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August 31, 2015

Lee A. McDonnell, P.E., Director  
Pennsylvania Department of Environmental Protection  
Bureau of Point and Nonpoint Source Management,  
Division of Planning and Permitting,  
Rachel Carson State Office Building, P. O. Box 8774,  
Harrisburg, PA 17105-8460

**Re: Pennsylvania Builders Association Comments for Draft PAG-13 NPDES General Permit for Stormwater Discharges from Small MS4s**

Dear Mr. McDonnell:

The following comments are being provided on behalf of the Pennsylvania Builders Association (PBA) regarding Pennsylvania Department of Environmental Protection (DEP) draft PAG-13 General Permit (3800-PM-BPNPSM0100d) and draft Model Stormwater Management Ordinance (3800-PM-BPNPSM0100j).

**PAG-13 General Permit**

**General Comment.**

The draft PAG-13 General Permit appears to create new regulatory requirements for individual MS4 permits without undergoing the legally required framework for developing regulations in the Commonwealth and appear add new regulatory requirements for compliance with the NPDES permitting process that do not exist under current law.

Should DEP try to mandate all conditions found in the draft PAG-13 General Permit, the documents would be of questionable validity and likely unenforceable since they were not promulgated as a regulation pursuant to the Commonwealth Documents Law and the Regulatory Review Act. We recommend DEP provide clarification to the regulated community that any changes to the PAG-13 General Permit will not supersede current regulations for individual MS4 permits.

**Definition of “waters of the Commonwealth”**

“Waters of the Commonwealth” is defined as, “Any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water ponds, springs and all other bodies or channels or conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.”

The PAG-13 General Permit regulates discharges to surface waters in Pennsylvania consistent with federal NPDES permit programs under the Clean Water Act which do not regulate any type of



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groundwater or subsurface connections. What is DEP's statutory or regulatory authority to regulate MS4 discharges to groundwater or ditches? DEP should delete all terms that appear to extend the PAG-13 General Permit authority including the term "waters of the Commonwealth."

#### **Changes to authorized non-stormwater discharges.**

We request DEP provide the regulated community with scientific data that supports the changes made to discharges that will not be allowable under the PAG-13 General Permit. Non-contaminated water from geothermal systems is now an authorized discharge, as is water from residential car washing – as long as cleaning agents are not used. However, de-chlorinated swimming pool discharges will no longer be included on the list and must be discharged to a sanitary sewer.

#### **Notification Requirements for new and existing "stormwater outfalls".**

The draft PAG-13 permit requires a 180-day notice to DEP when a new stormwater outfall is proposed and a 90-day notice of any existing outfalls that are identified during the permit period. The requirement to notify DEP six months prior to any proposed discharge adds unnecessary delays for land developments projects. Since this requirement appears to be regulatory and not enforceable in a permitting requirement, we recommend DEP clarify any changes may be also reported in the required annual report.

#### **Public Notice Requirements and Comment Period**

The new local public participation process for TMDL submissions, MS4 specific pollution reduction plans, and resubmitted nutrient and sediment TMDL design details and strategies are a direct result of DEP's Stipulation of Settlement (Settlement) with Citizen's for Pennsylvania's Future. The Settlement requires a permittee to provide notice of a 30-day public comment period in a paper of general circulation in the geographic area of the MS4 and sets specific requirements for at least one public meeting where comments will also be accepted.

We recommend DEP narrow the scope of a permittees consideration of applicable comments to those public commentators who are directly impacted in the area served by the MS4.

The permittee is also required to "consider and make a record of consideration" of all comments that are received. DEP should clearly state, where applicable, that the permittee is under no obligation to make changes to any plans or submissions as a result of comments received and that DEP will not require a permittee to make changes to submissions based on public comments alone.

In addition, public notice should not be required for modifications that continue to meet the set permit compliance requirements and schedules.



