



April 8, 2024

Jessica Shirley, Interim Acting Secretary
PA Department of Environmental Protection
Rachel Carson Building
P.O. Box 2063
Harrisburg, PA 17105-2063

Re: **Draft National Pollutant Discharge Elimination System General Permit for Discharges of Stormwater Associated with Construction Activities (PAG-02). [54 Pa.B. 1263]**. Submitted via <https://www.ahs.dep.pa.gov/eComment/> and eComment@pa.gov

Dear Interim Acting Secretary Shirley:

The Marcellus Shale Coalition (MSC), a regional trade association with a national membership, appreciates the opportunity to submit comments regarding the above-referenced proposed rulemaking. The MSC was formed in 2008 and is currently comprised of approximately 140 producing, midstream, transmission and supply chain members who are fully committed to working with local, county, state and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, gathering, processing, transmission and utilization, in the country, as well as the supply chain companies, contractors and professional service firms who work with the industry.

The MSC appreciates the opportunity to offer the following comments on the above-referenced Draft National Pollutant Discharge Elimination System General Permit for Discharges of Stormwater Associated with Construction Activities (PAG-02). The member companies of the MSC are proud of their cumulative efforts to date to strengthen domestic energy production, meet the needs of America's citizens and businesses, enhance our nation's national security, all the while doing so in a manner that protects and enhances our shared environment. Our members are also extremely proud of their commitment and performance in producing the natural gas supplies our nation depends upon in the most environmentally conscious manner found anywhere in the world.

Please find below comments on the draft PAG-02.

Comments

1. The proposed draft PAG-02 Permit relies heavily on guidance contained in the draft PA Post Construction Stormwater Best Management Practice Manual, that has not been issued as a final guidance document. Issuance of a permit that relies on draft guidance will likely result in confusion and ambiguity. MSC recommends that the permit not be published as final until the guidance document is published.

2. The proposed draft PAG-02 Permit references the use of multiple forms (i.e. 3800-FM-BCW0271i and j) that do not appear to exist currently. MSC recommends that the Department publish all proposed forms referenced in the proposed rulemaking so the regulated community can provide informative comments and understand all aspects of the proposal. Indeed, publishing forms to be utilized in order to implement a rulemaking is a requirement of the Regulatory Review Act and is an issue that the Independent Regulatory Review Commission has raised with the Department several times.
3. The oil and natural gas industry is required to obtain either a NPDES PAG-02 permit or an Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production Process or Treatment Operations or Transmission Facilities (ESCGP), depending upon the specific type of activity to be undertaken.

For this reason, the MSC recommends that the PA Department of Environmental Protection (PA DEP or Department) coordinate internally to ensure that the requirements for both permits are consistent, as each permit is ostensibly intended to achieve a mutual purpose of protecting surface and ground waters during earthmoving activities. Earthmoving activities for all industries are, in many respects, similar in nature, as are many of the controls utilized to protect against erosion during construction and project implementation. Professional engineering firms routinely prepare permit packages for both permit vehicles, and we understand there is inconsistency between the current permit requirements. With the PAG-02 proposed for update and the current ESCGP up for revision in 2024, we recommend that the permit requirements are consistent, and the Department coordinate internally to ensure this.

4. The Department states that site inspections are only to be conducted by “qualified personnel” and that three options would be available to demonstrate that a person is qualified. PADEP did not publish the three criteria for review and public comment. MSC urges the Department to provide these options for review and public comment.
5. The Department is proposing that the full recording of post construction stormwater management controls and proof of the recording be submitted before the pre-construction meeting is scheduled and then again upon submission of the Notice of Termination to ensure compliance with 25 Pa. Code § 102.8(m). There is no benefit in full recording prior to the actual construction of a post construction stormwater management control. Modifications and project cancellations may occur during site construction. MSC recommends that PA DEP revise this section to only require recording of these controls when built.

Secondly, at least two state county conservation districts in southwest Pennsylvania require operators to file an instrument even when the operator is not relinquishing the responsibility of the long-term operation and maintenance of the stormwater management control, which is in direct conflict of 25 Pa. Code Sec. 102.8.m(1). MSC recommends that this be clarified in the general permit forms and that the Department communicate to



its delegated partners in the Conservation Districts to ensure that they are not imposing requirements outside the scope of regulatory authority.

6. The Department is proposing to eliminate the requirement to submit the Co-Permittee Acknowledgement Form for Chapter 102 Permits (3800-FM-BCW0271a) and the Co-Permittee Liability Release Form (3800-FM-BCW0271). MSC recommends that the Department reconsider the elimination of Co-Permittee Forms. Contractors have a large role in the construction of a facility and in some cases, assets may be sold and/or transferred. A Co-Permittee also provides additional contact information upon projection completion.
7. The Department is proposing that the permit notice of intent will require the completion of an Erosion Potential (EP) Analysis, using Department Form No. 3800-FM-BCW0271h, for stormwater discharges during and following construction that will not directly enter a surface water to evaluate the stability of the flow path up to the 10-year/24-hour storm event.

