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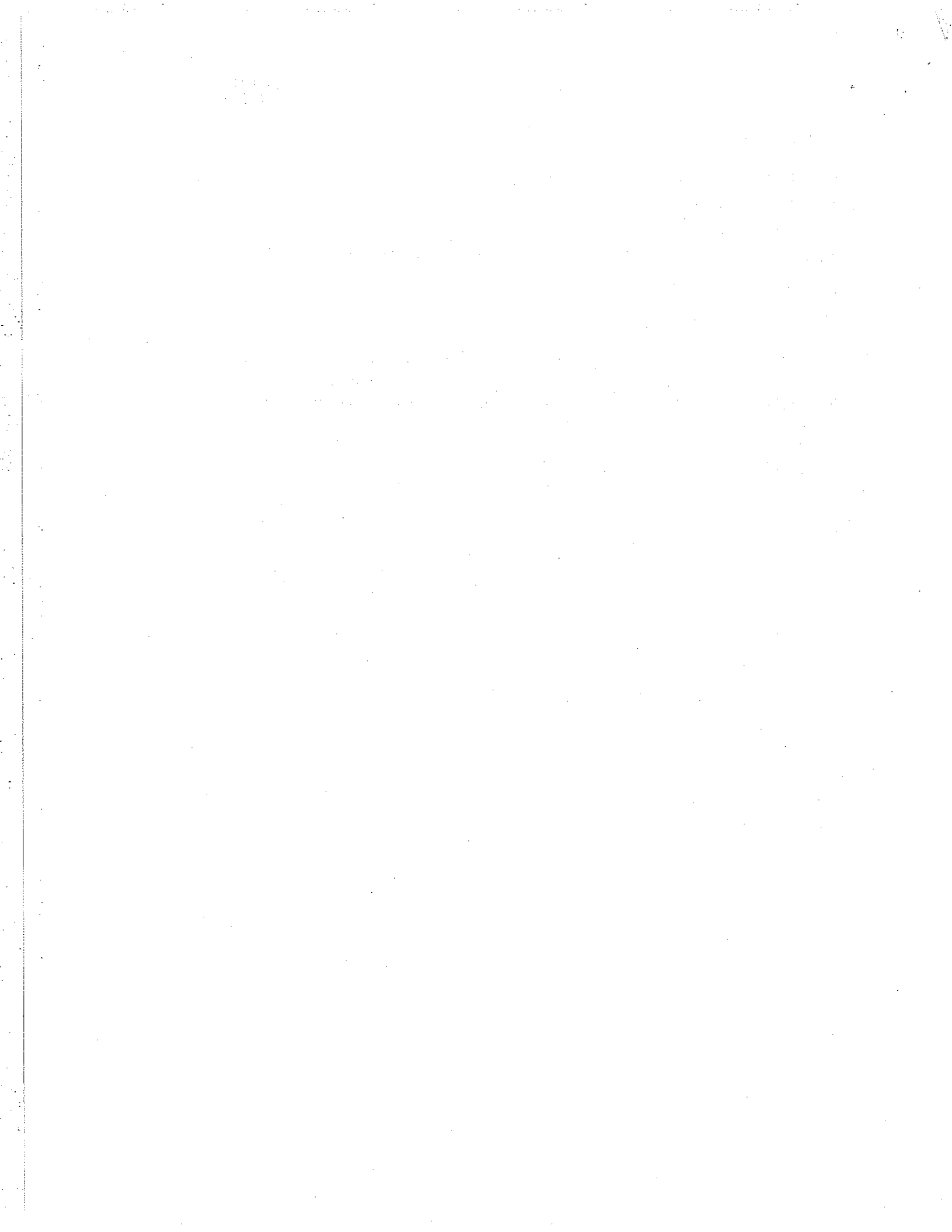
Chambers, Laura M.

From: Deisch, Phillip S [PSDeisch@spectraenergy.com]
Sent: Monday, November 30, 2009 5:14 PM
To: EP, RegComments
Subject: PROPOSED RULEMAKING [25 PA. CODE CH. 102] Erosion and Sediment Control and Stormwater Management [39 Pa.B. 5131]

To: Environmental Quality Board

Attached please find a letter of comment on the Proposed Rulemaking: [25 PA. CODE CH. 102] Erosion and Sediment Control and Stormwater Management [39 Pa.B. 5131]. This letter is submitted on behalf of Spectra Energy Transmission, LLC. Also, attached as a separate file is a Summary of our comments.

