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Pennsylvania Oil & Gas Association

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

Re: Proposed Rulemaking to Amend 25 *Pennsylvania Code* Chapter 102 (Erosion and Sediment Control and Stormwater Management)

Below are the comments and suggestions of the Pennsylvania Oil and Gas Association on proposed rules amending Department of Environmental Protection regulations governing erosion and sediment control and stormwater management. These comments are being submitted in accordance with instructions provided in the Notice of Proposed Rulemaking that was published in the August 29, 2009 edition of *the Pennsylvania Bulletin*.

General Comments

The Pennsylvania Oil and Gas Association (POGAM) hereby endorses and adopts the comments on the proposed rule submitted to the Board by the Marcellus Shale Coalition. POGAM participated in the development of the MSC comments to ensure that they reflect the specific concerns and recommendations of POGAM's membership.

Similarly, POGAM endorses and concurs with the comments and recommendations on the proposed rule submitted by the Pennsylvania Chamber of Business and Industry.

Additional Comments and Recommendations

POGAM offers the following comments and recommendations to supplement and expand upon the comments submitted by the MSC and the PCBI:

Section 102.5 (permit requirements)

The proposed rule establishes agency authority for two types of permits to control erosion and sedimentation impacts on surface waters:

- the NPDES Permit for Stormwater Discharges Associated With Construction Activities, which is governed generally by the requirements of section 402 of the federal *Clean Water Act*, US Environmental Protection Agency rules and Department rules promulgated in Chapter 92; and

- the E&S permit, which applies to specific earth disturbance activities that are not governed by the NPDES permit, including activities associated with timber harvesting, road maintenance activities, or oil and gas activities.

The distinction between the two permits, which is established in Section 102.1 (definitions) of the proposed rule, appropriately reflects the exemption from NPDES permitting for stormwater discharges from oil and gas exploration, production, processing or treatment operations and transmission facilities that the US Congress enacted in the federal *Energy Policy Act of 2005*.

The distinction between the two permit types is not maintained in section 102.5 (permit requirements) for NPDES-exempt stormwater discharges associated with oil and gas activities, however, and we suggest that the Board should modify the final rule to clarify the exemption and thereby avoid possible confusion when the rule is implemented.

While section 102.5(c) specifically establishes the E&S permit requirements for anyone proposing regulated oil and gas activities, we suggest that the final rule should also add language in sections 102.5(a)(1) and (2) and 102.5(d) to include oil and gas activities in the list of activities that are not required to obtain an individual NPDES Permit or coverage under a general NPDES permit or NPDES permit-by-rule.

We also suggest that the Board should amend the final rule at section 102.5(c) to clarify that the E&S permit required for regulated oil and gas activities is a general E&S permit. Specifically, the subsection should be amended to read:

(c) A person proposing oil and gas activities that involve 5 acres (2 hectares) or more of earth disturbance over the life of the project shall obtain ~~an~~ a general E & S Permit under this chapter prior to commencing the earth disturbance activity.

Section 102.6 (permit applications and fees)

The proposed rule substantially increases fees for permits issued pursuant to Chapter 102 to \$2,500 for a general permit and \$5,000 for an individual permit. The current fee for Erosion and Sediment Control General Permit (ESCGP-1) is only \$500, an amount that we believe is reasonable given the scope of Department review that is associated with this general permit. While some fee increase may be appropriate if the department can demonstrate the need, we are concerned that the proposed fee increase is excessive. We encourage the Board to revisit the proposed fee increases, especially those imposed for general E&S permits.

BMPs and Antidegradation Requirements

The Board should amend the final rule to clarify the role of Best Management Practices (BMPs) required by Chapter 102 in achieving compliance with the Department's antidegradation regulations in Chapter 93 (water quality standards). As noted in the comments provided by PCBI, recent Environmental Hearing Board rulings have undermined the Department's determination that Special Protection BMPs satisfy the antidegradation requirements of sections 93.4a through

93.4c and create considerable confusion over the appropriate regulatory standards needed to demonstrate compliance with Chapter 93.

The Board should amend the erosion and sediment control requirements in section 102.4(b)(6) and the post-construction stormwater management requirements in section 102.8(h) to categorically state that use of the nondischarge alternative and ABACT BMPs required by Chapter 102 to maintain and protect waters classified as High Quality or Exceptional Value under Chapter 93 constitutes compliance with the antidegradation requirements of sections 93.4a through 93.4c.

