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Chambers, Laura M.

DEC 7 2009

From: Brian Glass [glass@pennfuture.org]
Sent: Wednesday, November 25, 2009 6:55 PM
To: EP, RegComments
Subject: Proposed Rulemaking, 25 Pa. Code Ch. 102, Erosion and Sediment Control and Stormwater Management, 39 Pa.B. 5131 (August 29, 2009)

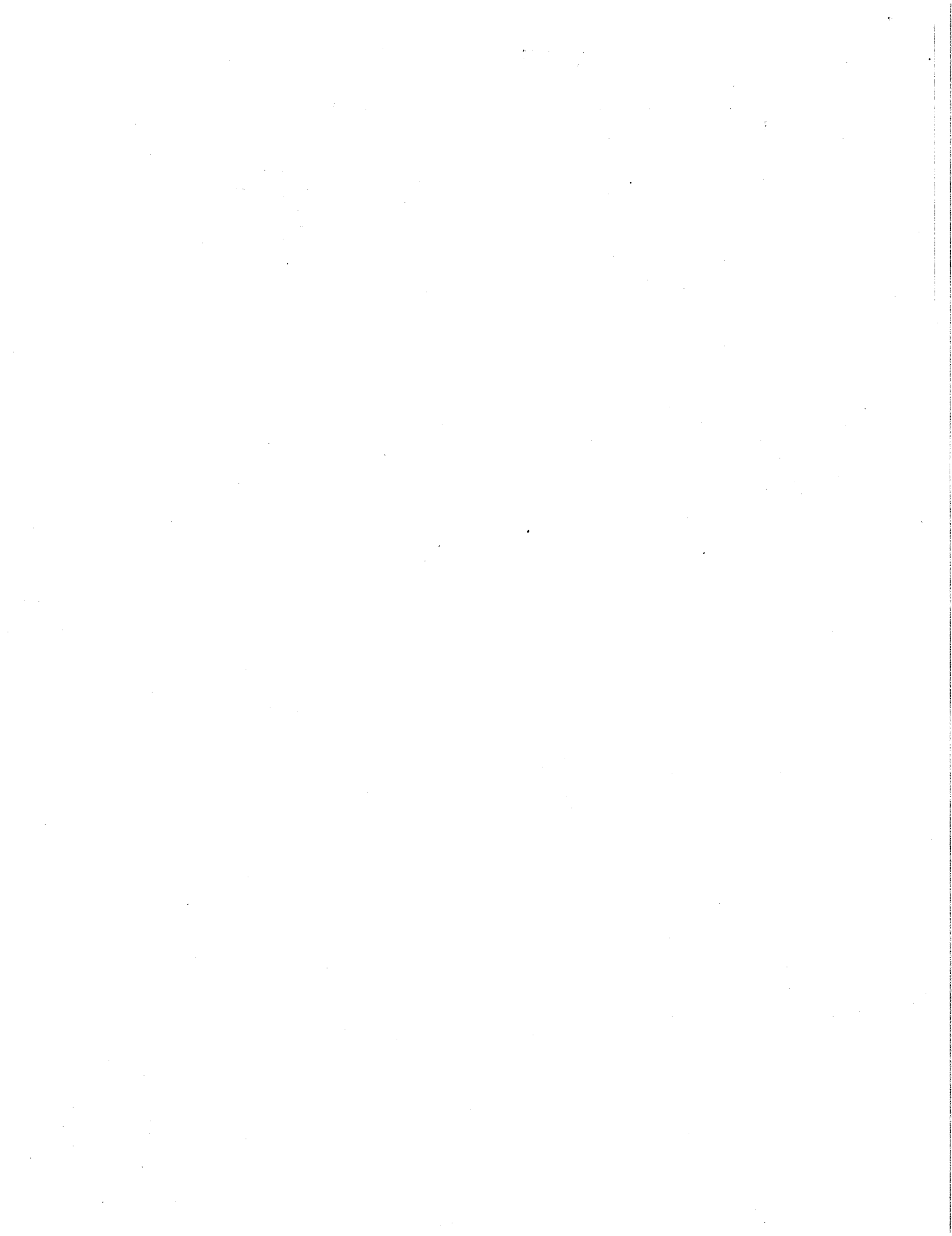
INDEPENDENT REGULATORY
REVIEW COMMISSION



Comments.pdf (1 MB) Summary.pdf (82 KB)

On behalf of Citizens for Pennsylvania's Future (PennFuture), I submit the attached comments on the referenced proposed rulemaking, as well as a summary of comments for inclusion in the agenda packets of the members of the Board. A hard copy of each document will be mailed today. Thank you.

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2783

Chambers, Laura M.

From: Keith Marshall [kmarshall@navenewell.net]
Sent: Wednesday, November 25, 2009 5:17 PM
To: EP, RegComments
Cc: andy@pasenate.com; dmilne@pahousegop.com
Subject: Proposed 25 Pa. Code Chapter 102 Rulemaking Comments

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DEC - 7 REC'D

INDEPENDENT REGULATORY
REVIEW COMMISSION

To: Environmental Quality Board
From: Keith J. Marshall, PE
Date: November 25, 2009
Subject: Proposed 25 Pa. Code Chapter 102 Rulemaking Comments

Thank you for the opportunity to offer the following comments on the proposed 25 PA Code Chapter 102 rulemaking. I offer the following comments:

GENERAL COMMENTS

NPDES Applications

1. Fee Schedule. We believe that the proposal to raise fees for NPDES permits by 1,000% is excessive and that a flat rate for every project is unfair. We would request that a fee schedule based on the size scope of a project be instituted. In addition, the administratively complete review and non-refund of the fee should only apply to the portion being reviewed (i.e. separate admin complete review for E&S and NPDES, and related fee applications).

Riparian Buffers

1. I feel that instituting a rigid buffer on streams could ultimately make many projects unbuildable. There could be language built into the buffer requirements that allow for disturbance if certain criteria are met such as additional Best Management Practices.
2. I feel that municipalities are better suited for adopting riparian buffers than a rigid, statewide mandate. The current regulations also do not address various use concerns within the buffers, to the level necessary to properly regulate. A local municipality is better suited to address these concerns via their Zoning Ordinance provisions.
3. Items that need more clarification are various uses per Zone (Zone 1 should be more restrictive than Zone 2, currently there is no differentiation), buffer impacts for a Chapter 105 permitted impact (road crossing, utility crossing, etc), currently utility installation is prohibited in the Buffer, regional sanitary sewer mains (trunk lines) need to be constructed at the lowest possible elevations and this provision will severely limit the ability to properly locate regional utilities.