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November 30, 2009

VIA ELECTRONIC MAIL
RegComments@state.pa.us

The Honorable John Hanger, Chairperson
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17101-2301

**Re: Pennsylvania Department of Environmental Protection's Draft
Erosion and Sediment Control and Stormwater Management
Regulations, published in 39 Pa. Bulletin 5131 (August 29, 2009)**

Dear Secretary Hanger:

Spectra Energy Transmission, LLC ("Spectra Energy Transmission" or "Spectra"), a subsidiary of Spectra Energy Corp, appreciates this opportunity to submit for the Pennsylvania Environmental Quality Board's ("Board" or "EQB") consideration the following comments and objections regarding the Proposed Rulemaking on Erosion and Sediment Control and Stormwater Management, 39 Pa. Bulletin 5131 (August 29, 2009), 25 Pa. Code ch. 102 ("Draft Regulations"). Spectra requests that the Environmental Quality Board ("EQB") include these comments and objections in the public record and that the EQB consider these comments and objections when it is deliberating the final language of the Draft Regulations.

Background

Spectra Energy Corp operates one of the largest natural gas transportation systems in North America, encompassing more than 19,000 miles of transmission pipelines and 285 billion cubic feet (Bcf) of storage capacity. In the United States, Spectra Energy Corp, through its subsidiary, Spectra Energy Transmission, LLC, operates interstate natural gas transmission and storage operations, including the following operations within Pennsylvania:

- Texas Eastern Transmission which transports up to 6.5 Bcf per day from producing fields in the Gulf Coast region of Texas and Louisiana to high-demand markets primarily in the Northeastern U.S. The pipeline comprises 8,700 miles of onshore pipe and 100 miles of pipe into the Gulf of Mexico. Texas Eastern has almost 2,000

miles of pipeline in Pennsylvania, 17 compressor stations, and underground natural gas storage: Oakford Storage Field (50% ownership) and Leidy Storage Field (25% ownership) providing 56 billion cubic feet of natural gas storage capacity.

- Steckman Ridge, LP through which Spectra has significant gas reservoir storage capabilities. Spectra has a 50% interest in Steckman Ridge. This facility provides over 10 billion cubic feet of natural gas storage capacity.

Spectra Energy Transmission's operations in Pennsylvania are in the following counties: Adams, Armstrong, Bedford, Berks, Blair, Bucks, Cambria, Centre, Chester, Clinton, Cumberland, Delaware, Fayette, Franklin, Fulton, Greene, Huntingdon, Indiana, Juniata, Lancaster, Lebanon, Montgomery, Northampton, Mifflin, Perry, Schuylkill, Somerset, Washington, Westmoreland, and York, Counties. Texas Eastern provides interconnections for Marcellus Shale producers in Pennsylvania. Customers that we deliver natural gas to in Pennsylvania include: Borough of Chambersburg; Carnegie Natural Gas Company; Columbia Gas of Pennsylvania; Equitrans, Inc.; PECO Energy; Penn Fuel Gas, Inc.; Philadelphia Gas Works; The Peoples Natural Gas Co.; Three Rivers Pipeline; T.W. Phillips Gas & Oil Co.; UGI Utilities; and PPL Energy.

Spectra Energy Transmission's operations have created and sustain over 200 permanent employees in Pennsylvania. Our expansion projects generate construction-related jobs and revenue for local contractors and suppliers. Spectra Energy Transmission's annual tax payments to Pennsylvania exceed \$8.5 million.

Comments and Objections

I. The EQB should extend the comment period on the Draft Regulations and consider withdrawing the Draft Regulations in light of U.S. EPA's issuance of Final Effluent Limitations Guidelines for Discharges for the Construction and Development Point Source Category, 40 CFR Part 450, published on November 23, 2009.

