

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 102]

Erosion and Sediment Control

The Environmental Quality Board (Board) by this order amends Chapter 102 (relating to erosion and sediment control). The amendments are the result of a comprehensive regulatory review required under Governor Ridge's Executive Order 1996-1 and the Department of Environmental Protection's (Department) Regulatory Basics Initiative (RBI). The amendments eliminate obsolete terms, simplify technical requirements for best management practices (BMP), update and clarify permit requirements, and integrate these regulations with current Federal National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Stormwater Discharges associated with construction activities.

This proposal was adopted by the Board at its meeting of September 21, 1999.

A. *Effective Date*

These amendments shall become effective upon publication in the *Pennsylvania Bulletin* as final-form rule-making.

B. *Contact Persons*

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C. *Statutory Authority*

The amendments are adopted under the authority of sections 5 and 402 of The Clean Streams Law (35 P. S. §§ 691.5 and 691.402); section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20); and section 11 of the Conservation District Law (3 P. S. § 859(2)), which provide the Board the authority to promulgate regulations, and the authority for the Department and delegated entities to regulate accelerated erosion and sediment from earth disturbance activities to waters of this Commonwealth.

D. *Background and Purpose*

The purpose of this final-form rulemaking is to amend regulations found in Chapter 102 as part of the RBI and Executive Order 1996-1 (Regulatory Review and Promulgation). These initiatives are multistep processes to evaluate regulations considering several factors including whether requirements: are more stringent than Federal regulations unless justified by a compelling Commonwealth interest or required by State law; impose economic costs disproportionate to the environmental benefit; are prescriptive rather than performance-based; inhibit green

technology and pollution prevention strategies; are obsolete or redundant; lack clarity; or are written in a way that causes significant noncompliance.

Under the amendments, persons proposing or conducting earth disturbance activities are required to develop, implement and maintain erosion and sediment control BMPs. BMPs are utilized to provide a measurable performance-based requirement for earth disturbance activities to minimize accelerated erosion and the potential of sediment pollution. The final-form regulations have been written to provide performance-based objectives rather than mandate specific practices for all activities. Flexibility in meeting the performance requirements is provided by allowing the use of a variety of BMPs provided in the Department's *Erosion and Sediment Pollution Control Program Manual* (Manual). The final-form regulations also allow for the consideration of alternative BMPs not listed in the Manual which provide the same level or improved protection of water quality and existing and designated uses.

Earth disturbance activities are regulated under Chapter 102. The amended revisions require the development of a written Erosion and Sediment Control Plan for all earth disturbances of 5,000 square feet or greater, earth disturbances in High Quality or Exceptional Value watersheds or when required by another Department regulation. Permit requirements have been amended to more clearly integrate the existing NPDES Stormwater Permit Requirements for Stormwater Discharges associated with construction activities. Construction activities having earth disturbances of 5 or more acres of land require an NPDES Permit for Stormwater Discharges Associated with Construction Activities. Earth disturbance activities associated with agricultural plowing or tilling, timber harvesting and road maintenance do not require coverage under the NPDES Permit for Stormwater Discharges Associated with Construction Activities. Persons conducting timber harvesting or road maintenance activities which involve 25 acres or more of earth disturbance must apply for and obtain coverage for an Erosion and Sediment Control Permit required under this chapter. Persons conducting agricultural plowing or tilling activities are required to develop plans and implement agricultural BMPs, but continue to be exempt from the permitting requirements in this chapter. Earth disturbance activities conducted under other Department permits issued under regulations which require compliance with Chapter 92 (relating to National Pollutant Discharge Elimination System) and Chapter 102, will not require a separate authorization under an Erosion and Sediment Control Permit, or an NPDES Permit for Stormwater Discharges Associated with Construction Activities.

The amendments have been developed with valuable input from the general public, Federal, county, municipal, industry, environmental and consulting representatives, and from the Department's internal review of its regulations.

The proposed rulemaking was published at 28 Pa.B. 769 (February 7, 1998). A 60-day public comment period on the proposal expired on April 8, 1998. Three public hearings were held by the Board: March 9, 1998, Leesport; March 11, 1998, Slippery Rock; and March 18, 1998, State College. Approximately 300 comments were received from 36 commentators through public hearings and written comments. A summary of the comments and responses are provided in Section F of this Preamble.

Initial drafts of the proposed revisions have been placed on the Department's Web site and presented to and discussed with the Agricultural Advisory Board (AAB), the Water Subcommittee of the Air and Water Quality Technical Advisory Committee (AWQTAC) and other representative groups. Additional comments have been provided by county conservation districts, State and Federal agencies and the regulated community, as part of the RBI public input process. Draft versions of the proposed amendments were presented to the AAB on December 18, 1996, February 26, 1997, April 23, 1997, and June 25, 1997, and to AWQTAC on December 10, 1996, February 20, 1997, and April 17, 1997. Both Committees raised comments and questions on a number of issues.

In addition, the Department has been working with several groups of stakeholders in addressing the use of BMPs for timber harvesting and road maintenance activities. The Department supports the nonregulatory approach of the Sustainable Forestry Initiative (SFI), and the Dirt and Gravel Road Task Force (DGRTF), in promoting, educating and training persons conducting these activities to use BMP techniques and standards to minimize accelerated erosion and thereby enhance the quality of this Commonwealth's waters. After considering the AWQTAC's comments, and the nonregulatory approaches of the SFI and DGRTF, the Department is proposing to continue the current regulatory framework that requires persons proposing or conducting timber harvesting and road maintenance activities to complete an Erosion and Sediment Control Plan, and implement BMPs, but does not require them to obtain a permit under Chapter 102 if the activities disturb less than 25 acres. An Erosion and Sediment Control Permit continues to be required for timber harvesting and road maintenance activities that disturb 25 acres or more.

