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From: John J. Walliser [jwalliser@pecpa.org]
Sent: Monday, November 30, 2009 11:33 AM
To: EP, RegComments
Cc: Jack Ubinger; Don Welsh; John J. Walliser
Subject: Comments on Proposed Rulemaking | 25 PA CODE CH.102

Attached please find the comments of the Pennsylvania Environmental Council on the proposed rulemaking re 25 PA. CODE Ch. 102. A one page summary of same is also attached. If you are unable to open/read the attachments, please contact me at 724.719.0069.

Thank you,

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INDEPENDENT REGULATORY
REVIEW COMMISSION

November 30, 2009

Pennsylvania Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

The Pennsylvania Environmental Council ("PEC") is pleased to submit these comments on the proposed amendments to 25 Pa. Code Chapter 102. PEC is a statewide membership organization with offices in Harrisburg, Philadelphia, Pittsburgh, Luzerne, Meadville, and Johnstown. Watershed protection and stormwater management have long been priorities of our work throughout the state at the both project and policy level.

General Comments

PEC understands that part of the rationale behind the proposed amendments from the Department of Environmental Protection ("Department") is to better facilitate permit review, particularly in light of limited agency resources. While we recognize the intent, we are concerned that several elements of the proposed amendments – as explained in greater detail, below – lack sufficient evaluation and assurance, and fall short of the Department's mission of resource protection and pollution prevention. This concern is heightened if the proposed amendments signal a larger change in the Department's approach to regulatory management; one that, in our view, proposes inappropriate dependence on third party analysis and judgment.

Specific Comments

1. The Proposed "Permit-By-Rule" Option Should be Eliminated

The Department proposes the creation of a new "permit-by-rule" (PBR) option for certain earth disturbance activities, one that would require the Department and County Conservation Districts to conduct expedited review of permit applications. For the following reasons, PEC believes this proposal is fundamentally flawed and would fail to adequately protect aquatic resources in accordance with state and federal law.

a. The Proposed PBR Would Violate Pennsylvania's Chapter 93 Antidegradation Regulations in High Quality (HQ) Watersheds.

DEP cannot make the PBR applicable in HQ watersheds without violating the antidegradation regulations set forth in 25 Pa. Code Chapter 93. Since these regulations are a federally required element of our state's water quality standards, the proposed PBR

would violate federal law and may result in the revocation of DEP's antidegradation program as it relates to stormwater discharges. See 40 C.F.R. § 131.12

The Chapter 93 antidegradation regulations require that existing uses and the water quality necessary to protect those uses, including HQ and Exceptional Value (EV) uses, shall be protected and maintained. 25 Pa. Code § 93.4a. The antidegradation regulations further require that all persons proposing new, additional, or increased discharges to HQ waters "shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge." 25 Pa. Code § 93.4c(b)(i)(A). As recognized by the Pennsylvania Environmental Hearing Board in *Zlomsowitch v. DEP and Lehigh Asphalt Paving & Construction Co.,* 2004 EHB 756, "a 'nondischarge alternative' is a method in which *no* point source discharge into the [special protection] water is permitted." (emphasis in original). The antidegradation regulations establish a hierarchy whereby these nondischarge alternatives *must* be evaluated *and used* if they are environmentally sound and economically feasible. *Id.*

Compliance with Chapter 102 regulations does not constitute compliance with Chapter 93 antidegradation regulations, and that DEP must ensure that any permitted stormwater discharges meet the requirements of both Chapter 102 and Chapter 93. *Blue Mountain Preservation Assoc. v. DEP and Alpine Rose Resorts*, 2006 EHB 589. Accordingly, a Chapter 102 PBR process cannot suffice to ensure that Pennsylvania's Chapter 93 antidegradation requirements will be met for stormwater discharges in HQ watersheds.

Yet DEP is proposing to make the PBR applicable in HQ watersheds. The proposed regulations would require PBR applicants in HQ watersheds to:

- Demonstrate that all stormwater discharges will not degrade surface waters.
- Use a 150-foot riparian forest buffer and other nondischarge alternative Best Management Practices (BMPs). "Nondischarge alternative BMPs" are defined in the proposed regulations as "environmentally sound and cost effective BMPs that individually or collectively eliminate the net change from preexisting stormwater volume, rate and quality for storm events up to and including the 2 year/24-hour storm."