On November 23, 2009, U.S. Environmental Protection Agency issued its Final Effluent Limitations Guidelines for Discharges for the Construction and Development Point Source Category, 40 CFR Part 450. According to the preamble to EPA's new regulations:

EPA is today promulgating effluent limitations guidelines (ELG) and new source performance standard (NSPS) for the C&D [Construction and Development] point source category. EPA is promulgating a series of non-numeric effluent limitations, as well as a numeric effluent limitation for the pollutant turbidity. All construction sites will be required to meet the series of non-numeric effluent limitations. Construction sites that disturb 10 or more acres of land at one time will be required to monitor discharges from the site and comply with the numeric effluent

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limitation. Preamble at 12 (II. Purpose & Summary of the Final Rule).

According to the Preface to the Draft Regulations, DEP has attempted to incorporate the Federal program into its Draft Regulation program:

The Federal Clean Water Act, NPDES Program includes regulatory requirements for stormwater discharges associated with construction activities. Pennsylvania is delegated administration of the NPDES program by the Environmental Protection Agency (EPA). Chapter 102 provides the regulatory framework for the stormwater construction portion of the NPDES program in this Commonwealth. The Federal requirements for stormwater construction were promulgated by the EPA in two phases (Pennsylvania compliance required by 1992 and 2002, respectively). *The Chapter 102 amendments in 2000 included the first phase "Phase I" of these NPDES requirements. In order to maintain delegation of the NPDES program and to be compliant with Federal law, Pennsylvania is incorporating the second phase "Phase II" of the Federal requirements in this proposed rulemaking.*

39 Pa. Bulletin 5131, Preface § D (Incorporation of updated Federal requirements) (emphasis added).

In fact, there are numerous places in the Draft Regulations that reference the Federal mandates. While Spectra Energy Transmission does not at all fault DEP for the unfortunate timing of the release of EPA's massive regulatory package (it is 251 pages long), in the one week prior to the close of the public comment period we think that there is no way that the regulated community—or DEP for that matter—can adequately review all 251 pages of the new EPA regulatory package and determine whether the new EPA regulations are consistent with or contradict the Draft Regulations. Furthermore, even if the new EPA regulations do not directly contradict the Draft Regulations, it is very likely that there will be unintended inconsistencies and interactions between the new EPA regulations and the Draft Regulations. Spectra Energy Transmission believes it is in its interest and the public interest for DEP's Draft Regulations to be consistent with EPA's new regulations. If DEP is going to embark on a significant new regulatory program, it ought to make sure that this new program does not create significant problems with the Federal program to the detriment of Pennsylvania. We suggest that a reasonable extension be provided so that all stakeholders in this rulemaking can adequately evaluate the proposed rules in light of the new Federal rules.

Spectra Energy Transmission urges the EQB to extend the review period for the Draft Regulations for at least 60 days to enable the regulated community and DEP to evaluate the impact of EPA's new regulations. Furthermore, Spectra Energy Transmission believes that DEP and the EQB ought to evaluate the Draft Regulations in light of the new EPA regulations and

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should withdraw the regulatory package until it can be evaluated in light of the new EPA regulations.

II. The Draft Regulations need to be clarified so that it is clear that construction, placement and maintenance of pipelines in the Riparian Forest Buffer area are permitted by the regulations.

Pipelines travel through all kinds of terrain and cross many streams. Owing to the fact that there are many streams that pipelines must cross that are designated "Special Protection" waters (including Exceptional Value streams) of the Commonwealth, Spectra Energy Transmission is very mindful of our obligations to work in an appropriate manner so as not to degrade those streams (or any others) when we must cross those streams or conduct maintenance activities on our pipelines in or near those waterways.

Riparian forest buffer requirements are now proposed in the regulations for all Exceptional Value watersheds. 25 Pa. Code §102.14 (Proposed). The new regulations mandate that buffers of both "undisturbed forest" and "managed forest" be maintained adjacent to the waterway. For linear development that crosses a stream (e.g. roads, bridges, pipelines), this requirement would effectively block all such development without an exception to the regulation. The draft regulation appears to provide such an exception; however, its language is unclear and needs to be improved. The following language is in the current draft of the regulations:

The following practices and activities are acceptable in the riparian forest buffer when permitted by the Department:

- (i) Construction or placement of roads, bridges, trails, storm drainage, utilities or other structures.
- (ii) Water obstructions or encroachments.

