



October 28, 2019

Submitted Via eComment (ecomment@pa.gov)

Patrick McDonnell, Secretary
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063

Re: Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges of Stormwater Associated with Small Construction Activities (PAG-01), 49 Pa. Bull. 5642 (Sept. 28, 2019).

Dear Secretary McDonnell,

On behalf of Citizens for Pennsylvania's Future (PennFuture) and its members, we submit these comments on the draft National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges of Stormwater Associated with Small Construction Activities, PAG-01 (PAG-01 or Draft Permit) prepared by the Pennsylvania Department of Environmental Protection (DEP or the Department). The Department is proposing a new general permit for stormwater discharges associated with small construction activities. In the comments below, PennFuture identifies some deficiencies in the Draft Permit regarding the effectiveness of the new permit, permit enforceability, and uniformity issues with DEP regulations. Accordingly, PennFuture suggests several changes or additions intended to clarify the provisions of the Draft Permit.

PennFuture is a public interest membership organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture strives to protect our air, water and land, and to empower citizens to build sustainable communities for future generations. One focus of PennFuture's work is to improve and protect water resources and water quality across Pennsylvania through public outreach and education, advocacy, and litigation. One area that has been at the heart of PennFuture's water resource protection work is stormwater management, including discharges of stormwater associated with construction activities.

Stormwater runoff is a major contributor to water pollution. In urban areas, stormwater runoff flows from the streets, parking lots, or other impervious surfaces and into storm drains, absorbing a variety of pollutants along the way. This contaminated water has the potential to severely impact water quality. Stormwater runoff associated with construction activities can be particularly harmful. For example, earth disturbance activities associated with construction, such as grading, often produce large amounts of sediment that can be transported to local waters via

Northeast: 425 Carlton Road
Suite 1
Mount Pocono, PA 18344

Southeast: 1429 Walnut Street
Suite 400
Philadelphia, PA 19102

Central: 610 North Third Street
Harrisburg, PA 17101

Southwest: 200 First Avenue
Suite 200
Pittsburgh, PA 15222

Website: www.pennfuture.org

stormwater discharges. Increased sediment in waterbodies has the potential to cause biological, chemical, and physical harm to a watershed. Thus, properly managing the effects of stormwater discharge is essential.

Because of the potential negative impacts of runoff and the limited duration of intensive activity at construction sites, properly permitting this activity is particularly important. Typically, NPDES permits limit, monitor, and report discharge, ensuring the water quality of the receiving water is acceptable. While individual NPDES permitting can be a lengthy procedure, in certain specific circumstances general permits can streamline this management process. General permits cover multiple dischargers, which operate in a similar field and discharge similar pollutants, such as discharges related to construction activities.

Despite its one-size-fits-all nature however, a general permit must serve its purpose—manage the discharge of pollutants. Here, PAG-01 suffers from several problems that result in a general permit that is ineffective in ensuring protection of Pennsylvania’s waters. The following comments address issues with the Draft Permit to provide for a more effective general permit that benefits regulators, permittees, and citizens alike.

1. DEP Must Assess Cumulative Impacts in Order to Comply with Pennsylvania’s Environmental Rights Amendment.

As a new permit, DEP should ensure the effectiveness of PAG-01 and must comply with the Pennsylvania Constitution. In creating the Draft Permit, DEP set out to establish a simplified permit that will speed up the permitting process. However, this cannot be done at the expense of the environment. Article I, Section 27 of the Pennsylvania Constitution—the Environmental Rights Amendment—provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The text establishes a duty for the Commonwealth government to prohibit the degradation, diminution, and depletion of Pennsylvania’s public natural resources, whether the harms result from direct state action or the state’s permitting of private parties.¹ As trustee of the state’s natural resources, the Commonwealth must protect “equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.”²

In order to fulfill the obligations of Pennsylvania’s Environmental Rights Amendment, the Department must evaluate and minimize cumulative impacts of PAG-01. Although the Draft

¹ *Robinson Township v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013) (plurality) (“*Robinson Twp.*”).

² *Robinson Twp.*, 83 A.3d at 959 (Pa. 2013).

Permit is designed to address construction projects disturbing under five acres, it does nothing to consider or mitigate the impacts of numerous small projects located in the same watershed and potentially allows for pollution to be generated from a significantly larger area than the limited earth disturbance area.

