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**Chambers, Laura M.**

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**From:** Anne Misak [amisak@cleanwater.org]  
**Sent:** Monday, November 30, 2009 4:05 PM  
**To:** EP, RegComments  
**Cc:** Bob Wendelgass; Myron Arnowitt  
**Subject:** RE: PROPOSED RULEMAKING on 25 PA. CODE CH. 102:

Please find attached comments on the proposed chapter 102 regulations from the Campaign for Clean Water, as well as a summary of the comments to be included in the agenda for the EQB. Thanks.

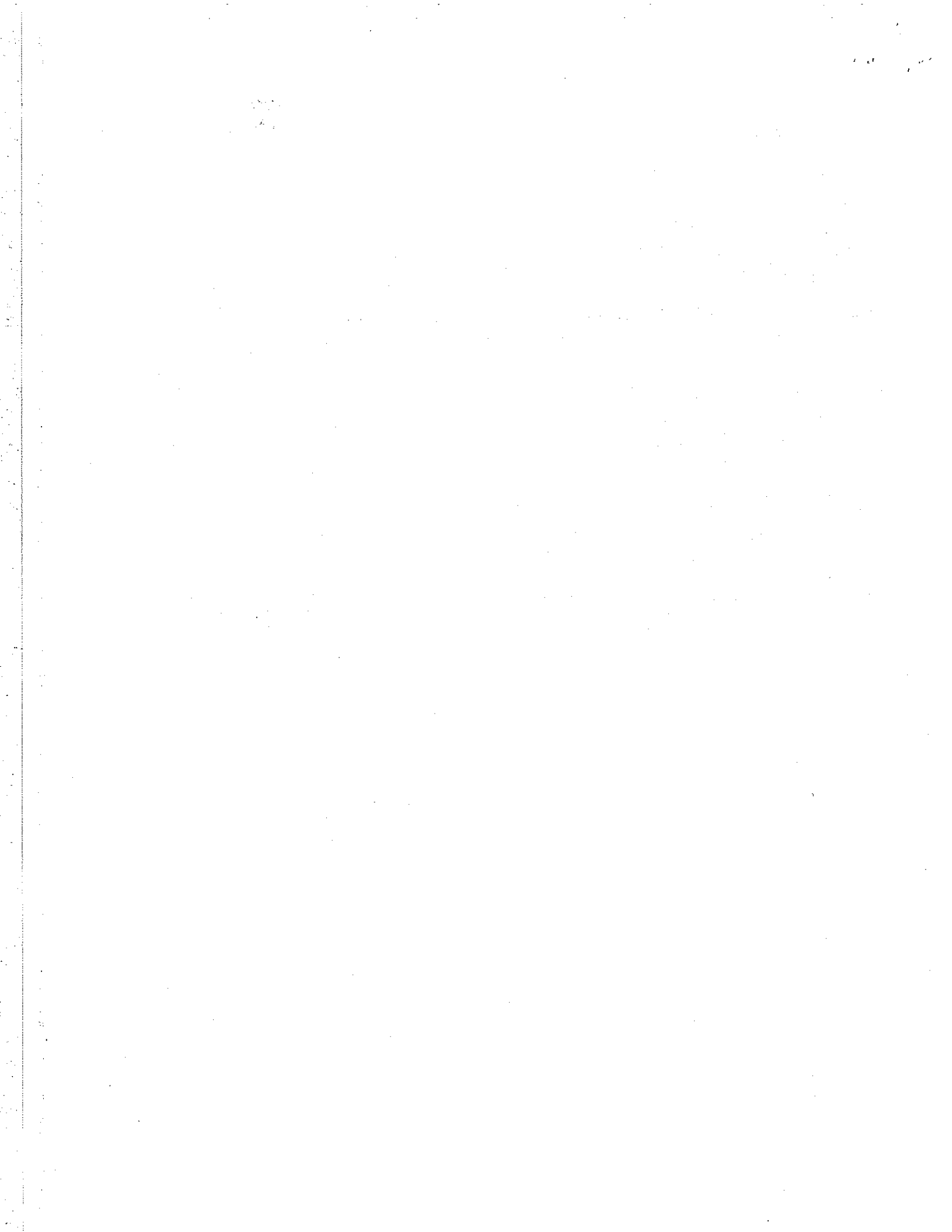
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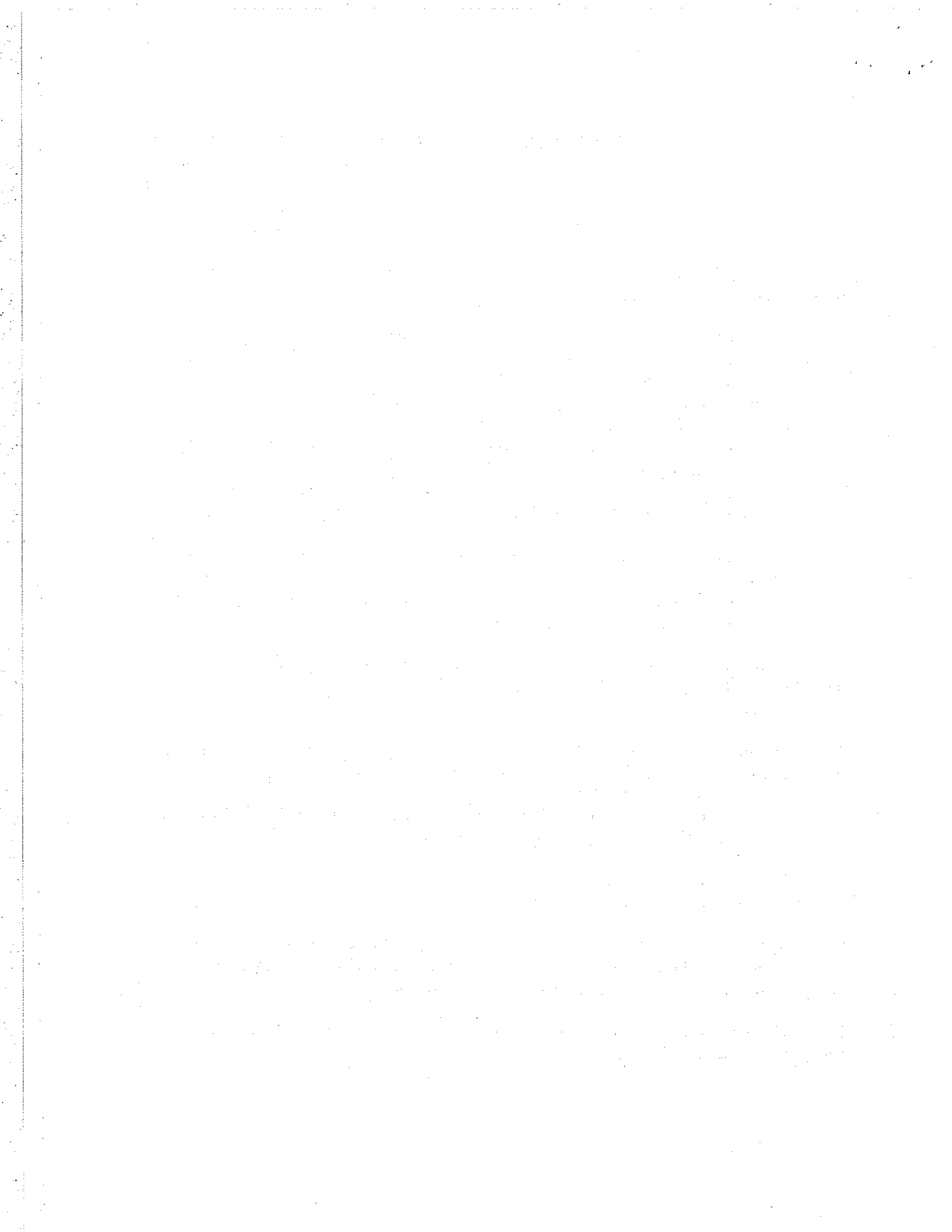


## **PENNSYLVANIA CAMPAIGN FOR CLEAN WATER**

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**RE: PROPOSED RULEMAKING on 25 PA. CODE CH. 102-Summary of Comments from the Campaign for Clean Water:**

