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November 30, 2009

**Via email:** [RegComments@state.pa.us](mailto:RegComments@state.pa.us)

The Honorable John Hanger  
Secretary  
Department of Environmental Protection &  
Chairperson, Environmental Quality Board  
Rachel Carson State Office Building, 16<sup>th</sup> Floor  
400 Market Street  
Harrisburg, PA 17101

**Subject:** Comments on Proposed Rulemaking, 25 PA Code Ch. 102

**Ref:** 39 PA Bulletin 5131, August 29, 2009

Dear Secretary Hanger:

On behalf of its 24,000 members and customers, representing the spectrum of Pennsylvania industry, business, and commercial enterprises, the Pennsylvania Chamber of Business and Industry appreciates the opportunity to provide feedback and comment regarding the PA Department of Environmental Protection's proposed rulemaking for 25 PA Code Ch. 102, as published in the August 29, 2009 PA Bulletin.

In general, the goal of the proposed rule to reduce the impacts of storm water runoff on the waters of the Commonwealth, both during project construction and afterwards, is well understood by the Chamber. However, specific issues and requirements within the proposed regulation result in significant potential land ownership, use, and development conflicts while exceeding the measures necessary to protect Pennsylvania's waterways.

### **§ 102.1 - Definitions**

- In the definition of "E&S Plan," DEP has added the words, "consisting of both drawings and a narrative that identifies." The Chamber assumes that the intent of these words is to make clear that the E&S Plan (which a regulated entity must implement) encompasses both the elements on the drawings and the elements described in any accompanying narrative, and that the "narrative" portion of this definition is referring to current E&S submission practices and deliverables, and not a new type or format of narrative deliverable. Currently, the scope of E&S narratives vary to as simple as an E&S construction sequence contained within the E&S drawings for small projects, up to more extensive or distinct narrative plans, calculations, and sequences for larger projects. The Chamber requests DEP's clarification and concurrence.

- In this same definition of "E&S Plan," DEP has added the words "before, during, and after construction." These added words make no sense from a practical perspective. Specifically:
  - There is no need or requirement for E&S controls prior to commencement of construction because there is no earth disturbance. Construction officially "begins" when installation of the E&S control measures start. That's not a "before" period, but "during" construction.
  - It makes absolutely no sense that a construction erosion and sedimentation plan would contain a description of BMPs to prevent post-construction E&S other than a construction sequence discussion of permanent stabilization measures. At the post-construction point, when stabilization is completed and erosion and sedimentation control measures have been removed, and the E&S plan is not longer relevant. Rather, post construction pollution control measures are more appropriate for the Post Construction Stormwater Management (PCSM) plan.

The Chamber recommends DEP change the definition to read, "**A site-specific plan, which may consist of both drawings and narrative, that identifies BMPs to minimize accelerated erosion and sedimentation during earth disturbance activities, up to and including permanent stabilization.**"

#### **§ 102.2- Scope and Purpose**

- The Chamber requests additional clarification and discussion from DEP regarding the scope of post construction stormwater management for projects where the project site is restored to pre-construction conditions. This is specifically germane to utility industry and certain oil and gas activities, where following construction activities (*e.g.*, underground pipelines), the site is restored to its original condition. In such a situation, there are no new or specific PCSM BMPs because the post construction site is restored to its condition prior to earth disturbance.