As a trustee of our natural resources, the Department must ensure that, as multiple projects gain coverage under the Draft Permit, cumulatively adverse impacts do not result. The Draft Permit does not present any mechanism through which the Department can make this assurance. Per the Pennsylvania NPDES regulations, a Notice of Intent for coverage under general permits “must . . . demonstrate that the discharge from the point sources, individually and cumulatively, will not cause or contribute to an applicable water quality standard.”³ The inclusion of this information provides some, all be it limited, basis for the Department to evaluate cumulative impacts. However, neither this Draft Permit, nor its accompanying Notice of Intent, have any mention of such potential cumulative impacts, nor even indication of relevant attainment status of water quality standards of receiving waters. With no information about environmental impacts on receiving waters, DEP is left completely unable to evaluate cumulative impacts. Thus, PAG-01 has the potential to result in cumulative impacts to Pennsylvania’s natural resources without any analysis or mitigation approaches. Adverse water quality impacts would occur but would be unknown and unmonitored. Without providing assurance that cumulative impacts of multiple permittees are addressed, the Draft Permit fails to meet the obligations of the Environmental Rights Amendment.

Furthermore, the PAG-01, as currently drafted, has the potential to allow projects that result in significant additional pollution from areas beyond the limited “earth disturbance area” of less than five acres that the Draft Permit authorizes. This is because the Draft Permit allows for stormwater from not only the earth disturbance area but the “project site” and “off-site support activities” as well. “Project site” includes the entire area of activity, development, lease or sale including the area of earth disturbance activity, the area planned for an earth disturbance activity, and other areas which are not subject to an earth disturbance activity.⁴ The Draft Permit defines “off-site support activities” as activities providing support for construction and earth disturbance activities covered by this General Permit. Part B.VII.E of the Draft Permit requires projects to be on the same or contiguous tax parcels except for off-site support activities. DEP should include additional controls or limitations or, more preferably, eliminate this potential loophole in the permit and to ensure that additional stormwater pollution is not allowed to enter our waters without meeting NPDES permit requirements.

³ 25 Pa. Code § 92a.23(a).

⁴ 25 Pa. Code § 102.1.

2. DEP Must Ensure PAG-01 Complies with the Clean Water Act and Clean Streams Law.

a. DEP Must Ensure that Projects Do Not Cause or Contribute to Violations of Water Quality Standards.

A permit is not available for discharges that individually or cumulative have the potential to cause or contribute to a violation of an applicable water quality standard.⁵ The Draft Permit must include this condition in its eligibility criteria and then enforce it appropriately. The Draft Permit does note that permit coverage will be denied if “stormwater discharges [] individually or in combination with other similar discharges are or have the potential to be a contributor of pollution”⁶ or when “stormwater discharges [] are not in compliance or will not result in compliance with an applicable effluent limitation or water quality standard.”⁷ However, the Draft Permit provides no mechanism through which DEP will evaluate compliance with these conditions. Indeed, the attainment status of water quality standards of receiving waters is nowhere to be found on the Notice of Intent form.

For a body of water identified as impaired under section 303(d) of the CWA and for which a total maximum daily load (TMDL) has been develop, an NPDES permit may not be issued unless the permitting authority finds that the new source or discharge will not cause or contribute to the violation of water quality standards and will not violate the TMDL.⁸ This is generally accomplished by assurance that the discharge from the construction activity is in compliance with waste load allocations (WLAs) of the TMDL. Therefore, DEP should build into the Draft Permit requirements to ensure that permittees take actions necessary to meet the WLAs in approved TMDLs. Pollutant loading from construction sites are point sources requiring NPDES permits and are therefore part of the WLA and cannot be part of the non-point source load allocation for a waterway. Incorporating TMDL requirements into a construction stormwater permit would require post-construction stormwater management (PCSM) plans to be tailored to a specific site.⁹ PennFuture understands that this may be difficult in the context of a general permit and DEP may find it more appropriate to issue individual permits that are better tailored to meeting water quality standards.¹⁰ However, discharges of stormwater associated with construction activities are point sources, which must be responsive to waste load allocations in TMDLs.

⁵ 25 Pa. Code § 92a.54(a)(7), 40 C.F.R. § 122.4(i).

⁶ Draft Permit, Part A.I.D.1.

⁷ Draft Permit, Part A.I.D.6.

⁸ See 40 C.F.R. § 122.4(i).

⁹ PennFuture acknowledges that there may be difficulty in translating numeric waste load allocations from a TMDL into appropriate BMPs given the Draft Permit does not contain numeric effluent limits, but rather focuses on BMP implementation. However, discharges of stormwater associated with construction are point sources, which must be responsive to waste load allocations in TMDLs and thus are not considered part of a waterway’s load allocation.