1. **The new “permit-by-rule” option should be eliminated.** We strongly oppose the permit-by-rule (PBR). An expedited permit review process puts rivers and streams at risk, is poor policy, and violates core requirements of the Clean Water Act. Specifically:
  - The PBR cannot apply in High Quality (HQ) watersheds because its application would violate Pennsylvania’s Chapter 93 antidegradation regulations.
  - The PBR cannot apply in impaired watersheds because thorough, individual analyses of new discharges to those watersheds must be conducted.
  - The proposed PBR violates the Clean Water Act because it does not require meaningful agency review of NPDES permit effluent limits by the permitting authority and does not provide for public participation opportunities.
  - The PBR option should not be made available for large developments and developments that are not near a stream.
  - The PBR will likely result in economically costly and environmentally damaging problems that will develop during or after construction.
2. **Minimum 100 foot forest riparian buffers should be mandatory for all earth disturbances requiring an NPDES permit.** The Campaign’s full *Buffers 100* proposal should be adopted into regulation.
3. **Permittees should bear the legal responsibility of ensuring long term operation and maintenance of post-construction stormwater management best management practices.**
4. **We support the requirement for earth disturbance activities associated with oil and gas development to obtain NPDES stormwater permits.**
5. **The threshold for requiring an E&S permit for timber harvesting and road maintenance should be reduced to 5 acres.**
6. **New regulations requiring temporary stabilization of construction sites and erosion and sediment control plans for animal heavy use areas are positive steps, but a soil amendment and restoration requirement should be added.**
7. **The increase of application fees will help cover current costs associated with reviewing applications and plans.**



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November 30, 2009

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### **RE: PROPOSED RULEMAKING on 25 PA. CODE CH. 102:**

Dear Environmental Quality Board:

The undersigned member organizations of the Pennsylvania Campaign for Clean Water are pleased to submit these written comments on the proposed revisions to 25 Pa. Code Chapter 102.

The Pennsylvania Campaign for Clean Water is a coalition of over 130 organizations dedicated to improving statewide policy to protect the Commonwealth's precious water resources. Addressing pollution from stormwater runoff has been one of our top priority issues since the formation of our coalition.

Proper management of stormwater is critical to Pennsylvania's communities and watersheds. When combined, runoff from urban, suburban, and agricultural lands is by far the largest source of pollution to Pennsylvania's rivers and streams, with approximately 9,000 miles of the Commonwealth's streams too polluted to meet water quality standards as a result of agricultural and stormwater runoff.

The Campaign provides the follow specific comments on the proposed revisions to Chapter 102:

#### **1. The new "permit-by-rule" option should be eliminated.**

DEP proposes the creation of a new "permit-by-rule" (PBR) option for certain earth disturbance activities which would require DEP and County Conservation Districts to conduct expedited review of permit applications. We strongly oppose the PBR. An expedited permit review process puts rivers and streams at risk, is poor policy, and violates core requirements of the Clean Water Act. Specific concerns are discussed below.

**a. The PBR cannot apply in High Quality (HQ) watersheds because its application would violate Pennsylvania's Chapter 93 antidegradation regulations.**

DEP cannot make the PBR applicable in HQ watersheds without violating the antidegradation regulations set forth in 25 Pa. Code Chapter 93. Since these regulations are a federally required element of a state's water quality standards, the proposed PBR would violate existing federal law and may result in EPA revoking approval of DEP's antidegradation program as it relates to stormwater discharges. See 40 C.F.R. § 131.12 ("The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy . . .").

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

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

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

- Demonstrate that all stormwater discharges will not degrade surface waters.
- Not utilize the social or economic justification (SEJ) process established under 25 Pa. Code § 93.4c(b)(iii).
- Use a 150-foot riparian forest buffer and other nondischarge alternative BMPs. "Nondischarge alternative BMPs" are defined in the proposed regulations as "environmentally sound and cost effective BMPs that individually or collectively eliminate the net change from preexisting

stormwater volume, rate and quality for storm events up to and including the 2 year/24-hour storm.”

Any PBR authorization granted in an HQ watershed under this proposed process would clearly violate Pennsylvania’s antidegradation regulations. The most critical element to the antidegradation implementation regulations is that, *as the first step* in the hierarchy, nondischarge alternatives *must* be evaluated and *must* be used if they are feasible. In these regulations, DEP does not require the comprehensive and thorough antidegradation analysis that is necessary to ensure that nondischarge alternatives are fully evaluated and, where feasible, fully implemented. In fact, while the regulations require the implementation of “nondischarge alternative BMPs,” the regulations would define that term in such a way that such BMPs would *still* allow for a discharge of stormwater under storm events greater than the 2 year/24-hour storm. As the Environmental Hearing Board recently made clear in *Crum Creek Neighbors v. DEP and Pulte Homes*, EHB Docket No. 2007-287-L (Adjudication issued October 22, 2009), stormwater BMPs that merely meet the 2 year/24 hour volume control standard are *not* nondischarge alternatives under Chapter 93.