The final-form regulations were presented to the Water Resources Advisory Committee (WRAC) at the May 12, 1999, meeting and the AAB at the June 16, 1999, meeting for discussion. The WRAC approved the amended final regulations on May 12, 1999, and the AAB approved the final regulations on June 16, 1999.

At the WRAC meeting, the Department was asked to clarify that road maintenance activities apply to existing paved and unpaved roads. The Department explained that road maintenance typically includes shoulder cutting, road grading, ditch cleaning and similar activities. Road construction and roadway reconstruction is not considered road maintenance.

The WRAC suggested that the purpose of the regulations should be to prevent pollution from sediment. The Department stated that the regulations do prevent pollution by requiring the installation and use of BMPs to protect existing and designated uses of waters of this Commonwealth.

Questions were raised about the inclusion of BMPs for High Quality and Exceptional Value Waters in the regulations while other BMPs are listed in the Manual. The Department included special protection BMPs in the regulations at the suggestion of commentators and to emphasize special protection for these resources. To meet its RBI commitment, the regulations provide for a performance based standard which allows for alternate BMPs in special protection waters when the BMPs will maintain and protect existing water quality and existing and designated water uses.

In nonspecial protection waters, the Department's Manual lists a wide range of BMPs available to meet the

regulatory standard of minimizing the potential for accelerated erosion and sedimentation to protect, maintain, reclaim and restore water quality and existing and designated uses, without being prescriptive. Alternate BMPs may be utilized where they meet the regulatory standard.

At the AAB meeting, the AAB recommended that the Department include a definition for "conservation plan," include enforcement provisions applying to agricultural practices consistent with The Clean Streams Law, and clarify who was qualified to develop an Erosion and Sediment Control Plan. The AAB approved the amendments with the understanding that their recommendations would be included in the final rulemaking. The regulations have been revised as recommended by the AAB.

E. Summary of Regulatory Revisions in the Final Rulemaking

Section 102.1. Definitions.

Definitions in this chapter include revisions, additions and deletions, in response to comments received on the proposed rulemaking package.

The definition of "agricultural plowing or tilling activity" is clarified to specifically refer to the preparation and maintenance of soil for the production of agricultural crops.

The term "BMPs—best management practices" is revised in response to comments relating to the use of the terms "improve" and "aquatic environment." "Improve" is replaced with the term "reclaim and restore" to more closely track The Clean Streams Law. "Aquatic environment" is replaced with "existing and designated uses" to be consistent with the water quality standards program.

A definition for "channel" has been added at the suggestion of a commentator.

The term "collector" is amended to require that collected water be conveyed to facilities for sediment retention or removal.

The term "conservation plan," which was proposed for deletion, is included in the final rulemaking at the request of the AAB to be consistent with The Clean Streams Law and to clarify erosion and sediment control requirements for agricultural plowing or tilling.

A definition for "county conservation district" is added. The term is defined as "county conservation districts" which have the authority under a delegation agreement with the Department to administer and enforce the erosion and sediment control program. With this term added, the term "designee" is no longer required and is deleted.

The term "dewatering zone" is added to identify that portion of a sediment basin where stormwater runoff is held and released in a controlled manner.

The term "disturbed area" is revised to identify those land areas not stabilized where an earth disturbance activity is occurring or has occurred.

The term "earth disturbance" is clarified to ensure that clearing activities in and of themselves are not considered earth disturbance activities, whereas "clearing and grubbing" activities are considered earth disturbances.

"Erosion and Sediment Control Permit" is clarified to eliminate confusion with NPDES permits. Timber harvesting activities or road maintenance activities which

involve 25 acres or more of earth disturbance are required to secure an Erosion and Sediment Control Permit.

The term "Erosion and Sediment Control Plan" is modified to require BMPs to be identified on the plan. Also, language is added which provides that, 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.

The proposed terms "minimum sediment storage elevation" and "minimum storage elevation" are no longer used in the body of the regulations and are deleted.

The term "NPDES Permit for Stormwater Discharges Associated with Construction Activities" is amended to clarify that this permit is required for potential discharges into waters of this Commonwealth over the life of the project, and to specify that clearing alone does not require an NPDES permit.

A minor revision is made to the definition of the term "NOI—Notice of Intent" to incorporate the reference to county conservation districts.

The term "operator" is added to be consistent with the Federal NPDES program and to clarify who is responsible for securing NPDES stormwater permits associated with construction activities. The term includes persons who have oversight responsibility of earth disturbance activity on a project site with the authority to modify site plans and persons who have day to day control over the earth disturbance activity on a project site or portion thereof.

The proposed term "outlet structure" is no longer used in the regulations and is deleted.

The term "perimeter BMPs" is added to describe the specific types of BMPs developed and implemented on project perimeters to divert water around the project site or to capture water for treatment.

The term "person" is modified to include operators.

The term "permanent stabilization" has been added and is defined as long-term protection of soil and water resources from accelerated erosion.

The term "permanent pool" has been added and is defined as an area within a basin that is designed to be permanently inundated with water.

A definition for "principal spillway" is added to clarify that the function of the structure is to regulate the discharge of water from a basin.

The term "project site" is amended to be consistent with Federal requirements and includes the entire project area disturbed or planned to be disturbed.

The term "road maintenance activities" is clarified to apply to maintenance activities on existing unpaved roads and other similar activities within the existing road cross section.

The term "skim" is added to describe the removal of the upper most portion of water within a sediment basis.

Section 102.2. Scope and Purpose.

Sections 102.2 and 102.3 are merged into § 102.2 in response to comments received during the proposed rule-making process. Commentators stated that these sections were redundant and could be clarified by combining the requirements into one section. The revisions maintain the emphasis and focus on protecting, maintaining, reclaim-

ing and restoring water quality through the implementation of BMPs that minimize accelerated erosion from earth disturbance activities.