¹⁰ See EPA Revised memo Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs, Nov. 26, 2014, *available at* https://www.epa.gov/sites/production/files/2015-10/documents/epa_sw_tmdl_memo.pdf.

Where TMDL waste load allocations are not in place, the burden rests on the Department to ensure that each permittee as well as the general permit's implementation as a whole does not cause or contribute to violations of water quality standards. For example, where the cause of an impairment is sediment—a major pollutant of concern in the construction stormwater context—a construction site discharging into the water is *contributing to* the impairment. By definition, “impaired” waterbodies already receive too much pollution; the new construction permittee adding sediment is contributing to that impairment—thus necessarily violating the regulatory prohibition on contributing to an applicable water quality standard.¹¹ Thus, in order to rectify these problems in the Draft Permit, DEP must incorporate additional controls on permittees discharging to impaired waters in order to meet the regulatory obligations.

Moreover, DEP cannot avoid its responsibility to ensure that permittees do not cause or contribute to impairments by relying on the claiming a lack of a specific sediment criteria set by the Environmental Protection Agency (EPA) and not subsequently incorporated into DEP's criteria.¹² Pennsylvania's regulations do set a general water quality criteria which mandates the control of turbidity,¹³ and therefore DEP must protect its waters by controlling turbidity in permitting decisions. Even though DEP does not have a specific numeric limit for sediment, the Department has options for creating effective permits that comply with the CWA and CSL. For example, DEP could include a narrative prohibition on discharges that cause or contribute to water quality standard violations.

b. DEP Should Include Mandatory Monitoring Requirements in this New General Permit.

As the first iteration of this new general permit, the Draft Permit should include monitoring in order to evaluate the permit's effectiveness at its expiration. Without this evaluation, the Draft Permit is left devoid of the ability to assure that cumulatively permittees do not adversely affect our natural resources. As the Draft Permit is currently written, “DEP *may* require monitoring of stormwater discharges”¹⁴ However, without assessment of potential cumulative impacts at the time permittees receive coverage (as described above) and no requirement to monitor within the permit, DEP will be left with no ability to assess the permit's effectiveness in complying with its legal obligations at the end of the permit's term. This is clearly insufficient. The Department should require more in order to evaluate the permits effectiveness and compliance with relevant law at the end of the permit term.¹⁵

¹¹ 25 Pa. Code § 92a.54(a)(7).

¹² The Department need not wait for EPA to set a sediment criteria before establishing its own.

¹³ 25 Pa. Code § 93.6(b).

¹⁴ Draft Permit, Part A.II.H (emphasis added).

¹⁵ Although 25 Pa. Code § 92a.61(b) gives DEP discretion in imposing reasonable monitoring requirements (“The Department *may* impose . . .” (emphasis added)), it is critical for the health of Pennsylvania's waters – and for DEP's compliance with the Environmental Rights Amendment – to require such monitoring in PAG-01.

c. DEP Must Express All Permit Requirements in Clear, Specific, and Measurable Terms.

The Department must clarify vague terms such as “minimize,” “reasonable steps,” and similar language within the Draft Permit. The CWA does not allow for “self-regulation” by NPDES permittees. Rather, the permitting authority, *not the permittee*, must determine which pollution reduction measures are necessary to comply with applicable technology-based and water quality-based effluent limitations.¹⁶ In 2016, the U.S. Environmental Protection Agency (EPA) explained in a rulemaking on remand of the Small Municipal Separate Storm Sewer System (MS4) General Permits regulations that MS4 general permits must establish pollution control requirements that are “clear, specific, and measurable.”¹⁷ Although the rulemaking revised only the rules for Small MS4 General Permit, and does not specifically address NPDES general permits for stormwater discharges associated with construction activities (such as the Draft Permit), the same underlying principles of NPDES permitting apply to both.

In the preamble to the small MS4 rulemaking, EPA expounded at length on what it means to have “clear, specific, and measurable” permit requirements.¹⁸ EPA released with the final rule a “Compendium of Clear, Specific and Measurable Permitting Examples.”¹⁹ The preamble and Compendium provide examples both of what would be considered “clear, specific, and measurable,” and what would not. Provisions that fail the test include:

- Permit provisions that simply copy the language of the [] regulations verbatim without providing further detail on the level of effort required or that do not include the minimum actions that must be carried out during the permit term.
- Permit requirements that include “caveat” language, such as “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary” or “as appropriate” unless defined.
- Permit provisions that preface the requirement with non-mandatory words, such as “should” or “the permittee is encouraged to”
- Permit requirements that lack a measurable component. For instance, permit language implementing the construction minimum control measure that requires inspections “at a frequency determined by the permittee” based on several factors. This type of provision includes no minimum frequency that can be used to measure adequacy and, therefore, would not constitute a measurable requirement for the purposes of the rule.

