



EMBARGOED MATERIAL

Monroe County Conservation District

8050 RUNNING VALLEY ROAD, STROUDSBURG, PA 18360

Technical
Section
570-629-3060

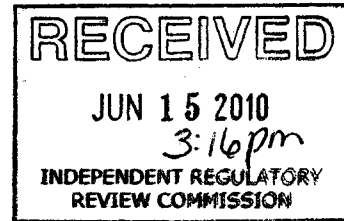
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November 19, 2009

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477



RE: Monroe County Conservation District Comments
Proposed Rulemaking – 25 Pa. Code Ch. 102
39 Pa.B. 5131, August 29, 2009

Dear Environmental Quality Board members:

At the November 19, 2009 regular meeting of the Monroe County Conservation District Board of Directors, a motion was made and approved to forward the following comments in response to a Public Notice of proposed rulemaking relating to 25 Pa. Code Chapter 102 (Erosion and Sediment Control and Stormwater Management.)

The changes that we have recommended to the proposed regulations may be considered substantive, and, if embraced by the EQB, may require re-advertisement in the *Pa. Bulletin*. While we understand the Department's desire to move forward with this rulemaking process, we all have to live with the end result. Our waters are predominantly special protection, and we have some of the highest value wetland resources in the state. Our local efforts in maintaining and improving existing water quality and quantity have benefited our downstream neighbors. We acknowledge the difficulty in incorporating non point regulatory provisions into a point source format. After having reviewed a recent Environmental Hearing Board Decision issued October 22, 2009, *Crum Creek Neighbors v. Commonwealth of PA, DEP and Pulte Homes of PA, LP*, Permittee, and having participated in the Alpine Rose appeal, we feel that the following comments will result in a more defensible and effective regulation.

Our general comments provide input requested by the Water Resources Advisory Committee, as well as highlighting additional issues which are pervasive in the proposed regulation.

General Comments

1. Permit-by-rule (PBR).

We feel that this provision should be eliminated from the proposed regulations. It was conceived at a time when there was a tremendous backlog of permits in the DEP Northeast Regional Office. While the Department was trying to devise a permit instrument on a statewide basis that would resolve a permit

backlog issue driven by workload in the Northeast Region, there was a parallel effort by Conservation Districts in the northeast and DEP to revise the delegation agreement to provide for post construction stormwater management review. Districts felt that this was the best strategy to pursue as it maintained the integrity of the program through an upfront technical / engineering review of proposed Post Construction Stormwater Management (PCSM) Plans and provided for concurrent reviews of both Erosion and Sedimentation Control Plans and PCSM Plans. Currently, three Conservation Districts in the Northeast, as a result of this parallel initiative, have assumed PCSM delegation agreements. In Monroe County, this effort included reconfiguring office space, securing a new position through County Government, negotiating a competitive salary, securing a long term commitment for funding between County Government and the District, and crafting the revised delegation agreement that provided for the responsible administration of the program. It is our contention that this effort by Conservation Districts to address this problem has created a situation where the permit-by-rule is no longer necessary.

We are also opposed to the permit-by-rule because it does not provide for a technical or engineering review, which would ensure good design and management strategies. Instead it will result in the Department needing to exponentially expand its compliance assistance to Conservation Districts since compliance will be achieved after contracts are let and construction has begun. For example, the Department recently revoked an expedited ESCGP-1 permit when it was discovered that the plans, which lacked an engineering review, contained inaccurate calculations and improper technical detail, and did not provide for best management practices where required. According to DEP, "DEP took this action because of numerous technical deficiencies discovered after our approval of the permits."

When NPDES Phase II came into effect, Districts pleaded with the Department to hire additional engineering staff to provide for the increased workload associated with permit reviews. Budget constraints and other factors contributed to the Department's lack of action to address this problem. Districts did respond. With the advent of PBR, Districts again have asked the Department to increase its staff for compliance assistance and again the perfect storm exists for no action by the Department. We greatly appreciate the Department's cooperation in developing the PCSM delegation.

This permit-by-rule is actually a general permit (GP) in every respect, but it could not be proposed as a GP because §92.81(a)(8) prohibits the use of a GP in special protection waters and because this category of activities will individually and cumulatively have the potential to cause significant adverse environmental impact. We question the legality of including this general permit (PBR) in Chapter 102.

