

PENNSYLVANIA CAMPAIGN FOR CLEAN WATER
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March 31, 2009

John Hanger
Acting Secretary
Department of Environmental Protection
Rachel Carson State Office Building, 16th Floor
P.O. Box 2063
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Dear Acting Secretary Hanger:

We were dismayed to learn of the new directives issued by DEP on March 18, 2009 related to review of Chapter 102 and 105 permits associated with Marcellus Shale gas activities. DEP's actions to suddenly strip County Conservation Districts of their delegated duties without notice and public comment and to institute, through revisions to permit forms, a permitting process that does not allow for public participation or meaningful agency review of permit applications is illegal, irresponsible, and a violation of DEP's public duties as a public resource protection agency of the Commonwealth.

DEP's mission is to "protect Pennsylvania's air, land and water from pollution" and "work as partners with individuals, organizations, governments and businesses to prevent pollution and restore our natural resources." DEP has established five core values to guide its work:

Public Service. To "serve the public in a fair, efficient, responsive, open and honest manner."

Protection. To protect "the air, land and water of the Commonwealth" and "promote measurable environmental improvement, cooperation, innovation and sustainable development so future generations may share our wealth."

Teamwork. To recognize that DEP's "responsibilities are great and our numbers are few" and that DEP's goals "can only be accomplished if we work cooperatively and support each other in the achievement of our common purpose."

Communication. To "encourage the broadest two-way communication possible with all our constituencies by involving the public in decision-making opportunities" and "disseminating information through all means possible."

Pollution Prevention. To "promote the goal of zero discharge" and "stop pollution before it starts."

For the reasons discussed below, these recent actions violate every one of DEP's core values.

- **The lack of transparency and public involvement in development of the process is contrary to DEP's stated mission and values.**

As a public agency, DEP must remain committed to transparency and full public involvement of major policy, guidance, and regulatory initiatives. Despite espousing these principles in its mission and values statement, DEP has not asked the public to comment on the decisions to strip Conservation Districts of their delegated duties and to revise, through permit form revisions, the permit review process for the oil and gas industry. This proposal was not shared with important advisory committees made up of public stakeholders, including the Water Resources Advisory Committee (WRAC) or even the Citizens Advisory Council (CAC), a statutorily-created advisory committee tasked with providing independent oversight of DEP's operations and policies.

While DEP's draft proposed permit-by-rule for the entire stormwater construction program was shared with these committees, it was widely criticized as unworkable and fraught with many of the same Clean Water Act issues that now confront DEP's current permit process applicable to oil and gas activities. Yet, apparently, DEP has chosen to ignore these criticisms and institute a permit-by-rule process through the back door to facilitate Marcellus Shale development activity.

- **County Conservation Districts are valuable local resource agencies with which DEP should be partnering to ensure it can fulfill its regulatory duties.**

Development of the Marcellus Shale formation has the potential to benefit local economies in rural Pennsylvania. It also has the potential to drastically change the landscape and impact the forests, mountains, farms, and streams of some of the most pristine areas of the Commonwealth. For decades, County Conservation Districts have provided grassroots-directed local support and expertise to ensure protection of Pennsylvania's soil and water resources. Since being delegated duties of administering elements of the Chapters 102 and 105, Conservation Districts have performed admirably in ensuring that earth disturbance and water resource encroachments associated with new activities are protective of our rivers and streams.

There has been no evidence presented that there are persistent and systemic problems with County Conservation District review and permit processing under Chapters 102 and 105. Thus there is absolutely no justification for unilaterally stripping Conservation Districts of such delegated duties, particularly when DEP should be partnering with as many agencies as possible to ensure that environmental regulations continue to be implemented in the face of increasing Marcellus Shale development activity.

- **DEP lacks the staff to take on these new duties and effectively administer the E&S and stormwater permitting program.**

By your own admission in response to questioning during testimony before the House Environmental Resources and Energy Committee, DEP lacks adequate staff to fully implement the oil and gas program in the face of increasing activity. While we understand that DEP has

hired new employees in recent months to address this staffing shortfall, there is still not enough staff at DEP to administer all necessary regulatory duties.

It will take months before these new employees are established and trained. The professionals with the most training and experience in reviewing erosion and sediment control plans and inspecting BMPs in the field are those at the County Conservation Districts.