25 Pa. Code § 102.14(e)(4) (Proposed).

Spectra Energy Transmission has three concerns with this draft regulation. First, the use of the term "when permitted by the Department" makes it appear that the Department has the discretion to "permit" or "allow" the activities contained in subsections (i) and (ii) over and above the requirements contained in other regulations. We do not understand the Department's regulatory package to be providing for an *additional* permit, rather it is our understanding that the activities are to be allowed (without regard to the riparian forest buffer requirement) when another permit has been issued by DEP for that activity (e.g., a stream crossing or wetlands permit).

Second, it is important that the regulations make it clear that maintenance activities are also permitted in such riparian forest buffer zones. This kind of activity happens often. It is not enough simply to allow construction or placement of such facilities, since maintenance activities must also take place.

Finally, the use of the term "utilities" is inadequate as there may be times when a pipeline is not a regulated utility. Spectra Energy Transmission believes the regulation ought to specifically mention pipelines and related structures. The following is our suggested revision to the regulation:

The following practices and activities are allowed in the riparian forest buffer when the Department has issued a permit for that activity under the appropriate program:

- (i) Construction, placement or maintenance of roads, bridges, trails, storm drainage, utilities, pipelines or other structures.
- (ii) Water obstructions or encroachments.

III. The Draft regulations sweep into the definition of "Oil and gas activities" transmission facilities when it appears that the intention was to regulate oil and gas exploration and production operations rather than interstate natural gas pipelines.

"Oil and gas activities" is defined as:

Earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities. 25 Pa. Code § 102.1 (Proposed).

This is a new definition. While it is not clear that DEP did not intend to include oil and gas transmission facilities (i.e. pipelines) in this definition, it is patently obvious that the transmission of natural gas is a very different kind of activity than oil and gas exploration and the related activities contained in the proposed definition. The news has been full of stories regarding the Marcellus Gas Play and all of the activity associated with the exploration and processing of that important natural resource.

The transmission of oil and gas in pipelines is a significantly different activity than the exploration and processing of those natural resources. Most environmental regulatory programs recognize a distinction between production operations and downstream transmission, e.g. RCRA. There is nothing particularly different about the transmission of oil and gas from other linear construction projects that are not specially regulated by the Draft Regulations. For example, there are no special regulations for water pipelines, storm sewers, sanitary sewers, fiber optic cables, electric transmission lines, telephone lines and similar linear construction projects. Further, the proposed Draft regulations should recognize that interstate natural gas pipelines, unlike these other linear facilities, and unlike oil or refined liquid product lines, are subject to the pervasive regulation of the Federal Energy Regulatory Commission ("FERC"), including the rigorous construction supervision authority of the FERC. The new Federal regulations in 40 CFR 450.10 (b) expressly exempt the construction of interstate natural gas transmission pipelines from the numeric discharge standards in the new regulations. As explained on pages 45-46 of the Preamble to the pre-publication version of the new Federal rules:

Based on the unique regulatory circumstances of interstate natural gas pipeline construction projects EPA has chosen not to have the numeric limitation and monitoring requirements of 40 CFR 450.22(a) apply to discharges associated with the construction of natural gas pipelines. This exemption only applies to discharges associated with construction of interstate natural gas pipelines that are under the jurisdiction of the Federal Energy Regulatory Commission (FERC). EPA determined this was appropriate due to the comprehensive regulatory program that FERC requires and enforces for these projects. Through its program, FERC requires a variety of erosion and sediment controls to be implemented during construction, some of which are more stringent than those contained in today's rule. FERC conducts site-specific reviews to establish the allowable area of disturbance for project construction and dictates the manner in which construction of these projects can proceed. Typical requirements would include minimizing the amount of time that soils are allowed to be exposed, managing the discharges from trench dewatering, limiting the amount of vegetation that can be cleared adjacent to streams and wetlands, and requiring successful revegetation of project areas. FERC has been requiring these projects to implement its erosion and sediment control program since 1989. Thus, it is a well-developed regulatory program that includes stringent requirements, oversight, public participation, and onsite inspection. EPA does not want to limit the flexibility of FERC to implement its program by imposing numeric limitations on these unique projects.