We have not provided a detailed review or recommended specific revisions to §102.15 because we are opposed to the PBR. If the PBR remains in the revised regulations, its use should be prohibited in high quality watersheds given the high potential for sediment pollution and degradation in the absence of a collaborative engineering review and prohibited in counties in which the Districts have assumed the **engineering review** of PCSM plans, and the Registration of Coverage should require that copermittees be identified to demonstrate compliance with §102.15(b)(4). It is ironic that a permit with the potential for so much degradation is applicable in high quality watersheds. This can be explained, but not justified, by the need to address the

permit backlog issue in the Northeast Region which is dominated by special protection waters. The PBR calls into question the need for a delegation that Districts and county governments have invested such a large amount of equity in creating. Our solution (revised delegation agreement) provides for appropriate protection while at the same time expediting permit issuance.

2. Responsibility for long-term PCSM operation and maintenance.

Long-term operation and maintenance of both structural and non-structural PCSM BMPs is critical if compliance with required protection is to be achieved. In the Paradise Creek (Monroe County) Watershed Assessment, it was found that a majority of the structural PCSM BMPs were failing. While some of these failures can be attributed to improper design and construction, many failures were a result of lack of maintenance. Chapter 102 is not the correct vehicle to address this topic because the state will not be able to administer or enforce such a program. Before long-term operation and maintenance (O&M) can become a reality, a local infrastructure for O&M must be established. We feel that Act 167, the Stormwater Management Act, is better suited for O&M on a watershed scale as opposed to providing for it on a site by site basis. We agree that it is important for Chapter 102 to require that a schedule of O&M be provided and that a legal instrument be required (see comment #57 below).

3. Mandatory Riparian Forested Buffers.

For many years, we have been working with the local governments via the 167 stormwater management process to establish buffers as non structural BMPs and feel that we are uniquely qualified to provide comment on buffers.

The Department repeatedly acknowledges the importance of buffers in special protection waters. We support mandatory buffers on permitted sites, wetlands and in special protection waters and impaired waters (please note that we suggest PBR be eliminated). This is consistent with the scientific community's assessment of the benefits of buffers to protect, maintain, reclaim and restore the waters of this Commonwealth. It also supports local governments' efforts to incorporate sustainable land use practices and sends a strong message to those considering implementing such strategies. While we have not suggested mandatory buffers in non-impaired or non-special protection waters, they should be considered to prevent further degradation. By making buffers voluntary, plan designers will fit them in at the end of the design phase rather than properly planning from them, which will result in buffers rarely being proposed. The development community may be more amenable to buffers if buffers are required to be incorporated into the constraints mapping early in the design process and if limited project appurtenances in buffers are listed as "allowable activities" as suggested in our comments. We are opposed to the proposed buffer establishment and management requirements because they serve as a deterrent to voluntary buffers and require inappropriate disturbance within EV riparian areas.

We have traditionally established buffer zones as an avenue to identify acceptable activities within buffers. While we support the concept of buffer zones, the proposed regulations make only one distinction between

what can occur in Zone 1 and Zone 2 (timber harvesting). In light of this, we question the incorporation of buffer zones in the revised regulation.

If the Department has intended to relate zones to vegetative composition, these proposed regulations do not reflect that. We see no utility in this strategy as reflected in our comments. We have proposed the enhancement of existing buffers utilizing Department guidance in instances where the existing buffer is predominantly non-woody vegetation only.

4. There appears to be an inconsistent use of the terms Waters of the Commonwealth, surface waters and surface waters of the Commonwealth. Throughout the proposed 102 regulations, post construction stormwater discharges are only regulated when they discharge to surface waters. Discharges during construction are regulated when they discharge to Waters of the Commonwealth, as is currently the case. There appears to be a misconception that when there is a post construction stormwater discharge to other than surface waters, there is no threat of pollution or pollution potential. We believe that the potential exists for a polluting post construction discharge to occur to surface waters from non surface waters during a design storm event at the point of discharge from the site. We believe that all post construction discharges should be regulated when they occur to waters of the Commonwealth. This would provide for consistency throughout the chapter for during and post construction discharges and provide for more relevant regulation of all discharges. This discrepancy may have occurred because of the incorporation of provisions from Chapter 92 and 93 for point discharges of sewage to surface waters into a regulation which actually address non-point discharges.

