

PROPOSED RULEMAKING

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CHS. 59 AND 59a]

Comment Period Extended for the Proposed Rulemaking on the Milk Sanitation

The Department of Agriculture (Department) recently provided notice of its intention to rescind the current regulation in 7 Pa. Code Chapter 59 (relating to milk sanitation) and establish a new Chapter 59a (relating to milk sanitation). This notice was published at 39 Pa.B. 4677 (August 1, 2009); and provided for a 30-day public comment period on the proposed regulations.

The Department gives notice that it will extend this public comment period by an additional 30 days, providing the total public comment period of 60 days. This public comment period began on August 1, 2009, and will run through September 30, 2009.

Interested persons may submit written comments regarding the proposed regulations to the Department of Agriculture, Bureau of Food Safety, Division of Milk Sanitation, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attention: Paul Hoge.

RUSSELL C. REDDING,
Executive Deputy Secretary

[Pa.B. Doc. No. 09-1609. Filed for public inspection August 28, 2009, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 102]

Erosion and Sediment Control and Stormwater Management

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code Chapter 102 (relating to erosion and sediment control and stormwater management). The amendments update agricultural planning and implementation requirements, update erosion and sediment (E & S) control requirements, incorporate the Federal Clean Water Act "Phase II" NPDES permit requirements for stormwater discharges associated with construction activities, include post construction stormwater management (PCSM) requirements, establish riparian forest buffer provisions, and include provisions for a permit-by-rule option.

This proposal was adopted by the Board at its meeting of June 16, 2009.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Kenneth F. Murin, Chief, Division of Waterways, Wetlands, and Stormwater Management, P. O. Box 8775, Rachel Carson State Office

Building, Harrisburg, PA 17105-8775, (717) 787-6827 or Margaret O. Murphy, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposal is available electronically through the DEP web site (<http://www.depweb.state.pa.us>).

C. Statutory Authority

The proposed rulemaking is being made under the authority of Sections 5 and 402 of The Clean Streams Law (35 P. S. §§ 691.5 and 691.402), which authorize the Department of Environmental Protection to formulate, adopt and promulgate rules and regulations that are necessary to implement the provisions of the act, specifically, to regulate accelerated erosion, sedimentation and stormwater runoff from earth disturbance activities to protect, maintain, reclaim and restore waters of this Commonwealth by requiring that accelerated erosion, sedimentation during construction, and volume, rate and quality of post construction stormwater runoff, be minimized and controlled; and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes the Board to promulgate rules and regulations that may be determined by the Board to be for the proper performance of the work of the Department; and Section 11 of the Conservation District Law (3 P. S. § 859(2)).

D. Background and Purpose

The existing E&S control regulations found in 25 Chapter 102 describe the requirements for controlling accelerated erosion and preventing sediment pollution from various earth disturbance activities. The purpose of Chapter 102 is to protect surface waters of this Commonwealth from sediment and stormwater pollution by requiring the use of best management practices (BMPs) that minimize accelerated erosion and sedimentation and manage post construction stormwater runoff, both during and after earth disturbance activities.

Since 1972, earth disturbance activities related to agricultural plowing and tilling, as well as, non-agricultural earth disturbance activities have been regulated under this chapter by requiring persons to develop, implement and maintain BMPs.

The proposed amendments elaborated in this preamble, incorporate specific language which enhance requirements related to agriculture; clarify existing requirements for accelerated E&S control; incorporate updated Federal requirements; update permit fees; codify PCSM requirements; add requirements related to riparian forest buffers; and introduce a permit-by-rule option.

Enhanced requirements related to agriculture

The scope of the agricultural section (§ 102.4(a)) is being enhanced beyond "agricultural plowing and tilling" to also include "animal heavy use areas." The requirements related to plowing and tilling are also being more clearly defined. The animal heavy use area provisions of the proposed rulemaking require responsible parties to develop and implement an E & S Control Plan (E & S Plan) that minimizes accelerated erosion and sedimentation.

Clarification of existing requirements for accelerated E & S control

Revisions to existing language are included in the proposed rulemaking to clarify definitions, plan requirements, Chapter 93 antidegradation implementation requirements, permitting and site stabilization.

Incorporation of updated Federal requirements

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 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.

Updated permit fees

The proposed rulemaking includes the NPDES permit fees specific to the stormwater construction program, and updates the fees for other (non-NPDES) permits that may be required under Chapter 102.

Codification of PCSM requirements

Permanent changes to the surface of the land resulting from earth disturbance activities also have the potential to cause pollution as that term is defined under both the federal Clean Water Act as well as the Clean Streams Law. This rulemaking proposes to include specific PCSM requirements, as a codification of existing practices in this Commonwealth. Since 2002, the Department has included PCSM requirements in the NPDES stormwater permitting program in response to the need for enhanced water quality protection, long-term stormwater management, streambed and streambank protection and as a flood control measure. The inclusion of PCSM requirements in this program is driven by the federal NPDES stormwater construction requirements, Environmental Hearing Board decisions, and is necessary to support implementation of stormwater management planning requirements for the Municipal Separate Storm Sewer System (MS4) NPDES program and the Pennsylvania Stormwater Management Act (32 P. S. §§ 680.1—680.17).

Addition of requirements related to riparian forest buffers

Riparian forest buffers are one of the most effective and efficient BMPs for preventing pollution both during and after earth disturbance activities, and provide natural, long-term sustainability for aquatic resource protection and water quality enhancement. This proposed rulemaking includes new requirements for protecting existing riparian forest buffers and for establishing new buffers. The rulemaking also proposes mandatory riparian forest buffers for projects permitted under Chapter 102 that contain, or are located along or within, 150 feet of Exceptional Value (EV) rivers, perennial and intermittent streams, or lakes, ponds, or reservoirs. Requirements for buffer conservation, construction and maintenance are included.

Introduction of a permit-by-rule option

The proposed amendments include a new permitting option for low impact, low risk projects that incorporate riparian forest buffers. This permit-by-rule could be used to authorize qualifying projects that require either an NPDES permit or E & S control permit under this chapter. The proposed permit-by-rule balances environmental protection for this Commonwealth with predictability in permitting for the applicant. The permit-by-rule includes eligibility criteria to limit applicability to "low-risk" projects and conditions requiring the use of riparian forest buffers, "low impact design" techniques, more prescriptive plan and implementation requirements, mandatory oversight by a professional engineer, geologist or landscape architect registered in this Commonwealth, and a 30-day review time frame.

E. Public Participation and Outreach

In developing this proposed rulemaking, the Department undertook extensive outreach efforts to meet with stakeholders, including: conservation districts, builders, agriculture, other industry groups, environmental groups, legislators and advisory committees.

Outreach efforts by Department Secretary Hanger and Executive Staff on permit-by-rule and riparian forest buffers included meetings with the following groups during 2008-2009:

- Department of Community and Economic Development
- Governor's Action Team
- Interested legislators
- Pennsylvania Association of Conservation Districts (PACD)
- PA Builder's Association and building industry representatives
- PA Campaign for Clean Water (Coalition of environmental groups including: Chesapeake Bay Foundation, Clean Water Action, Delaware River Keepers, Sierra Club, Trout Unlimited PA Chapter, Penn Future)
- PA Chamber of Business and Industry
- POGAM, IOGA, and oil & gas industry representatives
- State Conservation Commission

Outreach efforts by the Department staff on Chapter 102 revisions, permit-by-rule and buffers included meetings with the following groups during 2007-2009:

- Conservation district directors, managers, and staff
- Department of Conservation & Natural Resources
- PACD
- PA Builders Association
- PA Campaign for Clean Water (Coalition of environmental groups including: Chesapeake Bay Foundation, Clean Water Action, Delaware RiverKeepers, Sierra Club, Trout Unlimited PA Chapter, Penn Future)
- PennAg Industries, PA Farm Bureau and agricultural representatives
- State Conservation Commission
- USDA, NRCS

Advisory Committee Meetings:

- Citizen's Advisory Council:
 - March 17, 2009 (permit-by-rule)
 - April 21, 2009
- Agricultural Advisory Board (AAB) :
 - February 21, 2007 Overview of proposed revisions
 - October 10, 2007 Overview of proposed revisions
 - December 19, 2007 Discussion of proposed draft language for agricultural activities
 - April 15, 2009 Consideration of Proposed Chapter 102 rulemaking
- Water Resources Advisory Committee (WRAC):
 - January 10, 2007 Overview of proposed revisions
 - January 9, 2008 Overview of proposed revisions
 - July 22, 2008 Overview of riparian forest buffers
 - February 25, 2009 Overview of proposed permit-by-rule
 - April 8, 2009 Consideration of Proposed Chapter 102 rulemaking
 - April 23, 2009 Special Meeting—continuation of proposed Chapter 102 Rulemaking
 - April 29, 2009 Second Special Meeting—continuation of proposed Chapter 102 (No quorum of WRAC)

In the proposed rulemaking, the Department has incorporated many revisions suggested by these various groups. The Department acknowledges that the Water Resources Advisory Committee would like the Board to solicit input during the public comment period on the following three issues:

- Scope of the permit-by-rule: Should the proposed rulemaking limit or expand the availability of the proposed permit-by-rule?

The permit by rule is proposed to be used for low risk projects with riparian forest buffers in High Quality and all waters other than Exceptional value. Some of the members recommended that the permit-by-rule be available for all waters (including Exceptional Value); while others recommended that it be available for use in only waters other than special protection.

- Responsibility for long-term PCSM operation and maintenance (O & M): How should the proposal rulemaking address responsibility for long-term operation and maintenance of PCSM BMPs?

Assignment of the long-term O&M responsibility for PCSM has been, and continues to be, a challenging issue for the Department and regulated community. The proposed rulemaking requires the permit applicant to identify a party with long-term responsibility for operation and maintenance of PCSM BMPs, and includes a default provision that obligates either the landowner or permittee to provide that O&M function. Some members of WRAC voiced concern that the Department should be more detailed and prescriptive on how this function will be carried out.

- Mandatory Riparian Forest Buffers: Should the proposed rulemaking include a provision for mandatory riparian forest buffers?

The rulemaking proposes 150-foot riparian forest buffers for permitted activities along Exceptional Value (EV) streams. Some of the members recommended that riparian forest buffers be mandatory for not only EV, but all waters, while others recommended that riparian forest buffers be used voluntarily.

F. Summary of Regulatory Requirements

Several changes are proposed in this regulatory package and are described as follows. The descriptions include a reference to the section or subsection proposed to be changed, the nature of the change and the effect of the change.

§ 102.1. Definitions

Specific amendments include the following:

New definitions: Act 167, Agricultural Operation, Along, Animal heavy use areas, Antidegradation Best Available Combination of Technologies, Forest stewardship plan, Intermittent stream, K Factor, Licensed professional, Nondischarge alternative, Normal pool elevation, Notice of Termination, Oil and gas activities, Perennial stream, Point source, Pollutant, Post construction stormwater, PCSM, PCSM Plan, PPC Plan, Riparian forest buffer, Soil loss tolerance, Stormwater, Surface waters and Top of streambank.

Revised definitions: Agricultural plowing or tilling activity, BMPs, Conservation district, Conservation plan, Diversion, Earth disturbance activity, E & S Permit, E & S Plan Municipality, NPDES, Notice of Intent, NPDES Permit for Stormwater Discharges Associated with Construction Activities, Operator, Person, Project site, and Sediment.

Definitions proposed to be deleted: Dewatering zone, Permanent pool, Principal spillway, and Skim.

§ 102.2. Scope and purpose.

This section is revised to reflect the codification of existing PCSM requirements.

§ 102.4. Erosion and sediment control regulations.

Agricultural Activities

This section incorporates new terms and establishes general requirements for animal heavy use areas. The revisions clarify planning requirements for agricultural activities and soil loss tolerance values or "T," and identify the conservation plan requirements that satisfy the E & S Plan requirements of this Chapter.

Non-agricultural Activities

This section provides clarity by codifying the Department's current policy and guidelines that have been established to meet Federal requirements and to comply with court decisions. Persons proposing or conducting earth disturbance activities shall limit the extent and duration of the earth disturbance; protect existing drainage features and vegetation; minimize soil compaction; utilize measures or controls that prevent or minimize the generation of stormwater; and protect, maintain, reclaim and restore waters of this Commonwealth. Additionally an E & S Plan must be consistent with the PCSM Plan; identify naturally occurring geologic formations, or soil conditions that may have the potential to cause pollution during earth disturbance activities and include BMPs to avoid or minimize potential pollution and its impacts from such formations; utilize Chapter 93 nondischarge and ABACT BMPs in special protection waters, evaluate

the potential for thermal impacts; and identify and protect existing and proposed forest riparian buffers when applicable.

§ 102.5. Permit requirements.

This section adds the federal NPDES “Phase II” permit requirements for earth disturbance activities between 1 and 5 acres with a point source discharge; and incorporates the antidegradation implementation requirements related to NPDES Permits in special protection waters as required by Chapter 93 and *Blue Mtn. Preservation Assn. v. DEP*, 2006 EHB 589. Permitting requirements are included for oil and gas activities to obtain an E&S permit for 5 acres or more of earth disturbance. Additionally, a permit requirement is included for activities involving 5 acres or more of earth disturbance not otherwise specified in this section as requiring permit coverage. Additional requirements have been included for a preconstruction meeting for all permitted activities; a general requirement that a permittee must ensure long term operation and maintenance requirements for PCSM facilities identified in § 102.8; and a provision to clarify that operators who are not the permittee shall be identified as co-permittees. Finally, the Clean Water Act NPDES permit exemption for activities covered by a Clean Water Act § 404 dredge and fill permit is clarified.

§ 102.6. Permit application and fees.

This section introduces the registration requirements for coverage under the permit-by-rule option; clarifies the existing requirement to include a PCSM Plan with a permit application, as well as the existing requirement to create a preparedness, prevention and contingency (PPC) plan when necessary. Fees for E & S permits are updated to meet program expenses. The fees for NPDES Permits for Stormwater Discharges Associated with Construction Activities from Chapter 92 are incorporated and updated. Language is added to clarify the Department’s obligation to review fees at least once every 3 years and to clearly define complete applications and an applicant’s responsibility to provide additional information to the Department within 60 days. Additionally, the ability of conservation districts to charge additional fees pursuant to Conservation District Law is clearly outlined.

§ 102.7. Permit Termination.

This section adds an obligation to identify the person responsible for operation and maintenance of PCSM BMP and PCSM Plans and clarifies the obligation of the permittee to operate and maintain the PCSM BMPS and PCSM Plan until the Notice of Termination is acknowledged.

§ 102.8. PCSM requirements.

This new section is added to codify provisions for PCSM for all activities that require an NPDES permit for stormwater discharges from construction activities or an E & S Permit. The goals for which PCSM Plans should be designed and implemented are outlined. The components of a written PCSM Plan that includes drawings and a narrative portion are also identified. Additional requirements are also established including, the performance criteria for the PCSM BMPs; the need for a licensed professional to certify “record drawings” that ensure the PCSM Plan was implemented properly prior to termination of the permit; and a requirement to ensure there is a long-term operation and maintenance plan and that a responsible party is identified.

§ 102.11. General requirement.

This section has been revised to include additional references.

§ 102.14. Riparian forest buffer requirements.

This section was added to describe requirements associated with the establishment of new riparian forest buffer and the protection of existing buffers along surface waters in this Commonwealth when required under Chapter 102, or which may be required by other Department rules regulations, permits, orders, or other authorizations. General requirements are added to identify a certain size, composition, quality, management, reporting, and permanent protection of riparian forest buffers when utilized to meet regulatory requirements. Finally, this section establishes a mandatory 150 foot riparian forest buffer requirement for projects permitted under Chapter 102 that are located along certain specified Exceptional Value waters.

§ 102.15. Permit-by-rule for low impact projects with riparian forest buffers.

This section provides a new permit-by-rule option in addition to existing individual and general permits. The permit-by-rule includes the following eligibility criteria: discharges to waters other than Exceptional Value; Pennsylvania Natural Heritage Program requirements shall be met; applicants shall satisfy compliance history requirements; lands that are currently contaminated are excluded; and sensitive geologic formations, soils with steep slopes, wetlands and floodplains are excluded.

The permit-by-rule conditions for use, include: a pre-submission meeting; inclusion of a riparian forest buffer (meeting the requirements of § 102.14); limit of 15 acres of disturbance at any one time during development of a project; and the retention of services of a professional engineer, geologist, or landscape architect registered in this Commonwealth to prepare and certify E & S and PCSM Plans, oversee critical stages of construction, and provide “record drawings” upon project completion.

The permit-by-rule option includes a requirement for municipal notification; prescriptive planning requirements for E & S and PCSM; a 30-day review and eligibility verification and determination for coverage; and an obligation for the Department to verify the effectiveness and level of environmental protection that the permit-by-rule provides. Additionally, the permit-by-rule includes further requirements for projects in High Quality waters and waters impaired for stormwater or sediment.

§ 102.22. Site stabilization.