Section 102.3. Reserved.

This section, formerly titled "Purpose," is deleted in its entirety as a result of combining §§ 102.2 and 102.3.

Section 102.4. Erosion and Sediment Control Planning Requirements.

Section 102.4 consolidates the proposed § 102.4 "General" and § 102.5 "Erosion and Sediment Control Plan" requirements into one comprehensive section. The Department has reformatted the regulations to distinguish erosion and sediment control requirements for agricultural plowing or tilling activities from other earth disturbance activities. The regulations specify the circumstances where written erosion and sediment control plans are required as those earth disturbance activities which:

- (1) Involve 5,000 square feet (464 square meters) or more of earth disturbance;
- (2) Are located in special protection waters; or
- (3) Require a plan under another Department regulation.

This section is also amended to include specific BMPs for maintaining and protecting water quality in High Quality and Exceptional Value Waters.

Section 102.5. Permit Requirements.

Permit requirements are moved from § 102.31 "Permit requirements" to § 102.5. Minor revisions to the final form of the regulations are provided for clarity and readability.

Section 102.6. Permit Applications and Fees.

This section consolidates language from § 102.31 "Permit requirements" and § 102.32, "Permit application and fees" to clarify permit application and fee requirements for erosion and sediment control permits and NPDES permits for stormwater discharges associated with construction activities.

Section 102.7. Permit Termination.

This section is added to the regulations to clarify the procedures for terminating coverage under either an erosion and sediment control permit or an NPDES permit for stormwater discharges associated with construction activities. Both permits can be terminated by the permittee or copermitttee prior to the expiration date of the permit provided permanent stabilization is achieved.

Section 102.11. General Requirements.

This section establishes the general regulatory standard that persons conducting or proposing to conduct an earth disturbance activity shall design, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation to protect, maintain, reclaim and restore water quality and existing and designated uses. In response to the recommendation of commentators, BMPs to achieve the regulatory standard are listed in the Department's Manual. This provides the regulated community with a broad range of widely accepted and published performance-based BMPs to meet the substantive requirements of these regulations. The regulations also provide for the consideration of alternative BMPs, not currently in the Manual, provided the alternative BMPs meet the performance criteria of the regulations to maintain, protect, reclaim and restore water quality and existing and designated uses.

Sections 102.12 and 102.13. Reserved.

Section 102.12 "Control measures" and § 102.13 "Control facilities" are deleted in their entirety. BMPs are listed in the Department's Manual.

Section 102.21. Reserved.

As a result of the reorganization and clarification of this chapter, § 102.21 "Applicability" is no longer required and is deleted.

Section 102.22. Permanent Stabilization.

The regulation is revised to specify the criteria for implementing and maintaining BMPs to achieve permanent stabilization.

Section 102.23. Reserved.

Section 102.23 "Interim control measures" is merged into § 102.22 "Permanent stabilization."

Section 102.24. Reserved.

Section 102.24 "Final measures" is deleted.

Section 102.31 and 102.32. Compliance and Enforcement.

Section 102.31 "Permit requirements" and § 102.32 "Application for permit" are revised in the final rulemaking. Permit requirements and application fees are now provided in §§ 102.5 and 102.6. Sections 102.31 and 102.32 now provide the compliance and enforcement provisions of this chapter. Section 102.32(b) has been added to ensure conformity with section 316 of The Clean Streams Law (35 P. S. § 691.316).

Section 102.41. Administration by County Conservation Districts.

The regulation is clarified by specifically referring to county conservation districts instead of "local governing bodies."

Section 102.42. Notification of Application for Permits.

The regulation is clarified by referring to county conservation districts instead of designee.

Section 102.43. Withholding Permits.

For clarification, the Department uses the term "municipality or county" instead of "local governing body." The Department has also clarified that this section only applies to final municipal approvals.

Section 102.51. Implementation.

This section, written in 1972 when this regulation was originally implemented, is no longer necessary and is deleted.

F. Summary of Comments and Responses on the Proposed Rulemaking

The proposed rulemaking was published at 28 Pa.B. 769. A 60-day public comment period on the proposal expired on April 8, 1998. Three public hearings were held by the Board. Approximately 300 comments were received from 36 commentators through public hearings and written comments. A summary of the comments and responses follows:

Temporary and permanent BMPs—The Board received several comments that indicated that commentators were confused about temporary and permanent erosion and sediment control BMPs. To eliminate confusion, the Board has eliminated references to temporary and permanent BMPs. Erosion and sediment control BMPs include both temporary structural and temporary and permanent stabilization practices.

Structural practices, such as silt fence, ditches and sediment basins collect, divert, store and treat stormwater runoff to protect against accelerated erosion and the discharge of sediment from disturbed areas, during and immediately after the earth disturbance activity. These temporary BMPs are designed and implemented during the earth disturbance activity, and until vegetation or other permanent cover is established. Permanent structural BMPs required for postconstruction stormwater management are developed and implemented under municipal planning requirements. The Department encourages plan developers to design compatible practices for both construction and postconstruction characteristics.

Stabilization is the covering of disturbed areas with vegetative (grass, trees, shrubs, sod, and the like) and nonvegetative (pavement, rock mulch, geotextiles, and the like) practices. Establishing either temporary or permanent stabilization can be the single most important BMP in reducing accelerated erosion and sedimentation. Temporary stabilization provides interim control of earth disturbance activities that have temporarily ceased and will resume at a later date, or is used until a permanent cover can be established. Permanent stabilization is achieved when perennial vegetation of uniform coverage and density is established, or by covering the disturbed area with permanent nonvegetative cover.

County conservation districts should replace designee—A commentator stated that the reference to "other local governing body" is ambiguous and could conceivably lead to personal, political and territorial conflicts and that designee should be restricted to the county conservation district (district). The references to designee are deleted and references to county conservation districts have been added.

