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PROPOSED AMENDMENTS TO 25 PA CODE CHAPTER 102

Comments on Behalf of:

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I. Introduction

On August 29, 2009, the Pennsylvania Environmental Quality Board ("EQB") published in the Pennsylvania Bulletin proposed regulations developed by the Pennsylvania Department of Environmental Protection ("PADEP") that contain significant changes to the current rules governing erosion and sedimentation control measures set forth in 25 Pa. Code Chapter 102. See 39 Pa. Bull. 5135-5152 (Aug. 29, 2009). These proposed regulations not only revise existing requirements pertaining to erosion and sedimentation controls, but add, among other things, an array of new provisions (1) governing the management of stormwater discharges during construction activities that may not be warranted on a case-by-case basis, (2) imposing long term obligations to manage stormwater discharges following the completion of construction activities where none previously existed and may not be warranted, and (3) requiring the creation and maintenance of forested riparian buffers in certain instances as a condition to receiving permits to proceed with activities that will result in earth disturbances, even though such requirements may result in an inability to use existing railroad rights of way. As currently drafted, the proposed regulations facially appear to apply to rail projects and activities without any recognition of the unique linear nature of rail facilities (including main line tracks, sidings, spur lines, switches, terminals, depots and rail yards) and the impermissible burdens on interstate commerce that such regulations will impose if applied to rail projects. If the proposed regulatory amendments are finalized without significant changes, the reach of Pennsylvania's erosion and sedimentation control program will expand dramatically with respect to rail projects, not only in terms of the universe of activities subject to regulation but in terms of the scope and duration of various requirements, such as proposed regulatory amendments imposing post-construction stormwater management obligations in perpetuity.

The comments that are presented herein have been prepared on behalf of Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSRC").[1] Conrail, CSXT and NSRC are collectively referred to hereinafter as the "Railroads." The Railroads are different from virtually every other sector of the regulated community in that they provide transportation services vital to interstate commerce over a network of privately-owned and maintained linear facilities that stretch across the Commonwealth. Because of the critically important and unique role that railroads play in facilitating interstate commerce, the federal government has recognized and implemented long-standing policies to promote uniform federal regulation of the railroads to enable the railroads to serve the citizens of multiples states and local jurisdictions without being subjected to layers of competing state and local requirements. To that end, the federal Surface Transportation Board ("STB") is vested under the Interstate Commerce Commission Termination Act ("ICCTA") with exclusive jurisdiction over transportation by rail carriers, including the construction, acquisition,

[1] CSXT and NSRC are both Class 1 freight railroads providing long-haul freight transportation services to customers throughout the Commonwealth of Pennsylvania. Both CSXT and NSRC operate rail lines and rail facilities in Pennsylvania as part of providing rail transportation services with the Commonwealth. In addition, Conrail continues to own and operate a variety of rail facilities in southeastern Pennsylvania. These facilities, commonly referred to as "shared assets" in documents submitted to the federal Surface Transportation Board, are operated for the benefit both CSXT and NSRC.

operation, abandonment and discontinuance of tracks and facilities as discussed in more detail in Section II of these comments. As such, states and local governmental entities are generally precluded from imposing requirements that intrude on transportation by railroads, including construction and operation of tracks and facilities. Because the proposed regulations contain various requirements that impinge on the ability of the Railroads to proceed with rail projects, certain provisions of the proposed regulations run afoul of the express provisions of ICCTA.

Even in the absence of the preemptive effect of the federal framework established under ICCTA, the potential application of many elements of the proposed regulations to rail projects is impracticable if not wholly infeasible due to the unique linear characteristics of the rail network in Pennsylvania. The Commonwealth has long been a leader in rail transportation services. For more than 150 years, rail lines have provided key transportation links throughout Pennsylvania, allowing goods and passengers to move between population centers along the east coast and the vast interior sections of the country across the spine of mountains bisecting the Commonwealth. The railroads helped to overcome the difficulties posed by Pennsylvania's geography in creating "east-west" transportation corridors. From the nascent days of the Commonwealth, native Americans and early settlers used Pennsylvania's network of rivers and streams to help negotiate the challenges of crossing the Appalachian mountains. The rail lines in the Commonwealth often follow these same routes along rivers and streams because these routes make use of the mountain passes that exist in various locations and avoid the steep grades that otherwise would exist in attempting to surmount directly the mountain ranges that lie in central Pennsylvania. As a result, rail lines are often located in immediate proximity to rivers and streams, sometimes wedged between stream and river banks and surrounding ridges and mountains.