5. PCSM Design Strategy.

The proposed rulemaking indicates that the Department is not committed to producing a regulation consistent with current sustainable development strategies as implied by the lack of a requirement for an alternatives analysis which progresses from nonstructural to structural. Chapter 102 should promote sustainable planning and design strategies and prioritize the use of nonstructural BMPs in the development of PCSM Plans. By doing so, it becomes easier to comply with anti-degradation requirements in special protection waters, reduces costs of compliance, and minimizes complications with long term O&M.

6. There are a number of provisions in Chapter 102 for Department review and approval of alternate design, BMPs, or strategies for stormwater management. We have added throughout the regulation provisions for conservation district review and approval consistent with their delegated authorities and responsibilities per agreement. This would allow delegated districts to perform all of the duties under their delegation agreement. For example, a PCSM engineering review delegated District would not necessarily seek guidance from the Department on an engineering issue as in 102.4(b)(4). Additional examples would be 102.4(b)(6), 102.(b)(7) 102.6(c)(2), 102.8(d), 102.8(f)(16), 102.8 (g)(6), 102.8 (k), 102.8(m).
7. We noticed that there were instances where *must* was substituted for *shall* and *pre-development* was substituted for *pre-construction*. The use of these terms is not necessarily interchangeable. We have

addressed this in most instances in our comments, however Chapter 102 should be reviewed and updated to use each word consistently.

8. There is a critical need for assuring that on-lot PCSM BMPs are constructed and maintained. Comment #56 below reflects this need and offers input on a solution.

The following comments on the specific sections of the proposed regulations are structured in the following manner:

Items in **Bold** are our suggested changes.

Items which are ~~struck~~ are items we feel should be removed.

Items in *italics* are not meant to be incorporated into the regulations but are commentary for added clarification on the given topic.

102.1 Definitions

1. **ABACT – BMPs which will individually or collectively manage the difference in the net change from pre existing stormwater volume, rate and quality for events up to and including the 2-year 24-hour storm and that will contribute to the maintenance and protection of the existing quality of the receiving surface water.** *The application of Section 93.4c (b)(1)(i)(A) does not translate to non point source stormwater discharges(i.e. stormwater reuse BMPs are non discharge BMPs). The other components of stormwater runoff that degrade water quality and the management of those should be addressed further in the regulation. See further comments below).*
2. Animal heavy use - operation where because of the concentration of **one or more animals**.....
3. **BMPs – This is a good revision.**
4. Conservation District – a portion of the **erosion and sediment control and stormwater management**.....
5. Conservation Plan – keep [which minimize the potential for accelerated erosion and sedimentation from] and keep [The Conservation Plan shall include a schedule for the implementation of the BMPs]
6. Earth disturbance activity – A construction or other human activity which disturbs the surface of the land, including, **but not limited to**, land clearing and grubbing, *We agree with the additions but are concerned that the deletion of not limited to may omit some earth disturbance activities.*
7. **Impervious Surface - A surface that prevents the percolation of water into the ground such as rooftops, pavement, sidewalks, driveways, gravel drives, roads and parking, and compacted fill, earth or turf to be used as such.**

8. **Infiltration** – For stormwater to pass through the soil from the surface.
9. **Intermittent Stream** – A body of water flowing in a channel or bed ~~composed primarily of substrates associated with flowing water~~, which, during periods of the year, ... *We suggest this deletion so that a stream which has been manipulated or enclosed is still defined as a stream.*
10. **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**, or ...
 - (i) Equal to or greater than 1 acre and less than 5 acres (0.4 to 2 hectares) of earth disturbance with a point source discharge ~~to surface waters of this Commonwealth~~, or ... *Remove surface waters of this Commonwealth in both instances. Up until this point, permits were required for discharges to non surface waters such as roadside swales. Because discharges to non surface waters will flow to surface waters and have the potential to cause degradation, a permit should be required.*
11. **Nondischarge alternative BMPs** – Environmentally sound and cost-effective BMPs ...
12. **Operator**- ...
 - (i) who has the ability to ~~make~~ **propose** modifications to the E & S Plan, ... *Most modifications to E&S and PCSM Plans on permitted sites require review; this section implies otherwise.*
13. *The proposed definition for perennial stream has no utility. After reviewing the use of perennial stream in the regulations, we feel that the following definition will suffice: A stream or river that has continuous flow in parts of its bed all year round during years of normal rainfall.*
14. **Point source**-- ~~(i)~~ **Concentrated flow** from any discernible, confined and discrete conveyance, including any **concentrated or channelized flow associated with stormwater**, pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged.
 - ~~(ii) The term includes concentrated or channelized flow associated with stormwater.~~
 - ~~(iii) The term does not include sheet flow associated with stormwater.~~
15. **Pre-Construction Hydrologic Regime** – The hydrologic cycle or balance that sustains quality and quantity of stormwater, baseflow, storage, and groundwater supplies under pre-development conditions.
16. **Practicable** – Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.
17. **Record Drawings** - Original documents revised by a licensed professional to reflect the as-built conditions. These drawings shall be based on the contractor's notes and a field survey.