SPECIFIC COMMENTS

102.1 Definitions. "Surface Waters" – Stormwater and E&S features should be excluded similarly to the exclusion for wastewater facilities.

102.6 As mentioned earlier, a graduate review fee dependant on the size and scope of a project should be

instituted rather than a flat fee for all projects. In addition, Conservation District should only be permitted to not refund a fee relative to the submission deemed incomplete, should the application contain all E&S requirement but be incomplete relative to the NPDES checklist then only the NPDES fee is surrendered. With 2 independent fees of the amounts proposed, they must be managed appropriately.

102.8(b)(3) The comment should specifically state the "2-yr" stormwater runoff volume.

102.8(f)(4) The comment should specifically state 2-yr for volume and 2,5,10,25,50,100-yr for rate control.

102.14 (b)(2) There does not appear to be a substantive difference between Zone 1 and Zone 2, especially considering many streams are currently void of vegetation and the Buffer will be established by the applicant. Greater clarity for the difference between Zones should be provided.

102.14 (d) (1-3) The language is confusing since it seems to imply a 100-ft buffer on all streams or 150-ft if Special Protection or Impaired. The RBA standards should be formatted more closely to a Zoning Ordinance format that separates the applicability of the Buffer to the performance standards of the buffer. Is it intended that these dimensions apply only to a PBR permit or EV watershed?

102.14(d)(1-3) The dimensions of the various Zones of the RBA does not seem appropriate. Typically Zone 1 is narrower than Zone 2. The split seems more appropriate at 25/75 and 50/100 for 100-ft and 150-ft buffer respectively.

102.14(e)(3) The use provisions should be split between Zone 1 and Zone 2, with additional uses permitted in Zone 2 as opposed to Zone 1. In addition, the prohibition of utility construction within 150-ft of a streambed will severely restrict the ability to design and construct regional utility systems, specifically sanitary sewer trunk lines.

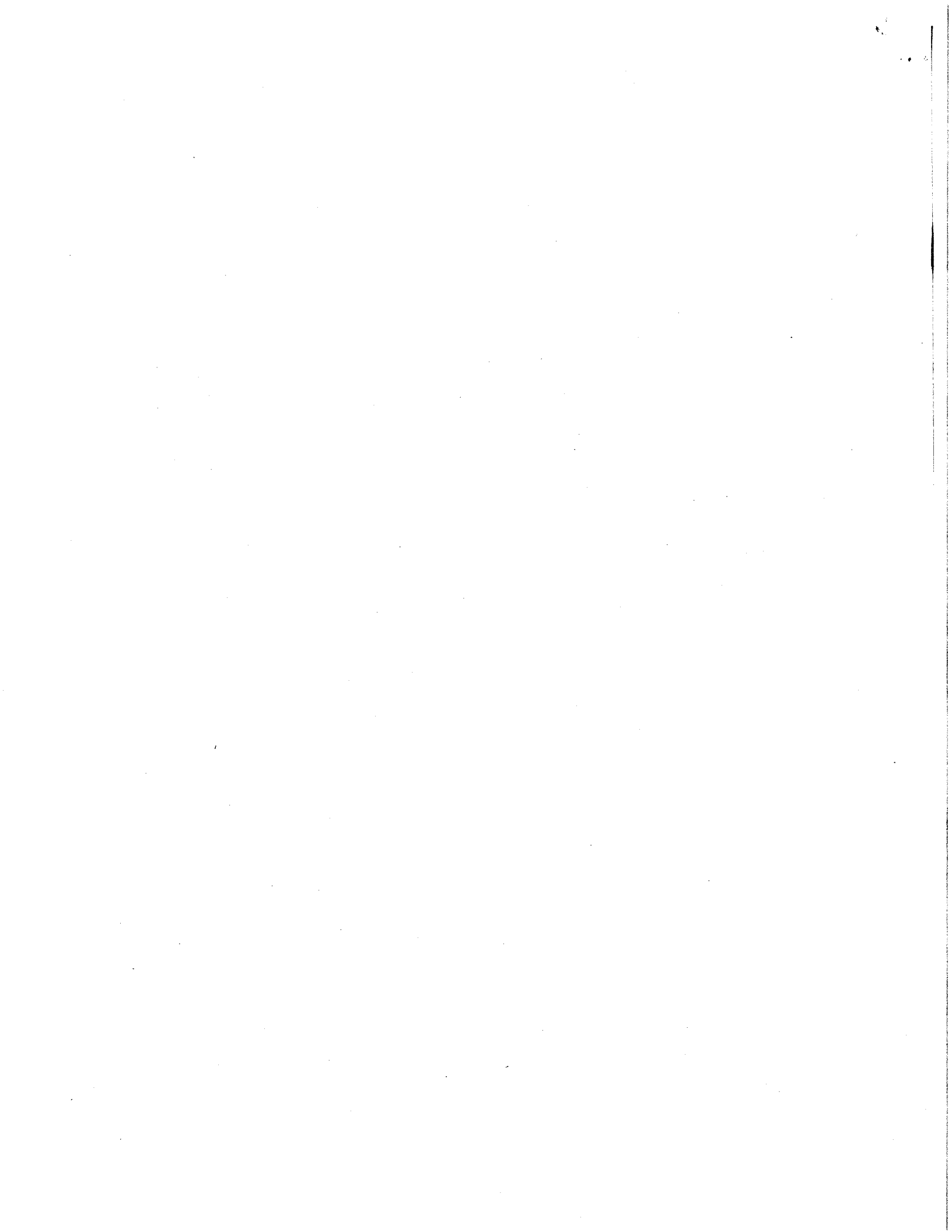
102.14(f)(2) The signage this requirement seems to imply is a large financial burden for the applicant, greater detail as to the method for demarcation should be included for future comment/discussion. Will each independent zone of the ZBA be required to be demarcated?