The potential ramification to the Railroads from the proposed amendments to 25 Pa. Code Chapter 102 insofar as they relate to activities along and near surface water bodies are significant, simply by virtue of where rail infrastructure tends to be located.[2] The web of existing rail infrastructure and rights-of-way define the locations where earth disturbance activities associated with rail operations will take place. Unlike other types of activities and facilities in Pennsylvania potentially subject to 25 Pa. Code Chapter 102 that can be located in a variety of different places, the Railroads do not enjoy such locational options and are largely confined to the footprint of existing rights-of-way and infrastructure created during the past 150 years. Accordingly, the Railroads believe that the proposed regulations need to reflect practical and common-sense approaches to rail projects, recognizing the limited rights-of-way, often narrow rail corridors and minimal environmental impacts that rail projects typically present.

While the Railroads recognize the important role that the regulations in 25 Pa. Code Chapter 102 can play in protecting Pennsylvania's surface water resources, the Railroads also believe that the proposed regulations will impose requirements that will unnecessarily impinge on Pennsylvania's economic well-being and impermissibly interfere with interstate commerce, at least insofar as the proposed regulations apply to rail activities. The rail lines through

[2] It has been the practice of the Railroads to work with PADEP to meet various types of reasonable requirements pertaining to earth disturbances associated with rail projects, without waiving the position that such requirements may be preempted under ICCTA. Accordingly, while the Railroads believe that many of the requirements contained in the proposed regulations advanced by the EQB would be held to be preempted if challenged, the Railroads also have an interest in ensuring that the proposed regulations reflect a reasonable and practical approach to erosion and sedimentation control and stormwater management requirements as they may apply on their face to rail projects.

Pennsylvania were integral to the development of the United States and are critical to the continuing vitality of Pennsylvania and the country as a whole. The ability of the railroads to efficiently move vast quantities of freight holds enormous promise for contributing to the environmental well-being of both Pennsylvania and the nation. Rail transportation promotes national and state interests and policies by reducing the nation's dependence on foreign sources of energy and in reducing emissions of greenhouse gases as compared to other means of transportation. The proposed regulations have the potential to frustrate the great potential of rail by limiting the ability of the Railroads to proceed with rail projects that are of vital importance to interstate commerce and involve earth disturbance activities.

II. Federal Preemption of State Requirements Impinging on Rail Transportation

In recognition of the important role that rail transportation plays in interstate commerce, Congress has enacted legislation broadly preempting requirements developed by state and local entities that impinge on rail transportation. Specifically, Congress adopted ICCTA in 1995 which, among other things, vests the STB with exclusive jurisdiction over transportation by rail carriers.[3] ICCTA provides in pertinent part, as follows:

> The *jurisdiction of the [STB] over*
>
> (1) *transportation by rail carriers* and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, *and facilities of such carriers*; and
>
> (2) the *construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities*, even if the tracks are located, or intended to be located, entirely in one State,
>
> *is exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and *preempt the remedies provided under Federal or State law.*

49 U.S.C. §§ 10501(b)(1) and (2) (emphasis added).

ICCTA defines a "railroad" to include:

> (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and

[3] ICCTA defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." 49 U.S.C. § 10102(5).

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. §10102(6).

ICCTA also defines "transportation" to include:

(A) a locomotive car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement . . . .

49 U.S.C. §10102(9).

The express terms of ICCTA establish that the STB has exclusive jurisdiction over the construction, acquisition, operation, abandonment or discontinuance of tracks and facilities related to rail transportation. Attempts to regulate such activities under state law are preempted. Moreover, it is clear under ICCTA that the scope of the STB's exclusive jurisdiction extends not only to the manner in which railroads operate but to the tracks and facilities that support such rail operations.

