



July 29, 2024

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

Re: **Availability of Proposed Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment Operations or Transmission Facilities (ESCGP-4)** Submitted via PA eComment: <https://www.ahs.dep.pa.gov/eComment/>

Dear Acting Secretary Shirley:

The Marcellus Shale Coalition (MSC), a regional trade association with a national membership, appreciates the opportunity to submit comments for consideration by the Department of Environmental Protection (PA DEP or Department) regarding PA DEP's proposal to reissue the Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment Operations or Transmission Facilities (ESCGP-4).

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, professional service firms, and trade unions who work with the industry. Please find below comments on the draft ESCGP-4 permit.

## **General Comments**

### Lack of Availability of Related Documents

The MSC is concerned that critical documents related to implementing the permits have not been provided to the regulated community for review and formal public comment, though is appreciative of the Department for providing these documents after they were requested. These documents include the Notice of Intent (NOI) form and the related NOI Instructions. It has been our members' experience that these forms provide a critical path for what is required to be submitted by applicants to obtain this permit and there should be an opportunity for constructive comments. While the proposed permit issued for public comment provides the foundation for what is required, the forms provide the guide

for how the information is expected to be communicated to the Department. The understanding of how the forms interact with the permit document is critical to understanding what may now be required for approval.

To illustrate this point, the proposed ESCGP-4 permit contains several definitions (Exceptional Value Waterways, Floodplain, Floodway, High Quality Waters and Point Source, as examples) which are not even utilized within the permit itself. It stands to reason that these terms are instead applicable to the NOI and NOI Instructions, otherwise why include them for definitional purposes?

As stated, the NOI and NOI Instructions are important documents intertwined to the permit itself. Consider the fact that the NOI Instructions for the ESCGP-4 is over 30 pages in length in-and-of itself. It is important to underscore that the MSC and its members have not had sufficient time to review these documents yet as they relate to the new permit. However, the existing NOI Instructions for the current ESCGP-3 permit contain a host of de facto permit requirements that – presuming similar criteria are found in the ESCGP-4 NOI Instructions – would be appropriate for and benefit from review and comment. Examples of requirements embedded in the existing NOI Instructions for ESCGP-3 include:

- An NOI checklist with items determined by PA DEP to be necessary for the review and processing of a permit application. An applicant's failure to adequately address each item in the checklist may result in the permit application being considered withdrawn and/or the forfeiture of any permit fees.
- A requirement to include a resource delineation report as part of any application.
- A requirement to establish new or preserve riparian forest buffers within certain proximity to waterways.
- A requirement for an applicant's demonstrations on effective solute reduction included in a post-construction stormwater management plan.
- A mandate for the inclusion of certain maps, such as USGS quadrangle maps and location maps.
- A mandate for the submission of a Riparian Forest Buffer Plan.

While there are additional examples, the above are sufficient to illustrate the aforementioned concern, as similar requirements are presumably present in the new NOI Instructions document. The MSC does not illustrate these examples to question their utility with respect to environmental protection, but rather to demonstrate that a document unavailable for public review and comment – but which for all intents and purposes creates binding norms upon the regulated community – should in fact be made available for a formal public comment period. Indeed, failure to do so puts the Department at risk of compliance with the Commonwealth Documents Law.

The Department has repeatedly and consistently stressed its commitment to transparency and robust public engagement. The MSC respectfully urges you to direct DEP staff to seek input on these forms, and to honor the spirit of the Department's commitment to transparency, openness, and customer service that you have rightfully prioritized.



### Support for Retaining Current Expedited Review Process

The Department is proposing to eliminate the expedited review for the ESCGP-4 permit. According to eFacts, the expedited ESCGP-3 permit is still being utilized on a regular basis. Without the expedited ESCGP permit review, this leaves only the standard review for these permit applications, and the MSC presumes this will increase permit times. According to the 2012 PA DEP Permit Decision Guarantee Policy, the stated review time is 43 business days, which equates to approximately 60 calendar days, and the 60-day timeframe is stated in the draft ESCGP-4 permit. By comparison, the expedited review period is supposed to be 14 business days. While the Department has struggled to adhere to the expedited permit review timeframes, there is still value in utilizing this process, including its requirements to have an application sealed by a licensed professional. The MSC respectfully suggests that the Department retain the expedited permit review as an option for eligible clients/projects.

### Post Construction Stormwater Management Best Management Practice Manual

Throughout the proposed ESCGP-4 permit document, the Department incorporates by reference the revised draft Post Construction Stormwater Management Best Management Practice manual (PCSM BMP) and associated forms.