¹⁶ *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003); *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 498-502 (2d Cir. 2005).

¹⁷ 81 Fed. Reg. 89320 (Dec. 9, 2016).

¹⁸ *Id.* at 89334-37.

¹⁹ The Compendium, which includes an introduction and three separate parts, can be found here: <https://www.epa.gov/npdes/municipal-sources-resources>. Part 1 covers the “six minimum control measures,” Part 2 covers post-construction standards, and Part 3 covers water quality-based effluent limitations. https://www.epa.gov/sites/production/files/2017-01/documents/final_compendium_intro_document_508.pdf.

- “Provisions that require the development of a plan . . . but does [sic] not include details on the minimum contents or requirements for the plan, or the required outcomes, deadlines, and corresponding milestones”²⁰

Many of the provisions in the Draft Permit suffer these defects or are otherwise so vague that they impermissibly defer to the permittee to determine what stormwater pollution control measures sufficiently meet Clean Water Act requirements. These include, for example:

- Part B.I.F.—“The permittee shall take all *reasonable steps to minimize* or prevent any discharge in violation of this permit that has a *reasonable likelihood* of adversely affecting human health or the environment.”
- Part B.VII.G.1.—“The permittee shall identify all deficiencies in E&S or PCSM Plan implementation on Visual Site Inspection Reports and document the corrective action that will be taken to *mitigate* the deficiency.”

3. PCSM Plans Must Take Climate Change Into Account.

Part A.I.C.2. of the Draft Permit states that “[i]mplementation of [PCSM BMP] standards will satisfy the requirements of 25 Pa. Code § 102.8(g) to manage the net change in stormwater volume and water quality up to and including the 2-year/24-hour storm event” It is PennFuture’s understanding that in arriving at the applicable BMPs for this permit to comply with this standard, generally, the National Oceanic and Atmospheric Administration’s Atlas information, which is retrospective, was used in providing a standard deviation of historical 2-year/24-hour storm events. However, using this number does not account for the increased frequency and intensity of storm events resulting from climate change. Heavy rain events in the northeastern United States—including Pennsylvania—have increased 71% since the early 1990’s.²¹ Heavy rain fall over a short duration can present particular problems for stormwater runoff from exposed surfaces of construction sites, allowing it to collect significant sediment and other pollutants on its way to local waters. By only requiring that only the 2-year/24-hour storm to be managed, the Draft Permit provides the potential for significant impacts from stormwater runoff to go unregulated.²²

4. Miscellaneous suggestions:

- The definition section should explicitly define what is considered a “small construction activity.” Currently, the definition of “small construction activity” is

²⁰ 81 Fed. Reg. at 89335.

²¹ Lara B. Fowler et al., *Flood Mitigation for Pennsylvania’s Rural Communities: Community-Scale Impact of Federal Policies* 14 (2018); D.J. Wuebbles et al., *Climate Science Special Report: Fourth National Climate Assessment, Volume I* 10 (2018) (“Heavy rainfall is increasing in intensity and frequency across the United States and globally and is expected to continue to increase. The largest observed changes in the United States have occurred in the Northeast.”).

²² Furthermore, engineers generally use the peak standard deviation number. In the absence of incorporating information regarding the likely size of future storms, in order to be more protective, the higher end of the standard deviation should be used.

buried within the definition for “stormwater associated with small construction activity.” As a new permit specifically designed for “small construction activity,” it is important to clearly define the term.

- Reconsider some of the authorized non-stormwater discharges in section III.B. For example, III.B.4. allows discharges of “[w]ater used to wash vehicles and equipment where cleaning agents are not used.” This is under inclusive and should contain language like III.B.6. which allows discharges of “[e]xternal building washdown where cleaning agents are not used and external surfaces do not contain hazardous substances.” The additional caveat prohibiting discharges containing hazardous substances is more comprehensive.
- This permit should not apply to earth disturbance activities within a specified distance of waters of the Commonwealth. Earth disturbance activities physically alter the land and consequently affect the physiology of nearby waterbodies. Projects in close proximity to waterbodies have a higher likelihood of resulting in such impacts. Therefore, construction activities within a specified distance of waters of the Commonwealth should be required to apply for an individual permit.

Thank you for your consideration of these comments. Please feel free to contact us at 215.545.9694 if you have any questions.

Sincerely,



Kody Hines
Legal Intern



Alice R. Baker
Senior Attorney