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INDEPENDENT REGULATORY
REVIEW COMMISSION

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NOV 30 2009

November 25, 2009

Environmental Quality Board
Rachel Carson State Office Building
16th Floor
400 Market Street
Harrisburg, PA 17101-2301

ENVIRONMENTAL QUALITY BOARD

RE: Proposed Rulemaking, Erosion and Sediment Control and Stormwater Management. 39
Pa.B. 5121; August 29, 2009.

Dear Sir or Madam:

Dominion is submitting these comments in reference to the Pennsylvania Department of Environmental Protection (PADEP) proposed revisions to the Erosion and Sediment Control and Stormwater Management regulations at 25 Pennsylvania Code Chapter 102. Dominion owns and operates approximately 2300 miles of natural gas pipeline and 31 compressor stations in Pennsylvania as well as extensive natural gas exploration and production assets. The construction and maintenance of natural gas transmission pipelines and compressor stations and certain natural gas exploration and production activities are regulated under these provisions and will be subject to the revised requirements proposed in this rulemaking.

Since the U.S. Environmental Protection Agency has recently finalized major revisions to the Federal construction stormwater requirements, Dominion would encourage PADEP to consider revising the Pennsylvania Chapter 102 regulations before the revisions currently under review are finalized.

This PADEP proposal significantly expands the scope of the existing erosion and sediment control program and adds several requirements not directly related to the prevention of accelerated erosion and sediment control, specifically:

- post-construction stormwater management requirements;
- duplicative permits for oil and gas activities;
- burdensome recordkeeping and reporting, and;
- riparian forest buffer requirements.

Some of these requirements impose significant land ownership, use and management restrictions which would require use of environmental covenants and conservation easements to ensure compliance. The proposed revisions mandate excessive restrictions and costly mandates above and beyond federal requirements with a performance-based requirement to "improve and enhance" water quality, as opposed to a more reasonable standard of ensuring that permitted activities maintain and do not degrade existing water quality. The requirements for post-

construction stormwater management are inappropriate for most linear projects where there are no resulting impervious surfaces or grading changes. The post-construction stormwater management requirements also create property issues for the majority of construction on right-of-ways which are leased rather than owned by Dominion.

The post-construction stormwater management requirements are excessive and should focus on maintenance of disturbed lands and water bodies. Dominion requests these post-construction requirements be withdrawn or significantly revised to address only the construction activities covered by the permit rather than restoration of existing impairments which are outside the scope of the current activity.

Parties involved in earth disturbance activities should be obligated to protect and maintain the quality and existing designated uses of waters of the Commonwealth during the activity and be obligated to implement best management practices (BMPs) to protect and maintain the water quality after the construction activities are completed. The restoration and reclamation of the waters in the project area that have not been degraded by the current project should not become the responsibility of the current project. There is, furthermore, no measure or metric in the implementing regulation that defines whether the current project has restored or reclaimed the water quality of the water body in the project area.

These post-construction requirements are included in many sections of the proposed changes, including:

- The §102.1 Definitions of “Best Management Practices” and “E&S Plan – Erosion and Sediment Control Plan”.
- The §102.2 Scope and purpose – which expands the scope of E&S Plans to “manage post construction stormwater.” Dominion requests that this requirement not be broadly applied to each and every earth disturbance activity, as this section implies.
- The §102.4(b) requirements to “minimize the increased stormwater” and “to reclaim and restore the quality of water.” Dominion requests that these requirements be removed from the list of requirements for planning of earth disturbance activities, particularly those under the permitting threshold.
- The §102.8(a) PCSM (Post-construction Stormwater Management) requirements – which would require a PCSM Plan (containing all of the extensive listed requirements) for many small repair activities that do not generate post-construction stormwater management issues of any type. For example, a small repair to a pipeline or other structure within a stream channel requires a Chapter 105 permit. All Chapter 105 permits require compliance with Chapter 102; however, a PCSM Plan would not be appropriate for that activity. Dominion requests that the PCSM Plan requirements apply only to earth disturbance activity that requires an NPDES or E&S Permit under this chapter by removing the phrase “or other department permit that requires compliance with this chapter”.
- The §102.8(f)(1) PCSM Plan requirements to provide drawings and other documentation ...” designed to minimize the threat to human health, safety and the environmental to the greatest extent practicable.” These items are not pertinent to post-construction stormwater management, but rather issues to be

addressed when planning construction and are fully addressed in the E&S plan. Dominion requests that these requirements be removed from the PCSM Plan.

