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NOV 25 2009

ENVIRONMENTAL QUALITY BOARD

**MEMORANDUM**

**To:** Environmental Quality Board  
Rachel Carson State Office Building  
400 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2301

**From:** Adam J. Brower, P.E.

**Re:** Proposed 25 Pa. Code Chapter 102 Rulemaking Comments

**Date:** November 16, 2009

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2009 DEC -3 AM 10:54  
INDEPENDENT REGULATORY  
REVIEW COMMISSION

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On behalf of Edward B. Walsh and Associates, Inc. (EBWA), I thank you for the opportunity to offer the following comments on the proposed 25 Pa. Code Chapter 102 Rulemaking. EBWA is a member of the Home Builders Association of Chester / Delaware Counties.

**GENERAL COMMENTS**

NPDES Applications:

1. Fee Schedule. Our company feels that the proposal to raise fees for NPDES permits by 1,000% is excessive. It is our understanding that these new fees would underwrite conservation district expenses, even though the districts have the power to set their own fee schedule in addition to the proposed fee schedule.

This is not to imply that the conservation districts should not be sufficiently compensated for their time and energy reviewing submitted plans and inspecting their implementation in the field. Regulatory requirements and complexities have increased over the past several years necessitating higher costs on both sides of the submission. However, we do feel that fees should be reasonably proportional to the actual cost of performing the services. A \$5,000 fee for an Individual NPDES permit on a small site does not seem proportional – again, particularly in light of the fact the conservation districts will add several more thousands of dollars on top. In many cases, the fee will exceed the cost to engineer such a small project.

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We would like to suggest that the proposed rules adopt the approach taken by most conservation districts. That is to say, the fee schedule should be based upon the size of a proposed project – either by number of units or acres disturbed. We would recommend a tiered fee schedule that ranges up to \$2,500/\$5,000 for the NPDES permits based upon project size, versus a flat rate for all projects. A three acre site should not be charged the same as thirty acre site.

2. Incomplete NOI. Regarding incomplete applications and NOI's, we feel that the limitation of 60 days to complete or revise the application is too rigid. Applications have increased in complexity and may take more than 60 days to address deficiencies. We would recommend increasing the time to make revisions to 120 days.

We would recommend that language is added stating that reasonable requests for extension by the applicant will be approved. A slow or depressed housing market may dictate waiting on a permit, and, an applicant shouldn't be punished by having to re-pay the application fees if they are pro-actively staying in contact with the review agency by filing extensions.

Lastly, we recommend that if the Department incorporates a "deemed withdrawn" timeframe, then it also create a deadline before which the Department must respond to the application (we suggest 30 days) or else it is "deemed administratively complete".

#### Operation & Maintenance of PCSM BMP's:

1. In order for the post construction stormwater management BMPs to work as designed someone must take responsibility for their long-term operation and maintenance. Some entities are better suited for those purposes than others, and depending upon the locale, some entities are more resistant to accepting that responsibility than others. Therefore, we believe it is important that the process include as much flexibility to allow the landowner to assign that responsibility. In some cases it may be a Home Owner Association; where a HOA doesn't exist, it may be the municipality; when the municipality resists the responsibility, it might be the individual homeowner. Each site and each situation is different and should be treated as such.

#### Riparian Buffers:

1. Economic Impact. The economic and financial impact of mandating riparian buffers will be significant to the regulated community. Incorporating the requirement for a 150 foot buffer on each side of EV waters will result in many unbuildable projects. This becomes particularly concerning for those projects that have initiated the process but have not yet received E&S approvals. Over the last two years, many projects that have begun the approvals process under one set of regulations – and one type of economy – have been postponed until the market returns. If these buffers are in place at that time, the lot layout and configuration for residential projects will as a matter-of-course need to be changed resulting in unexpected costs, lost densities, and potentially unviable projects.

This could also prove particularly problematic on compact redevelopment projects that may now be impossible to build.

The question was posed as to whether the buffers should be expanded to other streams. If the mandated buffers are expanded to HQ and non-special protection waterways – essentially all of Pennsylvania’s 83,000 miles of streams – the burden would be profound. Taken to its full realization, a 100 foot buffer on each side of these streams would result in a regulatory taking of over 3,000 square miles. Or, a land mass larger than the combined size of Bucks, Montgomery, Chester, Delaware, Lehigh, Northampton & Philadelphia Counties.

Furthermore, there seems to be no acknowledgement that local topography and modern stormwater management requirements limit the amount of actual runoff reaching the buffer.

It is for these reasons we feel the more local, hands-on approach of Pennsylvania’s municipalities are better suited for adopting riparian buffers than a rigid, statewide mandate.

2. Incorporate Flexibility. Assuming the Commonwealth will adopt some form of riparian buffers, we would like to offer some suggestions on ways to add flexibility. Primarily, the regulations should include the ability to buffer average. Many model ordinances include such provisions. Buffer averaging will allow the applicant to propose various buffer widths at various points, but they must average to the mandated minimum width. This flexibility allows the applicant to address unique site conditions and to better configure the lots within the site plan. Properly designed, there is no additional risk to the environment.

