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<b>President</b> Maria Coutts <i>Wayne Pike BIA</i>	<b>Vice President</b> Jon Sukonik <i>HBA of Bucks &amp; Montgomery</i>	<b>Associate Vice President</b> Betsy Dupuis <i>BA of Central PA</i>	<b>Treasurer</b> Lori Venema <i>West Branch Susquehanna BA</i>	<b>Secretary</b> Cindy Cepko <i>Wayne Pike BIA</i>	<b>Immediate Past President</b> Kert Sloan <i>HBA of Berks County</i>
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October 28, 2019

**Via Electronic Mail**

Department of Environmental Protection  
Policy Office  
400 Market Street,  
P.O. Box 2063,  
Harrisburg, PA 17105-2063

**Re: Comments to Draft Permit Issuance of Pennsylvania General Permit for Discharges of Stormwater Associated with Small Construction Activities (PAG-01) [DEP Form No. 3800-PM-BCW0404d 9/2019]**

Dear Secretary McDonnell:

On September 28, 2019, the Pennsylvania Department of Environmental Protection (DEP) published notice in the *Pennsylvania Bulletin* of the intent solicit comments on the Draft NPDES General Permit for Stormwater Discharges Associated with Small Construction Activities (PAG-01).

The following comments are being provided on behalf of the Pennsylvania Builders Association regarding draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated with Small Construction Activities (PAG-01) for reissuance. (DEP ID: 3800-PM-BCW0404d)

**Comments to Draft Permit Issuance of Pennsylvania General Permit for Discharges of Stormwater Associated with Small Construction Activities (PAG-01) [DEP Form No. 3800-PM-BCW0404d 9/2019]**

**Draft PAG-01 Comments:**

1. **Page 3, Opening Paragraph**

Page 3 of the Draft Permit, first paragraph states:

*“In compliance with the provisions of the Clean Water Act, 33 U.S.C. Section 1251 et seq. and Pennsylvania's Clean Streams Law, as amended, 35 P.S. Section*




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*691.1 et seq., the Department of Environmental Protection (DEP) hereby authorizes, subject to the terms and conditions contained in this General Permit, the discharge of stormwater associated with small construction activity from earth disturbances less than five acres to surface waters of the Commonwealth.”*

The phrase **“to surface waters of the 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 means 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 means rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, 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 it is strongly suggested that DEP update the Draft Permit’s Page 3, first paragraph (and all similar inappropriate references throughout PAG-01), to the following:

*“In compliance with the provisions of the Clean Water Act, 33 U.S.C. Section 1251 et seq. and Pennsylvania's Clean Streams Law, as amended, 35 P.S. Section 691.1 et seq., the Department of Environmental Protection (DEP) hereby authorizes, subject to the terms and conditions contained in this General Permit, the discharge of stormwater associated with small construction activity from earth disturbances less than five acres to **surface waters**.”*

**2. Section I: Definitions**

Waters of the Commonwealth is defined in Section I as:

*“Rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs, and other bodies or channels of*




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*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.

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.”*

Therefore, it is strongly recommended that DEP remove the term “artificial” from the definition of *Waters of the 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.”*

3. **Section II**

On Page 7 and 8 of the Draft Permit, the following sections: II.6, II.7, and II.8; need to be changed to II.5, II.6, and II.7, respectively.




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4. **Part II.B.1.a**

Part II.B.1.a states:

*“Applicants must select E&S BMPs to control stormwater runoff during earth disturbance activities that will be designed, installed and maintained in accordance with DEP’s Erosion and Sediment Pollution Control Program Manual (363-2134-008) (E&S Manual), as amended, with the exception of sediment traps and sediment basins which cannot be utilized under this General Permit.”*

It is perplexing why DEP will not afford the permittees the option to utilize sediment basins or sediment traps during construction operations if seeking coverage under PAG-01. When implemented properly, these two types of E&S controls are very effective at detaining and treating construction stormwater runoff. Additionally, pertaining to sediment basins/traps there are several sections of the Draft Permit that contain conflicting information.

- Section III.B.7 (Authorized Non-Stormwater Discharges) states:

*“7. Pavement wash waters, provided spills or leaks of toxic or hazardous substances have not occurred and where cleaning agents are not used if such wash waters are directed to a **sediment basin** or similar BMP.”*

- Part A.I.B.6 states:

*“The permittee shall utilize outlet structures that withdraw water from the surface when discharging from **basins** and impoundments, unless infeasible.”*

Therefore, it is strongly recommended that DEP allow the permittees the ability to use sediment traps or sediment basin E&S controls during the construction activities covered under PAG-01.

5. **Section III.B.11**

Change the following reference, “See Part A.I.A.3” to “See Part A.I.B.3”




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**6. Part C IV A & E, Long-Term Operation and Maintenance**

Part C IV.A states:

*“The permittee shall be responsible for long-term operation and maintenance (O&M) of PCSM BMPs unless a different person is identified in the NOT and that person has agreed to long-term O&M of PCSM BMPs.”*

Part C IV.E states:

*“A permittee that fails to transfer long-term O&M of the PCSM BMPs or otherwise fails to comply with this requirement, shall remain jointly and severally responsible with the landowner for long-term O&M of the PCSM BMPs located on the property.”*

DEP’s requirement that the permittee 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 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 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 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 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 IV.B of the Draft Permit states:




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*“For any property containing a PCSM BMP, the 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:*

- 1. Identify the PCSM BMP. PCSM BMPs under this General Permit include all BMPs identified in the PAG-01 NOI and PCSM Plan, including vegetated areas used for managing stormwater through overland flow.*
- 2. Provide for necessary access related to long-term O&M for PCSM BMPs.*
- 3. Provide notice that the responsibility for long-term O&M of the PCSM BMPs is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees.*

*The permittee shall provide proof of filing the instrument with the Recorder of Deeds as an attachment to the NOT required by Section VI of this General Permit”*

- And required to be provided to subsequent owner(s) or transferee(s), Part C IV.I of the Draft Permit:

*“Unless an alternative process is approved by DEP/CCD in writing, upon the sale or other transfer of any parcel, lot, road or other real property included within the permit boundary, the permittee shall notify the purchaser, grantee, or transferee of the long-term PCSM BMP O&M requirements. The permittee shall expressly identify:*

- 1. The PCSM BMPs on each property.*
- 2. The schedule for inspection and reporting.*
- 3. The person or entity responsible for long-term O&M of the PCSM BMPs.*
- 4. How access to the BMPs will be achieved.”*