Any PBR authorization granted in an HQ watershed under this proposed process would violate Pennsylvania's antidegradation regulations. The most critical element to the antidegradation implementation regulations is that, as the first step in the hierarchy, nondischarge alternatives must be evaluated and must be used if they are feasible. In these regulations, DEP does not require the comprehensive antidegradation analysis that is necessary to ensure that nondischarge alternatives are fully evaluated and, where feasible, fully implemented. In fact, while the regulations require the implementation of "nondischarge alternative BMPs," the regulations would define that term in a such a way that such BMPs would still allow for a discharge of stormwater under storm events up to and including the 2 year/24-hour storm standard. As the Environmental Hearing Board recently made clear in *Crum Creek Neighbors v. DEP and Pulte Homes*, EHB Docket No. 2007-287-L (Adjudication issued October 22, 2009), stormwater BMPs that merely meet

the 2 year/24 hour volume control standard are not nondischarge alternatives under Chapter 93.

In addition, the PBR would not allow for the thorough analysis of other hydrologic impacts that development may have on HQ watersheds; for example, adverse impacts to groundwater recharge and base-flow of streams. In *Crum Creek Neighbors*, the Environmental Hearing Board reiterated as a "cornerstone of Pennsylvania law" that "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." *Crum Creek Neighbors* at 20 (citing *Oley Township v. DEP*, 1996 EHB 1098). This includes impacts caused by earth disturbance, loss of vegetation, grading, soil compaction, impervious cover, and other elements of land development that may eliminate groundwater recharge and thus reduce the flow of streams. Id. at 21. Clearly, a comprehensive analysis of these nondischarge, hydrologic impacts must be undertaken by DEP permit reviewers in order to ensure that Chapter 93 antidegradation requirements are met. Id. at 20-27.

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

b. <u>The Proposed PBR Cannot Apply in Impaired Watersheds Because Thorough, Individual Analyses of New Discharges to Those Watersheds Must be Conducted.</u>

The Clean Water Act requires that DEP not issue permits for new discharges in impaired watersheds that cause or contribute to the impairment and, for watersheds where Total Maximum Daily Loads (TMDLs) have been approved, that NPDES permits are consistent with the waste load allocations (WLAs) set forth in the TMDL. Ensuring that these legal requirements are met requires a much more thorough analysis than what is afforded by the PBR approach.

The Clean Water Act requires states to establish TMDLs for impaired waters so that the impairment can be remedied and water quality standards can be met. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). Point sources are assigned WLAs necessary to meet the overall TMDL pollutant load cap. 40 C.F.R. § 130.2(h), (i). WLAs must be expressed in numeric form in the TMDL. *See id.* § 130.2(h), (i).

Once a TMDL is approved and specific WLAs have been established for point sources within the watershed, the NPDES permits for those point sources must be consistent with the terms of the TMDL and the WLA, and permit effluent limitations must be established that are "consistent with the assumptions and requirements of any available waste load allocation." 40 C.F.R. §122.44(d)(1)(vii)(B); *see also Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (citing 40 C.F.R. §130.2). In this respect, the WLA is a

type of water quality-based effluent limit that must be imposed upon the point source in order for water quality standards to be met. 40 C.F.R. §130.2(h); 25 Pa. Code §96.4(d).

Because stormwater discharges from construction activities are point sources under the Clean Water Act, if they are contributing to the impairment of waters for which a TMDL is developed, they must be given a specific, numeric WLA within the TMDL. 40 C.F.R. § 130.2(h), (i). Each stormwater NPDES permit in turn must incorporate permit conditions sufficient to ensure that WLAs are achieved so that water quality standards are met. *See* 25 Pa. Code §96.4(f)(2) (WLAs and effluent limitations "shall be made more stringent if the cumulative loading . . . does not meet [applicable water quality standards]"); *see also Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*, EPA Memorandum from Robert H. Wayland and James A. Hanlon to Water Division Directors, Regions 1-10 (EPA Memo) (November 22, 2002).