The proposed amendments to 25 Pa. Code Chapter 102 establish broad permitting and approval requirements that apply, on their face, to rail projects. As such, the proposed amendments run afoul of the federal mandates under ICCTA. For example, the proposed amendments require that with certain limited exceptions not applicable here, a person or entity proposing to conduct an earth disturbance activity involving at least one acre of land must obtain a permit from PADEP under the National Pollutant Discharge Elimination System ("NPDES") program. In addition, for earth disturbance activities that are otherwise exempt from NPDES permitting activities and which involve earth disturbances of at least five acres, a person or entity must obtain from PADEP an erosion and sedimentation control permit ("E&S permit"). As part of either an E&S permit or an NPDES permit, the person or entity proposing the earth disturbance activities is responsible for implementing and maintaining the elements of a post-construction stormwater management ("PCSM") plan reviewed and approved by PADEP. If the earth disturbance is within an exceptional value ("EV") watershed and is located within 150 feet of a river, stream, creek, lake, pond, or reservoir, the person or entity proposing or conducting the earth disturbance activities must comply with stringent riparian buffer requirements (discussed in more detail hereinafter). Even when a project is small enough to avoid the requirement to obtain either an NPDES permit or an E&S permit, the proposed amendments to 25 Pa. Code Chapter 102 provide that in most instances, a written erosion and sedimentation control plan ("E&S plan") must be prepared and implemented incorporating best management practices ("BMPs") consistent with the types specified by PADEP.

The foregoing requirements are of the type that intrude into and impinge on rail projects that involve earth disturbance activities. The proposed regulations on their face contemplate that

various permits and approvals must be obtained as a predicate to proceeding with rail projects involving earth disturbance activities. The permit application process involves a series of evaluations that are subject to PADEP's discretionary decision-making processes. Failure to obtain such permits and approvals in turn would prevent the rail projects from proceeding in direct contravention of ICCTA.

The preemptive effect of ICCTA has been widely recognized by the federal courts and the STB in a variety of contexts. Of particular importance here, the Second Circuit Court of Appeals in Green Mountain Railroad Corporation v. Vermont, 404 F.3d 638 (2nd Cir. 2005), recently held that Vermont's efforts to impose the requirements of an environmental land use statute on the construction of rail facilities consisting of storage buildings for commodities being shipped by rail and transloading facilities to facilitate the transfer of commodities from rail to truck transportation were preempted by ICCTA. The Court observed that pre-construction permit requirements imposed by states and localities almost invariably run afoul of the preemption requirements under ICCTA because they allow for the exercise of discretion on subjective questions and can result in extended or open-ended delays. The Court found that the environmental land use statute in question contained such flaws because "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency." 404 F.3d at 643. The Court therefore concluded that the land use statute at issue was clearly preempted by ICCTA. This decision is directly relevant to the type of requirements contained in the proposed regulations that the EQB has issued.[4]

In light of the foregoing, we request that prior to finalizing the proposed amendments to 25 Pa. Code Chapter 102, those amendments be clarified to expressly recognize the preemptive effect of ICCTA by including a provision that specifies that requirements otherwise applicable to earth disturbance activities do not apply to earth disturbance activities associated with rail projects. Such a modification in the proposed regulations will help avoid significant potential conflicts that may otherwise arise. In particular, we note that proposed requirements associated with riparian buffers and PCSM plans are unique to Pennsylvania and in the context of rail facilities, clearly intrude into areas that are preempted by ICCTA. Moreover, the proposed amendments to 25 Pa. Code Chapter 102 appear to authorize County Conservation Districts to impose in certain circumstances additional requirements on the Railroads which similarly would be preempted in the context of rail projects. (See, e.g., 25 Pa Code § 102.4(c) (proposed) (authorizing County Conservation Districts to impose additional BMPs); 25 Pa Code § 102.8(g) (proposed) (authorizing County Conservation Districts to impose additional BMPs in the context of PCSM plans)).

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[4] See also New York Susquehanna and Western Railway Corporation v. Jackson, 500 F.3d 238 (3rd Cir. 2007) (endorsing approach followed by Second Circuit in Green Mountain Railroad); City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) (finding that state and local environmental permitting requirements as applied to rail facilities were preempted by ICCTA); Wis. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W D. Wis. 2000) ("It is clear that the ICCTA has preempted all state efforts to regulate rail transportation."); Town of Ayer – Petition for Declaratory Order, STB Docket No. 33971 (April 30, 2001), aff'd Boston and Maine Corp. v. Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002) (Section 10501(b) of ICCTA preempts town's permit process, nuisance ordinance and additional local commission requirements).

