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INDEPENDENT REGULATORY
REVIEW COMMISSION

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November 30, 2009

VIA E-MAIL (RegComments@state.pa.us)

The Honorable John Hanger
Environmental Quality Board
Rachel Carson State Building, 16th Floor
400 Market Street
Harrisburg, PA 17101-2301

Subject: Comments on Proposed Rulemaking – 25 PA Code Chapter 102
Erosion and Sediment Control and Stormwater Management

Dear Secretary Hanger:

Thank you for providing the opportunity to better understand the proposed changes in the control of erosion and sediment and stormwater management at the public meeting in Pittsburgh in September 2009. Based on my understanding and review, I am providing feedback and comments on behalf of RRI Energy, Inc. (RRI), on the Department of Environmental Protection's Proposed Rulemaking for 25 PA Code Chapter 102 as published in the August 29, 2009 Pennsylvania Bulletin.

RRI Energy, Inc. owns and operates a diverse portfolio of power generation facilities in nine states and is one of the leading providers of electricity in competitive markets in the United States with a total operating capacity of more than 14,000 megawatts. Our power generation assets are located in key regions of the country and include a combination of base-load, intermediate and peaking units. These assets use coal, natural gas and oil in generating electricity. RRI Energy has 18 power generating stations located in Pennsylvania and employs more than 1,000 people in the state. RRI is investing more than \$435 million in emissions control related improvements at five Pennsylvania coal-fired generating plants, as part of the company's commitment to environmental stewardship.

The company is strongly committed to employee safety and caring for the environment and the communities where we operate, while providing reliable, affordable power to our customers.

Proposed Erosion and Sediment (E&S) Control and Stormwater Management Regulations

RRI understands that the goal of the proposed rule to reduce the impacts of stormwater runoff on the waters of the Commonwealth, both during project construction and afterwards. However, specific issues and requirements within the proposed regulation result in significant potential land ownership, use, and development conflicts while exceeding the measures necessary to protect Pennsylvania's waterways.

For ease of reference, the following comments are organized to the specific portions of the Proposed Erosion and Sediment Control and Stormwater Regulations containing the items or conditions in question.

§ 102.1 - Definitions

- In the definition of "E&S Plan," DEP has added the words "before, during, and after construction." The use of these words does not provide any additional clarification. Specifically:
 - There is no need or requirement for E&S controls prior to commencement of construction because there is no earth disturbance. Construction officially "begins" when installation of the E&S control measures start. That's not a "before" period, but "during" construction.
 - An E&S Plan for construction activities would not contain a description of BMPs to prevent erosion and sediment during post-construction activities other than a construction sequence discussion of permanent stabilization measures. The E&S Plan becomes irrelevant when stabilization is completed and erosion and sedimentation control measures have been removed. Rather, descriptions of post-construction pollution control measures are more appropriate for the Post Construction Stormwater Management (PCSM) Plan.

Changing the definition to read, "**A site-specific plan, which may consist of both drawings and narrative, that identifies BMPs to minimize accelerated erosion and sedimentation during earth disturbance activities, up to and including permanent stabilization.**" is more appropriate.

§ 102.2 - Scope and Purpose

- Additional clarification and discussion from DEP is requested regarding the scope of post-construction stormwater management for projects where the project site is restored to pre-construction conditions. This is specific to those instances where the site is restored to its original condition upon completion of construction activities. In such a situation, no new or specific PCSM BMPs are required because the post-construction site is restored to its condition prior to earth disturbance.

§ 102.4(b)(4) – Planning and Implementation of Earth Disturbance Activities

- Subsection 102.4(b)(4)(v) requires that earth disturbance activities shall be planned and implemented to "protect, maintain, reclaim and restore the quality of water and the existing and designated uses of the waters of the Commonwealth. This language exists in the current version of Chapter 102. It is contained in the current definition of BMPs, and in the general requirements for erosion and sedimentation control BMPs (102.11).

As presented in the previously adopted version of Chapter 102, however, this language is presented as high level goals and outcomes of stormwater protection BMPs to achieve water protection and restoration from a strategic perspective. PA DEP indicated in WRAC meetings that this was their intent. But at the regional implementation level, permit application reviewers may see this as a project-specific requirement. As presented in the proposed rule, this language is a project-specific, task-oriented outcome of a specific project's erosion and sedimentation plan. This requirement in the proposed rule again exceeds the scope of this regulation (102.2). In addition, this regulation could be interpreted to place responsibility for water quality restoration on a project that did not cause stream degradation, such as where any impairments occur upstream of the project.