Spectra Energy Transmission requests that the EQB delete the reference to "transmission facilities" in the definition of "oil and gas activities" or specifically exempt the construction of interstate natural gas transmission facilities under FERC jurisdiction from the provisions of the Draft regulations pertaining to oil and gas activities in light of the "unique regulatory circumstances" of these projects.

IV. The proposed erosion and sediment control requirements would impose inspection, monitoring and reporting requirements that would be infeasible for lengthy linear projects and would be inconsistent with EPA's new Federal regulations and the FERC's construction requirements for interstate natural gas pipelines.

Spectra Energy Transmission has several concerns regarding new provisions of the erosion and sediment control regulations. Where earth disturbance activity may result in a discharge to a water classified as High Quality or Exceptional Value, the person proposing the activity is required to "use nondischarge alternatives and ABACT BMPs to maintain and protect the water from degradation." 25 Pa. Code § 102.(b)(6)(x) (Proposed). If made final, this provision would require interstate natural gas pipeline construction projects to disturb significant

additional amounts of land for retention ponds, thus creating a larger project footprint. EPA's new regulations specifically exempt interstate gas pipelines from similar requirements. See Preamble to the pre-publication version of the new Federal rules at 44-45. Spectra Energy Transmission strongly urges the EQB to adopt the EPA's approach, or, in the alternative, use a BMP alternative that would avoid construction activities that would require a large earth disturbance footprint. We suggest considering incorporating by reference the anti-degradation requirements of 25 Pa. Code § 93.4a-d, as this would provide for maximum flexibility. As noted in Blue Mountain Preservation Association, Inc. v. DEP, EHB No. 2005-077-K (Sept. 7, 2006), chapter 102 does not currently incorporate the entirety of the antidegradation regulations. Our proposed change would meet DEP's antidegradation goals while providing both the regulated community and DEP with maximum flexibility.

In addition, while existing regulations require that BMPs be inspected on a weekly basis, the proposed regulations require a maintenance program for the "operation and maintenance of BMPs" and the inspection of BMPs "after each stormwater event." Another new requirement mandates the "completion of a written report documenting each inspection and all BMP repair and maintenance activities." 25 Pa. Code § 102.4(b)(4)(x) (Proposed). These requirements are infeasible for significant linear projects such as pipelines which may involve miles of project area. Spectra Energy Transmission urges the Board to revise the Draft regulations so that linear projects and specifically natural gas pipeline projects already subject to the FERC's construction requirements, not be subjected to infeasible monitoring requirements.

V. The draft permit requirements place undue burdens on pipeline projects.

With respect to stormwater discharge associated with construction activities, in addition to all other requirements, "for projects proposed in special protection watersheds [the project proponent] shall evaluate and use BMPs in accordance with the antidegradation requirements of Chapter 93 (relating to water quality standards) regardless of whether the discharge is new, additional or increased." 25 Pa. Code §102.5(a)(3) (Proposed).

We urge the Board not to over-rely on the use of BMPs in a manner that is not intended by the Chapter 93 regulations. The Board should note that in Crumb Creek Neighbors v. DEP, EHB No. 2007-287-L (Oct. 22, 2009) the EHB held that direct discharges of stormwater to an EV stream "are not necessarily prohibited" by DEP's regulations. Slip op. at 17. Further, as the EHB has held, "[t]here is no reason to assume the discharges [of stormwater] will result in pollutant loading [to the EV stream]." As the EHB has noted, "large amounts of stormwater would have been flowing off of the site to the stream in a five-year storm even if the site had remained undeveloped." Finally, "it is not incumbent upon [the developer] to *improve* the quality of [the EV stream] during large storm events." Id. at 18 (emphasis in original).

It ought to be enough to require that a pipeline utilize an E & S Plan, rather than an E & S Permit. Nevertheless, since the draft regulations imprecisely lump natural gas transmission in with oil and gas exploration, the draft regulations will add significant additional regulatory burden on Spectra Energy Transmission. The Draft regulation provides: "A person proposing oil and gas activities that involve 5 acres (2 hectares) or more of earth disturbance over the life of

the project is required shall obtain an E & S Permit under this chapter prior to commencing the earth disturbance activity.” 25 Pa. Code §102.5(c) (Proposed). We request that natural gas pipelines be removed from the definition of oil and gas activities or that the requirement of obtaining an E & S Permit be limited to exploration activities.