Minimize versus prevent—The Board received comments in support of, and opposed to, the requirement to "minimize" rather than "prevent" accelerated erosion and sedimentation.

The Board believes that the use of the term "minimize" is more appropriate than "prevent." Erosion and sedimentation is a natural process that occurs even in the absence of human activity. The objective of this regulation is to minimize the accelerated erosion process from earth disturbance activities. Accelerated erosion, if unchecked, may adversely impact our waterways because of the increased sediment load beyond natural background levels. BMPs are effective, practical and environmentally sound practices that minimize the threat of pollution, and protect and maintain water quality and existing and designated uses. BMPs are designed to address site conditions such as slope, soil conditions, risk of erosion and other factors, to operate effectively during reasonably expected storm and rainfall events of normal duration and intensity. BMPs prevent sediment pollution during these storm events. The reference to the protection and maintenance of water quality and existing and designated uses assures protection of receiving waters.

Water quality standards—The Board received comments suggesting that the Department adopt numeric water quality standards for sediment.

Before numeric water quality criteria can be established for sediment, gaps in existing knowledge and research need to be addressed including: the establishment of a meaningful standard which accounts for natural background variability; the establishment of standard storm event intervals and the production of sediment above the natural background; the ability to identify and

address cumulative effects within a watershed; and the establishment of an acceptable risk through models which are precise and accurate. Because of these gaps, at this time the Board does not believe that numeric sediment water quality standards can be incorporated into the regulations.

5,000 square foot threshold—The Board received several comments on the establishment of a 5,000 square foot threshold for erosion and sediment control plan development. The commentators provided varied recommendations, mostly in support of establishing the 5,000 square foot requirement. Several commentators recommended increasing the requirement to a larger area (ranging from 10,000 square feet to one acre) or including exceptions for activities such as earth disturbances for single family lot development. One commentator recommended eliminating the threshold entirely and requiring written plans for all earth disturbance activities, regardless of the size of disturbance.

The 5,000 square foot threshold provides a reasonable risk based planning measure for minor earth disturbance activities which do not present a significant threat when typical BMPs are utilized. Earth disturbance activities less than 5,000 square feet are generally minor in scope and duration and do not generally constitute a substantial risk to water quality. To assure water quality protection, the regulations specify several instances where erosion and sediment control plans are required for activities which disturb less than 5,000 square feet, such as an earth disturbance activity in special protection waters. This threshold for planning activities is also consistent with existing municipal requirements and established standards in the neighboring states of Delaware, Maryland and New Jersey.

The Board agrees with the commentators that larger land disturbances of 5,000 square feet or greater can be conducted without significantly increasing the threat for accelerated erosion and sediment pollution provided BMPs are effectively designed, implemented and maintained. BMPs for projects greater than 5,000 square feet must be carefully selected and designed. A written plan is the most effective way to ensure that BMPs are effectively incorporated in an earth disturbance activity. The Board has clarified the final regulations by identifying specific planning criteria and elements to be included in an erosion and sediment control plan.

Time frames for the review of erosion and sediment control plans/permits—The Board received comments which suggested that specific time frames consistent with the Money-Back Guarantee Program be included in the final-form regulations. The Board disagrees that the time frame established under the Money-Back Guarantee Program must be specified in the regulations. The Department's regional offices and county conservation districts endeavor to complete the review of all NOIs and applications for individual NPDES permit for stormwater discharges associated with construction activities within the time specified under the Money-Back Guarantee Program (150 days for Individual Permits and 100 days for NOIs). Also, under the Department's delegation agreements with districts, districts must "... Receive, review and process all NOIs for coverage under the Commonwealth's general permit for discharges of stormwater from construction activities and all individual permit applications for discharge of stormwater from construction activities within 30 days of receipt."

Registration of all plans greater than 5,000 square feet—The Board received comments recommending that

all erosion and sediment control plans should be registered with the Department or the district. The Board does not believe that this additional administrative process will provide any additional water quality protection. The Department or delegated district has the authority to request erosion and sediment control plans to be submitted for any project to ensure the plan is adequate and provides effective protection for soil and water resources. This allows the Department and districts to exercise best professional judgment, and utilize considerations such as landscape position, proximity to watercourses, site conditions and potential for water quality impairment, in prioritizing staff resources and efforts.

Professional engineer certification for erosion and sediment control plans—Several commentators suggested that the Board require that all erosion and sediment control plans be certified by a professional engineer. The regulations do not reserve the authority to develop erosion and sediment control plans to any specific profession, industry or individual since there are many differing and varied contexts in which earth disturbance activities are conducted such as agriculture, timber harvesting, road maintenance and residential and commercial construction.

Qualifications required for districts—The Board received several comments regarding the qualifications of district staff who review erosion and sediment control plans. District staff in districts delegated the Chapter 102 and the NPDES stormwater construction programs are trained by the Department to ensure that they are qualified to review erosion and sediment control plans, and perform other functions required under the delegation agreements. District staff conducts reviews under the guidance, direction and assistance provided by the Department.

Pennsylvania Soil and Water Technical Guide for Agriculture—The Board received several comments recommending that the technical design criteria for agricultural plowing or tilling activities be consistent with the USDA-Natural Resource Conservation Service (NRCS) Pennsylvania Technical Guide. The Board agrees with the commentators that the Pennsylvania Technical Guide provides effective and acceptable BMPs for agricultural plowing or tilling activities. The definition of "conservation plan" was added at the request of the AAB and specifically references the Technical Guide.

BMP Manual—The Board received several comments recommending that the technical design criteria for BMPs in the final regulations should reference the Department's Manual. In response, the regulations have been amended to refer to the Manual as suggested. The Manual provides a broad range of performance based practices to meet the regulatory standard of minimizing accelerated erosion to protect, maintain, reclaim and restore water quality and existing and designated uses. In addition, the regulations allow for alternate BMPs to be used when they are as effective as the BMPs listed in the Manual.

