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GARY E. SLAGEL
Director, Government Affairs

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Rachel Carson State Office Building
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RE: Proposed Rulemaking. Erosion and Sediment Control and Stormwater Management. 39 Pa.B. 5121; August 29, 2009.

Dear Sir or Madam:

CNX Gas is submitting these comments in reference to Pennsylvania Department of Environmental Quality's proposed revisions to the Erosion and Sediment Control and Stormwater Management regulations in 25 Pennsylvania Code Chapter 102. CNX Gas owns and operates nearly 500 gas wells (coalbed methane, Upper Devonian and Marcellus Shale), approximately 190 miles of natural gas pipeline and 37 compressor stations in Pennsylvania as well as extensive natural gas exploration and production assets. The construction and maintenance of natural gas transmission pipelines and compressor stations and certain natural gas exploration and production activities are regulated under these provisions and will be subject to the revised requirements proposed in this rulemaking in the future.

Pennsylvania currently has extensive requirements for controlling accelerated erosion and preventing sediment pollution from various earth disturbance activities. These requirements have been effective in achieving the stated purpose of minimizing accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing designated uses of waters within the Commonwealth. The EQB now proposes to change these effective requirements to "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." The EQB has taken more than forty printed pages to provide this elaboration and to revise the current program without any stated justification for the need for much of what is now proposed. CNX Gas will limit its comments to those provisions of the proposed rule that directly relate to oil and gas activities.

First, CNX Gas believes that longstanding and well-established erosion and sedimentation control requirements have been fully effective in regard to oil and gas activities. The proposed rules include several new and burdensome requirements that would adversely affect these activities. No new requirements should be added without adequate justification and

no such justification is expressed in connection with this proposed rulemaking. Second, the federal Energy Policy Act of 2005 expressly exempts stormwater discharges associated with oil and gas activities from NPDES permitting programs. Therefore, it is inappropriate to impose any requirements for stormwater discharges associated with oil and gas activities as a result of NPDES permitting rules. Third, regardless whether or not it is lawful to subject the oil and gas industry to a stormwater permitting program, there is simply no justification for imposing the proposed permitting requirements upon the oil and gas industry. Fourth, as currently drafted, the proposed permit and permit-by-rule processes would provide no improvement on current permitting mechanisms for the oil and gas industry. Oil and gas construction activities are significantly different from other types of construction projects and are expressly regulated by the Pennsylvania Oil and Gas Act. However, to improve upon the current program, the Department should create a general permit program solely for such activities.

As stated above, this proposal significantly expands the scope of the existing erosion and sediment control program and adds several items not directly related to the prevention of accelerated erosion, specifically post-construction stormwater management requirements, stormwater runoff restrictions, and riparian forest buffer requirements. Some of these requirements impose significant land ownership, land use and management restrictions and will require use of environmental covenants and conservation easements to ensure compliance. In addition, there is repeated emphasis in both the definitions and through new requirements on the stated intent to "reclaim and restore" waters of the commonwealth, as opposed to a more reasonable standard of ensuring that permitted activities maintain and do not degrade existing water quality. The proposed revisions mandate excessive restrictions and costly mandates above and beyond federal requirements with a performance-based requirement to "improve and enhance" water quality. The requirements for post-construction stormwater management are inappropriate for most projects where there are no resulting impervious surfaces or grading changes. While we believe, as a whole, that these proposed rules are unnecessary, arbitrary and capricious, we have nevertheless provided specific comments on the following portions of the proposal.

§102.1 Definitions – BMP's- 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.***

A person involved in earth disturbance activities should be obligated to protect and maintain the quality and existing and designated uses of waters of the Commonwealth during the activity (but not before) and be obligated to implement BMPs to protect and maintain the water quality after the activities. The restoration and reclamation of the waters in the project area that have not been degraded by the current project should not become the responsibility of the current project. There is, furthermore, no measure or metric in the implementing regulation that defines whether the current project has restored or reclaimed the water quality of the waterbody in the project area.