18. Riparian ~~forest~~ buffer - A BMP that is an area of permanent vegetation consisting of predominantly native trees, shrubs and forbs along rivers, streams, creeks, wetlands, lakes, ponds, or reservoirs that is maintained in its pre-development state, or enhanced and sustainably managed to protect and enhance water quality, stabilize stream channels and banks, and buffer land use activities from surface waters. *These changes provide for consistency with our comments under the buffer provisions of this regulation.*
19. Top of Stream Bank – First substantial break in slope between the edge of bed of the stream as defined by the normal high water mark and the surrounding terrain.....

102.4 Erosion and sediment control requirements

20. (b)(1) The implementation and maintenance of E & S BMPs are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet (464.5 square meters).
21. (b)(2)(ii) The person proposing the earth disturbance activities is required to develop an E & S Plan ~~under~~ pursuant to this chapter under Department regulations other than those contained in this chapter.
22. (b)(4) Unless otherwise authorized by the Department or conservation district ~~or conservation district after consultation with the Department.....~~
23. (b)(4)(iv) ~~Utilize other measures or controls that prevent or minimize the generation of increased stormwater runoff.~~ Minimize earth disturbance on areas where soil erodibility and slope create a high potential for erosion.
24. (b)(5) Add a requirement that a cut-fill analysis be provided.
25. (b)(5) Add a requirement that dust control be implemented.
26. (b)(5)(iii) and the proposed alteration to the project site as well as offsite fill, staging and borrow areas.
27. (b)(5)(v) The location of all ~~surface Waters of this Commonwealth~~ which may receive runoff within or from the project site and their classification ~~under~~ pursuant to Chapter 93.
28. (b)(5)(vii) A sequence of BMP installation and removal in relation to the scheduling of earth disturbance activities, prior to, during and after earth disturbance activities ~~that ensure the proper functioning of all BMPs.~~ *The sequencing of the BMP installation and removal does not ensure that the BMP will function properly. The functioning of a BMP is related to its design, operation, and maintenance.*
29. (b)(5)(viii) Supporting calculations, **documentation**, and measurements.

30. (b)(5)(xii) Identify **soil conditions and** naturally occurring geologic formations ~~or soil conditions~~ that may have the potential to cause pollution during earth disturbance activities and include BMPs to avoid or minimize potential pollution. ~~and its impacts from the formations.~~
31. (b)(5)(xiii) Evaluate the potential for thermal impacts to surface waters from the earth disturbance activity **during construction** and include BMPs to avoid, minimize or mitigate potential pollution from thermal impacts.
32. (b)(5)(xiv) **For those projects requiring a PCSM plan under § 102.8 (relating to PCSM requirements),** the E & S Plan shall be planned, designed and implemented to be consistent with the PCSM Plan ~~under § 102.8 (relating to PCSM requirements)~~ **and be the final plan for construction.** Unless otherwise approved by the Department **or conservation district,** the E & S Plan must be separate from the PCSM Plan and labeled "E & S" or "Erosion and Sediment Control Plan". ~~and be the final plan for construction.~~
33. (b)(5)(xv) Identify ~~existing and proposed~~ riparian forest buffers.
34. (b)(6) Where an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value ~~under~~ pursuant to Chapter 93, the person proposing the activity shall, as applicable, use nondischarge alternatives and ABACT BMPs to maintain and protect the water from degradation[:]. Nondischarge alternatives and ABACT BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (April 2000), as amended and updated.* The Department **or conservation district** may approve alternative BMPs which will maintain and protect existing water quality and existing and designated uses. *The BMP Manual does not identify ABACT BMPs. How will designers know what to use to comply with this section?*
35. (b)(7) The E & S Plan, inspection reports and **self-monitoring** records shall be available for review and inspection by the Department or the conservation district at the project site during all stages of the earth disturbance activity.