102.15(b)(2)(c) It appears the phrase "disturbance to" is missing from this statement. If wetlands and floodplains exclude the use of PBR, very few streams will be eligible.

cc: State Senator Andrew E. Dinniman
State Representative Duane Milne

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November 25, 2009

By Electronic Mail and U.S. Mail

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Re: **Proposed Rulemaking, 25 Pa. Code Ch. 102,
Erosion and Sediment Control and Stormwater Management,
39 Pa.B. 5131 (August 29, 2009)**

Ladies and Gentlemen:

On behalf of Citizens for Pennsylvania's Future (PennFuture), I respectfully submit the following comments (and enclosed summary) on the referenced proposed rulemaking (Proposed Rulemaking). PennFuture is a statewide public interest membership organization that works to create a just future where nature, communities and the economy thrive. A significant focus of our work relates to protecting and improving Pennsylvania's water resources.

1. The Proposed Rulemaking would improve the current regulatory program in a number of ways.

PennFuture believes that the Proposed Rulemaking represents an improvement in erosion and sediment control and stormwater management in several respects, including:

Regulating animal heavy use areas. Like agricultural plowing and tilling, animal heavy use areas can cause accelerated erosion and sedimentation. For that reason, PennFuture is pleased that the Proposed Rulemaking requires the development and implementation of Erosion and Sediment Control Plans (E&S plans) for animal heavy use areas.

Requiring E&S permits for certain oil and gas activities. Oil and gas activities also can cause accelerated erosion and sedimentation, but federal law has exempted them from the requirement of obtaining coverage under an NPDES permit, see 33 U.S.C. §§ 1342(f)(2), 1362(24). PennFuture therefore commends the Pennsylvania Department of Environmental Protection (Department) for filling this federal regulatory gap by requiring oil and gas activities to obtain an Erosion and Sediment Control Permit (E&S permit).

Codifying post-construction stormwater management requirements. Post-construction stormwater can have long-lasting impacts on nearby residents and natural resources. For that reason, PennFuture appreciates the increased attention the Proposed Rulemaking gives to post-construction stormwater management (PCSM), including requirements for certification of proper implementation of PCSM best management practices (BMPs), and

for long term operation and maintenance (O&M) of those BMPs. In Comment 3, below, we offer a suggestion on how best to ensure this critical long term O&M.

Updating permit fees. PennFuture acknowledges that there are significant expenses involved in administering the stormwater program and believes that it is appropriate for the regulated community to share in those expenses. PennFuture therefore supports updating permit fees to cover the cost of program operations.

Encouraging, and in some cases mandating, riparian forest buffers. PennFuture strongly supports riparian forest buffers, which provide both water-related and other benefits, such as reducing flood damage, protecting drinking water, decreasing the costs of stormwater management, filtering pollutants, improving in-stream pollution removal, reducing stream bank erosion, cooling waters, enhancing stream habitat for fish and other aquatic life, helping to address climate change, and increasing property values. For all of these reasons, PennFuture is pleased that the Proposed Rulemaking encourages, and in some cases mandates, the protection and establishment of such buffers. As explained in Comment 4, below, we advocate that the final rule go farther in promoting this proven, beneficial practice.

Requiring preconstruction and presubmission meetings. The Proposed Rulemaking requires a preconstruction meeting for all permitted activities. PennFuture strongly supports such meetings, which should help to identify and resolve any misunderstandings between the regulators and the regulated before those misunderstandings lead to violations and impacts to nearby residents and natural resources. The Proposed Rulemaking also requires a presubmission meeting for persons seeking coverage under the proposed permit-by-rule (PBR). PennFuture also supports these meetings, which should help not only to ensure that projects will appropriately protect natural resources, but also to expedite the permitting process by identifying and resolving issues before a registration of coverage (ROC) is submitted. PennFuture urges the Department to consider expanding this requirement to all permitted activities, rather than just those seeking coverage under the PBR.

Notwithstanding the foregoing, PennFuture has some concerns about the Proposed Rulemaking, as well as some ideas for how the Proposed Rulemaking could be improved. The preamble to the Proposed Rulemaking specifically solicits input on three issues. In the comments below, PennFuture begins by addressing those issues and then offers comments on some additional issues.

2. The Proposed Rulemaking should limit the availability of the permit-by-rule.

The permit-by-rule (PBR) should not be available in any special protection watersheds. Special protection waters – which include both exceptional value and high quality waters – represent the best streams in the Commonwealth. As discussed in greater detail in Comment 5, below, projects in special protection watersheds require a thorough and site-specific analysis to ensure that water quality will be maintained and protected. See 25 Pa. Code §§ 93.4a, 93.4c; see also Crum Creek Neighbors v. DEP, EHB Docket

No. 2007-287-L (Adjudication issued Oct. 22, 2009); Lipton v. DEP, EHB Docket No. 2007-026-MG (consolidated with EHB Docket No. 2008-038-MG) (Opinion and Order on Motions for Summary Judgment and Motion to Dismiss issued May 20, 2008); Blue Mountain Pres. Ass'n v. DEP, 2006 EHB 589; Zlomsowitch v. DEP, 2004 EHB 756. Such an analysis is incompatible with the expedited approach contemplated by the PBR.

Similarly, the PBR should not be available in impaired watersheds. Proposed discharges in impaired watersheds also require a more rigorous analysis, in this case to comply with the prohibition against issuing a NPDES permit "to a new discharger if the discharge will contribute to the violation of water quality standards," Friends of Pinto Creek v. EPA, 504 F.3d 1007, 1012 (9th Cir. 2007) (citing 40 C.F.R. § 122.4(i)), cert. denied sub nom., Carlota Copper Co. v. Friends of Pinto Creek, 129 S. Ct. 896 (2009), and the requirement that NPDES permits be consistent with numerical waste load allocations in an approved Total Maximum Daily Load (TMDL). See 40 C.F.R. § 122.44(d)(1)(vii)(B) (incorporated by 25 Pa. Code § 92.2(b)(14)); 25 Pa. Code § 92.31(a)(5), 96.4(d). Like projects in special protection watersheds, projects in impaired watersheds simply are not conducive to an expedited approach.

For these reasons, the Proposed Rulemaking should exclude eligibility for coverage under the PBR in special protection and impaired watersheds. Section 102.15(b)(1) of the Proposed Rulemaking should be revised to state: "Projects located in or with the potential to discharge to waters that have a designated or existing use of Exceptional Value or High Quality under Chapter 93 (relating to water quality standards) or for which the identification as impaired pursuant to Section 303(d)(1)(A) of the Federal Clean Water Act (33 U.S.C. § 1313(d)(1)(A)) has been approved pursuant to Section 303(d)(2) of the Federal Clean Water Act (33 U.S.C. § 1313(d)(2))."

