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From: Smith, James M
Sent: Tuesday, December 01, 2009 12:53 PM
To: IRRC
Cc: Gelnett, Wanda B
Subject: FW EQB Proposed Regulation "Erosion and Sediment Control and Stormwater Management"
Attachments: POGAM Chapter 102 Comments pdf, PI-#2276880-v1-Marcellus_Shale_Letter (2) pdf

The attached comments are on #2783. Thanks

From: Steve Rhoads [mailto:srhoads@pogam.org]
Sent: Monday, November 30, 2009 4:32 PM
To: Smith, James M.
Cc: 'Gary Slagel'
Subject: RE: EQB Proposed Regulation "Erosion and Sediment Control and Stormwater Management"

REC-1
11/30/09
11:31 AM

Jim:

Attached are the comments of the Pennsylvania Oil and Gas Association and the Marcellus Shale Coalition on the Chapter 102 rules. At some point it may be worthwhile to sit down and discuss these matters.

Thanks.

Steve Rhoads

From: Smith, James M. [mailto:jsmith@irrc.state.pa.us]
Sent: Tuesday, September 08, 2009 10:26 AM
Subject: EQB Proposed Regulation "Erosion and Sediment Control and Stormwater Management"

For your information, on August 29, 2009, the Environmental Quality Board (EQB) published a notice of proposed rulemaking in the *Pennsylvania Bulletin* titled "Erosion and Sediment Control and Stormwater Management." This notice is available at <http://www.pabulletin.com/secure/data/vol39/39-35/1610.html>. You can also find the regulation, along with other information related to the rulemaking on our website at <http://www.irrc.state.pa.us/Regulations/RegInfo.cfm?IRRCNo=2783>.

The last day to submit comments to the EQB is November 30, 2009. As stated in the *Pennsylvania Bulletin*, interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to:

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

(express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments may be submitted electronically to the EQB at RegComments@state.pa.us and must also be received by the Board by November 30, 2009. A subject heading of the proposal and a return name and address must be included in each transmission. Please be aware that comments will appear on IRRC's website.

Please submit your comment to the EQB at the address and email shown above. It is also helpful to "cc: IRRC" on any written comments to the EQB. Our mailing address and email are listed below.

If you, other members of your organization or other interested parties have any questions, please contact me at (717) 783-5439 or via email. Also, please feel free to share this information with anyone who might be interested in this regulation.

Thanks,

Jim Smith

James M. Smith
Regulatory Analyst
IRRC
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November 30, 2009

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)

REC-1111
2009-11-13
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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


Stephen W. Rhoads
President



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November 25, 2009

Environmental Quality Board
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Harrisburg, PA 17105-8447

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

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

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

The Marcellus Shale: Energy to fuel our future

I. Summary of MSC's Comments

Pennsylvania currently has extensive requirements for controlling accelerated erosion and preventing sediment pollution from various earth disturbance activities. These requirements have been effective in achieving the stated purpose of minimizing accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing designated uses of waters within the Commonwealth. The EQB now proposes to change these effective requirements to "enhance requirements related to agriculture; clarify existing requirements for accelerated E&S control; incorporate updated Federal requirements; update permit fees; codify PCSM requirements; add requirements related to riparian forest buffers; and introduce a permit-by-rule option." The EQB has taken more than forty printed pages to provide this elaboration and to revise the current program without any stated justification for the need for much of what is now proposed. The MSC will limit its comments to those provisions of the proposed rule that directly relate to oil and gas activities.

First, the MSC believes that longstanding and well-established erosion and sedimentation control requirements have been fully effective in regard to oil and gas activities. The proposed rules include several new and burdensome requirements that would adversely affect these activities. No new requirements should be added without adequate justification and no such justification is expressed in connection with this proposed rulemaking. Second, the federal Energy Policy Act of 2005 expressly exempts stormwater discharges associated with oil and gas activities from NPDES permitting programs. Therefore, it is inappropriate to impose any requirements for stormwater discharges associated with oil and gas activities as a result of NPDES permitting rules. Third, regardless whether or not it is lawful to subject the oil and gas industry to a stormwater permitting program, there is simply no justification for imposing the proposed permitting requirements upon the oil and gas industry. Fourth, as currently drafted, the proposed permit and permit-by-rule processes would provide no improvement on current permitting mechanisms for the oil and gas industry. Oil and gas construction activities are significantly different from other types of construction projects and are expressly regulated by the Pennsylvania Oil and Gas Act. However, to improve upon the current program, the Department should create a general permit program solely for such activities. The MSC includes with these comments a proposal for an oil and gas industry-specific general permitting program.

II. Comments on EQB's Proposed Rulemaking

As mentioned above, the EQB describes its proposed amendment of 25 Pa. Code Ch. 102 as necessary to "enhance requirements related to agriculture, clarify existing requirements for accelerated E&S control; incorporate updated Federal requirements; update permit fees; codify PCSM requirements; add requirements related to riparian forest buffers; and introduce a permit-by-rule option." 39 Pa.B. 5131. The MSC provides the following comments on those topics.

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

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

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

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

2. Incorporation of updated Federal requirements

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

3. Updated permit fees

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

4. Codification of PCSM requirements

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

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

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

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

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

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

5. Addition of requirements related to riparian forest buffers

The EQB describes its riparian forest buffer proposal as follows:

This proposed rulemaking includes new requirements for protecting existing riparian forest buffers and for establishing new buffers. The rulemaking also proposes mandatory riparian forest buffers for projects permitted under Chapter 102 that contain, or are located along or within, 150 feet of Exceptional Value (EV) rivers, perennial and intermittent streams, or lakes,

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

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

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

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

6. Introduction of a permit-by-rule option

As proposed, the permit-by-rule is so limited, time-consuming, and complex as to be of little or no value to the oil and gas industry. The proposed permit-by-rule is to be used for what the EQB describes as “low risk projects with riparian forest buffers in High Quality and all waters other than Exceptional Value.” The proposed amendments are described by EQB as containing “a new permitting option for low impact, low risk projects that incorporate riparian forest buffers. This permit-by-rule could be used to authorize qualifying projects that require either an NPDES permit or E & S control permit under this chapter.” The EQB asserts that “[t]he proposed permit-by-rule balances environmental protection for this Commonwealth with predictability in permitting for the applicant.”

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

Gary Slage
Chairman of the Regulatory
Subcommittee

Appendix A

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

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

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