

**Permit Guidelines for Phased NPDES Stormwater Discharges Associated With
Construction Activity Permits, Chapter 102 Erosion and Sediment Control
Permits, and Chapter 105 Waterway Restoration Project Permits**

COMMENT/RESPONSE DOCUMENT

March 14, 2003

Document ID# 363-2134-013

COMMENTATOR LIST

1. Dean B. Walters
Standard Steel
107 Gertrude Street
P. O. Box 71
Latrobe, PA 15650
2. Kevin D. Hudock
PA Oil and Gas Assn.
1310 Commerce Drive
Park Ridge 1
Pittsburgh, PA 15275
3. Thomas F. Shields
President
Douglas Oil & Gas, Inc.
400 Southpointe Blvd.
Suite 410
Canonsburg, PA 15317
4. David A. Lind
President
PA General Energy, Corp.
208 Liberty Street
Warren, PA 16365
5. Michele A. Wice
Kriebel Minerals, Inc.
P. O. Box 765
633 Mayfield Drive
Clarion, PA 16214
6. Eugene F. Cornelius
A.R.G., Inc.
77 North Kendall Avenue
Bradford, PA 16701
7. Gregory R. Wrightstone
Vice President, Exploration & Development
Texas Keystone, Inc.
Suite 2500
Fifth Avenue Place
Pittsburgh, PA 15222
8. Dan Billman

Billman Geologic Consultants, Inc.
P. O. Box 567
402 Lincoln Avenue
Mars, PA 16046

9. Russell Kelly
Texas Keystone, Inc.
120 Fifth Avenue
Pittsburgh, PA 15222
10. Stephen W. Rhoads
President
PA Oil & Gas Assn.
106 Locust Grove Road
P. O. Box 349
Bainbridge, PA 17502
11. Terry J. Holt
Great Oak Energy, Inc.
637 Allegheny Avenue
Oakmont, PA 15139
12. Craig D. Todd
Monroe Conservation District
8050 Running Valley Road
Stroudsburg, PA 18360
13. Jolene E. Chinchilli
PA Executive Director
Chesapeake Bay Foundation
614 N. Front Street
Harrisburg, PA 17101
14. Scott J. Wilkes
President
Wilkes Energy, Inc.
80 West Bowery Street
Suite 304E
Akron, OH 44308
15. Gregory C. Bell
Heritage Surveys
RD #1, Box 280A
Eldred, PA 16731
16. Terry E. Belter
Star Iron Works
R.D.3, Box 155

Punxsutawney, PA 15767

17. Wayne S. Leeper
W. S. Leeper & Associates
120 Walters Lane
Evans City, PA 16033
18. Bob Long
blong@eastresourcesinc.com
19. Open Flow Gas Supply Corp.
openflow@adelphia.net

1. Comment: We support the Proposed Permit Guidelines for Phased Projects under the NPDES stormwater permit. We also ask that you make the changes to the guidelines that are being sent to you by the Pennsylvania Oil and Gas Association. (1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19)

Response: The Department acknowledges the support for the policy. Comments from the Pennsylvania Oil and Gas Association are addressed in this comment and response document.
2. Comment: On behalf of Pennsylvania General Energy, Corp. (PGE) and Pennsylvania's oil & gas development industry, we want to express our strong support for the proposed draft guidance entitled Permit Guidelines For Phased NPDES Stormwater Construction Permits, Erosion and Sediment Control Permits, and Waterway Restoration Project Permits (Document No. 363-2134-013).

The need to provide landowners, municipalities and other interested persons with the information necessary to comment on proposed development activities under current guidance provisions is quite difficult, if not impossible, to do accurately without the potential for substantial wasted effort on the part of the developer, the Department and other involved agencies because of the uncertainties surrounding well site selection and the placement of related infrastructure related to oil & gas development.

This proposed guidance for Phased Permits addresses this dilemma in a way which should satisfy the needs of all of the stakeholders in this issue.

The Pennsylvania Oil and Gas Association, through consultation with interested industry participants, has developed a response which is offered by POGAM in an effort to help clarify some of the provisions in the proposed guidance.

PGE respectfully requests the Department's consideration of POGAM's comments and we reiterate our strong support for this proposal. (4)

Response: The Department acknowledges the support for the policy.

3. Comment: On behalf of the Pennsylvania Oil and Gas Association, I write to express our strong support for the concepts and procedures contained in the draft guidance entitled Permit Guidelines For Phased NPDES Stormwater Construction Permits, Erosion and Sediment Control Permits, and Waterway Restoration Project Permits (Document No. 363-2134-013).

The guidance is particularly important to the oil and gas exploration and production industry because of the uncertainties surrounding well site selection and the placement of related infrastructure that is typically associated with the development of multiple well development projects. The guidance will provide our industry with a flexible, efficient and economical procedure for planning and developing oil and gas properties while ensuring that landowners, municipalities, and other interested persons have ample opportunities to comment on the overall goal and scope of the project and proposed activities. We urge you to proceed toward implementation of the final guidance as expeditiously as possible. (10)

Response: The Department acknowledges the support for the policy.

4. Comment: On page 4, the draft guidance requires permit applicants to include the PNDI supplement for the entire project site to reflect potential impacts on threatened and endangered species in all possible phases of the construction project.