- 3. The Proposed Rulemaking should require the recording of an environmental covenant to address responsibility for the long-term operation and maintenance of post-construction stormwater management best management practices.**

Many post-construction stormwater management (PCSM) best management practices (BMPs) require long-term operation and maintenance (O&M) to ensure that post-construction stormwater discharges will continue to meet regulatory standards. For that reason, PennFuture is pleased that the Proposed Rulemaking seeks to address the issue of responsibility for long-term O&M. PennFuture is concerned, however, that the Proposed Rulemaking does not properly ensure that the Department will be able to enforce requirements relating to the long-term O&M of PCSM BMPs.

Section 102.8(m) contemplates the use of a deed restriction to ensure the long-term O&M of PCSM BMPs, but PennFuture does not believe that a deed restriction ordinarily would be enforceable by the Department. Nor does PennFuture believe that the Department would be able to enforce a permit condition requiring long-term O&M once the permit has been terminated, which the Proposed Rulemaking contemplates, see Section 102.8(m); see also Section 102.7. With respect to the permanent protection of riparian

forest buffers (another kind of long-term O&M), in addition to deed restrictions and permit conditions, the Proposed Rulemaking contemplates conservation easements and local ordinances. PennFuture does not believe that the Department ordinarily would be able to enforce conservation easements any more than it would be able to enforce deed restrictions, and local ordinances, which can be amended or repealed, do not provide the kind of long-term assurances that should be required.

Although deed restrictions and conservation easements can be made enforceable by a third-party (in this case the Department), PennFuture believes that requiring the recording of an environmental covenant is a much better way to address responsibility for the long-term O&M of PCSM BMPs. The Pennsylvania Uniform Environmental Covenants Act, 27 Pa.C.S. §§ 6501-6514, already provides the necessary regulatory framework, and it expressly allows for Department enforcement, see 27 Pa.C.S. § 6501(a)(2). Therefore, the Proposed Rulemaking should require the recording of an environmental covenant to address responsibility for the long-term O&M of PCSM BMPs (including riparian buffers). Sections 102.8(m) and 102.14(f)(1) of the Proposed Rulemaking should be revised accordingly.

4. The Proposed Rulemaking should require the protection of all waters with riparian forest buffers.

PennFuture believes that Pennsylvania should require forest buffers at least 100 feet wide between areas of earth disturbance and all of the water resources identified in the Proposed Rulemaking, plus wetlands. As the Department knows, the science overwhelmingly supports such buffers. Moreover, mandating the establishment or preservation of such buffers would not amount to a regulatory taking.¹ For that reason, the Proposed Rulemaking should require riparian forest buffers for all waters, including wetlands. Section 102.14(a)(1)(i) of the Proposed Rulemaking should be revised to state: “The activity requires a permit under this chapter, [is located within an Exceptional Value watershed,] and the project site contains, is along, or is within[,] [150]100 feet of, a river, stream, creek, lake, pond, wetland, or reservoir.”²

PennFuture believes that at a minimum, Pennsylvania should require forest buffers at least 150 feet wide between areas of earth disturbance and all special protection waters³ – not just exceptional value waters (as the Proposed Rulemaking would require), but high

¹ Government can regulate the permissible uses of private property without compensating the owner of that property when the regulation “advances legitimate state interests” and does not deny the owner of all economically viable uses of his or her land. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The Pennsylvania Supreme Court has explained that a taking does not necessarily result even when a regulation deprives an owner of “the most profitable use of his [or her] property.” Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot., 799 A.2d 751 (Pa. 2002) (quoting Miller & Son Paving, Inc. v. Plumstead Township, 717 A.2d 483, 486 (Pa. 1998)) (emphasis added).

² The proposed revisions to punctuation contained in Comment 4 are explained in Comment 10, below.

³ PennFuture supports the expanded, 150-foot-wide riparian forest buffer requirement in all special protection watersheds set forth in Section 102.14(d)(3) of the Proposed Rulemaking, which PennFuture believes is legally defensible. See, e.g., In re Stormwater Management Rules, 384 N.J. Super. 451, 894 A.2d 1241 (2006) (affirming the validity of a regulation requiring 300-foot riparian buffers for the New Jersey analog of special protection waters), cert. denied, 188 N.J. 489, 909 A.2d 724 (2006).

quality waters as well. Discharges to high quality waters must use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies. See 25 Pa. Code § 93.4c(b)(1)(i)(A). Further, in all special protection watersheds, the Department must “assure that cost-effective and reasonable best management practices for nonpoint source control are achieved.” 25 Pa. Code § 93.4c(b)(2). In the preamble to the Proposed Rulemaking, the Department states that “[r]iparian 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.” 39 Pa. Bull. at 5132 (Preamble, § D); see also 39 Pa. Bull. at 5136 (Preamble, § G) (describing riparian forest buffers as “one of the most effective and sustainable BMPs for protecting, maintaining, reclaiming and restoring surface waters of this Commonwealth”). As a cost-effective BMP for minimizing the impacts of both point and nonpoint source discharges, riparian forest buffers must be required for all special protection waters, both exceptional value and high quality waters. Therefore, at a minimum, Section 102.14(a)(1) of the Proposed Rulemaking should be revised to state: “The activity requires a permit under this chapter, is located within an Exceptional Value or High Quality watershed, and the project site contains, is along, or is within[,] 150 feet of, a river, stream, creek, lake, pond, wetland, or reservoir.”

5. The Proposed Rulemaking must be amended to ensure consistency with the Antidegradation regulations.

In Comment 5.A., immediately below, PennFuture discusses the ways in which the Proposed Rulemaking is inconsistent with or obscures the requirements of the Antidegradation regulations. In Comment 5.B., immediately below that, PennFuture offers proposed revisions to address those issues.

A. The Proposed Rulemaking is inconsistent with or obscures the requirements of the Antidegradation regulations.

i. The definition of “Nondischarge alternative” is inconsistent with the interpretation of that term as used in the Antidegradation regulations.

Section 102.1 defines a “Nondischarge alternative” as “Environmentally sound and (sic) 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.” The recent adjudication in Crum Creek Neighbors v. DEP, EHB Docket No. 2007-287-L, establishes that this definition is inconsistent with the more demanding standard for what constitutes a “nondischarge alternative” under the Antidegradation regulations.