The entire section 102.4(b)(4) should be reformatted and rewritten to meet the intent as presented in the current Chapter 102 version, which is a high level strategic outcome or goal of storm water protection. This could be accomplished by modification of the lead-in phrase to read "planned and implemented using reasonable and appropriate methods and practices to address the following objectives to the extent practicable . . ."

§ 102.4(b)(5)(x) – Stormwater Event vs. Measurable Rainfall

- In the proposed rule, DEP eliminated the words "measurable rainfall" from the requirements for inspection and maintenance of E&S BMPs. In the current version of Chapter 102, this requirement is interpreted in accordance with EPA guidance regarding a "measurable precipitation event," which is rainfall of 0.1 inches or greater. The proposed rule refers to "each stormwater event," a term which is undefined and could be read as implying any quantity of precipitation. We do not believe that the DEP intends to require a full, documented inspection of all project BMPs for a rainfall event resulting in nothing more than a few raindrops. However, without a clear definition of "stormwater event," this provision creates a prospect for confusion and misunderstanding. RRI suggests that DEP either re-insert the words "measurable rainfall," or clearly defines a "stormwater event" as an event generating some measurable amount of runoff from the land, and more distinctly quantify this if different than the currently accepted EPA guidance.

§ 102.4(b)(5)(xiv) and 102.8(c) – Relationship Between E&S Plans and Post-Construction Stormwater Plans

- DEP has added language requiring the planning and implementation of erosion and sedimentation control measures during the construction period to be consistent with post-construction stormwater management measures. There may be a number of reasons why activities during the construction phase would be different than the post-construction phase, and establishing a "consistency" mandate is not always reasonable or practicable in all situations. An example of this are project areas that are ultimately designed for a post-construction stormwater BMP may need to be used during construction for material staging. At the WRAC meeting in April 2009, DEP stated in response to verbal comments on this issue that the developer should consider these requirements and their relationship to efficiencies. Therefore, the two above provisions should be rewritten to reflect an optional, efficiency-driven measure. For example, 102.4(b)(5)(xiv) could be rephrased as, "The project should consider planning, designing, and implementing the E&S plan, to the extent practicable, to be consistent

with the PCSM plan." 102.8(c) should also be similarly reworded. This will ensure that appropriate flexibility is retained to adequately plan and implement a project, while recognizing the value of planning and designing BMPs that are consistent between the two phases of the project.

§ 102.4(b)(5)(xv) – Identifying Riparian Forest Buffers

- DEP has added a requirement to "identify existing and proposed riparian forest buffers" as part of an E&S plan. The proposed riparian forest buffer requirement only applies to earth disturbance activities within a certain distance of an EV waterway, and earth disturbance activities proposing to use the proposed permit-by-rule that are within a certain distance of a waterway (§102.14). Therefore, the necessity or requirement for all earth disturbances in the Commonwealth to identify riparian forest buffers in their E&S plans when section 102.14 does not apply is not completely understood. The wording of 102.4(b)(5)(xv) could be changed to read, "**For earth disturbance activities installing a riparian forest buffer as a PCSM BMP (102.14), identify existing and proposed riparian forest buffers.**" and thus, provide better clarification.

§ 102.4(b)(6) and 102.8(h) – Relationship Between E&S Regulations and Chapter 93 Antidegradation Requirements

- In promulgating these regulations updating the Chapter 102 rules governing erosion and sedimentation control requirements, the relationship should be clarified between the Chapter 102 requirements and antidegradation provisions in Chapter 93. In the absence of clear guidance from the language of the regulations or in the preambles to either chapter, several Environmental Hearing Board cases issued over the past several years have created considerable confusion and concern in the regulatory community in overturning DEP's long-standing management of the E&S program. In order for the E&S program to function in a reasonable and practical manner, and in the process provide a reasonable level of protection to the Commonwealth's special protection watersheds, the Chapter 102 regulations need to clearly embrace a practical standard of performance, and specifically declare that meeting that standard satisfies the antidegradation requirements of Chapter 93. The approach which DEP has suggested in Chapter 102, of requiring management of stormwater in a 2-year, 24-hour storm, and defining ABACT best management practices in special protection watersheds, is reasonable. In order for that approach to be effective, however, the regulations and preamble need to clearly declare that satisfaction of the requirements found in §§102.4(b)(6) and 102.8(h) constitutes compliance with §§93.4a-93.4c.

§ 102.6(a)(2) – Pennsylvania Natural Heritage Program

- This section changed Pennsylvania Natural Diversity Inventory (PNDI) to Pennsylvania Natural Heritage Program (PNHP) as the authoritative source regarding the presence of State or Federal threatened or endangered species in a proposed project location. DEP should be aware that the website for PNHP contains a disclaimer that "retains the reservation at any time and without notice to modify or suspend the web site and to terminate or restrict access to it." Permission to use an alternative source for identifying the presence of endangered species if the PNHP site is inaccessible or shutdown should be included in the regulation.