We appreciate the Department's logic for requiring a PNDI search for the entire project site in the permit application. We believe, however, that the provision should be clarified to indicate when the permit applicant will be required to carry out remedial action to protect T&E species that are identified at the project site. Specifically, we suggest that the guidance should stipulate that the applicant will not be required to address possible remedial action to protect the T&E species until he submits detailed information for activities that will occur in the specific phase of the project that includes the area of concern identified in the PNDI search. (10)

Response: The identification of threatened and endangered species provides an opportunity to develop plans to avoid and minimize potential impacts to those species during the life of the project. This up-front notification can help direct the project away from specific critical areas. If a threatened or endangered species is identified on the project site but is located in a future subsequent phase, the applicant must include avoidance and minimization measures with the submission of the plans for the subsequent phase. Applicants will not be required to provide detailed documentation of avoidance and minimization measures for future subsequent phases prior to the site design for those phases. However, applicants are on notice that avoidance and minimization measures for subsequent phases will be required.

5. Comment: On page 4, the draft guidance requires the permit applicant to identify “the location and characteristics of sensitive areas or areas of environmental concern” for the project site. Sensitive areas or areas of environmental concern include but are not limited to: wetlands, special protection waters, historic or cultural resource areas and areas where threatened or endangered species or critical habitat may be present.

On page 4, the draft guidance requires the permit applicant to identify “the location and characteristics of sensitive areas or areas of environmental concern” for the entire project site. It does not, however, indicate how detailed the information must be.

While we appreciate the need to identify areas of environmental concern that could be impacted by a phased development project, we believe that the department should specify the appropriate level of detail that would be required to locate and characterize areas of environmental concern.

For the overall project site, we suggest that the permit applicant should only be required to provide general information to characterize an area of environmental concern. Greater detail on the characteristics of an area of concern should only be required during the planning and review of each specific phase of the project when the permittee provides information on the scope of his planned activities at specific locations and when those activities may impact a particular area of environmental concern.

For example, a permit applicant may identify a wetland area somewhere on his project site, but he should not be required to carry out an extensive wetlands delineation to characterize the resource simply because it is present. Delineation would only be appropriate when the permittee’s detailed plans for a specific phase of the project indicate that his activities could encroach into the wetland area. (10)

Response: Identification of sensitive areas such as wetlands during the planning stage will provide an opportunity for avoidance and minimization during development of site-specific plans. As described in more detail in the policy itself and the regulations, the initial project description should include a narrative and a map identifying the approximate locations, areas, and characteristics of wetlands and proposed encroachments including the approximate size, type, location, and reason for these encroachments for the entire project. Detailed wetland delineations are required when activities are planned to actually affect wetlands and must be included with the plans for each phase or subsequent phase.

6. Comment: We note that the Department has determined that runoff calculations are not needed when standard BMPs are installed in accordance with standard recommendations pursuant to a Department-approved E&S Plan. The

guidance should be modified to reflect the Department's determination regarding supporting calculations that must be included in the E&S Plan.

Specifically, we suggest that the department explain the requirement by including language on page 4 that is contained in the Erosion and Sediment Pollution Control Program Manual (Document No. 363-2134-008), which states:

Supporting calculations. All design information for all BMPs must be included in the narrative report. The information will vary according to the BMP, but may include such information as the drainage area, anticipated flow rate, velocity and the proposed method of stabilization. The STANDARD WORKSHEETS included in this publication give guidance for the design calculations and information required. Plan preparers are not required to use the STANDARD WORKSHEETS, but must furnish the information indicated.

The foregoing statement should be further clarified by adding language from the Oil and Gas Operator's Manual (Document No. 550-0300-001):

If the proposed use of BMPs conforms to the standards contained in this manual, no additional supporting calculations are required. If the standards for BMPs are altered, or if other BMPs (e.g., channels, berms, sediment traps, or sediment basins) are required, supporting calculations demonstrating the adequacy of the BMPs for anticipated runoff conditions must be provided.

This recommendation would apply to the discussion of subsequent phase approvals on page 5 as well. (10)

Response: The comments are not within the scope of the proposed policy. Regulatory requirements and existing guidance are not changed by this policy. This policy provides flexibility for the timing, processing and approval of project plans.

7. Comment: We support the draft guidance primarily because of the uncertainties associated with oil and gas lease development. Specifically, an oil and gas operator cannot locate and define the specific earth disturbance activities that may occur throughout the entire project site and cannot know whether the total acreage that may be disturbed over the life of a phased project will exceed 10 acres. As a result, the permit applicant for a phased oil and gas well development project will be unable to determine whether the Cultural Resource Notice should be submitted along with the individual NPDES permit application.

The operator's inability to identify the specific locations of all potential earth disturbances that could occur throughout the various phases of project development at the time that the permit application is submitted also makes it

virtually impossible for the Pennsylvania Historical and Museum Commission (PHMC) to properly evaluate the project for potential impacts to significant historical or archaeological resources. Without precise knowledge of the location of the proposed earth disturbance activities, the PHMC would be unable to conduct a targeted archaeological survey.

To address the problems caused by the general requirement, we suggest that page 5 of the guidance should be revised to tie the submission of the Cultural Resource Notice to each phase of the permitted project. The guidance should be modified to require the permittee to submit a Cultural Resource Notice when more than 10 acres of earth disturbances are identified at specific locations during each discrete phase of the project. (10)

Response: Where activities on the entire project site potentially exceed 10 acres of earth disturbance, coordination with PHMC is required. This coordination with PHMC to identify potential historical and cultural resources for the entire project site will allow for the incorporation of avoidance and minimization measures into the overall site design. To parcel the project into smaller increments, as suggested, is contrary to the comprehensive review process being advanced by this policy. DEP does agree that specific requirements for site investigations to explore for suspected cultural resources or to recover cultural resources should be tied to each phase approval rather than the initial permit action.