In Crum Creek Neighbors, the Environmental Hearing Board reiterated that the plain meaning of “nondischarge” is that there is no discharge under any circumstances. As a result, stormwater management practices designed to prevent discharges only during

storm events up to a certain size or frequency are not properly classified as “nondischarge alternatives” for the purposes of the Antidegradation program. The Board explained:

... The basins were designed to provide enough capacity to infiltrate up to a two-year storm ...

...
[W]e do not have the sense that any of the experts disagree strongly that the recharge basins will overflow in very heavy storms. Rather, Pulte and the Department would have us believe that these discharges may be ignored. ... As we said in *Zlomsowitch v. DEP*, 2004 EHB 756, 784-87, there is either a discharge or there is not. ... The Department’s analysis concerning the adequacy of BMPs or the antidegradation best available combination of technologies (ABACT) may be appropriate as a step down the road in assessing whether a discharge should be permitted, 25 Pa. Code § 93.4c, but it is not a basis for pretending that there is, in fact, no discharge.

EHB Docket No. 2007-287-L, slip op. at 15-17.

In other words, BMPs that allow discharges to occur during rare, large storm events are not “nondischarge alternatives” as that term is used in the Antidegradation regulations, 25 Pa. Code § 93.4c(b)(1)(i)(A). Section 102.1 of the Proposed Rulemaking, however, would define “Nondischarge alternative” in precisely this manner, requiring the BMPs to be designed to “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.” Even if the BMPs at a given site met this standard and eliminated the net change in stormwater volume resulting from the permitted project, they would not necessarily eliminate all discharges of stormwater. Moreover, by limiting the largest storm event that must be considered to the 2-year/24-hour storm, the definition introduces the same problem that led the EHB to hold in *Crum Creek Neighbors* and *Zlomsowitch* that PADEP had violated the Antidegradation regulations by incorrectly classifying rare discharge alternatives as nondischarge alternatives. For these reasons, the definition of “nondischarge alternative” in the Proposed Rulemaking should be made consistent with its meaning in the Antidegradation regulations.

ii. The definition of “ABACT” in the Proposed Rulemaking is inconsistent with the Antidegradation regulations.

The error in the definition of the term “Nondischarge alternative” discussed in Comment 5.A.i., immediately above, is incorporated into the definition of the term “ABACT—Antidegradation best available combination of technologies,” in Section 102.1 of the Proposed Rulemaking. As proposed, Section 102.1 defines “ABACT” as “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 water.” For the reasons explained

in Comment 5.A.i., immediately above, the implication that “nondischarge alternative BMPs” must only be capable of handling storm events “up to and including the 2-year/24-hour storm” in order to be considered a “nondischarge alternative” within the meaning of the Antidegradation regulations is incorrect.

It is also incorrect that the BMPs that constitute “ABACT” need only be capable of handling storm events of some fixed size or frequency. Whatever amount of stormwater is not fully managed by (true) nondischarge alternative BMPs – which is to say, whatever amount of stormwater is actually discharged from the permitted site⁴ – must be managed using ABACT. See 25 Pa. Code § 93.4c(b)(1)(i)(A). For these reasons, the definition of “ABACT” in the Proposed Rulemaking should be made consistent with its meaning in the Antidegradation regulations.⁵

iii. The Proposed Rulemaking creates the false impression that merely following various guidance manuals constitutes compliance with the Antidegradation regulations.

Section 102.4(b)(6) requires that a person proposing an earth disturbance activity that may result in a discharge to a special protection water “use nondischarge alternatives (sic) and ABACT BMPs to maintain and protect the water from degradation” and then explains that these BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual*. Similarly, Section 102.8(h) requires that a person “use nondischarge and ABACT BMPs to maintain and protect the water from degradation” and then explains that these BMPs and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual*.⁶ PennFuture is concerned that these provisions will leave permittees with the impression that simply using the BMPs listed in the relevant guidance manuals automatically constitutes compliance with the Antidegradation regulations. As the recent adjudication in Crum Creek Neighbors instructs, such an impression would be incorrect. The EHB stated:

⁴ For example, where no discharge-eliminating BMPs (nondischarge alternatives, as properly conceived) are environmentally sound and cost effective, or where such nondischarge alternatives are available for only a portion of the permitted site.

⁵ PennFuture notes that part of the definition of ABACT in the Proposed Rulemaking is actually more exacting than the concept of ABACT in the Antidegradation Regulations. The last clause – “that will maintain and protect the existing quality of the receiving surface water” – is the Antidegradation program’s standard for discharges to exceptional value (EV) waters. See 25 Pa. Code § 93.4a(d). Although meeting that heightened standard satisfies the Antidegradation program requirement applicable to discharges to High Quality (HQ) waters, one also may satisfy the HQ requirement by applying ABACT and then providing a “social or economic justification” (SEJ) for any reduction of the existing quality of the receiving water that occurs notwithstanding the application of ABACT. See 25 Pa. Code § 93.4c(b)(1)(iii); Antidegradation Guidance, p. 71 (in all cases for which the applicant seeks to demonstrate that the proposed degradation caused by a discharge to HQ waters is socially or economically justified, the discharge shall use ABACT).

⁶ It is worth noting that both of these manuals specifically address Special Protection Waters, see *Erosion and Sediment Pollution Control Program Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), as amended and updated, ¶ 5, pp. 2-3; *Pennsylvania Stormwater Best Management Practices Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated, §7.7, Ch. 7, pp. 20-21. It is also worth noting that neither manual refers to the BMPs that it lists as “nondischarge alternatives” or “ABACT,” which could be confusing to permit applicants.

To a large extent, the Department and Pulte approached this issue by listing BMPs, describing compliance with the Department's checklists, policy manuals, the local ordinance, and accepted engineering practices, and justifying the use of particular engineering models instead of showing that there would in fact be no discharges to the stream. For example, the Department is simply wrong in concluding that meeting Control Guidance 1 (CG-1) as set forth in its guidance document automatically and *ipso facto* constitutes a "nondischarge alternative" under the antidegradation regulations. See 25 Pa. Code § 93.4c(b)(1)(i). (T. 583.) . . . Determining whether there will be a discharge is not about checking off boxes on a form. We specifically rejected this type of reasoning not only in *Zlomsowitch*, but in *Blue Mountain Preservation Association v. DEP and Alpine Resorts*, 2006 EHB 589, as well, where we held that compliance with Chapter 102 regulations regarding erosion and sedimentation control does not automatically constitute compliance with the antidegradation requirements. *Blue Mountain Preservation Association*, 2006 EHB at 613.