102.5 Permit Requirements

36. (a)(2) ... shall obtain an individual NPDES Permit for Stormwater Discharges Associated With Construction Activities or coverage under a general NPDES permit ~~or NPDES permit-by-rule~~ for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity. *We are opposed to the permit-by-rule (see further comments below).*
37. (h) Operators who are not the permittee shall ~~be co-permittees~~ **apply for permit coverage on a form provided by the Department.**

102.6 Permit applications and fees

38. (b) *We support the proposed fees and suggest that provisions be made for a reduced fee on smaller individual NPDES permit sites. We also recommend that the permit-by-rule fee be increased to \$5,000.00 to capture the additional field work associated with the provisions of the permit-by-rule.*

39. (c)(2) When the Department or conservation district determines that an application or NOI is incomplete The applicant shall have 60 days to complete the application or NOI, or the Department or conservation district will consider the application to be withdrawn When an application or NOI is considered withdrawn, the Department or conservation district will close the application file and take no further action to review the file.

102.7 Permit Termination

40. (b)(2) The ~~permittee operator~~ name and address. *This section appears to contemplate the termination of the permit for the entire project which can only be accomplished by the permittee.*
41. Add **(b)(6) Record Drawings Per Section 102.8 (I).**
42. (c) Until the permittee has received written acknowledgement of an NOT, ...

102.8 PCSM requirements

43. Add **(b)10 Maintain pre-development hydrologic regime.**
44. (c) The PCSM Plan shall be ~~planned, designed and implemented to be~~ consistent with the E & S Plan under § 102.4(b) (relating to erosion and sediment and control requirements).
45. (f)(1) The existing topographic features of the project site, ~~and the immediate surrounding area,~~ **and areas conveying points of discharge to receiving waters.**
46. (f)(5) Identification of the location of surface waters, which may receive runoff within or from the project site and their classification under Chapter 93 (relating to water quality standards). *If this section was added to establish which waters require drainage easements and which waters do not, the regulation should also require the identification of other waters of the Commonwealth that are receiving stormwater.*
47. (f)(6) A written description of the location and type of PCSM BMPs **and construction details for permanent stormwater BMPs including permanent stabilization specifications and locations.**
48. (f)(14) An evaluation of potential thermal impacts from post construction stormwater to surface waters and inclusion of BMPs
49. (g)(2) Analysis demonstrating that the PCSM BMPs will ~~meet the volume reduction and water quality requirements specified in an applicable Department approved and current Act 167 stormwater management watershed plan,~~ or manage the net change for storms up to and including the 2-year/24-hour storm event when compared to preconstruction runoff volume and water quality....*We believe that a Department approved and current Act 167 stormwater management watershed plan is applicable to rate control where detailed studies were conducted to establish the release rates. However, since detailed studies*

are not done to determine the infiltration requirement contained in 167 plans, the 2-year/24-hour net should be the target for volume reduction and water quality.

50. Add (g)(2)(iii) Hydrologic routing analysis is required to demonstrate that the volume reduction requirement is met.
51. (g)(2)(ii) When the existing project site contains impervious area **which does not have stormwater control consistent with this chapter**, 20% of the existing impervious area to be disturbed must be considered meadow in good condition or better, except for repair, reconstruction, or restoration of roadways or utility infrastructure when the site will be returned to ~~existing~~ **pre-development** condition.
52. (g)(6) The Department may require, or ~~after consultation with the Department~~ a conservation district may require, additional information necessary ...
53. (h) When a PCSM Plan is being developed for an activity that may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value under Chapter 93, the person proposing the activity shall use nondischarge, **site design** and ABACT BMPs to maintain and protect the water from degradation...
54. (i) *This is a good addition.*
55. (l) The permittee shall include with the notice of termination "Record Drawings" with a final certification statement from a licensed professional, which reads as follows:

"I (name) do hereby certify pursuant to the penalties of 18 Pa.C.S.A. § 4904 to the best of my knowledge, information and belief, that the accompanying record drawings ~~accurately reflect the redline drawings~~, are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environment Protection and that the project site was constructed in accordance with the approved PCSM Plan." ~~and accepted construction practices."~~
56. Insert new section between (l) and (m) which reads as follows: **The person responsible for the construction of approved PCSM BMPs on individual residential lots which receive stormwater solely from the lot in which the PCSM BMP is located shall be identified on the deed as a covenant that runs with the land and that is enforceable by subsequent grantees. A grantor that fails to comply with this requirement shall remain jointly responsible with the grantee for the construction of the PCSM BMPs located on the property. This will solve a large problem with individual lot PCSM BMP installation by holding all parties responsible and providing a way to ensure implementation after an NOT for a residential project with an extended build out period is acknowledged.**
57. (m) ~~Unless a different person is approved in writing by the Department, operation and maintenance of PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMP is located. The party responsible for the operation and maintenance of PCSM BMPs shall be approved in writing by the department or conservation district.~~ The deed for any property containing a PCSM BMP shall identify the PCSM BMP and provide notice that the responsibility for operation and maintenance of the PCSM BMP is a covenant that runs with the land and that is enforceable by subsequent

grantees. A grantor that fails to comply with this requirement shall remain jointly responsible with the landowner grantee for operation and maintenance of the PCSM BMPs located on the property. *The original language of this section placed the emphasis on the landowner being responsible for the O&M of the BMP on that individual's property. This is problematic when a BMP, which collects stormwater from multiple lots or areas, is located on an individual's lot because the cost to maintain these facilities is high. This is also a problem because the landowner has little control over the contributing drainage area to the BMP.*

58. (n) The portion of a site reclamation or restoration plan that identifies PCSM BMPs to manage stormwater from oil and gas activities or mining activities permitted in accordance with Chapters 77 and 86--90, or a plan for abandoned mine land reclamation activities may be used to satisfy the PCSM Plan requirements of this section if the reclamation plan meets the requirements of subsections (b), (c), (e), (f), (g), (h), (i), (j) and (m). *These activities which require an E&S permit should also provide a PCSM Plan in accordance with subsections (g) and (j) due to permanent changes in cover and runoff characteristics.*

102.11 General Requirements

59. (a)(2) If required to develop a PCSM Plan, design, implement and maintain PCSM BMPs to mimic preconstruction stormwater runoff conditions and **hydraulic regime** to protect, maintain, reclaim and restore water quality and existing and designated uses...
60. (a)(3) **Riparian buffers shall be incorporated into the PCSM plan in watersheds which drain to High Quality or Exceptional Value streams.** *If required to develop a riparian forest buffer, design, implement and maintain the buffer in accordance with § 102.14 (relating to riparian forest buffer requirements). Various design, construction, and maintenance standards are listed in the *Riparian Forest Buffer Guidance*, (Buffer Guidance), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 395-5600-001 (2009), as amended and updated.*
61. (b) BMPs and design standards other than those listed in the Manuals of Buffer Guidance may be used when a person ... demonstrates to the Department or **conservation district** ...

102.14 Riparian Forest Buffer Requirements

62. *Change Riparian Forest Buffer to Riparian Buffer in all instances.*
63. (a)(1) *Riparian-forest buffer.* Persons proposing or conducting earth disturbance activities shall incorporate a riparian ~~forest~~ buffer within the boundaries of the project site when the activity requires a permit under this chapter, is located within an Exceptional Value or **High Quality** watershed, and the project site contains, or is along or within, 150 feet of a river, stream, creek, lake, pond or reservoir surface water.
64. (a)(1)(ii) ~~The activity is authorized utilizing the permit by rule under this chapter.~~
65. (a)(2) *Other approvals that include buffer.* ~~A riparian forest buffer may be required to be incorporated within the boundaries of a project site in accordance with this section by other rules, regulations, order, permit or other approval of the Department. It is interesting that the Department acknowledges, by this statement~~

the importance of buffers outside of EV waters.

66. (a)(3) Discharges into the buffer.

(i) ~~Concentrated flow and~~ Accelerated erosion and sedimentation shall be managed in the area upgrade and along the riparian ~~forest~~ buffer in accordance with §§ 102.4(b)--(e) and § 102.8 (relating to erosion and sediment control requirements; and PCSM requirements).

(ii) Concentrated flow shall be managed to the greatest extent practicable in the area upgrade and along the riparian buffer in accordance with §§ 102.4(b)--(e) and § 102.8 (relating to erosion and sediment control requirements; and PCSM requirements).

See 102.8(b)(10) above as it relates to maintaining existing hydraulic regime.

67. ~~(a)(4) Existing buffer composition.~~ An existing riparian forest buffer must: meet the requirements of subsection (d); consist predominantly of native trees and shrubs that provide at least 60% uniform canopy cover; noxious weeds and invasive species must be removed or controlled to the extent possible.