8. Comment: The draft guidance stipulates that the Department may approve minor modifications or corrections to the NPDES or E&S Permit to allow for minor changes. These minor modifications may include field adjustments on-site to BMPs and locations that are within the scope of the approved plan and that do not constitute a major modification of the permitted activity.

We suggest that the paragraph should be clarified to include the addition or deletion of BMPs to address unforeseen site circumstances as field adjustments that are minor permit and plan modifications. (10)

Response: The Department has clarified this section of the policy as suggested.

9. Comment: The draft guidance states that new NPDES or E&S Permit shall be obtained for a new or increased discharge, or change of the waste stream, including any new or increased pollutant not identified in a previous permit application.

We are concerned that stormwater discharges included in subsequent phases of a construction project that were not identified during the permit review of the initial project phase could be viewed as a “new or increased discharge” that would trigger the need for a major permit modification.

We suggest that the paragraph should be modified to clarify that stormwater discharges that are included in subsequent phases of a project permitted

pursuant to the draft guidance are not major plan modifications and do not require a major permit modification.

Thank you for this opportunity to comment in this very significant draft guidance document. We reiterate our strong support for this proposal, and we hope that the suggested recommendations we have made will help you to clarify the intent and scope of the draft guidelines. (10)

Response: The purpose of the NPDES permit is to authorize stormwater discharges that meet the requirements of the relevant DEP regulations. It is presumed under this policy that subsequent phases of a project will have stormwater discharges; however, where those discharges are consistent with the initial permit submission and meet the requirements of DEP regulations, those subsequent phases can be approved under the operative requirements of this policy. Stormwater discharges in subsequent phases do not automatically trigger a new permit or major permit modification. This policy does not however, bar the Department from requiring a major permit modification or new permit in unusual or unique circumstances.

10. Comment: The Monroe County Conservation District appreciates the opportunity to comment on the draft technical guidance referenced above. As a Conservation District with DEP-delegated authority in all of the programs affected by this policy, we feel uniquely qualified to offer our comments. This office opposes including Chapter 102 and NPDES Stormwater permits and those waterway restoration permits that include permanent wetland impacts in this policy for the reasons outlined below.

This office strongly suggests that this policy only apply to the last category of activities: individual Water Obstruction and Encroachment Permit applications for waterway restoration. To include E&S permits and NPDES stormwater permits in this policy is redundant and may introduce inconsistencies into an existing program complete with regulations and guidance manuals. The fact is, we are already processing some NPDES stormwater permits with a phased approach but we require much more information for the initial phase than is outlined in the policy. What is different is that the policy now requires limited information to be submitted for the overall project, and subsequent phases of development that constitute major permit modifications to submit new permit applications. This seems to contradict the requirement that we consider the earth disturbance over the life of the project. On the one hand we are saying, "Get one permit for the entire site for the life of the project," and on the other hand we are requiring multiple permits for the activity.

The issue of future phases being subject to public comment and permit coordination is currently handled through special permit conditions (on individual NPDES permits), and could be easily administered in general permit territory by requiring an individual permit on phased sites under existing policies and procedures. Special permit conditions are much more

site-specific and user-friendly than the two options presented in this draft policy: 1) to publish decisions on subsequent phases in the PA Bulletin with no opportunity for permit coordination or public input, or 2) to require a new permit application and fee for each subsequent phase that has a sedimentation basin or trap (new or increased discharge). (12)

Response: The Department agrees that many districts have been using a phased approach for some development projects for some time. This policy provides a general framework to further that effort by placing phased projects into a policy rather than on an individual case-by-case basis. This policy should not affect sound planning, the review of plans, or conditioning of individual permits where necessary. Additionally this policy provides for a more complete public participation process than currently used.

11. Comment: This office opposes including NPDES stormwater permits in this policy. The following comments include a few of the reasons we feel that the applicability of this policy to Chapter 102 and NPDES is inappropriate:

Long-term and large-scale projects must be defined and included in the Executive Summary and “applicability” section. We want to avoid legitimizing situations with this policy that Districts would not otherwise allow (i.e., 5 acre project with 1 acre stockpile as the initial phase). (12)

Response: The Department disagrees that these terms need to be specifically defined in order to effectively implement the policy. These terms are general in nature and refer to projects that are conducted in distinct phases or stages as described in the policy.

12. Comment: The definition of NPDES Permit should reflect the Phase II program rather than referencing it as a footnote. (12)

Response: The Department has made the change to the policy as suggested.

13. Comment: To remain consistent with the existing NPDES program, the existing E&S and NPDES manuals should be referenced instead of listing submittal requirements in the permit processing section of this policy. As a specific example, the E&S Plan for the overall project site should include a wetland delineation, not a “map of the project area that identifies the location and characteristics of sensitive areas” which may be satisfied by submitting a copy of a National Wetlands Inventory map. (12)

Response: The final policy submittal list is consistent with the NPDES regulations, program requirements, and DEP technical guidance manuals. The initial project description should include a narrative and a map identifying the approximate locations, areas, and characteristics of wetlands and proposed encroachments including the approximate size, type, location, and reason for these encroachments for the entire project. Detailed wetland delineations are

required when activities are planned to actually affect wetlands and must be included with the plans for each phase or subsequent phase.