This section is revised to incorporate and to clarify existing requirements for permanent and temporary stabilization.

§ 102.32. Compliance and enforcement provisions.

This section adds a new provision to include an opportunity to request an informal hearing with the Department after action by a conservation district and a new provision for cost recovery by the Department or conservation district.

§ 102.42. Notification of applications of permits.

This section is revised to reference the Federal NPDES “Phase II” permit requirements and to be consistent with the change in § 102.5.

§ 102.43. Withholding permits.

This section clarifies language to include references to local stormwater approvals and authorizations.

F. Benefits, Costs and Compliance

Benefits

The citizens of the Commonwealth, the regulated community, and State and local governments will benefit from the recommended changes in this rulemaking because surface waters will be protected, maintained and improved through requirements that minimize accelerated erosion and sedimentation and strengthen PCSM.

The proposed rulemaking provisions related to E & S control and PCSM will improve water quality and mitigate flooding potential by controlling increases in sediment and other pollutant discharges during and after earth disturbance activities. Controlling the discharges through this rulemaking will limit the risk for increased pollutant levels to waters of this Commonwealth, and protect against adverse impacts on aquatic ecosystems. To ensure protection against adverse impacts from stormwater runoff, the proposed rulemaking includes provisions for long-term operation and maintenance of PCSM facilities. In support of the Federal NPDES Stormwater Construction rulemakings the EPA also cited: benefits to navigation in the reduced sediment loads requiring dredging; benefits to water storage in reservoirs - again as a result of regained capacity from reduced sediment build-up; benefits to drinking water treatment - in terms of reduced costs for treatment for sediment in turbidity; as well as water quality.

The Commonwealth will benefit from increased permit fees that are based in part on the estimated cost of administering the program. Revisions to Chapter 92 in 1999 and Chapter 102 in 2000 included modifications to permit fees, but these were administrative filing fees and did not cover cost of program operations. This proposed rulemaking is the first effort by the Department to cover the Chapter 102 program costs through permit fees.

The regulated community is expected to benefit from these regulatory revisions through the restructuring and clarification of planning and permit application requirements, as well as the codification of the existing PCSM requirements. This rulemaking reflects a continuing commitment to integrate regulatory obligations for stormwater management including requirements under Act 167, the NPDES Municipal Separate Storm Sewer Systems (MS4) program and permitting of earth disturbance activities. Local governments with State Act 167 or NPDES MS4 regulatory obligations may rely on the regulatory structure provided by this proposed rulemaking. This reliance on existing State stormwater programs represents a significant cost savings to local governments.

Finally, these regulatory revisions are beneficial because they continue to support the delegation of the E & S control and stormwater management programs to local county conservation districts. County conservation districts and the Department have had a successful and effective partnership that allows the Commonwealth to meet the Federal requirements of the NPDES program. Additionally, the delegation to the local government provides more accessibility to the community and regulated parties and ensures local involvement in oversight of the program.

Compliance Costs

These regulatory revisions should not result in significant increased compliance costs for persons proposing or conducting earth disturbance activities. Moderate increased costs may be incurred due to: increased permit application fees for activities requiring permits; PCSM Plan licensed professional oversight and preparation of record drawings; and long-term operation and maintenance of PCSM facilities.

Generally, there may be cost savings as a result of eliminating the outdated and unnecessary requirements, while increasing the protection of this Commonwealth's valuable water resources. Additionally, the emphasis in the proposed rulemaking on nonstructural "low-impact" stormwater management approaches should result in lower long-term operation and management costs. The permit-by-rule may provide the regulated community cost savings through a new permitting option that provides a definitive timeframe for review and determination of coverage.

Compliance Assistance Plan

The Department assists the regulated community in complying with these regulations through technical and educational assistance, largely provided in partnership with county conservation districts. These efforts have resulted in local community based initiatives that stimulate awareness and achieve regulatory compliance. Department staff have worked with conservation districts to develop and enhance their professional abilities. The development of compliance strategies that focus on negotiation, total quality management, mediation, and professional development, has greatly enhanced the Department's ability to protect *this* Commonwealth's water resources. County conservation district staff provide an efficient and effective local source of assistance as well as an efficient mechanism for the protection of valuable resources. Evaluations of district performance have shown that district staff can provide a quick response to process, review, and acknowledge permit applications.

By involving various advisory committees in the development of these regulations, and pursuing initiatives with the regulated community and other stakeholders, the Department's outreach efforts have allowed stakeholders to work together with regulators to work towards the goal of protecting water quality and the aquatic environment through E & S control and stormwater management efforts. Involvement of the public and the regulated community in the development of these regulations fosters subsequent compliance with standards and practices developed as a result of these efforts, and are an important form of compliance assistance.

The Department assists the regulated community with compliance by its development of standard checklists, worksheets and permit review letters to aid plan designers in developing sound pollution prevention plans. The Department also assists compliance by assuring that Department and district reviews are timely, effective, and consistent. Finally, the regulations incorporate a performance-based approach, which allows persons conducting earth disturbance broad latitude and flexibility in designing BMPs to achieve compliance.

Paperwork Requirements

The majority of the revisions to this proposed rulemaking are codifications of existing requirements, therefore only minor changes to forms, fact sheets, and technical guidance are anticipated.

G. Pollution Prevention

Chapter 102 prevents sediment and stormwater pollution to surface waters of this Commonwealth from earth disturbance activities through a tiered regulatory framework built upon BMP requirements. The chapter covers both agricultural and nonagricultural earth disturbance activities, with distinct regulatory requirements for these two broad categories. Regardless of the category, all earth disturbance activities must utilize BMPs to minimize accelerated erosion and sedimentation for the duration of earth disturbance activities. Additionally, some earth disturbance activities require preparation of a written E & S Plan. Finally, earth disturbance activities exceeding specified acreage thresholds may trigger the requirement to obtain permit coverage, which in turn includes the obligation to prepare and implement a written PCSM Plan.

The proposed rulemaking will improve protection from earth disturbance activities not only through the inclusion of PCSM requirements, but also through the addition of the riparian forest buffer provisions, which are one of the most effective and sustainable BMPs for protecting, maintaining, reclaiming and restoring surface waters of this Commonwealth.

Effective pollution prevention also requires robust inspection, oversight, and enforcement authority, which are retained and enhanced in this rulemaking. The proposed rulemaking adds requirements such as: mandatory pre-construction meetings; licensed professional documentation requirements; and a program audit provision to verify the environmental protection and effectiveness of the permit-by-rule.

H. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which it was intended.

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the proposed rulemaking on August 18, 2009, to the Independent Regulatory Review Commission (IRRC), and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

J. Public Comments

Written Comments—Interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted.

Comments, suggestions or objections must be received by the Board by November 30, 2009. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by November 30, 2009. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments—Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by November 30, 2009. A subject heading of the proposal and a return name and address must be included in each transmission.

K. Public Meetings and Public Hearings

The Board will hold three public meetings to explain the proposed rulemaking and to respond to questions from meeting participants. In addition to the public meetings, the Board will hold three public hearings for the purpose of accepting comments on the proposed rulemaking. The public meetings and hearings will be held as follows:

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|--------------------|---|
| September 29, 2009 | Cranberry Township Municipal Building
2525 Rochester Road
Cranberry Township, PA 16066-6499
Public Meeting: 4 p.m.
Public Hearing: 5 p.m. |
| October 1, 2009 | Department of Environmental Protection
Southcentral Regional Office
Susquehanna Room A
909 Elmerton Avenue
Harrisburg, PA 17110
Public Meeting: 4 p.m.
Public Hearing: 5 p.m. |
| October 5, 2009 | Salisbury Township Municipal Building
2900 South Pike Avenue
Allentown, PA 18103
Public Meeting: 4 p.m.
Public Hearing: 5 p.m. |

Persons wishing to present testimony at a hearing are requested to contact the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477, (717) 787-4526, at least 1 week in advance of the hearing to reserve a time to present testimony. Oral testimony is limited to 10 minutes for each witness. Witnesses are requested to submit three written copies of their oral testimony to the hearing chairperson at the hearing. Organizations are limited to designating one witness to present testimony on their behalf at each hearing.

Persons in need of accommodations as provided for in the Americans With Disabilities Act of 1990 should contact the Board at (717) 787-4526 or through the Pennsylvania AT&T Relay Service at (800) 654-5984 (TDD) to discuss how the Board may accommodate their needs.

JOHN HANGER,
Chairperson

Fiscal Note: 7-440. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECT

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 102. EROSION AND SEDIMENT CONTROL AND STORMWATER MANAGEMENT

GENERAL PROVISIONS

ENFORCEMENT

GENERAL PROVISIONS

§ 102.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

ABACT—Antidegradation best available combination of technologies—Treatment, land disposal, pollution prevention and stormwater reuse BMPs that will individually or collectively manage the difference in the net change from preexisting stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm that is not fully managed by nondischarge alternative BMPs and that will maintain and protect the existing quality of the receiving surface water.

* * * * *

Act 167—The Storm Water Management Act (32P. S. §§ 680.1—680.17)

Agricultural operation—The management and use of farming resources for the production of crops, livestock, or poultry, or for equine activity.

Agricultural plowing or tilling activity—

(i) Earth disturbance activity involving the preparation and maintenance of soil for the production of agricultural crops.

(ii) The term includes no-till cropping methods.

Along—Touching or contiguous; to be in contact with; to abut upon.

Animal heavy use area—Barnyard, feedlot, loafing area, exercise lot, or other similar area on an agricultural operation where because of the concentration of animals it is not possible to establish and maintain vegetative cover of a density capable of minimizing accelerated erosion and sedimentation by usual planting methods.

BMPs—Best management practices—Activities, facilities, measures, planning or procedures used to minimize accelerated erosion and sedimentation and manage stormwater to protect, maintain, reclaim, and restore the quality of waters and the existing and designated uses of waters within this Commonwealth before, during, and after earth disturbance activities.

* * * * *

Collector—A channel, dike or other conveyance, constructed downslope of an earth disturbance activity for the purpose of collecting stormwater runoff from [an existing or proposed disturbed] that area and conveying it to facilities for sediment retention or removal.

[County conservation] Conservation district—A conservation district, as defined in section 3(c) of the Conservation District Law (3 P. S. § 851(c)), which has the authority under a delegation agreement executed with the Department to administer and enforce all or a portion of the erosion [and], sediment [control], and stormwater management program in this Commonwealth.

Conservation Plan—A plan that identifies conservation practices and includes site specific BMPs [which minimize the potential for accelerated erosion and sediment from] for agricultural plowing or tilling activities and animal heavy use areas.

[(i) BMPs for agricultural plowing or tilling activities, including soil loss tolerance values (T), are identified in the Pennsylvania Soil and Water Conservation Technical Guide, United States Department of Agriculture, Natural Resources Conservation Service, 1991.

(ii) The Conservation Plan shall include a schedule for the implementation of the BMPs.

Dewatering zone—The zone within a sediment basin where stormwater runoff is held and released in a controlled manner.]

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Diversion—A facility, including a channel, [terrace or dike] or a conveyance constructed up-slope of [an earth disturbance activity for the purpose of diverting] the disturbed area to divert clean offsite runoff away from [an existing or proposed disturbed area] the earth disturbance activity.

Earth disturbance activity—A construction or other human activity which disturbs the surface of the land, including [,but not limited to,] land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

* * * * *

E & S Permit—Erosion and Sediment Control Permit—A permit required for earth disturbance activities [of 25 acres (10 hectares) or more] where the earth disturbance is associated with timber harvesting [or], road maintenance activities, or oil and gas activities.

E & S Plan—Erosion and Sediment Control Plan—A site-specific plan [identifying] consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities. [For agricultural plowing or tilling activities, the Erosion and Sediment Control Plan is that portion of a conservation plan identifying BMPs to minimize accelerated erosion and sedimentation.]

Forest Stewardship Plan—A written plan that provides an overview of a woodland property in the context of a landowner's needs and objectives and serves as a means of communicating technical information in a concise form that is useful to the landowner.

Intermittent stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing water, which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges.

K factor—The soil erosion factor used for determining the level of potential erosion based upon soil characteristics.

Licensed professional—Professional engineers, landscape architects, geologists and land surveyors licensed to practice in this Commonwealth.

Municipality—[(i)] A county, city, borough, town, township, school district, institution or authority [created by any one or more of the foregoing] or another public body created by or pursuant to state law. [(ii)] For purposes of this definition, town includes an incorporated town.

NOI—Notice of Intent—A request, on a form provided by the Department [or county conservation district], for coverage under a General NPDES Permit for Stormwater Discharges Associated With Construction Activities.

NOT—Notice of Termination—A request, on a form provided by the Department, to terminate coverage under a permit-by-rule, General or Individual NPDES Permit for Stormwater Discharges Associated With Construction Activities or other permits under this chapter.

NPDES—National Pollutant Discharge Elimination System—The National system for the issuance of permits under section 402 of the Federal Clean Water Act (33 U.S.C.A. § 1342) including a state or interstate program which has been approved in whole or in part by the EPA, including the regulations codified in Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance), and as specified in this chapter.

NPDES Permit for Stormwater Discharges Associated With Construction Activities—A permit required for the discharge or potential discharge of stormwater [into waters of this Commonwealth] from construction activities, including clearing and grubbing, grading and excavation activities involving [5]:

(i) Equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters of this Commonwealth, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre to less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters of this Commonwealth over the life of the project.

(ii) Five acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project.

Nondischarge alternative—Environmentally sound and cost-effective BMPs that individually or collectively eliminate the net change from preexisting stormwater volume, rate and quality for storm events up to and including the 2-year/24-hour storm.

Normal pool elevation—

(i) For bodies of water which have no structural measures to regulate height of water, the height of water at ordinary stages of low water unaffected by drought.

(ii) For structurally regulated bodies of water, the elevation of the spillway, outlet control, or dam crest which maintains the body of water at a specified height.

(iii) The term does not apply to wetlands.

Oil and gas activities—Earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities.

Operator—A person who has one or more of the following:

(i) Oversight responsibility of earth disturbance activity on a project site or a portion thereof [which] who has the ability to make modifications to the [Erosion and Sediment Control] E & S Plan, PCSM Plan or site specifications.

(ii) Day-to-day operational control over earth disturbance activity on a project site or a portion thereof to ensure compliance with the [Erosion and Sediment Control] E & S Plan or PCSM Plan.

Perennial stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing waters and capable, in the absence of pollution or other manmade stream disturbances, of supporting a benthic macroinvertebrate community which is composed of two or more recognizable taxonomic groups of organisms which are large enough to be seen by the unaided eye and can be retained by a United States Standard No. 30 sieve (28 meshes per inch, 0.595 mm openings) and live at least part of their life cycles within or upon available substrates in a body of water or water transport system.

* * * * *

Person—[An] Any operator, [natural person, partnership, association or corporation or an agency, instrumentality or entity of Federal or State government, including a municipality] individual, public or private corporation, partnership, association, municipality or political subdivision of this Commonwealth, institution, authority, firm, trust, estate, receiver, guardian, personal representative, successor, joint venture, joint stock company, fiduciary; Department, agency or instrumentality of State, Federal or local government, or an agent or employee thereof; or any other legal entity.

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[**Permanent pool**—The area within a sediment basin which is designed to be inundated with water at all times.

Principal spillway—The structure within a sediment basin which controls the discharge of water from the facility.]

Point source—

(i) Any discernible, confined and discrete conveyance, including any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged.

(ii) The term includes concentrated or channelized flow associated with stormwater.

(iii) The term does not include sheet flow associated with stormwater.

Pollutant—Any contaminant or other alteration of the physical, chemical, biological or radiological integrity of surface water which causes or has the potential to cause pollution as defined in section 1 of The Clean Streams Law (35 P. S. § 691.1).

Post construction stormwater—Stormwater associated with a project site after the earth disturbance activity has been completed and the project site is permanently stabilized.

PCSM—Postconstruction stormwater management.

PCSM Plan—A site-specific plan identifying BMPs to manage changes in stormwater runoff volume, rate and water quality after earth disturbance activities have ended and the project site is permanently stabilized.

PPC Plan—Preparedness, Prevention and Contingency Plan—A written plan that identifies an emergency response program, material and waste inventory, spill and leak prevention and response, inspection program, housekeeping program, security and external factors, developed and implemented at the construction site to control potential discharges of pollutants other than sediment into waters of this Commonwealth.

Project site—The entire area of activity, development, lease, or sale including:

* * * * *

ROC—Registration of coverage for the permit-by-rule

Riparian forest buffer—A BMP that is an area of permanent vegetation consisting of predominantly native trees, shrubs and forbs along surface waters that is maintained in a natural state or sustainably managed to protect and enhance water quality, stabilize stream channels and banks, and buffer land use activities from surface waters.

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Sediment—Soils or other erodible materials transported by surface water as a product of erosion.

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[*Skim*—To remove the uppermost portion of water within a sediment basin.]