In January 2023, the Department published a revised draft PCSM BMP manual for public comment. The proposed changes in the document were significant (a total of 755 pages), and the MSC submitted significant technical and constructive comments. According to the February 2024 Non-Regulatory Agenda, the PCSM BMP manual is not scheduled to be published as final until Q1 2025, along with the response to comment document. The MSC is hopeful that the Department takes the comments received seriously and thus anticipates several significant revisions to the PCSM BMP manual will be made.

While the PCSM BMP manual is noted as guidance only, PA DEP permit reviewers have historically required applicants to follow the manual when preparing an ESCGP permit application, specifically for PCSM control design. It is premature to incorporate the PCSM BMP manual by reference when this document is not finalized. More concerning and to the point, however, it is not appropriate to effectively give this manual the weight of a binding requirement upon the regulated community. In addition to running contrary to the explicit text of the BMP itself, along with the Department's own policies relating to the weight (or lack thereof) of technical guidance documents, this utilization again raises concerns with respect to conformance with the Commonwealth Documents Law.

### **Specific Comments**

1. Page 1 of 18, The draft ESCGP-4 states, *"If a discharge approved for coverage under this General Permit subsequently exhibits a condition that renders the discharge ineligible for coverage, the permittee promptly shall take action to restore eligibility, to notify the Department in writing of the condition, and, if eligibility cannot be restored, to submit an individual erosion and sediment control permit (Individual E&S Permit)*



*application to the Department. The Department will terminate coverage under this General Permit if potential or actual adverse impacts to water quality occur as a result of the permittee's discharge(s)."*

Again, without the NOI and NOI Instructions, we are provided no explanation regarding the specific discharge conditions which would make an ESCGP ineligible and require an individual permit. MSC members routinely account for the potential of encountering a variety of soils, and the earthwork design specifically accounts for these variables, while E&S and PCSM controls employ best practices to eliminate the potential for impactful discharges from the site, especially during construction. The MSC insists that the Department provide additional guidance and ensure flexibility so that permittees clearly understand the permit requirements and may provide a permit package eligible for coverage under the ESCGP-4 permit.

2. Page 2 of 18, The draft ESCGP-4 states, *"The Department may deny coverage under this General Permit and require submittal of an application for an Individual E&S Permit based on a review of the NOI or other information in accordance with applicable laws and regulations."*

Again, without the NOI and NOI Instructions, it is impossible to understand how the Department will make a determination to grant or deny coverage under the general permit. In February 2022, PA DEP Oil and Gas began making the interpretation that projects that have the potential to encounter Acid Producing Rock no longer qualified for coverage under the ESCGP-3 permit. However, the Department provided no specifics that an applicant should consider or for which it should prepare a design. Rather, the Department provided a vague FAQ document (dated December 2023) that discussed when an individual permit may be required for oil and gas operations.

The MSC insists that coverage under a general permit should be applicable even when there is the potential to encounter acid producing rock and other geological hazards. The current ESCGP-3 permit published in 2018 allowed for a licensed professional engineer to prepare a design to account for this and prevent runoff from leaving the site during construction.

3. Section 2 DEFINITIONS
  - a. Site Stabilization – *"The proper placing, grading, constructing, reinforcing, lining, and covering of soil, rock, or earth to ensure their resistance to erosion, sliding, or other movement"*

The MSC recommends that PA DEP expand on the definition of "stabilization." It's unclear how stabilization under 78a.65 site restoration for the well site restoration reporting (WSSR) differs from stabilization under chapter 102 for the NOT. Both the WSSR and the NOT require stabilization but, the restoration timeframes vary, so the intent of 'stabilization' should be clarified for each.

- b. Designee – *“A licensed professional as defined in this General Permit or someone acting on behalf of a licensed professional who has knowledge, skill, experience, training, and education in the field of engineering, landscape architecture, geology, or land surveying that is beyond that possessed by a layperson and upon which a licensed professional can rely upon to provide oversight of critical stages of PCSM Plan implementation. A designee must be independent from the operator/co-permittee(s) responsible for the construction or installation of SCMs on a project site.”*

Prior versions of the ESCGP Permit utilized the term “designee” for purposes of identifying the preparation, submission, and implementation of the permit and permitted activities. The draft ESCGP-4 permit explicitly defines this term “designee” for the first time. As defined, the term “designee” introduces ambiguity and confusion and should be modified. The last sentence of the definition states that *“A designee must be independent from the operator/co-permittee(s) responsible for the construction or installation of SCMs on a project site.”* There is no justification that a designee must be independent from an applicant/permittee, let alone what constitutes “independent.” There are situations where the most qualified designee is employed by an operator/permittee.