14. Comment: In NPDES permit processing, subsequent phases or minor modifications could be authorized by either the Department or the District. (12)

Response: The policy has been amended as suggested.

15. Comment: The Post-Construction Stormwater Management section is confusing because it describes E&S BMPs. Stormwater BMPs are distinct from E&S BMPs in that they control the rate and volume and quality of stormwater runoff. (12)

Response: The Department has clarified this section of the policy as suggested.

16. Comment: In the minor modification section, changes written on an E&S Plan are contrary to NPDES permit conditions and to all of our DEP training. Many “field adjustments” require that we review supporting calculations and approve a revised plan. (12)

Response: The Department does not agree that this policy is contrary to the NPDES program or all of the DEP training. Under the existing program approving minor modifications and noting field adjustments on plans is a current practice. The Department agrees that there are circumstances when supporting information must be reviewed and this policy does not preclude that analysis where necessary.

17. Comment: In the major modification section, new or increased discharges must be defined and examples of new or increased pollutants given. (12)

Response: The Department has provided examples of new or increased pollutants in the policy.

18. Comment: It is stated in the Overview section that a phased approach promotes the development of comprehensive project plans and provides for a single and complete project review. We disagree. The current Chapter 105 permit process accomplishes those goals far better than the proposed policy. (12)

Response: Regulatory requirements and existing guidance are not changed by this policy. This policy provides flexibility for the timing, processing and approval of project plans. During pilot tests of this policy in five counties, applicants including Trout Unlimited, Izaak Walton League, Kreutz Creek Preservation Society, Falling Spring Greenway, Hammer Creek Watershed Association, Letort Regional Authority, and Octoraro Watershed Association, found the process to be reasonable and a beneficial practice. DEP has been able to effectively ensure the protection of public health and safety and the environment as required by the regulations.

19. Comment: Preapplication meetings should be required for all phased permits. (12)

- Response: Consistent with the Chapter 105 regulations, the policy specifically recommends and encourages preapplication meetings.
20. Comment: In the Applications section (General Information), all references to watershed organizations should be deleted in favor of a generic reference to project sponsors so that the “public” is not involved in preapplication meetings. (12)
- Response: DEP believes that many of the project sponsors are watershed organizations, which are the public, and they should be able to participate. DEP believes that interested parties including the public and landowners should be allowed to participate in these discussions.
21. Comment: Information presented at the preapplication meeting should include the location of stream access points and spoil areas. With the existing Chapter 105 permit extension process, we question the need to issue waterway restoration permits for a longer time period. Won't this open the Department to case-by-case requests for longer permit durations? (12)
- Response: This policy does not eliminate a permittee's ability to request a time extension as it is in the current program. Many waterway restoration projects, primarily because of funding, may take longer to construct than the traditional activities permitted through Chapter 105. For this reason waterway restoration permits may authorize longer construction windows in order to eliminate the formality of time extension requests.
22. Comment: It is not appropriate to authorize any permanent wetland impacts under this phased permit since this policy is limited to waterway restoration and cumulative wetland impacts cannot be quantified until final design is complete. The policy should clearly and consistently state that it applies only to waterway restoration and that no permanent direct or indirect wetland impacts can be authorized. (12)
- Response: The policy clearly states that it is intended to facilitate waterway restoration. The Department disagrees that the policy should bar all wetland impacts associated with these activities. At times, it may be necessary to have some limited wetland encroachment in order to facilitate a viable waterway restoration project. These wetland encroachments must be identified in the initial project application that covers the entire site.
23. Comment: As with the NPDES permits, this office is concerned that including permit requirements in this policy will create a second set of criteria for permit applicants. Instead, we suggest cross-referencing or duplicating the application checklist from the Joint Permit application and adding only those requirements that are specific to waterway restoration permits. This will also address inconsistencies within this policy such as not requiring a north arrow or demarcation of floodplains and regulated waters on subsequent phases. (12)

- Response: Nothing in this policy relieves applicants of meeting the fundamental requirements of Chapter 105. This policy provides flexibility for the timing, processing, and approval of project plans.
24. Comment: The Department may be limiting viable restoration proposals by requiring FGM or Natural Stream Design. We suggest adding the phrase “or approved alternative”. (12)
- Response: The suggested change has been made.
25. Comment: As with NPDES permits, we question the efficacy of publishing subsequent phases in the PA Bulletin when it affords no opportunity for public input or permit coordination. We would agree with the PA Bulletin notice for information purposes in conjunction with special conditions to the initial permit. (12)
- Response: The purpose of this policy is to identify all environmental impacts associated with a project in the initial submission of the entire project site which provides an opportunity for public review and comments.
26. Comment: The first sentence in the Minor Permit Modification section (page 13) should end after “project site plan.” The Department’s intent for the phrase at the end of that sentence is unclear. A revised E&S Plan should be required for all minor changes involving earth disturbance that are made in the field. The purpose of the subsequent phase notice is two fold: to provide public notice of the approval as well as to provide for a thirty day appeal period.(12)
- Response: The final policy has been clarified as requested.
27. Comment: The Major Permit Modifications section should not include “any new direct or indirect impacts to wetlands” as discussed above. We also question the requirement for a new permit application for every major modification when the Department’s existing permit amendment process may suffice. Issuing multiple permits on a single project contradicts and undermines the “single and complete” review concept. (12)
- Response: The policy requires that all wetland impacts should be addressed during the initial submission. We agree that under the existing program the Department can amend permits. We believe that this policy supports the single and complete project concept review.
28. Comment: Conceptual plans for an entire NPDES permitted area may be rendered invalid through the municipal review process.
- Response: The phased approach is not mandatory, and may not be appropriate for all projects. Where municipalities need to review or approve the entire project the phased approach may not be appropriate or beneficial.

