

2783



Senate Environmental Resources and Energy Committee

Senator Mary Jo White
Chairman

Patrick Henderson, Executive Director

Room 169 • State Capitol Building
Mailing address: Senate Box 203021 • Harrisburg, PA 17120-3021
Phone: 717-787-9684 • FAX: 717-787-6088 • energy@pasen.gov

RECEIVED
2010 FEB 25 PM 3:23
INDEPENDENT REGULATORY
REVIEW COMMISSION

February 22, 2010

John Hanger, Secretary
Department of Environmental Protection
16th Floor Rachel Carson Building
Harrisburg, PA 17105

Re: Reg. # 7-440 Erosion & Sediment Control

Dear Secretary Hanger:

We are writing to provide additional comments on the Department's anticipated changes to the above-referenced rulemaking. We greatly appreciate the opportunity extended by the Department recently to sit down with our committee staff and discuss these changes prior to resubmitting the regulation as final to the Environmental Quality Board.

First, we commend the Department's willingness to move away from a flat permit fee approach and instead embrace a permit fee structure based on the size of the proposed disturbance. We believe this approach is more equitable and better reflects the administrative and oversight costs incurred by the Department in reviewing permit applications.

In addition, while there was some support from commentators for a permit-by-rule approach for obtaining an erosion and sediment control permit, as well as opposition to this concept from a number of commentators, we understand the Department's decision to abandon this concept as part of this rulemaking. While the concerns that a permit-by-rule would somehow shortchange the environmental protection efforts of the Department or conservation districts did not appear to be valid, we nonetheless understand that even those who would benefit from a potentially streamlined process were not enamored with the structure of the permit-by-rule. We would encourage the Department to consider revisiting this concept in the future.

Our most significant concern with the revised regulation, however, concerns the retention of a mandatory buffer for activities within special protection (High Quality and Exceptional Value) waterways. It is our understanding that the revised regulation would require a *riparian forested buffer* of 150 feet for an activity within an HQ or EV watershed if the watershed were impaired, while a *riparian buffer* would be required within an HQ or EV watershed if the watershed is meeting its designated use at the time of application.

We agree that riparian buffers, forested or not, can be an appropriate means to mitigate a project's impact on a waterway. However, we are not convinced that it is appropriate for the Department to take one potential best-management-practice available to an applicant and arbitrarily codify the practice into regulation. There are no doubt several scenarios where a

John Hanger, Secretary
Department of Environmental Protection
February 22, 2010
Page 2

combination of other best-management-practices that do not include a riparian buffer could be just as protective of water quality.


Under the Department's anti-degradation requirements, all existing uses must be maintained and protected. Therefore, we believe that the Department has the existing authority to ensure, on a case by case permit basis, that all nearby waterways are protected. To the extent that DEP believes it needs specific regulatory authority to, on a case-by-case basis, require a riparian buffer (of whatever distance deemed appropriate), we would be willing to consider this approach.


However, we are very concerned that mandating a specific best-management-practice in regulation reinforces the mistaken notion that the Department does not have the existing authority, responsibility or ability to "maintain and protect" an existing use. Furthermore, since the anti-degradation requirements are applicable to *all* existing uses, not simply High Quality or Exceptional Value, it will be only a matter of time until a third party seeks, through the courts or elsewhere, to impose a similar riparian buffer requirement on all erosion and sediment control activities. The Department will have aided this effort by effectively agreeing that a mandatory buffer is necessary to protect and maintain some existing uses – in this case High Quality and Exceptional Value. However, it is important to note that all waterways are entitled under federal law to the same degree of protection – that is, that their existing use not be degraded.

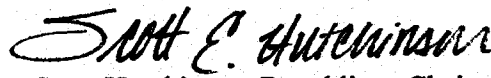
We urge the Department to remove the mandatory buffer requirement contained in the final rulemaking, and instead consider language that explicitly permits the Department to utilize a buffer requirement on a case-by-case basis.

Thank you for your consideration of these comments.

Sincerely,


Mary Jo White, Chairman
Senate Environmental Resources
& Energy Committee


Raphael J. Musto, Democratic Chairman
Senate Environmental Resources
& Energy Committee


Scott Hutchinson, Republican Chairman
House Environmental Resources & Energy Committee