In light of these facts, it makes no sense whatsoever for DEP to take on more duties by stripping County Conservation Districts of delegated duties under the Chapter 102 and 105 programs with which Districts have considerable experience. We fear that, if administering of these permitting programs remain in DEP hands, shorthanded and inadequately trained DEP staff will not have the time or experience to conduct adequate review of plans, and permits will be approved and projects constructed that will not be protective of waters of the Commonwealth. In addition, we fear that few experienced DEP staff will be in the field to oversee the operations of gas drillers.

- **This process is illegal under the Clean Water Act and 25 Pa. Code Chapters 92 and 102.**

Current state regulations clearly require all oil and gas activities that disturb five acres or more to obtain an NPDES stormwater permit. 25 Pa. Code § 102.5(a). In addition, the Ninth Circuit recently vacated EPA's rulemaking exempting construction associated with oil and gas activities from NPDES permitting. *NRDC v. EPA*, 526 F.3d 591 (9th Cir. 2008). As a result of this court decision, the limitation that Section 402(l)(2) of the Clean Water Act places on NPDES permit requirements for oil and gas operations does not apply where stormwater runoff is contaminated by contact with sediment. Stormwater runoff contamination by contact with sediment will, as a matter of course, result from any and all construction activities associated with oil and gas operations. Moreover, the need for NPDES permits to control sediment contamination from stormwater runoff on oil and gas sites is applicable to both Phase I and Phase II facilities, and thus should be required for all operations 1 acre or greater. The Ninth Circuit noted that, due to contact with sediment:

the runoff generated while construction activities are occurring has potential for serious water quality impacts . . . [and] [e]ven small construction sites may have a significant negative impact on water quality in localized areas. Over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades.

NRDC v. EPA, 526 F.3d at 597 (citing 55 Fed. Reg. at 48033-34). Further, it noted that "EPA long recognized that oil and gas construction sites were prime candidates for NPDES permitting in light of what EPA referred to as 'serious water quality impacts' caused by construction stormwater discharges polluted with sediment." *Id.* at 607.

Pennsylvania requires an NPDES stormwater permit for oil and gas activities that disturb five acres or more. 25 Pa. Code 102.5(a). And, in light of *NRDC v. EPA*, Pennsylvania should require all oil and gas operations greater than one acre to obtain an NPDES stormwater permit. Accordingly, it is illegal for DEP to continue to regulate E&S and stormwater discharges from

oil and gas sites using the Erosion and Sediment Control General Permit ESCGP-1. Moreover, in light of the regulatory requirements of the Clean Water Act, the Clean Streams Law, and Chapters 102, 92, and 93, DEP cannot legally regulate E&S and stormwater through a mere “Erosion, Sediment and Stormwater Control Module” to well drilling permits.

DEP’s new permitting scheme, therefore, violates state and federal law in several respects. As we have explained in our many comments on DEP’s proposed permit-by-rule for the stormwater program, a process that lacks public opportunity to comment on NPDES permit applications and does not allow enough time for meaningful agency review of stormwater and E&S plans violates the Clean Water Act. *Waterkeeper Alliance v. EPA*, 399 F.3d, 486, 498 (2nd Cir. 2005); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, *Texas Cities Coalition on Stormwater v. EPA*, 541 U.S. 1085, 124 S. Ct. 2811 (2004).

In addition, the process is illegal pursuant to Chapter 92, the state regulations governing NPDES permits. DEP’s scheme allows for general permit coverage under ESCGP-1 in High Quality (HQ) and Exceptional Value (EV) special protection watersheds. However, 25 Pa. Code §§ 92.81(a)(8), 92.83(b)(9) do not allow coverage under general NPDES permits in HQ or EV watersheds. Rather, individual permits are required.

To conclude, in taking this new direction for the stormwater and Chapters 102 and 105 programs as related to Marcellus Shale development, DEP has violated legal requirements, bypassed the public comment process, and refused to work with willing local partners to ensure that the Pennsylvania’s wealth of clean water resources are protected while natural gas development proceeds at record pace. We urge you to retract the memo dated March 18, 2009, implement the NPDES stormwater program for oil and gas activities as required by federal and state law, and continue to partner with County Conservation Districts to deliver this program.

Sincerely,

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