

# Citizens Advisory Council

to the Department of Environmental Protection

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Environmental Quality Board  
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ENVIRONMENTAL QUALITY BOARD

The following letter outlines the Citizens Advisory Council's (CAC) comments on the Environmental Quality Board's proposed rulemaking for Erosion and Sediment Control and Stormwater Management, 25 Pa. Code Chapter 102. While there are a number of significant improvements included in the proposal, as indicated in Council's April 21, 2009 letter to Secretary Hanger, we have concerns regarding the permit-by-rule provisions included in section 102.15. While we recognize the need to address permit delays and inadequate staff resources, the Citizens Advisory Council does not support inclusion of this section of the regulation based on philosophical, legal, procedural and effectiveness concerns discussed below.

The CAC's membership is professionally, politically and geographically diverse. While individual members had varied reasons for their opposition, they were nearly unanimous in their agreement that this proposal should not be adopted.

### Philosophical

The proposal shifts responsibility for environmental review and protection to third party licensed professionals in order to reduce the permitting burden on staff and release them to focus on field inspection and enforcement activities. We recognize that there may be a need for a change in the process given reported permitting delays and staffing and resource shortfalls. However, surrendering part of DEP's core mission to the private sector could have adverse and costly consequences. This is a major change to how DEP conducts business. Even if the initial application is limited, this sets a major precedent that should not be taken lightly. There are numerous examples demonstrating how easily allowing industry to regulate itself can go awry.

Reviews for administrative completeness will not identify technical deficiencies and prevent environmental impacts. The end result will be that deficiencies and impacts will not be identified until activities have begun and impacts have occurred, making the department's role reactive rather than proactive. For the permittee, fixing problems after they have occurred will be costly. We also question whether there is enough manpower to do the needed inspections, given the repeated budget cuts to both DEP and to the Conservation Districts. Inadequate technical review compounded by insufficient inspection could be disastrous.

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Finally, it is not clear if the permit delay situation and its root causes have been accurately characterized or the future use and outcomes of the proposed solution tested. Rather than rely on anecdotal evidence, DEP needs to provide data such as a frequency chart of permit review times for the various participants, the proportion returned for technical deficiencies, and a test using existing permitting data of how well a proposed solution will work and what outcomes will be achieved. There is clearly a perception that the current process is inefficient and does not adequately address the needs of the regulated community, the public or the Commonwealth's natural resources. CAC is willing to assist in identifying and developing a solution that is more protective, timely and appropriate than the current proposal.

### Legal

The proposal does not meet the requirements of the Clean Water Act because it does not provide for meaningful technical review of National Pollutant Discharge Elimination System (NPDES) permits by the permitting authorities. It is our understanding that federal courts have held that, where NPDES permits utilize site-specific BMP-based effluent limitations, the permitting scheme *must* allow for technical review by the permitting authority of the plans setting forth those BMPs to ensure that the permits contain all required effluent limitations and standards.

The permit-by-rule would also not provide opportunities for public participation into the development of effluent limits for NPDES permits. Section 402 of the Clean Water Act requires opportunities for public participation into the development of effluent limits of NPDES permits.

### Procedural

The proposed approach has procedural shortcomings:

- DEP has indicated that it intends to pursue action against licensed professionals through the State Registration Board for Professional Engineers, Land Surveyors and Geologists housed in the Department of State. There is a process for filing a complaint if you believe the practice or service provided by a licensed professional to be unethical, below an acceptable standard or out of the scope of the profession, or if you are aware of unlicensed practice. If an inspection identifies a problem, DEP will have to file a complaint with the Department of State board to initiate a review.
  - A review of "significant disciplinary actions" published by the board since May 2005 indicates that nearly all disciplinary actions are related to licensing and registration; two of the 55 actions highlighted as significant were actions resulting from conviction of a felony, and none referenced practice below an acceptable standard of the profession. While licensing, registration and continuing education are all important aspects of qualified service, there is no indication of how the board will handle substantive complaints.
  - It is not clear what specific offenses might be actionable; decisions about whether or not to prosecute cases are constrained by the applicable

licensing laws, rules and regulations, which set forth specifically enumerated offenses for which the licensing boards and commissions may impose discipline on a licensee. If offensive conduct or activity does not fit within any specifically enumerated offense, disciplinary action cannot be filed against the licensee because the activity is not within the applicable board or commission's jurisdiction