The core components of the proposed amendments to 25 Pa. Code Chapter 102 focus on permitting requirements for stormwater management and erosion and sedimentation control measures. Unless and until permits are issued by PADEP under 25 Pa. Code Chapter 102 (or by delegated County Conservation Districts), a project subject to such permitting requirements may not proceed. Moreover, the proposed regulations make clear that PADEP has tremendous discretion in evaluating the manner in which the requirements necessary to obtain a permit are being met. As such, the permitting process under 25 Pa. Code Chapter 102 bears the same hallmarks of the permitting process at issue in Green Mountain Railroad which the Second Circuit readily concluded was preempted by ICCTA.

III. Comments Regarding Specific Elements of the Proposed Regulations

As discussed in detail in the preceding section of these comments, many of the requirements contained in the proposed amendments to 25 Pa. Code Chapter 102 run afoul of the preemption provisions of ICCTA and intrude into rail projects that fall within the exclusive jurisdiction of the STB. Subject to the foregoing comments and analysis, the Railroads also offer various comments directed to the substantive components of the proposed regulations, focusing on the manner in which the proposed regulations pertain to rail projects involving earth disturbance activities. As previously noted, it has been the practice of the Railroads to attempt to work with PADEP to meet various types of reasonable requirements imposed by PADEP pertaining to earth disturbances without waiving the position that such requirements may be preempted. The Railroads therefore have a strong interest in ensuring that the proposed regulations reflect reasonable, practicable and implementable approaches as they may relate to earth disturbances associated with rail projects to avoid the potential for unnecessary conflict. The comments that follow are offered without waiver of the positions set forth above regarding the preemptive effect of ICCTA.

A. Maintenance Activities

The proposed amendments to 25 Pa. Code Chapter 102 state that an NPDES permit for stormwater discharges associated with construction activities is required for all projects having a point source discharge to surface waters and creating an earth disturbance of between 1 and 5 acres, as well as any project creating an earth disturbance of greater than 5 acres even if there is no point source discharge (see proposed 25 Pa. Code §§ 102.2(a)(1) and (2)). The proposed amendments must be revised to exclude "rail maintenance activities" from any requirements to obtain a NPDES permit. Rail maintenance activities must be free from the restrictions that the proposed amendments potentially would otherwise impose in terms of requiring permits as predicates to proceeding with rail maintenance activities.

In regulations promulgated by the United States Environmental Protection Agency ("EPA") to implement the Clean Water Act, maintenance activities are expressly excluded from the universe of stormwater discharges that trigger NPDES permitting requirements. Specifically, 40 C.F.R. § 122.26(b)(15)(i) provides that "[s]mall construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility." This exclusion should be included in the proposed amendments to 25 Pa. Code Chapter 102.

The provisions of the Clean Water Act also explicitly recognize the need for emergency maintenance activities required for transportation facilities and exempts those activities from permitting.[5]

We note the proposed regulations contain exclusions to NPDES permitting requirements and E&S permitting requirements for "road maintenance activities" which are defined as "[e]arth disturbance activities within the existing road cross-section, such as grading and repairing existing unpaved road surfaces, cutting road banks, cleaning or clearing drainage ditches and other similar activities." 25 Pa. Code § 102.1. The exclusion from E&S permitting requirements does not apply to road maintenance activities when those activities involve 25 acres or more of earth disturbance. 25 Pa. Code § 102.5(b).

Like highways, railroad tracks require on-going maintenance to ensure continuing proper operation. For this reason alone, it is appropriate to treat railroad maintenance activities differently than other types of earth disturbances. Moreover, as discussed earlier in these comments, maintaining tracks and railroad right-of-way is an activity that falls squarely within the purview of the exclusive jurisdiction of the STB. In addition, the Federal Railroad Safety Act requires the Railroads to maintain their rights of way to allow for safe interstate rail transportation. Accordingly, it is appropriate that the proposed amendments be modified to explicitly exempt railroad maintenance activities from permitting requirements even if they involve earth disturbances of 25 acres or more.

If the proposed amendments to 25 Pa. Code Chapter 102 are not modified to exempt from permitting railroad activities that fall within the purview of the exclusive jurisdiction of the STB, the EQB will intrude into areas specifically reserved for the STB and run afoul of the preemption provisions of ICCTA. We suggest (without waiver of the positions presented herein) at a minimum that the exclusion for maintenance activities contained in the federal regulations under the Clean Water Act discussed above be added to the proposed regulations and/or the proposed regulations be modified to place railroad maintenance activities on the same footing as road maintenance activities (without the requirement to obtain an E&S Permit for earth disturbances of 25 acres or more). This latter outcome can be accomplished by modifying the definition of "road maintenance activities" set forth in 25 Pa. Code § 102.1 to specifically include "railroad roadbed and right-of-way maintenance and repair, culvert clean out, and ditching activities, including activities to maintain hydraulic capacity" within the activities enumerated in the definition and striking the phrase "or road maintenance activities" in 25 Pa. Code § 102.5(b) (proposed).

