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INDEPENDENT REGULATORY
REVIEW COMMISSION

Comments of the Marcellus Shale Committee on the Environmental Quality Board's Proposal to Amend 25 Pa. Code Ch. 102 (relating to erosion and sediment control and stormwater management)

The Marcellus Shale Committee ("MSC") appreciates the opportunity to provide the Environmental Quality Board ("EQB") and the Department of Environmental Protection ("Department") with comments concerning the proposal to amend 25 Pennsylvania Code Chapter 102, which relates to erosion and sediment control and stormwater management. The MSC is made up of companies focused on the responsible development of the Commonwealth's natural gas resource in the Marcellus Shale formation. The members of the MSC represent the vast majority of natural gas well permit holders developing the formation. The comments herein are submitted in response to the EQB's publication of the Proposed Rulemaking in 39 Pennsylvania Bulletin 5131 on August 29, 2009.

Governor Rendell's Energy Independence Strategy seeks to expand Pennsylvania's energy independence by, among other goals, expanding energy production in the Commonwealth. The Marcellus Shale presents an opportunity for Pennsylvania to expand energy production and to perhaps achieve energy independence through the further production of clean burning natural gas from this potentially large shale formation. In addition, initial development efforts have already created thousands of new jobs in the Commonwealth, and it is projected that several thousand additional new jobs will be created in the next several years. The MSC looks forward to continuing to work with the EQB, the Governor and the Department to develop this opportunity while fully protecting Pennsylvania's environmental resources.

I. Summary of MSC's Comments

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. The MSC will limit its comments to those provisions of the proposed rule that directly relate to oil and gas activities.

First, the MSC 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. The MSC includes with these comments a proposal for an oil and gas industry-specific general permitting program.

II. Comments on EQB's Proposed Rulemaking

As mentioned above, the EQB describes its proposed amendment of 25 Pa. Code Ch. 102 as necessary 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." 39 Pa.B. 5131. The MSC provides the following comments on those topics.

1. Clarification of existing requirements for accelerated E&S control

The EQB has included extensive revisions to existing definitions and, in doing so, would expand the scope of the Chapter 102 program and add many new substantive requirements. For example, the definition of "BMPs—Best management practices" is proposed to be revised to add requirements for managing stormwater. The definition would further be revised to impose requirements "before, during, and after earth disturbance activities," thereby potentially expanding the scope of the program (emphasis added). Justification for these expansions is not explained or established in the proposal. Similarly, the EQB proposes to add new definitions for "post construction stormwater," "PCSM—Postconstruction stormwater management," and "PCSM Plan." Again, these definitions, coupled with extensive new PCSM requirements, substantially expand the scope of the erosion and sedimentation control regulations without justification.

The Pennsylvania Oil and Gas Act and regulations at 25 Pa. Code Chapter 78 already establish requirements for restoration of well sites and for erosion and sediment control. There is no need to expand this program. Yet, the proposal adds a new definition for "oil and gas activities" as "[e]arth disturbances associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities." Earth disturbance associated with oil and gas activities occurs when drilling well sites are initially constructed and this activity is completed before drilling rigs are moved onto location, hydraulic fracturing activities are performed or production occurs. Marcellus Shale well sites require approximately three to seven acres of such temporary earth disturbance in the form of a constructed drilling location. Upon completion of well or pipeline development, areas disturbed during construction are stabilized per the Chapter 78 regulations. There is little discharge because the stabilized areas are permeable surfaces and are vegetated. Thus, in our view, the existing Chapter 78 regulatory regime is sufficiently protective. There is no need or justification for additional controls or for PCSM requirements (see discussion below) for restored well locations.

Similarly, in regard to natural gas collection and transmission pipelines, earth disturbance occurs during the limited pipeline construction and installation phase. After pipelines are placed in excavations, the pipeline route is promptly backfilled and the area is seeded and mulched and returned to original topography, including permeable natural surfaces. There is no need or justification for additional restrictions or for PCSM requirements.

2. Incorporation of updated Federal requirements

As stated in the proposed rule, many of the proposed changes are expressly included to comply with Federal NPDES permit requirements. The federal Energy Policy Act of 2005 exempted oil and gas activities associated with stormwater discharges from NPDES permitting. Therefore, there should be no imposition of updated Federal NPDES requirements upon the oil and gas industry or included in any permit program affecting construction of oil and gas facilities.