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

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

- b. The PBR cannot apply in impaired watersheds because thorough, individual analyses of new discharges to those watersheds must be conducted.**

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

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

Once a TMDL is approved and specific WLAs have been established for point sources within the watershed, the NPDES permits for those point sources must be consistent with the terms of the TMDL and the WLA, and permit effluent limitations must be established that are “consistent with the assumptions and requirements of any available waste load allocation.” 40 C.F.R. § 122.44(d)(1)(vii)(B); *see also Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995) (citing 40 C.F.R. § 130.2). In this respect, the WLA is a type of water quality-based effluent limit (WQBEL) that must be imposed upon the point source in order for water quality standards to be met. 40 C.F.R. § 130.2(h); 25 PA. CODE § 96.4(d).

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

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



discharger that would cause or contribute to the impairment shall not be issued an NPDES permit. *Id.*

In order to determine whether a particular development will meet these federal law requirements (i.e., be consistent with a TMDL and its established WLAs and not cause or contribute to the violation of water quality standards), analysis of the pollutant loadings expected from the proposed development must be conducted. This requires a very detailed and thorough site specific technical analysis of the E&S Plan and PCSM Plan for the development site in question. Individual site specific issues such as topography, soils, vegetation, extent of proposed disturbance, pollutant sources, impacts to stream channel and banks, placement and design of BMPs, etc. will come into play when determining the site-specific pollutant loadings for that particular site. This kind of site-specific thorough review cannot be conducted through an expedited PBR process. Rather, individual technical review of plans is required.

- c. **The proposed PBR violates the Clean Water Act because it does not require meaningful agency review of NPDES permit effluent limits by the permitting authority.**

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

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

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

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

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

Even more on point is *Waterkeeper Alliance*, where the Second Circuit held that the federal CAFO Rule violated the Clean Water Act because it did not require permitting authorities to review nutrient management plans developed by CAFOs before issuing an NPDES permit. While CAFOs are regulated as point sources under the Clean Water Act, CAFO NPDES permits do not contain numeric effluent limits, but rather, BMP-based effluent limits. Among the key BMP-based effluent limits is a nutrient management plan that includes, among other elements, a field-specific application rate for manure and other fertilizers to minimize nutrient runoff from fields to receiving waters. *Id.* at 497 (citing 40 C.F.R. § 412.4(c)(1)).

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

Citing the Clean Water Act, the court found that the Act allows states to issue NPDES permits only when the state permitting authorities “*apply, and insure compliance with, any applicable [effluent limitations and standards].*” *Id.* (citing 33 U.S.C. § 1342(b) (emphasis in original)). The court held that “[b]y failing to provide for permitting authority review of the nutrient management plans, the CAFO Rule plainly violates these statutory commandments and is otherwise arbitrary and capricious under the Administrative Procedure Act.” *Id.* at 499.

The court explained that “not just *any* nutrient management plan suffices” to meet the BMP-based effluent standards of a CAFO NPDES permit. *Id.* Rather, the plans must contain a “field-specific assessment of the potential for nitrogen and phosphorus transport from the field,” and site-specific “application rates that minimize phosphorus and nitrogen transport from the field to surface waters in compliance with technical standards for nutrient management.” *Id.* The court found that, even the development of state technical standards for nutrient management was not enough to ensure that the plans prepared and submitted by permittees will minimize nutrient runoff, as permittees “ultimately set application rates based on *site-specific* assessments of the relevant field conditions.” *Id.* at 501. These are site-specific plans that must be prepared by a technical professional—the court noted that “[e]ven EPA has acknowledged that crafting proper waste application rates is a complicated task—that is why the EPA expressly

recommended . . . that waste application rates be prepared by those who are ‘competent in or have an understanding of a number of technical areas’ and that USDA and a number of agricultural organizations and institutions “recommend that nutrient management plans be prepared by trained and certified specialists.” *Id.* at 500 n.19.