Soil loss tolerance (T)—The maximum amount of soil loss, in tons/acre/year, that a given soil type can tolerate and still permit a high level of crop production to be sustained economically and indefinitely. Values for T for various soil types may be obtained from the *Pennsylvania Soil and Water*

Conservation Technical Guide, USDA NRCS, 1991 (as amended and updated).

Stabilization—The proper placing, grading, constructing, reinforcing, lining, and covering of soil, rock or earth to [insure] ensure their resistance to erosion, sliding or other movement.

Stormwater—Runoff from precipitation, snowmelt, and surface runoff and drainage.

Surface waters—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.

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Top of streambank—First substantial break in slope between the edge of the bed of the stream and the surrounding terrain. The top of streambank can either be a natural or constructed (that is, road or railroad grade) feature, lying generally parallel to the watercourse.

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§ 102.2. Scope and purpose.

(a) This chapter requires persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.

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§ 102.4. Erosion and sediment control requirements.

(a) For agricultural plowing or tilling activities or for animal heavy use areas, the following erosion and sediment control requirements apply:

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(2) Written [Erosion and Sediment Control] E & S Plans are required for agricultural plowing or tilling activities or for animal heavy use areas that disturb 5,000 square feet (464.5 square meters) or more of land.

(3) The landowner, and any lessee, renter, tenant or other land occupier, conducting or planning to conduct agricultural plowing or tilling activities, or operating an animal heavy use area, are jointly and individually responsible for developing a written [Erosion and Sediment Control] E & S Plan and implementing and maintaining BMPs, including those identified in the [Erosion and Sediment Control] E & S Plan.

(4) The [Erosion and Sediment Control] E & S Plan [shall be] must include cost-effective and reasonable BMPs designed to minimize the potential for accelerated erosion and sedimentation from agricultural plowing or tilling activities and animal heavy use areas.

(i) For agricultural plowing or tilling activities, the E & S Plan must, at a minimum, limit soil loss from accelerated erosion to the soil loss tolerance (T) over the planned crop rotation.

(ii) For agricultural plowing and tilling activities that will occur on fields with less than 25% cover and within 100 feet of a river, or perennial or intermittent stream, additional BMPs shall be implemented to minimize accelerated erosion and sedimentation.

(iii) For animal heavy use areas, the E & S Plan must identify BMPs to minimize accelerated erosion and sedimentation. BMPs and their design standards are listed in the current amended and updated version of the appropriate National Resources conservation Service conservation practice standards such as Heavy Use Area Protection, Critical Area Planting, Fencing, Wastewater Treatment Strip, Constructed Wetland, Use Exclusion, Animal Trails and Walkways, Diversions, and Roof Runoff Structure.

(5) The [Erosion and Sediment Control] E & S Plan [shall] must contain plan maps [, soils maps,] that show the location of features including surface waters [of this Commonwealth,] and drainage patterns, field and property boundaries, buildings and farm structures, animal heavy use areas, roads and crossroads, and BMPs; soils maps; and a description of BMPs including animal heavy use area practices and procedures, tillage systems, schedules, and crop rotations[, and cost effective and technically practical conservation measures]. The plan must be consistent with the current conditions and activities on the agricultural operation.

(6) The E & S Plan must contain an implementation schedule. The plan shall be implemented according to the schedule, and the BMPs shall be operated and maintained as long as there are agricultural plowing or tilling activities or animal heavy use areas, on the agricultural operation.

(7) The portion of a conservation plan that identifies BMPs to minimize accelerated erosion and sedimentation from agricultural plowing or tilling activities, or from operation of animal heavy use areas, may be used to satisfy the E & S Plan requirements of this subsection if it meets the requirements of paragraphs (4)—(6).

(8) The [Erosion and Sediment Control] E & S Plan shall be available for review and inspection at the [project site during each stage of the agricultural plowing or tilling activity] agricultural operation.

(9) Nothing in this section negates the requirements under other provisions of this chapter, such as those applicable to construction activities.

(b) For earth disturbance activities other than agricultural plowing or tilling or animal heavy use areas, the following erosion and sediment control requirements apply:

(1) The implementation and maintenance of [erosion and sediment control] E & S BMPs are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet (464.5 square meters).

(2) A person proposing earth disturbance activities shall develop and implement a written [Erosion and Sediment Control] E & S Plan under this chapter if one or more of the following criteria apply:

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(ii) The person proposing the earth disturbance activities is required to develop an [Erosion and Sediment Control] E & S Plan under to this chapter under Department regulations other than those contained in this chapter.

* * * * *

(3) The [Erosion and Sediment Control] E & S Plan shall be prepared by a person trained and experienced in [erosion and sediment] E & S control methods and techniques [, and shall be designed to minimize the potential for accelerated erosion and sedimentation].

(4) [Earth disturbance activities shall be planned and conducted to minimize the extent and duration of the disturbance.] Unless otherwise authorized by the Department or conservation district after consultation with the Department, earth disturbance activities shall be planned and implemented to the extent practicable in accordance with the following:

(i) Minimize the extent and duration of the earth disturbance.

(ii) Maximize protection of existing drainage features and vegetation.

(iii) Minimize soil compaction.

(iv) Utilize other measures or controls that prevent or minimize the generation of increased stormwater runoff.

(v) Protect, maintain, reclaim and restore the quality of water and the existing and designated uses of waters within this Commonwealth.

(5) The [Erosion and Sediment Control] E & S Plan [shall] must contain drawings and narrative which describe the following:

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(iv) The [amount] volume and rate of runoff from the project [area] site and its upstream watershed area.

(v) The location of all surface waters [of this Commonwealth] which may receive runoff within or from the project site and their classification under to Chapter 93.

(vi) A [written depiction] narrative description of the location and type of perimeter and onsite BMPs used before, during and after the earth disturbance activity.

(vii) A sequence of BMP installation and removal in relation to the scheduling of earth disturbance activities, prior to, during and after earth disturbance activities that ensure the proper functioning of all BMPs.

(viii) Supporting calculations and measurements.

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(x) A maintenance program which provides for the **operation and maintenance of BMPs and the** inspection of BMPs on a weekly basis and after each [**measurable rainfall**] **stormwater** event, including the repair of the BMPs to ensure effective and efficient operation. **The program must provide for completion of a written report documenting each inspection and all BMP repair and maintenance activities.**

* * * * *

(xii) **Identify naturally occurring geologic formations or soil conditions that may have the potential to cause pollution during earth disturbance activities and include BMPs to avoid or minimize potential pollution and its impacts from the formations.**

(xiii) **Evaluate the potential for thermal impacts to surface waters from the earth disturbance activity and include BMPs to avoid, minimize or mitigate potential pollution from thermal impacts.**

(xiv) **The E & S Plan shall be planned, designed and implemented to be consistent with the PCSM Plan under § 102.8 (relating to PCSM requirements). Unless otherwise approved by the Department, the E & S Plan must be separate from the PCSM Plan and labeled "E & S" or "Erosion and Sediment Control Plan" and be the final plan for construction.**

(xv) **Identify existing and proposed riparian forest buffers.**

(6) Where an earth disturbance activity 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, as applicable, use [**the following Special Protection**] **nondischarge alternatives and ABACT BMPs to maintain and protect the water from degradation[:]. Nondischarge alternatives and ABACT BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), as amended and updated.***

[(i) **Special sediment basin requirements.**

(A) **Principal spillways shall be designed to skim water from the top 6 inches (15 centimeters) of the dewatering zone, or shall have permanent pools greater than or equal to 18 inches (46 centimeters) deep.**

(B) **The basin shall be designed with a flow length to basin width ratio of 4:1 or greater.**

(C) **The basin shall be designed so that it dewateres in at least 4 days and no more than 7 days when at full capacity.**

(ii) **Channels, collectors and diversions shall be lined with permanent vegetation, rock, geotextile or other nonerosive materials.**

(iii) **BMPs that divert or carry surface water shall be designed to have a minimum capacity to convey the peak discharge from a 5-year frequency storm.**

(iv) **Upon completion or temporary cessation of the earth disturbance activity, or any stage thereof, the project site shall be immediately stabilized.**

(v)] **The Department [or county conservation district] may approve alternative BMPs which will maintain and protect existing water quality and existing and designated uses.**

(7) **The [Erosion and Sediment Control] E & S Plan, inspection reports and monitoring records shall be available for review and inspection by the Department or the [county] conservation district at the project site during all stages of the earth disturbance activity.**

(8) **Upon complaint or site inspection, the Department or [county] conservation district may require that the E & S Plan be submitted for review and approval to ensure compliance with this chapter.**

(c) **The Department may require, or [county] the conservation district [may require] after consultation with the Department may require, other information necessary to adequately review a plan, or may require additional BMPs, on a case-by-case basis, when necessary to ensure the maintenance and protection of water quality and existing and designated uses.**

(d) **A person proposing or conducting an earth disturbance activity shall obtain the other necessary permits and authorizations from the Department or conservation district, related to the earth disturbance activity, before commencing with the earth disturbance activity.**

(e) **Persons proposing an earth disturbance activity that requires permit coverage under § 102.5 (relating to requirements) shall have permit coverage prior to commencing the earth disturbance activity.**

§ 102.5. Permit requirements.

(a) **An NPDES permit stormwater discharges associated with construction activities.**

(1) **Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development sale that involves equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge to surface waters over the life of the project, shall obtain an individual NPDES Permit or coverage under a general NPDES permit or NPDES permit-by-rule for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity.**

(2) **Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves 5 acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project, shall obtain [a general or] an individual NPDES Permit for Stormwater Discharges Associated With Construction Activities or coverage**

under a general NPDES permit or NPDES permit-by-rule for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity.

(3) In addition to other applicable requirements, persons required to obtain an Individual NPDES Permit for Stormwater Discharges Associated with Construction Activities for projects proposed in special protection watersheds 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.

(b) A person proposing a timber harvesting or road maintenance activity involving 25 acres (10 hectares) or more of earth disturbance shall obtain an [**Erosion and Sediment Control Permit**] E & S Permit under this chapter prior to commencing the earth disturbance activity.

(c) A person proposing oil and gas activities that involve 5 acres (2 hectares) or more of earth disturbance over the life of the project shall obtain an E & S Permit under this chapter prior to commencing the earth disturbance activity.

(d) Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting or road maintenance activities, a person proposing earth disturbance activities that involve 5 acres (2 hectares) or more of earth disturbance over the life of the project that do not require a permit under subsections (a), (b), (c), (g) and (i) shall obtain an E & S Permit under this chapter prior to commencing the earth disturbance activity.

(e) For earth disturbance activities authorized by a permit under this chapter, a preconstruction meeting is required unless the permittee has been notified otherwise in writing by the Department or conservation district. The permittee shall contact the Department or conservation district at least 7 days but not more than 30 days prior to the commencement of construction. Permittees, co-permittees, operators, and licensed professionals or designees responsible for critical stages of construction must attend a preconstruction meeting along with the Department or conservation district.

(f) A person proposing earth disturbance activities requiring a permit or permit coverage under this chapter shall be responsible to ensure implementation and long-term operation and maintenance of the PCSM Plan.

(g) A person proposing or conducting an earth disturbance activity approved under a Department permit issued under a chapter other than Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) or this chapter, which includes requirements to comply with Chapter 92 and this chapter, need not obtain an additional [**Erosion and Sediment Control**] E & S Permit or NPDES Permit for Stormwater Discharges Associated With Construction Activities.

(h) Operators who are not the permittee shall be co-permittees.

(i) A person proposing or conducting an earth disturbance activity associated with discharging dredged or fill material to waters of the United

States which is required to obtain a permit or coverage under a permit under section 404 of the Clean Water Act (33 U.S.C.A. § 1344) need not obtain an additional E & S Permit or NPDES Permit for Stormwater Discharges Associated with Construction Activities for the area of disturbance covered by the Clean Water Act section 404 permit.

[(d)](j) A person proposing or conducting agricultural plowing or tilling activities or animal heavy use areas is not required to obtain an [**Erosion and Sediment Control**] E & S Permit, or an NPDES Permit for Stormwater Discharges Associated With Construction Activities, for these activities under this chapter.

[(e)](k) A person proposing or conducting an earth disturbance activity who is not required to obtain a Permit under this chapter shall comply with the other provisions of this chapter.

§ 102.6. Permit applications and fees.

(a) *Permit requirements.* A person proposing or conducting an earth disturbance activity which requires [**an Erosion and Sediment Control Permit or an NPDES Permit for Stormwater Discharges Associated with Construction Activities**] a permit under § 102.5 (relating to permit requirements), shall:

(1) Submit to the Department or a [**county**] conservation district a complete application, [**or notice of intent**], or ROC, an [**Erosion and Sediment Control**] E & S Plan meeting the requirements of § 102.4 (relating to erosion and sediment control requirements), a PCSM Plan meeting the requirements of § 102.8 (relating to PCSM requirements), and other information the Department may require.

(2) Provide proof of consultation with the Pennsylvania Natural [**Diversity Inventory (PNDI)**] **Heritage Program (PNHP)** regarding the presence of a State or Federal threatened or endangered species on the project site. If the Department or [**county**] conservation district determines, based upon [**PNDI**] **PNHP** data or other sources, that the proposed earth disturbance activity may adversely impact the species or critical habitat, the person proposing the earth disturbance activity shall consult with the Department or [**county**] conservation district to avoid or prevent the impact. If the impact cannot be avoided or prevented, the person proposing the activity shall demonstrate how the impacts will be minimized in accordance with State and Federal laws pertaining to the protection of threatened or endangered flora and fauna and its habitat.

(3) **Prepare and implement a PPC Plan when storing, using or transporting materials including: fuels, chemicals, solvents, pesticides, fertilizers, lime, petrochemicals, wastewater, wash water, core drilling wastewater, cement, sanitary wastes, solid wastes, or hazardous materials onto, on, or from the project site during earth disturbance activities. The PPC Plan shall be available upon request by the Department or conservation district.**

(b) *Permit fees.*

(1) [**Erosion and Sediment Control Permit applications for timber harvesting and road maintenance activities shall be accompanied by an application fee of \$500.**

(2) Applications and Notices of Intent for an NPDES Permit for Stormwater Discharges Associated with Construction Activities shall be submitted and accompanied by the fee established pursuant to Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance).]

A person submitting a permit application, NOI or ROC shall submit a fee as follows:

- (i) NPDES permit-by-rule—\$2,500.
- (ii) General NPDES Permit—\$2,500.
- (iii) Individual NPDES Permit—\$5,000.
- (iv) General E & S Permit—\$2,500.
- (v) Individual E & S Permit—\$5,000.

(2) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the EQB. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and contain recommendations to adjust fees to eliminate the disparity, including recommendations for regulatory amendments.

(3) Conservation districts may charge additional fees in accordance with section 9(13) of the Conservation District Law (3 P. S. § 857(13)).

(c) *Complete applications or NOI.*

(1) An application or NOI for a permit is not complete until the necessary information and requirements under The Clean Streams Law (35 P. S. § 691.1—691.1001) and this chapter have been satisfied by the applicant.

(2) When the Department determines that an application or NOI is incomplete or contains insufficient information to determine compliance with this chapter, it will notify the applicant in writing. The applicant shall have 60 days to complete the application or NOI, or the Department will consider the application to be withdrawn by the applicant. Requests for a specific extension may be sought by the applicant in writing. The applicant will be notified in writing when an application or NOI is considered withdrawn. When an application or NOI is considered withdrawn, the Department will close the application file and take no further action to review the file.

(3) If the incomplete or deficient application is returned or withdrawn, the fees associated with filing the application will not be refunded.

§ 102.7. Permit termination.

(a) Upon permanent stabilization of the earth disturbance activity under § 102.22[(c)](a)(2) (relating to permanent stabilization), the person who obtains permit coverage under this chapter shall submit a notice of termination to the Department or [county] conservation district.

(b) The notice of termination [shall] must include:
* * * * *

(5) An identification of the persons who will be responsible for operation and maintenance of the PCSM BMPs in accordance with the approved PCSM Plan.

(c) Until the permittee has received written acknowledgement an NOT, the permittee will remain responsible for compliance with the permit terms and conditions including operation and maintenance of all PCSM BMPs on the project site and is responsible for violations occurring on the project site.

§ 102.8. PCSM requirements.

(a) A person proposing an earth disturbance activity that requires NPDES permit coverage under this chapter or other Department permit that requires compliance with this chapter shall be responsible to ensure that a written PCSM Plan is developed, implemented, operated and maintained.

(b) The management of post construction stormwater shall be planned and conducted to the extent practicable in accordance with the following:

- (1) Preserve the integrity of stream channels and protect the physical, biological and chemical qualities of the receiving stream.
- (2) Prevent an increase in the rate of stormwater runoff.
- (3) Minimize any increase in stormwater runoff volume.
- (4) Minimize impervious areas.
- (5) Maximize the protection of existing drainage features and existing vegetation.
- (6) Minimize land clearing and grading.
- (7) Minimize soil compaction.
- (8) Utilize other measures or controls that prevent or minimize the generation of increased stormwater runoff and pollutants.
- (9) Protect, maintain, reclaim and restore the quality of water and the existing and designated uses of waters within this Commonwealth.