3. Updated permit fees

The proposal would impose a fee of \$2,500 for a general E&S permit and \$5,000 for an individual E&S permit. The fee for the present ESCGP-1 for the oil and gas industry is \$500. This is a reasonable and appropriate amount. Increasing the cost 5 to 10 times is simply not justified. The MSC believes that no new or additional permits programs are necessary for the oil and gas industry and, thus, these fees should not affect or be imposed upon the industry. The MSC is willing to accept a reasonable fee for an oil and gas industry-specific general permit program as is discussed below, however.

4. Codification of PCSM requirements

The proposed rule includes new post-construction stormwater management ("PCSM") requirements. These new PCSM requirements are extensive, covering four printed pages and go well beyond the scope of the current regulations. For example, for each earth disturbance project, the proposed rule would require:

- Development of a written PCSM plan;
- Management of post-construction stormwater;
- An operation and maintenance schedule in perpetuity;
- Evaluation of potential thermal impacts for stormwater discharges;
- A riparian forest buffer management plan under certain circumstances;
- Analytical testing and assessment of soil, geology and other site characteristics;
- Water volume and quality demonstrations for stormwater discharges;
- A hydrologic routing analysis; and
- Having a licensed professional on-site during implementation of an approved PCSM plan.

As discussed above, these PCSM requirements are unnecessary for the oil and gas industry. Furthermore, imposition of such requirements may be unlawful. The justification for PCSM requirements is stated in the proposal as a mere codification of existing programs because the "Department has [historically] included PCSM requirements in the NPDES stormwater permitting program" and these new requirements are "driven by the federal NPDES stormwater construction requirements." As mentioned above, oil and gas activities are exempt from federal NPDES permitting requirements.

In addition, PCSM requirements are not necessary or appropriate because oil and gas construction activities are distinctive and unique in several respects, when compared to other construction activities. For example:

- The Oil and Gas Act and its regulations already establish site restoration requirements. These regulations presently require operations to prepare a Site Restoration Plan containing post-construction BMPs. Such Site Restoration Plans look at site restoration in its entirety, consider soil and site characteristics, and present simple and clear prescriptions for the implementation of BMPs specific to well pad and pipeline construction. These are measures that have been proven to be effective; industry contractors know how to build these features; and they do not include overly burdensome and unnecessary maintenance requirements.
- The Oil and Gas Act and its regulations already establish erosion and sedimentation control requirements. The application of time-tested, industry-specific BMPs is the best course for achieving site conditions that protect all water resources. The Oil and Gas Operators Manual already describes effective BMPs for managing erosion and sedimentation concerns.
- Initial construction of a well site involves approximately three to seven acres, but restored drilling and production sites typically require only an insignificant non-vegetated area when compared to pre-construction conditions, due to the compliance with restoration requirements. All other areas are re-vegetated and returned to approximate original topographic contours.
- Pipeline areas are fully revegetated and returned to approximate original contours.
- Oil and gas activities at well sites and pipelines are unmanned after initial construction and installation activities are completed.

In summary, there is no need or justification for PCSM requirements for oil and gas activities; such requirements would certainly be burdensome; and imposition of such requirements may be unlawful.

5. Addition of requirements related to riparian forest buffers

The EQB describes its riparian forest buffer proposal as follows:

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 Exceptional Value (EV) rivers, perennial and intermittent streams, or lakes,

ponds, or reservoirs. Requirements for buffer conservation, construction and maintenance are included.

DEP recently issued new *Riparian Forest Buffer Guidance*, DEP Doc. No. 394-5600-001, which includes almost 100 pages of new DEP policy on the development of riparian forest buffer recommendations for regulatory and other programs. In order to use the permit-by-rule proposal contained in the proposed rulemaking, which is discussed below, companies would have to design and maintain new and existing riparian forest buffers in accordance with this not-yet-finalized guidance. See §102.15(c)(2)(iii). There does not appear to be any flexibility in this new requirement for projects that have only limited and temporary stormwater impacts, such as natural gas well site construction and pipeline projects, the impacts from which are typically limited to construction-related issues easily managed by other BMPs. Moreover, this proposal fails to account for typical right-of-way maintenance requirements and management techniques that apply to pipelines.