As a parallel effort to the regulatory revisions, the Department has created an ad hoc working group of six conservation districts from around the State (Armstrong, Berks, Centre, Columbia, Indiana and Monroe) to review and discuss revisions to the Manual to ensure that the latest BMP technology for erosion and sediment control is listed. When the recommendations from these six conservation districts are incorporated, the Department will make the draft revisions to the Manual available to conservation districts and advisory committees for review

and comment, and establish a public comment period for the general public to review and comment on the proposed revisions.

Larger plan of common development or sale/operator—Several commentators recommended that the Board provide a clarification of what it considers “a larger common plan of development or sale that involves 5 acres or more of earth disturbance.” The commentators recommend that the regulations include the criteria that will be used to reasonably determine if a project or activity will fall under a common plan of development and to include a definition of an “operator.”

The final Chapter 102 regulations are written to be consistent with Environmental Protection Agency (EPA) construction stormwater program requirements. When EPA reissued its NPDES General Permits for Stormwater Discharges from Construction Activities (63 F.R. 7859-7860) (February 17, 1998), it provided answers to general questions on the construction stormwater permitting program. The EPA stated that: “The ‘plan’ in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice, or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. You must still meet the definition of operator in order to be required to get permit coverage, regardless of the acreage you personally disturb. As a subcontractor, it is unlikely you would need a permit.” The Board believes that Chapter 102 conveys the same intent.

The Board has clarified the final regulations by defining the term “operator” to be consistent with the EPA’s description of the term at 63 F.R. 7859 (February 17, 1998). The Board defines “operator” consistent with the Federal description of the term as: The person with (1) oversight responsibility of earth disturbance activity on a project site or a portion thereof who has the ability to make modifications to the Erosion and Sediment Control Plan or site specifications; or (2) 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 Plan.

NPDES permits for construction activities and utilities—Several commentators recommended that the Board clarify the requirements for earth disturbances associated with utility line installation and associated requirements for an NPDES Permit for Stormwater Discharges Associated with Construction Activities.

In new subdivisions or developments, utility line installations would normally be conducted under the authority of the NPDES permit secured by the developer or general contractor, or both. Where utility companies are extending lines or services, or conducting other earth disturbance activities outside the confines of a new development or subdivision, the utility company would be the project operator in control of the project and the utility company would be required to secure the NPDES permit.

NPDES permit for stormwater discharges associated with construction activities requirements for oil and gas activities—The Board received several comments that averred that the proposed amendments were more stringent than Federal regulation for earth disturbance associated with oil and gas exploration and production activities. The provisions in the amended Chapter 102 regulations are no more stringent than Federal require-

ments. The Board has determined that discharges of stormwater from construction activities associated with oil and gas exploration and production activities are regulated under the Federal NPDES stormwater program and therefore cannot be exempt from State NPDES stormwater permit requirements. Since October 1992, the Department and county conservation districts have authorized discharges from construction activities in this Commonwealth under Federal NPDES requirements, including those construction activities associated with oil and gas development and associated activities.

Under the Federal program, oil and gas operations are addressed under the construction category and the mineral industry category. Under the construction category, the EPA has established that erosion, sediment and pollution control should be addressed in all pollution prevention plans for the oil and gas exploration and production activities, particularly where the industrial activity has the potential to disturb vegetation or natural runoff patterns and exacerbate erosion. Where the construction of the drilling site or any construction of facilities for the oil and gas exploration and production would disturb or is part of a plan to develop which would disturb 5 acres or more, that construction activity is defined as having a stormwater discharge associated with industrial activity which requires separate permitting. In this case, the EPA requires an NPDES permit for the stormwater discharge from the construction activity (60 F.R. 51166). This is also explained as colocated industrial activities.

Section 402(l)(2) of the Clean Water Act (33 U.S.C.A. § 1342(l)(2)), places a limitation on permit requirements from stormwater runoff from oil and gas operations. Under this section, the EPA cannot require an NPDES permit or require a state to require an NPDES permit for discharges of stormwater runoff from oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct or waste products located on the site of the operation. As part of the mineral industry category, the EPA includes this limitation in 40 CFR 122.26(c)(1)(iii) and only requires the operation to submit an application for a discharge of stormwater when the facility has been a discharger of stormwater resulting in the discharge of a reportable quantity under 40 CFR 117.21, 40 CFR 110.6 or contributes to a violation of a water quality standard.

Permit requirements for earth disturbances of 5 acres or more—Several commentators believe that a permit requirement for 5 acres or more of earth disturbance activities will add paperwork, create significantly more applications and create a bottleneck in the approval process.

The 5 acre permitting requirement is a Federal requirement which has been in place since October 1992. The Board’s amendments to Chapter 102 are intended to integrate the Federal requirements into Chapter 102. Since the Department has implemented the Federal NPDES permit for stormwater discharges associated with construction activities requirement since October 1992, the Board does not expect that applications or paperwork will be increased or that the approval process will become burdensome under Chapter 102.

Permit requirements for timber harvesting and road maintenance activities—Several commentators recommended that the Board reduce the area of disturbance requirement for permitting of timber harvesting and road maintenance activities requiring erosion and sediment control permits. The Board has not proposed changes for these activities. The final-form regulations require that persons proposing or conducting earth disturbance activities associated with timber harvesting and road maintenance activities that involve 25 acres or more of earth disturbance obtain erosion and sediment control permits.

The Department has been working with several groups of stakeholders in addressing the use of BMPs for timber harvesting and road maintenance activities. The Department supports the nonregulatory approaches of the SFI and DGRFT in promoting, educating and training persons conducting these activities to use BMP techniques and standards to minimize accelerated erosion and thereby enhance the quality of this Commonwealth's waters.

