



**INDEPENDENT REGULATORY REVIEW COMMISSION  
COMMONWEALTH OF PENNSYLVANIA  
333 MARKET STREET  
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HARRISBURG, PA 17101**

**(717) 783-5417  
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May 8, 1998

Honorable James M. Seif, Chairman  
Environmental Quality Board  
16th Floor, 400 Market Street  
Harrisburg, PA 17105-2063

Re: IRRC Regulation #7-332 (#1921)  
Environmental Quality Board  
Erosion and Sediment Control

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-332. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Chuck Tyrrell at 772-3455 or Fiona E. Wilmarth at 783-5438. They have been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Nyce", with a long horizontal flourish extending to the right.

Robert E. Nyce  
Executive Director

REN:kcg

Enclosure

cc: Sharon Freeman  
Kenneth F. Murin  
Barbara Sexton  
Office of General Counsel  
Office of Attorney General  
Pete Tartline

**COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION**

**ON**

**ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-332**

**EROSION AND SEDIMENT CONTROL**

**MAY 8, 1998**

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to clarity, reasonableness, and economic impact. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

**1. Section 102.1. Definitions. - Clarity.**

*BMPs - Best Management Practices.*

The definition of "best management practices" includes a reference to the quality of waters and the "aquatic environment" within the Commonwealth. The meaning of "aquatic environment" is unclear. We recommend that the EQB define this term in the final-form regulation.

The definition of best management practices requires the individual to "protect, maintain, and improve the quality of waters...." We question what responsibility and role the individual has, using best management practices, to improve the existing water quality. We recommend that the EQB delete the requirement for improving the quality of waters from the definition of "best management practices."

*Erosion and Sediment Control Permit.*

Erosion and Sediment Control Permit is defined as "A permit required for earth disturbance activities, except activities that require an NPDES permit for stormwater discharges associated with construction activities." The latter provision of this definition contains a substantive provision that is better placed in the body of the regulation. Therefore, we recommend that the EQB define this term as a permit required for earth disturbance activities.

**2. Section 102.2. Scope. & Section 102.3. Purpose - Need.**

These two sections contain similar language describing the intent and purpose of Chapter 102. To avoid this duplication, we recommend that the EQB consolidate this information in only one section.

### **3. Section 102.4. General. - Clarity and Reasonableness.**

Section 102.4(b)(1) requires an Erosion and Sediment (E&S) control plan when an activity results in an earth disturbance of 5,000 square feet or more. Several commentators questioned the appropriateness of the 5,000 square feet standard. Specifically, several building associations observe that this standard is too small and will require the builder of a single family home to continue to develop an E&S control plan. The builders believe this standard adds to the cost of home construction. The Pennsylvania Builders Association believes the standard for submitting a plan should be somewhere between 3/4 of an acre to 1 acre.

We request the EQB provide justification for why 5,000 square feet is the appropriate standard for requiring an E&S control plan.

Section 102.4(b)(3) requires development of an E&S control plan if "The Department determines that the activity may adversely impact waters of this Commonwealth." The Department of Environmental Protection (Department) may delegate the administration and enforcement of this regulation to a conservation district. Consequently, we recommend that this provision be clarified in the final-form regulation to read as follows: "The Department or its designee...."

This section of the regulation is also unclear because it does not include the criteria that the Department or its designee will use to determine if an earth disturbance activity will adversely impact the waters of the Commonwealth. We recognize that it may be difficult to list all possible criteria which will be considered in making this determination. However, the EQB could include a nonexhaustive list to give the regulated community guidance on how such a determination will be made. We suggest the EQB include language such as:

- (3) ... In making this determination, the Department or its designee will address factors including, but not limited to, the following:
  - (i)...
  - (ii)....

Section 102.4(c) provides that the Department or its designee may request an E&S control plan be submitted for review and approval. This provision is unclear because it does not specify under what circumstances plan submission and approval will be required. The regulation also does not provide the timeline for review of plans. We recommend that the EQB revise the final-form regulation to specify under what conditions plan submission and approval will be required. We further recommend that the EQB specify the timeline for review of plans in the final-form regulation.

### **4. Section 102.5. Erosion and sediment control plan. - Clarity.**

Section 102.5(a) requires a plan to be prepared by "a person trained and experienced in erosion and sediment control methods and techniques." The provision is unclear, however,

because it does not specify what is acceptable training and experience. We recommend that the EQB specify the acceptable training and experience in the final-form regulation.