Moreover, the proposed rule makes it impossible to discern just what situations it will apply to. For example, it appears to require mandatory buffers for any project that "contains" ponds; does this mean that any permitted project that happens to occur on a property with a farm pond automatically requires buffers to be constructed around that pond? Thus, the geographic scope of the rule likely extends to almost all possible projects, given the ubiquity of streams, lakes and ponds in the Commonwealth.

Finally, in virtually all situations, an oil and gas operator leases the land or otherwise acquires only a limited interest in the land. Thus, the permanent landowner is the one most affected by such buffers and would need to agree to the conditions of any permit in this regard. If riparian forest buffers effectively are mandated, property owners may balk at allowing any gas development on their properties if it will mean that hundreds of feet around any water will become riparian forest buffers. This would have a dramatic adverse effect on the development of additional natural gas production in the Commonwealth.

6. Introduction of a permit-by-rule option

As proposed, the permit-by-rule is so limited, time-consuming, and complex as to be of little or no value to the oil and gas industry. The proposed permit-by-rule is to be used for what the EQB describes as "low risk projects with riparian forest buffers in High Quality and all waters other than Exceptional Value." The proposed amendments are described by EQB as containing "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 EQB asserts that "[t]he proposed permit-by-rule balances environmental protection for this Commonwealth with predictability in permitting for the applicant."

The proposed permit-by-rule would, in fact, be of no new or additional value to the oil and gas industry. For example, it would unjustifiably be limited to "low-risk" projects and conditions requiring the use of riparian forest buffers, would require "low impact

design” techniques, would require more prescriptive plan and implementation obligations, would require mandatory oversight by a professional engineer, geologist or landscape architect, and would mandate a 30-day review time period during which the Department is to determine whether the permit-by-rule applies to a project.

The proposed permit-by-rule requires those seeking coverage to first submit a “Registration of Coverage (ROC)” for Department approval. The ROC, as proposed, would need to include a wide range of information, engineering and environmental reports, municipal engineers’ approvals, and public notice confirmations. The Department would have to verify a registrant’s eligibility for coverage under the permit-by-rule, despite the registrant’s having represented that it meets the criteria for coverage. The EQB’s proposed subsection (c)(8) requires a company to wait another seven business days after receiving a “Verification of Coverage.”

Before a company can even submit an ROC, it must first schedule a “presubmission meeting with the Department or the conservation district.” Although such meetings can be useful, given Department staffing and budget challenges and escalating natural gas development, it may be difficult to schedule such meetings in a timely fashion. The company will also have to provide a public notice “once a week for 3 consecutive weeks,” followed by a 30-day comment period. The company must undertake and clear the PNDI process and must have a professional geologist evaluate the soil types in the project area. Once a company finally has developed and obtained all of the information and documents necessary for an ROC, and (assuming the company can determine that it is eligible under all of the criteria) submits the ROC, the company must then wait another 30 days while the Department reviews the ROC. Once the Department approves a project, the company must provide “pre-construction notification” and then wait another 7 days. Overall, the timing of and delay in this process is extremely long and uncertain.

Furthermore, there is no need for the proposed exclusion of projects from permit-by-rule coverage in Exceptional Value (“EV”) watersheds. Concerns about projects in EV watersheds can be fully and adequately addressed just as they can for high quality and impaired watersheds. EQB’s proposed blanket exclusion of projects in EV watersheds fails to account for the fact that the oil and gas industry has been operating responsibly and effectively in such watersheds for decades. Moreover, the proposed language focuses on the “potential to discharge to a *watershed*” rather than to EV waters. Thus, this proposal could bar projects from permit-by-rule coverage that touch only the barest edge of such a watershed but which are located miles from EV waters.

Proposed § 102.15(b)(3), which excludes brownfields and similar sites from the possibility of coverage under the permit-by-rule, is also overbroad. If regulated activities do not and will not undermine site remediation activities, there is no need for such exclusion.

Proposed § 102.15(b)(4) provides that activities by persons who have “failed and continue[] to fail to comply or [have] shown a lack of ability or intention to comply with a regulation, permit and schedule of compliance or order issued by the Department” are

excluded from coverage. This provision is vague and ambiguous and could unnecessarily call into question whether oil and gas developers could seek any coverage under the permit-by-rule. There are no standards, criteria or procedures for how such a determination would be made, or by whom.