#### **§ 102.4(b)(4) – Planning and Implementation of Earth Disturbance Activities**

- Our concern is that subsections (i) through (iv) could arguably be read to establish absolute standards for erosion and sedimentation controls that would be interpreted and applied in the extreme, or otherwise become an avenue for third-party attacked on virtually any plan. In requiring that regulated entities "minimize" the extent and duration of earth disturbance, "maximize" protection of existing drainage features and vegetation, and "minimize" soil compaction, for example, the wording suggests an almost absolute objective. The Department may have intended to temper this by including in the lead in sentence reference to earth disturbance activities being "planned and implements *to the extent practicable* in accordance with the following ..."; but that tempering should be clarified to avoid any misunderstanding. One way to do that might be to modifying the lead in phrase to read: "planned and implemented using reasonable and appropriate methods and practices to address the following objectives to the extent practicable: ..."
- Subsection 102.4(b)(4)(v) requires that earth disturbance activities shall be planned and implemented to "protect, maintain, reclaim and restore the quality of water and the existing and designated uses of the waters of the Commonwealth. DEP has stated in meetings with WRAC, and the Chamber acknowledges, that this language does exist in some measure in the current version of Chapter 102. It is contained in the current definition of BMPs, and in the general requirements for erosion and sedimentation control BMPs (102.11). As presented in the previously adopted version of Chapter 102, however, this language is presented as high level goals and outcomes of storm water protection BMPs to achieve water protection and restoration

from a strategic perspective. PA DEP indicated in WRAC meetings that this was their intent. But at the regional implementation level, permit application reviewers will see this as a project-specific requirement. As presented in the proposed rule, this language is a project-specific, task-oriented outcome of a specific project's erosion and sedimentation plan. This requirement in the proposed rule again exceeds the scope of this regulation (102.2). In addition, could be read as placing responsibility for water quality restoration on a project that did not cause stream degradation, such as where any impairments are occurring from upstream of the project.

The entire section 102.4(b)(4) should be reformatted and rewritten to meet the intent as presented in the current Chapter 102 version, which is a high level strategic outcome or goal of storm water protection. The language suggested in the first bullet above would help to clarify this point.

#### **§ 102.4(b)(5)(x) – Stormwater Event vs. Measurable Rainfall**

- In the proposed rule, DEP eliminated the words "measurable rainfall" from the requirements for inspection and maintenance of E&S BMPs. In the current version of Chapter 102, this requirement is interpreted in accordance with EPA guidance regarding a "measurable precipitation event," which is rainfall of 0.1 inches or greater. The proposed rule refers to "each stormwater event," a term which is undefined and could be read as implying any precipitation quantity – which would be unreasonable. We do not believe that the DEP desires to require a full, documented inspection of all project BMPs for a rainfall event that results in nothing more than sparse, distinct raindrops on a car windshield. However, absent a clear definition of "stormwater event," this provision creates a prospect for confusion and misunderstanding. The Chamber recommends DEP either re-insert the words "measurable rainfall," or clearly define a "stormwater event" as an event generating some measurable amount of runoff from the land, and more distinctly quantify this if different than the currently accepted EPA guidance.

#### **§ 102.4(b)(5)(xiv) and 102.8(c) – Relationship Between E&S Plans and Post-Construction Stormwater Plans**

- DEP has added language requiring land developers to plan and implement construction period erosion and sedimentation control measures to be consistent with post construction storm water management measures, . First, it is not clear just what this means. For example, one reading could be that if an E&S plan calls for use of a sedimentation control basin, and the PCSM Plan calls for a stormwater infiltration basin, the two facilities must be located in the same place. Some might argue that if the basins are not in the same location, somehow the two plans are "not consistent." Moreover, there may be a number of reasons why facilities and activities at the construction phase would be different than at the post-construction phase, and establishing a "consistency" mandate is not reasonable or practicable in all situations. For example, project areas that are ultimately designed for a post construction storm water BMP may need to be used during construction for material staging, which will cause short term soil compaction, or have temporary construction roadways placed over designated post construction BMP areas pending installation of infrastructure such as piping or bridges. Similar to the Chamber's comment on 102.4(b)(4), our concern is that this provision is written as a strict legal requirement. Not only does it leave projects open to risk from unreasonable challenges, but is also unrealistic from a construction management perspective. At the April 8, 2009, WRAC meeting, DEP stated in response to verbal comments on this issue that the requirements were things that the developer should be considering or thinking about due to efficiencies. The Chamber greatly appreciates the Department's concern and consideration for efficiencies and cost control. But this intent

connotes optional, or BMP measures, and the two above provisions should be rewritten to reflect that intent. At a minimum, they should be completely reworded to reflect an optional, efficiency-driven measure. For example, 102.4(b)(5)(xiv) should be worded to say, "The project should consider planning, designing, and implementing the E&S plan, to the extent practicable, to be consistent with the PCSM plan." 102.8(c) should also be reworded equivalently. This will ensure land planners and developers retain appropriate flexibility to adequately plan and implement a project, while recognizing the value of planning and designing BMPs that are consistent between the two project phases.