Reduction of acreage requirements—One commentator recommended that the Board delete the provision allowing the Department to reduce permit acreage requirements by notice. The Board has deleted this procedure from the final-form regulations in response to the comment.

Permit fee increase for Erosion and Sediment Control Permits—Several commentators requested that the Board clarify, evaluate and provide a justification for the proposed increase in permit fees. The proposed fee increase for erosion and sediment control permits from \$200—\$500 only applies to earth disturbances of 25 acres or more associated with timber harvesting and road maintenance activities. The fee for NPDES permits, including NPDES permit for stormwater discharges associated with construction activities is established under § 92.22 (relating to application fees). The fee for erosion and sediment control permits is intended to cover the administrative costs of the Department and districts processing the permit applications, including administrative completeness review, data management, coordination and other related activities. The fee of \$500 was calculated using an average time of 25 hours of effort per permit review at a rate of \$20 per hour.

Pennsylvania Natural Diversity Inventory (PNDI) provisions—Several commentators recommended that the Board clarify and explain why PNDI provisions were added and what criteria the Department and Districts will use in making PNDI determinations.

The Department cooperates with several natural resource agencies including the Department of Conservation and Natural Resources; the Fish and Boat Commission; the Game Commission; and the United States Fish and Wildlife Service, in determining impacts to threatened and endangered species. These resource agencies consider if a proposed activity adversely impacts known or documented occurrences of a Pennsylvania or Federal threatened or endangered species, and consult with the applicant and the Department to recommend preventive measures that can be taken.

Projects which require permits, that is, projects of 5 or more acres requiring an NPDES permit for stormwater discharges associated with construction activities, or 25 or more acres for an erosion and sediment control permit, require PNDI coordination. This requirement is consistent with the Department policy to consult the PNDI prior to issuing permits and with the EPA requirements for NPDES permits to protect listed species and critical habitat under the Federal Endangered Species Act.

County conservation district plan review fees—Several commentators questioned why an applicant must pay the permit application fee, along with an additional fee charged by districts.

The permit application fee is intended to cover the administrative costs of the Department's and district's processing of NPDES permit applications. The Board, through Chapter 102 or other regulations, does not establish plan review fees for districts. The State Conservation Commission authorizes districts, under the authority of the Conservation District Law, to charge fees for the review of erosion and sediment control plans and other services.

Local permit coordination—Commentators requested clarification on municipal notification requirements and the potential burden it places on both municipalities and NPDES permitting authorities. The Board has revised the final-form regulations to require notifications for projects needing a Department permit under Chapter 102. The Department and districts have an ongoing outreach program designed to educate and update municipal officials on a regular basis. The Department has also developed guidance on implementation of model ordinances and Memorandums of Understanding (MOU) with municipalities to assist in this requirement. It is anticipated that many municipalities will be covered under EPA's proposed Phase II NPDES stormwater permit program when those regulations are finalized. The Board anticipates that continuing this coordination process will help satisfy municipal obligations for erosion and sediment control ordinances under this EPA proposal.

Enforcement provisions—A commentator recommended that the final-form regulations should indicate the penalties or enforcement provisions that may be used to enforce Chapter 102, or include a statutory citation to the potential penalties or actions.

The Clean Streams Law sets forth a variety of enforcement mechanisms that may be used to enforce failures to develop, implement or maintain an erosion and sediment control plan, or to obtain an NPDES or erosion and sediment control permit. The Board has revised the final regulations to include enforcement provisions in §§ 102.31 and 102.32. These sections identify the statutory citation of The Clean Streams Law, and some of the compliance and enforcement mechanisms available to the Department or districts. In addition, the language in section 316 of The Clean Streams Law which applies to agricultural operations that fully implement and maintain a complete conservation plan developed by a Conservation District and the USDA, Natural Resource Conservation Service (NRCS) has been added in § 102.32(b).

G. Benefits, Costs and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the final-form regulations.

Benefits

The citizens of this Commonwealth will benefit from these amendments. This Commonwealth's waters will be protected from the effects of accelerated erosion and the potential of sediment pollution. Special provisions provide enhanced protection for waters classified as High Quality and Exceptional Value under Chapter 93. The regulated community is expected to benefit from these regulatory revisions through the streamlining and clarification of permit requirements, plan preparation requirements and more flexible performance based BMPs. A cost savings to the regulated community of approximately \$150,000 is expected as a result of the elimination of the require-

ments for erosion and sediment control plans for earth disturbance activities less than 5,000 square feet. The regulations continue to support the delegation of the erosion and sediment control program to local conservation districts, where the majority of the program is implemented, which facilitates effective and timely authorizations to proceed with projects.

Compliance Costs

These final-form regulations are not expected to result in significant changes in compliance costs for those persons proposing or conducting earth disturbance activities. Compliance costs will be less for many projects less than 5,000 square feet, which are exempted from planning requirements. Costs to the regulated community may be incurred in the form of: permit application fees; the consideration and prevention of endangered and threatened species impacts; and the consideration of special measures to address earth disturbance activities in High Quality and Exceptional Value Waters.

Compliance Assistance Plan

The Department assists the regulated community in complying with these regulations through technical and educational assistance, and through partnership with county conservation districts. These efforts have resulted in local community based initiatives which stimulate awareness and achieve regulatory compliance. Department staff have worked extensively with conservation districts to develop and enhance their professional abilities and technical capabilities. 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 conservation district performance have shown that district staff can provide a quick response to process, review, and acknowledge permit applications, and readily assist in obtaining performance-based compliance.