Mandatory Riparian Buffers

The proposed rule would require mandatory riparian buffers as a condition for Chapter 102 permits that are issued for activities that occur in the proximity of Exceptional Value waters. The proposed rule in section 102.14 (riparian forest buffer requirements) also establishes numerous standards and conditions for protecting existing riparian forest buffers and establishing new buffers.

POGAM shares the concerns raised by the PCBI and the MSC on the proposed rule and the related draft *Riparian Forest Buffer Guidance* (Document No. 394-5600-001), and we urge the Board to ensure that the final rule that it adopts includes all revisions necessary to clarify the scope of the riparian buffer regulation.

Of particular concern to POGAM members are:

- the riparian forest buffer mandate; and
- the potential conflicts between oil and gas rights and surface property rights created by the requirement for permanent protection of riparian forest buffers.

In the preamble to the proposed rule, the Board asks for feedback from commentators on the question of whether the final rule should include a provision for mandatory riparian forest buffers. POGAM agrees that riparian forest buffers provide a variety of benefits to a watershed, including pollution control, habitat enhancement and water quality improvements, but we believe it is critical to recognize that riparian forest buffers are extremely complex ecosystems that are difficult to create, restore, maintain and sustain and may not be appropriate in all cases where they would be required by the proposed rule. For example, steep slopes, cliffs, outcroppings and other topographic or geologic features may preclude the installation of a riparian forest buffer. Similarly, existing land uses such as roads, buildings and bridges may also prevent the use of a buffer.

Rather than imposing a mandatory riparian forest buffer requirement in all cases where a permitted project occurs near EV waters or whenever an applicant wishes to use the proposed NPDES permit-by-rule, POGAM urges the Board to provide flexibility in the final rule by relying on riparian forest buffers as a preferred BMP option for meeting the nondischarge or ABACT

requirements in a Special Protection watershed that the permittee may voluntarily choose when local topography, existing land uses and other site-specific conditions can accommodate them.

Another major concern that must be taken into consideration is the potential conflict between different property interests that have a right to use land that would be affected by the proposed riparian forest buffer mandate. The proposed rule at section 102.14(f)(1) requires permanent protection of riparian forest buffers through deed restrictions, conservation easements, local ordinances or permit conditions. This provision does not acknowledge or consider the existence of interests in real property that are either of record, arise by operation of law, or enjoy protection under Pennsylvania common law that entitle the owner of the property interest to use the land in such a way that may affect or impair the riparian buffer.

As a rule, oil and gas developers do not own the surface of the lands upon which they operate. Rather, oil and gas interests that have been severed from the surface estate or that have been leased by the surface owner to an oil and gas operator will contain express and implied rights created by deed or operation of law pertaining to the allowable use of surface resources. It is entirely likely that the requirements to actually install a forest buffer along with making provision for it to be “protected in perpetuity” would both exceed the scope of the oil and gas operator’s general common law privilege to reasonable use of the surface and conflict with the terms of deeds or leases.

Accordingly, we are concerned that the application of such rules as proposed would impair rights secured to both landowners and oil and gas operators by existing contracts and deeds and implicate constitutional prohibitions forbidding the impairment of contracts.

In addition, a mandated forest buffer, particularly when coupled with the requirement of “permanent protection,” would be a government prescribed and exclusionary land use imposed directly on a surface landowner. As such it implicates the state and federal prohibitions against government takings without just compensation. For example, Sections 102.14 (e) and (f) require a landowner to discontinue active farming activity and some timbering activities within a forest buffer zone.

Finally, assuming there is no deed, lease or common law right for a mineral owner to install perpetual forest buffers, a regulatory provision or permit condition mandating the maintenance of a buffer zone would require the mineral owner to obtain a surface owners consent before being able to proceed with development. If consent was not forthcoming, the requirement would afford the surface owner a veto right over development in contravention of a mineral owner’s dominant mineral rights.

To ensure that the final rule does not create constitutional, contractual or common law conflicts between owners of separate estates in land, and to avoid imposing a mandatory BMP that may not be appropriate in all cases envisioned by the proposed rule, we strongly suggest that the Board modify the final rule to provide for riparian forest buffers as an optional BMP that may be selected by the permittee voluntarily.

On behalf of the hundreds of companies and individuals who are members of the Pennsylvania Oil and Gas Association, we thank the Board for the opportunity to offer our insights, express our concerns, and make recommendations that we believe will improve the final rule.

For the Pennsylvania Oil and Gas Association

A handwritten signature in black ink, appearing to read "S. Rhoads", written in a cursive style.

Stephen W. Rhoads

President