(c) The PCSM Plan shall be planned, designed and implemented to be consistent with the E & S Plan under § 102.4(b) (relating to erosion and sediment and control requirements).

(d) Unless otherwise approved by the Department, the PCSM Plan must be separate from the E & S Plan and labeled “PCSM” or “Post Construction Stormwater Management Plan” and be the final plan for construction.

(e) The PCSM Plan shall be prepared by a person trained and experienced in PCSM design methods and techniques.

(f) The PCSM Plan must contain drawings and narrative requirements as described within this chapter and other supporting documentation. The PCSM Plan shall be designed to minimize the threat to human health, safety and the environment to the greatest extent practicable. PCSM Plans must contain at a minimum the following:

- (1) The existing topographic features of the project site and the immediate surrounding area.
- (2) The types, depth, slope, locations and limitations of the soils and geologic formations.
- (3) The characteristics of the project site, including the past, present and proposed land uses and the proposed alteration to the project site.

(4) Identification of the net change in volume and rate of stormwater from preconstruction hydrology to post construction hydrology for the entire project site and each drainage area.

(5) Identification of the location of surface waters, which may receive runoff within or from the project site and their classification under Chapter 93 (relating to water quality standards).

(6) A written description of the location and type of PCSM BMPs including construction details for permanent stormwater BMPs including permanent stabilization specifications and locations.

(7) A sequence of PCSM BMP implementation or installation in relation to earth disturbance activities of the project site and a schedule of inspections for critical stages of PCSM BMP installation.

(8) Supporting calculations.

(9) Plan drawings.

(10) A long-term operation and maintenance schedule, which provides for inspection of PCSM BMPs, including the repair, replacement, or other routine maintenance of the PCSM BMPs to ensure effective and efficient operation. The program must provide for completion of a written report documenting each inspection and all BMP repair and maintenance activities and how access to the PCSM BMPs will be provided.

(11) Identification of the persons responsible for long-term operation and maintenance of the PCSM BMPs.

(12) Procedures, which ensure that the proper measures for the recycling or disposal of materials associated with or from the PCSM BMPs, are in accordance with Department laws, regulations and requirements.

(13) Identification of naturally occurring geologic formations or soil conditions that may have the potential to cause pollution after earth disturbance activities are completed and PCSM BMPs are operational, and development of a management plan to avoid or minimize potential pollution and its impacts.

(14) An evaluation of potential thermal impacts from post construction stormwater to surface waters and inclusion BMPs to avoid, minimize or mitigate potential pollution from thermal impacts.

(15) A Riparian Forest Buffer Management Plan when required under § 102.14 (relating to riparian forest buffer requirements).

(16) Additional information requested by the Department.

(g) PCSM Plans for proposed activities requiring a permit under this chapter require the following additional information:

(1) Analytical testing and assessment of soil, geology, and other predevelopment site characteristics including infiltration and geotechnical studies that identify location and depths of test sites and methods used.

(2) Analysis demonstrating that the PCSM BMPs will meet the volume reduction and water quality requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net

change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality. The analysis for the 2-year/24-hour storm event shall be conducted using the following minimum criteria:

(i) Existing predevelopment nonforested pervious areas must be considered meadow in good condition or its equivalent.

(ii) When the existing project site contains impervious area, 20% of the existing impervious area to be disturbed must be considered meadow in good condition or better, except for repair, reconstruction, or restoration of roadways or utility infrastructure when the site will be returned to existing condition.

(3) Analysis demonstrating that the PCSM BMPs will meet the rate requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change in peak rate for the 2-, 5-, 10-, 25-, 50-, and 100-year/24-hour storm events in a manner not to exceed preconstruction rates.

(i) Hydrologic routing analysis is required to demonstrate this requirement is met.

(ii) Exempt from this requirement are Department approved direct discharges to tidal areas or Department-approved no detention areas.

(4) Identify the methodologies for calculating the total runoff volume and peak rate of runoff and provide supporting documentation and calculations.

(5) Construction techniques or special considerations to address soil and geologic limitations.

(6) The Department may require, or after consultation with the Department a conservation district may require, additional information necessary to adequately review a PCSM Plan or may require additional BMPs, on a case-by-case basis, when necessary to ensure the maintenance and protection of water quality and existing and designated uses.

(h) 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. Specifically, the person proposing the activity shall use PCSM BMPs that collectively achieve no net change when compared to preconstruction discharges, in stormwater runoff volume, rate and water quality during storm events up to and including the 2-year/24-hour storm event. Nondischarge alternatives and ABACT BMPs and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual* Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(i) Upon complaint or site inspection, the Department or conservation district may require that the PCSM Plan be submitted for review and approval to ensure compliance with this chapter.

(j) The PCSM Plan, inspection reports and monitoring records shall be available for review and inspection by the Department or the conservation district.

(k) 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.

(l) The permittee shall include with the notice of termination "Record Drawings" with a final certification statement from a licensed professional, which reads as follows:

"I (name) do hereby certify pursuant to the penalties of 18 Pa.C.S.A. § 4904 to the best of my knowledge, information and belief, that the accompanying record drawings accurately reflect the redline drawings, are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environment Protection and that the project site was constructed in accordance with the approved PCSM Plan and accepted construction practices."

(1) The permittee shall retain a copy of the record drawings as a part of the approved PCSM Plan.

(2) The permittee shall provide a copy of the record drawings as a part of the approved PCSM Plan to the person identified in this section as being responsible for the operation and maintenance of the PCSM BMPs.

(m) Unless a different person is approved in writing by the Department, operation and maintenance of PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMP is located. The deed for any property containing a PCSM BMP shall identify the PCSM BMP 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. A grantor that fails to comply with this requirement shall remain jointly responsible with the landowner for operation and maintenance of the PCSM BMPs located on the property.

(n) The portion of a site reclamation or restoration plan that identifies PCSM BMPs to manage stormwater from oil and gas activities or mining activities permitted in accordance with Chapters 77 and 86—90, or a plan for abandoned mine land reclamation activities may be used to satisfy the PCSM Plan requirements of this section if the reclamation plan meets the requirements of subsections (b), (c), (e), (f), (h), (i) and (m).

EROSION AND SEDIMENT CONTROL AND POST CONSTRUCTION STORMWATER MANAGEMENT BMPs

§ 102.11. General requirements.

(a) A person conducting or proposing to conduct an earth disturbance activity shall [**design**]:

(1) **Design**, implement and maintain E & S BMPs to minimize the potential for accelerated erosion and sedimentation [**in order**] to protect, maintain, reclaim and restore water quality and existing and designated uses. Various E & S BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual* (Manual), Commonwealth of Pennsylvania,

Department of Environmental Protection, No. 363-2134-008 [(January 1996)] (April 2000), as amended and updated.

(2) If required to develop a PCSM Plan, design, implement and maintain PCSM BMPs to mimic preconstruction stormwater runoff conditions to protect, maintain, reclaim and restore water quality and existing and designated uses. Various PCSM BMPs and their design standards are listed in the *Pennsylvania Stormwater Best Management Practices Manual* (Stormwater BMP Manual), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(3) If required to develop a riparian forest buffer, design, implement and maintain the buffer in accordance with § 102.14 (relating to riparian forest buffer requirements). Various design, construction, and maintenance standards are listed in the *Riparian Forest Buffer Guidance*, (Buffer Guidance), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 395-5600-001 (2009), as amended and updated.

(b) BMPs and design standards other than those listed in the [**Manual**] **Manuals or Buffer Guidance** may be used when a person conducting or proposing to conduct an earth disturbance activity demonstrates to the Department [**or a county conservation district**] that the alternate BMP or design standard minimizes accelerated erosion and sedimentation **or manages stormwater during and after the completion of earth disturbance activities** to achieve the regulatory standards in subsection (a).

§ 102.14 Riparian forest buffer requirements.

(a) *General requirements.*

(1) *Riparian forest buffer.* Persons proposing or conducting earth disturbance activities shall incorporate a riparian forest buffer within the boundaries of the project site in accordance with this section if one of the following apply:

(i) The activity requires a permit under this chapter, is located within an Exceptional Value watershed, and the project site contains, is along or within, 150 feet of a river, stream, creek, lake, pond or reservoir.

(ii) The activity is authorized utilizing the permit-by-rule under this chapter.

(2) *Other approvals that include buffer.* A riparian forest buffer may be required to be incorporated within the boundaries of a project site in accordance with this section by other rules, regulations, order, permit or other approval of the Department.

(3) *Discharges into the buffer.* Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with §§ 102.4(b)—(e) and § 102.8 (relating to erosion and sediment control requirements; and PCSM requirements).

(4) *Existing buffer composition.* An existing riparian forest buffer must: meet the requirements of subsection (d); consist predominantly of native trees and shrubs that provide at least 60% uniform canopy cover;

noxious weeds and invasive species must be removed or controlled to the extent possible.

(5) *Existing site enhancement.* Existing sites that consist of predominantly native woody vegetation that do not meet all of the criteria in paragraph (3) shall be enhanced or widened, or both, by additional plantings in open spaces around existing native trees and shrubs to establish a riparian forest buffer. Noxious weeds and invasive species shall be removed or controlled to the extent possible.

(6) *Buffer establishment.* On sites with no native woody vegetation, a riparian forest buffer shall be established in accordance with this chapter.

(7) *Wetlands and buffers.* Wetlands located in the riparian forest buffer shall be protected and maintained consistent with Chapter 105 (relating to dam safety and waterway management).

(8) *Plan submission.* The applicant shall prepare and submit a plan for riparian forest buffer management to the Department or conservation district as part of the PCSM Plan. The riparian forest buffer management plan must describe how the management requirements of this section will be met.

(b) *Composition.*

(1) *Buffer zones.* At a minimum, newly established riparian forest buffers must be composed of two distinct zones, Zones 1 and 2 (See paragraph (2) regarding zones). Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with this subsection and subsections (c)—(e) and § 102.8.

(2) *Zones.*

(i) *Zone 1.* Undisturbed forest (trees) must begin at the top of the streambank or normal pool elevation of a lake, pond or reservoir and occupy a strip of land measured horizontally on a line perpendicular from the top of streambank or normal pool elevation of a lake, pond or reservoir. Predominant vegetation must be composed of a variety of native riparian tree species.

(ii) *Zone 2.* Managed forest (trees and shrubs) must begin at the landward edge of Zone 1 and occupy an additional strip of land measured horizontally on a line perpendicular from the top of streambank or normal pool elevation of a lake, pond or reservoir. Predominant vegetation must be composed of a variety of native riparian tree and shrub species.

(c) *Measurements.* Riparian forest buffers must be measured horizontally with no more than a 10% variation below the minimum width from the normal pool elevation for lake, pond or reservoir and from top of streambank or top of slope for streams.

(d) *Average minimum widths.*

(1) *All waters.* One hundred feet (50 feet Zone 1 and 50 feet Zone 2 for newly established riparian forest buffers) along all rivers, perennial or intermittent streams (both sides), lakes, ponds or reservoirs. Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with §§ 102.4(b)—(e) and § 102.8.

(2) *Impaired waters.* One hundred fifty feet (75 feet Zone 1 and 75 feet Zone 2 on newly established riparian forest buffers) along all rivers, perennial or intermittent streams (both sides), lakes, ponds or reservoirs. Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with §§ 102.4(b)—(e) and 102.8.

(3) *Special protection waters.* One hundred fifty feet (75 feet Zone 1 and 75 feet Zone 2 on newly established riparian forest buffers) in special protection waters (High Quality and Exceptional Value designations) on all rivers, perennial or intermittent streams (both sides), and the shoreline of lakes and ponds. Concentrated flow and accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian forest buffer in accordance with §§ 102.4(b)—(e) and 102.8.

(4) *Existing buffer width.* Existing riparian forest buffers must meet minimum aggregate widths of this chapter.

(5) *Average buffer width.* The average riparian forest buffer width shall be calculated based upon the entire length of streambank or shoreline that is located within the boundaries of the project site. When calculating the buffer length the natural streambank or shoreline shall be followed.

(e) *Management requirements.*

(1) Both existing and newly established riparian forest buffers, including wetlands and floodplains, shall be managed and maintained to enhance and maximize the unique value of these resources.

(2) Newly established riparian forest buffers and sites with existing woody vegetation shall be managed in accordance with the riparian forest buffer management plan and until established vegetation consists of predominantly native trees and shrubs that provide at least 60% uniform canopy cover and noxious weeds and invasive species have been removed or controlled to the extent possible for a period of at least 5 years.

(3) The following practices and activities are prohibited within the riparian forest buffer:

(i) Soil disturbance by grading, stripping of topsoil, plowing, cultivating or other practices.

(ii) Draining by ditching, underdrains or other drainage systems.

(iii) Housing, grazing or otherwise maintaining animals.

(iv) Storing or stockpiling materials.

(v) Off road vehicular travel.

(4) 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.

(5) The following practices and activities are allowable within the riparian forest buffer:

(i) Activities or practices used to maintain the riparian forest buffer including the disturbance of existing vegetation, tree removal, shrub removal, clearing, mowing, burning, or spraying in accordance with the long-term operation and maintenance plan.

(ii) Restoration projects, facilities, emergency response and other activities approved by the Department.

(iii) Scientific studies approved by the Department, including water quality monitoring and stream gauging.

(iv) Timber harvesting operations only in Zone 2, as described in this section, that maintain at least 60% uniform canopy cover of predominantly native trees and shrubs and are identified in a Forest Stewardship Plan approved by the Department of Conservation and Natural Resources.

(v) Passive recreational activities.

(f) *Permanent protection of riparian forest buffers.*

(1) Existing and newly established riparian forest buffers including access easements must be protected in perpetuity through deed restriction, conservation easement, local ordinance or permit conditions.

(2) For any existing or newly established riparian forest buffer, the boundary limits of the riparian forest buffer must be identified and clearly marked.

(g) *Reporting.* Permittees shall complete data forms provided by the Department for newly established and existing riparian forest buffers and submit them to the Department or conservation district as part of the PCSM Plan.

§ 102.15. Permit-by-rule for low impact projects with riparian forest buffers.

(a) *Qualifying for coverage.* Persons proposing or conducting an earth disturbance activity requiring a permit authorization under this chapter shall qualify for permit coverage under this rule if they meet the requirements of this section, which supersede any requirements of Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance). An earth disturbance activity that requires a permit authorization under this chapter that is not consistent with this section shall obtain coverage under a general or individual NPDES Permit for Discharges Associated with Construction Activities or other E & S control permit under this chapter prior to commencing the earth disturbance activity.

(b) *Permit-by-rule exclusions.* The following sites or the activities associated with the project are not eligible for coverage under the permit-by-rule:

(1) Projects located in or with the potential to discharge to waters that have a designated or existing use of Exceptional Value under Chapter 93 (relating to water quality standards).

(2) Earth disturbance activities conducted in or on the following sensitive areas:

(i) Highly erodible conditions (soils in combination with percent slope) as follows:

(A) 3% to 8% slope with soil K factor greater than 0.37.

(B) 8% to 15% slope with soil K factor greater than 0.28.

(C) 15% slope with soil K factor greater than 0.18.

(ii) Geological formations that present a risk to public health, safety and the environment including:

(A) Sinkhole development.

(B) Land sliding.

(C) With the significant potential to cause or contribute to pollution when disturbed; including acid, radioactive and arsenic bearing formations.

(iii) Wetlands or floodplains, unless earth disturbance in these areas is required for access and utilities and is authorized under Chapter 105 or 106 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance; and floodplain management).

(3) Lands that are currently contaminated from a spill or release of a hazardous material, or hazardous, toxic, or other regulated substance, as these terms are defined in this title, that pose a risk or threat to public health, safety, or the environment.

(4) The earth disturbance is being proposed or conducted by a person who has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit and schedule of compliance or order issued by the Department.

(5) The earth disturbance activities or potential discharges will adversely affect a Pennsylvania or federal endangered or threatened species.

(c) *Permit conditions.* Persons conducting earth disturbance activities under this permit shall meet the following requirements:

(1) Persons seeking coverage under permit-by-rule shall first schedule a presubmission meeting with the Department or the conservation district prior to submitting an ROC. The meeting shall also be attended by the professional engineer, geologist or landscape architect registered in this Commonwealth that will be responsible for project design and the operator when known. At the presubmission meeting, the registrant shall provide:

(i) A site location map (United States Geologic Survey or equivalent) including:

(A) All waters of this Commonwealth and water quality classifications under Chapter 93 (relating to water quality standards).

(B) Existing site conditions.

(C) Limits of earth disturbance activities.

(D) Preliminary site design.

(E) Total project acres and boundaries.

(ii) A presubmission meeting checklist using a form provided by the Department.

