

PAG-02
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED
WITH CONSTRUCTION ACTIVITIES

COMMENT RESPONSE DOCUMENT

3800-PM-BCW0405 12/2019



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF CLEAN WATER

INTRODUCTION

The Department of Environmental Protection (DEP) published notice of the availability of a draft NPDES General Permit for Stormwater Discharges Associated with Construction Activities (PAG-02) in the *Pennsylvania Bulletin* on August 17, 2019 [49 Pa.B. 4603]. A 30-day comment period was provided, and interested parties were directed to submit comments to DEP's eComment system. The comment period ended on September 16, 2019. DEP received comments and questions from 12 different individuals and organizations during the comment period. The purpose of this document is to present DEP's responses to these comments and answer all questions posed.

DEP has decided to issue the final PAG-02 General Permit for a new 5-year term. Notice of the availability of a final PAG-02 General Permit was published in the *Pennsylvania Bulletin* on December 7, 2019. The PAG-02 General Permit became effective on December 8, 2019 and will expire on December 7, 2024.

LIST OF COMMENTERS

The names of individuals who submitted comments to DEP are identified below. DEP has recorded each comment in this document and identified the commenter(s) by number, corresponding to the list below.

- (1) Adam Smith, 38 N. Duke Street, York, PA 17401.
- (2) Marigrace Butela, 1601 West Crawford Avenue, Connellsville, PA 15425.
- (3) Mike Hess, HRG Inc., 369 East Park Drive, Harrisburg, PA 17111.
- (4) Paul Shaefer, 320 North George Street, Suite 100, York, PA 17401.
- (5) Pennsylvania Builders Association, 2509 North Front Street, Harrisburg, PA 17110.
- (6) Doug Hartman, FirstEnergy, 76 South Main Street, Akron, OH 44308.
- (7) Patrick Renshaw, PPL Electric Utilities, 1639 Church Road, Allentown, PA 18104-9342.
- (8) Mark Lombard, Pennsylvania Department of Transportation, 400 North Street, 7th Floor, Harrisburg, PA 17120.
- (9) Michael Smith, 33 South Broad Street, Lititz, PA 17543.
- (10) Kevin Sunday, PA Chamber of Business and Industry, 417 Walnut Street, Harrisburg, PA 17101.
- (11) Alice Baker and Kody Hines, PennFuture, 1429 Walnut Street, Suite 400, Philadelphia, PA 19102.
- (12) Trisha Salvia, Chesapeake Bay Foundation, 1426 North Third Street, Suite 220, Harrisburg, PA 17102.

COMMENTS AND RESPONSES

The number associated with each commenter is identified in parentheses following the comment.

1. **Comment:** The public notice references that the General Permit will clarify the appropriate form for visual inspections. Is the intent to utilize PA DEP document 3800-FM-BCW0271d Rev. 1/2019 entitled "Chapter 102 Visual Site Inspection Report" as the appropriate form? If so, it may be helpful to reference this document in Part A.II.a on the Permit document. (1)

Response: Yes, DEP's published Visual Site Inspection Report (3800-FM-BCW0271d) or equivalent must be used for visual site inspections, and the PAG-02 General Permit has been updated to refer to use of this form.

2. **Comment:** Within E&S Module 1, Table 1 under Sediment Barriers/Filters the Drainage Area (DA) column is not grayed out for perimeter controls such as compost filter sock, compost filter berm, silt fence, super silt fence, sediment filter log, weighted sediment filter tube, etc. Design of these measures is completed by utilizing maximum slope length limits. Determining drainage areas above such perimeter measures is erroneous in E&SPC design. We request the Drainage Area requirement be removed for perimeter controls and only required for BMPs which are designed based upon a drainage area method. (1)

Response: DEP agrees and has made it clear on E&S Module 1 that drainage area to perimeter best management practices (BMPs) does not need to be reported. It is noted that Table 1 is only applicable to applicants for PAG-01 coverage, not PAG-02.

3. **Comment:** The current PAG-02 will expire December 7. Will projects that have approval under the current PAG-02 be required to extend or renew existing authorizations under the new PAG-02? (1)

Response: On or about the effective date of the reissued PAG-02 General Permit, DEP and/or the delegated county conservation district (CCD) will transmit a letter to all permittees that have existing PAG-02 coverage. This letter will explain the changes to the terms and conditions of the general permit that permittees are operating under. Permittees are expected to review the new terms and conditions and determine whether they 1) remain eligible for PAG-02 coverage, and 2) will be able to comply with the reissued PAG-02 General Permit. If a permittee determines that they are no longer eligible or will not be able to comply with the reissued PAG-02 General Permit, the permittee must submit an application for an individual NPDES permit application within 90 days; permittees who are eligible for and will be able to comply with the General Permit may continue to operate under the reissued PAG-02 General Permit.

4. **Comment:** Page 1 - Scope. Paragraph 2 - Under federal regulations, construction activities are one category of industrial activities who stormwater discharges must be covered by an NPDES permit, and generally consist of clearing and grubbing, grading and excavation resulting in earth disturbances greater than or equal to five (5) acres, as well as disturbances of less than five acres that are part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.

Change: five (5) acres to two (2) acres as stormwater runoff can occur during any earth disturbance activity that is covered under the NPDES permit. (2)

Response: The statement referenced in the comment, which is located in the PAG-02 NOI Instructions (3800-PM-BCW0405a), is an accurate statement as reflected in federal regulations at 40 CFR 122.26(b)(14)(x).

**PAG-02 General Permit
Comment Response Document**

5. Page 2 - Eligibility Criteria, Paragraph 2 - Discharges which contain hazardous pollutants, toxics, or any other substance which - because of its quantity, concentration, or physical, chemical or infectious characteristics - may cause or contribute to an increase in mortality or morbidity in either an individual or the total population, or pose a substantial present or future hazard to human health or the environment when discharges into surface waters of this Commonwealth (25 PA. Code 92a.54(a)(5)).

Changes: remove the word substantial, line 5, **(2)**

Response: The statement referenced in the comment, which is an eligibility requirement of PAG-02 coverage that is contained in the PAG-02 NOI Instructions and the PAG-02 General Permit, is an accurate statement as reflected in state regulations at 25 Pa. Code § 92a.54(a)(5).

6. **Comment:** The proposed E&S module 1 and PCSM module 2 (3800-PM-BCW0406b and c) do not appear to allow sufficient space to provide the requested information in several areas. For example, section 1 of module 2 requests a “detailed description” for each BMP used, but only provides one partial line in which to enter the information. We encourage DEP to increase the space available and/or provide these forms as a “unlocked” electronic documents so that space can be expanded as needed. **(3)**

Response: A Word version of these documents will be available through DEP’s eLibrary, which will allow users to enter all the information necessary to address each question. Attachments to the modules may also be submitted. Changes have been made to the final version of these modules.

7. **Comment:** The proposed E&S module 1 and PCSM module 2 (3800-PM-BCW0406b and c) should provide space for additional narrative information or allow for additional sheets to be attached so that unique or site specific information can be provided. **(3)**

Response: See response to Comment No. 6.

8. **Comment:** The PAG-02 Fact Sheet (3800-PM BCW0405e) Eligibility criteria item #13 indicates that nondischarge or ABACT BMPs will be required for any projects discharging to a surface water that is impaired for siltation, suspended solids, or nutrients. PA Code chapter 102 requires nondischarge or ABACT BMPs only for surface waters classified as HQ or EV. What is the Department’s authority to enact this requirement? **(3)**

Response: DEP may establish conditions for coverage under General NPDES Permits that are reasonable and appropriate to protect and maintain water quality standards of surface waters. The Chapter 102 regulation performance standards for both construction and post-construction phases of a project are based upon the Chapter 93 antidegradation requirements. All projects must demonstrate compliance with antidegradation requirements. DEP believes that the utilization of non-discharge and ABACT BMPs for impaired waters will ensure that discharges of stormwater associated with construction activities will not cause or contribute to a violation of an applicable water quality standard established under Chapter 93 or cause significant adverse environmental impact per 25 Pa. Code § 92a.54(a)(7). An applicant who cannot or chooses not to meet the eligibility criteria for coverage under the General Permit may seek authorization under an individual permit.

9. **Comment:** The PAG-02 Fact Sheet (3800-PM BCW0405e) Eligibility criteria item #14 requires nondischarge or ABACT BMPs throughout the Chesapeake Bay watershed for any stormwater runoff which includes sediment, phosphorous, nitrites, or nitrates. The absolute nature of this requirement seems difficult to enforce, considering that trace amounts of the subject pollutants are present in virtually any runoff stream. Is it DEP’s intent to require nondischarge or ABACT BMPs for all projects within the Chesapeake Bay Watershed? Considering that PA Code chapter 102 requires nondischarge or ABACT BMPs only for surface waters classified as HQ or EV, what is the Department’s authority to enact this requirement? **(3)**

**PAG-02 General Permit
Comment Response Document**

Response: Yes, all applicants seeking new coverage under the PAG-02 General Permit that will discharge to surface waters tributary to the Chesapeake Bay or other waters impaired for siltation, suspended solids, or nutrients with TMDLs will need to design and implement a non-discharge alternative or ABACT BMPs. Also see response to Comment No. 8.

- 10. Comment:** No details are provided on the extent of the required training or who must undergo it. When will the public have an opportunity to review and comment on the training program? **(3)**

Response: DEP does not have a formal training program in place at this time. DEP is in the process of developing training courses for posting in its Clean Water Academy (<https://pacleanwateracademy.remote-learner.net/>). Also see response to Comment No. 30.

- 11. Comment:** The PAG-02 Fact Sheet (3800-PM BCW0405e) section titled “Proposed PAG-02 Modifications” indicates that all permits issued under the statewide general permit will expire on a set date (December 7, 2024) instead of remaining valid for 5 years from their date of issuance. This places an unfair burden of permit renewal on projects submitted late in the permit cycle. The change will create detrimental surges and declines in the engineering and construction industry as project sponsors strive to obtain permits early in the cycle. It will adversely affect the workload of DEP and CCD reviewers, who often cite problems with understaffing as it is. We strongly recommend against this change due to the adverse economic impacts with no corresponding environmental benefit. **(3)**

Response: All new and renewed coverage under the reissued PAG-02 General Permit will have an expiration date of December 7, 2024. This change was made in response to concerns the U.S. Environmental Protection Agency (EPA) has had with DEP’s historic practice of approving coverage beyond the expiration date of the statewide general permit. DEP anticipates that an electronic system will be used in 2024 to allow existing permittees to reaffirm eligibility or submit an NOI for the reissued PAG-02 General Permit, allowing DEP/CCD to more quickly approve coverage. Also see response to Comment No. 13.

- 12. Explicitly define what constitutes an ‘administrative complete’ NOI package? Will that definition change? **(4)****

Response: An administratively complete NOI package for the PAG-02 General Permit is a submission that satisfies all of the items on the PAG-02 NOI Checklist (3800-PM-BCW0405c).

- 13. If a permit is approved at any time during 2024, does it still expire on December 7, 2024? **(4)****

Response: Yes. DEP will provide additional information and clarification of the NOI process for the 2024 General Permit as that time approaches. Alternatively, the permittee may be required to reaffirm eligibility as described in response to Comment No. 11.

- 14. What training is going to be required for onsite personnel? **(4)****

Response: Training is required for any personnel responsible for the installation, maintenance, and/or repair of the E&S and PCSM BMPs as well as the PPC Plan, storage of chemicals, performing inspections and those taking corrective actions. The general permit goes on to state that the permittee “must ensure that personnel understand any requirements of this permit that may be affected by the work they are subcontracted to perform.” The permittee is ultimately responsible for ensuring that all activities on the site comply with the requirements of the General Permit. Also see response to Comment No. 10.

**PAG-02 General Permit
Comment Response Document**

15. Who is required to get the aforementioned training? Land Owners? Developers? Contractors? (4)

Response: Part C XV.A of the General Permit identifies the personnel who must understand responsibilities under, and requirements of, the General Permit. The permittee is responsible for ensuring that the identified personnel meet the requirements of the General Permit.

16. Is the 60 days time frame from initial submission, determination of completeness, or permit issuance? (4)

Response: If DEP/CCD determines, upon receipt of a PAG-02 NOI package, that the NOI package is incomplete, DEP/CCD will notify the applicant in writing (letter or email) prior to the end of the review period. NOIs with fee payments that include insufficient funds will be considered incomplete. The applicant will have 60 calendar days ("deficiency correction period") to submit the necessary information or fees to make the NOI package complete; this period is independent of the review period.

17. If the site cannot meet the volume reduction requirement, does that mean an individual permit will be required? (4)

Response: Applicants for PAG-02 coverage must demonstrate either 1) the volume reduction and water quality requirements specified in an applicable DEP-approved and current Act 167 Plan will be achieved; 2) the net change in runoff volume and water quality up to and including the 2-year/24-hour storm event comparing pre- and post-construction conditions will be managed; or 3) an alternative will be implemented that will be either more protective than required under 1) and 2) or will maintain and protect existing water quality and existing and designated uses by maintaining the site hydrology, water quality, and erosive impacts of the conditions prior to initiation of any earth disturbance activities (see 25 Pa. Code § 102.8(g)). One of these three options must be selected and implemented for PAG-02 coverage (as well as for any permit required under Chapter 102).

18. What is involved in the "inspection report" for critical stages? Will there be a template provided by the DEP? (4)

Response: DEP's Visual Site Inspection Report (3800-FM-BCW0271d) or equivalent must be used for visual site inspections under the PAG-02 General Permit. There are check boxes on this report for documenting critical stages of PCSM BMP implementation, which are determined by the PCSM Plan developer.

19. Does the 60 days time limit for completeness mean the CCD / DEP will be required and/or able to review submittals within the time limit? (4)

Response: The 60-day deficiency correction period applies to applicants if DEP/CCD determines that an NOI is incomplete. If an applicant submits information to correct a deficiency prior to the deadline, DEP/CCD will review the information according to its procedures for prioritizing permit application/NOI reviews. DEP/CCD will not necessarily wait until the end of the deficiency correction period to resume review of the NOI.

20. Comment: Draft Permit Cover Sheet

The Cover Sheet, first paragraph states:

"...the Department of Environmental Protection (DEP) authorizes the permittee named below to discharge stormwater associated with small construction activities from an earth disturbance activity..."

It is suggested that DEP update the language in the first paragraph of the Cover Sheet to the following:

"...the Department of Environmental Protection (DEP) authorizes the permittee named below to discharge stormwater associated with large or small construction activities from an earth disturbance activity..." **(5)**

**PAG-02 General Permit
Comment Response Document**

Response: The word, “small” has been removed from the Authorization to Discharge page (page 1) of the PAG-02 General Permit.

21. Comment: Section I: Definitions

The Cover Sheet of the Draft Permit, second paragraph states:

“This authorization is subject to DEP’s enclosed PAG-02 General Permit which incorporates all effluent limitations, monitoring and reporting requirements, and other terms, conditions, criteria, and special requirements for the discharge of stormwater composed entirely of stormwater associated, in whole or in part, with construction activity, as defined in this General Permit, to surface waters of this Commonwealth, including through storm sewers...”

The phrase “to surface waters of this Commonwealth” is misleading and conflicting as there are separate and distinct definitions for both Surface Waters and Waters of this Commonwealth. They are defined in Section I as:

“Surface Waters – Perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps, and estuaries, excluding water at facilities approved for wastewater treatment such as wastewater treatment impoundments, cooling water ponds, and constructed wetlands used as part of a wastewater treatment process.”

“Waters of this Commonwealth – Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs, and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.”

Therefore, to avoid confusion to all permittees we recommend DEP update the Draft Permit’s Cover Sheet, second paragraph to the following:

“This authorization is subject to DEP’s enclosed PAG-02 General Permit which incorporates all effluent limitations, monitoring and reporting requirements, and other terms, conditions, criteria, and special requirements for the discharge of stormwater composed entirely of stormwater associated, in whole or in part, with construction activity, as defined in this General Permit, to surface waters, including through storm sewers...” **(5)**

Response: This change has been made to the Authorization to Discharge page (page 1) of the PAG-02 General Permit.

22. Comment: Section I: Definitions

Waters of this Commonwealth is defined in Section I as:

“Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs, and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.”

DEP is over-reaching in the use of the term “artificial” in defining Waters of this Commonwealth. Artificial (human-made) ponds or underground water are often types of post-construction stormwater management (PCSM) BMPs installed during commercial, residential, and industrial construction activities. Examples of artificial ponds are retention/detention ponds and bioretention areas; and, examples of artificial underground water are underground vaults or chambers used for stormwater retention/detention typically implemented in commercial construction sites.

**PAG-02 General Permit
Comment Response Document**

PCSM BMPs are designed to accept and treat stormwater runoff from impervious areas in perpetuity. Stormwater runoff is inherently comprised of a myriad of pollutants that are typically abated using the PCSM BMPs. Therefore, including these types of artificial waters into the definition of Waters of the Commonwealth is encouraging liability to the owners of the PCSM BMPs, as they are designed to treat potentially polluted stormwater runoff.