- The §102.8(g)(2) and (g)(3) PCSM Plans for proposed activities include requirements for analysis of volume reduction, water quality and adherence to the stormwater management watershed plan. These requirements go beyond measures to insure that the activity does not degrade from pre-construction conditions; indeed, they mandate **improvement** from pre-construction conditions. This section should be removed.
- The §102.8 (m) requirement that operation and maintenance of the PCSM BMPs be the responsibility of the landowner of the property. Dominion requests that the permittee, property owner, developer, operator, tenant, etc. be allowed to determine and propose the appropriate responsible party(ies) to the Department on a case-by-case basis. While we do not disagree that long-term operation and maintenance of certain PCSM BMPs is critical, we urge the Department to provide for flexibility that will allow the responsibility to be assigned to the most appropriate party for each individual situation.

The proposed rule changes are unclear regarding the permitting requirements applicable to oil and gas activities. The rules should clearly indicate which permits apply to these activities.

The definition of "E&S Permit" has been changed to remove the applicability threshold of 25 acres or more and different thresholds have been defined for activities covered by the E&S permit as described in §102.5 - Permit requirements. Since *oil and gas activities* have been added to both the definition of "Earth Disturbance Activity" and "E&S Permit" as well as its own definition, it may be concluded that these activities may, in some cases, require both an NPDES permit and an E&S permit. Dominion requests that the permitting and plan requirements for oil and gas activities be clarified within the rule as the cross-referencing of definitions makes the intent very unclear.

There are several sections of the proposed rule where the inclusion of oil and gas activities needs to be clarified, including:

- *The §102.1 Definition of E&S Permit - Erosion and Sediment Control Permit* – includes earth disturbance activities associated with oil and gas activities.
- *The §102.1 Definition of and oil and gas activities* – includes "earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities."
- *The §102.5(a) Permit Requirements* includes requirements for obtaining an NPDES for
 - "stormwater discharges associated with construction activities";
 - "an earth disturbance activity that involves equal to or greater than 1 acre and less than 5 acres of earth disturbance with a point source discharge"
 - "an earth disturbance activity that involves 5 acres or more of earth disturbance"

- "oil and gas activities that involve 5 acres or more of earth disturbance over the life of the project shall obtain an E&S permit under this chapter prior to commencing the earth disturbance activity."

The proposed rule changes include several new requirements for recordkeeping and reporting. These new requirements are either excessive or need more clarification.

- Dominion requests that the inspection and maintenance requirements for PCSM BMPs contained in proposed §102.8 (f)(10) not specify that inspection records be maintained by use of a "written" report. Many companies are now using electronic compliance inspection scheduling and tracking systems. Documentation of inspections in such systems should serve in lieu of maintaining written paper records, if the permittee desires.
- §102.4(b)(5)(x) of the proposed rule requires a maintenance program for the "operation and maintenance of BMPs and the inspection of BMPs on a weekly basis and after each [measurable rainfall] stormwater event...[and]... completion of a written report documenting each inspection and all BMP repair and maintenance activities." Dominion requests that a workable rule-of-thumb or guideline be provided for defining a "stormwater event" for inspection purposes in actual practice, otherwise the result will be conflict, confusion, and uncertainty. An endpoint for the inspection and documentation requirements should be provided to prevent unnecessary inspections after restoration is complete and the site is permanently stabilized.

The requirement for written documentation and retention of the inspection reports should only be required for projects that require either an NPDES or an E&S permit. The proposed change would result in this requirement being extended to all projects that disturb greater than 5000 square feet, the threshold for requiring an E&S plan. We believe that this requirement is excessive and should be redefined to include only permitted projects, as it does not improve compliance on smaller projects.