Pursuant to 40 C.F.R. §122.4(i), an NPDES permit shall not be issued to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. §122.4(i). In impaired watersheds where a TMDL has been developed, a new source or discharger may only be issued an NPDES permit if (i) a WLA has been allotted within the TMDL for the new source or new discharger; and (ii) compliance schedules have been established for all point and nonpoint sources within the watershed sufficient to correct the impairment. *See Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1015 (9th Cir. 2007), *cert. denied, Carlota Copper Co. v. Friends of Pinto Creek*, 2009 U.S. LEXIS 381 (U.S. 2009). In impaired watersheds where TMDLs have not been established, a new source or discharger that would cause or contribute to the impairment shall not be issued an NPDES permit. *Id.*

In order to determine whether a particular development will meet these federal law requirements, analysis of the pollutant loadings expected from the proposed development must be conducted. This requires a very detailed and thorough site specific technical analysis of the Erosion and Sediment (E&S) Plan and Post Construction Stormwater Management (PCSM) Plan for the development site in question. Individual site specific issues such as topography, soils, vegetation, extent of proposed disturbance, pollutant sources, impacts to stream channel and banks, and placement and design of BMPs will come into play when determining the site-specific pollutant loadings for that particular site. This kind of site-specific thorough review cannot be conducted through an expedited PBR process. Rather, individual technical review of plans is required.

c. <u>The Proposed PBR Would Violate the Clean Water Act Because it Does Not Require Meaningful Agency Review.</u>

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

Such a review is required by the Clean Water Act. Without technical review, the program is an "impermissible self-regulatory permitting regime." *Waterkeeper Alliance v. EPA*, 399 F.3d, 486, 498 (2nd Cir. 2005).

In *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), *cert. denied, Texas Cities Coalition on Stormwater v. EPA*, 541 U.S. 1085, 124 S. Ct. 2811 (2004), the Ninth Circuit held that the federal Phase II Rule for MS4s violated the Clean Water Act because the NPDES general permit for Phase II MS4s did not require substantive review of stormwater management plans designed to meet MS4 permitting requirements. The court found that the Clean Water Act clearly requires a permitting authority to review plans "to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable." *Id.* at 855 (emphasis in original).

When such review is not provided, "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable." *Id.* Further, "no one will review that operator's decision to make sure that it was reasonable, or even in good faith." *Id.*

The court concluded by noting that its holding does not preclude permittees from designing their own stormwater management plans, "however, stormwater management programs that are designed by regulated parties must, *in every instance, be subject to meaningful review by an appropriate regulatory entity* to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable." *Id.* at 856

Even more on point is *Waterkeeper Alliance*, where the Second Circuit held that the federal CAFO Rule violated the Clean Water Act because it did not require permitting authorities to review nutrient management plans developed by CAFOs before issuing an NPDES permit. While CAFOs are regulated as point sources under the Clean Water Act, CAFO NPDES permits do not contain numeric effluent limits, but rather, BMP-based effluent limits.

The federal CAFO Rule did not, however, require the permitting authority to review nutrient management plans submitted by each CAFO, and ensure that the plan contained site-specific application rates to adequately control runoff. Several environmental groups challenged this aspect of the rule, arguing that it created an "impermissible self-regulatory permitting regime." *Id.* at 498. The Second Circuit agreed. Stating that "the Clean Water Act demands regulation in fact, not only in principle," the court found that under the Clean Water Act, a permitting authority may only issue NPDES permits "where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards." *Id.*

Citing the Clean Water Act, the court found that the Act allows states to issue NPDES permits only when the state permitting authorities "*apply, and insure compliance with*, any applicable [effluent limitations and standards]. *Id.* (citing 33 U.S.C. § 1342(b) (emphasis in original)). The court held that "[b]y failing to provide for permitting authority review of the nutrient management plans, the CAFO Rule plainly violates these statutory

commandments and is otherwise arbitrary and capricious under the Administrative Procedure Act." *Id.* at 499.

The court found that, because of the technical, site-specific nature of the nutrient management plans, simply put, the Clean Water Act requires that the permitting authority "*ensure*" that each permittee "has, *in fact*, developed a nutrient management plan that satisfies the [technical] requirements [for such plans]—in other words, ensure compliance "with all applicable effluent limitations and standards." *Id.* at 499. Thus the court concluded that the CAFO Rule violated the Clean Water Act because "*most glaringly, the CAFO Rule fails to require that permitting authorities review the nutrient management plans developed by Large CAFOs before issuing a permit that authorized land application discharges.*" *Id.* (emphasis added). Such review is necessary to "adequately prevent Large CAFOs from misunderstanding or misrepresenting their specific situation and adopting improper or inappropriate nutrient management plans, with improper or inappropriate application rates." *Id.* at 500.