§ 102.6(b) – Permit Fees

- Reasonable and justifiable permit fee adjustments are appropriate if that fee structure is dedicated to assure an adequate staffing of the program, and if firm commitments are made regarding review deadlines by DEP and/or Conservation District. Currently, timeframes to review the permit application are implied as part of the permit application instructions. However, these instructions are subject to change at DEP's discretion without public input or comment. These schedules to review applications for E&S Plans and NPDES permit for construction activities and deadlines are critical to supporting RRI's environmental projects.

§ 102.7(c) – Notice of Termination Process

- DEP has added language to the proposed rule requiring written acknowledgement of the filing of a Notice of Termination (NOT) before the permittee can be released from permit terms and conditions. Considering the recently reduced resources within the Department, this new requirement could relieve DEP from any accountability to review or acknowledge incoming NOT's. This would leave the permittee responsible for permit and E&S requirements long after the project is complete, and potentially expose the permittee to third-party suits and challenges to situations that occur beyond their control. This requirement should either be deleted; or alternatively, a "deemed approval" provision be included in which a NOT is deemed approved if the Department or Conservation District has not provided a written objection to the NOT within a specific timeframe.

§ 102.8(a) – PCSM Requirements

- This new section requires that "a person proposing an earth disturbance activity that requires an NPDES permit, or another Department permit that requires compliance with Chapter 102, shall develop, implement, operate, and maintain a PCSM plan." While understanding the requirement for a PCSM for earth disturbances requiring a NPDES permit for stormwater discharges associated with construction activities, RRI has concerns with the wording, "or other Department permit that requires compliance with this chapter shall be responsible." This wording encompasses the universe of very small projects that, as a condition of an applicable non-Chapter 102 permit, must meet some aspect of the Chapter 102 requirements. For example, Chapter 105 permits for stream encroachments require compliance with Chapter 102 E&S controls. But an earth disturbance such as this can be measured in square feet, not acres, and may actually not require an E&S plan (less than 5000 square feet), let alone an NPDES permit. But based on the proposed wording of §102.8(a), this very small earth disturbance project would ostensibly be required to have a PCSM plan. The wording of this section be changed limiting the requirement for a PCSM plan only to earth disturbances that require an NPDES permit.

§ 102.8(g) – Requirements for Additional Information for PCSM Plans

- § 102.8(g)(1) requires the "analytical testing and assessment of soils, geology, and other predevelopment site characteristics including infiltration and geotechnical studies that identify location and depths of test sites and methods used." Compliance with this proposed regulation would impose onerous burdens on the actual start of the

construction project. Additional costs of \$50,000 to \$100,000 and upwards of three months to gather and compile the necessary information would be incurred. This would cause delays in implementation of the start of the construction projects. At a higher strategic level, the imposition of these requirements would discourage economic development, be it residential, commercial, or industrial, within the Commonwealth.

§ 102.8(l) – Certification Requirements

- §102.8(l) requires that "record drawings" be submitted with a Notice of Termination, retained with the PCSM plan, and copies provided to the person responsible for the operation and maintenance of PCSM BMPs. Record drawings as described in the proposed regulation are not applicable to all earth disturbance activities. The currently proposed requirement is applicable for projects installing engineered and constructed PCSM BMPs. The language of this section should be modified to reflect the appropriate applicability of the Record Drawing requirement.