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

The applicability of *Waterkeeper Alliance* to the current situation cannot be more striking. Like the CAFO NPDES permit program, construction NPDES permits require BMP-based effluent limits. To meet these effluent limits, they require the submission of technical, site-specific plans that set forth BMPs to control stormwater runoff and volume and minimize phosphorus, nitrogen, and sediment transport from a specific and unique landscape. These plans are technical and complicated in nature and must be “prepared by trained and certified specialists.” Statewide technical standards for developing these plans and the BMPs they set forth are not enough—rather, they must be developed “based on *site-specific* assessments of the relevant field conditions” for any given development site.

Moreover, simply because buffers may be required for projects permitted under the PBR option does not mean that good stormwater management and overall site design can be ignored. Buffers of 100 feet or greater are only part of an appropriate stormwater management plan. Along with buffers, stormwater management plans must also employ upslope best management practices (BMPs) that seek to minimize disturbance, maximize the use of existing and planted native vegetation and good infiltrating soils, and treat stormwater runoff at the source. Without requiring technical review of such plans, DEP cannot ensure that the development will employ these necessary stormwater management practices to adequately control stormwater runoff and prevent pollution.

Because of the site-specific and technical nature of these plans, the permitting authority *must* require technical review of these plans before issuing an NPDES permit that assures compliance with all applicable effluent limits and standards. 33 U.S.C. § 1342(b). Without such review, this statutory requirement cannot be met, as there is no assurance from the permitting authority that the permittee’s consultant did not “misunderstand or misrepresent” proposed BMPs and relevant water quality requirements, or that the plans

are not “improper or inappropriate,” or contain “improper or inappropriate” BMPs to meet effluent limits and water quality standards. *Waterkeeper Alliance*, 399 F.3d at 500.<sup>1</sup>

Sadly, we’ve already seen this scenario play out for several erosion and sediment control permits issued to gas drilling companies under the expedited permit review process DEP has instituted for oil and gas activities. The Chesapeake Bay Foundation appealed three permits that were issued for operations in Tioga County without technical review. Only because of these third party appeals, DEP went back and took a careful look at the permits, concluded that they had major substantive deficiencies, and revoked the permits. As stated in DEP’s own press release dated October 28, 2009, DEP revoked the permits “because of numerous technical deficiencies discovered after our approval of the permits” which included “inaccurate calculations, failure to provide best management practices where required, and lack of proper technical detail.”

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

**d. The proposed PBR violates the Clean Water Act because it does not provide adequate public participation opportunities.**

In *Waterkeeper Alliance* and *Environmental Defense Center*, both the Second and Ninth Circuits held that the proposed permitting schemes violated Sections 402(a)(1), 402(b), and 402(j) of the Clean Water Act because they did not provide opportunities for the public to review and comment on plans submitted to meet NPDES effluent limit requirements. These sections of the Clean Water Act require public notice and an opportunity to be heard on the development of NPDES permits. In *Environmental Defense Center*, the court found that the notices of intent (NOIs) submitted for coverage under the Phase II MS4 general permit were “functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act’s public availability and public hearing requirements,” and thus notice and an opportunity to be heard must be granted to the public. *Environmental Defense Center*, 344 F.3d at 857.

Similarly, the court in *Waterkeeper Alliance* found that failing to make nutrient management plans available to the public for comment “deprives the public of its right to

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<sup>1</sup> In *Texas Independent Producers and Royalty Owners Assoc. v. EPA*, 410 F.3d 964 (7<sup>th</sup> Cir. 2005), the Seventh Circuit held that EPA’s general permit for stormwater associated with construction activities did not violate the Clean Water Act’s public participation requirements. While this ruling is relevant to the comment we raise related to public participation, *it has no bearing whatsoever on the issue of whether technical review of plans is required.* This is because the Seventh Circuit did not address the critical substantive issue of whether the Clean Water Act requires the permitting authority to review individual stormwater BMP plans prior to authorizing discharges of stormwater under an NPDES permit, because it found that the environmental plaintiff lacked standing to raise this substantive challenge. We posit that, had the court found that the environmental plaintiff had the standing to raise this challenge, the court would have had no choice but to rule in its favor as the Ninth and Second Circuits have done—the language and requirements of the Clean Water Act are that clear.