#### **§ 102.4(b)(5)(xv) – Identifying Riparian Forest Buffers**

- DEP has added a requirement to "identify existing and proposed riparian forest buffers" as part of an E&S plan. This is an inappropriate requirement for all E&S plans. The proposed riparian forest buffer requirement only applies to earth disturbance activities within a certain distance of an EV waterway, and earth disturbance activities proposing to use the proposed permit-by-rule that are within a certain distance of a waterway (§102.14). The Chamber does not understand the necessity or requirement for all earth disturbances in the Commonwealth to identify riparian forest buffers in their E&S plans when section 102.14 does not apply. The Chamber requests DEP change the wording of 102.4(b)(5)(xv) to read, "**For earth disturbance activities installing a riparian forest buffer as a PCSM BMP (102.14), identify existing and proposed riparian forest buffers.**"

#### **§ 102.4(b)(6) and 102.8(h) – Relationship Between E&S Regulations and Ch. 93 Antidegradation Requirements**

- In promulgating these regulations updating the Ch. 102 rules governing erosion and sedimentation control requirements, the Department should clarify the relationship between the Ch. 102 requirements and antidegradation provisions in Ch. 93. In the absence of clear guidance from the language of the regulations or in the preambles to either chapter, several Environmental Hearing Board cases issued over the past several years have created considerable confusion and concern in the regulatory community in overturning DEP's long-standing management of the E&S program. Specifically, the decisions in *Blue Mountain Preservation Association v. DEP and Alpine Resorts* and *Crum Creek Neighbors v. DEP and Pulte Homes* have engrafted an extreme interpretation and application of the antidegradation provisions found in 25 Pa. Code §93.4a-93.4d to the setting of managing all earth disturbance and development activities. Going well beyond DEP's practical guidance that antidegradation requirements are reasonable evaluated and achieved by managing stormwater discharges from a 2-year, 24-hour storm, the EHB has suggested in *Crum Creek Neighbors* that antidegradation analysis must encompass and evaluate stormwater discharges from even huge flood-inducing storms (such as the 100-year storm or greater) in terms of both quantity and quality of discharge. The EHB's decisions raise the specter of requiring either the impossible (that is, avoid any discharge of stormwater under any storm condition, no matter how great), or requiring regulated entities to respond to unanswerable questions (*e.g.*, demonstrating how stormwater runoff during every type of storm event will affect the quality of stream flow in such a storm). In order for the E&S program to function in a reasonable and practical manner, and in the process provide a reasonable level of protection to the Commonwealth's special protection watersheds, the Chapter 102 regulations need to clearly embrace a practical standard of performance, *and specifically declare that meeting that standard satisfies the antidegradation requirements of Ch. 93*. The approach which DEP has suggested in Ch. 102, of requiring management of stormwater in a 2-year, 24-hour

storm, and defining ABACT best management practices in special protection watersheds, makes sense. In order for that approach to be effective, however, the regulations and preamble need to clearly declare that satisfaction of the requirements found in §§102.4(b)(6) and 102.8(h) constitutes compliance with §§93.4a-93.4c.

### **§ 102.5 – Permit Requirements**

- Section 102.5 contains confusing and potentially conflicting language regarding the permitting requirements for oil and gas activities. On the one hand, §102.5(c) adds a requirement for oil and gas industry earth disturbances greater than five (5) to obtain an state E&S permit. However, §§ 102.5(a)(1) and (2) (relating to NPDES permits) do not contain an exclusion for the oil and gas industry in the "other than" phrases, creating the potential implication that the oil and gas industry has to obtain both an NPDES permit and an E&S permit. We do not believe this was DEP's intent. Our understanding is that DEP recognizes that under the Federal Clean Water Act §402(l)(2), stormwater runoff from oil and gas exploration, production, processing or treatment operations and transmission facilities are generally exempt from NPDES permits, and DEP's objective is to require such activities to come under a "state-only" permit arrangement. To clarify this point, the Chamber suggests that DEP add the words "oil and gas activities" to 102.5(a)(1) and (2) as to state: "Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities, road maintenance activities, or **oil and gas activities**, a person conducting .... "
- In similar manner, we would suggest that DEP add the words "oil and gas activities" to §102.5(d) to state: "Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities, road maintenance activities, or **oil and gas activities**, a person conducting ....."