29. Comment: DEP may be taking the feet out from under the municipalities by approving a 500-acre development on the basis of an E&S Plan for a Sales Office. (12)

Response: The phased approach is not mandatory, and may not be appropriate or beneficial for all projects. Further, neither the Department's authorization nor this policy relieves the permittee from any responsibility or requirement to comply with local ordinances.

30. Comment: On behalf of the Chesapeake Bay Foundation, please accept the following comments on the Department's Proposed Technical Guidance 363-2134-013 (Permit Guidelines for Phased NPDES Construction Permits, Erosion and Sediment Control Permits, and Waterway Restoration Project Permits). The Chesapeake Bay Foundation (CBF) is the largest non-profit organization dedicated to the protection and restoration of the Chesapeake Bay, its tributaries, and its resources. With the support of 100,000 members, our staff of scientists, attorneys, educators and policy specialists work to ensure that changes in policy, regulation, and legislation are protective of the quality of the Chesapeake Bay. Our work is centered on improving water quality in the Chesapeake Bay watershed. We are in a unique position to comment on the proposal because while our policy is to support strong and thorough regulation and permitting requirements for activities that may adversely impact waterways and wetlands in Pennsylvania and the Chesapeake Bay, CBF is actually engaged in substantial "on the ground" waterway and wetland restoration efforts and thus subject to those same permitting requirements. We believe that our situation enables us to provide valuable perspective on the proposal.

We are sympathetic with the plight of many persons undertaking waterway restoration projects. We understand that sufficient money may not be available up front for complete design and environmental work under government programs, and support a process that makes it easier for people to implement such projects, so long as the projects do not have adverse environmental impacts and are in full compliance with all applicable laws and regulations. Unfortunately, we believe that the approach chosen by DEP in the proposed policy will not ensure that projects are fully designed and environmental measures are implemented to satisfy legal requirements. We believe that rather than pursuing the approach set forth in the proposal, DEP should consider alternate approaches such as reworking the applicable funding mechanisms to ensure that adequate funding is available up front for necessary detailed design and the planning and implementation of necessary environmental measures, developing general and individual permits specifically streamlined and tailored for situations such as waterway restoration under government funded scenarios, and/or seeking revisions to applicable laws and regulations to allow for a process such as that in the proposal.

In sum, after careful examination, CBF believes that the proposed policy fails to ensure adequate environmental safeguards, eliminates meaningful public input for activities undertaken after the initial phase, and is unlawful. We believe that there are measures that can be undertaken to streamline the permitting process, but that this proposal is not the proper mechanism. Our specific comments are as follows:

It is Unlawful, Arbitrary and Capricious, and Poor Public Policy for DEP To Issue a Permit When Final Design and Environmental Measures For a Project Have Not Been Fully Developed Up Front and Detailed in the Permit Application or NOI.

In the Executive Summary to the proposed policy, DEP states that the policy allows for the submittal of a permit application “for the entire project site without the requirement for detailed construction plans and drawings for all phases of the project up front”. Under the proposal, detailed construction drawings, plans, Erosion and Sediment Control plans, and other required information must be submitted to DEP for review and approval prior to commencing work on “subsequent phases” of the project, rather than up front before the permit is approved. The approach taken in the proposal is clearly contrary to prior rulings of the Environmental Hearing Board and is poor public policy, for numerous reasons.

In New Hanover Township v. DEP, 1996 Pa. Environ. LEXIS 37, 1996 EHB 668, *aff'd* 2081 C.D. 1996 (Pa. Cmwlth. August 19, 1997), the Environmental Hearing Board (EHB) held that it is an abuse of discretion for the Department to issue a permit that is not based on a final approvable design. In that case, the Department issued a landfill permit for a landfill when the design for the facility was not fully developed. The Department tried to justify permit issuance by pointing to conditions in the permit that required that the facility undergo a major redesign before it could be operational. The EHB held that “DEP acted unlawfully and abused its discretion in issuing the Permits and Certifications without adequate information as to the final design of the proposed landfill or knowledge of the potential resultant environmental effects therefrom”. *Id.* at 29. As a subsequent case citing New Hanover Township noted: “The essence of the Board’s holding in New Hanover was that the law required that a permit be issued upon a final design....” Birdsboro and Birdsboro Municipal Authority v. DEP, 2001 Pa. Environ. LEXIS 27, p. 48.

The issuance of a permit that leaves many aspects of design, including erosion and sediment control BMPs, to be completed at later stages, makes everything in the permit “conceptual” and “subject to change” and forces interested citizens and challengers to permits to “shoot at moving targets.” *Id.*, New Hanover at 28. This is not only unlawful and arbitrary and capricious, but also fundamentally unfair to persons interested in the project who are concerned that it may have adverse environmental impacts.