The applicability of *Waterkeeper Alliance* to the current situation cannot be more striking. Like the CAFO NPDES permit program, construction NPDES permits require BMP-based effluent limits. To meet these effluent limits, they require the submission of technical, site-specific plans that set forth BMPs to control stormwater runoff and volume and minimize phosphorus, nitrogen, and sediment transport from a specific and unique landscape. These plans are technical and complicated in nature and must be "prepared by trained and certified specialists."

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

Because of the site-specific and technical nature of these plans, the permitting authority *must* require technical review of these plans before issuing an NPDES permit that assures compliance with all applicable effluent limits and standards. 33 U.S.C. § 1342(b). Without such review, this statutory requirement cannot be met, as there is no assurance from the permitting authority that the permittee's consultant did not "misunderstand or misrepresent" proposed BMPs and relevant water quality requirements, or that the plans are not "improper or inappropriate," or contain "improper or inappropriate" BMPs to meet effluent limits and water quality standards. *Waterkeeper Alliance*, 399 F.3d at 500.

Unfortunately, we've already seen this scenario play out for several erosion and sediment control permits issued to gas drilling companies under the expedited permit review process DEP has instituted for oil and gas activities. The Chesapeake Bay Foundation appealed three permits that were issued for operations in Tioga County without technical review. Only because of these third party appeals, DEP went back and took a careful look at the permits, concluded that they had major substantive deficiencies, and revoked the permits.

As stated in DEP's own press release dated October 28, 2009, DEP revoked the permits "because of numerous technical deficiencies discovered after our approval of the permits" which included "inaccurate calculations, failure to provide best management practices where required, and lack of proper technical detail."

In sum, the language of the Clean Water Act and the relevant case law make clear that the proposed PBR is an "impermissible self-regulatory permitting regime" that violates the Clean Water Act. *Id.* at 498.

2. There is Need for Greater Assurance Concerning Long Term Operation and Maintenance

a. Codification of Post-Construction Stormwater Management Plans Requirements

PEC commends the Department for the addition of Section 102.8 ("PCSM requirements"), as well as the conforming revisions to other related sections, to the Chapter 102 regulations. Clearly stated, enforceable requirements designed to ensure the long-term operation, maintenance, repair and monitoring of BMPs is an imperative element of effective erosion and sediment control and stormwater management.

The hall marks of the PCSM planning and plan implementation requirements should include: (1) clear assignment of responsibility for the performance of the activities specified in the PCSM Plan to a capable "Operator" in the first instance; (2) an effective process for the subsequent assignment of responsibility by the then current designated Operator to a capable successor; (3) effective routine communication, on a periodic basis, concerning the actions required to comply with the approved PCSM Plan; (4) a record-keeping and reporting system that will provide an effective means for the Department or other delegated entity to monitor compliance without exclusive reliance on complaints and random site inspections; and (5) a mechanism for ensuring that parties responsible for the performance of long-term PCSM plan activities have the financial capacity to do so.

b. Specification of the Party Responsible for Long-Term Operation and Maintenance of PCSM BMPs

Subsection 102.8(a) of the proposed rule states that "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." Similarly, Subsection 102.5(f) states that "[a] person proposing earth disturbance activities requiring a permit or permit coverage under this chapter shall be responsible to ensure implementation and long-term operation and maintenance of the PCSM Plan."

Subsection 102.8(f)(11) specifies that the PCSM Plan submitted to the Department for review and approval must include "identification of the person responsible for long-term operation and maintenance of the PCSM BMPS [*sic*]." The person identified as the person responsible for long-term operation and maintenance activities is within the definition of "Operator" (*see,* Section 102.1 ("Definitions.")). If the designated Operator is a person

other than the permitee, the "Operator" would be deemed a co-permitee by operation of the proposed rule (*see*, Subsection 102.5(h)).

Finally, Subsection 102.8(m) provides, in part, that "[u]nless a different person is approved in writing by the Department, operation and maintenance of PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMP is located."