Additionally, Waters of the United States as defined in 40 CFR 122.2(2)(vi) states:

“(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition. (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.”

We recommend that DEP remove the term “artificial” from the definition of Waters of this Commonwealth, to the following:

“Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs, and other bodies or channels of conveyance of surface and underground water, or parts thereof, within or on the boundaries of this Commonwealth.” (5)

Response: The term, “Waters of this Commonwealth” is defined in the PAG-02 General Permit because the General Permit includes other definitions that use this term. The definition in PAG-02 is consistent with the term, “Waters of the Commonwealth” as defined in Pennsylvania’s Clean Streams Law and the term, “Waters of this Commonwealth” as defined at 25 Pa. Code § 102.1.

23. Comment: Sections III.D, E, and F

On Page 7 and 8 of the Draft Permit, the following sections: III.D, III.E, and III.F; need to be changed to III.C, III.D, and III.E, respectively. (5)

Response: These revisions have been made.

24. Comment: Part A II.A, Monitoring, Inspection, and Reporting Requirements

Part A II.A of the Draft Permit states:

“The visual site inspections and reports shall be completed on a form developed by DEP...”

DEP’s requirement that a visual site inspection report shall be completed on a form developed by DEP is overly constrictive to the construction industry and does not provide any tangible water quality benefit.

When the permittee can illustrate to DEP that another type of inspection report meets or exceeds the written report minimum requirements in Part A II.A (1) and (2) of the Draft Permit, their report captures the data itemized on the current Chapter 102 Visual Site Inspection Report form [Form 3800-FM-BCW0271d Rev. 1/2019], the permittee should be afforded the ability to use another iteration of an inspection report form.

Therefore, it is suggested that DEP update Part A II.A of the Draft Permit to allow the use of another type of visual site inspection report form when shown that it meets or exceeds the requirements of Part A II.A of the Draft Permit and the Chapter 102 Visual Site Inspection Report form.

Additionally, Part A II.A of the Draft Permit states:

“A written report of each inspection shall be kept...”

**PAG-02 General Permit
Comment Response Document**

DEP's requirement that the inspection report be retained as a written (e.g. hardcopy) report conflicts with the intent of EPA's paperwork reduction policies.

Therefore, it is strongly recommended that DEP add language to Part A II.A of the Draft Permit that affords the permittee the ability to use inspection software programs which allows the permittee the ability to provide access to the electronic reports in like manner to hard copies. **(5)**

Response: DEP has included the following requirement in the final PAG-02 General Permit to address this comment: "The permittee shall document each site inspection on DEP's Chapter 102 Visual Site Inspection Report (3800-FM-BCW0271d) *or alternative document or electronic form that collects and retains identical information*" (emphasis added). Also see response to Comment No. 1.

25. Comment: Part A.II.E - Monitoring, Inspection, and Reporting Requirements

Part A.II.E states:

"...all reports and other information prepared in accordance with the terms of this permit shall be available for public inspection at the appropriate DEP Regional Office or authorized conservation district."

The Draft Permits' description of the location of documents available for public review is vague. Are the permittee(s) and co-permittee(s) responsible to keep up-to-date permit documentation at the appropriate DEP Regional Office or authorized conservation district office throughout the duration of construction activities? Who is responsible for maintaining this documentation offsite: the permittee(s), co-permittee(s), DEP, or the authorized conservation district? If the permittee(s) and co-permittee(s) are required to provide this documentation upon request, then DEP needs to update Part A.II.E to define the timeframe afforded the permittee(s) and co-permittee(s) to provide the documentation (e.g. in a timely manner); or, DEP should update Part A.II.E to be consistent with the following parts of the Draft Permit, as outlined below:

- Section III.A.6 states: "The permittee or co-permittee shall have the E&S plan, PCSM Plan, PPC Plan, and other documents required by this permit maintained at the site and available for review by DEP, authorized conservation district, or other authorized local, state, or federal agent or representative."
- Part B.I.B.1 states: "The permittee or co-permittee(s) shall furnish to DEP or the authorized conservation district within thirty (30) days of the date of request, any information DEP or the authorized conservation district may request...to determine compliance with this permit."
- Part B.I.B.2 states: "The permittee or co-permittee shall furnish, upon request, to DEP, EPA or the authorized conservation district, copies of records required to be kept by this permit." **(5)**

Response: DEP agrees that this provision may cause confusion and has removed it from the final PAG-02 General Permit.

26. Comment: Part C II C, Erosion and Sediment Control Plans

Part C II.C states:

"E&S Plans must be made available at the site of the construction activity at all times."

This language is more prescriptive than the language previously detailed in Section III.A.6 of the Draft Permit, which states:

"The permittee or co-permittee shall have the E&S Plan, PCSM Plan, PPC Plan, and other documents required by this permit maintained at the site and available for review by DEP, authorized conservation district, or other authorized local, state, or federal agent or representative."

**PAG-02 General Permit
Comment Response Document**

DEP needs to afford the permittees the ability to make the documents (e.g. E&S Plan, PCSM Plan, PPC Plan) that are already required to be retained onsite, available in a timely manner when requested. Therefore, it is strongly recommended that DEP update the language to Part C II.C of the Draft Permit as follows:

“E&S Plans shall be made available upon request at the site of the construction activity in a timely manner during normal working hours.” (5)

Response: DEP has revised this language in the final PAG-02 General Permit to state, “The permittee shall maintain the approved E&S Plan on-site during earth disturbance activities at all times and shall make the plan available for inspection by DEP or CCD upon request.” DEP/CCD generally conducts site inspections during normal working hours but, in the event that a visit does occur outside of normal working hours, DEP/CCD would expect that the plan is available on-site.

27. Comment: Part C V C, Post-Construction Stormwater Management Plans

Part C V.C states:

“PCSM Plans must be made available at the site of the construction activity at all times.”

This language is more prescriptive than the language previously detailed in Section III.A.6 of the Draft Permit, which states:

“The permittee or co-permittee shall have the E&S Plan, PCSM Plan, PPC Plan, and other documents required by this permit maintained at the site and available for review by DEP, authorized conservation district, or other authorized local, state, or federal agent or representative.”

DEP needs to afford the permittees the ability to make the documents (e.g. E&S Plan, PCSM Plan, PPC Plan) that are already required to be retained onsite, available in a timely manner when requested. Therefore, it is strongly recommended that DEP update the language to Part C V.C of the Draft Permit as follows:

“PCSM Plans shall be made available upon request at the site of the construction activity in a timely manner during normal working hours.” (5)

Response: DEP has revised this language in the final PAG-02 General Permit to state, “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 DEP or CCD upon request.” DEP/CCD generally conducts site inspections during normal working hours but, in the event that a visit does occur outside of normal working hours, DEP/CCD would expect that the plan is available on-site.

28. Comment: Part C VI, Pre-Construction Meeting

Part C VI of the Draft Permit states:

“For earth disturbance activities authorized by this General Permit, a pre-construction meeting is required, unless the permittee has been notified otherwise in writing by DEP or the authorized conservation district.”

It is suggested that DEP add greater detail to explain the instances in which a permittee is not required to have a pre-construction meeting, and what would determine the permittee being notified by DEP or the authorized conservation district that the pre-construction meeting is not required. (5)

Response: Pre-construction meetings are important to ensure all parties understand the approved plans and permit requirements prior to earth disturbance activities, and DEP/CCD will always aim to hold such meetings. However, issues such as staff availability may prevent DEP/CCD from participating in the meeting. If DEP/CCD notifies the permittee that a pre-construction meeting is not required because staff will be unavailable to attend,

**PAG-02 General Permit
Comment Response Document**

the permittee is nonetheless encouraged to invite all permittees, co-permittees, operators, and licensed professionals or designees responsible for the earth disturbance activity to a pre-construction meeting in the absence of DEP/CCD. This may also provide an opportunity to satisfy requirements of the General Permit concerning the permittee's and co-permittee's responsibility to ensure understanding of the General Permit (also see response to Comment No. 30).

29. Comment: Part C XIV A & E, Long-Term Operation and Maintenance

Part C XIV.A states:

"The permittee or co-permittee shall be responsible for long-term operation and maintenance of PCSM BMPs unless a different person is identified in the NOT and that person has agreed to long-term operation and maintenance of PCSM BMPs."

Part C XIV.E states:

"A permittee or co-permittee that fails to transfer long-term operation and maintenance of the PCSM BMPs or otherwise fails to comply with this requirement, shall remain jointly and severally responsible with the landowner for long-term operation and maintenance of the PCSM BMPs located on the property."

DEP's requirement that the permittee or co-permittee(s) identify the person(s) that has agreed to the long-term operation and maintenance (O&M) of the Post Construction Stormwater Management (PCSM) BMPs on the Notice of Termination (NOT) is burdensome to the permittee or co-permittee(s), unnecessary, and should be removed from the Draft Permit. There may be various external factors that are out of the control of the permittee or co-permittee(s) as to why a landowner of the property containing a PCSM BMP will not agree to long term O&M on the NOT.

For this reason, making the permittee or co-permittee(s) jointly and severally liable with the landowner for the long-term O&M is impractical; places permittees at risk for significant penalties; and, redundant as procedures are already included in the Draft Permit to ensure that the landowners of the property with a PCSM BMP are provided their long-term maintenance obligations. Therefore, the requirement that the permittee or co-permittee(s) identify the person(s) that has agreed to the long-term O&M of the PCSM BMPs should be removed from the Draft Permit for these and the following reasons:

- The Draft Permit already contains language that the permittee or co-permittee(s) will record documents pertaining to the PCSM BMP, and their related obligations that are binding to the property regardless if the landowner(s) changes. Part C XIV.B of the Draft Permit states:

"For any property containing a PCSM BMP, the permittee or co-permittee shall record an instrument with the Recorder of Deeds which will assure disclosure of the PCSM BMP and the related obligations in the ordinary course of a title search of the subject property. The recorded instrument must identify the PCSM BMP, provide for necessary access related to long-term operation and maintenance for PCSM BMPs, and provide notice that the responsibility for long-term operation and maintenance of the PCSM BMPs is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees, and provide proof of filing with the NOT under 25 Pa. Code §102.7(b)(5) and 102.8(m)(2)."

And required to be included with these documents is the long-term maintenance plan as stated in Part C XIV.F of the Draft Permit:

"...the permittee shall record an instrument as required under 25 Pa. Code § 102.8(m)(2) and paragraph XIV.B above within 45 days from the date of issuance of this permit or authorization. Unless DEP authorizes a different procedure, the long-term operation and maintenance plan shall be recorded along with the instrument." (5)

Response: Someone must be identified as being responsible for long-term O&M of such BMPs, and it may be the permittee or co-permittee(s) in the absence of some other identified person(s). The permit language is a restatement of the regulatory language at 25 Pa. Code § 102.8(m).

**PAG-02 General Permit
Comment Response Document**

30. Comment: Part C XVIII, Training

The following sections of Part C XVII states:

“A. Prior to commencement of construction activities, the permittee and co-permittees must ensure that the following personnel understand the requirements of this permit and their specific responsibilities with respect to those requirements.”

“B. The permittee and co-permittees are responsible for ensuring that all activities on the site comply with the requirements of this permit. The permittee and co-permittee are not required to provide or document formal training for subcontractors or other outside service providers but must ensure that personnel understand any requirements of this permit that may be affected by the work they are subcontracted to perform.”

“D. A training log must be kept onsite and made available upon request from EPA, DEP, or conservation district staff.”

Part C XVII has ambiguous language and conflicting information. Therefore, it is strongly recommended that DEP removes Part C XVIII from the Draft Permit for the following reasons:

- “...permittee and co-permittees must ensure...”
 - DEP uses the term “ensure” several times in Part C XVII and includes no additional clarification on what this term means or how the permittee will accomplish ‘ensuring’. DEP does not offer any State certification training program for the permittees, BMP inspectors, or BMP installers; and, DEP does not formally approve any third-party certification programs. DEP is naively hopeful that every permittee or co-permittee throughout the construction industry will uniformly confirm that all their subcontractors or other outside service providers are either adequately trained or fully understand the requirements of this General Permit.
- Part C XVII.B states: “The permittee and co-permittee are not required to provide or document formal training for subcontractors or other outside service providers”; and, Part C XVII.D states: “A training log must be kept onsite and made available upon request from EPA, DEP, or conservation district staff.”
 - DEP has added thoroughly conflicting language in Parts C XVII.B and C XVII.D regarding documenting training. Does the permittee or co-permittee need to document training of their subcontractors or other outside service providers or not? As stated above, since DEP does not offer any State certification training program for the permittees, BMP inspectors, or BMP installers; and, DEP does not formally approve any third-party certification programs it is incredibly burdensome to the permittees to be required to ensure, conduct, or oversee a training program for their subcontractors or other outside service providers. How can DEP adequately determine if the training that the permittees are doing to “ensure” is done is sufficiently conveying the requirements of this General Permit and the Pennsylvania Administrative Codes applicable to this program?
- DEP should leave the responsibility of the permittees’ ensuring that their subcontractors or other outside service providers are qualified and knowledgeable in the requirements of the General Permit, to their work contracts. Contracting allows the permittees to explicitly define the expectations of the subcontractor and their work product and provides the permittee with leverage to make certain that the subcontractors remain in compliance with the General Permit. (5)

Response:

Training is required for any personnel responsible for the installation, maintenance, and/or repair of the E&S and PCSM BMPs as well as the PPC Plan, storage of chemicals, performing inspections and those taking corrective actions. The general permit goes on to state that the permittee “must ensure that personnel understand any requirements of this permit that may be affected by the work they are subcontracted to perform.” The permittee is

**PAG-02 General Permit
Comment Response Document**

ultimately responsible for ensuring that all activities on the site comply with the requirements of the General Permit.

This section does not require formal documentation of exact training materials provided and/or delivery of training, such as handouts, PowerPoint presentations, minutes of meetings, or similar documentation. However, this section specifies: the content and extent of training at a minimum, that the permittee keep a log on-site of all individuals that were trained on the relevant parts of the General Permit and make this log available if requested by DEP/CCD and keep the associated plans on-site for review.

31. Comment: Part A – Monitoring, Inspection, and Reporting Requirements

Page 4 of the Draft Fact Sheet, Part A, first bullet states:

“Inspection and Oversight Requirements – visual site inspections must occur throughout the duration of construction and until the Notice of Termination (NOT) has been submitted the permittee. Two types of inspections are required: 1) routine inspections (at least weekly); and 2) post-storm event inspections (within 24 hours of each 0.25 inch or greater storm event or the occurrence of snowmelt sufficient to cause a discharge; and 3) corrective action inspections.”

DEP documents that there are two types of inspections that are required: 1) routine inspections (at least weekly); and 2) post-storm event inspections (within 24 hours of each 0.25 inch or greater storm event or the occurrence of snowmelt sufficient to cause a discharge; which is in accordance with Part A II A of the Draft Permit. However, the fact sheet lists a third type of inspection (i.e. 3) corrective action inspections) which is not prescribed in the Draft Permit. Therefore, it is recommended that DEP remove the third type of inspection from the Draft Fact Sheet, so that Page 4 of the Draft Fact Sheet, Part A, first bullet states:

“Inspection and Oversight Requirements – visual site inspections must occur throughout the duration of construction and until the Notice of Termination (NOT) has been submitted the permittee. Two types of inspections are required: 1) routine inspections (at least weekly); and, 2) post-storm event inspections (within 24 hours of each 0.25 inch or greater storm event or the occurrence of snowmelt sufficient to cause a discharge.”
(5)

Response: The draft Fact Sheet was correct in that corrective action inspections were intended to be included in the PAG-02 General Permit, but were inadvertently omitted from the General Permit. The final PAG-02 General Permit includes corrective action inspections. Corrective action inspections are to be completed anytime the permittee observes a deficiency in implementation of the E&S and PCSM Plans.

32. Comment: Part C, Page 6 states:

“Required Training – This condition would establish minimum requirements for permittees to ensure that personnel conducting earth disturbance activities are adequately trained on the General Permit and procedures necessary to comply with the General Permit and implement the approved E&S and PCSM Plans.”

It is strongly recommended that DEP remove the above language from the Draft Fact Sheet for the reasons below:

- The proposed language in Part C XVII of the Draft Permit has ambiguous language and conflicting information in regard to required training.
- DEP does not currently offer any State certification training program for the permittees, BMP inspectors, or BMP installers; and, DEP does not formally approve any third-party certification programs. DEP is naively hopeful that every permittee or co-permittee throughout the construction industry will uniformly confirm that all their subcontractors or other outside service providers are either adequately trained on the General Permit and procedures necessary to comply with the General Permit and implement the approved E&S and PCSM Plans.