### **§ 102.6(a)(2) – Pennsylvania Natural Heritage Program**

- This section changed Pennsylvania Natural Diversity Inventory (PNDI) to Pennsylvania Natural Heritage Program (PNHP) as the authoritative source regarding the presence of State or Federal threatened or endangered species in a proposed project location. PA DEP should be aware that the website for PNHP contains a disclaimer that "retains the reservation at any time and without notice to modify or suspend the web site and to terminate or restrict access to it." What alternative resource does DEP recommend if this should occur? The Chamber recommends that DEP include in the regulation permission to use an alternative source for identifying the presence of endangered species if the PNHP site is inaccessible or shutdown.

### **§ 102.6(b) – Permit Fees**

- The Chamber can support reasonable and justifiable permit fee adjustments if that fee structure is dedicated to assure an adequate staffing of the program, and if firm commitments are made as to review deadlines by DEP and/or Conservation District. Currently, permit application review timeframes are implied as part of the permit application instructions. These instructions are subject to change at DEP's discretion without public input or comment. But E&S and construction NPDES permit application review schedules and deadlines are critical to supporting the competitiveness of Pennsylvania commerce and industry. First-to-market is vital to private industry for achieving competitive advantage, and therefore schedule can often be just as critical as cost.

**§ 102.7(c) – Notice of Termination Process**

- DEP has added language to the proposed rule requiring written acknowledgement of the filing of a Notice of Termination (NOT) before the permittee can be released from permit terms and conditions. Considering the recently reduced resources that the Department has encountered, the Chamber is extremely concerned about this new requirement. It is open-ended, and relieves DEP from any responsibility or accountability to review or acknowledgement incoming NOT's. This would leave a developer or permittee responsible for permit and E&S requirements long after the project is complete, and expose the permittee to third-party suits and challenges to situations that occur outside of their control. It also unnecessarily increases the cost of development by requiring permittees to expend funds to maintain permit-required controls when they aren't necessary, until the Department or conservation district happens to get around to issuing an acknowledgement. The Chamber strongly recommends that this requirement either be deleted; or alternatively that a "deemed approval" provision be included in which a NOT is deemed approved if the Department or conservation district has not provided a written objection to the NOT within a specified time frame (say 14 days of receipt).
- There is a grammatical error in the opening clause of this subsection.

**§ 102.8(a) – PCSM Requirements**

- This new section requires that a person proposing an earth disturbance activity that requires an NPDES permit, or another Department permit that requires compliance with Chapter 102, shall develop, implement, operate, and maintain a PCSM plan. The Chamber concurs with the requirement for a PCSM for earth disturbances requiring a construction NPDES permit. But the Chamber has concerns with the wording, "or other Department permit that requires compliance with this chapter shall be responsible." This wording pulls in an extremely large world of very small projects that, as a condition of an applicable non-Chapter 102 permit, must meet some aspect of the Chapter 102 requirements. For example, a small stream encroachment such a pipe repair, requires a Chapter 105 permit. Chapter 105 permits require compliance with Chapter 102 earth disturbance controls. But an earth disturbance such as this can be measured in square feet, not acres, and may actually not require an E&S plan (less than 5000 square feet), let alone an NPDES permit. But based on the proposed wording of §102.8(a), this very small earth disturbance project would ostensibly be required to have a PCSM plan. The Chamber requests that the wording of this section be changed limiting the requirement for a PCSM plan only to earth disturbances that require an NPDES permit.