The practical effect of the policy would be to force persons who have concerns with the project to appeal the permit within 30 days of issuance, under the provisions of the Environmental Hearing Board Act, 35 P.S. Section 7514, even if they are satisfied with the design and environmental efficacy of the initial phase, because their failure to appeal would render the permit administratively final and unchallengeable at a later time, should later phase design submittals and anticipated environmental impacts prove unacceptable. As such, the chosen approach negatively impacts the ability of the public to meaningfully comment on a project. Although under the proposal citizens can comment as new detailed submissions come in for each phase, such comments are essentially superfluous and can be easily overlooked because the permit will be considered administratively final and not subject to legal attack if the comments are completely ignored. The similar approach undertaken by the Department in the New Hanover landfill situation was described by the EHB as “a convenient broom to sweep illegalities and abuses of discretion under an administrative rug”. *Id.*, New Hanover at 27. A meaningful public “check and balance” on unfettered administrative discretion is thereby eliminated by the policy.

The proposal also encourages the filing of protective appeals that may be unnecessary by, in essence, impelling citizens concerned about a project to file a legal appeal to preserve their rights if they believe there may be some problem with subsequent phases of the project. These legal actions are expensive to pursue and defend and constitute a drain on societal resources. A citizen faces the Hobson’s choice of filing a costly appeal that may ultimately prove to be entirely unnecessary, or failing to appeal and risking that he will never be able to challenge the project in the future, even if its design and environmental measures are wholly inadequate, because the permit will be considered to be administratively final. Citizens must, under the proposal, use a crystal ball to guess at what actions the permittee may take in subsequent phases of the project to gauge their decision whether or not to appeal.

It is only fair that those interested in a project be able to review a complete permit file, with complete designs and environmental measures, before deciding whether to appeal the permit. Such persons should not be compelled to speculate and guess about the design and environmental effect of future phases of a project before choosing whether or not to challenge a permit for a project. Although the Department and Conservation Districts generally do commendable work in reviewing applications and NOIs, we are wary of the extent the proposal requires a “just trust us” philosophical commitment to ensuring that projects are properly designed and adequate environmental controls are designed and implemented. (13)

Response:

The Department has considered the commentator’s concerns and disagrees with their two essential points. First, this policy does not create a “New Hanover Township” problem, but rather sets out a process that is clearly

distinguishable from the New Hanover permit condition process overturned by the EHB. The Board's analysis in New Hanover is based upon the unique facts of that case which involved the appeal of the waste permit issued under the then existing regulations, but conditioned so as to require a major redesign of the project to comply with proposed regulations. The Phased Permit Policy sets out a process more analogous to the phased non-coal mining permit approach upheld by the Board in the Birdsboro case. Under the Chapter 92, 102 and 105 regulations, in order to issue a permit, the Department must have sufficient information in the application to be able to conclude: 1) that the project will minimize accelerated erosion and sedimentation (for NPDES Stormwater Construction or E&S permits) or that that the project will not adversely impact health, safety or the environment (for Chapter 105 water restoration permits) and 2) that the project meets Water Quality Standards and antidegradation requirements of Chapter 93. Under the Phased Permit Policy, unlike in the New Hanover case, an applicant must provide sufficient information in the initial submission on which basis the Department can meet its regulatory obligations.

Second, the Department disagrees that the policy will encourage the filing of protective appeals. The commentator is wrong regarding "administrative finality" as it relates to subsequent phase submissions and approvals. The Department will not take the position and in fact disagrees that subsequent phase approvals will be administratively final and thus unappealable. The Department will publish notice of all subsequent phase approvals. To the extent a party believes a subsequent phase approval is not consistent with the permit approved initially, that party will have thirty days to appeal the subsequent phase approval. "Significant changes to design or control" which have an adverse environmental impact are not authorized by this policy.

The Department disagrees that the proposal requires a "just trust us" philosophical commitment to ensuring that projects are properly designed and adequate environmental controls are designed and implemented. The policy in fact provides increased opportunities for public notice, increased appeal rights, and major modification provisions which all contradict the commentator's premise.

31. Comment: The Policy Fails to Satisfy the Requirements for Approval of NPDES Individual Permit Applications and General Permit NOIs.

General NPDES NOI Submittal

The review process for general NPDES permit approvals set out in 25 Pa. Code Section 92.83(a)(1) requires an individual review of a Notice of Intent (NOI) submitted by a person seeking to conduct, *inter alia*, earth disturbance activities under the permit (PAG-2). Specifically, the regulations require that, at a minimum, the NOI "demonstrate that each point source meets the eligibility requirements for inclusion in the general permit" and "demonstrate

that the discharge from the point sources, individually or cumulatively, will not result in a violation of an applicable water quality standard.” These regulatory requirements cannot be met if there is piecemeal submittal of design and environmental information, as allowed by the proposal. How can these required demonstrations be made in the NOI if they are only included for the first phase of a project? Additionally, this approach defeats the purpose of good holistic planning for a project; an applicant can make a significant change in design or control in subsequent phases of the project and no one can legally object to it. Full design details and environmental measures that will be undertaken for all phases must be included in the NOI submitted by the applicant. (13)

Response: The Department believes that this policy does not promote piecemealing of projects, but rather emphasizes the need to identify potential environmental impacts for the entire project area. Greater emphasis is placed on better site design, reduction and avoidance of impacts to receiving waters and environmentally sensitive areas, and the promotion of comprehensive site management. There is enough information regarding environmental impacts provided in the initial submission to determine whether or not Water Quality Standards will be met. Should subsequent phases not be consistent with the initial submission a major modification will be required.