EHB Docket No. 2007-287-L, slip op. at 15-17. The Proposed Rulemaking should more clearly indicate that the BMPs listed in the relevant guidance manuals are to be used in meeting the requirements and following the procedures set forth in the Antidegradation regulations but that their use alone does not guarantee compliance with those regulations.

- iv. **The Proposed Rulemaking creates the false impression that the Antidegradation regulations only apply to earth disturbance activities that may result in a discharge to special protection waters.**

Section 102.4(b)(6) provides that the antidegradation review that it outlines applies "[w]here an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value under (sic) Chapter 93" (emphasis added). Similarly, Section 102.8(h) provides that its antidegradation review applies "[w]hen 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 under Chapter 93" (emphasis added). PennFuture is concerned that these provisions will leave permittees with the impression that the Antidegradation regulations only apply to earth disturbance activities that may result in a discharge to special protection waters. Once again, however, the recent adjudication in *Crum Creek Neighbors* instructs otherwise. The EHB stated:

The purpose of Pennsylvania's antidegradation regulations is to protect the existing quality of High Quality and Exceptional Value waters and the existing use of all surface waters. The Department's Antidegradation Implementation Guidance Document states that the Department will evaluate the effect of proposed projects that do not involve a discharge but that may nevertheless affect [Exceptional Value] or [High Quality] surface waters to ensure that the use of the special protection waters will be maintained and protected. The Department's guidance is legally

sound. A permittee may not degrade a stream by altering its physical or biological properties any more than it may degrade a stream by the direct discharge of pollutants. 35 P.S. § 691.1; *PDG Land Development v. DEP*, EHB Docket No. 2007-041-R (Opinion & Order, May 21, 2009). This cornerstone of Pennsylvania law was firmly laid down in the seminal case of *Oley Township v. DEP*, 1996 EHB 1098 The principle that degrading a stream by materially changing its movement, circulation, or flow is prohibited has been repeated in numerous other cases and it is now beyond dispute. *UMCO, supra*; *PUSH v. DEP*, 789 A.2d 319, 329 (Pa. Cmwlth. 2001); *PDG Land Development, supra*, slip op. at 6-7; *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 1038, 1042, 1045; *Consol Pennsylvania Coal Co. v. DEP*, 2003 EHB 239, 243; *Consol Pennsylvania Coal Co. v. DEP*, 2003 EHB 792, 795, 800; *Tinicum Township v. DEP*, 2002 EHB 822, 832; *Borough of Roaring Spring v. DEP*, 2003 EHB 825, 840. *See also, S.D. Warren Co. v. Maine Board of Environmental Protection*, 126 S. Ct. 1843, 1852-53 (2006); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994).

EHB Docket No. 2007-287-L, slip op., at 19-20 (emphasis added; internal references to exhibits omitted).⁷ The Proposed Rulemaking should more clearly indicate that the Antidegradation regulations apply to earth disturbance activities in special protection watersheds regardless of whether those activities will result in a discharge.

B. PennFuture recommends revisions to Sections 102.1, 102.4(b)(6), 102.8(h) and 102.15(d)(1) to address these issues.

In order to address the various issues raised in Comment 5.A., immediately above, PennFuture recommends the following revisions to the Proposed Rulemaking:

- **Section 102.1**: Delete the definitions for the terms “ABACT” and “Nondischarge alternative.” If the Proposed Rulemaking defines these terms at all, which it need not do if the remaining recommendations are accepted, these terms should be defined by reference to Chapter 93. Under no circumstances should these terms have different meanings in Chapter 102 than they have in Chapter 93.
- **Section 102.4(b)(6)**: “[Where an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value [u]nder Chapter 93, the p]ersons proposing [the activity]an earth disturbance activity located in watersheds containing waters

⁷ The EHB came to a similar conclusion last year in *Lipton v. DEP*, where it stated:

. . . there is nothing in the simple language of Section 94.3a which limits the command to protect the water quality of EV waters only from direct discharges to surface waters, nor do we find an exemption in the regulation from review of “non-discharge alternatives” because they discharge through an absorption area rather than directly to water.

Docket No. 2007-026-MG (consolidated with EHB Docket No. 2008-038-MG) (Opinion and Order on Motions for Summary Judgment and Motion to Dismiss issued May 20, 2008), slip op., at 8-9.

of this Commonwealth that have a designated or existing use of exceptional value or high quality shall maintain and protect those waters as required by 25 Pa. Code § 93.4a and follow the procedures set forth in 25 Pa. Code § 93.4c, as applicable, use nondischarge alternatives and ABACT BMPs to maintain and protect the water from degradation]. Without limiting the foregoing, the persons shall use the BMPs and design standards [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, with particular attention to paragraph 5 on pages 2 and 3, in satisfying these requirements and in following these procedures.”

- Section 102.8(h): “[When 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 under Chapter 93, the p]Persons proposing [the activity]an earth disturbance activity located in watersheds containing waters of this Commonwealth that have a designated or existing use of exceptional value or high quality shall maintain and protect those waters as required by 25 Pa. Code § 93.4a and follow the procedures set forth in 25 Pa. Code § 93.4c. [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] Without limiting the foregoing, the persons shall use the BMPs and design standards 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, with particular attention to section 7.7 on pages 20 and 21 of Chapter 7, in satisfying these requirements and in following these procedures.”
- Section 102.15(d)(1): “Permit-by-rule registrants proposing projects that are located in watersheds containing waters of this Commonwealth that have a designated or existing use of high quality[,] or [nonspecial protection waters]that are impaired for sediment or stormwater shall [demonstrate that all construction and post construction discharges will not degrade the physical, chemical or biological characteristics of the surface waters]maintain and protect those waters as required by 25 Pa. Code § 93.4a and follow the procedures set forth in 25 Pa. Code § 93.4c but [and] may not utilize the social or economic justification process established under § 93.4c(b)(iii) (relating to implementation of antidegradation requirements). I], and, in addition to the 150-foot riparian forest buffer, [registrants] shall utilize solely nondischarge alternatives, as that term is used in Chapter 93, [BMPs] in their E & S and PCSM Plans. Without limiting the foregoing, registrants shall use the BMPs and design standards 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, with particular attention to paragraph 5 on pages 2 and 3, and 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, with particular attention to section 7.7 on pages 20 and 21 of Chapter 7, in satisfying these requirements and in following these procedures.⁸