**§ 102.8(l) – Certification Requirements**

- §102.8(l) requires the submission of "record drawings" to be submitted with a Notice of Termination, retained with the PCSM plan, and copies provided to the person responsible for the operation and maintenance of PCSM BMPs. Record drawings as described in the proposed regulation are not applicable to all earth disturbance activities. For example, record drawings are not created for many utility or oil and gas activities. The currently proposed requirement is applicable for projects installing engineered and constructed PCSM BMPs. The language of this section should be modified to reflect the appropriate applicability of the Record Drawing requirement.

**§ 102.14 – Riparian Forest Buffer Requirements**

- Although the PA Chamber does not dispute the conceptual environmental value and benefit of riparian forest buffers to water quality, the Chamber does not support the inclusion of riparian forest buffers as a mandatory regulatory requirement. The incorporation of a riparian forest buffer as part of a regulated earth disturbance project should rather be highlighted as a significant and preferred BMP, with incentives in the regulation and the PA storm water BMP manual to adopt this BMP over other available BMPs. For example, DEP could have highlighted the incorporation of a riparian forest buffer BMP as the means of compliance for meeting the nondischarge or ABACT requirements in a High Quality (HQ) or Exceptional Value (EV) watershed.
- A riparian forest buffer cannot always be placed along a stream. Physical impediments such as streamside roads and buildings, or topographical features such as cliffs or high banks, prevent the installation and/or survival of a forest system. The regulation should be modified to account for these issues, and consideration of the best use of the land to protect the water bodies while accounting for site-specific issues and obstacles.
- The riparian forest buffer requirement also presents a conflict with overhead utilities (electrical power industry). In the vicinity of overhead electrical lines, vegetation that is low-growing and will not interfere with and disrupt overhead power lines is specifically planned and maintained. Trees in the proximity of overhead power lines present a very real risk to electrical utility infrastructure in the Commonwealth. The Chamber again emphasizes that the utility industry should be exempted from the riparian forest buffer requirement.
- §102.14(a)(2) ("Other approvals that include a buffer") – This section should be deleted from the proposal. Our concern is that the language of this section could be read as delegating to the Department *carte blanche* authorization to require the installation of a riparian buffer for any situation, simply by adding conditions to other permits (*e.g.*, mining permits, Ch. 105 permits, etc.) issues pursuant to other programs. Such an open-ended delegation, without any control or guidelines, is not acceptable.
- §102(a)(4) – This section describes the composition of an existing riparian buffer that is acceptable to the Department. In public meetings, DEP has stated that the average cost to establish and maintain a riparian buffer is \$1400/acre. Considering the widespread presence of invasive species in Pennsylvania, the Chamber believes that the Department's estimates are low, and the cost to design, install, and maintain a riparian forest buffer in accordance with DEP's composition requirements exceeds the Department's current projection. The Chamber requests DEP re-evaluate their cost estimates, and in turn re-evaluate the cost impact of 102.14 on PA commerce and the economy.
- The language in §102.14(d)(1) through (3) is confusing. Specifically, the proposed rule injects the words, "(both sides)" after the words "along all rivers, perennial or intermittent streams" in each subsection relative to the required average minimum widths. What is DEP's intention with the words "both sides?" Did DEP intend to say "either side?" Or, is DEP's intention that if a project is proposed within a required minimum width on one side of a stream, then a riparian buffer must be also established on the other side of the stream where the project is not occurring. We note that in many situations, the land which the developer owns and controls may be located only on one side of the stream (with the stream acting as a property boundary). If DEP's intention is to impose an obligation to install a buffer on both sides of the stream, even where the land in question is owned by other entities, then the Chamber strongly objects, as this requirement is unreasonable and unachievable due to land ownership issues, as well as the fact that the project is not taking place on the other side of the stream. The Chamber requests that DEP very clearly explain, then clarify and adjust the wording in the regulation.