**PAG-02 General Permit
Comment Response Document**

DEP should leave the responsibility of the permittees' ensuring that their subcontractors or other outside service providers are qualified and knowledgeable in the requirements of the General Permit, to their work contracts. Contracting allows the permittees to explicitly define the expectations of the subcontractor and their work product and provides the permittee with leverage to make certain that the subcontractors remain in compliance with the General Permit. **(5)**

Response: See response to Comment No. 30.

33. Comment: Cover Page (page 1)

Language allowing for the extension of general permit coverage past the current permit expiration date has been removed from the previous 12/2017 PAG-02 Permit. A clearly specified procedure for extension/renewal past the proposed expiration date of December 7, 2024, has not been given in the draft documents. **(6)**

Response: See responses to Comment Nos. 3, 11 and 13.

34. Comment: Definitions – I. (pages 4-5)

The definitions given for the E&S Plan and PCSM Plan still require both drawings and narratives. It appears that the E&S and PCSM Modules are intended to replace the narratives that are currently required. FE requests clarification of the intention of the Modules. FE strongly supports efforts to streamline permit applications. **(6)**

Response: E&S Module 1 and PCSM Module 2 are to be used to satisfy the narrative component of E&S and PCSM Plans, respectively. Plan drawings and supporting calculations where applicable would also need to be completed for these plans.

35. Comment: Notice of Intent (NOI) Submittal – Condition III.B.1 (page 6) / Fact Sheet (page 2) – High Quality or Exceptional Quality Waters

On page 2 of the draft Fact Sheet and PAG-02 draft Sample Permit Condition III.B.1, denies PAG-02 permit eligibility for construction activities that discharge to high quality or exceptional waters. While FirstEnergy can understand PADEP's concerns about discharges to high quality or exceptional waters, it is also important for PADEP to understand the consequence of such action. By denying PAG-02 eligibility, the permittee is forced to obtain an individual permit for the discharge which can take several months or even years to obtain. The process to obtain an individual permit is quite cumbersome and can delay the investment of millions of dollars. Several states, like Ohio and West Virginia, have provisions and enhanced conditions in their general permits for stormwater associated with construction activities that protect these high quality and exceptional waters while still maintaining the efficiency of the general permit program. FirstEnergy recommends that PADEP review enhanced conditions for high quality and exceptional waters and adopt them in PAG-02. **(6)**

Response: DEP is prohibited from authorizing general permit coverage for discharges to surface waters classified as High Quality and Exceptional Value (see 25 Pa. Code §§ 92a.54(a)(8) and 92a.54(e)(9)).

36. Comment: Notice of Intent (NOI) Submittal – Condition III.B.13 (page 7) / Fact Sheet (page 6) – Nutrients in Impaired Waters

On page 7 of the draft Fact Sheet and PAG-02 draft Sample Permit Condition III.B.13, denies PAG-02 permit eligibility where the discharge is not managed in accordance with Antidegradation Best Available Combination of Technologies Best Management Practices ("ABACT BMPs") for siltation, suspended solids and nutrients. FirstEnergy understands and agrees with PADEP that impaired waters deserve a higher level of treatment, such as ABACT BMPs. However, the Draft Permit includes nutrients as a qualifying pollutant to warrant ABACT BMPs which should not be a pollutant of concern for many construction sites. While construction sites create and

**PAG-02 General Permit
Comment Response Document**

aggressively attempt to control siltation and suspended solids, they generally do not create or control nutrients. The United States Environmental Protection Agency ("USEPA") has devoted some online resources to nutrients sources and solutions (<https://www.epa.gov/nutrientpollution/sources-and-solutions>). While USEPA lists several sources, such as agriculture, construction stormwater is not listed; where stormwater is listed, it is associated with stormwater runoff from contact with fertilizer or fecal matter. While nutrients are a major concern in water bodies, and FirstEnergy shares this concern, other industries and sectors contribute significantly more nutrients than construction sites. FirstEnergy recommends that PADEP remove nutrients as a qualifying pollutant to warrant ABACT BMPs. (6)

Response: DEP's Chapter 102 program has historically used sediment and nutrients as surrogates for pollutants in stormwater discharges from construction sites. See for example Chapter 8 of the Pennsylvania Stormwater Best Management Practices Manual (363-0300-2000). Phosphorus is known to bind to sediment in runoff and can cause or contribute to surface water impairments. Also, DEP's Phase III Watershed Implementation Plan (WIP) for the Chesapeake Bay TMDL includes actions to reduce nutrients in stormwater runoff. DEP believes it is appropriate for permittees to implement BMPs that will minimize discharges of nutrients when those discharges will be to waters impaired for nutrients.

37. Comment: Notice of Intent (NOI) Submittal – Condition III. "C." (page 7)

Letter C, as previously given in the 12/2017 PAG-02 Permit, which specified the procedure for renewal of coverage under the general permit, has been removed. (6)

Response: See responses to Comment Nos. 3, 11 and 13.

38. Comment: Part A II. Monitoring, Inspection, and Reporting Requirements – Condition C. (page 9) – Non-compliance Reporting

The verbiage has changed to require a phone or personal contact within 4 hours of any incident causing or threatening pollution. FirstEnergy recommends adding email to the acceptable means of communication, since construction work can take place well outside office hours, including weekends and holidays. Also, Department and Conservation District staff do not always have voicemail capability, or voicemail may be full. (6)

Response: Under 25 Pa. Code § 91.33, a responsible party is required to "immediately notify the Department by telephone." In addition, 25 Pa. Code § 92a.41(b) provides that "the permittee shall comply with the oral notification requirement of § 91.33" and specifies that this "[o]ral notification is required as soon as possible, but no later than 4 hours after the permittee becomes aware of the incident causing or threatening pollution." DEP has 24-hour emergency response numbers for each regional office on its website (visit www.dep.pa.gov and select "Report an Incident").

39. Comment: Part B I. Management Requirements – Condition A (page 11) – Permit Modification, Termination, or Revocation and Reissuance

The permit states:

The General Permit will expire five (5) years from the date of issuance. DEP will publish a notice in the Pennsylvania Bulletin of the draft, renewed, or reissued General Permit or any amendments to this General Permit, and after a comment period, notice of the final, renewed, reissued or amended General Permit will be published in the Pennsylvania Bulletin. Any person wishing to be covered by such a final, renewed, reissued or amended General Permit must submit a Notice of Intent for permit coverage or an affirmative acknowledgement of the new permit's terms and conditions, as applicable. See 40 CFR § 122.28(b)(2)(i). Such person may request coverage under an Individual Permit. See 40 CFR § 122.28(b)(2)(vi); 25 Pa. Code § 92a.54(c) and (d) (relating to general permits). If the permittee is unable to comply with the renewed, reissued, or amended

PAG-02 General Permit Comment Response Document

General Permit, the permittee must submit an application for an individual permit within 90 days of publication of this General Permit.

There is no target date given for the Department to publish notice in the PA Bulletin of a draft, renewed, or reissued General Permit ahead of the December 7, 2024 expiration date. Applicants with approved coverage expiring on December 7, 2024 will have a high degree of uncertainty for any projects in construction or close to the start of construction during this period. There is no guarantee of renewed or reissued permit coverage, and applicants and permittees will be subject to unspecified Dept timelines. FE strongly encourages the Department to include a target date ahead of the permit expiration date for publish of a draft, renewed, or reissued General Permit, that allows proper time for the public comment period, as well as submission, review and approval of an NOI package for continued or new coverage under the renewed or reissued permit. Contingency measures if the date is not met should be clearly specified. An “affirmative acknowledgement” is stated as a possible alternative to submission of an NOI package but has not been defined nor approval requirements identified. The Department is introducing an unacceptable level of risk into the process of NPDES Permitting for business and other stakeholders by removing the existing process for extending permit coverage past the permit expiration date, and not providing enough detail on the new process to allow for proper planning. (6)

Response: Starting December 8, 2019, all DEP/CCD approvals of coverage (i.e., new, renewals and amendments) under the PAG-02 General Permit will be given an expiration date of December 7, 2024, the date of the statewide PAG-02 General Permit's expiration. DEP intends to reissue the statewide PAG-02 General Permit on or before December 8, 2024 to ensure there is uninterrupted coverage for existing permittees at that time. The specific details concerning the mechanism (e.g., NOI or affirmative acknowledgement) and the deadline to confirm eligibility and compliance are not known at this time but will be provided in the *Pennsylvania Bulletin* notice for the draft reissued PAG-02 General Permit that is expected to be published during 2024.

40. Comment: Part B I. Management Requirements – Condition B.4 (page 11) – Duty to Provide Information

The phrasing of this condition has been truncated from the 12/2017 version of the permit to read, The permittee or co-permittee shall give seven (7) calendar days advance notice to DEP or the authorized conservation district of any planned physical alterations or additions to the permitted facility. Reference to alterations that are specifically regulated by the PAG-02 Permit has been removed (...which could, in any way, substantially affect the quality and/or quantity of stormwater discharged from the activity). Since there is no regulatory requirement for permittees or co-permittees to give notice of changes to the site which do not affect the stormwater discharge, FE recommends the original language given in the 12/2017 version of the PAG-02 Permit be reinstated. (6)

Response: DEP has updated the language in Part B I.B.4 of the final PAG-02 General Permit to include the qualifications provided in the 2017 version of the PAG-02 General Permit.

41. Comment: Part C – Condition XVIII.A (page 19) / Fact Sheet (page 6) – Training

On page 6 of the draft Fact Sheet and PAG-02 draft Sample Permit Condition XVIII.A, states that training to appropriate personnel shall be given “prior to commencement of construction activities...” FE performs phased, linear projects which can last several months at a time. The phases may include brining on various contractors and personnel at different points of the construction. Therefore, it is inefficient, overly burdensome, and arbitrary to train all personnel prior to the commencement of construction activities. Instead, FE proposes that personnel be trained prior to starting their respective earth disturbance activities at the construction site. (6)

Response: This language has been revised to state, “Prior to commencement of construction activities or commencement of work on the project site...” to reflect DEP's understanding that new personnel may be added throughout the life of the project. Such personnel must be briefed on the requirements of the General Permit and their responsibilities to ensure compliance prior to commencing work. Also see response to Comment No. 30.

**PAG-02 General Permit
Comment Response Document**

42. Comment: PAG-02 NPDES Notice of Intent & Instructions (8/2019)

The title of the document is PAG-02 National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges of Stormwater Associated with Small Construction Activities Notice of Intent (NOI), with no explanation of the “small” category. The term “small” is also given in paragraph one, page one of the draft Permit. FE requests clarification on the use of the term in the permit and NOI. **(6)**

Response: The use of the term “small” in the title of the NOI and in the draft general permit was mistaken and has been corrected in the final versions of these documents.

43. Comment: PAG-02 NPDES Notice of Intent & Instructions (8/2019)

The title of the document no longer includes Individual NPDES Permits. Will a separate NOI be issued for Individual Permits? FE requests clarification. **(6)**

Response: DEP has published a separate application for an Individual NPDES Permits for Discharges of Stormwater Associated with Construction Activities in eLibrary (Document ID 3800-PM-BCW0408b).

44. Comment: PAG-02 NPDES Notice of Intent & Instructions (8/2019)

Page 6 of the NOI Instructions provides a flow chart for permit submission and approval. Is the flow chart intended to follow the existing Standard Operating Procedure for NPDES General Permit coverage or will a new Standard Operating Procedure be implemented? FE requests clarification. **(6)**

Response: DEP will update its Standard Operating Procedures (SOPs) for the review of Chapter 102 NPDES permit applications and NOIs. DEP has also updated the referenced flow chart in the PAG-02 NOI Instructions.

45. Comment: PAG-02 NPDES Notice of Intent & Instructions (8/2019)

A checkbox for “Renewal” is still offered, although there seems to be no provision in the draft PAG-02 Permit for coverage renewal. FE requests clarification. **(6)**

Response: DEP has amended the final PAG-02 General Permit by including a provision in Part B for “duty to reapply.” All existing PAG-02 permittees must reapply (renew) their NPDES permit coverage by submitting an NOI or an individual permit application at least 180 days prior to the expiration date of PAG-02 coverage (unless a later date is approved by DEP) if permittees wish to continue discharging stormwater associated with construction activities beyond the expiration date. For example, if a permittee received PAG-02 coverage that was effective on June 1, 2016 and expires on May 31, 2021, and the permittee anticipates there will be stormwater discharges following May 31, 2021 (i.e., the project site will not be permanently stabilized by this time), DEP expects that the permittee will submit an NOI to renew PAG-02 coverage by December 2, 2020 (i.e., 180 days prior to the expiration date). If DEP or CCD approves the renewal of coverage, the renewed coverage will expire on December 7, 2024.

46. Comment: Page 1 General Information, #1

FE recommends adding on to Site Restoration Project to include, meets 102.8(n), PCSM Module completion not required. **(6)**

Response: The applicant of a project that satisfies the criteria of a site restoration project must complete PCSM Module 2 to the extent applicable. As described in the PAG-02 NOI Instructions, sections of PCSM Module 2 relating to the Stormwater Analysis and Infiltration Information may be omitted, but otherwise the remainder of the module must be completed.

**PAG-02 General Permit
Comment Response Document**

47. Comment: Operator Information

FE requests clarification if the NPDES Permit Consultant is intended to be identified as an Operator in this section. **(6)**

Response: The Operator Information section of the PAG-02 NOI is to be used to report known operator(s) as of the time of the NOI submission. If reported, such operators will be identified as co-permittees if permit coverage is approved. Consultant information should be identified on E&S Module 1 and PCSM Module 2 (i.e., plan preparer information) as well as plan drawings, as appropriate.

48. Comment: Page 2 Eligibility Information, #2

While the trigger of Chapter 105.17 Exceptional Value (“EV”) Wetlands for Individual NPDES Coverage is not new, there is significant ambiguity and inconsistency in the interpretation of the 105.17 regulation that requires further clarification from the Department. For some areas that are identified under 105.17 as triggering EV status of a wetland, the presence of wetlands is difficult or impossible for an applicant to determine, since they are often out of the project area and on property not legally accessible to the applicant. FE recommends the Department issue guidance on how to proceed in these cases. Examples are below:

- Wetlands located within ½ mile of wetlands that maintain the habitat of threatened or endangered species,
- Wetlands in the floodplain of a Wild Trout stream, or in the floodplain of a stream tributary thereto, or within the corridor of a National or PA wild or scenic river, and
 - Additional issues are the floodplain is only FEMA mapped in some cases, and the term corridor is not defined
- Wetlands located along an existing public or private drinking water supply, including both surface and groundwater supplies. **(6)**

Response: DEP will consider these issues and the development of guidance in the future. Project-specific questions should be referred to the appropriate DEP regional office's Waterways and Wetlands Program.

49. Comment: Page 2 Eligibility Information, #5

FE linear projects take place primarily on private land for which we hold easements that allow our facilities to exist, and for access associated with maintenance, etc. While we routinely perform due diligence to identify any known contaminated sites prior to a construction project, we do not perform (nor have the rights to perform) soil sampling on every property. Sampling is only performed if soil material will need to be hauled away off-property. It is not clear how an applicant working on multiple non-owned properties can in good faith check true or false to this question. Previous versions of the NOI only included language about the presence of known “hazardous or toxic pollutants”, which we could satisfy with desktop due diligence. The Department is placing an undue burden on applicants to now determine if any residential or non-residential MSCs are exceeded in soils within proposed limits-of-disturbance, especially on linear projects. FirstEnergy recommends the modification or removal of this language, or a provision where the land is not owned the applicant be added to the NOI. **(6)**

Response: The applicant should conduct environmental due diligence, as defined in DEP's Management of Fill Policy (Document ID No. 258-2182-773, as updated), prior to the submission of the PAG-02 NOI form to verify that fill excavated on-site that is used to establish final grade, fill imported to the site, and fill exported from the site is considered clean fill. If due diligence results in evidence of a release (as defined by the Policy) that has affected the fill material, the material must be tested to determine whether the material qualifies as clean fill, and Form FP-001 (Certification of Clean Fill) must be completed. Soil sampling, as it relates to soil contamination, is necessary only when there is evidence of a release. If the applicant is aware of soil sampling data in which MSCs are exceeded, PAG-02 may not be used for NPDES permit coverage unless a site-specific standard has been met or evidence is provided of naturally occurring contamination.

**PAG-02 General Permit
Comment Response Document**

50. Comment: Page 4 Earth Disturbance Information, #11

The way this question is currently presented is confusing. FE suggests editing #11 to read, 11. Identify any other off-site support activities greater than ¼ acre away from the site, and not counted in the area identified in the answer to Question #1, to clarify what information the question is intended to provide. **(6)**

Response: To provide the requested clarification, the question on the NOI has been revised to read, "Identify any other off-site support activities whose disturbance is not included in #1, above (see instructions)."