§ 102.14 – Riparian Forest Buffer Requirements

- Although the conceptual environmental value and benefit of riparian forest buffers to water quality is not in question, the use of riparian forest buffers should not be included as a mandatory regulatory requirement. The incorporation of a riparian forest buffer as part of a regulated earth disturbance project could be highlighted as a significant and preferred BMP, with incentives in the regulation and the Pennsylvania Stormwater BMP Manual to adopt this BMP over other available BMPs. For example, DEP could have highlighted the incorporation of a riparian forest buffer BMP as the means of compliance for meeting the nondischarge or ABACT requirements in a High Quality (HQ) or Exceptional Value (EV) watershed.
- A riparian forest buffer cannot always be placed along a stream. Physical impediments, such as streamside roads and buildings, or topographical features, such as cliffs or high banks, prevent the installation and/or survival of a forest system. The regulation should be modified to account for these issues, and consideration of the best use of the land to protect the water bodies while accounting for site-specific issues and obstacles.
- §102.14(a)(2) ("Other approvals that include a buffer") – This section should be deleted from the proposal. The language of this section could be interpreted as a delegation of unlimited authorization to the Department that, without any controls or guidelines, to require the installation of a riparian buffer for any situation, simply by adding conditions to other permits (e.g., Chapter 105 permits).
- §102.14(a)(4) – This section describes the composition of an existing riparian buffer that is acceptable to the Department. In public meetings, DEP has stated that the average cost to establish and maintain a riparian buffer is \$1400/acre. Considering the widespread presence of invasive species in Pennsylvania, the cost to design, install, and maintain a riparian forest buffer in accordance with DEP's composition requirements exceeds the Department's current projection. DEP should consider re-evaluation of their cost estimates, and in turn, the impact of these costs of compliance with 102.14 to the regulated community.
- The language in §102.14(d)(1) through (3) is confusing. Specifically, the proposed rule injects the words, "(both sides)" after the words "along all rivers, perennial or intermittent streams" in each subsection relative to the required average minimum widths. If a project is proposed within a required minimum width on one side of a stream, the regulation could be interpreted that a riparian buffer must be also established on the

other side of the stream where the project is not occurring. In many situations, the project may be located only on one side of the stream (with the stream acting as a property boundary). If DEP's intention is to impose an obligation to install a buffer on both sides of the stream, even where the land in question is owned by other entities, then this requirement becomes unreasonable and unachievable due to land ownership issues, as well as the fact that the project is not taking place on the other side of the stream. RRI requests that DEP very clearly explain, then clarify and adjust the wording in the regulation.

- Section 102.14(f)(1) requires protecting riparian buffers in perpetuity through legal means such as deed restrictions, easements, and ordinances. Since installation of a riparian forest buffer under the proposed regulation is essentially eliminating future land use for the land owner, it is highly unlikely that the land owner would agree to such a condition. The requirement to permanently protect the riparian forest buffers would impose under burdens on project development and cause delays in implementation of environmental projects. The removal of this requirement for riparian forest buffers from the proposed regulation and establishing it as a primary and preferred BMP per the previous comment makes better environmental and business sense.

§ 102.15 – Permit-by-Rule (PBR) for Low Impact Projects

- The proposed requirements for the PBR have significantly changed since Spring 2009 when the Pennsylvania Chamber of Business and Industry submitted a letter to the Department in support of the construction NPDES PBR option for low-risk earth disturbance activities. The review period for a PBR is now 30 days and requires the installation of riparian forest buffers. The use exclusions of the PBR are now so substantively restrictive that very few projects would even conceptually qualify. As this concept evolved, the Department attempted to accommodate the needs and requests of many different parties. However, the outcome is that the concept has diminished to the point that the restrictions, conditions and timeframes have eliminated the construction NPDES PBR as a useful tool for the regulated community.

§ 102.22(b)(1) – Temporary Stabilization

- In this section, DEP added specific language for temporary stabilization. Specifically, the new requirement states: "Upon temporary cessation of earth disturbance activity or any stage or phase of activity where a cessation of earth disturbance activities will exceed 3 days, the site shall be immediately seeded, mulched, or otherwise protected from accelerated erosion and sedimentation pending future earth disturbance activities." Such an approach would engender a significant waste of resources. The minimum germination time for annual rye grass is ten (10) days under ideal soil moisture and temperature conditions. Therefore, planting grass seed for a cessation in earth disturbance activities that is less than the germination period will provide no short-term E&S benefit before the seed and mulch is disturbed, turned under, or removed upon start up of earth disturbance activities. Assuming the project sites are already operating under an E&S plan approved by the Department or applicable conservation district, and possibly even an NPDES or E&S permit, then the disturbed project area is already protected from accelerated erosion and sedimentation. Because of this, the Department may reconsider and to increase the number of days for temporary stabilization from three (3) days to seven (7) or more days.

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RRI Energy, Inc. appreciates this opportunity to comment on the proposed Chapter 102 regulations for Erosion and Sediment Control and Stormwater Management.

Please do not hesitate to contact me at (724) 597-8633 if you have any questions or require additional information.

Respectfully Submitted,

Sara Marie Baldi

Sara Marie Baldi
Senior Environmental Specialist

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Chambers, Laura M.

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Subject: RRI Energy Inc's Comments on Proposed Rulemaking: 25 PA Code Chapter 102
Importance: High

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<<RRI's Comments on Draft 102 Regulations - 11-2009.pdf>>

Good evening.

Attached is the electronic copy of my comments on the proposed rulemaking for Chapter 102 – Erosion & Sediment Control and Stormwater Management.

Please contact me if you need additional information.

Sara Marie Baldi

RRI Energy, Inc.

Senior Environmental Specialist

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