- §102.4 (b) (7) of the proposed rule requires that inspection reports and monitoring records be available for review and inspection at the project site during all stages of the earth disturbance activity. Many small construction projects do not have an onsite construction trailer or other place sufficient to keep these records. The inspection reports may be kept electronically at a remote office or in possession of an inspector who is not present on site at all times (such as a consultant or licensed professional). Dominion requests that this requirement be changed to require records to be produced promptly (within 24 hours or one business day) upon request.
- §102.5(e) of the proposed rule requires a preconstruction meeting with PADEP or conservation district prior to beginning earth disturbance activities. Dominion requests that the preconstruction meeting be held with PADEP Office of Oil and Gas for oil and gas exploration and production activities or with the Conservation District for other projects and at the discretion of these departments. The Office of Oil and Gas and the conservation districts are most familiar with Dominion activities and construction practices and are normally involved with the preconstruction activities. Their

participation in this role continues to be appropriate and beneficial and should continue as currently managed, with these offices both scheduling and participating in preconstruction meetings at their discretion. If this requirement is not changed to allow for the discretion of the Department with oversight responsibilities, Dominion asks that provisions be made in the rule for those occasions when a Department representative is unable to attend the preconstruction meeting although the required notifications have been made in a timely fashion.

- §102.7(c) of the proposed rule establishes a new requirement that a permit is terminated only after receipt of written acknowledgement from PADEP of a permittee notice of termination (NOT). Until that acknowledgment is received, the permittee would remain responsible for compliance with the permit terms and conditions including operation and maintenance of all PCSM BMPs on the project site. There is no justification for this proposed requirement. The proposal contains no deadline for the PADEP response, leaving permittees responsible for permit conditions and the project site for an undetermined amount of time. This could include continued unnecessary inspections of completely stabilized disturbed areas for extended duration, at considerable expense and with no further benefit. Dominion requests that this requirement be removed entirely – especially for projects involving only temporary earth disturbance that are restored with no added impervious surfaces or constructed PCSM BMPs – such a pipeline installation or repair projects. At a minimum, the NOT should be deemed acknowledged if no response is received within 15 days.
- §102.8(l) of the proposal requires the permittee to include “Record Drawings” with the notice of termination, including a final certification statement from a licensed professional. This requirement is unnecessary and not relevant for all projects. “Record” drawings of the type described are typically not created for gas utility, pipeline, and gas well construction projects. This requirement only makes sense when used to record engineered and constructed structures for Post-Construction Stormwater Management which are not part of all earth disturbance projects. Dominion requests that this requirement be removed.

The proposed rule contains significant new requirements for riparian forested buffers that are costly and lack flexibility in their implementation. They also create significant property rights issues for activities on leased utility right-of-ways.

Although riparian forested buffers can result in various environmental benefits, only a few of these benefits are directly or indirectly related to preventing accelerated erosion and sedimentation. Because of the extreme cost and lack of flexibility, as well as property rights issues associated with this type of mandate, Dominion asks that this requirement be removed from this rulemaking in its entirety and be addressed in a separate rulemaking. We believe that voluntary riparian buffer creation could be encouraged through other incentives, such as post-construction stormwater credits. This requirement is particularly problematic for the oil and gas industry where construction is normally conducted on leased right-of-ways, where the permittee has no continuing property rights outside of those specifically negotiated in the lease agreement.

Should these requirements remain in the final rule, we offer the following comments regarding the specific provisions concerning riparian forest buffers:

§102.14 (a) General requirements.

(1) Riparian forest buffer. Persons proposing or conducting earth disturbance activities shall incorporate a riparian forest buffer within the boundaries of the project site in accordance with this section if one of the following apply:

- (i) The activity requires a permit under this chapter, in located within an Exceptional Value watershed, and the project site contains, is along or within, 150 feet of a river, stream, creek, lake, pond or reservoir.***
- (ii) The project is authorized utilizing the permit-by-rule under this chapter.***

(2) Other approvals that include buffer. A riparian forest buffer may be required by to be incorporated within the boundaries of a project site in accordance with this section by other rules, regulations, order, permit, or other approval by the Department.

Dominion requests that this requirement clarify that the intent is to require buffers only along the EV stream and not every stream within the EV watershed. Dominion requests that the requirement in section (2) be removed as it is an open-ended statement and not a requirement; it does not add to the scope or applicability of this specific requirement.

§102.14 (a) (4) Existing buffer composition. An existing riparian forest buffer must: meet the requirements of subsection (d); consist predominantly of native trees and shrubs that provide at least 60% uniform canopy cover; noxious weeds and invasive species must be removed or controlled to the extent possible.