51. Comment: Page 5 Stormwater Discharge Information, # 1-6

Most FE linear projects involve temporary disturbances, with only non-point sheet flow discharge through perimeter BMPs such as filter sock. It is unclear how the chart given on Page 5 is intended to be filled out for such a project. FirstEnergy suggests providing a space on the chart for "sheet or shallow concentrated flow discharges only," to be listed with associated information for each receiving surface water. This should be clarified in the NOI form or instructions, to avoid the necessity for individual Conservation Districts and Regions to make their own interpretations on future permit applications. **(6)**

Response: A box for "Not Applicable" has been added to the NOI for situations where there is no planned discharge point during or following construction. This box should be selected only if there will be no discharge points across the entire project site during or following construction, and would be applicable primarily to site restoration projects. The PAG-02 NOI Instructions have been updated to clarify that, "[i]f there will be no discharge points (i.e., all stormwater flows will be sheet flows or shallow concentrated flows as may occur for example with a linear project such as utility installation or replacement where disturbed areas will be restored to approximate original condition), the box for "Not Applicable" may be checked. The applicant must however complete applicable information on receiving waters."

52. Comment: PAG-02 NPDES NOI Checklist

Footnote #1 indicates sending the disturbed acre feet to both the CCD and DEP regional office. FE requests clarification. **(6)**

Response: This mistake has been corrected in the final PAG-02 NOI Checklist. When the CCD is conducting the NOI review, applicants will send the disturbed acreage fee to the CCD only, and DEP will only receive a copy of the NOI to provide notification that an NOI has been submitted to the CCD.

53. Comment: Erosion & Sediment Control Module

There are numerous references to PAG-01 in the module. This appears to be a typo, but if it is not FE requests clarification. **(6)**

Response: The use of PAG-01 in E&S Module 1 (3800-PM-BCW0406a) is not a typo. At the time the draft E&S Module 1 was published to eLibrary, the draft PAG-01 General Permit had not yet been published, which resulted in this confusion. E&S Module 1 will be used by all applicants for PAG-01 and PAG-02 coverage and individual NPDES and E&S permits.

**PAG-02 General Permit
Comment Response Document**

54. Comment: Post Construction Stormwater Control Module

FE suggests adding a check box at the beginning of the document for Site Restoration projects. It is to the benefit to applicants and reviewers to clarify that the calculations are not required for Site Restoration projects that meet the requirements of 102.8(n). **(6)**

Response: There is a check box for "The Project Qualifies as a Site Restoration Project (25 Pa. Code § 102.8(n))" in question 1 of the PCSM Plan Information section of PCSM Module 2. The PAG-02 NOI Instructions explain that completion of the Stormwater Analysis and Infiltration Information sections of PCSM Module 2 do not need to be completed when this box is checked. The word "Site" has been added to the check box description for further clarification.

55. Comment: Post Construction Stormwater Control Spreadsheet

No comments. We hope it works once released with active cell formulas. **(6)**

Response: DEP's PCSM Spreadsheet contains numerous formulas and references on hidden areas of the spreadsheet, so even if formulas were shown in areas accessible to the user, the user would not be able to understand how the calculations are carried out. The instructions to the spreadsheet explain the general calculations performed. Any user desiring additional information on the spreadsheet should feel free to contact DEP's Bureau of Clean Water at (717) 787-2137.

56. Comment: County Notification Form & Instructions

FE recommends the Dept clarify whether the provided form is required to be used or is an optional template. FE recommends that allowance be made for an agent of the applicant to sign the county notification form. **(6)**

Response: The County (3800-FM-BCW0271b) and Municipal (3800-FM-BCW0271c) Notification Forms are not optional and must be used for all PAG-02 NOI submissions. These forms serve two purposes: 1) to provide notice under Act 14 of planned land development activities requiring a DEP permit; and 2) to provide information to DEP/CCD concerning consistency with county and municipal plans and ordinances pursuant to Acts 67, 68 and 127 of 2000.

In the event that an applicant has submitted the Notification Forms to the appropriate county and municipality, but the county and/or municipality have not completed, signed and returned the Forms to the applicant within 30 days, the applicant may submit the PAG-02 NOI to DEP/CCD with the following documentation: 1) copies of the County and Municipal Notification Forms that were submitted to the county and municipality (in which the applicant's section is complete and signature provided); and 2) proof of receipt by the county and/or municipality (i.e., copies of returned registered mail receipts or other suitable documentation). DEP/CCD will consider county and municipal notification to be complete upon receipt of these items. If the county and/or municipality does complete and sign the Notification Form(s) during the review period, the applicant must submit these forms to DEP/CCD to supplement the NOI.

57. Comment: Municipal Notification Form & Instructions

FE recommends the Dept clarify whether the provided form is required to be used or is an optional template. FE recommends that allowance be made for an agent of the applicant to sign the municipal notification forms. **(6)**

Response: See response to Comment No. 56.

**PAG-02 General Permit
Comment Response Document**

58. Comment: General Question related to Individual Permit

For general information what process will the department utilize for an applicant to submit for Individual NPDES Permit for Stormwater Discharges Associated with Construction Activities? The previous PAG-02 provided the applicant the opportunity to select coverage for either Individual or General Permit. **(7)**

Response: See response to Comment No. 43.

59. Comment: E&S Module Page 2

The information requested by the department in Table 1 of the E&S Module is also available in the worksheets for each BMP. The format of Table 1 will make it very cumbersome to provide information for all instances of a proposed BMP "type". It is recommended that the DEP allows the table to be completed with references to the worksheets (i.e. "see Worksheet X").

Note also E&S Module Page 2, Table 1 (3800-PM-BCW0406a) references that it is for this is for PAG-01 and not PAG-02. Please clarify. **(7)**

Response: Table 1 in E&S Module 1 is only to be used by applicants for PAG-01 coverage. Table 1 is used in lieu of the standard worksheets from the E&S Manual for PAG-01. Applicants for PAG-02 coverage are not expected to complete Table 1 (see final PAG-02 NOI Instructions) and are required to submit all relevant and applicable standard E&S worksheets (or equivalent), as reflected on the PAG-02 NOI Checklist (3800-PM-BCW0405c). Also see response to Comment No. 53.

60. Comment: E&S Module Page 9

A proposed change requires that individuals onsite are properly trained and are aware of responsibilities under the General Permit. Does the department propose any guidance to what is considered "trained and experienced in E&S control methods?" If there are criteria or recommended criteria it would be prudent for the department to identify such criteria. **(7)**

Response: DEP's regulations require that E&S Plans must be prepared by a person trained and experienced in E&S control methods and techniques applicable to the size and scope of the project being designed (see 25 Pa. Code § 102.4(b)(3)). This requirement is not new. DEP/CCD evaluates compliance with this requirement on a case-by-case basis with each NOI that is submitted. The credentials of the plan preparer should be included as part of the E&S Plan.

61. Comment: NOI Instructions Cover Page

The title of the General Permit includes the following "...Discharges of Stormwater Associated with Small Construction Activities...", the department does not define "Small". For clarification the Department should provide applicants with a definition. **(7)**

Response: See response to Comment No. 42.

62. Comment: NOI Instructions Cover Page

The new General Permit Title no longer includes reference to Individual permits. Is it the intent of the department to issue a separate NOI for Individual Permits? **(7)**

Response: See response to Comment No. 43.

**PAG-02 General Permit
Comment Response Document**

63. Comment: NOI Instructions 4 Note 7

The proposed language states that the DEP/CCD may or may not provide notification of the agency determination, depending on resource availability. It is critical for planning purposes that the applicant be made aware of administrative completeness status. The DEP/CCD has email contact information from the application therefore notification can be made quickly to the applicant of the NOI status. **(7)**

Response: This Note has been removed from the final PAG-02 NOI Instructions. DEP will continue its efforts to consistently and efficiently implement the PAG-02 General Permit, including updating our SOPs which are publicly available on DEP's website.

64. Comment: NOI Instructions 5 Note 7 Final Bullet

For clarification to an applicant the DEP refers the permit entering an "elevated review process". Can the department expand upon what an "elevated review" is and the subsequent steps of this process? **(7)**

Response: The elevated review process is described in the "Policy for Implementing the Department of Environmental Protection (Department) Permit Review Process and Permit Decision Guarantee" (021-2100-001), available on DEP's website (visit www.dep.pa.gov, select Businesses, then Program Integration, and then Permit Decision Guarantee).

65. Comment: NOI Instructions 5 Item 3

For clarification to an applicant when the DEP refers to other permits are they specific to environmental agency permits or other permits such as PennDOT, Railroad, Turnpike, etc.? **(7)**

Response: Applicants must identify all permits that have been issued or are pending for the facility or project site by DEP or CCD or EPA within the past five years (environmental permits only).

66. Comment: NOI Instructions 13 Item 5

Item 5 states as follows; "Soils in the area of the earth disturbance, are NOT contaminated at levels exceeding residential and non-residential medium-specific concentrations (MSCs) in 25 Pa. Code Chapter 250 at residential and non-residential construction sites, respectively, unless a site-specific standard has been met or evidence is provided of naturally occurring contamination. "

This item implies that soil samples would be required to demonstrate compliance. This is not in concert with the Department's Management of Fill Policy with regards to due diligence procedure.

Is it the intention of the department that after proper due diligence of the soil determines that either previous history of contamination exists or potential for contamination exists based on prior usage, then the applicant must demonstrate that the soil is not contaminated at levels greater than the limits identified in Chapter 250 or meets proper site-specific standards or the contamination is due to naturally occurring levels?

Recommendation is to insert at beginning of the statement in item 5 on page 13 the following;

"After proper due diligence as prescribed by the Department's Management of Fill Policy soils in the area of the earth disturbance are NOT contaminated at levels exceeding residential and non-residential medium-specific concentrations (MSCs) in 25 Pa. Code Chapter 250 at residential and non-residential construction sites, respectively, unless a site-specific standard has been met or evidence is provided of naturally occurring contamination." **(7)**

**PAG-02 General Permit
Comment Response Document**

Response: See response to Comment No. 49.

67. Comment: NOI Instructions 22 E&S Plan Developer

For clarification it is suggested the Department clearly state that the preparer of the E&S Plan be a trained professional in the appropriate E&S control methods. The additional language in the instruction section on page 22 may lead the reader to interpret that the preparer must be a licensed professional. **(7)**

Response: Clarification has been added to the NOI Instructions that E&S Plan Developers do not need to be licensed professionals.

68. Comment: Permit Expiration Date

Having all the NPDES permits expire on the same date will cause undue burden on both PennDOT and the PaDEP funded review staff. This would require PennDOT to prepare dozens on NPDES renewals at one time and our funded reviewers would have to review them under our MOU timelines. PennDOT nor PaDEP have the staff or resources to accomplish this. PennDOT recommends keeping the current renewal process where the NPDES permit expires 5 years after the date of issuance thus staggering the renewal process. **(8)**

Response: See responses to Comment Nos. 3, 11, 13, 39 and 45.

69. Comment: Support Activities

PennDOT recommends including stormwater discharges from construction support activities (e.g., concrete or asphalt batch plants) be covered under the PAG-02 permit as the EPA allows under section 1.2.1C of their National Pollutant Discharge Elimination System General Permit for Discharges from Construction Activities (as modified). **(8)**

Response: The PAG-02 NOI Instructions identify stormwater discharges from construction support activities as authorized discharges. Note that discharges of wastewater may not be authorized under PAG-02.

70. Comment: NOI Instructions (3800-PM-BCW0405a Rev. 8/2019)

The instructions for Stormwater Analysis – Runoff Volume (p. 23), Peak Rate (p. 25), and Water Quality (p. 26) state that, “A Stormwater Analysis must be performed for each Discharge Point identified in the NOI.” This appears to contradict the instructions for the PCSM Spreadsheet, which states, “The spreadsheet is intended for the evaluation of volume, rate, and water quality for discharges to a single receiving water. If for example there are 3 post-construction discharge points to Mud Run and 3 post-construction discharge points to Clear Creek, two spreadsheets should be completed (one each for Mud Run and Clear Creek).” PennDOT strongly supports the instructions for the latter. Most of our projects involve multiple discharge points to the same surface water. Except for occasional cases of discharges into headwaters, multiple points of discharge into a common surface water should be analyzed cumulatively. There does not appear to be a rational scientific basis for analyzing points of discharge separately when the project drainage area to the surface water is a tiny fraction (e.g., less than 1%) of the watershed area. **(8)**

Response: PCSM Module 2 and the PAG-02 NOI Instructions have been updated to incorporate the concept that all discharge points that discharge stormwater to the same surface water may be analyzed collectively, as is done through DEP’s PCSM Spreadsheet.

**PAG-02 General Permit
Comment Response Document**

71. Comment: NOI Form

It would be helpful to develop a NOI that could be easily expandable to add multiple discharge points. This would be helpful on our projects since they are generally linear in nature and cross multiple watersheds. **(8)**

Response: If there are more discharge points than space allows in the Stormwater Discharge Information section of the NOI, the applicant may attach additional pages or may refer to a separate attachment that includes equivalent information. For example, an applicant may enter the words “see Attachment A” into this section and include an attachment that contains a larger list of discharge points and the same information as requested in the NOI.

72. Comment: E&S Module 1 (3800-PM-BCW0406a 7/2019)

- a. Item #4 – Describe the volume and rate of runoff from the project site and its upstream watershed area. Is this a qualitative or quantitative description? If quantitative, DEP should clarify the storm duration and frequency. The instructions do not help to clarify. An example would be helpful. **(8)**

Response: DEP interprets this section of E&S Module 1, which is based on 25 Pa. Code § 102.4(b)(5)(iv), to be a qualitative description of volume and rate of runoff and clarification has been added to the NOI Instructions.

- b. Item #5 – Please clarify the difference between a Roadside Ditch and a Runoff Conveyance (Channel). **(8)**

Response: A roadside ditch is generally designed for conveying flows with lower velocities than runoff conveyance channels. See DEP’s Erosion and Sediment Pollution Control Program Manual (E&S Manual) (363-2134-008) for additional differences in design.

- c. Table 1 – Recommend emphasizing that PAG-02 applicants do not fill out this table. **(8)**

Response: A note has been added to the final PAG-02 NOI Instructions that states, “Applicants for PAG-02 coverage should not complete Table 1.”

- d. Item #13, #14 – Per the DEP ESPC Program Manual, PennDOT seed mixes are acceptable and are not normally shown on the ESPC Plan because they are a standard specification in Pub. 408. Per the instructions, #13 and #14 do not have to be filled out if an E&S Standard Worksheet is used. If PennDOT uses its standard seed mixes, can we simply note as such in these items? **(8)**

Response: The requested seed mix information and other stabilization procedures should be identified on E&S Plan Drawings. The E&S Manual does refer to Publication 408 but DEP sometimes adapts PennDOT specifications in combination with other sources. To ensure there is no confusion, DEP recommends clearly identifying the specifications for the project in the E&S Plan.

- e. Item #15 – If this is described on the ESPC Plan drawings, can it be stated as such with a sheet number? **(8)**

Response: Yes, if the information requested is clearly presented on an E&S Plan Drawing, the applicant may refer to the specific drawing number.

73. Comment: PCSM Module 2 (3800-PM-BCW0406b 7/2019)

- a. A space for the Project Site Name is not provided. The instructions indicate there should be one. **(8)**

Response: Project Site Name has been added to PCSM Module 2.

**PAG-02 General Permit
Comment Response Document**

- b. Item #1 – How should multiple installations of the same BMP type be handled? The space provided seems inadequate to provide the area treated; percent imperviousness; and BMP dimensions, materials, and capacities. Also, if MRC is used, should the applicant check “Other” or do nothing because MRC is addressed on page 2? **(8)**

Response: The PCSM Plan Information section of PCSM Module 2 has been redesigned. Multiple installations of the same BMP type should be reported on different rows with unique BMP ID numbers (or otherwise presented in an attachment with equivalent information).

- c. Item #3 – Recommend adding to the NOI Instructions, “For applicants seeking PAG-02 coverage, this box should remain unchecked.” **(8)**

Response: This revision has been made.

- d. Stormwater Analysis – Runoff Volume

Item #11 – Please clarify the “% of Net Change”. Of what? What does “Vegetation used in PCSM BMP(s)” mean? **(8)**

Response: This question has been removed from the final PCSM Module 2.

- f. Infiltration Information

There is no space to enter the BMP name. Insert a space and renumber the items so that they match the numbering in the NOI Instructions.

Infiltration Elevation is missing from this section. It is included in the NOI Instructions.

Item #1 – Since a separate section must be completed for each infiltration BMP, should “BMPs” be “BMP”?

Item #3 – The word “attached” appears twice. **(8)**

Response: The Infiltration Information section has been revised to include a BMP ID number at the top of each table. BMP IDs should be provided in the PCSM Plan Information section. Other revisions have been made to correct errors as referenced by the comment.

- g. Long-Term O&M

PennDOT maintains its stormwater BMPs (or SCMs) in accordance with Publication 888 – Stormwater Control Measure Maintenance Manual. Please confirm that it is acceptable to reference Pub. 888 and state that all BMPs/SCMs shall be maintained in accordance with Pub. 888. **(8)**

Response: The requested O&M information should be completed in the module or otherwise the module may refer to clear language concerning O&M requirements on PCSM Plan Drawings.