VI. Postconstruction stormwater management (“PCSM”) requirements are unworkable for significant linear projects unless made more flexible.

The proposed regulations contain extensive new requirements for PCSM. 25 Pa. Code §102.8 (Proposed). In particular, the requirements for High Quality and Exceptional Value waters are very burdensome. The draft regulations provide as follows:

When a PCSM Plan is being developed for an activity that may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value under Chapter 93, the person proposing the activity shall use nondischarge and ABACT BMPs to maintain and protect the water from degradation.” 25 Pa. Code §102.8(h) (Proposed).

Rather than requiring the use of nondischarge and ABACT BMPs, we suggest that such BMPs be “considered.” In many instances it may be impractical to use such BMPs. In that case, then the requirement ought to be waived and the project developer should be permitted to use best efforts to minimize impact to the receiving water.

The proposed regulations require:

A licensed professional or a designee shall be present onsite and be responsible during critical stages of implementation of the approved PCSM Plan including underground treatment or storage BMPs, structurally engineered BMPs, or other BMPs as deemed appropriate by the Department. 25 Pa. Code §102.8(k) (Proposed).

This mandate is both impractical and costly. Further, it is redundant for interstate natural gas transmission pipeline construction projects under FERC regulation. Such projects already must have environmental inspectors present continually during the project who are specifically mandated to ensure the implementation of the erosion and sedimentation control plans for the project. The erosion and sediment control plans, the environmental inspector plan, and related features of the project are all embraced in the FERC review and approval. Additional requirements are prescribed by Army Corps of Engineer requirements as well as the existing state requirements. Overlaying additional requirements to utilize “a licensed professional” merely adds costs without additional benefits for environmental protection. We urge the Board to take cognizance of the existing regulatory framework in which interstate natural gas transmission construction projects already take place and not to layer on to that framework additional requirements that have no additional environmentally protective features.

The proposed regulations also require that the landowner of the property where the PCSM BMPs are located shall be responsible for them, unless a different person is approved by DEP. Further, the same regulation requires that a deed for any property containing a PCSM BMP shall identify that structure and provide notice that the responsibility for operation and maintenance of the PCSM BMP is a "covenant that runs with the land and that is enforceable by subsequent grantees." 25 Pa. Code §102.8(m) (Proposed). This proposal is completely unworkable in the context of linear construction, such as pipelines. Typically, all the pipeline company acquires is an easement to cross the property of the landowner. While that easement contains significant rights for the pipeline company, record title to the property remains vested in the landowner. It would be impractical to the point of being impossible to require that the landowner bear the responsibility for the operation of the PCSM BMP. Further, the sites of natural gas pipeline construction are typically fully restored to the original surface within a short time. Such restoration is required by the FERC certificate authorizing the construction project. This restoration makes the need for a covenant running with the land unnecessary.

VII. E & S Plans ought to be consistent from Conservation District to Conservation District which can be accomplished either by mandating uniform E & S Plans or allowing for statewide E & S Plans for linear projects such as pipelines.

Linear development projects, like pipelines, typically traverse many municipal and county boundaries. This requires the preparation of numerous E & S Plans, most of which are virtually identical, at great cost to the company. Spectra Energy Transmission has found that Conservation Districts sometimes impose additional, and in our view unnecessary, mandates on these plans. This makes it difficult to plan and implement a linear project crossing many county boundaries.

Currently, there are numerous Conservation Districts that have a say in E & S controls and stormwater management for these projects. Since the Department now is proposing to make (minor) revisions to 25 Pa. Code § 102.41, this would be an opportune time to impose uniformity on the requirements imposed by the Conservation Districts. This could be accomplished either by mandating uniform E & S Plans at the Conservation District level or by allowing statewide E & S Planning that would be reviewed by DEP. The Conservation Districts would still have a role in the inspection and enforcement of uniform or statewide E & S Plans. Such uniform or statewide planning would be accomplished once, which would benefit both DEP (which would only have to review a single E & S Plan for a linear project) and the regulated company, which would only have to prepare a single or uniform E & S Plan. The public would be protected as the plan would still have to be implemented by the company and enforced by the Conservation District.