- The permit by rule section of the proposed regulation excludes projects proposed or conducted by applicants with a bad DEP compliance history but does not also exclude applicants/licensed professionals with Department of State compliance issues.
- Filing a complaint is additional paperwork, and occurs after a problem has been identified, but there is no indication if the environmental impact will be allowed to continue while the complaint is under review.
- There needs to be a written Memorandum of Understanding between DEP and the Department of State licensing board to lay out responsibilities and expectations and to lay out professional standards and educational requirements to ensure expertise in water quality protection. Without this there is no way for the regulated community, the licensed professional or the general public to know with some level of certainty and predictability how this process will work.
- The regulation does not define what protections will be provided to the licensed professional and whether there will be provisions for the licensed professional to sever his/her responsibility and liability due to such things as time elapsed (project completed), severed relationship with the permittee, or potential conflict of interest.
  - Will the licensed professional be provided an "exit" from the process if they are not satisfied that the permittee is doing what is specified or needed, or if the licensed professional is dismissed from the project?
  - If the licensed professional leaves mid-project, is the new one responsible for plans he/she did not seal? Do they have to be re-sealed?
  - Will licensed professionals respond by over-engineering projects to minimize their potential liability given the level of responsibility and risk they would assume? Will this drive up applicant costs?

### Efficacy

Requiring the sealing of E&S and PCSM plans by the permittee's engineer does not guarantee that those plans will include BMPs adequate to protect water quality. Conservation districts have reported that they have reviewed plans submitted by professional engineers that have required substantive technical changes to meet the requirements of Chapter 102 and the Clean Streams Law. Professional engineers seal plans to certify that the project as built will be protective of health, safety, and welfare; that is, the structures to be built are safe and will not fail or cause harm or injury to persons or property. Such seals do NOT provide any sort of guarantee that plans will meet necessary Clean Water Act effluent limits or water quality standards. In order to

make these determinations, professionals trained in biology, hydrology, and soil sciences must be involved. This is particularly true in Exceptional Value (EV) and High Quality (HQ) waters. Not all engineers or other licensed professionals are qualified to conduct the requisite anti-degradation analysis or are familiar with wetlands designations. If the intent is to raise the professional bar with respect to the sealing of these types of projects, then the level of that bar needs to be defined. In the meantime, it is critical that DEP and the conservation districts, which include technical staff trained in these sciences, continue to conduct the review of plans.

Increasing field presence without a technical review of the E&S plans will only cause problems out in the field during the construction phase of the process when time and money issues are magnified. Fixing rather than preventing plan deficiencies will be much more difficult and expensive. This will lead to increased erosion and sedimentation and stormwater runoff from construction sites causing further degradation of our soil and water resources and will lead to an increase of the number of impaired waterbodies on our 303d list.

#### Buffer questions

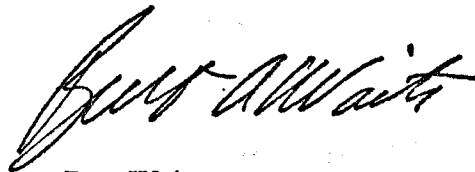
While it is generally accepted that buffers are effective Best Management Practices (BMP), we caution that they are only effective as long as they are maintained. What provisions (e.g. deed restrictions, easements) are contemplated to ensure that new buffers will be retained and maintained over the long term? We also note that pre-set buffer width requirements (100 and 150) do not allow for flexibility to address site specific conditions.

Council appreciates the opportunity to comment on the proposed regulation, and again offers to work with the Department to develop a protective and more appropriate solution. Thank you for your consideration of our views.

Respectfully,



Richard J. Manfredi  
CAC Chair



Burt Waite  
Water Committee Chair