74. Comment: PCSM Spreadsheet

Pursuant to 25 Pa Code 102.8.g.2.i and ii, except for new roadway projects, the actual existing land cover/soils characteristics are used for computing pre-construction runoff volumes. The Volume table in the PCSM Spreadsheet allows for manual input of cover types other than impervious, meadow, and forested. In the NOI, assuming that the design results in no increase in the 2-year/24-hour storm volume, should PennDOT select:

- “The design standard is based on managing the net change for storms up to and including the 2-year/24-hour storm”, or
- “An alternative design standard is being used”? **(8)**

**PAG-02 General Permit
Comment Response Document**

Response: Applicants should select or manually enter the following four pre-construction land covers: 1) Impervious, 2) Impervious as Meadow, 3) Forested (Good Condition), and 4) Pervious as Meadow. The land cover, "Pervious as Meadow" satisfies 25 Pa. Code § 102.8(g)(2)(i), and the land cover, "Impervious as Meadow" satisfies 25 Pa. Code § 102.8(g)(2)(ii). If the project will involve the repair, reconstruction, or restoration of roadways or rail lines, or construction, repair, reconstruction or restoration of utility infrastructure when the site will be returned to existing condition, the applicant can omit the "Pervious as Meadow" and "Impervious as Meadow" land covers from the pre-construction volume analysis and still select the option in the NOI that the design standard is based on managing the net change for storms up to and including the 2-year/24-hour storm for volume. If there are instances where the PCSM Plan designer desires to use, with proper justification, a different cover type that what is provide, the information will have to be entered manually into the spreadsheets.

- 75. Comment:** Permit Expiration date- Will site permit coverage automatically be extended beyond December 7, 2024 if/when the General Permit is renewed? Or will an NOI for renewal have to be submitted? If an NOI for renewal is required, how will the timing of this work? Can the NOI for renewal be submitted before the General Permit is actually renewed? And if not, will there be a time period that the site is without permit coverage? For example, a site permit issued on September 7, 2024 will expire in 3 months. What will the process be for ensuring the site remains covered by a permit? **(9)**

Response: See responses to Comment Nos. 3, 11, 13, 39, and 45.

- 76. Comment:** NOI General Information- Site Restoration- Is it appropriate to check the SITE RESTORATION box if only a portion of the project site meets the site restoration criteria? **(9)**

Response: The entire project must involve site restoration for DEP/CCD to treat it as a site restoration project. If a portion of the project will not be returned to approximate original condition, that portion will need to be addressed in full. DEP requests that applicants select the Site Restoration box only for those projects where site restoration will occur across the entire project site.

- 77. Comment:** Eligibility Information Question 6- Uses the term NET CHANGE; is this intended to mean NET INCREASE? A decrease in volume or rate would be a change. **(9)**

Response: Yes, net change in this context means an increase. Clarification has been added to the PAG-02 NOI Instructions.

- 78. Comment:** Eligibility Information Questions 10 & 11- Does this apply only to stormwater discharges DIRECT to surface waters or any discharges within the watershed of a surface waters? **(9)**

Response: The eligibility criterion related to stormwater discharges to waters impaired for siltation, suspended solids, turbidity, water/flow variability, flow modifications/alterations, or nutrients applies to direct discharges to those waters. The eligibility criterion related to stormwater discharges to waters with a TMDL for siltation, suspended solids, or nutrients applies to discharges to waters covered by the TMDL. Waters covered by TMDLs may be watershed-based, as with the Chesapeake Bay TMDL, or the TMDL may be limited to a specific surface water. Clarification has been added to the PAG-02 NOI Instructions.

- 79. Comment:** NOI- PROJECT SITE INFORMATION- Pre Construction Impervious Area- Is this the ACTUAL impervious area and not the area assuming 20% of existing impervious as meadow? Same question applies for the EARTH DISTURBANCE section. **(9)**

Response: Actual pre-construction impervious area is requested and clarification has been added to the final PAG-02 NOI Instructions.

**PAG-02 General Permit
Comment Response Document**

80. Comment: Are the terms MAPS and PLANS synonymous? **(9)**

Response: DEP has eliminated the term “maps” and replaced it with “Plan Drawings” (i.e., one of the required components of both E&S Plans and PCSM Plans), as these drawings are expected to contain topography, the project site boundary, the limit of disturbance boundary, surface waters, anticipated discharge points during and following construction, anticipated locations for E&S and PCSM BMPs, drainage patterns, and the location(s) of off-site construction support activities, if known at the time of NOI. DEP does not intend for the submission of a separate map for this purpose.

81. Comment: NOI-Existing Permits- Do NPDES permits that have been terminated need to be listed? **(9)**

Response: Yes. Clarification has been added to the PAG-02 NOI Instructions.

82. Comment: Consider revising PCSM Module 2 STORMWATER ANALYSIS section to include an area in which to indicate the discharge point number the information pertains to. **(9)**

Response: This revision has been made.

83. Comment: The instructions for the PCSM Spreadsheet state that if post development impervious cover is less than or equal to pre development impervious cover, stormwater analysis is not required. Does this include water quality analysis? **(9)**

Response: DEP has decided to revise the PCSM Spreadsheet to no longer specify that a stormwater analysis is not required if post-construction impervious area is less than or equal to pre-development impervious area, pending further review. Given the “meadow in good condition” presumption under § 102.8(g)(2)(ii) and the fact that replacing impervious surfaces that are roofs with other impervious surfaces such as parking lots will result in higher pollutant loading, DEP believes it is important for all applicants (other than those exempted by other policies or regulations) to go through the stormwater analysis process to make the demonstration that net changes in runoff volume and pollutant loads will be adequately managed. The PCSM Spreadsheet does however retain the “small site exemption” for peak runoff analysis as contained in the existing Stormwater BMP Manual.

84. Comment: PCSM Spreadsheet (Volume Worksheet)- If you have a BMP (e.g. rain garden) that is not being designed for infiltration (i.e. an impermeable liner will be installed), can you still get credit for ET? The DEP PCSM Instructions states to leave the “Inf. Rate (in/hr)” and “Inf. Area (SF)” fields blank if the BMP is not designed as an infiltration BMP; however, the ET credit is not calculated unless you have entered an infiltration area. **(9)**

Response: DEP has revised the PCSM Spreadsheet, Volume Worksheet, by updating the header from “Inf. Area” to “Infiltration / Vegetated Area.” If an applicant proposes a BMP that will not infiltrate but is vegetated, the spreadsheet will calculate an ET credit if the vegetated area is entered. Users can omit entering an infiltration rate and infiltration period and the ET credit will still be calculated.

85. Comment: PCSM Spreadsheet (Volume and Quality Worksheets)- Under “Project Site Post-Construction Conditions:” in the volume worksheet, there are five impervious area options to choose from (e.g. Impervious Areas: Paved Parking Lots, Roofs, Driveways, Etc. (Excluding ROW)). These land cover options are also used when determining the Post-Construction Pollutant Loads (without BMPs). It is our understanding that DEP considers roof areas as “clean” which generate little to no pollutant load. Why does the quality worksheet use the same calculations to determine the pollutant loads for roofs as it does for paved parking lots? **(9)**

**PAG-02 General Permit
Comment Response Document**

Response: The Event Mean Concentrations (EMCs) used by the PCSM Spreadsheet at this time for calculating pollutant loads are as follows for the five impervious area land cover options, based on the latest available research:

- Impervious Areas: Paved Parking Lots, Roofs, Driveways, etc. (excluding ROW):

- TSS – 65 mg/L;
- TP – 0.29 mg/L; and
- TN – 2.05 mg/L.

- Impervious Areas: Streets and Roads – Paved; Curbs and Storm Sewers (excluding ROW):

- TSS – 142 mg/L;
- TP – 0.32 mg/L; and
- TN – 3 mg/L.

- Impervious Areas: Streets and Roads – Paved; Open Ditches (including ROW); Impervious Areas: Streets and Roads – Gravel (including ROW); and Impervious Areas: Streets and Roads – Dirt (including ROW):

- TSS – 141 mg/L;
- TP – 0.43 mg/L; and
- TN – 2.65 mg/L.

Therefore, impervious areas that are roofs will have the lowest pollutant loads.

86. Comment: Will there be educational sessions and/or tutorials and/or example projects for the PCSM Spreadsheets? We have tried the PCSM Spreadsheets with multiple test projects with mixed results (i.e. unclear error messages, pollutant runoff levels when none were expected). **(9)**

Response: DEP will develop training for the PCSM Spreadsheet and post availability of this training to its website. Anyone with questions may call the Bureau of Clean Water at (717) 787-2137.

87. Comment: Can the Rate Spreadsheet be revised to allow a user input Tc of 5 minutes? **(9)**

Response: DEP has updated the Rate Worksheet of the PCSM Spreadsheet to allow users to select a default of 0.1 hour (6 minutes) for time of concentration, which is the minimum recognized under NRCS' TR-55 protocol.

88. Comment: We recommend several clarifications or edits to the Non-Compliance Reporting section of the permit. First, we encourage the section to be retitled to "Incident Reporting," rather than "Non-Compliance," as there may be reportable incidents which threaten to cause environmental degradation but that nonetheless do not cause a pollution event or otherwise result in the permittee being out of compliance with the permit's obligations.

Second, we encourage the Department to clarify that DEP may waive the requirement to submit a written report within five days on a case-by-case basis. This option is codified in other general permits, such as PAG-03.

Finally, we do not believe it is necessary for both the permittee and co-permittees to make separate notification when there is an incident. The permit should require notice to the Department by either party, but not require it from both. **(10)**

Response: DEP has modified the title of this section to, "Non-Compliance or Potential Pollution Reporting." DEP has included language providing for the waiver a written report by DEP or CCD. DEP has clarified that either the permittee or co-permittee(s) may provide notification to DEP or CCD or both may provide notification.

**PAG-02 General Permit
Comment Response Document**

89. Comment: A general permit must be enforceable, and a permittee must understand what is required by looking at the fact of the permit.

DEP must revise the Draft Permit to express all permit requirements in “clear, specific, and measurable” terms.

The Department must clarify insufficiently vague terms such as “minimize,” “reasonable steps,” and similar language within the Draft Permit. The Clean Water Act does not allow for “self-regulation” by NPDES permittees. Rather, the permitting authority, not the permittee, must determine which pollution reduction measures are necessary to comply with applicable technology-based and water quality-based effluent limitations¹. In 2016, the U.S. Environmental Protection Agency (EPA) explained in a rulemaking on remand of the Small Municipal Separate Storm Sewer System (MS4) General Permits regulations that MS4 general permits must establish pollution control requirements that are “clear, specific, and measurable.”² Although the rulemaking revised only the rules for Small MS4 General Permit, and does not specifically address NPDES general permits for stormwater discharges associated with construction activities (such as the Draft Permit), the same underlying principles of NPDES permitting apply to both.

In the preamble to the small MS4 rulemaking, EPA expounded at length on what it means to have “clear, specific, and measurable” permit requirements.³ EPA released with the final rule a “Compendium of Clear, Specific and Measurable Permitting Examples.”⁴ The preamble and Compendium provide examples both of what would be considered “clear, specific, and measurable,” and what would not. Provisions that fail the test include:

- Permit provisions that simply copy the language of the [MS4 permitting] regulations verbatim without providing further detail on the level of effort required or that do not include the minimum actions that must be carried out during the permit term.
- Permit requirements that include “caveat” language, such as “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary” or “as appropriate” unless defined.
- Permit provisions that preface the requirement with non-mandatory words, such as “should” or “the permittee is encouraged to...”
- Permit requirements that lack a measurable component. For instance, permit language implementing the construction minimum control measure that requires inspections “at a frequency determined by the permittee” based on several factors. This type of provision includes no minimum frequency that can be used to measure adequacy and, therefore, would not constitute a measurable requirement for the purposes of the rule.
- “Provisions that require the development of a plan...but does [sic] not include details on the minimum contents or requirements for the plan, or the required outcomes, deadlines, and corresponding milestones...”⁵

Many of the provisions in the Draft Permit suffer these defects or are otherwise so vague that they impermissibly defer to the permittee to determine what stormwater pollution control measures sufficiently meet Clean Water Act requirements. These include, for example:

- Part B.I.G. requires that “[t]he permittee and co-permittee(s) shall take all reasonable steps to prevent, minimize, or cease any discharge in violation of this permit.” However, the Draft Permit does not define “reasonable steps.” Therefore, this term impermissibly defers to the permittee/co-permittee(s) regarding the appropriate extent of stormwater pollution controls.
- Part C.XVIII.B. states that “[t]he permittee and co-permittees are responsible for ensuring that all activities on the site comply with the requirements of this permit.” As the permit is currently drafted, the permittee and co-permittees are not required to provide or document formal training for subcontractors. To bolster enforceability and improve clarity, the Department should specify exactly how the permittee and co-permittees

**PAG-02 General Permit
Comment Response Document**

are to “ensure” that personnel understand the requirements of this permit that may be affected by the work they are subcontracted to perform.

- The language in Part C.II.A that defines the requirements for Erosion and Sediment Control Plans (E&S Plans) is overly broad. This section is riddled with unmeasurable requirements such as “minimize the extent and duration of earth disturbance,” “minimize soil compaction,” and “maximize protection of existing drainage features and vegetation.” Absent clear and measurable requirements, this section leaves permittees and regulators in the dark as to what is sufficient when developing E&S Plans.
- Part C.V.A describes post construction stormwater management plans in ambiguous terms. Specifically, this section requires permittees to manage post construction stormwater in a manner that “minimizes” negative impacts, such as the increase in stormwater runoff volume, while “maximizing” other aspects, such as the protection of existing drainage features and existing vegetation. These minimum and maximum terms are undefined and unmeasurable. **(11)**

Footnotes:

- 1 Environmental Defense Center v. EPA, 344 F.3d 832 (9th Cir. 2003); Waterkeeper Alliance v. EPA, 399 F.3d 486, 498-502 (2d Cir. 2005).
- 2 81 Fed. Reg. 89320 (Dec. 9, 2016).
- 3 Id. at 89334-37.
- 4 The Compendium, which includes an introduction and three separate parts, can be found here: <https://www.epa.gov/npdms/municipal-sources-resources>. Part 1 covers the “six minimum control measures,” Part 2 covers post-construction standards, and Part 3 covers water quality-based effluent limitations. https://www.epa.gov/sites/production/files/2017-01/documents/final_compendium_intro_document_508.pdf.
- 5 81 Fed. Reg. at 89335.

Response: There were two instances in which the word, “should” was used in the draft PAG-02 General Permit. This word has been replaced with “shall.”

Although DEP disagrees that the language was vague or impermissible, Part B I.G of the draft PAG-02 General Permit has been removed from the final PAG-02 General Permit because the General Permit already establishes the permittee’s responsibility to comply.

With respect to Part C XVIII.B, please see the response to Comment No. 30. Further, DEP disagrees that the language quoted from the permit is vague or defers to the permittee as to what constitutes compliance. The quoted language reinforces the responsibility of the permittee and co-permittees to ensure that all activities on the site comply with the requirements of the General Permit. While the General Permit does not require documentation of formal training for subcontractors, the requirements of the General Permit, and therefore the responsibility of the permittee and co-permittees, are not diminished or made more vague by the inclusion of the quoted language in Part C XVIII.B of the draft PAG-02 General Permit (which is Part C XV.B of the final PAG-02 General Permit).

With respect to Part C II.A, these elements are contained within the regulatory language (see 25 Pa. Code § 102.4(b)(4)). The implementing details on what must be done by an applicant or permittee to demonstrate these elements will be achieved are prescribed by 25 Pa. Code § 102.4(b)(5), which is an important component of the NOI submission and review by DEP/CCD. Arguably the inclusion of these elements in the General Permit is not necessary, but DEP believes it is important to reiterate the larger objectives of E&S Plans.

For Part C V.A, here again, the regulatory language at 25 Pa. Code § 102.8(b) is repeated in the General Permit because DEP believes it is useful to reiterate the larger objectives of PCSM Plans. The implementing details on what must be done by an applicant or permittee to demonstrate these elements will be achieved are prescribed by 25 Pa. Code §§ 102.8(f) and (g).

**PAG-02 General Permit
Comment Response Document**

- 90. Comment:** The Draft Permit's Notice of Intent (NOI) requirements must reflect the NOI requirements set forth in the Department's regulations.

The Department requires the submission of an NOI for each issuance and reissuance of coverage under the general permits for discharges regarding POTWs, CSOs, CAFOs, MS4s, primary industrial facilities, and stormwater discharges associated with industrial activities. 25 Pa. Code § 92a.23(c). For general permits relating to all other discharges – including those associated with construction activities, the Department can either authorize the discharge without requiring an NOI for coverage under the general permit, or it can require an initial NOI for issuance of coverage but no subsequent NOI for reissuance of coverage. Id. Part B.I.A. of the Draft Permit states that “[a]ny person wishing to be covered by such a final, renewed, reissued or amended General Permit must submit a Notice of Intent for permit coverage or an affirmative acknowledgement of the new permit's terms and conditions, as applicable.”