Given the widespread epidemic of invasive species in some areas of Pennsylvania almost all of the groundcover would have to be removed and replanted to meet this specification. PADEP referred to the draft Forest Buffer Guidance Document for suggested costs of these buffers. \$1400/acre was offered as an average cost by PADEP staff during one of the public meetings. PADEP also suggested the use of volunteer labor to plant these buffers, including environmental groups and donated labor and equipment from industries. We doubt that volunteer labor or donated materials will be available to the majority of permittees. Additionally, based on similar installations, we believe the design/installation cost per acre to be more accurately \$25,000 - \$40,000 per acre or more, plus monitoring costs.

102.14 (e) (2) An existing riparian forest buffer must: meet the requirements of subsection (d); consist predominantly of native trees and shrubs that provide at least 60% uniform canopy cover; noxious weeds and invasive species must be removed or controlled to the extent possible for a period of at least 5 years.

This section would require long-term maintenance of a riparian forest buffer, similar in nature to a Post Construction Stormwater Management maintenance plan and would add substantial direct and indirect cost to all projects. Dominion requests that this requirement be limited to those projects that impact current forest riparian buffers only.

§102.14 (f)(1) Existing and newly established riparian forest buffers including access easements must be protected in perpetuity through deed restriction, conservation easement, local ordinance or permit conditions.

The cost of the acquiring the riparian buffer, added to ROW costs and the need to obtain the perpetual protection of the land, will be burdensome and costly to the utilities. It may limit or prohibit the location of our utility services and essentially involve a taking of the landowners' property to comply with this mandatory regulation. As proposed by PADEP, the landowner would then have the financial obligation to maintain that buffer as a PCSM BMP. Dominion requests that this requirement be limited to developments that have post-construction impacts that must be controlled through engineered controls only.

§102.15 Permit-by-rule for low impact projects with riparian forest buffers

As proposed, the permit-by-rule is very prescriptive and would have limited use to much of the regulated community. Any advantage provided by the promise of an "expedited" 30-day review period is more than offset by the additional, time-consuming "up-front" requirements prior to submission (three weekly newspaper publications, pre-application meeting, etc.). The additional mandatory riparian buffer requirement (and time needed to arrange and design such) and need for licensed professional may well add more to project costs than would be offset by the expedited review. Traditionally, in other Department programs, the term "permit-by-rule" is used where a regulated entity is "deemed" to have a permit without the need to apply for one, provided certain conditions are met. This permit-by-rule does not reduce the permitting burden for either the permittee or the Department.

Dominion believes that the increased fee schedule for permit applications as proposed at §102.6 of the rule is justified, provided that the fees are used to provide the agency resources to improve responsiveness and provide reasonable and defined application processing timelines.

As proposed, these rules only impose timelines on the permittee for response to application deficiencies with no guarantee of times for Department review. Timelines should be mandated for both completeness and technical reviews by the Department. General permit applications should not be subject to technical review, but only a check to determine that all required elements are present and that the standard conditions for coverage have been met. The Department should commit to review times for both General and Individual NPDES and E&S permit applications. Currently, permit review times are contained in the permit application instructions, rather than in the regulations, and can be changed at any time and without opportunity for public participation. Permittees need to be certain of timeframes so that construction schedules and resources can be appropriately planned.

The proposed rules for Temporary Stabilization at §102.22(b)(1) require that any earth disturbance activity where work has been stopped for more than three days be immediately seeded, mulched, or otherwise protected from accelerated erosion and sedimentation

pending future earth disturbance activities. Three days is much too short a period of time to require these measures be taken.

In the absence of a definition for temporary cessation of earth disturbance, this requirement is not reasonable or workable and would require reseeding and mulching over short periods of no work such as extended holiday weekends or while construction equipment is being repaired. This practice would have no tangible, beneficial impact to the site which is already protected from erosion by the BMP's required by the permit and described in the E&S Plan. Dominion requests that this time be changed to 20 days.

Dominion appreciates this opportunity to provide comments on these proposed regulatory changes that will have significant impact on our businesses in the Commonwealth. Should you have any questions regarding these comments please contact Roberta Jackson at 304.627.3562 or at roberta.j.jackson@dom.com.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Faggert". The signature is written in dark ink and is positioned above the printed name.

Pamela F. Faggert