The specification of the person responsible for the performance of the activities specified in the PCSM Plan (*i.e.* the "Operator" of the PCSM BMPs) should be reviewed and approved by the Department in every case. In addition, if the approved Operator is a person other than the landowner of the property where the PCSM BMP is located, the landowner should be jointly responsible for the activities specified in the PCSM Plan so that the landowner has a vested interest in assuring that the Operator of the PCSM BMPs is fulfilling its obligations.

c. Transfer of Responsibility for Long-Term Operation and Maintenance of PSCM BMPs

The responsibility for the operation and maintenance of PSCM BMPs should be transferable from the then current, Department-approved Operator to another person having the competence and capacity to undertake the responsibilities for performing the obligations of the approved PCSM Plan. A specific provision should be added to Section 102.8 to enable the substitution of one approved Operator for another through a process in which the Department: (1) is provided advance written notice of the proposed transfer (including the specification of the information to be provided for the Department's review of the competence and capacity of proposed transferee); and (2) approves the transfer. If the Department-approved Operator does not seek the Department's prior written approval, the Operator, as well as the landowner, should remain responsible, together with the purported transferee, until the Department's approval is obtained.

d. Communication of the Actions Required for the Long-Term Operation and Maintenance of PCSM BMPs

Effective communication of the Operator's or landowner's responsibilities for the performance of the activities specified in the PCSM Plan requires that the plan, as well as all reports and records maintained pursuant to the Plan, be in the possession of the then current Operator and/or landowner(s). This requirement is not explicitly stated in Section 102.8. (Subsection 102.8 (l), relating to the notice of termination required by Section 102.7, merely provides that the permitee shall include "Record Drawings" with the notice of termination; retain a copy of the Record Drawings as part of the approved PCSM Plan and provide a copy of the Record Drawings as a part of the approved PCSM Plan to "the person identified in this section as being responsible for the operation and maintenance of the PCSM BMPs.") Section 102.8 should provide that, as part of the review and approval of the PCSM Plan in the first instance, the permitee shall (1) deliver a copy of the approved PCSM Plan to the specified Operator and landowner(s); (2) obtain written acknowledgements of receipt from the Operator and the landowner(s), on a form to be specified by the Department; and (3) submit the acknowledgements of receipt to the Department for its file. This provision should also apply as part of the process for the

Department's prior review and approval of a proposed transfer of the responsibility for performing the activities specified in the PCSM Plan to a new Operator or when the landowner conveys the property to a new landowner. In the transfer scenario, the obligation should also include the transfer of all records created and maintained pursuant to the PCSM Plan (*e.g.,* inspection reports and maintenance and repair records). In the case of land conveyances, the obligation of the landowner to deliver a copy of the approved PCSM Plan, as well as relevant records, to the new owner and to file the executed acknowledgement of receipt form with the Department should be specified in the deed covenant specified in Subsection 102.8(m). (*See,* the comment on covenants below.)

Effective communication relating to the performance of the Operator's and landowner(s)' long-term responsibilities under the approved PCSM Plan also requires the submission of periodic compliance reports to the Department. The proposed rule provides that documentation of each inspection and all BMP repair and maintenance activities shall be prepared (Subsection 102.8(f)(10)); however, there is no explicit requirement in the proposed rule for the periodic submission of such documentation to the Department. Rather, the proposed rule provides only that the requisite documentation be available for review and inspection by the Department. (Subsection 102.8(i) and (j)).

It is unrealistic to expect the Department to have the capacity to inspect the potentially large and dispersed population of sites subject to PCSM Plans with the requisite frequency to assure consistent compliance with the requirements of the PCSM Plans. Therefore, the rule should include a provision requiring the Operator to submit annual reports to the Department, with written notice of the submittal to the landowner(s), summarizing the activities performed to comply with the PCSM Plan. We suggest that the rule specify the submission of the annual reports in electronic form and explicitly authorize the submission of digital photographs of surface BMPs in those circumstances where such photography would effectively demonstrate compliance with the maintenance requirements for the BMP in question. In addition to summarizing the activities performed to comply with the inspection, operation and maintenance requirements of the PCSM Plan, the report should also provide information on any plan to alter the physical characteristics or planned uses of the property covered by the PCSM Plan that would affect the function of the PCSM BMPs. The failure to submit a timely or compliant annual report should be used by the Department as the mechanism for selecting sites for compliance inspections.

