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November 25, 2009

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477
regcomments@state.pa.us

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NOV 30 REC'D

INDEPENDENT REGULATORY
REVIEW COMMISSION

RE: Comments on Proposed Chapter 102 Regulations

Dear Environmental Quality Board:

Pennsylvania Council of Trout Unlimited, a non-profit organization with over 12,000 members in Pennsylvania, provides the follow specific comments on the proposed revisions to Chapter 102:

- 1. Forested riparian buffers should be mandatory for all earth disturbances requiring an NPDES permit.**

Forest buffers along our streams provide a wealth of benefits. They filter pollution, enhance the ability of streams to process pollutants, cool streams to offset thermal impacts, reducing flooding and flood damage, increase property values, and help combat climate change. Buffers provide food and habitat for aquatic species. They provide shade and cooler water temperatures for trout.

We strongly recommend that the proposed Chapter 102 regulations be revised to include the Campaign for Clean Water's full *Buffers 100* proposal. This would include, for all new earth disturbance activities that require an NPDES permit, a requirement that the following be a part of the post-construction stormwater management plan:

- 100 foot forest buffers on all streams.
- 150 foot forest buffers on small headwaters streams and impaired streams.
- 300 foot forest buffers on all Exceptional Value (EV) and High Quality (HQ) streams, which are our highest value rivers and streams and require special protection under the law.

- 2. The new "permit-by-rule" option should be eliminated.**

DEP proposes the creation of a new "permit-by-rule" (PBR) option for certain earth disturbance activities which would require DEP and County Conservation Districts to conduct expedited review of permit applications. We strongly oppose the PBR. An expedited permit review process puts rivers and streams at risk, is poor policy, and violates core requirements of the Clean Water Act.

- **The PBR cannot apply in High Quality (HQ) watersheds because its application would violate Pennsylvania's Chapter 93 anti-degradation regulations.**

DEP cannot make the PBR applicable in HQ watersheds without violating the antidegradation regulations set forth in 25 Pa. Code Chapter 93. Since these regulations are a federally required element of a state's water quality standards, the proposed PBR would violate existing federal law and may result in EPA revoking approval of DEP's antidegradation program as it relates to stormwater discharges.

Any PBR authorization granted in an HQ watershed under this proposed process would clearly violate Pennsylvania's antidegradation regulations. The most critical element to the antidegradation implementation regulations is that, *as the first step* in the hierarchy, nondischarge alternatives *must* be evaluated and *must* be used if they are feasible. In these regulations, DEP does not require the comprehensive and thorough antidegradation analysis that is necessary to ensure that nondischarge alternatives are fully evaluated and, where feasible, fully implemented.

Because of the complexity and multi-tiered nature of the antidegradation analysis required under Chapter 93, it is clear that an expedited PBR process will be a legally deficient process for implementing Pennsylvania's antidegradation regulations. In fact, existing NPDES regulations (Chapter 92) acknowledge this by requiring individual NPDES permits for all discharges in HQ or EV waters. 25 Pa. Code § 92.83(b)(9). The PBR process, which is more expedited and less review-intensive than even the general permit process, would clearly be an inadequate and illegal vehicle for implementing antidegradation regulations in HQ streams.

- **The proposed PBR violates the Clean Water Act because it does not require meaningful agency review of NPDES permit effluent limits by the permitting authority.**

The proposed PBR does not contain a requirement to conduct a technical review of erosion and sediment control (E&S) plans and post-construction stormwater management (PCSM) plans. It is absolutely critical for DEP and County Conservation District staff to conduct thorough technical reviews of the detailed and highly technical E&S and stormwater management plans to ensure that rivers and streams are protected from erosion and stormwater runoff.

Moreover, simply because buffers may be required for projects permitted under the PBR option does not mean that good stormwater management and overall site design can be ignored. Buffers of 100 feet or greater are only part of an appropriate stormwater management plan. Along with buffers, stormwater management plans must also employ upslope best management practices (BMPs) that seek to minimize disturbance, maximize the use of existing and planted native vegetation and good infiltrating soils, and treat stormwater runoff at the source. Without requiring technical review of such plans, DEP cannot ensure that the development will employ these necessary stormwater management practices to adequately control stormwater runoff and prevent pollution.

- **The proposed PBR violates the Clean Water Act because it does not provide adequate public participation opportunities.**

The PBR does not allow for the opportunity for the public to review permit applications and plans and comment on them prior to DEP authorizing use of the PBR. Nor, for that matter, are these public participation opportunities made available through DEP's current general permitting scheme for stormwater NPDES permits. Public participation opportunities are mandatory under the Clean Water Act. The proposed Chapter 102 regulations should be revised to provide for public notice and opportunity to review and comment on permit applications on *all* types of NPDES stormwater permits.

- **The PBR will likely result in economically costly and environmentally damaging problems that will develop during or after construction.**

Under a PBR approach, the lack of an adequate technical review of plans means that DEP and Conservation Districts will not have the time to conduct thorough reviews of plans and require important substantive technical changes to those plans that may be necessary to avert serious erosion and stormwater problems during and after construction. Correcting a flawed design during or after construction is much more expensive and difficult (if it is even possible) than doing so as part of plan review, and significant pollution can occur in the interim. It is much less expensive and more protective of health, safety, and the environment to ensure that plans are technically correct before construction begins.

The oil and gas erosion and sediment control permit revocations that DEP recently undertook are stark examples of this problem. The plans as submitted clearly had important substantive technical problems, including “inaccurate calculations” and “failure to provide best management practices.” DEP’s permit revocations meant that the drilling companies were required to immediately cease earth disturbance activities.

This is a backwards, reactionary, and costly way of doing things which places both the environment and the regulated community at risk. The solution is simple—do not institute an expedited PBR permit review process, but rather require technical review of plans and opportunities for the public to comment on those plans, so that potential problems can be corrected and avoided during the permit review process.

3. We support the requirement for earth disturbance activities associated with oil and gas development to obtain NPDES stormwater permits.

The proposed regulations require earth disturbance activities associated with oil and gas development to obtain NPDES permits for stormwater discharges associated with construction. We fully support this regulation; as such earth disturbance activities can result in sediment and stormwater pollution during both the construction and post-construction phases, just as with other forms of development. There is no good reason to treat oil and gas developers different from commercial and residential developers with respect to erosion and sediment control and stormwater permitting.

4. The threshold for requiring an E&S permit for timber harvesting and road maintenance should be reduced to 5 acres.

The current proposal keeps this threshold at 25 acres. Timber harvesting and road maintenance activities of such a large size can result in significant earth disturbance and corresponding potential for accelerated erosion and sedimentation. Reducing the threshold to projects of 5 acres or greater would be more protective of water quality, and would be consistent with requirements for other regulated activities.

5. The increase of application fees will help cover current costs associated with reviewing applications and plans.

We support the increase in application fees. The fees should be at levels that can sustain the program. We recognize the challenges that DEP faces in implementing the stormwater program given limited staff and funding, and an increase in fees should help address these challenges.

Thank you for the opportunity to submit these comments.

Sincerely,

Dave Rothrock

Dave Rothrock, President
Pennsylvania Council of Trout Unlimited

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Chambers, Laura M.

From: Nardone, Deb
Sent: Tuesday, November 24, 2009 3:19 PM
To: EP, RegComments
Subject: PATU Comments on Chapter 102

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Please accept these comments on the proposed changes to Chapter 102.

Thank you,
Deborah Nardone

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