The MSC insists that the proposed ESCGP-4 permit clearly state that it is at the applicant/permittee’s discretion, not the Department’s, if and when an internal designee or third-party designee be utilized.

#### 4. Section 3 SCOPE OF ACTIVITIES

- a. (b.6) – *“Discharges which individually or cumulatively have the potential to cause or contribute to a violation of an applicable water quality standard established under 25 Pa. Code Chapter 93 (relating to water quality standards) or cause significant adverse environmental impact.”*

The MSC would like to understand how the Department will make the determination of whether the discharges have the potential to cause environmental impact. Again, without the NOI and NOI Instructions, we are not able to understand how to comply with the scope of the draft ESCGP-4. Guidance will be needed on how the discharge water quality is to be measured.

- b. (b.7) – *“Discharges to surface water identified as impaired waters in the Department’s latest published Integrated Water Quality Monitoring and Assessment Report (Integrated Report), unless an analysis is completed which documents that the discharge will neither cause nor contribute to an impairment of the receiving waters or manages the discharge with a non-discharge alternative or ABACT BMPs/SCMs.”*

The MSC questions why the Department is proposing a change from pre to post condition in volume or rate or water quality. The draft ESCGP-4 requires an

analysis that the discharge will neither cause nor contribute an impairment to the receiving waters. However, the stream is already designated as impaired so it is not clear how it can be shown that any discharge will not impair the impaired stream. Why can't an applicant design to pre-conditions, preserving the status quo with the stream quality?

5. Section 6 NOTICE OF INTENT (NOI) SUBMITTAL

- a. (a.) ESCGP-4 Coverage – *“Persons proposing to conduct oil and gas activities that disturb equal to or greater than five (5) acres, or an earth disturbance on any portion, part, or during any stage over the life of the project, who request to be covered by this general permit, must submit an administratively complete and acceptable NOI at least 60 calendar days prior to the planned date for commencing any new discharge. Submission of an NOI 60 calendar days prior to the planned date for commencing construction does not imply or guarantee that the Department or conservation district will be able to approve ESCGP-4 coverage on or before the end of that 60-day period. Applicants are encouraged to apply as early as possible prior to the planned date for commencing construction and ensure the NOI is complete and technically adequate.”*

The MSC requests that the Department add the following to the end of the section, “Construction may commence after ESCGP-4 coverage is approved provided that the permittee complies with the requirements and timeframes of Pre-Construction Conferences.”

The MSC requests that the Department remove the requirement “...*must submit an administratively complete and acceptable NOI at least 60 calendar days prior to the planned date for commencing any new discharge*”. The Department is not under any obligation to complete their review within said timeframe and there appears to be no reference or reason that 60 calendar days are a “must.”

- b. (d.) Minor Modifications – According to the draft ESCGP-4 permit, minor modifications to the E&S or PCSM plans, particularly field modifications, are typically approved on-site by PA DEP and/or the conservation district. The MSC recommends that the Department implement a deadline for the reviewing agencies' response to requests. We would like the PA DEP and/or conservation district to promptly provide written approval of modifications (i.e. electronically through email) to minimize delays during construction.
6. Section 11 MONITORING, INSPECTION, AND REPORTING REQUIREMENTS
- a. (a.) Site Inspections – E&S inspections will now be required after the “occurrence of snowmelt sufficient to cause a discharge”. Sites without active operations may be unattended in the winter and therefore have limited access with snow/ice accumulations on state, local and access roads. The MSC recommends that the Department reconsider this requirement for driver and operator safety and develop objective guidance on the depth/volume of snowmelt that would trigger an inspection.



- b. (b.) Site Inspection Documentation - *“If electronic forms are used to document site inspections, the permittee shall provide a physical copy of the inspection report to the Department or conservation district upon request.”*

The MSC requests clarification on whether a PDF emailed upon request would satisfy this requirement.

- c. (c.) Qualified Personnel

MSC members utilize trained and experienced personnel when conducting inspections that would not meet the criteria set forth in the proposed requirements. Further, the Department or Conservation District should not have the ability to approve or deny an “applicant” that is requesting approval to conduct these inspections. Approving each applicant to conduct inspections would be very burdensome to the Department (and the industry). The MSC recommends that this section be reconsidered.

- d. (c.(ii)) Recognized Organization

The MSC requests that the Department provide a list of recognized organizations for the purpose of inspector certification. What are the criteria for an organization to be placed on the list?