- The riparian forest buffer requirement is specifically and substantively problematic for the utility industry. For example, for utility line crossings, the utility typically does not own the land. Right-of-way needs to be negotiated and obtained from the land owner. Section 102.14(f)(1) requires protecting riparian buffers in perpetuity through legal means such as deed restrictions, easements, and ordinances. Since installation of a riparian forest buffer under the proposed regulation is essentially eliminating future land use for the land owner, it is highly unlikely that the land owner would agree to grant the right-of-way for the crossing, therefore blocking the utility's progress. Does DEP propose the use of eminent domain just to satisfy this proposed riparian forest buffer provision? The Chamber recommends that utility services be exempt from the riparian forest buffer requirement. As an alternative, remove the requirement for riparian forest buffers from the proposed regulation and establish it as a primary and preferred BMP per the Chamber's previous comment.

The mandatory requirement for incorporation of riparian forest buffers in regulated earth disturbance projects is not a good idea, and could have been handled differently that would have achieved buy-in with the numerous organizations in Pennsylvania that are impacted by this provision. It deprives land owners of their land, increases the cost of land and land development, is a strong disincentive for using the new Permit-by-Rule, and is not really necessary for an EV watershed, since the watershed is already exceptional.

#### **§ 102.15 – Permit-by-Rule for Low Impact Projects**

- On March 11, 2009, the Pennsylvania Chamber delivered a letter to the Department (PA Chamber to Ken Murin, Proposed Erosion and Sedimentation Control NPDES Permit-By-Rule) supporting the construction NPDES PBR option for permitting low risk earth disturbances under Chapter 102. At the time of the Chamber's endorsement, the proposed review period was 15 days, which was a distinct advantage over the review periods typically required for a general or individual construction NPDES permit. The Chamber supported the construction NPDES PBR as a permitting strategy that supported the industry and commerce of the Commonwealth while still protecting the environment.
- Since then, the proposed requirements for the PBR have significantly changed. The PBR review period is now 30 days, and requires the installation of riparian forest buffers. The use exclusions of the PBR are now so substantively restrictive that very few projects would even conceptually qualify. As this concept has evolved, and the Department has attempted to compromise with many disparate interests, the concept has unfortunately devolved to such a point that the attendant restrictions, conditions and timeframes have all but eliminated the construction NPDES PBR from being a useful tool for the regulated community.

#### **§ 102.22(b)(1) – Temporary Stabilization**

- In this section, DEP added specific language for temporary stabilization. Specifically, the new requirement states: "Upon temporary cessation of earth disturbance activity or any stage or phase of 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." This requirement is confusing, open-ended, and unreasonable. The Chamber's first issue is with the three (3) day cessation time period. Is the Department saying that when earth disturbance activities are interrupted due to the many three or four day holiday weekends that exist on the U.S. calendar, that the project has to seed and mulch all disturbed areas, just to re-disturb those same areas at the conclusion of the

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short holiday period? Such an approach is unreasonable, and would engender a significant waste of resources. The minimum germination time for annual rye grass is ten (10) days under ideal soil moisture and temperature conditions. Therefore, planting grass seed for a cessation in earth disturbance activities that is less than the germination period will provide no short term E&S benefit before the seed and mulch is disturbed, turned under, or removed upon start up of earth disturbance activities. Assuming that project sites are already operating under an E&S plan approved by the Department or applicable conservation district, and possibly even an NPDES or E&S permit, then the disturbed project area is already protected from accelerated erosion and sedimentation. This segues to the next point. What does the Department mean by "otherwise protected from accelerated erosion and sedimentation?" Does the fact that the project site is operating under, and protected by a Department-approved E&S plan, and the E&S BMPs are being maintained mean that the project site is already being protected from accelerated erosion and sedimentation? (102.2) To account for Pennsylvania's northern latitude location, and varying moisture conditions, the Chamber requests that DEP change three days earth disturbance cessation to **twenty (20) days** earth disturbance cessation before requiring temporary stabilization measures.

The PA Chamber of Business and Industry appreciates this opportunity to comment on the proposed Chapter 102 regulation.

Sincerely,



Gene Barr

Vice President, Government and Public Affairs

cc: Mr. John Hines, Deputy Secretary, Water Management  
Mr. Dana Aunkst, Bureau Director, Water Standards and Facility Regulation