B. Proposed Riparian Forest Buffer Requirements

Under the proposed amendments to 25 Pa. Code Chapter 102, earth disturbance activities requiring permits in areas along EV waterways will require that riparian forest buffers at least 150 feet wide be created and maintained in perpetuity. This requirement will severely and adversely affect rail operations in Pennsylvania. The mandatory imposition of riparian forest

[5] See 42 U.S.C. § 1344(f)(1)(B), excluding from permitting requirements discharges "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, rip rip, breakwaters, causeways, bridge abutments or approaches, and *transportation structures*." (emphasis added)

buffers will impermissibly interfere with interstate commerce as conducted by the Railroads. Therefore, earth disturbances associated with rail projects must be excluded from any requirement to create riparian forest buffers, rail lines and facilities must be permissible in areas potentially falling with zones designated for the creation of riparian forest buffers, and any riparian forest buffers previously created must allow rail projects to be constructed, operated, maintained and enlarged without any interference.

The proposed amendments to 25 Pa. Code Chapter 102 seek to create for the first time mandatory riparian forest buffers in connection with earth disturbances located within EV watersheds where the project site contains, is along or within, 150 feet of a river, stream, creek, lake, pond or reservoir. In addition, to be eligible for the proposed Permit-By-Rule ("PBR") set forth in proposed 25 Pa. Code § 102.15, the Registration of Coverage ("ROC") to be submitted to PADEP must include a riparian forest buffer. With respect to earth disturbances requiring a permit and located within an EV watershed, or projects qualifying for the PBR and located in either a High Quality watershed or a non-special protection watershed impaired for either sediment or stormwater, the proposed amendments impose an average minimum 150 foot wide riparian forest buffer lying on either side of the waterway. For other projects qualifying for a PBR and not located in such watersheds, the proposed amendments impose an average minimum 100 foot wide riparian forest buffer lying on either side of the waterway.

If a riparian forest buffer is required, the proposed amendments further state that the permit applicant must establish, through the planting of native woody plants, a riparian forest buffer if one is not present, and manage and maintain the riparian forest buffer in accordance with PADEP's regulation and policies. (PADEP has recently published for public comment a guidance document entitled "Riparian Forest Buffer Guidance" which sets forth PADEP's guidance on the management of riparian forest buffers.)

As discussed earlier in these comments, rail lines in Pennsylvania frequently follow stream and river valleys in order to take advantage of the moderate grades which cut through the mountain ranges that lie in central Pennsylvania. Rail lines and facilities are therefore often located within 150 feet of the edges of streams and rivers. If rail projects are not excluded from the proposed regulations, then under the proposed regulations, preservation of a minimum of a 150 foot riparian forest buffer would be required on the project site whenever a rail project involving earth disturbance activities necessitating a permit or approval from PADEP is located in a stream or river valley that falls within an EV watershed. In essence, by engaging in earth disturbance activities requiring a permit, the right-of-way for the rail project may become subject to the restrictions applicable to riparian forest buffers thereby precluding rail operations in these area under the proposed regulations as currently drafted. This result would preclude the Railroads from using the very land on which rail lines and facilities are presently located. Such an absurd result cannot be what the EQB intended and underscores why rail projects must be excluded from requirements pertaining to riparian forest buffers. A contrary result would not only impermissibly burden interstate commerce and violate the mandates of ICCTA, but pose important regulatory takings issues. Such a result would also violate federal safety requirements regarding the proper maintenance of railroad rights of way as set forth in the Federal Rail Safety Act ("FRSA") and its implementing regulations. 49 U.S.C. § 20101 et seq. and 49 CFR § 213.37.

1. Mandatory Riparian Forest Buffer Requirements are Neither Warranted Nor Justified

In addition to the preemption of these state permitting requirements by ICCTA, and the contrary federal safety requirement as set forth in FRSA, there are other reasons why the imposition of any mandatory riparian forest buffer is neither warranted nor justified.

