HQ waters?

- Are there other ways to implement long-term O&M responsibilities for post-construction and who should be responsible for these activities?
- Should Riparian Forest Buffers be a mandatory requirement for permitted activities in EV waters?

The Department will provide the Commission with the assistance required to facilitate a thorough review of this proposal. Section 5(d) of the Regulatory Review Act provides that the Commission may, within 30 days of the close of the comment period, covey its comments, recommendations and objections to the proposed regulation. The Department will consider any comments, recommendation or suggestions made by the Commission, as well as the Committees and public commentators, prior to final adoption of these regulations.

Please contact me at the number above if you have any questions or need additional information.

Sincerely,

Michele L. Tate

Michele L. Tate
Regulatory Coordinator

Enclosures

0120-FM-PY0011 8/2006

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF POLICY

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER: 7-440

SUBJECT: Erosion and Sediment control and Stormwater management

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- [x] Proposed Regulation
- [ ] Final Regulation
- [ ] Final Regulation with Notice of Proposed Rulemaking Omitted
- [ ] 120-day Emergency Certification of the Attorney General
- [ ] 120-day Emergency Certification of the Governor
- [ ] Delivery of Tolled Regulation
  - a. [ ] With Revisions
  - b. [ ] Without Revisions

RECEIVED
2009 AUG 18 PM 4:09
INDEPENDENT REGULATORY REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
8-18-09	D Smith	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
8/18/9	A Beaven	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
8/18/10	[illegible]	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
8-18-09	A. Rybarczyk	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
8/18/09	Kathy Cooper	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
8/19/09	M. Lothrop	LEGISLATIVE REFERENCE BUREAU (for Proposed only)