While the Department may review the initial NOI, the Draft Permit contains no obligation for the Department to review and approve subsequent continuations of coverage. This leaves the facility-specific pollution control measures necessary to comply with future general permits without agency oversight. The failure to provide for permitting authority oversight of permittee-developed pollution control measures creates an impressible self-regulatory system. This self-regulating program leaves the Department with no mechanism or procedure to ensure that discharges of pollutants will comply with applicable effluent limitations and standards and thus violates the Clean Water Act.⁶

PennFuture acknowledges that the Department has the authority to require dischargers to submit an initial NOI. However, the Department does not have the authority to recognize a discharger's “affirmative acknowledgement” as an adequate workaround to the initial NOI. To abide by its own regulations, the Department must strike language relating to an “affirmative acknowledgement of the new terms and conditions” as an alternative to submitting an initial NOI. Alternatively, the Department could include language that makes clear that the “affirmative acknowledgement” is only applicable to renewed, reissued, or amended general permits and not to NOIs submitted in the first instance. Furthermore, the Draft Permit fails to establish requirements for what is considered an acceptable affirmative acknowledgement. Such a lackadaisical condition runs contrary to the regulatory purpose of requiring an NOI. **(11)**

Footnote:

6 Waterkeeper Alliance, Inc., 399 F.3d at 499.

Response: DEP may require the submission of an NOI following the subsequent reissuance of PAG-02 or may require an acknowledgement where the permittee must certify that they remain eligible for and will comply with the reissued PAG-02. A decision on the mechanism for renewing or acknowledging coverage will be announced in concert with the publication of the draft PAG-02 General Permit for reissuance in the *Pennsylvania Bulletin*, expected during 2024. DEP has clarified the final PAG-02 General Permit to reflect that an affirmative acknowledgement can be used only for existing discharges, not in lieu of an NOI for initial coverage. Also see response to Comment Nos. 3, 11, 13, 39, and 45.

- 91. Comment:** Inspections are important to ensure that the Draft Permit is enforceable.

Visual inspections should include a warning of the potential penalties for falsification to a Visual Site Inspection Report.

Part A.II.A of the Draft Permit requires that “visual site inspections and reports shall be completed on a form developed by DEP...” As a document that is “required to be maintained under this permit, including reports of compliance or noncompliance,” visual site inspection reports are subject to the statutory provisions cited in Part B.II.J of the Draft Permit, which identifies the possible penalties for falsification of reports.

The Department's Visual Site Inspection Report form itself, however, does not contain any warning of the potential consequences for providing false information on the form.⁷ PennFuture recommends that the Department add such a warning immediately above the line for the “Inspector's Signature.” We suggest using the

**PAG-02 General Permit
Comment Response Document**

following language, which is like that found on page 3 of the Department's "Transferee/Co-Permittee Application" form for construction stormwater NPDES permits:⁸

I certify under penalty of law that the information presented in this report is, to the best of my knowledge, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment or both for knowing violations pursuant to Section 309(c)(4) of the Clean Water Act, 33 U.S.C. § 1319(c)(4), and 18 Pa. C.S. §§ 4903-4904. **(11)**

Footnotes:

7 No. 3150-FM-BWEW0083 (2/2012)

8 No. 3150-FM-BWEW0228 (Rev. 9/2016)

Response: DEP's Visual Site Inspection Report (3800-FM-BCW0271d) already contains a certification statement above the Inspector's Signature line. Form No. 3150-FM-BWEW0083 was replaced by 3800-FM-BCW0271d in 2017.

92. Comment: The meaning of "measurable stormwater event" and how it must be calculated should be clarified.

All NPDES permits must include conditions regarding inspection and entry. 25 Pa. Code 92a.41(a)(9), 40 CFR 122.41(i). The purpose of such inspections is to ensure compliance with the permit and the Clean Water Act. The Draft Permit requires a permittee or co-permittees to conduct and document visual site inspections both weekly and within 24 hours after each "measurable stormwater event." Draft Permit Part A.II.A. However, the Draft Permit does not define what this important phrase means, leaving the permittee, regulators, and citizens in the dark. Therefore, the Draft Permit should provide additional clarity regarding what constitutes a "measurable stormwater event" as well as how a permittee is to determine such an event has occurred.

The Draft Permit does not include in its definitions the intended meaning of "measurable stormwater event" or even "stormwater event." However, the Draft Permit's section of visual inspections indicates that this term means when an event of 0.25 inches or greater occurs. The Department should define the term within the Draft Permit's definition section. The definition should include additional information to clarify the terms meaning, for example, that a stormwater event includes rain as well as the occurrence of runoff from snowmelt sufficient to cause a discharge.

Furthermore, the Draft Permit should articulate how a permittee is to determine that a "measurable stormwater event" has occurred. Is a permittee to collect and gauge rainwater onsite? PennFuture recommends the Department include the following language with the term "measurable stormwater event":

To determine if a measurable stormwater event of 0.25 inches or greater has occurred at the permitted site, permittee or co-permittees must either keep a properly maintained rain gauge at the site or obtain the storm event information from a weather station that is representative of the construction location. **(11)**

Response: Part A II.A of the final PAG-02 General Permit clarifies that a measurable stormwater event is a precipitation event of at least 0.25 inch over a 24-hour period or the occurrence of snowmelt sufficient to cause a discharge. With this clarification, DEP does not believe further definition is necessary. Part A II.A.3 of the final PAG-02 General Permit also requires the use of either an on-site rain gauge or storm event information from a weather station that is representative of the project site location. Other clarifications have been added to Part A II.A concerning the need for inspections when a deficiency in the implementation of E&S and PCSM Plans is identified.

93. Comment: The Draft Permit confusingly and impermissibly relies on terms applicable to special protection waters to circumvent general permit restrictions.

Confusingly, the Draft Permit defines and attempts to apply two terms – "Antidegradation Best Available Combination of Technologies (ABACT)" and "Nondischarge Alternative" – used in Pennsylvania's water quality

**PAG-02 General Permit
Comment Response Document**

regulations applicable to Special Protection Waters. These terms of art in Pennsylvania's antidegradation program do not seem applicable in the context of this Draft Permit because the discharges to High Quality and Exceptional Value waters are not eligible for coverage under this permit. Further confusing the issue, the Draft Permit appears to ascribe Post Construction Stormwater Management (PCSM) Plan analysis requirements that proposed activities "manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality" to both terms. See 25 Pa. Code § 102.8(g). The Draft Permit define "Antidegradation Best Available Combination of Technologies (ABACT)" and "Nondischarge Alternative" in almost identical terms as BMPs that individually or collectively eliminate the "net change in stormwater volume, rate, and quality for stormwater events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume, and quality prior to the earth disturbance activities..." See Part I. By incorporating these antidegradation terms and ascribing to them PCSM Plan meaning, the Department conflates the requirements of Chapter 102 Post Construction Stormwater Management with those of Chapter 93.4c's Implementation of Antidegradation Requirements. To avoid confusion created by the use of these antidegradation terms of art in the context of this general permit for discharges of stormwater associated with construction activities, the Department should remove these terms from the Draft Permit. **(11)**

Response: DEP disagrees that the use of the identified terms is confusing or impermissible. To the extent that this comment suggests that the draft or final PAG-02 General Permit would authorize discharges prohibited by 25 Pa. Code 92a.54(a)(8), DEP disagrees. DEP acknowledges that discharges to a surface water with a designated or existing use of High Quality Waters (HQ) or Exceptional Value Waters (EV) may not be authorized under a general permit, and DEP does not believe the draft or final PAG-02 General Permit utilizes any concepts in a manner that would authorize a discharge to such waters. Section III.B.1. of the final PAG-02 General Permit specifically states that discharges to waters with a designated or existing use of HQ or EV are ineligible for coverage under the General Permit.

DEP believes that a non-discharge alternative or ABACT BMPs are appropriate for stormwater discharges associated with construction activities to certain impaired waters. Non-discharge alternatives and ABACT BMPs eliminate and manage the net change in rate, volume, and water quality up to and including the 2-year/24-hour storm event, respectively, per 25 Pa. Code § 102.1. DEP does not find the use of these terms to be in conflict with the antidegradation requirements of 25 Pa. Code Chapters 93 or 102. DEP has modified these eligibility criteria to 1) refer to DEP's latest published Integrated Water Quality Monitoring and Assessment Report as the source in determining impairments, and 2) include additional causes of impairment that would necessitate a non-discharge alternative or ABACT BMPs (i.e., turbidity, water/flow variability, and flow modifications/alterations).

- 94. Comment:** A general permit is not eligible for discharges that individually and cumulatively have the potential to cause or contribute to a violation of an applicable water quality standard.

Putting aside the confusing use of antidegradation terminology in this context, the use of these terms (as defined in the Draft Permit's definitions section) is inappropriate. Reference to these terms is only found in two additional locations within the Draft Permit – Part III.B.13 and 14 regarding discharges to impaired waters and those that have TMDLs, respectively. But, a general permit is available for discharges that individually or cumulatively have the potential to cause or contribute to a violation of an applicable water quality standard or cause significant environmental impact.⁹ See 25 Pa. Code § 92a.54(a)(7). **(11)**

Footnote:

- 9 PennFuture acknowledges that elements of this restriction on the use of general permits are incorporated into Part III.B.3 and 8. Allowing from discharges to impaired waters only adds confusion to the permit.

Response: See response to Comment No. 93. When a non-discharge alternative or ABACT BMPs are utilized, DEP does not believe that stormwater discharges to these waters will individually or cumulatively have the potential to cause or contribute to a violation of an applicable water quality standard or cause significant environmental impact.

**PAG-02 General Permit
Comment Response Document**

95. Comment: To be eligible for a general permit, wasteload allocations must be met in TMDL waters.

Similarly, where approved TMDLs are in place, discharges from construction activity are not eligible for general permit coverage unless specific wasteload allocations are met. The Draft Permit prohibits discharges to TMDL waters “unless the E&S and PCSM Plans use nondischarge or ABACT BMPs to manage the stormwater from the project.” Draft Permit, Part III.B.14. Although it may be possible to demonstrate that wasteload allocations can be achieved through PCSM plan analysis, this analysis must be tailored to a specific site and TMDL requirements and therefore inappropriate for a general permit. The elimination of “the net change in stormwater volume, rate, and quality for stormwater events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume, and quality prior to the earth disturbance activities,” as nondischarge and ABACT are defined in the Draft Permit, will not necessarily be sufficient across all construction sites and TMDLs and therefore should not be offered as pathways to the general permits applicability in TMDL waters. **(11)**

Response: The PAG-02 NOI requires that applicants identify whether a WLA in an approved TMDL applies to proposed discharges. If so, the applicant must demonstrate how the WLA will be achieved. If an applicant cannot make this demonstration, the project is ineligible for PAG-02 coverage, regardless of whether non-discharge alternatives or ABACT BMPs will be implemented. Also, see responses to Comment Nos. 93 and 94.

96. Comment: PCSM Plans must take climate change into account.

Finally, where a PCSM Plan is developed in compliance with Chapter 102 regulations that require plans to “manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality,” the Department should account for increased frequency and intensity of storm events resulting from climate change.¹⁰ Heavy rain events in the northeastern United States – including Pennsylvania – have increased 71% since the early 1990’s.¹¹ Heavy rain fall over a short duration can present particular problems for stormwater runoff from exposed surfaces of construction sites, allowing it to collect significant sediment and other pollutants on its way to local waters. By only requiring that only the 2-year/24-hour storm to be managed, the Draft Permit provides the potential for significant impacts from stormwater runoff to go unregulated.¹²

Footnotes:

10 Pennsylvania Dep’t Env’tl. Prot., Pennsylvania Climate Action Plan 2018: Strategies and Activities to Reduce and Adapt to Climate Change (April 29, 2019), available at <http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=1454161&DocName=2018%20PA%20CLIMATE%20ACTION%20PLAN.PDF%20%20%20%3cspan%20style%3D%22color:blue%3b%22%3e%28NEW%29%3c%2Fspan%3e> (noting “[m]ore frequent extreme weather events, including large storms, periods of drought, heat waves, heavier snowfall, and an increase in overall precipitation variability” as a reason Pennsylvania needs a Climate Action Plan).

11 Lara B. Fowler et al., Flood Mitigation for Pennsylvania’s Rural Communities: Community-Scale Impact of Federal Policies (14(2018).

12 PennFuture understands that engineers generally determine the amount of rain to be managed by referring to the National Oceanic and Atmospheric Administration’s Atlas information. However, these data are retrospective, providing a standard deviation of previous 2-year/24-hour storm events, which does not account for the increased intensity of storms. Furthermore, engineers generally use the peak standard deviation number. In the absence of incorporating information regarding the likely size of future storms, in order to be more protective, the higher end of the standard deviation should be used. **(11)**

Response: The PAG-02 General Permit requires management of the net change up to and including the 2-year/24-hour storm event for volume and water quality (or use of an Act 167 Plan standard or an alternative standard that is as effective) and management of the net change for the 2-, 10-, 50-, and 100-year/24-hour storm events for rate (or use of an Act 167 Plan standard or an alternative standard that is as effective), per the requirements of 25 Pa. Code §§ 102.8(g)(2) and (3).

**PAG-02 General Permit
Comment Response Document**

The 2-year/24-hour storm event is the performance standard codified in the 2010 Chapter 102 rulemaking that permittees must meet to ensure that in-stream water quality is protected or maintained, as required by Pennsylvania's antidegradation requirements. See 40 Pa.B. 4861. DEP codified the 2-year/24-hour event standard during the 2010 Chapter 102 rulemaking based on technical input, research and peer-reviewed scientific studies, including several cited by the commenter. This storm event standard is also referenced in EPA's Construction General Permit.

DEP and its contractor are planning to update the Stormwater BMP Manual based on the latest information on regional rainfall distributions, infiltration, and evapotranspiration, and plan to remove unintended barriers for green infrastructure. DEP is planning improvements to protocols for infiltration testing and construction inspections and the promotion of treatment train approaches for protecting vegetated and infiltration surfaces. These improvements are intended to ensure that green infrastructure BMPs function throughout all storm events, providing greater volume reduction and reducing maintenance requirements. Safety factors inherent in the design of these BMPs promote climate resilience.

- 97. Comment:** The Department must clarify conflicting language regarding the definition of "earth disturbance activity" and which activities are not covered under the general permit. The first paragraph on page 3 of the Draft Permit states that "[t]his permit applies to 'earth disturbance activities'..." The following paragraph states that activities involving agricultural plowing and tilling, animal heavy use areas, timber harvesting activities, and road maintenance activities are not covered under this general permit. However, in the definition section of the permit, Section I., "earth disturbance activities" includes all of the above-mentioned activities.¹³ To avoid conflicting language, the Department should revise the second paragraph on page three to read as follows: "This permit does not apply to *earth disturbance activities involving* agricultural plowing and tilling, animal heavy use areas, timber harvesting activities, and road maintenance activities."¹⁴

Footnotes:

13 Earth Disturbance Activity – A construction or other human activity which disturbs the surface of the land, including land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock, or earth materials. Draft Permit, p. 3.

14 Added language in italics. (11)

Response: This revision has been made to the final PAG-02 General Permit.

- 98. Comment:** The Department should clarify the provisions in Part B.I.D of the Draft Permit governing changes in ownership or control of the permitted facility.

To make clear when and why a general contractor or other operator must seek to become a permittee or co-permittee, the Department should add the following sentence at the beginning of Paragraph 3 of Part B.I.D of the Draft Permit. "An Operator must become a permittee prior to conducting any earth disturbance activities at the project site."

To make clear when the permit is considered modified, the Department should add the following sentence at the beginning of Paragraph 4 of Part B.I.D. of the Draft Permit. "Upon approval of deemed approval of a Transferree/Co-permittee Application, the permit will be considered modified by DEP or the authorized conservation district." (11)

Response: DEP has revised the language in this section to address both components of this comment.

**PAG-02 General Permit
Comment Response Document**

99. Comment: Change period at the end of Part A.II.A. on page 10 to a colon. **(11)**

Response: This section has been updated such that there is no longer a need to make this correction.

100. Comment: In the first sentence of Part A.I.C on page 8 of the Draft Permit, change “the receiving water” to “all affected waters.” **(11)**

Response: This revision has been made to the final PAG-02 General Permit.

101. Comment: In the last sentence of Part C.II.B on page 14 of the Draft Permit, add the word “approved” at the beginning of the sentence and immediately before the word “revisions.” **(11)**

Response: This revision has been made to the final PAG-02 General Permit.