(2) When the project site contains, is along, or within 100 feet of a river, stream, creek, lake, pond or reservoir, the registrant shall:

(i) Establish new or preserve existing riparian forest buffers at least 100 feet in width between the top of streambank or normal pool elevation of a lake, pond or reservoir and areas of earth disturbance.

(ii) Establish new or preserve existing riparian forest buffers at least 150 feet in width between the top of streambank or normal pool elevation of a lake, pond or reservoir and disturbed areas for projects located in high quality or impaired watersheds.

(iii) Design or maintain, or both, a riparian forest buffer in accordance with *Riparian Forest Buffer Guidance*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 395-5600-001 (2009), as amended and updated.

(3) The earth disturbance must not exceed 15 acres at a time. If the total disturbed area will exceed 15 acres over the life of the project, earth disturbance shall be sequenced in a manner that provides for stabilization prior to disturbance of subsequent phases.

(4) Earth disturbance activities on any portion, part, or during any stage of, a larger common plan of development or sale over the life of the project must meet the requirements and be covered under a single ROC.

(i) Any significant new or increased changes to the earth disturbance activities that are not included in the original ROC shall be submitted to the Department or conservation district through an amended ROC in accordance with this section.

(ii) The new or increased earth disturbance activities may not commence until receipt of written verification of coverage.

(5) Analysis demonstrating that the PCSM BMPs will: meet the volume reduction and water quality requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality. The analysis for the 2-year/24-hour storm event shall be conducted using the following minimum criteria:

(i) Existing predevelopment nonforested pervious areas must be considered meadow in good condition or its equivalent.

(ii) When the existing project site contains impervious area, 20% of the existing impervious area to be disturbed must be considered meadow in good condition or better, except for repair, reconstruction, or restoration of roadways or utility infrastructure when the site will be returned to existing condition.

(6) Analysis demonstrating that the PCSM BMPs will: meet the rate requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan; or manage the net change in peak rate for the 2-, 5-, 10-, 25-, 50-, and 100-year/24-hour storm events in a manner not to exceed preconstruction rates.

(i) Hydrologic routing analysis is required to demonstrate this requirement is met.

(ii) Exempt from this requirement are Department-approved direct discharges to tidal areas or Department-approved no detention areas.

(7) Retain the services of a professional engineer, geologist or landscape architect registered in this Commonwealth who shall:

(i) Prepare and seal E & S and PCSM Plans to be submitted with the ROC which contain the following certification:

“I (name) do hereby certify, pursuant to the penalties of 18 Pa.C.S.A. § 4904, to the best of my knowledge, information and belief that the ROC, E & S and PCSM Plans are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environmental Protection.”

(ii) Identify in the E & S and PCSM Plans a schedule of inspections for critical stages of E & S and PCSM BMP installation and provide oversight responsibility during construction of those critical stages.

(iii) Oversee and seal any necessary modifications to E & S and PCSM Plans; and submit copies of modified plans to the Department or conservation district.

(iv) Prepare and seal record drawings and provide certification that the E & S and PCSM BMPs were installed consistent with E & S and PCSM Plans submitted with the ROC.

(8) Upon receipt of the Verification of Coverage, the registrant shall notify the Department or conservation district at least 7 business days before commencing construction.

(9) The registrant or co-registrant shall have the E & S Plan, PPC Plan, PCSM Plan, and other documents required by this permit-by-rule available at the site for review by the Department, conservation district, or other authorized local, State or Federal government official.

(10) The registrant shall implement the plans developed and verified in accordance with this section.

(11) The registrant or an agent shall notify the Department or conservation district at least 3 days prior to critical stages of E & S and PCSM BMP installation.

(d) *Projects located in High Quality watersheds or watersheds impaired for sediment or stormwater.*

(1) *Watersheds.* Permit-by-rule registrants proposing projects that are located in watersheds that have a designated or existing use of high quality, or nonspecial protection waters impaired for sediment or stormwater shall demonstrate that all construction and post construction discharges will not degrade the physical, chemical or biological characteristics of the surface waters and may not utilize the social or economic justification process established under § 93.4c(b)(iii) (relating to implementation of antidegradation requirements). In addition to the 150-foot riparian forest buffer, registrants shall utilize solely nondischarge alternative BMPs in their E & S and PCSM Plans.

(2) Public notice.

(i) The registrant shall provide a public notice once a week for 3 consecutive weeks in at least one newspaper of general circulation within the geographical area of the project site prior to submission for the ROC. The contents of every public notice must include the following:

(A) The name, address and phone number of the registrant.

(B) A 30-day period following publication of the notice during which written comments may be submitted by interested persons to the applicant.

(C) A brief description of each registrant's activities and project location which result in the discharge proposed for the permit-by-rule.

(D) The name of the receiving water and watershed to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether the discharge is a new or an existing discharge.

(E) The location of the nearest downstream potable water supply, or a finding that no potable water supply will be affected by the proposed discharge.

(F) The means by which interested persons may comment upon the proposed project.

(G) Contact information including the name, address and phone number where interested persons may obtain further information regarding the project.

(H) The existing or designated use of the receiving surface water under Chapter 93.

(ii) The registrant shall provide proof that public notice has been published in a newspaper of general circulation covering the locality or localities in which the activity is or will be located. The proof of public notice, along with any comments and responses, shall be submitted with the ROC.

(e) *Municipal notification.* At least 30 days prior to submission of the ROC, the registrant shall provide written notification to every municipality in which the proposed earth disturbance activity will be located under section 1905-A of The Administrative Code of 1929 (71 P. S. § 510-5). Proof of this notification shall be submitted with the complete ROC.

(f) *Written E & S Plan, PCSM Plan and PPC Plan.* The registrant shall develop an E & S Plan, PCSM Plan and PPC Plan in accordance with the requirements of this chapter and the following:

(1) The E & S BMPs required by this section shall be designed and implemented to meet the standards and specifications identified in the Department's *Erosion and Sediment Pollution Control Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), as amended and updated.

(2) PCSM BMPs shall be designed and implemented to meet the standards and specifications identified in the *Pennsylvania Stormwater Best Management Practices Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(3) Both the E & S Plan and the PCSM Plan must include a riparian forest buffer designed in accordance with § 102.14 (relating to riparian forest buffer requirements) and this section.

(4) Both the E & S Plan and PCSM Plan must minimize the accelerated erosion and sedimentation and must use PCSM BMPs that collectively achieve no net change when compared to preconstruction discharges in stormwater runoff volume, rate and water quality. This shall be accomplished first through the use of site design and nonstructural BMP approaches, and if necessary, structural filtration, infiltration and runoff control BMPs in accordance with *Erosion and Sediment Pollution Control Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), and *Stormwater Best Management Practices Manual*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-0300-002 (December 2006), as amended and updated.

(5) Both the E & S Plan and PCSM Plan shall be prepared and sealed by a professional engineer, geologist or landscape architect registered in this Commonwealth.

(6) Prepare a PPC Plan in accordance with *Guidelines for the Development and Implementation of Environmental Emergency Response Plans*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 400-2200-001 (April 2001), as amended and updated.

(g) *E & S Plan for the permit-by-rule.* The E & S Plan submitted under this section must meet the requirements of § 102.4 (relating to erosion and sediment control requirements) and also include the following categories of E & S BMPs to be installed and maintained. The installation of BMPs shall be conducted in the following sequence:

(1) *Site preparation, sensitive area and buffer protection.* Prior to commencement of any earth disturbance activity including clearing and grubbing, the registrant shall clearly delineate sensitive areas, riparian forest buffer boundaries, areas proposed for infiltration practices, the limits of clearing, and trees that are to be conserved within the project site and install appropriate barriers where equipment may not be parked, staged, operated or located for any purpose.

(2) *Site access.* This is the first land-disturbance activity to take place at the site and the registrant should provide BMPs to minimize accelerated erosion and sedimentation from the following areas: entrance to the site, construction routes, and areas designated for equipment or other use at the site including parking areas and soil stockpiles.

(3) *Sediment barriers.* The registrant shall install perimeter BMPs after the construction site is accessed, keeping associated clearing and grubbing limited to only that amount required for installing perimeter BMPs.

(4) *Diversions.* The registrant shall include outlet protection, constructed to divert upslope clean water runoff around the disturbed area (when necessary).

(5) *Sediment basins and traps.* Outlet protection included shall be constructed prior to the remaining clearing/grubbing and other earth disturbance activities.

(6) *Sediment laden water channels or other conveyance.* This method shall be used to divert stormwater runoff water to the appropriate BMPs such as traps and ponds and should be installed prior to the remaining clearing/grubbing and other earth disturbance activities.

(7) *Land clearing and grading.* The registrant shall implement clearing and grading only after all downslope E & S BMPs have been constructed and stabilized.

(8) *Surface stabilization.* The registrant shall apply temporary or permanent stabilization measures immediately to any disturbed areas where work has reached final grade, has been delayed or otherwise has been temporarily suspended.

(9) *Construction of buildings, utilities, and paving.* During construction, the registrant shall install and maintain any additional E & S BMPs that may be required and implement structural PCSM BMPs.

(10) *Landscaping and final stabilization, topsoiling, trees, and shrubs.* After construction is completed, the registrant shall install stabilization BMPs including: permanent seeding, mulching, sodding and riprap, and complete implementation of PCSM BMPs in this last construction phase. The registrants stabilize all open areas, including borrow and spoil areas, and remove all temporary BMPs and stabilize any disturbances associated with the removal of the BMP.

(h) *PCSM Plan for the permit-by-rule.* The PCSM Plan submitted under this section must meet the requirements of § 102.8 (relating to PCSM requirements), and also include the following categories of BMPs to be installed and maintained:

(1) *Nonstructural BMPs.* Nonstructural BMPs which promote the treatment, infiltration, evaporation and transpiration of stormwater runoff shall be used.

(2) *Low impact, conservation and green infrastructure designs.* These designs shall be used to minimize the generation of runoff by preserving open space, preserving natural areas, reducing the amount of impervious surface, and other green infrastructure design principles that utilize or mimic infiltration or evapotranspiration.

(3) *Volume reduction and infiltration practices.* These practices must include either engineered structures or landscape features designed to capture, reuse, recycle and manage, or infiltrate runoff that mimic preconstruction conditions.

(4) *Runoff practices.* These practices shall be designed and constructed to convey runoff, increase evaporation and manage rate. The practices are to also promote infiltration, filtration and biological uptake of pollutants.

(5) *Filtration practices.* These practices shall be used to treat runoff through filter media that are designed to capture pollutants through the processes of physical filtration of solids or cation exchange of dissolved pollutants.

(i) *ROC under the permit-by-rule.* Registrants seeking coverage under this permit-by-rule shall prepare and submit a complete ROC to the Department or conservation district. The ROC must demonstrate eligibility under and compliance with this section and include:

(1) An ROC checklist.

(2) An E & S Plan prepared by a professional engineer, geologist or landscape architect registered in this Commonwealth.

(3) A PCSM Plan prepared by a professional engineer, geologist, or landscape architect registered in this Commonwealth.

(4) Proof of municipal notice.

(5) Proof of public notice along with all comments and responses for projects in High Quality watersheds impaired for sediment or stormwater.

(6) Proof of consultation with the PNHP regarding the presence of a State or Federal threatened or endangered species on the project site.

(7) Applicable fees.

(j) *Eligibility verification.* Upon submission of the ROC, the Department or the conservation district will review the ROC for consistency with the eligibility criteria, conditions and other requirements of this section, and make a determination of coverage within 30 days. Upon determination of eligibility, the Department or the conservation district will provide written verification of coverage for 5 years. The registrant may apply for other permit coverage as referenced in this section if coverage under this permit-by-rule is denied.

(k) *Coverage notice.* The Department will provide notice in the *Pennsylvania Bulletin* of every approval of coverage under this permit-by-rule.

(l) *Requiring coverage under an individual permit or general permit.*

(1) The Department may deny coverage under this permit-by-rule, or may amend, revoke, suspend or terminate previously issued coverage under this permit-by-rule and require the registrant to apply for and obtain either a general or an individual NPDES permit for failure to meet the requirements of this section. An interested person may petition the Department to take action under this subsection. If a permittee is notified by the Department that previously authorized coverage under this permit is revoked, terminated or suspended and that a general or individual NPDES permit is required, the registrant shall submit a complete NPDES NOI or application, in conformance with this chapter, within 90 days of receipt of the notification, unless the discharger is already in possession of a valid general or individual NPDES permit. Failure to submit the NOI or application within 90 days shall result in automatic termination of coverage under the permit-by-rule. If the project site is in compliance with this chapter, a timely submission of a complete NOI or application shall result in continuation of coverage under the permit-by-rule until the Department takes final action on the pending NOI or permit application.

(2) An action of the Department or the conservation district denying coverage under this permit-by-rule, or requiring a general or an individual NPDES permit, is not a final action of the Department until the registrant submits and the Department takes final action on an individual permit application.

(m) *ROC*. Persons requesting an ROC under this permit-by-rule shall submit to the Department or conservation district an administratively complete and acceptable ROC at least 30 days prior to the expiration date of the coverage. In the event that a timely, administratively complete, and acceptable application for renewal of coverage has been submitted and the Department or conservation district is unable, through no fault of the permittee, to reissue the approval for coverage before the expiration date of the approved coverage, the terms and conditions of the approved coverage will be automatically continued and will remain fully effective and enforceable pending the issuance or denial of the renewal of coverage, provided the permittee is, and has been, operating in compliance with the terms and conditions of the permit-by-rule.

(n) *Other permits or approvals*. Nothing in this permit-by-rule relieves the registrant of the obligation to obtain any other applicable permits, or of complying with all Federal, State or local laws, regulations or standards for the construction, operation and maintenance of the project.

(o) *Termination of coverage*. A permit-by-rule registrant covered under this section shall comply with § 102.7 (relating to permit termination) to terminate permit coverage.

(p) *Program audit*.

(1) The Department will audit the permit-by-rule to verify the effectiveness and the level of environmental protection that the permit provides. The audit will include the following:

(i) Evaluation of whether the objectives of riparian forest buffers, conservation design and permittee compliance are being met.

(ii) Whether the professional engineer, geologist or landscape architect registered in this Commonwealth plan certifications are accurate and effective.

(iii) The adequacy of permittee plan development and BMP implementation and maintenance.

(iv) The effectiveness of achieving the desired environmental results.

(2) This audit process will not only report non-compliance and corrective actions, but also highlight areas of good practices and favorable results. That information will be used to develop policy or amend regulations for enhanced and continual improvement.

§ 102.22. [Permanent] Site stabilization.

(a) *Permanent stabilization*. Upon final completion of an earth disturbance activity or any stage or phase of an activity, the site shall [be] immediately have topsoil restored, replaced, or amended, seeded, mulched or otherwise permanently stabilized and protected from accelerated erosion and sedimentation.

[(b) Erosion and sediment control]

(1) E & S BMPs shall be implemented and maintained until the permanent stabilization is completed. Once permanent stabilization has been established, the temporary E & S BMPs shall be removed. Any areas disturbed in the act of removing temporary E & S BMPs shall be permanently stabilized upon completion of the temporary E & S BMP removal activity.

[(c)](2) For an earth disturbance activity or any stage or phase of an activity to be considered permanently stabilized, the disturbed areas shall be covered with one of the following:

[(1)](i) A minimum uniform 70% perennial vegetative cover, with a density capable of resisting accelerated erosion and sedimentation.

[(2)](ii) An acceptable BMP which permanently minimizes accelerated erosion and sedimentation.

(b) *Temporary stabilization*.

(1) Upon temporary cessation of an earth disturbance activity or any stage or phase of an activity where a cessation of earth disturbance activities will exceed 3 days, the site shall be immediately seeded, mulched, or otherwise protected from accelerated erosion and sedimentation pending future earth disturbance activities.

(2) For an earth disturbance activity or any stage or phase of an activity to be considered temporarily stabilized, the disturbed areas shall be covered with one of the following:

(i) A minimum uniform coverage of mulch and seed, with a density capable of resisting accelerated erosion and sedimentation.

(ii) An acceptable BMP which temporarily minimizes accelerated erosion and sedimentation.

ENFORCEMENT

§ 102.31. Applicability.

The Department or a [county] conservation district may enforce this chapter under The Clean Streams Law (35 P. S. §§ 691.1—691.1001).

§ 102.32. Compliance and enforcement provisions.

* * * * *

(b) If the Department finds that pollution or a danger of pollution results from an act of God in the form of sediment from land for which a complete Conservation Plan has been developed by the [county] conservation district and the Natural Resource Conservation Service, and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of [the act] The Clean Streams Law (35 P. S. § 691.1—691.1001)

(c) A person aggrieved by an action of a conservation district under this chapter may request an informal hearing with the Department within 30 days following the notice of the action. Any final determination by the Department under the informal hearing may be appealed to the EHB in accordance with established administrative and judicial procedures.