assist in the ‘development, revision, and enforcement of . . . [an] effluent limitation.’” *Waterkeeper Alliance*, 399 F.3d at 503 (quoting 33 U.S.C. § 1251(e)). Specifically, the rule “prevents the public from calling for a hearing about—and then meaningfully commenting on—NPDES permits before they issue.” *Id.* (citing 33 U.S.C. §§ 1342(a), 1342(b)(3)).<sup>2</sup>

The PBR does not allow for the opportunity for the public to review permit applications and plans and comment on them prior to DEP authorizing use of the PBR. Nor, for that matter, are these public participation opportunities made available through DEP’s current general permitting scheme for stormwater NPDES permits. As discussed above, public participation opportunities are mandatory under the Clean Water Act. The proposed Chapter 102 regulations should be revised to provide for public notice and opportunity to review and comment on permit applications on *all* types of NPDES stormwater permits.

**e. The PBR option should not be made available for developments that are not near a stream.**

A fair reading of the expedited permit review process offered through the PBR is that it appears to be a tradeoff for requiring 100 foot streamside buffers. Yet this expedited process would be available to even those developers who want to develop land that is not within 100 feet of a stream.

This is simply poor environmental policy. While we do not feel that the cost of the PBR is worth the price of greater harm to our rivers and streams in any circumstance, this is particularly so when the benefit of a forested buffer does not come with it.

**f. The PBR should not be made available for large developments.**

While the PBR is billed as only applicable for “low risk” sites, it would be available for very large construction sites, as long as only 15 acres are being disturbed at a time. This allows very large projects to receive expedited permit approval without adequate technical review of plans, as long as the construction work is phased in 15 acre increments. We do not believe this phased approach without a total acreage limit on the size of the development allows the DEP to minimize the environmental risk associated with the PBR. A better approach would be to limit the overall size of the developments eligible for the PBR to 15 acres or less.

**g. The PBR will likely result in economically costly and environmentally damaging problems that will develop during or after construction.**

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<sup>2</sup> While the Seventh Circuit in *Texas Independent Producers and Royalty Owners Assoc.* ruled the other way on the public participation issue, we (as do the Second and Ninth Circuits) disagree with that court’s analysis. It is beyond reproach that E&S and PCSM Plans set forth the *site-specific* site design and critical *BMPs* that are required to meet the *BMP-based effluent limitations* of the NPDES Construction Permit. Under the clear meaning and intent of the Clean Water Act, the public has a right to review and comment on the “development . . . of . . . [an] effluent limitation’ . . . before they issue.” *Waterkeeper Alliance*, 399 F.3d at 503 (quoting 33 U.S.C. § 1251(e), citing 33 U.S.C. §§ 1342(a), 1342(b)(3)).

Under a PBR approach, the lack of an adequate technical review of plans means that DEP and Conservation Districts will not have the time to conduct thorough reviews of plans and require important substantive technical changes to those plans that may be necessary to avert serious erosion and stormwater problems during and after construction.

Correcting a flawed design during or after construction is much more expensive and difficult (if it is even possible) than doing so as part of plan review, and significant pollution can occur in the interim. It is much less expensive and more protective of health, safety, and the environment to ensure that plans are technically correct before construction begins.

The oil and gas erosion and sediment control permit revocations that DEP recently undertook are stark examples of this problem. The plans as submitted clearly had important substantive technical problems, including “inaccurate calculations” and “failure to provide best management practices.” DEP’s permit revocations meant that the drilling companies were required to immediately cease earth disturbance activities.

This is a backwards, reactionary, and costly way of doing things which places both the environment and the regulated community at risk. The solution is simple—do not institute an expedited PBR permit review process, but rather require technical review of plans and opportunities for the public to comment on those plans, so that potential problems can be corrected and avoided during the permit review process.

**2. Forest riparian buffers should be mandatory for all earth disturbances requiring an NPDES permit.**

Forest buffers along our streams provide a wealth of benefits. They filter pollution, enhance the ability of streams to process pollutants, cool streams to offset thermal impacts, reducing flooding and flood damage, increase property values, and help combat climate change.