- e. (e.) Long-term Operation and Maintenance Schedule

The MSC presumes that the long-term operation and maintenance schedule is for the life of the ESCGP-4 permit. Once the permit is approved for termination, and the PCSM SCMs are functional, regular inspections and written reports are no longer required to be submitted to the Department. Clarification of this presumption is requested.

## 7. Section 12 RECORD KEEPING

- a. (b.) Inspection Reports – *“Visual inspection reports and monitoring records shall be available at the project site for review and inspection...during all stages of earth disturbance activities.”*

Visual Inspection reports are no longer physically kept on well pads. The MSC recommends that this be updated to state, “available upon request.”

Electronic copies, accessed at the project site, should be sufficient to meet this requirement. Further, there are regional offices that allow for a log to be kept onsite instead of physical copies of the reports and records.

## 8. Section 17 OPERATING CONDITIONS

- a. (a.) Copy of Permit – *“The permittee shall retain a physical copy of this GP, auth. of coverage, the NOI form, all attachments, the E&S plan, PCSM plan and PPC*



*plan (as applicable) on-site during earth disturbance activities at all times and shall make these documents available to the DEP or CD for inspection upon request.”*

The MSC points out that this conflicts with 8(e) which states that all personnel must have access to an electronic copy or paper copy of this permit, E&S/PCSM plans, PPC plans and other relevant documents, or info that must be kept with these plans.

- b. (d.) BMP, SCM Repair – *“Unless extended by the DEP in writing, upon the reduction, loss, or failure of any E&S BMP or PCSM SCM, the permittee .. must initiate repair or replace the BMP or SCM within 24 hours of discovery... or must provide an alternative method of treatment.”*

Initiation is an undefined term within the draft ESCGP-4 permit. Some repairs may require significant earthwork operations that would require a new PA One-Call to be placed. Will the placement of a one-call count as "initiating the repair?" A one-call must be placed at least three business days prior to earth disturbance occurring. The MSC recommends that this section be updated to define what initiating the repair means with respect to the timeframes and include mention of the PA One-Call requirements.

- c. (d.) BMP, SCM Repair – *“The permittee must complete the repair or replacement of the BMP or SCM within seven days unless otherwise required by the Department....”*

Same comment as above. Seven days may not be feasible in the scenarios where more expansive earthwork and repairs are required.

- d. (i. – m.) Infiltration Testing and SCM Certification  
The new infiltration testing and SCM Certification requirements being proposed in the draft ESCGP-4 are significant and utilize the draft PCSM BMP manual as the foundation for the requirements. This is inappropriate, and we recommend that the draft PCSM BMP manual and forms be removed from the ESCGP-4 permit until the PCSM BMP manual is published as final.
- e. (h. - k.) The permit lists circumstances where confirmation testing for infiltration capacity is required along with how and when to test. Specifically looking at when, the permit states, *“after major earthwork is complete, after permanent stabilization of the SCM’s drainage area, and where an E&S BMP is being converted to a PCSM SCM, prior to placing soil media or stone in an SCM.”*

It is hard to understand what the Department intends without the ability to review and offer comments on the NOI instructions or draft Chapter 102 SCM Construction Certification Form. However, it is required that a licensed PE sign off on all controls prior to submission of the permit NOT. Completing infiltration



testing at the time of construction would not provide additional benefit. Further, the requirement to test, “*after permanent stabilization of the SCM’s drainage area*” would result in the SCM’s construction being halted for months or more while permanent stabilization of the drainage area is established. This would leave the SCM susceptible to stormwater erosions events.

The MSC recommends that it would be more appropriate to wait until the conclusion of the project but prior to the permit NOT to conduct and submit confirmation test results.

- f. (k.) Confirmation Testing and SCM Certification – “*The permittee may not proceed to complete construction of the SCM until a licensed professional evaluates the confirmation testing and notifies the permittee that the infiltration SCM meets the purpose and intent of the approved PCSM Plan, without overflowing at the storm event the SCM is designed to manage, and will protect waters of the Commonwealth.*”

Many SCMs are constructed within one to three days. Requiring the infiltration testing necessary to complete the confirmation testing, in addition to the evaluation of test results by a licensed professional, will add a substantial pause or delay in construction for each SCM. This start, stop, test, evaluate, then re-start of construction may result in more accelerated erosion during rain events due to prolonged construction times and delayed stabilization of the SCM. Moreover, it appears to assume that an infiltration test is enough to verify overflow potential. The SCM confirmation testing would require the licensed professional to re-analyze the entire hydraulic model utilized when designing the SCM to make a determination during a specific storm event.