(d) For enforcement action taken under this subchapter, the Department or conservation district may collect or recover, from the responsible party, costs and expenses involved in taking enforcement action in accordance with this

subchapter and initiating cost recovery actions under this subchapter. The Department or conservation district may collect the amount in the same manner as civil penalties are collected under section 605 of The Clean Streams Law (35 P.S. § 691.1605).

RESPONSIBILITIES OF LOCAL GOVERNING BODIES

§ 102.41. Administration by [**county**] conservation districts.

(a) The Department may delegate by written agreement the administration and enforcement of this chapter to [**county**] conservation districts if they have adequate and qualified staff, and are; or will be; implementing the program identified in the delegation agreement.

(b) An acceptable program shall have the concurrence and approval of the governing body of the county in which the [**county**] conservation district operates.

(c) The Department will retain program administration and enforcement over projects which cross the political boundaries of [**county**] conservation districts unless otherwise authorized by the Department.

§ 102.42. Notification of application for permits.

A municipality or county which issues building or other permits shall notify the Department or [**county**] conservation district within 5 days of receipt of an application for a permit involving an earth disturbance activity consisting of [**5 acres**] 1 acre ([**2**] 0.4 hectares) or more.

§ 102.43. Withholding permits.

[**A**] With the exception of local stormwater approvals or authorizations, a municipality or county may not issue a building or other permit or final approval to those proposing or conducting earth disturbance activities requiring a Department permit until the Department or a [**county**] conservation district has issued the [**Erosion and Sediment Control**] E & S or individual NPDES Permit, or approved coverage under the general NPDES Permit for Stormwater Discharges Associated With Construction Activities under § 102.5 (relating to permit requirements).

[Pa.B. Doc. No. 09-1610. Filed for public inspection August 28, 2009, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 143]

Hunting and Furtaker Licenses

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed the following rulemaking at its July 9, 2009, meeting:

Add § 143.203a (relating to special elk conservation license auction) to Chapter 143 to establish the special elk conservation license auction and license issuance process.

The proposed rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the July 9, 2009, meeting of the Commission. Comments can be sent to the Director, Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, until September 25, 2009.

1. Purpose and Authority

On October 9, 2008, House Bill 747 (Act 101, 2008) was signed into law. This legislation effectively amended section 2706.2 of the code (relating to elk hunting licenses) to authorize the Commission to sell one elk license per year by auction sale through an eligible wildlife conservation organization. Due to the intermediary role the wildlife conservation organization serves in the sale of the license, the Commission determined that the implementation of the voucher procedures in section 2712 of the code (relating to vouchers for licenses and permits) will streamline and simplify the process of transferring the license to the winning bidder of the auction. Under this process, the wildlife conservation organization will issue the winning bidder of the auction a voucher which then may be redeemed from the Commission for the official elk license. To this end, the Commission is proposing to add § 143.203a to establish the special elk conservation license auction and license issuance process.

Section 2706.2 of the code (relating to elk hunting licenses) provides that "The commission shall promulgate regulations for the use of the license, remitting funds to the commission and conduct of the auction." Section 2712 of the code (relating to vouchers for licenses for permits) provides that "The commission may promulgate regulations to implement this section." Section 2722(g) of the code directs the Commission to adopt regulations for the administration, control and performance of license issuing activities. The addition of § 143.203a was proposed under this authority.

2. Regulatory Requirements

The proposed rulemaking will add § 143.203a to establish the special elk conservation license auction and license issuance process.

3. Persons Affected

Persons wishing to hunt elk within this Commonwealth may be affected by the proposed rulemaking.

4. Cost and Paperwork Requirements

The proposed rulemaking may result in some additional cost and paperwork associated with the production and distribution of the special elk conservation license. However, the Commission determined any additional expense associated with this initiative, should it exist, will be nominal and will be absorbed by the current budget.

5. Effective Date

The proposed rulemaking will be effective upon final publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. Contact Person

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-291. No fiscal impact; (8) recommends adoption.

Annex A
TITLE 58. RECREATION
PART III. GAME COMMISSION
CHAPTER 143. HUNTING AND FUR TAKER
LICENSES

Subchapter K. ELK LICENSES

§ 143.203a. Special elk conservation license auction.

(a) Each year the Commission may contract with an eligible wildlife conservation organization to conduct an auction sale of one special elk conservation license in accordance with the mandates under section 2706.2 of the act (relating to elk hunting licenses).

(b) Upon conclusion of the auction, the wildlife conservation organization shall issue the winning bidder a license voucher which may be redeemed for a special elk conservation license under section 2712 of the act (relating to vouchers for licenses and permits).

[Pa.B. Doc. No. 09-1611. Filed for public inspection August 28, 2009, 9:00 a.m.]

[58 PA. CODE CHS. 141 AND 147]
Hunting and Trapping and Special Permits

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed the following rulemaking at its July 9, 2009 meeting:

Amend §§ 141.20 (relating to protective material required falconry) and §§ 147.101, 147.104, 147.114 (relating to falconry) rescind §§ 147.105—147.110, 147.110a, 147.111—147.114 and add §§ 147.105a—147.109a, 147.110b—147.111a and 147.112a to meet the new Federal standards as well as simplify, reorganize and enhance current State regulations pertaining to falconry.

The proposed rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the July 9, 2009, meeting of the Commission. Comments can be sent to the Director, Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, until September 25, 2009.

1. Purpose and Authority

A dual State and Federal permitting system has been in place since the initial implementation of the Federal regulations governing falconry. Notwithstanding, the separation and independence of these dual permitting structures, the states have always been obliged to operate their individual falconry programs within the bounds of the Federal regulations. On October 8, 2008, the United States Fish and Wildlife Service published new changes to the Federal regulations. Most significantly, the new language eliminated the requirement for a Federal permit to practice falconry. The new language also established a deadline of January 1, 2014, at which time the Federal permit program will be discontinued. For Pennsylvania's falconry program to continue beyond this deadline, it must adopt and implement regulations that meet the standards of the new Federal regulations. Once these standards are met, falconers will only be required to possess a State permit. To this end, the Commission is

proposing to amend these regulations to meet the new Federal standards as well as simplify, reorganize and enhance current State regulations pertaining to falconry.

Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife and game or wildlife habitat, permitting or prohibiting hunting or fur taking, the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth." Section 2901(b) of the code (relating to authority to issue permits) provides "the commission may, as deemed necessary to properly manage the game or wildlife resources, promulgate regulations for the issuance of any permit and promulgate regulations to control the activities which may be performed under authority of any permit issued." The amendments to §§ 141.20 and 147.101—147.114 were proposed under this authority.

2. Regulatory Requirements

The proposed rulemaking will amend §§ 141.20 and 147.101, 147.109, rescind §§ 147.105—147.110, 147.110a, 147.111—147.114 and by adding §§ 147.105a—147.109a, 147.110b, 147.111a and 147.112a—147.114 to meet the new Federal standards as well as simplify, reorganize and enhance current State regulations pertaining to falconry.

3. Persons Affected

Persons wishing to engage in falconry activities within this Commonwealth may be affected by the proposed rulemaking.

4. Cost and Paperwork Requirements

The proposed rulemaking should not result in any additional cost or paperwork.

5. Effective Date

The proposed rulemaking will be effective upon final publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. Contact Person

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-292. No fiscal impact; (8) recommends adoption.

Annex A
TITLE 58. RECREATION
PART III. GAME COMMISSION
CHAPTER 141. HUNTING AND TRAPPING
Subchapter A. GENERAL

§ 141.20. Protective material required.

* * * * *

(b) *Permitted acts.* It is lawful to:

(1) Hunt without wearing daylight fluorescent orange-colored material for:

* * * * *

(iv) [**Small game**] Any or wildlife that can be lawfully harvested under the authority of a valid falconry permit.

* * * * *

CHAPTER 147. SPECIAL PERMITS

Subchapter F. FALCONRY

§ 147.101. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Bate—Attempt to fly.

Eyases—A young bird not yet capable of flight.

* * * * *

Falconry—The [**sport of hunting with trained raptors—including the training of raptors**] wild capture, husbandry and training of raptors for the pursuit of game and wildlife, and the hunting of game and wildlife with raptors.

Hacking—The controlled release of a raptor to the wild.

Hybrid—The offspring of birds listed as two or more distinct species in 50 CFR 10.13 (relating to list of migratory birds), offspring of birds recognized by ornithological authorities as two or more distinct species listed in 50 CFR 10.13 and the offspring of any hybrid birds.

Imprint—For the purposes of falconry, a bird that is hand-raised in isolation from the sight of other raptors until it has fledged. An imprinted bird is considered to be so for its entire lifetime.

* * * * *

Passage birds—

(i) Raptors in their first year of life, **postfledging** and possessing no more than two adult feathers.

(ii) Golden Eagles taken as a juvenile must possess at least one subadult feather.

Raptors—Live migratory birds of the order *Falconiformes* or the order *Strigiformes* [**other than**] including the Bald Eagle—*Haliaeetus leucocephalus*— [**or**] and the Golden Eagle—*Aquila chrysaetos*, wherever its place of origin, whether or not raised in captivity or a hybrid of those species.

* * * * *

§ 147.102. [Examination] Application, examination and fees.

[(a) New falconers shall begin at the apprentice class and are required to pass a supervised examination with a grade of 80%. Falconry examinations will be provided or approved by the United States Fish and Wildlife Service. Examinations will be given from January 1 to June 30 of each year at each regional headquarters building. The examination may relate to basic biology, care and handling of raptors, literature, regulations and other appropriate subject matter.

(b) The basic permit fee—whether a raptor is possessed or not—is \$25, which authorizes the permittee to possess one raptor. Each additional raptor

held shall require an extra fee of \$25. A raptor acquired during the permit year requires an added fee of \$25 payable within 10 days after receipt of the falconry bird.]

(a) **Application.** Applications for falconry permits issued under this subchapter shall be made through the regional office on the appropriate form provided by the Commission.

(1) Applications will only be accepted from persons who possess a valid hunting license or qualify for license and fee exemptions under section 2706 of the act (relating to license and fee exemptions).

(2) Applications must include the name, address and telephone number of the applicant, a photocopy of the applicant's valid Pennsylvania hunting license and a nonrefundable examination fee of \$25.

(3) Applicants who are 17 years of age or younger are additionally required to have a parent or legal guardian co-sign the application and assume legal responsibility for the applicant's falconry activities.

(b) **Examination.**

(1) New applicants shall pass a supervised examination with a minimum grade of 80%.

(2) Examinations must cover the following subjects:

- (i) Laws and regulations.
- (ii) Raptor biology and raptor identification.
- (iii) Trapping methods.
- (iv) Facilities requirements.
- (v) Care of raptors held for falconry.
- (vi) Disease and health problems of raptors.
- (vii) Training methods.

(3) Examinations are administered by the Commission at each regional office from January 1 to June 30 each year.

(c) **Validation.** A new applicant's falconry permit is validated at the apprentice class only upon passage of the supervised examination, passage of facility inspection, and payment of the falconry permit fee set forth in section 2904 of the act (relating to permit fees).

(d) **Lapsed permit.** A falconer whose permit lapses for 2 or more years shall apply as a new applicant.

§ 147.103. Classes [of permits].

(a) [**Apprentice.** A permittee shall be 16 years of age or older.

(1) A sponsor, who is the holder of a valid Federal and Pennsylvania general or master falconry permit, is required for a permittee in the apprentice class. An apprentice permittee shall notify the Commission in writing within 5 days after sponsorship has been withdrawn.

(2) A permittee may not have more than one raptor and may not obtain more than one raptor for replacement during a permit year. A first year permittee may take only one raptor with no replacement.

(3) A permittee shall possess only an American Kestrel—*Falco sparverius*—a Red Tailed Hawk—*Buteo jamaicensis*—or a Red Shouldered Hawk—*Buteo lineatus*.

(4) The raptor held by an apprentice shall be taken from the wild.

(b) *General*. A permittee shall be at least 20 years of age.

(1) A permittee who has been licensed at least 2 years as an apprentice falconer and has had a raptor in possession for at least 12 months of that time may be moved to the next higher classification. A sponsor for an apprentice shall certify in writing that the apprentice is qualified to become a general falconer.

(2) A permittee may not have more than two raptors in his possession and may not take more than two raptors for replacement birds during a permit year. For the first permit year at the general class, a permittee may take one raptor in addition to the one possessed as an apprentice and also take one replacement.

(3) A permittee may not take, transport or possess a Golden Eagle or a species listed as endangered or threatened by the United States Department of Interior or the Commission.

(c) *Master*. A permittee shall be at least 25 years of age.

(1) A permittee who has at least 5 years of falconry experience in the practice of falconry at the general class and had a raptor in possession for 30 months of this time may be moved to the master classification.

(2) A permittee may not possess more than three raptors, and may not take more than two raptors for replacements during a permit year. For the first permit year at the master class, one raptor may be taken in addition to the two which may be possessed as a general falconer and one raptor may be taken as a replacement.

(3) A permittee may not take, transport or possess a species listed as endangered on a United States Department of Interior or Commission list.

(4) A permittee may not take, transport or possess a Golden Eagle for falconry purposes unless authorized in writing by both the United States Fish and Wildlife Service and the Commission.

(5) A permittee may not take, transport or possess as part of the three bird limitation, more than one raptor listed as threatened on United States Department of Interior or Commission list and then only in compliance with all Federal requirements and written permission of the Commission.]

Apprentice. Permittees of the apprentice class shall be subject to the following requirements and limitations:

(1) Permittees shall be 12 years of age or older.

(2) Permittees shall be sponsored, at all times, by a Pennsylvania general or master class falconry permit holder. If a permittee's sponsorship is withdrawn or lost for any reason, the permittee shall provide written notification of the loss to the Commission within 5 days and shall be required to replace the sponsorship within 15 days.

(3) A first year permittee of this class may take and possess only one raptor with no replacement during the first permit year. Other permittees of this class may take and possess only one raptor with only one replacement during each permit year.

(4) Permittees are limited to taking and possessing only wild passage (no eyases) raptors of the following species:

(i) American Kestrel (*Falco sparverius*).

(ii) Red-tailed Hawk (*Buteo jamaicensis*).

(5) Permittees are required to trap their first passage raptor under the direct supervision of a Pennsylvania general or master class falconry permit holder.

(b) *General*. Permittees of the general class shall be subject to the following requirements and limitations:

(1) Permittees shall be 18 years of age or older.

(2) General class permit applicants shall have maintained their apprentice class permit status in good standing for a minimum of 2 years and during that period shall have maintained a raptor for a minimum of 12 months. An application to advance to the general class shall be accompanied by a written letter of recommendation from the permittee's sponsor representing that the permittee possesses the competency and skills necessary to become a member of the general class.

(3) A first year permittee of this class may take only one additional raptor and possess up to a total of two raptors with only one replacement during the first permit year. Other permittees of this class may possess up to a total of three raptors with two replacements during each permit year. Captive-bred raptors shall be included in these quota limits.

(4) Except as further limited under § 147.109 (relating to restrictions on taking raptors), permittees are authorized to take and possess any wild passage or eyas raptors except the following species:

(i) Golden Eagle (*Aquila chrysaetos*).

(ii) Bald Eagle (*Haliaeetus leucocephalus*).

(iii) White-tailed Eagle (*Haliaeetus albicilla*).

(iv) Steller's Sea-eagle (*Haliaeetus pelagicus*).

(v) Other raptor species listed or classified as threatened or endangered by the United States Department of Interior or the Commission.

(c) *Master*. Permittees of the master class shall be subject to the following requirements and limitations:

(1) Permittees shall be 23 years of age or older.

(2) Master class permit applicants shall have maintained their general class permit status in good standing for a minimum of 5 years and during that period shall have maintained a raptor for a minimum of 3 years.

(3) A first year permittee of this class may take only one additional raptor and possess up to a total of four raptors with only one replacement during the first permit year. Other permittees of this class may possess up to a total of five raptors with two

replacements during each permit year. Captive-bred raptors will not be included in these quota limits.

(4) Except as otherwise provided under § 147.109 and paragraph (5), permittees are authorized to take and possess any wild passage or eyas raptors except the following species:

- (i) Golden Eagle (*Aquila chrysaetos*).
- (ii) Bald Eagle (*Haliaeetus leucocephalus*).
- (iii) White-tailed Eagle (*Haliaeetus albicilla*).
- (iv) Steller's Sea-eagle (*Haliaeetus pelagicus*).

(v) Other raptor species listed or classified as threatened or endangered by the United States Department of Interior or the Commission, unless authorized in writing by the United States Department of Interior or the Commission, or both, to possess up to a maximum of one threatened or endangered raptor as part of their total possession allowance.

(5) Upon additional written authorization provided by the Commission, permittees may possess up to a maximum of three eagles, regardless of captive-bred or wild caught, limited to golden eagles, white-tailed eagles and Steller's sea-eagles, as part of their total possession allowance. An application to possess eligible eagles shall be accompanied by two written letters of recommendation from persons with experience handling or flying, or both, large raptors, such as eagles, ferruginous hawks (*Buteo regalis*), goshawks (*Accipiter gentilis*) or great horned owls (*Bubo virginianus*). Each letter of reference must contain a concise history of the author's experience with large raptors and an explicit representation that the permittee possesses the competency and skills necessary to possess eagles.