Because the proposed permit and permit-by-rule options are so limited, time-consuming, and complex, and because the oil and gas industry is unique, the proposed permit-by-rule process would be of little or no value to the oil and gas industry. Thus, the EQB should promulgate a categorical general permit process that will apply to the oil and gas industry, instead of a one-size-fits-all approach. The MSC has attached a proposed Key Elements of a Categorical General Permit for Earth Disturbance Activities Associated with Oil and Gas Development to these comments as **Appendix A**.

The MSC members appreciate the opportunity to submit these comments and look forward to continuing to work with the Department and the EQB to develop and implement sound environmental policy in the Commonwealth while also maintaining the ability to develop the vital resource available in the Marcellus Shale Formation.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Slagel" with a stylized flourish at the end. To the right of the signature, the letters "FOR" are written in a small, blocky font.

Gary Slagel
Chairman of the Regulatory
Subcommittee

Appendix A

KEY ELEMENTS OF A CATEGORICAL GENERAL PERMIT FOR EARTH DISTURBANCE ACTIVITIES ASSOCIATED WITH OIL AND GAS DEVELOPMENT

- Should improve on ESCGP1/E&S plan process and operate as a true general permit that is effective upon submission of a Notice of Intent (NOI).
- Persons proposing to conduct an earth disturbance activity associated with oil and gas development who wish to be covered by a categorical general permit should submit an NOI to DEP or an authorized County Conservation District prior to commencing the earth disturbance activity. Coverage would then apply beginning on the date that the NOI is received by DEP or the District.
- Persons conducting earth disturbance activities would be required to develop, implement, and maintain erosion and sediment and stormwater best management practices (BMPs) and similar pollution prevention measures. Erosion and sediment control BMPs would be designed to minimize point source discharges to surface waters, preserve the integrity of stream channels and protect the physical, biological and chemical qualities of the receiving water. Various BMPs and their design standards are listed in the Erosion and Sediment Pollution Control Program Manual (#363-2134-008).
- Applicants would be required to prepare and have in place an Erosion and Sediment Control Plan (E&S Plan) which identifies appropriate BMPs to be implemented to ensure that existing and designated uses of surface water are protected and maintained. If the earth disturbance activities are located in a High Quality or Exceptional Value watershed or Exceptional Value wetland pursuant to PA Code Chapter 93 and Chapter 105 of the Department's regulations, the E&S Plan would be required to address the special protection requirements in the Department's regulations at PA Code Chapter 102, section 102.4(b)(6) and Section II Chapter 4 of the *Oil and Gas Operators Manual*.
- Persons covered under the permit would be required to maintain a copy of the E&S Plan and any other documents required by the permit at the site and keep such documents available for review by DEP, a Conservation District or other authorized local, state, or federal government official.
- Persons requesting a renewal of coverage under the permit would be required to submit to DEP or authorized County Conservation District an NOI. The terms and conditions of the previous categorical general permit coverage would be automatically continued and remain fully effective and enforceable, provided the permittee is, and has been, operating in compliance with the terms and conditions of the permit.

- The Categorical General Permit for Earth Disturbance Activities Associated With Oil & Gas Development would issue from the date of receipt of the NOI by DEP or the County Conservation District and would remain in full force and effect for a period of one year, unless renewed on or before its expiration.
- Permittees would be required to ensure that visual site inspections are conducted weekly, and after each measurable precipitation event greater than 0.1 inch, by qualified personnel, trained and experienced in erosion and sediment control, to ascertain that the Erosion and Sediment Control (E&S) BMPs are properly installed and working as designed. Any E&S BMPs found not to be properly installed and working as designed would be required to be repaired or replaced within twenty four hours.

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From: Finucane, Mary K. [Mary.Finucane@klgates.com]

Sent: Wednesday, November 25, 2009 1:55 PM

To: EP, RegComments

Cc: Bender, Phillip M.; Komoroski, Kenneth

Subject: Marcellus Shale Committee's Comments on Proposed Rulemaking, Environmental Quality Board, 25 Pa.Code Ch. 102

INDEPENDENT REGULATORY
REVIEW COMMISSION

Attached please find the Marcellus Shale Committee's Comments on Proposed Rulemaking, Environmental Quality Board, 25 Pa.Code Ch. 102. Kindly confirm receipt by replying to all. Correspondence may be sent to the following:

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