102. Comment: In Part C.II.E on page 14 of the Draft Permit, considering the narrow time frame, specify that the notification must include contact by telephone or electronic mail. **(11)**

Response: This revision has been made to the final PAG-02 General Permit.

103. Comment: Delete typographical error – “of s” – in Part C.XVIII.E. This sentence currently reads, “[a]ll personnel must have access at all times during earth disturbance activities to an electronic or paper copy of s of this permit...” The sentence should be rewritten to read, “[a]ll personnel must have access at all times during earth disturbance activities to an electronic or paper copy of this permit...” **(11)**

Response: This revision has been made to the final PAG-02 General Permit.

104. Comment: Commendable features of the draft PAG-02.

We want to commend the Department on revisions that improve the draft PAG-02. For example,

- The requirement for onsite personnel to be properly trained and aware of the responsibilities under the PAG-02 should enhance the appreciation, understanding, implementation and maintenance of best management practices (BMPs) throughout the construction phase(s) of the project. We highly encourage the Department to partner with entities such as the International Association of Erosion Control in creating and delivering education to planners, engineers, contractors, Department and County Conservation District (CCD) staff, and others.
- The alignment of non-compliance reporting with the reporting requirements within regulations and the use of templates for consistency and clarity. However, it should be noted that the use of templates should not replace or circumvent the necessary and important review of the narrative components of the Erosion and Sediment (E&S) and Post-Construction Stormwater Management Plans (PCSM) by Department or CCD staff. Further, applicants should be able to deviate from the templates, with Department/CCD input and guidance, if necessary, to allow for more thorough plans.
- Requirements for activities discharging to siltation, suspended solid, or nutrient impaired waterbodies, with or without an approved Total Maximum Daily Load (TMDL) that can potentially reduce the impacts of land development activities on local and regional water quality. **(12)**

Response: Thank you for the comments. The E&S and PCSM modules are intended to streamline the development of applications/NOIs and reviews of those applications/NOIs. For small, less complicated projects, DEP anticipates that the modules themselves (along with required attachments) can serve as the narrative

**PAG-02 General Permit
Comment Response Document**

component of E&S and PCSM Plans to satisfy regulatory requirements. However, the more complicated the project, the more likely DEP/CCD will expect additional narrative explanations for the analyses undertaken.

105. Comment: Recommended enhancements to the draft PAG-02.

Although construction-related activities are of limited temporal scope, depending on the site and watershed conditions, the impacts of the construction and post-construction condition could have profound and permanent impacts on local and regional water quality.

According to the Department's draft 2018 Integrated Water Quality Report, construction stormwater runoff is cited as the source of impairment for 161 miles of streams and over 3,300 miles of streams are impaired from development sites in the Commonwealth.¹

In 2012, the USEPA released a report on Pennsylvania's stormwater program.² As part of that assessment, the agency determined that at the time of the analysis over 50 percent of the 2,871 construction general permits fall within Department regional offices that wholly or partially drain to the Chesapeake Bay. Assuming a similar number and proportional distribution exists today, the potential impacts of PAG-02 to achieving and maintaining Pennsylvania's obligations under the Chesapeake Bay Total Maximum Daily Load, is an important consideration.

Given the above, CBF does not believe the current draft PAG-02 is sufficient to address pollution from stormwater discharged from construction activities as required under state and federal law. The major shortcomings of the permit include:

A. Establish narrative discharge standards for all permitted sites.

The Department's current Erosion and Sediment Pollution Control Manual (No. 363-2134-008), herein referred to as ESPCM, is not designed to meet quantitative discharge standards or requirements; it can be more appropriately described as a lengthy list of possible BMPs, together with detailed specifications and application methodologies. No performance standards or objectives are prescribed. No explicit preferences or requirements or even evaluative, step-wise processes for choosing among BMPs are set. The manual is merely a laundry list of BMPs that the Commonwealth recognizes as potentially useful in a variety of settings.

For within the Pennsylvania's Chesapeake Bay Watershed (PA CBW), the permit should establish, at a minimum, a "no visible off-site discharge" baseline standard for all construction sites requiring an NDPES permit. This type of visual assessment would serve as an informal functional equivalent of assessing turbidity and is easy to use by citizens, inspectors, and contractors. It would also encourage application of passive flocculant dosing systems which can greatly reduce the turbidity of water discharged from construction sites. These types of approaches have been shown to greatly reduce suspended sediment and turbidity in construction site discharges.

Footnotes:

1 Draft Pennsylvania's Integrated Water Quality Monitoring and Assessment Report—2018. PADEP. <https://www.dep.pa.gov/Business/Water/CleanWater/WaterQuality/IntegratedWatersReport/Pages/2018-Integrated-Water-Quality-Report.aspx>.

2 Summary Final Report Pennsylvania Stormwater Program Review. USEPA. May 25, 2012. https://www.epa.gov/sites/production/files/2015-07/documents/pa_sw_final_report_doc.pdf. (12)

Response: The Erosion and Sediment Pollution Control Program Manual is a guidance document provided by DEP as a resource for the development of acceptable Erosion and Sediment Control Plans. The BMPs identified in the manual are expected to achieve regulatory requirements when properly designed, implemented, and maintained.

The inclusion of a performance standard of "no visible off-site discharge" would be challenging to impose because it would rely upon the perceived presence of color by the observer, which would vary among

**PAG-02 General Permit
Comment Response Document**

observers. Additionally, different soil types may produce different variations of color when suspended in water, such that the concentration of certain types of soil particles may be higher at one site compared to another, but the color of discharges with higher concentrations of certain particles may be less perceptible. DEP's experience is that many contractors propose the use of "floc logs" or other flocculants at construction sites in special protection watersheds or otherwise when concern has been expressed by the public or by DEP/CCD. However, special care must be used with flocculants to ensure there is no release of carcinogenic substances to the environment.

DEP has revised the final PAG-02 General Permit to include narrative standards contained in 25 Pa. Code §§ 92a.41(c) and 93.6(a) as effluent limitations.

B. Update manuals in concert with the draft PAG-02.

As with most things, science and technology advance and evolve over time and accordingly these manuals need to keep pace and be updated to ensure the practices are, in fact, the best management practices available at this time. Manuals, such as the ESPCM (363-2134-008) and PA Stormwater BMP Manual (363-0300-002) have not been updated in quite some time. ESPCM was last updated in 2012 with some modifications/corrections in 2015. The PA Stormwater BMP Manual has not been formally updated since its release in 2006.

CBF recognizes that the Stormwater BMP Manual is in the process of being updated, but in order to ensure a complete and up-to-date system of construction and post-construction stormwater planning, design, implementation, and permitting, the Department should adopt the practice of formally synchronizing the manuals and permit programs simultaneously.

Such an approach would ensure Pennsylvania's programs and standards incorporate prevailing engineering and scientific information while reducing potential inconsistencies and maximizing water quality benefits. **(12)**

Response: DEP agrees that guidance documents such as the manuals identified in the comment are most effective when updated to reflect the understanding and expectations of DEP. DEP will attempt to revise technical guidance documents more frequently and in concert with changes to permitting processes in the future as deemed appropriate.

C. Meaningful requirements are necessary to ensure that discharges do not individually or cumulatively have the potential to cause significant adverse environmental impacts.

Chapter 92a. section 54(a)(7) states that the Department may issue a general permit if the point sources, among other things, individually and cumulatively do not have the potential to cause significant adverse environmental impact. 25 Pa. Code §92a.54(a)(7). This condition of issuing a general permit under the regulations is not limited to just adverse impacts to surface water but is meant to include other environmental impacts as well. The draft PAG-02 does little to ensure that this condition is met by the applicant prior to review and issuance of the general permit.

Some factors to consider when satisfying this legal obligation include, but are not limited to qualitatively and quantitatively considering: the status of receiving waterbodies (e.g., physical, chemical, and biological conditions of impaired and nonimpaired streams), impacts to achieving/maintaining the load and wasteload allocations (WLAs) of an approved TMDL; indirect hydrologic connectivity from off-site discharges to waters of the Commonwealth (e.g., site discharges that flow to a waterbody via roadway swales); groundwater connectivity and quality; proximity and impact to source water and wellhead protection areas, other existing and proposed NPDES discharges or water withdrawers in the area (e.g., Hydrologic Unit Code 12) of the applicant. Further, when addressing "sensitive features" such as Karst topography, the applicant should be required to investigate these features more thoroughly and present within the NOI how it will mitigate any potential individual or cumulative significant adverse impacts that may occur from the proposed construction activity.

It is recommended that the draft PAG-02 be revised to require more narrative and numerical analysis and information from the applicant in the NOI to show that the proposed activity will not cause or contribute to

**PAG-02 General Permit
Comment Response Document**

significant adverse environmental impacts, not just surface water impacts. Further, the Department should improve its review and approval process for this requirement so as to not violate the regulation as well as its duty under the Pennsylvania Constitution.³

Footnote:

- 3 “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” Article I, section 27 of the Pennsylvania Constitution, see also, *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Pennsylvania Environmental Defense Foundation v Commonwealth*, 161 A.3d 911 (Pa. 2017); *Center for Coalfield Justice v. DEP & Consol*, EHB No. 2014-072-B (August 15, 2017). **(12)**

Response:

DEP has considered the potential for projects authorized under the PAG-02 General Permit to individually and cumulatively cause significant adverse environmental impact, and DEP believes that the Chapter 102 regulatory requirements and the eligibility requirements for the PAG-02 General Permit mitigate the potential for such impact and satisfy DEP’s standard under 25 Pa. Code § 92a.54(a)(7). Pennsylvania’s Chapter 102 standards include numerous conservative measures that result in greater environmental protections than provided by federal standards, e.g., PCSM requirements for projects disturbing as little as one acre and the requirements at 25 Pa. Code §§ 102.8(g)(2)(i) and (ii) requiring a presumption of “meadow in good condition” for all pre-development non-forested pervious areas and 20% of existing impervious areas.

In addition, DEP believes that, in practice, the process established for review of PAG-02 NOIs considers the elements described in the comment, as follows:

- DEP/CCD considers the status of receiving waterbodies in terms of designated and existing use classifications and whether the waters are or are not attaining their designated uses when reviewing PAG-02 NOIs as part of an eligibility determination.
- DEP/CCD considers approved TMDLs and evaluates whether WLAs apply to a stormwater discharge associated with construction activities, and where applicable, evaluates the applicant’s demonstration that a proposed discharge will achieve those WLAs.
- DEP/CCD ensures that off-site discharge analyses are completed that demonstrate there will be no accelerated erosion from stormwater discharges associated with construction activities.
- DEP/CCD considers groundwater and drinking water sources when PCSM BMPs are proposed that may affect those sources (e.g., injection wells).
- DEP/CCD requires a pre-development site characterization and assessment of soil and geology under 25 Pa. Code § 102.8(g)(1) as part of the PCSM Plan. Karst topography is a consideration that should be addressed by applicants to satisfy this regulatory requirement.

- D. Require landowner approval prior to the construction activity and documentation within the NOI for off-site discharges of stormwater to non-surface waters.

The Department has a duty to ensure that the applicant has obtained all necessary approvals as well as not permit an activity to occur under the general permit that may cause significant adverse environmental impacts. This duty is required under the draft PAG-02 language, regulations, Storm Water Management Act as well as common law.

The draft PAG-02 should be revised to require actual proof to be included in the NOI, prior to permit issuance and construction, that an express easement is provided by the landowner(s) in which an off-site discharge is proposed to occur. In the circumstances in which a common law easement exists, the draft PAG-02 should be revised to require proof within the NOI that such an easement exists, and that the applicant is not in violation of the common law easement, as further discussed below.

**PAG-02 General Permit
Comment Response Document**

Currently, the draft PAG-02 only requires a box to be checked on the NOI stating that an easement has been obtained (express or common law), but without proof of such occurrence. In the draft PAG-02 Instructions it states that “submission of an easement for off-site discharges **is not required as part of the NOI package** but is required by the PAG-02 General Permit and must be provided to DEP/CCD upon request **following coverage under the General Permit.**”⁴ [emphasis added]. By requiring this information after-the-fact does nothing to protect landowners from potential injury to health, safety or their property or the environment from significant adverse impacts. **(12)**

Footnote:

- 4 “NOI – Stormwater Discharge Information,” paragraph 5, Note 27, page 19.

Response: As stated in Part B.II.E, the PAG-02 General Permit does not convey property rights or authorize any injury to private property or invasion of personal rights. It is the duty of applicants to secure, through appropriate legal means, the right to discharge onto adjacent properties where necessary, and to ensure compliance with other federal, state, and local laws. Various types of easements and other property rights concepts may allow for such discharges, and DEP is not the appropriate authority to adjudicate any potential dispute over such rights, which would require determinations of both fact and law. It is noted that even a purported express easement could be subject to legal dispute.

Regardless of the means by which an applicant obtains the right to discharge onto adjacent properties, the applicant must demonstrate that construction and post-construction stormwater discharges to areas other than surface waters will not cause accelerated erosion on other properties.

106. Comment: Draft PAG-02 Language.

Throughout the draft PAG-02 package it states numerous times that construction resulting in stormwater discharges from earth disturbances may commence when “all other permits **and approvals** relating to the earth disturbance activities reported in the NOI . . . have been obtained.”⁵ [emphasis added] These approvals may be in the form of an express written landowner easement to allow for an off-site discharge or an express written waiver of such. Regardless of the type of approval, it is clearly and expressly required prior to construction resulting in stormwater discharges granted by the general permit. **(12)**

Footnote:

- 5 See, draft PAG-02 NOI Instructions, General Instructions, Administrative Process, Page 5.

Response: DEP acknowledges the comment. The language in the PAG-02 NOI Instructions is intended to cover a variety of potential approvals, including various municipal approvals, where applicable. DEP disagrees with the comment to the extent that it implies that an express easement or express written waiver from a landowner is required. Also, see response to Comment No. 105.D.

107. Comment: Section 54(a)(7) of Chapter 92a.

Further, Section 54(a)(7) of Chapter 92a., as further described above, also explicitly prohibits the granting of a general permit if individually or cumulatively there is the potential to cause significant adverse environmental impacts. For this section environmental impacts do not need to come in just the form of surface water (quality or quantity) impacts. Activities where there is the potential for adverse impacts to land surrounding the permitted activity should not be issued the general permit.

Allowing for off-site discharges that impact another landowner’s property may certainly have adverse environmental effects in the form of flooding, scouring, contamination of private drinking water and/or an exacerbation of nonpoint source pollution. This may cause a decrease of value in that landowner’s property as well as economic impacts such as loss of valuable soil and/or crops. The impacts can and should be mitigated at

**PAG-02 General Permit
Comment Response Document**

the beginning of the NOI process and not later after damage may already be done. By not requiring more express proof of an easement or evidence to indicate a lack of impact to the off-site landowner is in violation of Section 54(a)(7) of the regulations. **(12)**

Response: See response to Comment No. 105.D.

108. Comment: Storm Water Management Act.

Under the Storm Water Management Act, there is a duty by the applicant to implement measures that are “reasonably necessary to prevent injury to health, safety **or other property.**” 32 P.S. § 680.13 [emphasis added].⁶ These measures are to be consistent with the applicable watershed storm water plan. However, if a person engaged in the alteration or development of land which affects storm water runoff is not required to show that actions, such as an express easement was provided by the impacted landowner of off-site discharges, how can the Department or County ensure that reasonable measures are being taken to prevent injury to other property? This lack of proof can potentially contradict the watershed storm water plan and ultimately cause a violation of the Storm Water Management Act.

Footnote:

- 6 Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:
- (1)** to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
 - (2)** to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury. 32 P.S. § 680.13

The draft PAG-02 covers the measures that are outlined in 32 P.S. § 680.13 (1) and (2) above. However, these are not the exclusive list of measures that can be taken. The statute simply outlines actions that must be taken. Accordingly, more actions may be taken than those listed above to further prevent injury to health, safety or other property. **(12)**

Response: The means by which an applicant secures legal rights to discharge onto off-site properties is not dispositive as to regulatory compliance. Regardless of the legal concept by which an applicant secures rights to discharge onto off-site properties, DEP requires E&S and PCSM plans to include information relative to such off-site discharges. The plans must show the flow path from the project site to the receiving water, as well as information pertaining to that flow path, including property lines, contours, soils, and other information. DEP does not believe that an express easement would, necessarily, provide the type of information the comment suggests would be helpful in determining compliance with any regulatory requirement. Also see response to Comment No. 105.D.