32. Comment: The Policy Fails to Satisfy the Requirements for Approval of NPDES Individual Permit Applications and General Permit NOIs.

Individual NPDES Applications

Under the regulation at 25 Pa. Code Section 92.31, no NPDES application can be approved unless it is in compliance with, *inter alia*, water quality standards (Section 92.31(a)(5)); water quality protection requirements under Section 96.3 ((a)(9)), and antidegradation requirements ((a)(10)). As noted above, piecemeal submissions cannot demonstrate that all water quality standards, antidegradation requirements, and other water quality protection requirements can be satisfied for the entire project. In fact, the proposal does not even require consideration of certain antidegradation requirements at all, let alone for the first phase (see below). As such, by operation of Section 92.31, submissions that only contain enough information to satisfy requirements for the initial phase of the project are not approvable under applicable regulations. Full design details and environmental measures that will be undertaken for all phases must be included in the submitted application. (13)

Response: The Department believes that the policy properly recognizes and emphasizes the assessment of potential impacts on water quality and stream uses. The policy provides a mechanism to assure that both the construction and post-construction stormwater BMPs are adequately designed, implemented and maintained through a comprehensive planning approach. Fundamentally this

approach is consistent with the Department's antidegradation requirements and the protection and maintenance of the Commonwealth's water resources. A permittee is not authorized to commence construction on any phase until that phase has been approved as consistent with the initial permit submission which the Department will have to conclude meets the requirements of Section 92.31.

33. Comment: The Policy Should Not be Implemented Without Changes To DEP Regulations and/or State Laws

As indicated above, the proposal has severe legal shortcomings under current regulations. It is unclear whether the legal problems with the policy could be adequately remedied by regulatory and/or legislative change. Nevertheless, it is apparent that if the Department wants to pursue the major changes set forth in the proposed policy, it should seek regulatory and/or legislative amendments to do so. In addition to perhaps providing the necessary legal authorization, seeking a regulatory change would allow for a more formal review and public input process that includes entities other than the Department such as the Environmental Quality Board, Independent Regulatory Review Commission, Attorney General, and General Assembly.
(13)

Response: This policy describes a processing, submission, and approval framework for phased permit projects that utilizes the Department's existing authority and does not require enactment of new or revised regulations.

34. Comment: The Policy Lacks Any Consideration of Certain Antidegradation Requirements

The policy would be applicable to large earth disturbances in High Quality (HQ) and Exceptional Value (EV), yet there is no mention or reference in the policy to certain antidegradation requirements in 25 Pa. Code Chapter 93 and elsewhere in the Department's regulations. For example, under Section 93.4c(b)(1)(i)(A), persons proposing new, additional, or increased discharges to HQ or EV waters must evaluate nondischarge alternatives to the discharge, and use an alternative that is environmentally sound and cost-effective. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional, or increased discharger must use the best available combination of cost-effective treatment, land disposal, pollution prevention, and wastewater reuse technologies. There is no mention or reference in the policy to these requirements. Since NPDES permits for stormwater discharges associated with construction activity are, by definition, "point sources," the above antidegradation provisions are expressly applicable to these proposed activities.

In the Department's proposed "Water Quality Anti-Degradation Implementation Guidance" (April 16, 2001), the Department fleshed out the requirement for nondischarge alternatives as they apply to earth disturbance

activities by stating, on page 41, that: “nondischarge alternatives which are to be considered by persons proposing an earth disturbance activity which requires an NPDES permit include: alternative siting of the project, limiting the extent of earth disturbance, and the maintenance and/or installation of riparian buffers.” This language should be specifically included in the final policy. (13)

Response: This phased permit policy is based upon and implements Chapter 92, 102, and 105, each of which must comply with the water quality standards and antidegradation requirements of Chapter 93. This policy does not relieve an applicant from compliance with the requirements of any of these regulations, rather the policy is intended to outline a phased process for compliance with these regulatory requirements.

35. Comment: The Scope of The Policy With Regard To Earth Disturbance Activities Is Excessive

In the proposal, DEP proposes to allow all earth disturbance activities that require an NPDES permit, and all waterway restoration projects, to be eligible to participate. We are particularly concerned that DEP proposes to make the policy applicable to all earth disturbance activities that require an NPDES permit, whether they involve 5 acres of earth disturbance or 1000 acres of disturbance. Under the policy, erosion and sediment control plans for all phases of a project subject to a stormwater construction NPDES permit, other than the initial phase, can be developed, and submitted to DEP, after the permit is no longer legally subject to challenge. Since the E&S plan is the major component of environmental management for a construction project, we believe it is poor policy to allow such plans to be developed and submitted in a context where they can never be challenged. Since E&S planning decisions for all phases but the initial phase are unreviewable and not subject to meaningful public scrutiny or legal recourse, the policy opens the door to cheap, shoddy E&S planning and BMPs, and subsequently increased sediment pollution, that impacts the waters of the Commonwealth and the Chesapeake Bay. Additionally, this approach defeats the purpose of good holistic planning for a project; an applicant can make a radical change in design or control in subsequent phases of the project and no one can object to it with the possibility of pursuing legal recourse. Assuming, *arguendo*, that DEP could address the many legal and policy issues this policy presents, it should only pursue a very limited pilot project for small earth disturbance activities, and not make activities of hundreds or thousands of acres eligible for the policy. (13)

Response: The Department’s phased permit approach supports the goal of reducing, minimizing, and eliminating cumulative impacts from unmanaged stormwater runoff. The NPDES permit process for stormwater discharges associated with construction activities, either through the phased permit or

standard permit approach, emphasizes the objective of minimizing the potential for individual or cumulative impacts within the watershed.