The MSC believes that this direction is vague, at best. What methodology should be used to analyze a “discharge...not directly...(to) a surface water”? A discharge could be sheet flow from any given site in any given direction. It would be difficult to know the definition of “potential” for any given situation. Currently, MSC members analyze discharges for a 10 year/24-hour storm, review the velocities or slopes and apply erosion control BMP’s as necessary to prevent erosion. PADEP should clarify the intent of this proposed section and provide more specific information. MSC recommends deleting this section if there is not a change in what was previously required.

8. The Department is proposing to require that an annual report be submitted each year by December 7. The MSC believes this to be a duplication of effort. PA DEP already has a copy of the permit and all the specific conditions applicable to the construction sequence of the project. Until the permit Notice of Termination is filed, there is no need for an annual report for each project and this would not provide any added benefit, other than additional paperwork. The MSC recommends deleting this requirement.
9. The Department is proposing the use of a standard form, 3800-FM-BCW0271j, to document the completion of each structural post construction stormwater management control. The form would need to be signed by a licensed professional and submitted to the Department or county conservation district within 30 days of completion of each stormwater management control.

As stated previously above, PADEP has not made this form available for public comment. MSC recommends that the Department publish all proposed forms referenced in the proposed rulemaking so the regulated community can provide informative comments and understand all aspects of the proposal. Indeed, publishing forms to be utilized to implement a rulemaking is a requirement of the Regulatory Review Act and is an issue that the Independent Regulatory Review Commission has raised with the Department several times.



Operators typically have a licensed PE sign off on all controls prior to submission of the permit Notice of Termination. Completing a certification after each control has been constructed would not provide additional benefit, as the site may still be under construction. Depending on the language in the form and specific tolerances, as-construction is typically completed to the tenth of a foot. Anything more precise than this would result in substantial cost increases to construction companies and operators and provide little, if any, benefit to the functionality of a stormwater management control.

10. For infiltration-based stormwater management controls, the Department is proposing to require post-construction testing to determine whether as-built ponding time or drawdown time are within a tolerance range of the design ponding time or drawdown time. The results would be submitted to the Department or county conservation districts with the Stormwater Management Construction Certification Form.

Again, MSC observes that the construction certification form has not been provided as part of this public comment period. It is hard to understand what the Department intends without the ability to review and offer comments on the proposed form. Similarly to the comments on the certification form, operators typically have a licensed PE sign off on all controls prior to submission of the permit notice of termination. Completing infiltration testing at the time of construction would not provide additional benefit, as the site may still be under construction. It would be more appropriate to wait until the conclusion of the project prior to the permit notice of termination being submitted for this testing.

11. The Department is proposing to require permittees that sell property within the project site that contains or will contain PCSM SCMs to provide a copy of the New Property Owner Notification Form (3800-FM-BCW0271i) to the new property owner, along with record drawings or other documentation of stormwater management controls and the long-term Operation and Maintenance Plan. Permittees would need to submit the form to the Department or county conservation districts within 30 days of the date of property transfer.

The MSC questions the need for an additional form. As part of the sale of a property all this information would be included in the deed. This would be a duplicative effort and the MSC recommends deleting this proposed form.

12. Within in the draft PAG-02 NOI Form, Eligibility Information, Page 2 - Question 4 of the should be revised to clarify the expectation for determining levels of soil contamination exceeding residential or non-residential medium-specific concentrations (MSCs) in 25 Pa. Code Chapter 250. The PAG-02 NPDES Permit Comment Response Document dated December 2019 states that soil sampling is only necessary when there is evidence of a release. Evidence of a release is determined by performing due diligence per DEP's Management of Fill Policy (Document ID No. 258-2182-773). The MSC recommends that the Department revise the NOI and NOI Instructions to specify these procedures.



13. Within in the draft PAG-02 NOI Instructions Form, Site Restoration, Page 8, Note 14, the Department states, “runoff flows may not be concentrated following earth disturbance where such concentrated flows did not exist prior to earth disturbance.”

Earthen waterbars are a best management practice implemented during construction of linear utility projects and have been approved by PADEP to remain post-construction and may result in concentrated flows. The MSC recommends that this practice be able to continue as it has been accepted by Department representatives during the Permit Notice of Termination final inspection. The MSC also has this same comment for the new Erosion Potential Analysis Section, Page 11, with respect to the use of earthen waterbars.

14. Within in the draft PAG-02 NOI Instructions Form, Offsite Discharges, Page 20, Note 26, the Department states, “If there will be off-site discharges (e.g., discharges to a non-surface water such as a swale, ditch, or ground surface via level spreader, that will flow through a property or properties not owned by the applicant prior to reaching a surface water), the applicant is expected to secure an easement (e.g., common law or express easement) providing legal authority for the off-site discharge, unless waived by the property owner, and to provide for adequate BMPs to prevent accelerated erosion on off-site property. Submission of an easement for off-site discharges is not required as part of the NOI package. The PAG-02 General Permit does not grant property rights.”