Although PADEP believes that a riparian forest buffer is one measure that may be effective in protecting waterways from the potential adverse effects of nearby earth disturbances, the regulatory imposition of a mandatory riparian buffer requirement of an average minimum of 150 feet in width to both sides of an EV watercourse is troublesome in many respects. First, a riparian buffer which averages 150 feet wide or greater may be, in many circumstances, much too wide for the water quality improvements that the buffer provides, thereby imposing disproportionate burdens on the regulated community. Unnecessarily encumbering land for presumed, but not actual, water quality benefits removes the encumbered land from other productive uses with no corresponding benefit to the adjacent watercourse. If this occurs, worthwhile economic activity, such as the economic activity associated with the interstate movement of freight by rail, could be needlessly prohibited within the proposed riparian forest buffer area.

Second, the proposed amendments to 25 Pa. Code Chapter 102 do not allow for any waiver of the mandatory imposition of an average minimum 150 foot wide riparian forest buffer in EV watersheds. For properties located along an EV waterway, including but not limited to smaller parcels, the imposition of a mandatory average minimum 150 foot wide riparian forest buffer along both sides of the waterway could remove all or a significant portion of the value of the property, and thereby result in an impermissible taking of private property without just compensation.

To avoid these problems, we suggest that the proposed amendments be modified to allow a riparian forest buffer to be one of a suite of BMPs that a project proponent could employ when seeking an individual or general permit or requesting authorization to proceed under a PBR. If a riparian forest buffer is proposed at the discretion of the permit applicant, the width of the forest buffer would be properly determined on the basis of site-specific conditions set forth in the permit application, which would thereafter be reviewed and approved by PADEP

2. If Mandatory Riparian Forest Buffer Requirements are Retained, the Proposed Amendments Must be Clarified and/or Revised

While we strongly suggest that mandatory riparian forest buffer requirements be eliminated, if the concept is retained, we believe that it is vital to modify the proposed amendments to include "railroad projects" as one of the enumerated practices and activities that can be constructed, placed, maintained, operated and enlarged within a riparian forest buffer pursuant to 25 Pa. Code § 102.14(e)(4)(i) (proposed). For reasons described throughout these comments, rail projects are similar to the other types of linear features such as roads, bridges and utilities that are already specifically mentioned in the proposed amendments. Many rail projects are located within

rights-of-way or industrial areas that have existed for decades or centuries and therefore the potential for "Greenfield" type impacts is lessened. Engineering requirements related to grade and line limit the ability to move or alter rail lines, and accordingly, the riparian buffer provisions would not be possible to implement for many projects. Expressly including "rail projects" in 25 Pa. Code § 102.14(e)(4)(i) (proposed) will help clarify the thrust of the proposed regulations.

In addition, the proposed amendments must "grandfather" existing or approved activities within riparian forest buffers. At present, the proposed amendments do not address situations, which will be abundant throughout the Commonwealth, where there are existing structures or activities located within areas that fall within the boundaries of mandatory riparian forest buffers required by the proposed amendments, or structures or activities existing within areas to be designated as riparian forest buffers that are inconsistent with riparian forest buffers but nevertheless were permitted or approved prior to the adoption of the proposed amendments. Because these structures and activities are supported by investment-backed expectations of time, money and effort by their proponents, as well as the authorization of the governmental entity which provided the permit or approval (to the extent a permit or approval was required), the proposed amendments must be clarified to explicitly state that these structures and activities can be built, maintained, repaired, replaced and reasonably expanded despite any prohibitions which would otherwise be required by the later imposition of a mandatory riparian forest buffer.

This comment is especially meaningful in the context of rail operations. As discussed above, rail lines are often located in close proximity to rivers and streams in Pennsylvania. Existing rail infrastructure may very well be located in areas that would potentially need to be designated for riparian forest buffers under the proposed amendments as currently drafted. The proposed amendments need to be clarified to make clear that they will not operate in a way that would potentially require existing infrastructure to be relocated or redesigned, and that infrastructure can be maintained and rebuilt as necessary even if such activities take place in areas that would otherwise qualify as riparian forest buffers. Failure to make such changes to the proposed regulations will result in the impermissible interference with interstate commerce.