The Department's outreach efforts have allowed stakeholders to work together with regulators to achieve the goal of protecting water quality and the aquatic environment through erosion and sediment control efforts. Erosion and sediment control is a central theme in the SFI and the Dirt and Gravel Road Program. Involvement of the public and the regulated community in the development of these cooperative erosion and control protection efforts fosters subsequent compliance with regulatory standards and practices and is an important form of compliance assistance.

The Department will continue to assist the regulated community with compliance through the development of checklists, worksheets and permit review letters to aid in developing sound pollution prevention plans. Compliance can also be enhanced by assuring that Department and conservation district reviews are timely, effective and consistent. The regulations incorporate a performance-based approach which allows persons conducting earth disturbances broad latitude and flexibility in designing BMPs to achieve compliance.

Paperwork Requirements

No additional paperwork is anticipated to comply with the final requirements. A net reduction in paperwork is anticipated through the regulatory exemption of plan development for projects under 5,000 square feet.

H. Pollution Prevention

Pollution prevention approaches to environmental management often provide environmentally sound and longer-term solutions to environmental protection because pollu-

tion is prevented at the source. Pollution prevention is defined by the EPA as measures taken to avoid or reduce generation of all types of pollution—solid/hazardous waste, wastewater discharges and air emissions—at their points of origin. It does not include activities undertaken to treat, control or dispose of pollution once it is created. The Federal Pollution Prevention Act of 1990 established a National policy and an environmental management hierarchy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The hierarchy is as follows:

a. Pollution should be prevented or reduced at the source.

b. Pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible.

c. Pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible to render it less hazardous, toxic or harmful to the environment.

d. Disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

The short and long-term health of this Commonwealth's economy depends on clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment. To meet this Commonwealth's economic development and environmental protection goals successfully, the Commonwealth needs to adopt programs like pollution prevention that not only protect the environment but also significantly reduce costs and increase the competitiveness of the regulated community. When pollution is prevented up front, it can reduce a company's bottom-line costs and overall environmental liabilities often by getting the company out of the regulatory loop. It also can get the Department out of the business of regulating pollution that may not need to be generated in the first place.

In keeping with Governor Ridge's interest in encouraging pollution prevention solutions to environmental problems, these final-form regulations have incorporated several provisions to meet that goal.

First, § 102.2 provides a pollution prevention approach by requiring that BMPs for earth disturbance activities minimize accelerated erosion and sedimentation to protect, maintain, restore and reclaim water quality, and existing and designated uses of waters of this Commonwealth, thereby preventing pollution.

Second, § 102.4 requires that persons proposing an earth disturbance activity in a High Quality or Exceptional Value watershed must include special BMPs such as special sediment basin requirements, nonerosive channel linings, increased conveyance capacities, accelerated stabilization schedules, or other approved alternative BMPs which protect High Quality and Exceptional Value water from degradation. These measures work in conjunction with the Department's antidegradation program to ensure not only the prevention of pollution, but also the maintenance and protection of the existing quality of High Quality and Exceptional Value designated and existing uses.

Third, § 102.4 requires that Erosion and Sediment Control Plans shall contain requirements for the recycling or disposal of materials from the project site.

Fourth, § 102.11 provides that BMPs for earth disturbance activities must protect designated and existing uses classified under Chapter 93.

I. *Sunset Review*

These final-form 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 they were intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 20, 1998, the Department submitted a copy of the proposed amendments to the Independent Regulatory Review Commission (IRRC), and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public. These comments are addressed in the Comment and Response Document and summarized in Section F of this Preamble. The Senate and House Environmental Resource Energy Committees did not provide comments on the proposed rulemaking.

These final-form regulations were deemed approved by the House and Senate Environmental Resources and Energy Committees on October 25, 1999. IRRC met on November 4, 1999, and approved the regulations in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

K. *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 28 Pa.B. 769.

(4) These final-form regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

L. *Order*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 102, are amended by amending §§ 102.1, 102.2, 102.4, 102.5, 102.11, 102.22, 102.31, 102.32 and 102.41—102.43; by deleting §§ 102.3, 102.12, 102.13, 102.21, 102.23, 102.24 and 102.51 and by adding §§ 102.6 and 102.7 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication.

JAMES M. SEIF,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 29 Pa.B. 5963 (November 20, 1999).)

Annex A

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

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 102. EROSION AND SEDIMENT CONTROL

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:

Accelerated erosion—The removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone.

Agricultural plowing or tilling activity—Earth disturbance activity involving the preparation and maintenance of soil for the production of agricultural crops.

BMPs—Best management practices—Activities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing and designated uses of waters within this Commonwealth.

Channel—A natural or manmade water conveyance.

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

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

(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.

County 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 program in this Commonwealth.

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

Disturbed area—Unstabilized land area where an earth disturbance activity is occurring or has occurred.

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

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

Erosion—The natural process by which the surface of the land is worn away by water, wind or chemical action.

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.

Erosion and Sediment Control Plan—A site-specific plan identifying BMPs to minimize accelerated erosion and sedimentation. 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.

Municipality—

(i) A county, city, borough, town, township, school district, institution or authority created by any one or more of the foregoing.

(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.

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.

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 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.

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 and has the ability to make modifications to the Erosion and Sediment Control 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 Plan.

Perimeter BMPs—BMPs placed or constructed along the perimeter of an earth disturbance area to prevent runoff

from entering the disturbed area, or to capture and treat sediment runoff prior to leaving a disturbed area.

Person—An operator, natural person, partnership, association or corporation or an agency, instrumentality or entity of Federal or State government, including a municipality.

Permanent stabilization—Long-term protection of soil and water resources from accelerated erosion.

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.

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

(i) The area of an earth disturbance activity.

(ii) The area planned for an earth disturbance activity.

(iii) Other areas which are not subject to an earth disturbance activity.

Road maintenance activities—Earth disturbance activities within the existing road cross-section, such as grading and repairing existing unpaved road surfaces, cutting road banks, cleaning or clearing drainage ditches and other similar activities.