In addition to the submission of annual reports, the rule should provide for a review and, if necessary, a reassessment of the factors identified in Subsection 102.8(g) every five years. The report of that review and reassessment should include the specification of any required or recommended corrective actions. The report should be submitted to the Department for its review and approval. The review and reassessment must be prepared by a person trained and experienced in PCSM design methods and techniques (*see,* Subsection 102.8(e)).

e. <u>Financial Capacity to Implement the PCSM Plan</u>

The proposed rule does not include an explicit provision requiring the estimation of the annual cost of performing the long-term activities specified in a proposed PCSM Plan.

Such a cost projection and calculation of a net present value is essential to a determination by the Department as to whether the permitee, the operator and/or landowner have the financial capacity to implement the approved PCSM Plan. Such a cost projection/net present value calculation provision should be included in Section 102.8. In addition the rule should provide for the utilization of some form of appropriate financial assurance mechanism in those cases where warranted.

f. Deed Covenants

Subsection 102.8(m) specifies, in part, that "...The deed for any property containing a PCSM BMP shall identify the PCSM BMP and provide notice that the responsibility for operation and maintenance of the PCSM BMP is a covenant that runs with the land and that it is enforceable by subsequent grantees." It is important that the identification of the PCSM BMPs, as well as the specification of the responsibilities associated with the operation and maintenance of the BMPs, be recorded as promptly as reasonably possible following the installation of the BMPs in order to minimize the chance of other interests (*e.g.* mortgages, liens, *et cetera.*) being recorded ahead of the PCSM BMP covenants. In other words, if the PCSM BMPs are installed in connection with earth disturbances by a property owner who does not intend to immediately convey the land, the requisite easement and covenant document should be recorded promptly and not deferred until a deed of conveyance is recorded.

3. PEC Supports Expanding the NPDES Permitting Requirements to Cover "Oil and Gas Activities" and "Operation of Animal Heavy Use Areas"

Without question, both sets of activities present significant potential to cause sediment and stormwater pollution; their proposed inclusion under Chapter 102 is essential and appropriate.

4. PEC Supports the Increase of Permit Application Fees

Fees should be at levels that effectively sustain the Department's program. PEC recognizes the challenges that the Department faces in implementing the stormwater program given limited staff and funding; an increase in fees should help address these challenges.

5. The Proposed Riparian Buffer Requirements Should Be Expanded

The Department's proposal would require forest buffers for new development in Exceptional Value (EV) watersheds (Section 102.14(a)(1)). PEC supports this requirement, and recommends that it be expanded to include HQ watersheds. Moreover, PEC believes the proposed 150 foot buffer requirement should be increased to a minimum of 300 feet for EV waters.

6. The Threshold for Requiring an Erosion and Sediment Control Permit for Timber Harvesting and Road Maintenance Should be Reduced.

The current proposal keeps the permit threshold at 25 acres. Certain types of timber harvesting and road maintenance activities can result in significant earth disturbance with corresponding potential for accelerated erosion and sedimentation. PEC urges the Department to reduce this threshold corresponding to site-specific criteria and analysis. This threshold reduction would be consistent with requirements for other regulated activities.

Conclusion

Thank you for the opportunity to submit these comments. A one page summary of our comments is enclosed. Please contact me if you have any questions or require additional information.

Sincerely,

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Summary of Comments on Proposed Rulemaking 25 PA CODE CH. 102

1. **The Proposed "Permit-By-Rule Option" Should be Eliminated**
   a. Option would violate Pennsylvania's Antidegradation provisions when applied in High Quality watersheds
   b. Option would violate the Clean Water Act when applied in impaired watersheds.
   c. Option constitutes insufficient agency review under the Clean Water Act.

2. **Greater Assurance is Needed Concerning Long-Term Operation and Maintenance (Post Construction Stormwater Management)**
   a. Codification of Post-Construction Stormwater Management Plan Requirements
   b. Specification of the Responsible Party
   c. Transfer of Responsibility
   d. Communication of Actions Required
   e. Financial Capacity
   f. Deed Covenants

3. **PEC Supports Expanding NPDES Permitting Requirements to Include "Oil and Gas Activities" and "Operation of Animal Heavy Use Areas"**

4. **PEC Supports the Increase of Permit Application Fees**

5. **The Proposed Riparian Buffer Requirement Should be Expanded to, at a minimum, include High Quality Watersheds**

6. **The Threshold for Requiring an Erosion & Sediment Control Permit for Timber Harvesting and Road Maintenance Should be Reduced Using Site Specific Analysis**