109. Comment: Common Law Easements.

Additionally, for applicants that claim to have a “common law easement” for off-site discharges, the draft PAG-02 should be revised to require actual evidence that (1) a common law easement does, in fact, exist and (2) that it will not be violated under the common enemy rule exceptions. Generally, by way of a series of cases, under the common enemy rule, an upland landowner has the right to have surface water flowing on or over its land discharged through a natural water course onto the land of another, but cannot (or otherwise will be held liable) if the (1) landowner has diverted the water from its natural channel by artificial means; or (2) where the landowner has unreasonably or unnecessarily increased the quantity or change the quality of water discharged upon its neighbor.⁷ In order to establish this liability, an impacted landowner only needs to show that the applicant collected and/or concentrated surface water from its natural channel through an artificial medium and that the water was discharged onto the impacted landowner’s property in an increased volume or force, however, slight.⁸

**PAG-02 General Permit
Comment Response Document**

Landowners are at a huge disadvantage if they must confront large development companies or industry after damage is already done to their land by construction activities in which the permittee did not secure the appropriate easements or put in place measures to mitigate the off-site discharge and violated the common law easement. By requiring all the requisite proof of easements and/or additional information from the application at the time of the NOI will easily help protect landowners, property and the environment from negative impacts from off-site discharges and to ensure that a common law easement does not violate the common enemy rule. This is also beneficial to the applicant as it can prevent potential claims of trespass, negligence and harm by landowners impacted by an off-site discharge.

Footnotes:

- 7 See, *Strauss v. Allentown*, 215 Pa. 96, 63 A. 1073 (1906); *Leiper v. Heywood-Hall Construction Co.*, 381 Pa. 317, 113 A.2d 148 (1955); *LaForm v. Bethlehem Twp.*, 346 Pa. Super. 512, 499 A.2d 1373 (Pa. Super. 1985); *Fazio v. Fegley Oil Co.*, 714 A.2d 510 (Pa. Cmwlth. 1998); *Bretz v. Cent. Bucks Sch. Dist.*, 86 A. 3d 306 (2014).
- 8 *Id*; see also, *Marlowe v. Lehigh Twp*, 64 Pa. Commw. 587, 441 A.2d 497 (Pa. Cmwlth. 1982); *Rau v. Wilden Acres, Inc.* 376 Pa. 493, 103 A.2d 422 (1954). **(12)**

Response: See response to Comment 105.D.

110. Comment: Requirements proposed in Part C.VII. Phased Projects should include additional requirements.

Site staging or phasing is generally described and required (e.g. Part C.II.D. of the permit states that the staging set out in approved plans must be followed), but no standards are provided. For example, staging standards often state that construction sites of 5 acres or larger, no more than 10 acres or 25 percent of a site, whichever is greater, may be mass graded or cleared at any given time.

Related to the concern of not specifying site staging or phasing requirements, is the matter of an upper limitation for the size of construction sites which may be covered by this general permit. It is our opinion that sites larger than 25 acres, regardless of receiving waterbody status (e.g. impaired or HQ/EV) should be required to obtain an individual NPDES stormwater discharge permit in order to assure the adequate protection of waters of the Commonwealth.

And, although the draft PAG-02 references requirements in 25 Pa. Code § 102.4(b) for spoil and borrow areas, the draft permit does not set forth stabilization requirements, such as covering, covering within a given time frame (e.g. 4 days) and there is no expressed required protection of existing storm drains in the draft permit. These kinds of standards would provide the certainty currently lacking in the permit and necessary for its next generation expression – but none are present. **(12)**

Response: Applicants for PAG-02 coverage must comply with 25 Pa. Code § 102.4(b) concerning the implementation of E&S BMPs. When these BMPs are properly designed, implemented, and maintained, the requirements of Chapter 102 will be met regardless of the area or percent of a project site that may be mass graded or cleared at any given time, or the overall earth disturbance area.

The PAG-02 General Permit (both draft and final) does include requirements for stabilization, including immediate stabilization where the cessation of earth disturbance will exceed four days. The requirements for stabilization set forth in the PAG-02 are consistent with the regulatory requirements in 25 Pa. Code § 102.22.

With respect to protecting existing storm drains, DEP's E&S Manual requires inlet protection for storm drains unless such drains lead to a sediment basin or trap.

111. Comment: The draft PAG-02 should cite or encourage LID/ESD site planning techniques.

The proposed PAG-02 is incomplete with respect to the extent to which it describes, proposes, or encourages the use of low impact development (LID) or environmental site design (ESD) such as are preferred in the

**PAG-02 General Permit
Comment Response Document**

Commonwealth's Stormwater BMP Manual, nor does it provide an analytical method or process for determining which BMP may be more or most appropriate.

Technical literature and case studies clearly demonstrate that physical erosion prevention methods via application of LID/ESD can help achieve low turbidity levels in discharges of stormwater from construction sites. When combined with the use of traditional erosion and sedimentation controls, LID/ESD can reduce the number and/or size of sediment traps and basins needed to control construction site stormwater.⁹ However, the Department's currently proposed permit largely fails to recognize and encourage the use of site planning techniques. This is counter to the National Research Council committee recommendations which stressed LID/ESD as the preferred approach.¹⁰

A more comprehensive approach than standard LID/ESD is the Sustainable Sites Initiative (SITES).¹¹ The underlying principles of SITES is that ecosystem services such as flood protection provided by trees and wetlands; pollination by insects, bats, and birds; and the infiltration of pollutants from the air and water by healthy vegetation and soil, should be considered as a interlinked, holistic system on each site. Efforts to preserve and enhance such ecosystem services are integrated into the design planning, construction, or redevelopment of a site.

Footnotes:

9 USEPA, Reducing Stormwater Costs Through LID Strategies and Practices. EPA 841-F-07-006 (December 2007). <http://www.epa.gov/nps.lid>.

10 National Research Council. 2008. Committee on Reduction Stormwater Discharge Contributions to Water Pollution, Urban Stormwater Management in the United States.

11 Sustainable Sites Initiative. <http://www.sustainablesites.org/>. **(12)**

Response: DEP recognizes that LID is consistent with the objectives of PCSM planning and design under 25 Pa. Code § 102.8(b), and as such, the PAG-02 General Permit is supportive of and compatible with LID. In addition, LID is a non-discharge alternative as recognized in DEP's E&S Manual and Stormwater BMP Manual and therefore it may be considered and utilized by PAG-02 applicants for discharges to impaired waters.

112. Comment: PAG-02 should prohibit the use of a general permit for construction sites which propose earth disturbance within 100 feet of waters of the Commonwealth. In such instances, an individual permit should be required.

Research clearly documents that the land immediately adjacent to waterbodies has a profound impact on the physical, chemical, and biological integrity through direct interaction with soils, hydrology, and biotic communities.

To that end, we believe that for projects which propose earth disturbances that require an NDPES permit that are within 100 feet of waters of the Commonwealth, the use of a general permit should be prohibited. Permit applications which propose such earth disturbance should be required to obtain an individual permit, particularly within PA's CBW.

Requiring applicants to obtain an individual permit under these conditions offers greater assurance that the impact of earth disturbance during construction can be substantially limited in terms of sediment and nutrient impacts to Pennsylvania waters. **(12)**

Response: Applicants for PAG-02 coverage must comply with 25 Pa. Code §§ 102.4(b) and 102.8 concerning the implementation of E&S and PCSM BMPs. When these BMPs are properly designed, implemented and maintained, the requirements of Chapter 102 will be met regardless of proximity to surface waters..

**PAG-02 General Permit
Comment Response Document**

113. Comment: The effluent limitations established in Part A.I.A. are insufficient.

This section suffers from the same shortfalls as those above, referencing how the permit establishes “narrative performance-based effluent limitations in the form of BMPs identified in E&S Plans...,” but setting up the tautology that, if a BMP is merely in an accepted plan, it automatically is deemed an acceptable, performance-based effluent limit. Standard BMPs fail routinely for a variety of reasons. Regardless of specifications, they can be installed improperly, improperly maintained by the permit holder, or infrequently inspected by state or local agencies. The expression of specific, objective standards that must be included for the total uncertainty it presents for the future of waters of the Commonwealth. (12)

Response: DEP expects that the BMPs identified in the NOI and in E&S and PCSM Plans will be installed correctly and properly maintained. The permittee is obligated to complete visual site inspections at least weekly and identify corrective actions that must occur when BMPs fail. When DEP/CCD conducts inspections it verifies the proper installation of BMPs. The permittee, or other responsible party, is obligated to conduct long-term inspections of the PCSM BMPs. When such BMPs in approved plans are not installed correctly or are not properly maintained, appropriate enforcement may be pursued by DEP/CCD.

114. Comment: The draft PAG-02 changes regarding exceptions to discharges to impaired waters with and without TMDLs need to be bolstered to allow for improvements to water quality.

The draft PAG-02 made a substantive change in that the prohibitions concerning discharge to impaired waters, with and without a TMDL, now have exceptions. First, discharges to surface waters identified as impaired with a cause of siltation, suspended solids or nutrients may be authorized if the net change in stormwater volume, peak rate and water quality will be managed by non-discharge alternatives or ABACT BMPs. Similarly, the draft PAG-02 allows an exception for waters impaired for sediment or nutrients and under an EPA-approved TMDL to also demonstrate non-discharge or use of ABACT BMPs.

Although it is appreciated that that these are the standards similarly required for special protection waters, discharges to special protection waters are not permitted through a general permit and are required to apply for and be issued an individual permit. Similarly, waters that are impaired, with or without an approved TMDL should require an individual permit in order to ensure that the discharge will not cause or contribute to the impairment and so that there will not be cumulative or individual significant adverse environmental impacts caused by the discharge. Through the process of applying for and reviewing individual permit applications it allows for a more thorough and site-specific analysis of the receiving waters and discharge to then allow for specific conditions with the goal to not just retain the status quo of impairment, but to ultimately improve the water quality.

By simply requiring nondischarge the impaired receiving waters are left at status quo. Further ABACT BMPs, with outdated manuals in place, are not a guarantee that the discharge will minimize or mitigate the impairment. Given the Department's duty, under the state constitution to ensure that the people of the Commonwealth have the right to pure water and to conserve and maintain them for the benefit of all people¹² appropriate and more thorough actions and requirements should be taken to not just keep the impaired waters at that level, but to improve the water quality. Requiring individual permits for such a discharge would provide that opportunity to find thoughtful, meaningful and efficient practices to improve impaired waters or deny permits to certain construction activities if it may cause or contribute to an impairment.

Further, language in Part C.II.F. and V.F of the draft PAG-02 is ambiguous and confusing. The Department should simply state that activities authorized under this permit must meet and not exceed WLAs set forth in any applicable TMDL.

The State of Minnesota's¹³ language and interpretation of case law is consistent with the CWA and case law¹⁴ which states that an NPDES permit cannot be issued if there is a TMDL WLA for a particular pollutant, and that pollutant will be added as a result of the permitted activity, unless it is demonstrated that there is pollutant allocation still available in that waterbody. Specifically:

“No permit may 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,” unless the applicant can

**PAG-02 General Permit
Comment Response Document**

demonstrate that there is sufficient pollution allocation available to accommodate its new discharges, and that existing dischargers to that water-body are subject to compliance schedules designed to bring the water-body into compliance with water quality standards. 40 C.F.R. §122.4(j)

In other words, any proposed activity which will discharge pollutants identified in a WLA for a TMDL, such as sediment, phosphorus, and nitrogen cannot be issued without demonstration of a no-net increase requirement.

It could be argued that even with ABACT BMPs, permits essentially minimize the increase in loads from land conversion activities. For example, consider a new residential development in a green field setting that must acquire a permit. In this case, the reduction in pollutant loads via the new erosion and sedimentation control standards represent a decrease in the net increase in load during construction. As a result, no progress towards meeting local or Bay TMDL WLAs has been made during the period of construction but simply a reduction in the rate in which loads have increased, albeit temporarily in this case.

A similar argument can be made for the post-construction scenario. The Department has implied that a no net increase in pollutant loads is achieved by managing for the 2-year 24 hour storm event. Under this option, it was conventional thinking that if flows were held below the two-year level that erosion would be minimized. However, research has indicated that this criterion frequently does not protect channels from downstream erosion and may actually exacerbate erosion since banks are exposed to a longer duration of erosive bankfull and sub-bankfull events.^{15,16,17,18} And, as development continues within a watershed that is managed under 2-year 24 hour storm event criteria, the bankfull event that causes streambed and bank erosion actually can decrease below the 2-year threshold.¹⁹ If such is the case, then a no net increase is not achieved due to erosive flows causing increased sediment and phosphorus loads downstream.

As a result of this deficiency, we believe the TMDL provisions presented in the draft PAG-02 may not be sufficient to satisfy the requirements of the Chesapeake Bay TMDL offsetting of new or increased loads within the watershed.¹⁹ To that end, it is proposed that all projects proposed within the PA CBW require nondischarge alternatives in order to obtain a permit.

Footnotes:

- 12 Article I, section 27 of the Pennsylvania Constitution, see also, *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Pennsylvania Environmental Defense Foundation v Commonwealth*, 161 A.3d 911 (Pa. 2017); *Center for Coalfield Justice v. DEP & Consol*, EHB No. 2014-072-B (August 15, 2017).
- 13 Trojan, Michael & Plevan, Andrea. 2009. Linking TMDLs and NPDES-Permitted Stormwater: Minnesota's Experience. Proceedings of the Water Environment Federation. 2009. 480-498. 10.2175/193864709793958660.
- 14 e.g., *Friends of Pinto Creek v. United States Environmental Protection Agency*. 504 F.3d 1007 (9th Cir. 2007)
- 15 MacRae, C. 1993. An alternate design approach for the control of instream erosion potential in urbanizing watersheds. pp. 1086-1091. In proceedings of the Sixth International Conference on Urban Storm Drainage. Niagra Falls, Ontario. Marsalek and Torno (eds.)
- 16 MacRae, C. 1996. Experience from morphological research on Canadian streams: is control of the two-year frequency runoff event the best basis for stream channel protection? In *Effects of Watershed development and Management on Aquatic Systems*. L. Roesner (ed.) Engineering Foundation Conference. Proceedings. Snowbird, UT. August 4-9, 1996. pp. 144-160.
- 17 McCuen R. and G. Moglen. 1988. Multicriterion stormwater management methods. *Journal of Water Resources Planning and Management*. (114) 4.
- 18 Brown, T and D. Caraco. 2001. Channel Protection. *Water Resources IMPACT*. American Water Resources Association, Volume 3, Number 6, pp 16-19.

**PAG-02 General Permit
Comment Response Document**

- 19 USEPA. Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment: Appendix S. Offsetting New or Increased Loadings of Nitrogen, Phosphorus, and Sediment to the Chesapeake Bay Watershed. December 29, 2010. **(12)**

Response:

The requirements set forth in Section III.B.13 and 14 are not “exceptions to discharges” as stated in the comment, but rather are eligibility criteria for authorization under the General Permit, and are in fact additional limitations on the use of the General Permit. Contrary to the comment, these eligibility criteria are not new – the prior PAG-02 General Permit also contained eligibility criteria for discharges to impaired waters, with and without a TMDL. DEP is, with the final, reissued PAG-02 General Permit, providing clarification that these requirements can be met by implementing a non-discharge alternative or ABACT BMPs.

The 2-year/24-hour storm event is the performance standard codified in the 2010 Chapter 102 rulemaking that permittees must meet to ensure that in-stream water quality is protected or maintained, as required by Pennsylvania’s antidegradation requirements. See 40 Pa.B. 4861. DEP codified the 2-year/24-hour event standard during the 2010 Chapter 102 rulemaking based on technical input, research and peer-reviewed scientific studies, including several cited by the commenter. This storm event standard is also referenced in EPA’s Construction General Permit.

The requirements of 25 Pa. Code §§ 102.8(g)(2)(i) and (ii) are designed to require reductions by treating pre-development non-forested pervious areas and 20% of existing impervious surfaces as “meadow in good condition.” The General Permit requires the use of site-specific characterization and stormwater management plans using BMPs consistent with the codified, conservative standards set forth in Chapter 102, so that stormwater runoff rate, volume and quality that occurs during and after construction mimics or improves upon pre-existing stormwater runoff. DEP/CCD reviews NOIs submitted for authorization under the PAG-02 General Permit to ensure that the proposed BMPs have been designed in accordance with Chapter 102, the terms of the general permit, and as recommended in DEP guidance.

As a practical matter, it is DEP’s experience that sites where pre-development stormwater runoff conditions are as good or better than the “meadow in good condition” assumption are typically found in special protection watersheds, where use of a general permit is inapplicable.

Further, the language referenced in Part C II.F and Part C V.F of the draft PAG-02 General Permit has been removed from the final PAG-02 General Permit and has been replaced by language in Part A I.B (Water Quality-Based Effluent Limitations) as follows: “Earth disturbance activities authorized under this General Permit shall achieve WLAs established in any applicable TMDL.” Any applicant who cannot demonstrate compliance with this requirement will not be eligible for coverage under the General Permit.

DEP does not agree that individual permits are necessary for projects that discharge to impaired waters or waters with a TMDL, but otherwise qualify for use of the General Permit. DEP views the additional eligibility requirement specifying the use of the more stringent non-discharge alternative or ABACT BMPs for such projects to be protective, as well as consistent with the federal Clean Water Act, as well as the Pennsylvania Clean Streams Law, regulations, Constitution and case law.