In this context, we also suggest deleting the phrase "when permitted by the Department" in the introductory provision of 25 Pa. Code § 102.14(e)(4) (proposed) because the phrase appears to provide PADEP with unfettered and standardless discretion to determine when roads, bridges, trails, storm drainage, utilities or other structures may be constructed or placed within riparian forest buffers. The clause effectively transforms PADEP into a state-wide land use approval body, without any express legislative authorization allowing PADEP to assume such powers.[6]

Other key areas of clarification and/or revisions that are needed with respect to the proposed provisions relating to riparian buffers include the following:

First, if the "project site" is located in both an EV and non-EV watershed, the proposed amendments must clarify that any mandatory riparian forest buffers to be imposed by 25 Pa. Code Chapter 102 should only apply to the property located within the EV watershed, and not to the portions of the project site that are in the non-EV watershed and do not drain into the EV

[6] If express legislative authorization was given to PADEP, such authorization would be preempted by ICCTA.

watershed. If the intent of the mandatory riparian forest buffer requirements is to protect EV waters, then it only makes sense that areas located outside of EV watersheds not be encumbered in any way by any type of mandatory riparian forest buffer.

Second, the proposed amendments should be clarified to specify that any requirements that are triggered by the presence of EV waters means that those waters have a designated use as EV waters as set forth in 25 Pa. Code Chapter 93. PADEP makes a distinction between waters that have a designated use as EV waters, and waters that have an existing use as EV waters. The term "designated uses" is defined by regulation as "those uses specified in Sections 93.4(a) and 93.9a-93.9z for each waterbody or segment whether or not they are being attained." 25 Pa. Code § 93.1. The designated use of each waterbody or waterbody segment has passed through both a scientific and regulatory review process conducted and managed by PADEP, has been subjected to public review and comment, and is set forth in duly promulgated regulations. See 25 Pa. Code § 93.4d. Project proponents, landowners, citizens and governmental entities can easily obtain information on the designated use of a waterway when a project is being considered and permit applications are being prepared.

In contrast, those waters that may qualify as EV based on an existing use are not necessarily listed in Pennsylvania's water quality regulations, and therefore the existing use of a waterbody is not easily obtained by project proponents, landowners, citizens and governmental entities. The term "existing use" is defined by regulation as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Id. In the context of NPDES permitting for stormwater discharged from construction activities, PADEP typically makes an existing use determination during its review of a permit application. See 25 Pa. Code § 93.4c(a)(1)(iv). PADEP's determination may be in conflict with the designated use for that waterbody on which the proposed project was planned. A determination of existing use made by PADEP is not subject to the regulatory review process, nor is it subject to public review and comment. In short, existing use determinations made by PADEP during permit application review which are in conflict with the published designated use as set forth in the applicable regulations only serve to delay or deny otherwise properly planned projects.

We therefore recommend that if the proposed amendments require a severe restriction on property such as a mandatory forest buffer, the amendments be clarified to state the imposition of a mandatory riparian forest buffer be done based on the waterway's designated use as EV as set forth in the regulations at 25 Pa. Code Section 93.9a-93.9z , rather than its existing use as EV. This suggestion could be achieved by noting in proposed Section 102.14(a)(1)(i) that the activity "is located within an Exceptional Value Watershed as designed in § 93.9a-93.9z; and the project contains . . ."

Third, the proposed requirements to enhance, establish and/or manage and maintain any riparian forest buffer is unnecessary, and appears to be at odds with the intention of the proposed amendments to preserve certain riparian forest buffers. In situations in which a riparian forest buffer is required to be designated, the proposed amendments also require that the PCSM Plan include a plan to establish, enhance, maintain and manage the riparian forest buffer. The entity responsible for the implementation of the PCSM Plan would also be responsible for the management of the riparian forest buffer. Since the intention of the riparian forest buffer

requirements is, in part, to create natural areas removed generally from all human activity, then it seems inapposite to require active management of those areas, and to force the entity responsible for the implementation of the PCSM Plan to do so. Therefore, if the amendments as adopted include the mandatory imposition of a riparian forest buffer, we suggest that such provisions do not require any active management of the riparian forest buffer, and that the buffer area be generally left in its existing state to undergo natural succession. The proposed definition of the phrase "riparian forest buffer" would be revised accordingly. However, if the creation and width of a riparian forest buffer was voluntary, and reviewed by PADEP on a site-specific basis, then the permit applicant should be able to propose forest management techniques which are consistent with its proposed project and included in the PCSM Plan.