Section 102.5(b) requires that the erosion and sediment control plan “consider” all factors which contribute to erosion and sedimentation. The term “consider” is vague and could imply that not all factors must be addressed in the written plan. We recommend that the term “consider” be replaced with “address.”

Section 102.5(b)(6) also uses the term “consider,” but in a different context. This provision addresses circumstances when an earth disturbance activity may result in a discharge to a body of water classified as high quality or exceptional value. It is our understanding that the intent of this section is to require that measures be taken to protect the water from degradation and to provide a nonexhaustive list of examples of measures which may be used. We recommend that this section be revised to more clearly reflect the Department’s intent. Specifically, we recommend the following language:

(6) When an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as high quality or exceptional value in Chapter 93, measures shall be taken to maintain and protect the water from degradation. Acceptable measures include the following:

- (i) utilization of prolonged detention for sediment basins and sediment traps;
- (ii) stream buffers;
- (iii) an accelerated stabilization schedule; and
- (iv) other appropriate measures to maintain and protect the water from degradation.

#### **5. Section 102.12. BMPS. - Clarity.**

Subsection (4) provides that all disturbed areas shall be immediately stabilized after the final grade. However, Subsection (5) provides that if it is not possible to permanently stabilize a disturbed area immediately after the final earth disturbance activity has been completed, temporary vegetation, mulch, and other appropriate temporary cover shall be applied immediately. Several commentators expressed confusion on the responsibility of the individual to immediately stabilize the area after final grade.

We have two suggestions to improve the clarity of the regulation. First, the regulation can be improved by indicating when temporary stabilization is permissible. Although it may not be possible to list all circumstances, inclusion of the general criteria will provide guidance to those conducting earth disturbing activities.

Second, to avoid confusion about whether an area should be immediately stabilized, the regulation could indicate that temporary stabilization should be completed immediately, with permanent stabilization to follow as soon as possible.

## **6. Section 103.13. Design Criteria for BMPs. - Clarity.**

Subsections (c)(4) and (d)(6) use the phrase “other approved alternative” in relation to when a potential discharge from a sediment basin or trap may occur. It is not clear who will approve the alternative method. Therefore, we recommend that the EQB amend the regulation to indicate who is responsible for making this determination.

## **7. Section 102.31. Permit Requirements. - Reasonableness and Clarity.**

Subsection (a) requires an NPDES permit when an individual proposes an activity involving five or more acres of earth disturbance or “an earth disturbance on a portion, part, or during any stage of a larger common plan or development or sale that involves 5 acres or more of earth disturbance.” Numerous commentators have interpreted this provision to mean they would need to obtain a permit even if their activity resulted in less than five acres of earth disturbance.

It is our understanding that the EQB’s intent is to require an NPDES permit when the activity results in total earth disturbance of five or more acres. Furthermore, it is our understanding that when a utility or other subcontractor installs service in a new commercial or residential development, it is the responsibility of the developer of the site to submit a NPDES permit application. We believe the EQB needs to make several revisions to this subsection to clearly describe who will be required to submit an NPDES Permit.

First, the regulation should clearly indicate that when there is an earth disturbance of five or more acres, the individual responsible for the operation of the site must obtain the NPDES permit. As several commentators observed, the Environmental Protection Agency (EPA) has addressed the issue of who would be the individual responsible for the operation of the site. Specifically, the EPA considers the responsible person as the individual who has control of the construction project plans and specifications. This includes the ability to make modifications to those plans and specifications or to ensure compliance with the permit requirements. We recommend the EQB amend its regulation to be similar to the EPA’s structure and to clearly indicate who, such as a utility or a subcontractor, would fall under the provisions of the permit submitted by the operator of the site.

Second, the EQB must better define what it considers “a larger common plan of development or sale that involves 5 acres or more of earth disturbance.” We recommend the EQB define “Common Plan of Development.” In addition, we recommend the regulation include the criteria that will be used to reasonably determine if a project or activity will fall under a common plan of development.

The Pennsylvania Oil and Gas Association (POGA) believes the permitting requirements are more stringent than federal regulations. Specifically, POGA believes that the regulation does not recognize the exemption provided for in 40 CFR Section 122.26(a)(2).

Based on this provision of the federal regulations, it appears oil and gas exploration operations may be exempt from the NPDES permit requirement when the operation is composed

entirely of flows which are from conveyance or systems of conveyance used for collecting and conveying precipitation runoff which is not contaminated. We recommend the EQB explain how it would treat operations described in 40 CFR Section 122.26(a)(2). We also request that the EQB explain whether the provision is more stringent than federal regulations.