On those sites that simply can’t incorporate buffers, the Department may wish to consider establishing an appropriate fee that an applicant would pay into a fund that addresses water quality improvement issues upstream. Or, allow the applicant to propose a treatment train that meets the stated goals of the riparian buffer. Buffers are just one of many different BMPs. If the applicant can create a treatment train of BMPs that reach the identical environmental objective of protecting the water quality of the receiving stream, the opportunity to make such a proposal should be available.

## **SPECIFIC COMMENTS**

- 102.1 Definitions. - “Non-discharge alternative” – the HBAs seek clarification of this definition, specifically, what constitutes an “environmentally sound” BMP. Can the applicant’s engineer make that professional judgment?
- 102.4 Erosion and sediment control requirements-Sub-section (b)(4)(v) - Requires the applicant to “protect, maintain, reclaim and restore the quality of water”. What precisely is the Department’s expectation? Reclaiming and restoring water quality to what previous level? This requirement seems to force the applicant to remedy

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conditions not only on the subject property, but also any stormwater that flows to it from neighboring properties. This provision seems open to considerable variation in interpretations and misuse.

- 102.4 (b)(6) - Flexibility to approve alternative BMPs should be extended to the county conservation districts, in addition to the Department.
- 102.5 (f) - The language should be modified to clarify that the applicant can transfer the responsibility of long term operation and maintenance of the PCSM Plan to an appropriate steward, such as a home owners association, a municipality, a home owner, etc. Requiring a permittee to be responsible in perpetuity is unreasonable.
- 102.6 Permit applications and fees. Sub-section (b) Permit fees. - A 1,000% increase in fees is unreasonable, particularly in light of the fact that conservation districts have in the past, and will continue, to add additional review fees to compensate for District financial shortfalls. The Department should consider a graduated fee scale up to \$2,500/\$5,000 based upon project size. Additionally, the Department should establish a more strict process than currently exists for the approval of conservation district fee schedules for E&S reviews. Often, District fee schedules do not appropriately reflect the proportional cost to provide the application review and inspection services.
- 102.6 (c)(2) - The Department should increase the proposed time an applicant has to complete a deficient NOI and/or request an extension from 60 days to 120 days. Additionally, if the proposed rulemaking finds it fair to deem an application “withdrawn” if an applicant fails to contact the Department within an established timeframe, it is equally fair to expect that an application is deemed “administratively complete” if the Department does not communicate with the applicant in writing within 30 days.
- 102.8 PCSM Requirements-Sub-section (b)(9). - Requirement for the applicant to “reclaim and restore” water quality is problematic. (See previous comment)
- 102.8 (g)(2) - The requirements to use a 2-year/24 hour storm, a predevelopment condition of “meadow”, and an assumption that 20% of existing impervious area be considered meadow are unreasonable. Actual pre-development site conditions should be utilized. In particular, the pre-existing impervious requirements have a significant adverse impact to re-development projects.
- 102.8 (g)(6) - The ability of the Department to require additional information and/or BMPs whenever it deems it necessary to protect water quality seems overly broad and open to misuse. Language should be included to provide for a clear, predictable process that the Department must follow before it is allowed to exceed the existing regulatory requirements. An appeal process for the applicant should be incorporated.

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- 102.8 (m) - This requirement states that operation and maintenance of the PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMPs are located unless a different person is approved by the Department. This should also be a deed requirement. The Department has also proposed language stating that responsibility for a PCSM BMP is a covenant that runs with the land and is enforceable by subsequent grantees. This is a benefit to the grantor and grantee, not the Department, and should be done instead as an easement.
- 102.14 Riparian forest buffer requirements - The HBA's oppose the rigid requirement of a uniform 150-foot riparian buffer. Greater flexibility should be offered to the applicant to account for site conditions and/or inclusion of stormwater treatment trains that reduce sediment pollution before being received by the stream.
- 102.14 (a)(2) - What "other approvals that include buffer" requirements does this language refer to?
- 102.14 (a)(6) - On sites with no native woody vegetation, the buffer should mature naturally versus requiring the applicant to establish and care for the buffer. Doing otherwise would pose a financial hardship to the applicant and expose the stream to potential pollution events while the soil is disturbed during planting activities.
- 102.14 (e)(2) - The requirement to establish a riparian forest buffer that consists predominantly native species is a problematic one on several fronts. Economically, the cost of removing invasive species along the entire width of a buffer – on both sides of a stream – will necessarily pose a financial hardship on the applicant. Environmentally, the impact of disturbing the whole length of the stream bank to remove such species would seem to contradict the environmental objectives of maintaining a buffer by presenting the real possibility of creating a significant pollution event to the stream. And pragmatically, why create unnecessary cost and environmental risk when, after 5 years, they invasive species will likely return? The HBAs recommend removing all language referencing the removal of weeds and invasive species.
- 102.14 (e)(3) - The list of prohibited practices and activities within the riparian buffer seem to make it impossible to remove weeds and invasive species. For example, removing such plant materials will likely require soil disturbances and off road vehicular traffic. How does the Department envision applicants complying with 102.14(e)(2) if these activities are prohibited?

Thank you for the opportunity to present some of our concerns with the Chapter 102 proposed rulemaking as well as offer some suggested improvements. If you have any questions or require any additional information, please do not hesitate to contact me at [abrower@ebwalshinc.com](mailto:abrower@ebwalshinc.com).

AJB/mw