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

69. (a)(6) *Buffer establishment.* On sites ~~with no native woody~~ where buffers contain a predominance of non-woody vegetation, a riparian ~~forest~~ buffer shall be established in accordance with this chapter.

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

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

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

(i) Zone 1 must measured perpendicular to and on a horizontal line from the top of the bank of a river, stream, or creek, wetland boundary, or normal pool elevation of a lake, pond, or reservoir.

(ii) Zone 2 must begin at the landward edge of Zone 1 and occupy an additional strip of land measured perpendicular to and on a horizontal line from the edge of Zone 1.

71. ~~(b)(2) Zones.~~

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

102.15 Permit By Rule for Low Impact Projects with riparian forest buffers

73. *We feel that this provision should be eliminated from the proposed regulations (see general comments above).*

102.22. Site stabilization.

74. (b)(1) Upon temporary cessation of an earth disturbance activity or any stage or phase of an activity where a cessation of earth disturbance activities will exceed 3 days, the site shall be immediately seeded and mulched, or otherwise protected from accelerated erosion and sedimentation pending future earth disturbance activities.
75. (b)(2)(i) A minimum uniform coverage of mulch and seed, with a density capable of resisting accelerated erosion and sedimentation.

102.32 Compliance and Enforcement Provisions

76. *It sounds like this subsection is a response to complaints by the regulated community about inconsistencies and districts overstepping the boundaries of their delegation agreements, however we are not aware of a pervasive problem with districts responsibly administering these regulations. We can cite examples of a few disgruntled individuals in Monroe County who would cost Department a lot of staff time. Because there is an existing framework for persons to appeal actions of the Department which would include delegated conservation districts, we do not see the need for subsection 102.32 (c). If this provision remains in Chapter 102, it should be amended as follows: A person aggrieved by an action of a conservation district under this chapter may request an informal hearing with the Department and the conservation district within 30 days following the notice of the action. Any final determination by the Department under the informal hearing may be appealed to the EHB in accordance with established administrative and judicial procedures.*
77. 102.32(d) *This is a good addition.*

102.43 Withholding Permits

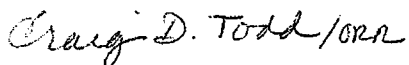
78. ~~With the exception of local stormwater approvals or authorizations,~~ A municipality or county may not issue a building or other permit authorize the initiation of earth disturbance by the issuance of a building permit or other permit, authorization or final approval to those proposing or conducting earth disturbance activities requiring a Department permit until the Department or a conservation district has issued the E & S or individual NPDES Permit, or approved coverage under the general NPDES Permit for Stormwater Discharges Associated With Construction Activities under § 102.5 (relating to permit requirements). *The proposed exception for local stormwater approvals or authorizations, which appears to relate to the requirement to provide a stormwater consistency letter prior to NPDES Permit issuance, is confusing and should be deleted. Said consistency does not constitute approval. A plan can be consistent with the local municipal ordinance*

and not receive approval because of small plan revisions. Final should also be deleted because many municipalities grant preliminary plan approval which allows developers to conduct earth disturbance associated with the construction of public improvements before gaining a final approval of their plans. As proposed, a municipality could waive permits or approvals for a project requiring an NPDES Permit and not be in violation of §102.43. We have proposed alternate language in reaction to a Monroe County municipality that told a developer no approvals were needed to build a resort in a subdivision that was approved in the 1970s.

Please find enclosed a one-page summary of our comments for distribution to the EHB members.

We would be happy to meet with the EHB and the Department to further discuss these comments. Please contact me if you have any questions or require additional information.

For the Board of Directors,



Craig D. Todd
District Manager

Enclosure

cc: DEP Secretary John Hanger
DEP Central Office, c/o Kenneth Murin
DEP Northeast Regional Office, c/o Joseph Buczynski
Water Resources Advisory Committee, c/o Stephen Rhoads
PACD, c/o Susan Fox Marquart
Monroe County Commissioners
Monroe County Planning Commission
File (4)

Monroe County Conservation District Comments to the Environmental Hearing Board
Proposed Rulemaking, 25 Pa. Code Ch. 102, 39 Pa.B. 5131, August 29, 2009