6. **The Proposed Rulemaking should extend the public notice requirements applicable to projects located in high quality or impaired watersheds, with some alterations, to all projects for which coverage under the permit-by-rule is sought.**

Section 102.15(k) requires that the Department provide notice in the *Pennsylvania Bulletin* of every approval of coverage under the PBR. Under Section 102.15(d)(2), however, the public would be provided with notice and an opportunity to comment before coverage under the PBR is approved only for projects located in High Quality watersheds or watersheds impaired for sediment or stormwater. Thus, for most projects, the provision of Section 102.15(l)(1) allowing an interested person to petition the Department to deny coverage under the PBR is a dead letter, because the public will not be aware that a ROC has been submitted, and therefore will have no pre-approval opportunity to object to or comment on the ROC and accompanying plans.

“The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.’” Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Munzo, 380 U.S. 545, 552 (1965)); see also Pa. Bankers Ass'n v. Pa. Dep't of Banking, 956 A.2d 956, 965 (Pa. 2008). Courts have struck down regulatory programs under the Clean Water Act that fail to provide for public participation in the development of an effluent limitation. See Waterkeeper Alliance v. EPA, 399 F.3d 486, 503-04 (2d Cir. 2005); Environmental Defense Center v. EPA, 344 F.3d 832, 856-58 (9th Cir. 2003), cert. denied sub nom., Texas Cities Coalition on Stormwater v. EPA, 541 U.S. 1085 (2004). In Waterkeeper Alliance, the Second Circuit found that the “CAFO Rule” – a set of regulations governing Concentrated Animal Feeding Operations (CAFOs) promulgated by the EPA – deprived the public of the required opportunity for regulatory participation because it “shielded nutrient management plans from public scrutiny and comment.” 399 F.3d at 503. The Second Circuit noted that a “copy of the CAFO’s site-specific nutrient management plan must be maintained on site and made available to the Director [of the state permitting authority] upon request,” but that “[t]he Rule does not similarly require that copies of the nutrient management plans be made available to the public by the CAFOs.” Id. (emphasis in original).

⁸ PennFuture believes that Comment No. 5 underscores the argument made in Comment No. 1 that the PBR should not be available in any special protection watersheds. If, however, the PBR is made available in these watersheds, PennFuture recommends the revision above.

As currently conceived, the PBR suffers from the same flaws that led to the partial invalidation of the CAFO Rule. Like the CAFO Rule, Section 102.15(c)(9) provides that the documents required by the PBR be made “available at the site for review by the Department, Conservation District or other authorized local, state, or federal government official,” but does not require that such documents be made available to the public. Moreover, even if the PBR guaranteed public access to these documents, in most instances the public would not receive notice of their availability until after coverage is already approved. Significantly, the Second Circuit found that “the CAFO Rule deprives the public of its right to assist in the ‘development [and] revision . . . of . . . [an] effluent limitation’ because it ‘prevents the public from calling for a hearing about – and then meaningfully commenting on – NPDES permits before they issue.” *Id.* (emphasis added; citations omitted). The Ninth Circuit reached a similar conclusion with respect to the “Phase II Rule” – a set of regulations governing discharges from small municipal separate storm sewer systems and from construction sites between one and five acres in size. *See Environmental Defense Center*, 344 F.3d at 856 (“The Clean Water Act requires that ‘[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public,’ and that the public shall have an opportunity for a hearing before [a] permit application is approved”) (emphasis added; citations omitted). Because the PBR generally would fail to provide for notice and comment before coverage is approved, the PBR as currently conceived could not withstand judicial scrutiny.

In order to ensure that the legal requirements of advance notice and an opportunity for public participation at a meaningful time are satisfied for all projects, PennFuture recommends that the public notice requirements of Section 102.15(d)(2) be extended to all projects for which coverage under the PBR is sought.

PennFuture does, however, recommend some alterations to the public notice requirements of Section 102.15(d)(2). For projects located in High Quality watersheds or watersheds impaired for sediment or stormwater, the Proposed Rulemaking requires that public notice include “[a] 30-day period . . . during which written comments may be submitted by interested persons to the applicant” (Section 102.15(d)(2)(B)), “[t]he means by which interested persons may comment upon the proposed project” (Section 102.15(d)(2)(F)), and “[c]ontact information . . . where interested persons may obtain further information regarding the project” (Section 102.15(d)(2)(G)). These requirements raise some questions: How will the Department ensure that PBR registrants are providing all of the information that the public needs to provide meaningful comment on the ROCs? How will the Department ensure that PBR registrants are responding to and submitting with their ROCs all of the comments that they received?

The Department should not outsource its public comment responsibilities to PBR registrants. All of the information that the public needs to provide meaningful comment on ROCs should be housed at the appropriate Department Regional Office, and the public should be advised to submit comments to the Department, which can forward copies of those comments to PBR registrants for their response. Section 102.15(d)(2) should be revised accordingly.

7. The Proposed Rulemaking should expressly discontinue coverage under the permit-by-rule after such coverage is revoked, terminated, or suspended.

In Section 102.15(l)(1), the Proposed Rulemaking wisely reserves the right of the Department to deny coverage under the PBR or to amend, revoke, suspend or terminate previously issued coverage under the PBR and to require the registrant to apply for and obtain a general or an individual NPDES permit. This provision would allow the Department to revoke, terminate or suspend coverage that was improperly granted under the PBR if it were subsequently determined, for example, that the registrant failed to meet all of the PBR conditions (Section 102.15(c)), or that its activities fell into one of the PBR exclusions (Section 102.15(b)).

However, automatic termination of coverage under the PBR would not occur unless and until the permittee fails to submit a complete NPDES notice of intent (NOI) or application within 90 days of receipt of notification by the Department that previously authorized coverage under the PBR is revoked, terminated or suspended. Further, Section 102.15(l)(1) provides that “[t]imely 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” (emphasis added). Thus, as currently conceived, the PBR would allow a permittee to continue operating under a revoked, terminated or suspended PBR for at least 90 days, and possibly longer, even if its own conduct formed the basis for the revocation, termination or suspension.