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

Sedimentation—The action or process of forming or depositing sediment in waters of this Commonwealth.

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

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

Timber harvesting activities—Earth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices.

Waters of this Commonwealth—Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.

§ 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.

(b) The BMPs shall be undertaken to protect, maintain, reclaim and restore water quality and the existing and designated uses of waters of this Commonwealth.

§ 102.3. (Reserved).

§ 102.4. Erosion and sediment control requirements.

(a) For agricultural plowing or tilling activities, the following erosion and sediment control requirements apply:

(1) The implementation and maintenance of erosion and sediment control 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) Written Erosion and Sediment Control Plans are required for agricultural plowing or tilling activities 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 are jointly and individually responsible for developing a written Erosion and Sediment Control Plan and implementing and maintaining BMPs, including those identified in the Erosion and Sediment Control Plan.

(4) The Erosion and Sediment Control Plan shall be designed to minimize the potential for accelerated erosion and sedimentation from agricultural plowing or tilling activities.

(5) The Erosion and Sediment Control Plan shall contain plan maps, soils maps, the location of waters of this Commonwealth, drainage patterns and a description of BMPs including tillage systems, schedules, and cost effective and technically practical conservation measures.

(6) The Erosion and Sediment Control Plan shall be available for review and inspection at the project site during each stage of the agricultural plowing or tilling activity.

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

(1) The implementation and maintenance of erosion and sediment control 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 a written Erosion and Sediment Control Plan under this chapter if one or more of the following criteria apply:

(i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more.

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

(iii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water pursuant to Chapter 93 (relating to water quality standards).

(3) The Erosion and Sediment Control Plan shall be prepared by a person trained and experienced in erosion and sediment 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.

(5) The Erosion and Sediment Control Plan shall contain the following:

(i) The existing topographic features of the project site and the immediate surrounding area.

(ii) The types, depth, slope, locations and limitations of the soils.

(iii) The characteristics of the earth disturbance activity, including the past, present and proposed land uses and the proposed alteration to the project site.

(iv) The amount of runoff from the project area and its upstream watershed area.

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

(vi) A written depiction 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.

(viii) Supporting calculations.

(ix) Plan drawings.

(x) A maintenance program which provides for inspection of BMPs on a weekly basis and after each measurable rainfall event, including the repair of the BMPs to ensure effective and efficient operation.

(xi) Procedures which ensure that the proper measures for the recycling or disposal of materials associated with or from the project site will be undertaken in accordance with this title.

(6) Where an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value pursuant to Chapter 93, the person proposing the activity shall, as applicable, use the following Special Protection BMPs to maintain and protect the water from degradation:

(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 Plan 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 Plan be submitted for review and approval to ensure compliance with this chapter.

(c) The Department or county conservation district 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.

§ 102.5. Permit requirements.

(a) Other than agricultural plowing or tilling, 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 individual NPDES permit for stormwater discharges associated with construction activities prior to commencing the earth disturbance activity.

(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 under this chapter prior to commencing the earth disturbance activity.

(c) 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) or this chapter, which includes requirements to comply with Chapter 92 and this chapter, need not obtain an additional erosion and sediment control permit or NPDES permit for stormwater discharges associated with a construction activity.

(d) A person proposing or conducting agricultural plowing or tilling activities is not required to obtain an erosion and sediment control permit, or an NPDES permit for stormwater discharges associated with a construction activity, for these activities under this chapter.

(e) 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 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, an Erosion and Sediment Control Plan meeting the requirements of § 102.4 (relating to erosion and sediment control requirements), and other information the Department may require.

(2) Provide proof of consultation with the Pennsylvania Natural Diversity Inventory (PNDI) 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 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.

(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).

§ 102.7. Permit termination.

(a) Upon permanent stabilization of the earth disturbance activity under § 102.22(c) (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 include:

- (1) The facility name, address and location.
- (2) The operator name and address.
- (3) The permit number.
- (4) The reason for permit termination.

EROSION AND SEDIMENT CONTROL

BMPs

§ 102.11. General requirements.

(a) A person conducting or proposing to conduct an earth disturbance activity shall design, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation to protect, maintain, reclaim and restore water quality and existing and designated uses. Various 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), as amended and updated.

(b) BMPs and design standards other than those listed in the Manual 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 to achieve the regulatory standards in subsection (a).

RESTORATION

§ 102.21. (Reserved).

§ 102.22. Permanent stabilization.

(a) Upon completion of an earth disturbance activity or any stage or phase of an activity, the site shall be immediately seeded, mulched or otherwise protected from accelerated erosion and sedimentation.

(b) Erosion and sediment control BMPs shall be implemented and maintained until the permanent stabilization is completed.

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

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

§ 102.23. (Reserved).

§ 102.24. (Reserved).

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.**

(a) Compliance and enforcement actions under this chapter which may be pursued include the following. The actions listed are cumulative and the exercise of one action does not preclude the exercise of another. The failure to exercise an action will not be deemed to be a waiver of that action:

- (1) Investigations and inspections.
- (2) Response to complaints.
- (3) Orders (including orders to remediate or restore).
- (4) Civil penalty proceedings, except as provided in subsection (b).
- (5) Summary proceedings.
- (6) The suspension, revocation, withholding or denial of permits or approvals.
- (7) Notices of violation.
- (8) Actions in a court of competent jurisdiction, including requests for injunctive relief.
- (9) Other administrative, civil, criminal or equitable action authorized by law.

(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.

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 (2 hectares) or more.

§ 102.43. **Withholding permits.**

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 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).

IMPLEMENTATION

§ 102.51. (Reserved).

[Pa.B. Doc. No. 00-51. Filed for public inspection December 30, 1999, 9:00 a.m.]