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## **Appendix D – Pollutant Reduction Plan Requirements for Discharges to the Chesapeake Bay Watershed.**

Appendix D requires a permittee to achieve a 10% reduction of existing sediment load and a 5% reduction in existing total phosphorus load within five years following DEP’s approval of coverage under a general permit for discharges to the Chesapeake Bay Watershed. This requirement is inconsistent with current existing NPDES individual MS4 permitting requirements and does not take into consideration the MS4s verifiable pollutant load. We request DEP demonstrate the proposed reductions are proportionate to the permittee’s contributing pollutant load to the Chesapeake Bay Watershed prior to implementing the requirements in Appendix D.

## **Appendix E – Pollutant Reduction Plan Requirements for Discharges to Waters Impaired for Nutrients and/or Sediment.**

Appendix E imposes pollutant load reduction targets of 10% of existing sediment and 5% of existing phosphorus load for direct and indirect stormwater discharges to receiving waters considered impaired for nutrients and sediments *in which a TMDL has not been developed or the TMDL has not identified a wasteload allocation for the permittee.*

TMDL’s are important to guarantee that watershed improvements are fairly and reasonably distributed among those industries whose discharges may have contributed to any impairment. Appendix E should be revised to eliminate any percentage reduction targets for impaired waters without an existing TMDL. In addition, the requirement for MS4s to attain numeric reduction targets without demonstrating those targets are attainable may be inconsistent with Section 402(p)(3)(B) of the Clean Water Act which states that pollution reduction requirements must be based on attainability for a particular MS4.

### **Draft MS4 Requirement Table.**

The table categorizes traditional MS4s and lists responsibilities applicable for each permittee based on the need for a PAG-13 or an individual MS4 permit. Will DEP provide a similar Table for non-traditional/non-municipal MS4s that also must meet requirements under the PAG-13 or an individual MS4 permit? It is unclear whether the expectations for non-traditional MS4 permittees will be different than municipal MS4s or if they will also be required to develop pollution reduction plans.

### **Draft DEP Model Stormwater Ordinance and Checklist**

PBA objects to DEP’s inclusion of a “recommended” 35-foot mandatory minimum riparian forested buffer requirement in the revised model ordinance. Many local governments will erroneously believe that they must adopt the model ordinance as presented by DEP without changes. Inclusion of this arbitrary recommendation and pushing local government adoption is also beyond the scope of DEP’s authority. We request DEP revise the model ordinance and delete all “highlighted options” providing local governments with reasonable clarity as to their responsibilities. We also request DEP



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clearly state that all currently enacted minimum ordinance requirements will meet DEP requirements and clarify changes are considered options for local governments.

In addition, “optional” language for a minimum riparian forested buffer requirement raises questions and concerns relating to conflicts with current state and federal regulations. We request DEP provide guidance and clarification on the following issues as they would conflict with FEMA Flood Ordinances, 25 Pa. Code Chapter 105 (Dam Safety and Waterway Management), and municipal floodplain ordinances.

- The requirement to record an easement document for Municipal Natural Resource Protection is typically regulated via a Zoning Code as setbacks or overlays. The requirements for easement recordation in the model ordinance appear to conflict with many municipal ordinances.
- It appears the model ordinance expands the regulatory protection of floodplains. Any expansion of the riparian buffer into floodplain areas will create conflicts with already permitted actions within regulated floodplains. The current language does not provide for sufficient clarity on effects to these existing permitted activities within floodplains.
- Should the riparian buffer remain within the floodplains, it should be limited to the FEMA regulated floodplains and the Group 13 SE O Manual provision should be excluded or the scientific basis for inclusion of these soil groups should be provided.
- The limits of the riparian buffer requirement are currently unclear and should be clarified. The definition mentions wetlands whereas the regulation does not include wetlands. This discrepancy may cause municipalities to incorrectly include wetlands in the riparian buffer when that is not the recommendation of the PAG-13 update.

Finally, PBA believes the construction oversight provisions in Section 407 B are unnecessary and overly burdensome. 25 Pa. Code Chapter 102 requires construction oversight of BMPs for any disturbance over one acre that requires an NPDES permit. These requirements will place an unnecessary financial burden for small projects less than one acre, and exceed the scope of DEP’s authority.



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