Subsection (e) allows the Department to reduce the acreage requirements for permits by notice in the *Pennsylvania Bulletin*. This will allow the Department to amend a regulation simply by publishing a notice. Changes to provisions of a regulation must be accomplished by proposing another regulation. Therefore, we recommend the EQB delete the provision allowing the Department to change the permit acreage requirements by notice. If there are circumstances when a permit is required for less acreage than specified in the rulemaking, the specific exceptions should be delineated in the regulation.

#### **8. Section 102.32. Permit Application and Fees. - Reasonableness and Economic Impact.**

The EQB is increasing the application fee from \$200 to \$500. We understand that this fee has not increased for over 20 years. However, we request that the EQB provide a more detailed description of the costs incurred in reviewing an application and how these costs relate to the application fee.

We also question how the fee structure will be applied when the county conservation district reviews the application. It is our understanding that the county conservation districts charge a separate fee for this review. If the county conservation district charges an additional fee, we question why the applicant must also pay the \$500 state fee contained in this rulemaking. We recommend the EQB investigate what the county conservation districts charge for reviewing the permit application. We also recommend that the EQB provide justification for assessing the applicant a \$500 fee when the Department delegates the review to a county conservation district.

The EQB is adding a new Subsection (c) which will require the completion of the Pennsylvania Natural Diversity Inventory form. The Department will use this form to determine if the earth disturbance activity may "adversely impact the species or their habitat." We recommend that the EQB explain what criteria the Department will use to make this determination.

Finally, the regulation does not include a time period within which the Department or its designee must complete the review of the permit application. We recommend that the EQB include a maximum time period for completion of the application review.

#### **9. Erosion and Sediment Pollution Control Program Manual. - Clarity.**

The Department has developed an Erosion and Sediment Pollution Control Program Manual that it uses to provide guidance on the Chapter 102 regulations. We question whether the Department should include a reference to this manual in the regulation, where appropriate, to provide guidance to the regulated public.

**10. Penalties for Non-Compliance. - Reasonableness and Clarity.**

The regulation does not indicate what penalties or enforcement provisions will be taken, if any, for failure to submit or implement an E&S control plan or for not obtaining a NPDES permit. We recommend that the final-form regulation include any action or penalties that may be taken to enforce the rulemaking or include a statutory citation to the potential penalties or actions.

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# INDEPENDENT REGULATORY REVIEW COMMISSION

**To:** Shirley Hartman  
or Patty Johnson  
or Denise Henke  
or Jocelyn Darrow

**Agency:** Department of Environmental Protection  
**Phone:** 7-2814  
**Fax:** 3-8926

**From:** Kristine M. Shomper, Executive Assistant  
**Company:** Independent Regulatory Review  
Commission  
**Phone:** (717) 783-5419 or (717) 783-5417  
**Fax:** (717) 783-2664

**Date:** May 8, 1998  
**# of Pages:** 8

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-332. Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

**Accepted by:**

*Shirley Hartman*

**Date:**

5/8/98



**INDEPENDENT REGULATORY REVIEW COMMISSION**

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**M E M O R A N D U M**

**To:** ✓ Fred Taylor  
Executive Director  
House Environmental Resources and  
Energy Committee

Phil DiMartile  
Executive Director  
Senate Environmental Resources and  
Energy Committee

Rich Thomas  
Executive Director  
House Environmental Resources and  
Energy Committee

Ron Ramsey  
Executive Director  
Senate Environmental Resources and  
Energy Committee

**From:** Chuck Tyrrell & Fiona Wilmarth, Regulatory Analysts

**Date:** May 11, 1998

**Re:** Commission's Comments on Proposed Rulemaking  
Environmental Quality Board  
Erosion and Sediment Control  
Regulation #7-332 (IRRC # 1921)

On May 8, 1998, the Commission submitted its Comments to the Environmental Quality Board on the referenced proposed regulation. A copy is attached for your review.

We hope this information is helpful. If you have comments or questions, please contact either one of us at 783-5417.

**ATTACHMENT**

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# INDEPENDENT REGULATORY REVIEW COMMISSION

To: David J Sumner  
Company: PA Gas Assoc  
Phone: \_\_\_\_\_  
Fax: 233-7946

From: Chuck Tyrrell  
Company: I. R. R. C.  
Phone: (717) 783-5417  
Fax: (717) 783-2664

Date: 5/11/98

Pages including this  
cover page: 7

Comments: \_\_\_\_\_  
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