VIII. The definitions in the Draft regulations are inconsistent with the definitions in other provisions of the law and ought to be reconciled so that they are the same as similar regulatory terms.

The Draft Regulations contain a number of definitions that use the same defined term that appears in other DEP regulations, but uses a different definition than the definition

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in another chapter of the Department's regulations. It is likely that there is DEP guidance and interpretative Environmental Hearing Board or Court decisions that interpret these previously defined terms. Instead of *clarifying* DEP's regulatory requirements, this unfortunate use of a new definition will greatly confuse the Department and the regulated community owing to the existence of different meanings for the same defined terms. The EQB should not adopt regulations that contain terms that are defined differently than pre-existing terms. All terms in the Draft regulations should conform to existing terms in the regulations and statutes.

1. "BMPs" are defined differently in the Draft Regulations than they are defined in DEP's NPDES regulations. 25 Pa. Code § 92.1.

2. "Person" is defined differently in the Draft Regulations than the definition of "person" found in DEP's NPDES regulations. 25 Pa. Code § 92.1. Both provisions are different than the definition contained in The Clean Streams Law. 35 P.S. § 691.1.

3. "Point source" is defined differently in the Draft Regulations than it is defined in DEP's NPDES regulations. 25 Pa. Code § 92.1.

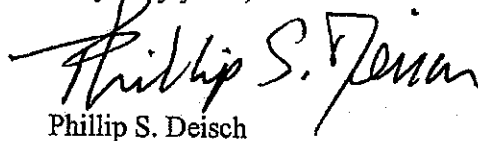
Spectra Energy Transmission strongly urges the EQB to revise these and any other definitions to coincide, word-for-word, with the definitions contained in other sections of DEP's regulations.

Conclusion

Spectra Energy Transmission appreciates the opportunity the EQB has provided for allowing us to provide these comments and objections. We believe that it is important for the EQB that this proposed regulation be written so as to achieve the intended environmental benefits without creating undue confusion and burden in the regulated community. We reiterate our suggestion that the Board put on hold the finalization of these Draft Regulations and that it conduct a thorough review the Draft Regulations in light of EPA's new regulations. At the same time, the public ought to be permitted the opportunity to have more than a scant week (over the Thanksgiving holiday, nonetheless) to review and comment on the package of regulations in light of EPA's pronouncement.

If the EQB or DEP has any questions, please feel free to contact me.

Very truly yours,



Phillip S. Deisch

**SUMMARY OF COMMENTS OF
SPECTRA ENERGY TRANSMISSION, LLC
Submitted on November 30, 2009**

Pennsylvania Department of Environmental Protection's Draft Erosion and Sediment Control and Stormwater Management Regulations, published in 39 Pa. Bulletin 5131 (August 29, 2009)

- I. The EQB ought to extend the comment period on the Draft Regulations and consider withdrawing the Draft Regulations in light of U.S. EPA's issuance of Final Effluent Limitations Guidelines for Discharges for the Construction and Development Point Source Category, 40 CFR Part 450, published on November 23, 2009.**
- II. The Draft Regulations need to be clarified so that it is clear that construction, placement and maintenance of pipelines in the Riparian Forest Buffer area are permitted by the regulations.**
- III. The Draft Regulations sweep into the definition of "Oil and gas activities" transmission facilities when it appears that the intention was to regulate oil and gas drilling and not pipelines. FERC regulated natural gas pipeline construction should be excluded from the "oil and gas activities" requirements.**
- IV. The proposed erosion and sediment control requirements would impose inspection, monitoring and reporting requirements that would be infeasible for lengthy linear projects and would be inconsistent with EPA's new Federal regulations and the FERC's construction requirements for interstate natural gas pipelines.**
- V. The draft permit requirements place undue burdens on pipeline projects.**
- VI. The Postconstruction stormwater management ("PCSM") regulation should be revised to be more flexible.**
- VII. E & S Plans ought to be consistent from Conservation District to Conservation District which can be accomplished either by mandating uniform E & S Plans or allowing for statewide E & S Plans for linear projects such as pipelines.**
- VIII. The definitions in the Draft Regulations are inconsistent with the definitions in other provisions of the law and ought to be reconciled so that they are the same as similar regulatory terms.**