§102.1 Definitions – Earth Disturbance Activity – A construction or other human activity which disturbs the surface of the land, including ***land*** *clearing, grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling,* ***operation of heavy animal 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 minerals.*

E&S Permit - Erosion and Sediment Control Permit. A permit required for earth disturbance activities where earth disturbance is associated with timber harvesting, road maintenance activities, or ***oil and gas activities****.*

Oil and gas Activities – Earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities.

The definition of E&S Permit has been changed to remove the applicability threshold of 25 acres or more and different thresholds have been defined for the activities covered by this permit as described in §102.5 - Permit requirements. Since *oil and gas activities* have been added to both of these definitions, as well as its own definition, it may be concluded that these activities may, in some cases, require both an NPDES permit and an E&SC permit (Refer to comment regarding ***§102.5(a)(1)).*** We strongly suggest that any requirement, or hint of a requirement, that an NPDES permit be obtained for E&S activities be deleted from this proposal

§102.1 Definitions- E&S Plan – Erosion and Sediment Control Plan – A site-specific plan ***[identifying] consisting of both drawings and a narrative that identifies*** *BMPs to minimize accelerated erosion and sedimentation* ***before, during, and after earth disturbance activities.***

It should not be necessary to mandate the inclusion of both drawings and narrative, especially for very small earth disturbances, where either one or the other would be appropriate and could adequately satisfy the purpose and need. The rule must clarify that BMPs required in E&S plan should be limited those that are required until the site is permanently stabilized.

§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.***

CNX Gas urges that the requirement to "manage post construction stormwater" be deleted. Earth disturbance activity where the site is restored to pre-construction runoff regime should not be subject to post construction stormwater management requirements.

§102.4(b)(4)(iv) and §102.4(b)(4)(v) - ...earth disturbance activity shall be planned and implemented to the extent practicable in accordance with the following: ...(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.

Minimizing increases in stormwater runoff and reclaiming and restoring water quality are outside the scope of erosion and sedimentation control and should not be included as a required element of planning for each and every earth disturbance activity, regardless of size. Improving water quality is outside the scope of minimizing accelerated erosion and sedimentation. CNX Gas urges the deletion of these requirements from the list of requirements for planning of earth disturbance activities, particularly those under the permitting threshold.

The E&S Plan must contain drawings and narrative which describe the following:

...

§102.4(b)(5)(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 effectiveness and efficient operation.* ***The program must provide for completion of a written report documenting each inspection and all BMP repair and maintenance activities.***

The requirement for written documentation and retention of the inspection reports should only be required for projects that require either an NPDES or an E&S permit. The proposed change would result in this requirement being extended to all projects that disturb greater than 5000 square feet, the threshold for requiring an E&S plan. We believe that this requirement is excessive and should be redefined to include only permitted projects, as it does not improve compliance on smaller projects.

§102.4(b)(5)(xv) Identify existing and proposed riparian forest buffers.

CNX Gas urges that this requirement be deleted from E&S plan requirements. Riparian forest buffers are associated with requirements of some NPDES and E&S permits, but should not be part of the E&S plan for earth disturbance activity. Many E&S plans are developed for small repair and maintenance projects as opposed to new developments where this may be an appropriate requirement; however, this should not be required for all plans regardless of the size and location of the project. Currently, the riparian forested buffer is only required in specific instances.

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

Flexibility is needed in requiring inspection reports and monitoring records to be kept onsite during construction. Many small construction projects do not have an onsite construction trailer or other place sufficient to keep these records. The inspection reports may be kept electronically at a remote office or in possession of an inspector who is not present on site at all times (such as a consultant or licensed professional). We suggest this requirement be changed to require records to be produced promptly (within 24 hours or one business day) upon request.