§ 147.104. [Facilities] Shelter, care and protection.

(a) [The primary consideration for raptor housing facilities, whether indoors or outdoors, is protection from the environment, predators and undue disturbance. Each falconer or applicant shall have indoor or outdoor facilities, or both, as described in paragraphs (1) and (2). The facilities shall be constructed so that the raptor being housed is provided with adequate protection at all times.

(1) *Indoor facilities.* Mews shall be sufficient to allow easy access for caring for the raptors in the facility. If more than one raptor is to be kept in the mews, the raptors shall be tethered, or separated by partitions, and the area for each bird shall be large enough to allow the bird to fully extend its wings. There shall be at least one window, protected on the inside by vertical bars, spaced narrower than the width of the bird's body, and a secure door that can be easily closed. The mews floor shall permit easy cleaning and shall be well drained. Adequate perches shall be provided.

(2) *Outdoor facilities.* Weathering areas shall be fenced and covered with netting or wire, or roofed to protect birds from disturbance and attack by predators. Perches more than 6 1/2 feet high need not be covered or roofed. The enclosed area shall be large enough to ensure the birds cannot strike the fence when flying from the perch. Protection

from excessive sun, wind and inclement weather shall be provided for each bird. Adequate perches shall be provided.

(b) If a falconer has only a single facility of an outdoor type where the bird is kept permanently tied, the facility shall be entirely enclosed with fencing material, regardless of the height of the perch, and the facility shall be constructed so that the raptor is able to seek refuge from extreme climatic conditions and disturbance. If a falconer has only a single facility of the indoor type, the raptors may not be weathered unless the bird is weathered on the fist.]

Housing. Any raptor possessed under a falconry permit shall be housed in a permanent indoor or outdoor facility that provides humane and healthful living conditions, including suitable protection from the environment, predators and other disturbances.

(1) *Size.* Housing facilities must be large enough to afford the permittee easy access to provide for the care and feeding of raptors housed within. Each raptor must have an area large enough to allow it to fly if it is untethered or, if tethered, to fully extend its wings and bate without damaging its feathers or contacting other raptors.

(2) *Containment.* Housing facilities must be totally enclosed and of a design, strength, quality and condition to provide for the adequate containment of any raptor housed within and exclusion of any predators from without. If two or more raptors are housed in the same housing facilities, each raptor shall be separated from other raptors by partitioning walls or suitable tethering. Compatible raptors may be housed together.

(3) *Protection.* Housing facilities must provide areas of refuge that provide adequate protection from excessive sun, wind, inclement weather and disturbance to any raptor housed within.

(4) *Perches.* Housing facilities must provide a suitable perch for each raptor housed within.

(5) *Sunlight.* Housing facilities must provide at least one opening or window to permit the admission of sunlight. The opening or window must be protected on the inside with visible bars spaced narrower than the width of the raptor's body to deter in flight impacts.

(6) *Cleaning and drainage.* Housing facilities must be of a design and condition to permit easy cleaning and adequate drainage.

(7) *Transportation.* Raptors may be transported to and from their permanent or temporary housing facilities provided they have a suitable perch and protection from extreme temperatures, wind and excessive disturbance.

(8) *Temporary housing.* Raptors may be housed outside of their permanent housing facilities, provided they have a suitable perch and protection from extreme temperatures, wind and excessive disturbance for a period not to exceed 30 days without additional authorization from the Commission. Permittees are required to notify the district wildlife conservation officer within 5 days of the commencement of utilizing a temporary housing facility.

(b) *Equipment.* Permittees shall possess the following equipment suitable for the maintenance of raptors:

(1) *Jesses.* At least one pair of Alymeria jesses or jesses of similar type or design and constructed of pliable, high quality leather or suitable synthetic material for use when free flying the raptor. Traditional one piece jesses may only be used for hunting or free flight if they do not have slits.

(2) *Leashes and swivels.* At least one flexible weather resistant leash and one strong swivel.

(3) *Bath container.* At least one suitable container accessible to each raptor for drinking and bathing purposes. The container must be 2 to 6 inches deep and wider than the length of one raptor.

(4) *Outdoor perches.* At least one suitable weathering area perch for each raptor.

(5) *Weighing device.* A reliable scale or balance suitable for weighing raptors. The device shall be graduated in increments of not more than 1/2 ounce or 15 grams.

(c) *Maintenance, care and sanitation.* Permittees shall maintain all raptors and their attendant housing facilities in safe, sanitary and humane condition.

(1) *Food.* Permittees shall provide each raptor with adequate supplies of palatable, uncontaminated and nutritionally adequate food suitable to ensuring the normal health and maintenance of raptors.

(2) *Water.* Permittees shall provide each raptor with adequate supplies of fresh, uncontaminated water that is available at all times.

(3) *Waste.* Permittees shall remove fecal, food and other waste from housing facilities as needed.

(4) *Care.* Permittees shall provide any necessary health care or seek care through a licensed veterinarian or wildlife rehabilitator for any sick or injured raptor.

(d) *Inspection.* A permittee's raptors, housing facilities, equipment and records are subject to inspection by the Commission during normal business hours on any day of the week. All housing, equipment, maintenance, care and sanitation conditions are subject to the initial and ongoing approval of the Commission. Any required modifications shall be completed within 30 days after official oral or written notice of deficiency received from the Commission.

§ 147.105. [Equipment] (Reserved).

[The following items shall be in the possession of the applicant before a permit or license will be granted:

(1) *Jesses.* At least one pair of Alymeri jesses or similar type constructed of pliable, high-quality leather or suitable synthetic material shall be used when a raptor is flown free. Traditional one-piece jesses may be used on raptors when not being flown.

(2) *Leashes and swivels.* At least one flexible weather-resistant leash and one strong swivel.

(3) *Bath container.* At least one suitable container, 2 to 6 inches deep and wider than the length of the raptor, for drinking and bathing for a raptor.

(4) *Outdoor perches.* At least one weathering area perch of an acceptable design shall be provided for each raptor.

(5) *Weighing device.* A reliable scale or balance suitable for weighing the raptor held and graduated in increments of not more than 1/2 ounce—15 grams—shall be provided.]

§ 147.105a. Taking restrictions for resident falconers.

Taking restrictions for resident falcons are as follows:

(1) A valid falconry permit is required prior to obtaining a raptor.

(2) *Eyases* may only be taken by a General or Master falconer. No more than two wild eyases may be taken by the same permittee per permit year. Permittee may not take the last remaining eyas from the nest.

(3) A raptor, other than an endangered or threatened species, taken under a depredation permit or rehabilitated by a licensed rehabilitator determined to be unfit for return to the wild, may, with written authorization of the Commission, be used by falconers as long as they do not exceed limits set by its classification and this subchapter.

(4) A bal-chatri type live trap, other live traps and nets may be used for taking raptors if they are used in a manner which minimizes the danger of injuring the raptor.

(5) Owners of escaped raptors which are banded as required by § 147.107 (relating to marking of certain raptors) may recapture the banded raptors.

(6) Permittees may take no more than two raptors from the wild during any given permit year for replacement or other purposes regardless of their permit quota allowances.

§ 147.106. [Maintenance] (Reserved).

[Facilities and equipment shall be kept at or above standards in this subchapter.]

§ 147.106a. Nonresident falconers.

(a) *Temporary importation.* A nonresident may temporarily import raptors into this Commonwealth for the purpose of attending a falconry meeting or to hunt, provided the possession and importation of the raptors is in compliance with applicable Federal and State laws and regulations. The temporary importation may not exceed 30 days without additional authorization from the Commission.

(b) *Permanent importation.* A nonresident who moves into this Commonwealth for the purpose of becoming a resident may permanently import raptors into this Commonwealth provided the following conditions are met:

(1) Possession and importation of the raptors is otherwise in compliance with applicable State and Federal laws and regulations.

(2) Establish permanent housing facilities for the raptors that meet or exceed the requirements of § 147.104 (relating to shelter, care and protection) within 30 days of importation.

(3) Obtain a Pennsylvania falconry permit no later than 60 days after relocation into this Commonwealth. A relocating nonresident is eligible to receive a Pennsylvania falconry permit of the same or equivalent classification. The falconry permit issued by the former state of residence will be deemed the nonresident's temporary authority to possess and exercise imported raptors until the Pennsylvania permit is issued. This temporary authority may not be construed to permit the taking of additional raptors from the wild in this Commonwealth.

(c) *Taking restrictions.* Taking restrictions for nonresidents are as follows:

(1) A nonresident permittee possessing a current and active falconry permit in the General or Master classification in a state listed in 50 CFR 21.29(k) (relating to Federal falconry standards), may apply for a special permit to take one raptor from the wild in this Commonwealth if the home state of the applicant allows the taking of raptors by nonresidents.

(2) The fee for a permit to take a raptor is \$100 and is not refundable.

(3) Applications for this permit shall be submitted directly to the Bureau of Wildlife Protection with the applicant's name, address, telephone number, date of birth, and the species desired and whether a nestling (eyas) or passage bird is requested. Copies of the applicant's current state or Federal, or both, falconry permit along with a valid import permit or letter from the applicant's home state authorizing the import of the raptor being requested must accompany the application. A certified check or money order in the amount of \$100 payable to "Pennsylvania Game Commission" must accompany the application.

(4) Applications may only be submitted between January 1 and December 1, annually.

(5) Periods for taking raptors as authorized under a nonresident take permit are May 8 to July 15, inclusive for nestling (eyas) birds, or September 19 to December 31, inclusive for passage birds.

(6) A permittee may not take the last remaining nestling—eyas—from a nest.

(7) The number of permits issued annually will not exceed:

<i>Number</i>	<i>Type</i>
5	Nestling (Eyas)
15	Passage

(8) Eyas Goshawk birds may not be taken.

(9) Permits will be issued under a first-come-first-served basis until the annual allocation is exhausted.

(10) The acquisition of a raptor taken from the wild as authorized by the take permit shall be reported to the United States Fish and Wildlife Service by completing a Form 3-186A (Migratory Bird Acquisition and Disposition Report) and forwarding a copy to the Bureau of Wildlife Protection within 5 days.

(11) Marking of certain raptors shall be in compliance with the requirements of the home state of the falconer.

(12) Raptors taken under the authority of this permit shall be used for falconry purposes only.

§ 147.107. [Transportation-temporary holding] (Reserved).

[A raptor may be transported or held in temporary facilities which shall be provided with an adequate perch and protected from extreme temperatures and excessive disturbance, for a period not to exceed 30 days.]

§ 147.107a. Marking of certain raptors.

(a) *Banding.* The following raptors possessed for falconry purposes shall be immediately banded upon capture by either a seamless numbered band or a permanent, numbered, nonreusable band supplied by the United States Fish and Wildlife Service or the Commission:

- (1) Peregrine Falcons (*Falco peregrinus*).
- (2) Goshawks (*Accipiter gentilis*).
- (3) Gyrfalcons (*Falco rusticolus*).
- (4) Harris Hawks (*Parabuteo unicinctus*).
- (5) Captive bred raptors and/or hybrid raptors.

(b) *Replacement bands.* The Commission will replace any band required by subsection (a) that has become mutilated, illegible or lost. The permittee shall report any damage or loss requiring replacement to the Bureau of Wildlife Protection within 72 hours of the damage or lost band. A band which is mutilated or no longer legible shall be returned to the Commission prior to replacement.

(c) *Return of bands.*

(1) *Removal and return of used bands.* Permittees shall remove bands from any raptor that expires, is released into the wild, or no longer requires banding under subsection (a). Golden Eagles banded prior to January 1, 2010, may retain their leg bands. Permittees shall return any removed bands to the Bureau of Wildlife Protection within 5 days.

(2) *Return of unused bands.* Permittees shall return any unused bands in their possession by June 30 to the Bureau of Wildlife Protection.

(d) *Radio transmitters.* Permittees shall attach two radio transmitters on any hybrid raptor that is flown for falconry purposes or for a falconry demonstration for the purpose of relocation if lost.

(e) *Unlawful acts.* It is unlawful for any person to transfer, alter or deface a lawfully issued band or to use or possess a counterfeit band. This subsection may not be construed in any manner to prohibit a permittee from removing the rear tab or smoothing rough or imperfect surfaces if the integrity of the band and numbering is not diminished.

§ 147.108. [Inspection] (Reserved).

[Falconry equipment shall be inspected and certified annually by a representative of the Commission. Equipment shall meet or exceed standards in this subchapter.]

§ 147.108a. Reporting requirements.

(a) *Raptor acquisition, transfer or disposition report.* Permittees shall complete and submit a Form 3-186A (Migratory Bird Acquisition and Disposition Report) to the United States Fish and Wildlife

Service and forward a copy to the Bureau of Wildlife Protection within 5 days for the following types of transactions or events:

- (1) The acquisition of a raptor taken from the wild or received by transfer from another person.
- (2) The loss of a raptor previously held through release, escape, theft or death.
- (3) The transfer of a raptor to another person.
- (4) The banding or rebanding of any raptor which requires banding.
- (5) The loss or removal of banding from any raptor that does not presently require banding.

(b) *Annual report.* Permittees shall complete and submit an annual report to the Bureau of Wildlife Protection by July 31 on forms supplied by the Commission. These reports must include an accurate accounting of all activities conducted under the authority of their falconry permit during the preceding permit year. Permittees shall complete and submit a similar report within 30 days of the termination of their permit.

§ 147.109. [Restrictions on taking raptors] (Reserved).

[(a) Taking restrictions for residents are as follows:

(1) A valid falconry permit is required prior to obtaining a raptor.

(2) Young wild birds not yet capable of flight—eyases—may only be taken by a general or master falconer, and only during the period April 1 to April 7 inclusive and May 8 to July 15 inclusive. Great Horned Owl eyases may be taken from March 15 to March 21 inclusive. No more than two wild eyases may be taken by the same permittee during specified periods.

(3) First year wild-passage-birds may be taken during the period September 19 to December 31, inclusive.

(4) Adult American Kestrels (*Falco sparverius*) and Great Horned Owls (*Bubo virginianus*) may be taken during the period September 19 to December 31, inclusive.

(5) A raptor, other than an endangered or threatened species, taken under a depredation permit or rehabilitated by a licensed rehabilitator determined to be unfit for return to the wild may, with written authorization of the Commission, be used by falconers as long as they do not exceed limits set by its classification and this subchapter.

(6) A bal-chatri type live trap, other live traps and nets may be used for taking raptors if they are used in a manner which minimizes the danger of injuring the raptor.

(7) Owners of escaped raptors which are banded as required by the United States Fish and Wildlife Service may recapture the banded raptors.

(b) Taking restrictions for nonresidents are as follows:

(1) A nonresident possessing a current and active falconry permit in the General or Master Classification in a state listed in 50 CFR 21—29(k) (relating to Federal falconry standards), may apply for a

special permit to take a raptor in this Commonwealth if the home state of the applicant allows the taking of raptors by nonresidents.

(2) The fee for a permit to take a raptor is \$100 and is not refundable.

(3) Applications for this permit shall be submitted directly to the Commissions' Bureau of Law Enforcement and shall state the applicants name, address, date of birth, telephone number and the species desired and whether a nestling (eyas) or passage bird is requested. Copies of the applicant's current state or Federal, or both, falconry permit along with a valid import permit or letter from the applicant's home state authorizing the import of the raptor being requested shall accompany the application. A certified check or money order in the amount of \$100 payable to "Pennsylvania Game Commission" shall accompany the application.

(4) Applications may only be submitted between January 1 and August 15 annually.

(5) Periods for taking raptors as authorized under a nonresident take permit are May 8 to July 15 inclusive for nestling (eyas) birds or September 19 to December 31, inclusive for passage birds.

(6) A permittee may not take the last remaining nestling—eyas—from a nest.

(7) The number of permits issued annually will not exceed:

<i>Number</i>	<i>Type</i>
5	Nestling (Eyas)
15	Passage

(8) Eyas Goshawk birds may not be taken.

(9) Permits will be issued under a first-come-first-served procedure until the annual allocation is exhausted.

(10) The acquisition of a raptor taken from the wild as authorized by the take permit shall be immediately reported to the Commission by completing a Form 3-186A (Migratory Bird Acquisition and Disposition Report) and forwarding a copy to the Bureau of Law Enforcement, Technical Services Division.

(11) Marking of certain raptors shall be as directed in 50 CFR 21.28(d)(7) (relating to falconry permits).

(12) Raptors taken under the authority of this permit shall be used for falconry purposes only.]

§ 147.109a. Hunting and training with raptors.

(a) Permittees may only hunt wildlife through the use of raptors in accordance with the requirements of the act and this part.

(b) Permittees may train raptors or propagated game birds during the period August 1 to March 31, inclusive, and are subject to the following conditions:

(1) Quarry shall be released either by hand or by means of electronic, spring or box holding devices.