DEP is requiring 150 foot forest buffers for new development in Exceptional Value (EV) watersheds only. This is not an adequate buffer requirement and does little to advance the goal of cleaning up our streams. EV streams are our highest quality streams in Pennsylvania, and need greater protection than 150 foot buffers. Buffers of at least 300 feet are needed. Moreover, by limiting the buffer requirement to only EV streams, if public and protected lands are netted out the requirement would only apply to 1.6% of streams in the state. One of DEP’s stated goals for a buffer requirement is to create new forested buffers along streams. However, if buffers are only mandatory for EV streams, then the potential to create new buffers only applies to 0.3% of Pennsylvania’s streams, since most of these EV streams are already forested.

The regulations should require a minimum 100 foot forested buffer along both sides of *all* streams and rivers for any new earth disturbance requiring an NPDES permit. Minimum 100 foot forested buffers are a key part of any good stormwater management plan and site design for new development. The science is clear that minimum 100 foot forest

buffers are required to maximize the many benefits that buffers provide, such as reducing pollution and prevent flooding. Where forest buffers exist along our streams, water quality is improved, flood waters are reduced, wildlife habitat is provided, and healthier communities are created.

We strongly recommend that the proposed Chapter 102 regulations be revised to include the Campaign for Clean Water's full *Buffers 100* proposal. Among other details, this would include, for all new earth disturbance activities that require an NPDES permit, a requirement that the following be a part of the post-construction stormwater management plan:

- 100 foot forest buffers on all streams.
- 150 foot forest buffers on small headwaters streams and impaired streams.
- 300 foot forest buffers on all Exceptional Value (EV) and High Quality (HQ) streams, which are our highest value rivers and streams and require special protection under the law.

**3. Permittees should bear the legal responsibility of ensuring long term operation and maintenance of post-construction stormwater management best management practices.**

As the legally responsible party for meeting permit limits to control stormwater pollution under the Clean Water Act, permit holders of NPDES permits must bear responsibility for ensuring the long term operation and maintenance of post-construction stormwater management BMPs. Individual landowners or homeowner associations cannot be counted on to have the expertise and knowledge to shoulder this legal responsibility and burden.

We believe a good long term option for developers is to enter into long term O&M agreements with County Conservation Districts to administer O&M on a fee for service basis, so that District staff can be supported financially. Districts have the expertise to monitor stormwater BMPs and conduct the necessary maintenance activities to ensure they continue to operate properly.

**4. We support the requirement for earth disturbance activities associated with oil and gas development to obtain NPDES stormwater permits.**

The proposed regulations require earth disturbance activities associated with oil and gas development to obtain NPDES permits for stormwater discharges associated with construction. We fully support this regulation, as such earth disturbance activities can result in sediment and stormwater pollution during both the construction and post-construction phases, just as with other forms of development. There is no good reason to treat oil and gas developers different from commercial and residential developers with respect to erosion and sediment control and stormwater permitting.

**5. The threshold for requiring an E&S permit for timber harvesting and road maintenance should be reduced to 5 acres.**

The current proposal keeps this threshold at 25 acres. Timber harvesting and road maintenance activities of such a large size can result in significant earth disturbance and corresponding potential for accelerated erosion and sedimentation. Reducing the threshold to projects of 5 acres or greater would be more protective of water quality, and would be consistent with requirements for other regulated activities.

**6. New regulations requiring temporary stabilization of construction sites and erosion and sediment control plans for animal heavy use areas are positive steps, but a soil amendment and restoration requirement should be added.**

Both open construction sites and animal heavy use areas on farms, if not managed correctly, can result in serious impacts to water quality. Requiring practices to minimize erosion and sedimentation from such sites should result in improved water quality in Pennsylvania rivers and streams.

However, the regulations do not contain a requirement to restore soils for any of the NPDES-regulated earth disturbance activities. Such a requirement is among the key stormwater management practices to improve stormwater infiltration and reduce runoff on developed sites. Soil amendment and restoration should be required in all disturbed development areas not converted to impervious, with Class A and B infiltrating soils being restored to their equivalent.

**7. The increase of application fees will help cover current costs associated with reviewing applications and plans.**

We support the increase in application fees. The fees should be at levels that can sustain the program. We recognize the challenges that DEP faces in implementing the stormwater program given limited staff and funding, and an increase in fees should help address these challenges.

Thank you for the opportunity to submit these comments.

Sincerely,

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