§102.5(a)(1), (2), and (3)(c) An NPDES permit stormwater discharges associated with construction activities. (1) ... a person proposing an earth disturbance activity that involves equal to or greater than 1 acre and less than 5 acres of earth disturbance with a point source

discharge...shall obtain an individual NPDES Permit ....prior to commencing earth disturbance activity. *(2) ...a person proposing an earth disturbance activity that involves 5 acres or more of earth disturbance... shall obtain* ***a general or*** *an individual NPDES permit ...* ***(3)(c)A person proposing oil and gas activities that involve 5 acres 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.***

Since "oil and gas activities" has been specifically added to the definition of "Earth Disturbance Activity" in §102.1, it appears that oil and gas activities will be required to obtain an NPDES permit as well as an E&S permit. We urge the deletion of any requirement to obtain NPDES permits under this program.

§102.5(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 shall contact the Department or conservation district at least 7 days but not more than 30 days prior to the commencement of construction. Permittees, co-permittees, operators, and licensed professionals or designees responsible for critical stages of construction must attend a preconstruction meeting along with the Department or conservation district.

CNX Gas requests that the rule specify that in most cases a preconstruction meeting will not be required. The PA DEP should specify the conditions under which a preconstruction meeting may be held. Any preconstruction meeting should be held at the nearest PADEP Bureau of Oil and Gas Management office or the local Conservation District office. The Bureau of Oil and Gas personnel and the Conservation Districts are most familiar with our activities and construction practices and are normally involved with the preconstruction activities. Their participation in this role continues to be appropriate and beneficial and should continue as currently managed with these offices both scheduling and participating in preconstruction meetings at their discretion.

§102.6 Permit applications and fees. (b)(2) A person submitting a permit application, NOI, or ROC shall submit a fee as follows:

(i)	***NPDES permit-by-rule --***	***$2,500***
(ii)	***General NPDES Permit - -***	***$5,000***
(iii)	***Individual NPDES Permit --***	***$5,000***
(iv)	***General E&S Permit --***	***$2,500***
(v)	***Individual E&S Permit--***	***$5,000***

CNX Gas believes that the above increased fees are not acceptable nor can they be justified, however, some lower level of fee increases may be acceptable provided that the fees are used to provide the agency resources to improve responsiveness and provide reasonable and defined application processing timelines. As proposed, these rules only impose timelines on the permittee for response to application deficiencies with no guarantee of times for Department review. Timelines should be mandated for both completeness and technical reviews by the Department. General permit applications should not be subject to technical review, but only a

check to determine that all required elements are present and that the standard conditions for coverage have been met.

§102.7(c) Permit Termination. Until the permittee has received written acknowledgement (of) an NOT, the permittee will remain responsible for compliance with the 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.

The Department has provided no justification for the proposed requirement to require written acknowledgement of NOTs which is a future demand on limited Department resources. Again, there is no commitment of response time for this acknowledgement in the proposal, however, permittees would continue to be responsible for permit conditions and the project site for this intervening, undetermined amount of time. This could include continued unnecessary inspections of completely stabilized disturbed areas for extended duration, at considerable expense and with to no further benefit. CNX Gas requests that this requirement be deleted in its entirety – especially for projects involving only temporary earth disturbance that are restored with no added impervious surfaces or constructed PSCM BMPs – such a pipeline installation or repair projects. At a minimum, the NOT should be deemed acknowledged if no response is received within 15 days.

§ 102.8(a) PCSM requirements. 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.

As written, this would require a PCSM Plan (containing all of the extensive listed requirements) for many small repair activities that do not generate post-construction stormwater management issues of any type. For example, a small repair to a pipeline or other structure within a stream channel requires a Chapter 105 permit. All Chapter 105 permits require compliance with Chapter 102 – however, a PCSM Plan would not be appropriate for that activity. CNX Gas requests that the PSCM Plan requirements apply only to earth disturbance activity that requires an NPDES or E&S Permit under this chapter by removing the phrase "or other department permit that requires compliance with this chapter".