1. Permit-by-rule (PBR). We feel that this provision should be eliminated from the proposed regulations. It was conceived at a time when there was a tremendous backlog of permits in the DEP Northeast Regional Office. While the Department was trying to devise a permit instrument on a statewide basis that would resolve a permit backlog issue driven by workload in the Northeast Region, there was a parallel effort by Conservation Districts in the northeast and DEP to revise the delegation agreement to provide for post construction stormwater management (PCSM) review. Districts felt that this was the best strategy to pursue as it maintained the integrity of the program through an upfront technical / engineering review of proposed PCSM Plans and provided for concurrent reviews of both Erosion and Sedimentation Control and PCSM Plans. Currently, three Conservation Districts in the Northeast, as a result of this parallel initiative, have assumed PCSM delegation agreements. In Monroe County, this effort included reconfiguring office space, securing a new position through County Government, negotiating a competitive salary, securing a long term commitment for funding between County Government and the District, and crafting the revised delegation agreement that provided for the responsible administration of the program. It is our contention that this effort by Conservation Districts to address this problem has created a situation where the permit-by-rule is no longer necessary.

We are also opposed to the permit-by-rule because it does not provide for a technical or engineering review, which would ensure good design and management strategies. Instead it will result in the Department needing to exponentially expand its compliance assistance to Conservation Districts since compliance will be achieved after contracts are let and construction has begun. For example, the Department recently revoked an expedited ESCGP-1 permit when it was discovered that the plans, which lacked an engineering review, contained inaccurate calculations and improper technical detail, and did not provide for best management practices where required. According to DEP, "DEP took this action because of numerous technical deficiencies discovered after our approval of the permits."

This permit-by-rule is actually a general permit (GP) in every respect, but it could not be proposed as a GP because §92.81(a)(8) prohibits the use of a GP in special protection waters and because this category of activities will individually and cumulatively have the potential to cause significant adverse environmental impact. We therefore question the legality of including this general permit (PBR) in Chapter 102.

If the PBR remains in the revised regulations, its use should be prohibited in high quality watersheds given the high potential for sediment pollution and degradation in the absence of a collaborative engineering review and prohibited in counties in which the Districts have assumed the **engineering review** of PCSM plans, and the Registration of Coverage should require that copermitees be identified to demonstrate compliance with §102.15(b)(4). The PBR calls into question the need for a delegation in which Districts and county governments have invested such a large amount of equity. Our solution (revised delegation agreement) provides for appropriate protection while at the same time expediting permit issuance.

2. Responsibility for long-term PCSM operation and maintenance. In the Paradise Creek (Monroe County) Watershed Assessment, it was found that a majority of the structural PCSM BMPs were failing. Many failures resulted from a lack of maintenance. Chapter 102 is not the correct vehicle to address this topic because the state will not be able to administer or enforce such a program. We feel that Act 167, the Stormwater Management Act, is better suited for O&M on a watershed scale as opposed to providing for it on a site by site basis. We agree that it is important for Chapter 102 to require that a schedule of O&M be provided and that a legal instrument be required.
3. Mandatory Riparian Forested Buffers. The Department repeatedly acknowledges the importance of buffers in special protection waters. We support mandatory buffers on permitted sites, wetlands, and in special protection and impaired waters. This is consistent with the scientific community's assessment of the benefits of buffers to protect, maintain, reclaim and restore the waters of this Commonwealth. It also supports local governments' efforts to incorporate sustainable land use practices and sends a strong message to those considering implementing such strategies. While we have not suggested mandatory buffers in non-impaired or non-special protection waters, they should be considered to prevent further degradation. By making buffers voluntary, plan designers will fit them in at the end of the design phase rather than properly planning from them, which will result in buffers rarely being proposed. The development community may be more amenable to buffers if buffers are required to be incorporated into the constraints mapping early in the design process and if limited project appurtenances in buffers are listed as "allowable activities" as suggested in our comments. We are opposed to the proposed buffer establishment and management requirements because they serve as a deterrent to voluntary buffers and require inappropriate disturbance within EV riparian areas.
4. PCSM Design Strategy. The proposed rulemaking indicates that the Department is not committed to producing a regulation consistent with current sustainable development strategies as implied by the lack of a requirement for an alternatives analysis which progresses from nonstructural to structural. Chapter 102 should promote sustainable planning and design strategies and prioritize the use of nonstructural BMPs in the development of PCSM Plans. By doing so, it becomes easier to comply with anti-degradation requirements in special protection waters, reduces costs of compliance, and minimizes complications with long term O&M.