Allowing a continuation of coverage might be warranted where, for example, a change in circumstances beyond the registrant’s control results in the project not being eligible for coverage under the PBR. Allowing the registrant to continue operating under the PBR where the fault lies with the registrant, however, improperly rewards the registrant’s error and thereby fails to give the registrant the proper incentive to ensure that it meets all of the permit conditions and that its activities do not fall into the exclusions of the PBR before submitting an ROC and operating under the PBR.

At least where the improvident granting of coverage under the PBR is attributable to an error or omission of the registrant, the registrant may not be allowed to profit from its own neglect, and must be required to suspend (unpermitted) operations until it obtains an individual permit or coverage under a general permit.

For these reasons, Section 102.15(l)(1) should be revised to expressly state that coverage under the PBR is immediately discontinued after such coverage is revoked, terminated, or suspended, and that registrants are prohibited from further land disturbance unless and until the Department takes final action on a NPDES NOI or application that the registrant may submit.

8. The Proposed Rulemaking should expand on its additional best management practices requirements for agricultural activities near rivers and streams.

Section 102.4 states that “additional BMPs shall be implemented to minimize accelerated erosion and sedimentation” for certain agricultural plowing or tilling activities “within 100 feet of a river, or perennial or intermittent stream.” First, this requirement should be extended to animal heavy use areas (as opposed to just agricultural plowing or tilling activities). Second, this requirement should be extended to include all “waters of this Commonwealth” (as opposed to just rivers, or perennial or intermittent streams). Third, the Proposed Rulemaking should provide at least some guidance on what additional BMPs should be implemented. Finally, the Proposed Rulemaking should require implementation of additional BMPs for agricultural plowing or tilling activities or animal heavy use areas located in special protection watersheds and provide at least some guidance on what additional BMPs should be implemented there.

9. The Proposed Rulemaking should provide more details about the permit-by-rule program audit.

PennFuture supports the concept of a PBR program audit but would appreciate more details. When will the audit be conducted? Will it be ongoing? How many ROCs will the Department audit? When will the Department report on the results of its audit?

10. The Proposed Rulemaking contains several minor issues that must be addressed.

The following minor issues must be addressed:

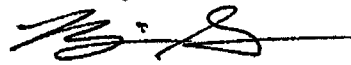
- Annex A, Part I: “Department of Environmental Protection”
- Section 102.1:
 - The term “Collector” need not be defined in this Section, as it would no longer be used in the Chapter once Section 102.4(b)(6)(ii) has been deleted.
 - The term “Conservation district”: “. . . the erosion and sediment control and stormwater management programs . . .”
 - The term “Conservation Plan” should retain the requirement that “The Conservation Plan shall include a schedule for the implementation of the BMPs.”
 - The term “Earth disturbance activity” should retain the “, but not limited to,” clause.
 - The term “Impervious,” used throughout the Proposed Rulemaking, should be defined in this Section.
 - The term “Nondischarge alternative”: “Environmentally sound and cost-effective . . .”
 - The term “Passive recreational activities,” used in Section 102.14(e)(5)(v), should be defined in this Section.

- The term “Stormwater”: “. . . snowmelt, and . . .”
- The term “Watershed,” used throughout the Proposed Rulemaking should be defined in this Section.
- Section 102.4(a)(4)(iii): “National Resources Conservation Service”
- Section 102.4(b)(5)(v): “. . . classification under [to] Chapter 93”
- Section 102.4(b)(6):
 - The terms “nondischarge alternatives” and “ABACT” are defined in Section 102.1 as BMPs, so references to “nondischarge BMPs” and “ABACT BMPs” are redundant. These references appear elsewhere in the chapter (see, e.g., Section 102.8(h)) and should be changed globally.
 - “. . . Exceptional Value [u]nder Chapter 93 . . . use nondischarge alternatives . . .”
- Section 102.5(a): “[An] NPDES permit for stormwater discharges associated with construction activities”
- Section 102.5(a)(1): “a larger common plan of development or sale”
- Section 102.6(a)(1): “. . . a complete application, NOI, or ROC . . .”
- Section 102.7(c): “written acknowledgement of an NOT”
- Section 102.8(c): “. . . (relating to erosion and sediment [and] control requirements)”
- Section 102.8(f)(14): “and inclusion of BMPs”
- Section 102.8(l): “Department of Environmentala Protection”
- Section 102.14(a)(1)(i): The punctuation obscures the requirement set forth in this provision, making it sound like a project site must contain 150 feet of a river, stream, creek, lake, pond or reservoir to require a buffer. This provision should read: “and the project site contains, is along_a, or is within_{,j} 150 feet of_i a river . . .” The confusing punctuation appears elsewhere in the chapter (see, e.g., Section 102.15(c)(2)) and should be changed globally.
- Section 102.14(a)(2): “*Other approvals that include a buffer.*”
- Section 102.14(a)(5): It would appear that this provision should reference “paragraph (4)”, not “paragraph (3)”
- Section 102.14(a)(6): “Buffer establishement”
- Section 102.14(b)(5): “. . . site₂. When . . .”
- Section 102.15(b)(3): This provision should reference where specifically “these terms” are defined.
- Section 102.15(b)(5): Should read “Consultation with the Pennsylvania Natural Heritage Program reveals the presence of a State or Federal threatened or endangered species on the project site.” Determinations about whether earth disturbance activities or potential discharges will adversely affect a Pennsylvania or federal endangered or threatened species should not be left to the discretion of the person seeking coverage under a permit-by-rule.
- Section 102.15(c)(4): “. . . or during any stage₂ of_{,j} . . .”
- Section 102.15(g)(10): “. . . The registrants shall stabilize . . .”
- Section 102.15(h)(5)(i)(5): “. . . for projects in High Quality watersheds or in watersheds impaired for sediment or stormwater”

- Section 102.15(i): The ROC should also include a Preparedness, Prevention and Contingency Plan (PPC Plan).
- Section 102.15(m): ROC in this section appears to refer to a “renewal of coverage,” but ROC is defined in Section 102.1 as a “registration of coverage.” Therefore, references in this section to ROC should be changed to “renewal of coverage.”

PennFuture appreciates your consideration of these comments. If you have any questions or wish to discuss further, please do not hesitate to contact me at (215) 545-9694 or at glass@pennfuture.org.

Sincerely,



Brian Glass
Staff Attorney

Enclosure

cc: John Hanger
Kenneth F. Murin
Margaret O. Murphy