§102.8(f)(1), (2), and (3) The PCSM Plan must contain drawings and narrative requirements as described within this chapter and other supporting documentation. The PCSM Plan shall be designed to minimize the threat to human health, safety and the environmental to the greatest extent practicable. 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 limitation 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.

These items are not pertinent to post-construction stormwater management, but rather issues to be addressed when planning construction and are fully addressed in the E&S plan. They have

little relevance at the post-construction stage of the project. CNX Gas suggests they be deleted in their entirety.

§102.8 (f)(10) … PCSM Plans must contain at a minimum the following: 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 must 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.

Many companies are now using electronic compliance inspection scheduling and tracking systems. Electronic documentation of inspections in such systems should serve in lieu of maintaining written paper records. Please delete the requirement for written reports in all cases.

§102.8(g)(2)(i) and (ii) and (g)(3) PCSM Plans for proposed activities requiring a permit under this chapter require the following additional information: …(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 shall 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 or 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.

Both of these requirements go beyond the requirement to insure that the activity does not degrade from pre-construction conditions, indeed, they mandate **improvement** from pre-construction conditions. The need for these burdensome requirements has not been justified by the Department for all proposed activities. Although this will codify current requirements, those requirements were imposed through permit application form changes without any opportunity for public participation and without supporting regulation. Construction of utilities, other pipelines, and many oil and gas facilities generally occurs on private land owned and often maintained by others (such as lawns and agricultural fields). There is little or no opportunity to change land use or install engineered, constructed PCSM BMP structures on these properties. In these cases, site conditions do not offer the opportunity to reduce the increase in run-off volume. CNX Gas suggests these subsections be deleted in their entirety.

§102.8(l) The permittee shall include with the notice of termination "Record Drawings" with a final certification statement from a licensed professional, which reads as follows…

The requirement to submit "record" drawings with a Notice of Termination is unnecessary and not relevant for all projects. "Record" drawings of the type described are typically not created for gas utility, pipeline, and gas well construction projects. This requirement only makes sense when used to record engineered and constructed structures for PSCM management which are not part of all earth disturbance projects. CNX Gas recommends deletion of this subsection.

§102.8 (m) Unless a different person is approved in writing by the Department, operation and maintenance of the PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMP is located. The deed for the property containing the 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 it is enforceable by subsequent grantees. A 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.

CNX Gas requests that the permittee, property owner, developer, operator, tenant, etc. be allowed to determine and propose the appropriate responsible party(ies) to the Department on a case-by-case basis. The proposed rulemaking appears to focus only on traditional commercial and residential development types and assumes that there will always be engineered PSCM BMPs that will require long-term operation and maintenance. By contrast, most pipeline projects, do not result in grade changes or increased impervious surface area - and once restoration is complete, do not require installation or maintenance of PSCM BMPs. These installations occur on "rights-of-way" not owned, and sometimes not even maintained by the permittee. While we do not disagree that long-term O&M of certain PSCM BMPs is critical, we urge the Department to provide for flexibility that will allow the responsibility to be assigned to the most appropriate party for each individual situation.

§102.14 Riparian forest buffer requirements.

Although riparian forest buffers can result in various environmental benefits, only a few of these benefits are directly or indirectly related to preventing accelerated erosion and sedimentation. Because of the extreme cost and lack of flexibility, as well as property rights issues associated with this type of mandate, **CNX Gas suggests that this requirement be removed from this rulemaking in its entirety and be addressed in a separate rulemaking**. We believe that voluntary riparian buffer creation could be encouraged through other incentives, such as post-construction stormwater credits. This requirement is particularly problematic for the oil and gas industry where construction is normally conducted on leased right-of-ways, where the permittee has no continuing property rights outside of those specifically negotiated in the lease agreement.

Sincerely,

Gary Lloyd