The Department disagrees that the policy “will open the door to cheap, shoddy E&S planning and BMPs, and subsequently increased sediment pollution, that impacts the waters of the Commonwealth and the Chesapeake Bay,” but instead the Department believes this policy promotes holistic planning and consideration of all environmental impacts for the entire project at the outset. All phases are subject to approval and subsequent public notice. All phases are appealable after they are approved and notice is published.

The Commentator is wrong in stating that: “Under the policy, erosion and sediment control plans for all phases of a project subject to a stormwater construction NPDES permit, other than the initial phase, can be developed, and submitted to DEP, after the permit is no longer legally subject to challenge.” Each subsequent phase approval will be noticed in the Pennsylvania Bulletin and will be appealable for thirty days after publication. Therefore, interested persons will be able to challenge subsequent phase E&S Plans.

36. Comment:

The Provisions on “Field Adjustments” in The Proposal Are Unworkable, Unlawful, and Constitute Poor Public Policy

On page 6 of the proposal, DEP proposes allowing “field adjustments” to BMPs and locations within the scope of the plan that are not major modifications. This proposal is internally inconsistent because under the scope of “minor modifications” in 40 CFR 122.63, no adjustments to BMPs, or location of BMPs, are allowed. Minor modifications include the correction of typographical errors and other very minor changes. As such, there can be no “field adjustments” of BMPs and BMP locations that are not major modifications. As such the proposal is unworkable as written, and unlawful as intended. It is also poor public policy to propose allowing substantive changes to environmental control measures and their locations without any possibility of meaningful public input. It is possible that a field inspector unfamiliar with the permit file or location could unwittingly approve the re-location of a BMP to an environmentally sensitive area. There would be no opportunity to review this decision if it was done on a subsequent phase of a project since the permit would be administratively final and unchallengeable at that point. (13)

Response:

The NPDES permit for stormwater discharges associated with construction activities establishes performance-based effluent limitations in the form of BMPs that restrict the rates and quantities of sediment, stormwater runoff and associated pollutants from being discharged into surface waters of the Commonwealth. The Department believes that the federal NPDES regulations allow the use of field adjustments as minor modifications. The Department believes that minor field adjustments based upon actual on-site conditions in coordination with the applicant is good public policy because

minor field adjustments can improve environmental performance of the approved design, and should be used as a mechanism to better ensure environmental protection.

The Department does not agree that this policy is contrary to the NPDES program or all of the DEP training. Under the existing program approving minor modifications and noting field adjustments on plans is a current practice. The Department agrees that there are circumstances when supporting information must be reviewed and this policy does not preclude that analysis where necessary.

37. Comment: The Policy Should Include Consideration of Act 67, 68, and 127 for NPDES General Permits To Be Consistent with the Intent of the Department’s Smart Growth Policy

In the Department's proposed policy on smart growth (Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure), the Department states that the intent of the policy is to address “proposed projects for facilities or infrastructure that involve a change in how the land is currently being used or that expands the current footprint of an existing facility.” This should seemingly include NPDES general permits for earth disturbance activity. Consideration of Acts 67, 68, and 127 should be added to the list of activities considered by an NOI reviewer in the policy. (13)

Response: Nothing in this policy relieves applicants of meeting the requirements of the Department’s final “Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure”. Consideration of Acts 67, 68, and 127 is currently required for both general and individual NPDES permits for stormwater discharges associated with construction activities.

38. Comment: The Provisions on Minor Modifications Need To be Amended to Satisfy Legal Requirements

The language proposed on minor permit and plan modifications on page 6 needs to be amended to fully reflect the legal requirements of 40 CFR Section 122.63, which are incorporated into DEP regulations at 25 Pa. Code Section 92.2(b)(18). Although the bulk of these provisions are included, some of them are not described in the policy as they are set out at 40 CFR Section 122.63. (13)

Response: The policy provides the processing framework within the scope of the regulations for facilitating phased projects. While the policy may not reiterate the applicable regulatory requirements verbatim, under this policy an applicant is not relieved of their obligation to comply with the regulations.

39. Comment:

Summary

In sum, we are extremely concerned that the law requires that complete design and required environmental demonstrations for an entire project must be completed prior to permit issuance, and that the doctrine of administrative finality eliminates meaningful public comment and legal recourse for inadequate designs and E&S BMPs after the initial phase. This policy fails to satisfy those requirements. Moreover, concerned citizens should not have to face the Hobson's choice of either appealing based on incomplete information, or failing to appeal and later being precluded from any legal recourse for insufficient design and environmental measures pursued for subsequent phases. We are also concerned, *inter alia*, about the broad scope of the policy with regard to earth disturbance activities, and the absence of certain antidegradation requirements in the policy. Finally, we sympathize wholeheartedly with the concerns of waterway restoration groups with limited resources, but believe that the method proposed by the Department to address these issues is not the proper way to proceed. (13)

Response:

For the reasons set forth in the response to Comment Nos. 30 – 38 above, the Department disagrees with the commentator. This policy will provide a useful tool for watershed groups and others in satisfying the applicable regulatory requirements.