(2) Game birds released shall be obtained from a licensed propagator.

(3) Released game birds which escape shall be considered wild birds, and no further attempt shall be made to pursue them except during the open season for hunting small game.

(c) Permittees shall possess their hunting license and falconry permit on their person at all times while engaged in any raptor hunting or training activities.

§ 147.110. [Marking of certain raptors] (Reserved).

[Marking of certain raptors shall be as follows:

(1) No Peregrine Falcon, Gyrfalcon or Harris Hawk may be taken, possessed or transported for falconry purposes unless the raptor is banded by either a seamless numbered band or by a permanent, numbered, nonreusable band supplied by the United States Fish and Wildlife Service. Permanent, numbered, nonreusable bands may be obtained by directing a written request to the Harrisburg headquarters of the Commission. The band shall be attached to the raptor immediately upon capture. A band is not transferable.

(2) A band which is required for Peregrine Falcons, Gyrfalcons, Harris Hawks and captive bred raptors that has been mutilated, becomes illegible or lost shall be reported within 72 hours to the Harrisburg headquarters of the Commission. A band which is mutilated or no longer legible shall be returned with the request for replacement. Replacement bands will be issued only for Peregrine Falcons, Gyrfalcons, Harris Hawks and captive bred raptors. A rebanding shall be reported to the United States Fish and Wildlife Service on a Form 3-186A, submitted within 5-calendar days from the date of the rebanding.

(3) A United States Fish and Wildlife Service Form 3-186A shall be completed for each other raptor which no longer requires banding when the presently attached band becomes mutilated, illegible or lost. The Form 3-186A shall be submitted directly to the United States Fish and Wildlife Service within 5-calendar days of the mutilation, illegibility or loss of the band. Bands removed as a result of mutilation or illegibility shall be returned to the Harrisburg headquarters of the Commission within 5-calendar days following their removal.

(4) It is unlawful for a person to alter or deface a band. A permittee may remove the rear tab and smooth an imperfect surface, if the integrity of the band and numbering is not affected. It is unlawful to use or possess a counterfeit band.

(5) A band shall be removed from a raptor which dies or is intentionally released into the wild and shall be forwarded to the Harrisburg headquarters of the Commission, within 5-calendar days, along with a report of the probable cause of death or the area of release.

(6) Unused bands in possession on July 16 or January 1 shall be returned to the Harrisburg headquarters of the Commission within 72 hours.]

§ 147.110a. [Raptor acquisition, transfer or disposition reporting] (Reserved).

[A United States Fish and Wildlife Service Form 3-186A (migratory bird acquisition and deposition report) shall be completed and submitted directly to the United States Fish and Wildlife Service within 5-calendar days following the date of transaction as follows:

(1) The acquisition of a raptor taken from the wild or received by transfer.

(2) The loss of a raptor held through its release, escape, theft or death.

(3) The transfer of raptor to another person.

(4) The rebanding of a raptor which requires banding.

(5) The loss, mutilation or illegibility of a previously attached band for a raptor held which does not presently require banding.]

§ 147.110b. Educational use of raptors.

(a) *Falconry and raptor lectures.* Permittees may engage in noncommercial educational lecture activities using live raptors subject to the following conditions:

(1) The educational lecture activities shall be focused on the natural history of raptors, the conservation of raptors, the sport of falconry and other related topics.

(2) The educational lecture activities shall be conducted by permittee's of the General or Master class only.

(3) Raptors used in educational lecture activities may not have physical contact with members of the audience or general public.

(4) Raptors used in educational lecture activities shall be maintained either tethered and on the permittee's gloved hand or in a transport carrier. No flight is permitted.

(5) The permittee may not receive any form of compensation for the lecture.

(6) The permittee is encouraged, but not required, to notify the regional office in advance of conducting any scheduled educational lecture activities.

(b) *Falconry demonstrations.* Permittees may engage in noncommercial falconry demonstrations using live raptors subject to the following conditions:

(1) Falconry demonstrations shall be conducted by permittees of the General or Master class only.

(2) Raptors used in falconry demonstrations activities shall not have any physical contact with members of the audience or general public.

(3) Outdoor raptor free-flight demonstrations may be conducted by permittees of the Master class only.

(4) Indoor raptor flight demonstrations shall be conducted with the raptor tethered in a manner that prevents physical contact with the audience or general public or with physical structures such as walls, windows or furniture. Indoor raptor free-flight demonstrations are strictly prohibited.

(5) The permittee may not receive any form of compensation for the falconry demonstration.

(6) The permittee shall notify the regional office in writing at least 5 days in advance of conducting any scheduled falconry demonstration activities.

(c) *Other educational uses of raptors.* Permittees may engage in other forms of noncommercial educational activities using live raptors, such as photography or filming, subject to the following conditions:

(1) The activities shall be focused on the natural history of raptors, the conservation of raptors, the sport of falconry and other related topics.

(2) The permittee may not receive any form of compensation for the activity.

(3) The permittee may not use raptors for entertainment, advertisements, promotion or endorsements of any products, merchandise, goods, services, meetings, fairs or as a representation of any business, company, corporation or other organization.

§ 147.111. [Hunting with raptors] (Reserved).

[(a) Wild birds and animals may be hunted only in accordance with the act and this part.

(b) The training of raptors by holders of valid falconry permits on liberated propagated game birds during the period August 1 to March 31, inclusive, is permitted, subject to the following conditions:

(1) Quarry shall be released either by hand or by means of electronic, spring or box holding devices.

(2) Game birds released shall be obtained from a licensed propagator.

(3) Released game birds which escape shall be considered wild birds, and no further attempt shall be made to pursue them except during the open season for hunting small game.

(4) Raptors may be used to take game birds on a licensed regulated hunting ground.]

§ 147.111a. Additional requirements for permittee.

(a) Permittees are prohibited from propagating raptors held under the authority of a falconry permit unless they possess a joint State/Federal raptor propagation permit.

(b) A permittee whose permit lapses or is otherwise suspended or revoked shall return any raptors possessed into the wild by hacking-back, transfer the raptors to another permitted falconer or forfeit the raptors to the Commission. Propagated, hybrid and nonindigenous raptors may not be released into the wild.

(c) A permittee may not sell, purchase, barter or offer to sell, purchase or barter a propagated raptor unless the raptor is marked on the metatarsus by a seamless, numbered band supplied by the United States Fish and Wildlife Service or the Commission.

(d) If a permittee's raptor unintentionally injures or kills any wildlife during a closed season while engaged in falconry activities, the permittee shall comply with the notification and reporting requirements in section 2306 of the act (relating to killing game or wildlife by mistake). The permittee will not be required to pay any restitution fees unless the injury or taking is determined to be the result of carelessness or negligence. The permittee is not required to put the carcass of the injured or killed wildlife in a place of safekeeping, but rather may leave the carcass in the field and allow the raptor to feed upon it. Once the raptor is finished feeding, it may not be hunted the rest of that day.

(e) A raptor possessed under authority of a falconry permit may be temporarily held by a person other than the permittee only if that person is otherwise authorized to possess raptors, and only if the raptor is accompanied at all times by a properly completed United States Fish and Wildlife Service Form 3-186A designating the permittee as the possessor of record and by a signed, dated statement from the permittee. If the period of care will exceed 30 days, written permission shall be obtained from the Commission. Illness or disability of the permittee would be cause for temporary transfer of the raptors to another authorized person for care. The Commission shall be notified of this action within 5 days following the temporary transfer. Final disposition of the raptors will be at the discretion of the Commission.

(f) Molted feathers, or feathers from birds held in captivity that die, may be retained by the permittee for imping purposes only. Molted feathers and retrices from a golden eagle shall be collected and used for imping purposes or submitted to the National Eagle Repository.

(g) Carcasses of dead raptors shall be disposed in a proper waste receptacle or buried underground unless otherwise authorized by the Commission. The entire carcass of dead golden eagles, including all feathers, talons and other parts shall be submitted to the National Eagle Repository.

(h) Propagated, hybrid and nonindigenous raptors may not be intentionally released into the wild without prior written approval of the Commission.

(i) A sponsor may not have more than three apprentices at one time.

§ 147.112. [Nonresident falconers] (Reserved).

[(a) A nonresident of this Commonwealth who possesses Federal falconry permits or falconry permits issued by states designated as participants in a joint Federal/state falconry permit system may bring a raptor legally possessed by the nonresident under authority of the falconry permit into this Commonwealth to attend falconry meets or to hunt if:

(1) No laws or regulations of other states are violated.

(2) No Federal laws are violated.

(3) A nonresident Pennsylvania hunting license is obtained and hunting regulations are observed.

(b) A nonresident of this Commonwealth who possesses Federal falconry permits or falconry permits issued by states designated as participants in a joint Federal/State falconry permit system who moves into this Commonwealth for the purpose of becoming a resident may bring legally possessed raptors if required facilities are constructed within 30 days, and the nonresident applies for a Pennsylvania falconry permit no later than 60 days after moving to this Commonwealth. A permit in the same classification as held in the previous state of residence may be issued without a written examination. The falconry permit issued by the former state of residence will be authority to possess and

exercise raptors until a Pennsylvania permit is obtained, if no raptors are taken from the wild and raptors are not used to take quarry without a valid Pennsylvania hunting license.]

§ 147.112a. Violations.

The Director may deny, revoke or suspend any permit for any violation of this subchapter upon written notice to the permittee.

§ 147.113. [Miscellaneous] (Reserved).

[(a) A person holding raptors under authority of a falconry permit shall possess a current hunting license. The hunting license shall be displayed while hunting wildlife with raptors. The falconry permit, or a facsimile thereof, shall be carried by the permittee when engaged in the sport of falconry.

(b) Captive breeding attempts, using raptors held under authority of falconry permits, are prohibited unless otherwise permitted under Federal law and then only under authority of a joint Federal/State permit.

(c) No permit will be renewed if the facilities do not meet the requirements of § 147.105 (relating to equipment).

(d) A person having a raptor in his possession whose falconry permit is not renewed or is revoked with cause has 30 days to return the birds to the wild by hacking-back or shall forfeit the raptors to the Commission. A raptor not indigenous to this Commonwealth shall be transferred to a licensed falconer or forfeited to the Commission.

(e) A permittee may not sell, purchase, barter or offer to sell, purchase or barter a raptor unless the raptor is marked on the metatarsus by a seamless, numbered band supplied by the United States Fish and Wildlife Service.

(f) If a person, while engaged in the sport of falconry, unintentionally injures or kills wildlife which could not legally be killed at that time, the person shall notify the regional office servicing the area within 12 hours of the injury or killing. The wildlife injured or killed shall be put in a place of safe keeping and may be disposed of only as specified by a Commission officer.

(g) A raptor possessed under authority of a falconry permit may be temporarily held by a person other than the permittee only if that person is otherwise authorized to possess raptors, and only if the raptor is accompanied at all times by a properly completed United States Fish and Wildlife Service Form 3-186A designating the permittee as the possessor of record and by a signed, dated statement from the permittee. If the period of care will exceed 30 days, written permission shall be obtained from the Commission. Illness, disability or death of the permittee would be cause for temporary transfer of the raptors of the permittee to another authorized person for care. The Commission shall be notified of this action within

5-calendar days following the temporary transfer. Final disposition of the raptors will be at the discretion of the Commission.

(h) Molted feathers, or feathers from birds held in captivity that die, may be retained by the permittee for imping purposes only.

(i) A permittee may transfer a raptor to another permittee if the transfer occurs entirely within this Commonwealth and a properly completed Form 3-186A is submitted to the United States Fish and Wildlife Service by each permittee as required.

(j) A permittee may transfer a raptor to or receive a raptor from another permittee in an interstate transaction if a properly completed Form 3-186A is submitted to the United States Fish and Wildlife Service by each permittee as required.

(k) Raptors which die shall be reported on a properly completed Form 3-186A submitted to the United States Fish and Wildlife Service as required. Carcasses of dead raptors shall be buried unless otherwise authorized by the Commission.

(l) A raptor which is not indigenous to the Commonwealth may not be intentionally released to the wild without prior written approval of the Commission.

(m) Captive bred and hybrid raptors used for falconry shall be included as part of the permittee's possession limit.

(n) Raptors held under authority of a falconry permit may be used for falconry. They cannot be used for another purpose except falconry demonstrations, which shall include the actual flying of the raptor. A notice of scheduled falconry demonstrations shall be submitted in writing to the regional office in charge of that area at least 5 days prior to the event. The notice shall set forth the location, date and time of the falconry demonstration.

(o) A permittee who refuses sponsorship of an applicant shall report the reasons for refusal to the Commission in writing within 10 days upon written request of the Commission.

(p) A sponsor may not have more than three apprentices at one time.

(q) This subchapter does not prohibit activities which are otherwise permitted.]

§ 147.114. [Annual report] (Reserved).

[An annual report shall be submitted on forms supplied by the Commission and approved by the United States Fish and Wildlife Service by July 31 of each year whether or not renewal is requested. A similar report is required upon termination of the permit. This report shall be an accurate account of all activities carried on under authority of the permit.]

[Pa.B. Doc. No. 09-1612. Filed for public inspection August 28, 2009, 9:00 a.m.]

[58 PA. CODE CH. 147]

Special Permits

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed the following rulemaking at its July 9, 2009, meeting:

Add § 147.558a (relating to political subdivisions as applicants) to authorize political subdivisions to apply for an agricultural deer control permit for the limited purpose of managing the agricultural deer control activities occurring on a conglomeration of separate, but otherwise individually eligible properties located within the jurisdictional boundaries of the political subdivision.

The proposed rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the July 9, 2009, meeting of the Commission. Comments can be sent to the Director, Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, until September 25, 2009.

1. *Purpose and Authority*

The Agricultural Deer Control Permit (commonly referred to as "Red Tag") is a very useful program that assists landowners in achieving their land use goals by managing deer densities on their respective properties through the use of licensed hunters. Traditionally, this program has required landowners to individually manage the application, reporting and deer control activities themselves. This higher level of individual responsibility has proven to be an impediment to participation for some landowners that are greatly interested in controlling deer densities on their properties, but are not capable of dedicating the necessary resources to manage the program on their property. In an effort to enhance public access to this program, the Commission is proposing to add § 147.558a to authorize political subdivisions to apply for an agricultural deer control permit for the limited purpose of managing the agricultural deer control activities occurring on a conglomeration of separate, but otherwise individually eligible properties located within the jurisdictional boundaries of the political subdivision. This structure will not only reduce the demands on each respective landowner, but it will enhance the effectiveness of a larger deer control plan promoted by the community by consolidating the management of the agricultural deer control activities into one centralized location.

Section 2901(b) of the code (relating to authority to issue permits) provides "the commission may, as deemed necessary to properly manage the game or wildlife resources, promulgate regulations for the issuance of any permit and promulgate regulations to control the activities which may be performed under authority of any permit issued." The addition of § 147.558a was proposed under this authority.

2. *Regulatory Requirements*

The proposed rulemaking will add § 147.558a to authorize political subdivisions to apply for an agricultural deer control permit for the limited purpose of managing the agricultural deer control activities occurring on a conglomeration of separate, but otherwise individually eligible properties located within the jurisdictional boundaries of the political subdivision.

3. *Persons Affected*

Persons wishing to engage in agricultural deer control activities within this Commonwealth may be affected by the proposed rulemaking.

4. *Cost and Paperwork Requirements*

The proposed rulemaking should not result in any additional cost or paperwork.

5. *Effective Date*

The proposed rulemaking will be effective upon final publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. *Contact Person*

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-293. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 147. SPECIAL PERMITS

Subchapter R. DEER CONTROL

AGRICULTURE

§ 147.558a. Political subdivisions as applicants.

(a) *Eligibility.* Political subdivisions are authorized to apply for an agricultural deer control permit under this subchapter for the limited purpose of managing the agricultural deer control activities occurring on a conglomeration of separate, but otherwise individually eligible properties located within the jurisdictional boundaries of the political subdivision. Any lands, other than those publicly owned, which lie immediately adjacent to and are connected with otherwise individually eligible lands may be included in the conglomeration of properties with the written consent of the owner or lessee thereof.

(b) *Application.* Political subdivisions applying for an agricultural deer control permit are responsible for the collection and submission of the application records required under § 147.552 (relating to application) for each of the properties included in the conglomeration.

(c) *Management.* Political subdivision permittees shall manage the distribution of agricultural deer control subpermits to qualified individuals in accordance with the eligibility criteria and quota limitations in §§ 147.553 and 147.554 (relating to permit; and subpermit). Political subdivision permittees shall appoint an officer or employee of the political subdivision to manage the permit activities and serve as a point of contact for affected land owners and the Commission.

(d) *Reporting.* Political subdivision permittees are responsible for the collection and submission of reporting records required under § 147.557 (relating to reporting of deer taken) for each of the properties included in the conglomeration.

[Pa.B. Doc. No. 09-1613. Filed for public inspection August 28, 2009, 9:00 a.m.]