The MSC requests clarification on how this would apply to a linear utility project. A linear utility project would almost always have an offsite discharge that flows through properties not owned by the applicant prior to reaching surface waters. The MSC believes that projects meeting site restoration criteria should not be expected to complete this section.

Also, on site development projects, post construction discharges mimicking flow characteristics of predevelopment should not be required to comply with this expectation. This can be demonstrated using discharge point analysis (e.g. the outfall of roadside culvert, where property ownership on the opposite side of the road changes).

15. Within in the draft PAG-02 NOI Instructions Form, Landowner Acknowledgement, Page 21, the Department states, “If the applicant is not the sole owner of all property within the project site, the current owner(s) must sign the Landowner Acknowledgement section of the NOI to certify that the applicant has authorization to conduct earth disturbance activities. Enter the name of the landowner, the tax parcel ID number(s) within the project site, and the date signed. If the applicant owns all property within the project site, this section may be omitted.”

The MSC recommends the PADEP consider an alternate means of certification under this section. For instance, a linear project usually crosses multiple landowners. An applicant should be able to provide documentation (i.e. executed Right of way or easement agreement) of the Applicant’s right to conduct earth disturbance activities. This requirement would be overly burdensome if each landowner needed to be reengaged to sign the application.



16. Within in the draft PAG-02 NOI Instructions Form, Pre-Development Site Characterization, Page 25, #8, the Department states, “Check the appropriate box (Yes or No) to indicate whether the project site is located in an area with known karst features. The PCSM Plan preparer must review information, maps and reports maintained by the Pennsylvania Department of Conservation and Natural Resources (DCNR) on carbonate rock formations and sinkholes for all sites in the following counties, at a minimum: Adams, Bedford, Berks, Blair, Bucks, Centre, Chester, Clinton, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Lancaster, Lebanon, Lehigh, Lycoming, Mifflin, Montgomery, Northampton, and York.

If Yes to #8, check the appropriate box (Yes or No) to indicate whether a subsurface geotechnical investigation was performed and whether a geotechnical report is attached. DEP **expects** that a geotechnical investigation will be performed for sites that: are within 0.5 mile of identified sinkholes and closed depressions on DCNR’s published maps of sinkholes and karst features; are within 0.5 mile of a “Karst Feature” on DEP’s eMapPA; or where there is a reasonable likelihood that active karst geology exists on a site requiring the design of stormwater management.

The DEP should not "expect" that subsurface investigations be completed based upon meeting the noted criteria. Rather, the MSC suggests that the Department should recommend that an expert be consulted to evaluate the proposed site and activities against the nature of the potential hazard or risk. The subject matter expert should determine what investigative steps are warranted.

17. Within in the draft PAG-02 NOI Instructions Form, Points of Analysis (POAs) 2, Page 26, the Department states, “When the contributing watershed of the receiving surface water body is smaller than one half square mile (0.5 mi²) (320 acres), as measured from the furthest downstream POA, the total drainage area to any single POA should not exceed 10% of the contributing watershed. If the drainage area exceeds 10%, the PCSM Plan preparer should attempt to establish multiple POAs, if feasible, to reduce the drainage area to the 10% threshold.”

This recommendation is unclear and MSC asks for additional clarification and/or examples. The Department should follow acceptable, published stormwater analysis practices.

18. Within in the draft PAG-02 General Permit Sample, Page 7 – 3.a., the Department states, “Construction dewatering must be treated...prior to discharge to surface waters to prevent discharges with visual turbidity...”

Based on MSC subject matter expert experience, no combination of BMPs will completely prevent visual turbidity. Requirement should be changed to “reduce discharges”, which is more consistent with the draft permit language.



19. Within in the draft PAG-02 General Permit Sample, Page 14 – C.1.a., the Department states, “The permittee must take color photographs of all E&S BMPs and PCSM SCMs on the project site at least monthly...”

The MSC observes that a linear project could have thousands of feet of perimeter controls – Is the expectation that every foot is photographed monthly? The MSC recommends clarification to make the best use of time compared with the overall benefit.

20. Within in the draft PAG-02 General Permit Sample, Page 23 – IV., the Department states, “Notification of Perimeter Control BMPs. Upon completion of installation of perimeter sediment control BMPs, the permittee must notify DEP/CCD in writing to provide an opportunity for inspection prior to proceeding with bulk earth disturbance activities. If DEP/CCD notifies the permittee in writing that it will not conduct an inspection or is unable to do so within three (3) business days of the permittee’s notification, the permittee may proceed with earth disturbance activities.”

There is no definition of “bulk earth disturbance activities”. On linear projects, earth disturbance may have to occur to obtain access to locations to install BMPs. It may take weeks to gain access to install all perimeter controls, while earth disturbance activities could or have commenced. This requirement has implications for larger, phased projects. The MSC recommends clarification from the Department for this item.

Conclusion

The MSC and its member companies take great pride in their efforts to conduct operations safely, efficiently, and in a manner that protects our shared environment and local communities, while at the same time meeting the critical energy needs of our citizens. We welcome the opportunity to discuss in greater detail any questions or need for clarification that you may have regarding our comments.

Sincerely,



David E. Callahan
President