The MSC recommends the requirement should be to test and certify that infiltration remains within an acceptable tolerance of the design rate.

Lastly, more than an infiltration test is required to ensure that a PCSM plan is protective of water quality. It is inappropriate to require a licensed professional to confirm that a test rate is protective of the waters of the Commonwealth, and the MSC recommends that the statement is removed from the permit.

#### 9. Section 18 COMPLIANCE RESPONSIBILITIES

- a. The MSC recommends that the Department add language requiring PA DEP inspectors to follow operator site-specific Preparedness, Prevention and Contingency Plan requirements when performing inspections. MSC members have observed PA DEP inspectors performing inspections without the proper Personal Protection Equipment when at a well site or midstream/pipeline facility.

#### 10. Section 19 EROSION AND SEDIMENT CONTROL PLANS

- a. (c.) Notifications - The Department is notified prior to operations. PA DEP is also invited to pre-operational meetings (also a requirement of Section 22).



- b. PRE-CONSTRUCTION CONFERENCES. MSC observes that the additional notifications for “bulk earth disturbance” activities seem to be redundant and unnecessary.
- c. (d.) Approved E&S Plans – *“The permittee shall maintain the approved E&S plans on-site during earth disturbance activities at all times and shall make the plan available for inspection by the DEP or CD upon request.”*

The MSC points out that this conflicts with 8(e) which states that all personnel must have access to an electronic copy or paper copy of this permit, E&S/PCSM plans, PPC plans and other relevant documents or info that must be kept with these plans.

#### 11. Section 21 POST CONSTRUCTION STORMWATER MANAGEMENT PLANS/SITE RESTORATION PLANS

- a. (c.) PCSM SCM Construction Certification Form – *“The permittee must document the implementation of each structural PCSM SCM using DEP’s SCM Construction Certification form (3800-FM-BCW0271j) and submit the completed form to the Department or conservation district within 30 days of the completion of SCM construction. The form must be signed by the licensed professional responsible for oversight of critical stages.”*

As stated before, the MSC insists that it is inappropriate to incorporate the draft PCSM BMP Manual and certification forms by reference and require their use within the ESCGP-4 permit until they are published as final. Further, submitting a certification form for PCSM SCMs prior to final stabilization is not prudent or practical since the PCSM SCM cannot properly function without being permanently stabilized.

- b. (f.) Approved PCSM Plans – *“The permittee shall maintain the approved PCSM plan on-site during earth disturbance activities at all times and shall make the plan available for inspection by the DEP or CD upon request.”*

The MSC presumes that a PDF emailed upon request satisfies this requirement and requests that the Department provide such clarification.

#### 12. Section 24 LONG-TERM OPERATION AND MAINTENANCE FOR WELL SITE CONSTRUCTION REQUIRING A WELL PERMIT

- a. (a.) Well Permits – *“For projects requiring a well permit under the 2012 Oil and Gas Act (e.g., well site preparation and construction), the permittee is not required to comply with the approximate original conditions requirement in Section 78a.65(b) if restoration is complete within statutory 9-month period. However, operators seeking an extension of the restoration period in accordance with 25 Pa. Code 78a.65(c) must demonstrate that the portions of the well site not*

*occupied by production facilities or equipment will be returned to approximate original conditions.”*

It is not clear what this item is proposing to explain. Is it simply a restatement of 78.65(b) or is this a proposed modification to what is in the regulation?

The MSC recommends that the Department replace *“portions of the well site not occupied by production facilities or equipment will be returned...”* with ***“portions of the well site not occupied by production facilities or equipment or necessary for access to the facilities throughout the lifespan of the well(s) will be returned...”*** As currently drafted, it could be construed that access to facilities is not necessary and would result in ‘islands’ of facilities.

- b. (d.)(2)-(7) Post Plugging Requirements – *“If the surface landowner provides consent, .....and provide proof of filing with the NOT under 25 Pa. Code § 102.7(b)(5).”*

The operator has likely terminated the ESCGP permit years prior to plugging operations and prior to any post plugging landowner consent agreements. Therefore, the surface landowner cannot file an NOT or terminate the aforementioned, already terminated permit. The MSC requests clarification on what permit NOT a landowner would be required to file.

## Conclusion

The MSC appreciates the opportunity to provide comments on the proposed ESCGP-4 permit document. The MSC welcomes the opportunity to meet with Department staff to explain further or illustrate and discuss any of these issues. Thank you very much for your consideration of these comments.

Sincerely,



David E. Callahan  
President