In the context of rail operations, we note that the Federal Railroad Administration ("FRA") enforces regulations that require, for safety reasons, maintaining railroad rights-of-way by removing or pruning vegetation through the FRSA. To the extent that regulations governing either riparian buffers or PCSM Plans conflict with such federal safety requirements, the state regulations must yield to the federal requirements. Any efforts by Pennsylvania to enforce conflicting regulations would impermissibly intrude into spheres of federal authority and impermissibly interfere with interstate commerce.

C. Grandfathering and Transition Requirements for Existing NPDES Permits and E&S Approvals

If amendments to 25 Pa. Code Chapter 102 are finalized, they should not apply to the reissuance or renewal of existing NPDES permits and E&S approvals. As noted above, when a project proponent obtains an NPDES permit or E&S approval, there has always been a significant amount of time, money and effort expended to design the project, prepare the E&S Plan and the PCSM Plan, and complete the application forms. For many larger projects, the five year term of the NPDES permit does not provide sufficient time to complete the permitted project. The application of any new, different, or inconsistent requirements found in the amended regulations could cause a partially completed project to be revised mid-stream, which could have an enormous impact on the viability of the previously permitted project.

To address the problems associated with potentially integrating new requirements into existing projects where permits and approvals that have already been issued need to be reissued or extended, we suggest that the proposed amendments be modified to include transition provisions to describe the manner in which the proposed amendments will be implemented. We strongly recommend that as part of such transition requirements, the regulations explicitly provide that new, different or inconsistent requirements found in the amendments not apply to the reissuance or renewal of NPDES permits or E&S approvals for earth disturbances.

D. PCSM Plans

As noted above, requirements governing earth disturbance activities associated with rail projects are preempted by ICCTA. As previously noted, requirements relating to PCSM plans may conflict with federal safety requirements set forth pursuant to FRSA, and are not part of the federal NPDES permit program for stormwater discharges during construction activities. Instead, they are an independent creature of state law. Unlike permitting requirements that apply

to stormwater discharges during construction activities which are necessarily of limited duration, requirements associated with managing stormwater from post-construction discharges are potentially of unlimited duration and exceed the scope of federal law. The proposed amendments governing PCSM Plans should therefore be deleted insofar as they relate to rail operations or an express exemption from such requirements for rail operations should be included in the proposed amendments.

In addition to concerns based on preemption, the proposed requirements pertaining to PCSM Plans make little sense in the context of activities that take place in railroad rights-of-way or other rail corridors. From a practical perspective, a railroad cannot manage a small section of right-of-way differently than it manages the remaining thousands of miles of right-of-way throughout the Commonwealth and the nation. As previously noted, railroads are subject to federal safety requirements pertaining to right of way maintenance. In addition, earth disturbance activities in such areas typically involve narrow ribbons of land that typically do not have the capacity or features to assimilate the type of post-construction stormwater management techniques that PADEP is now advocating. To impose the type of post-construction stormwater management requirements envisioned in the proposed amendments on earth disturbance activities in railroad corridors would impair the ability of the Railroads to conduct operations in their rights-of-way and impermissibly burden interstate commerce.

It appears that once a PCSM Plan has been approved by PADEP and implemented, the proposed amendments to 25 Pa. Code Chapter 102 envision that the requirements will be added to the deed for the property and become an obligation that runs with the land and is imposed on each succeeding property owner. The proposed regulations are completely silent as to what happens if changes are made to the property that obviate post-construction stormwater management BMPs or different BMPs are employed in the future. The proposed regulations fail to recognize the consequences of encumbering property and create the potential for property records to be cluttered with competing and conflicting requirements for BMPs that may become obsolete or unnecessary.

In addition, the proposed requirements relating to PCSM Plans are written so broadly and with so much latitude for interpretation that they create a minefield of potential problems in the context of permitting decisions. For example, 25 Pa. Code § 102.8(b) (proposed) directs that to the extent practicable, management of post-construction stormwater be done so as to, among other things, minimize impervious areas, maximize the protection of existing vegetation, minimize land clearing and grading, minimize soil compaction, and protect, maintain, reclaim and restore the quality of water and the existing and designated uses of waters within the Commonwealth. These type of criteria allow individuals reviewing PCSM Plans, and litigants appealing permit decisions by PADEP, to second guess virtually every element of a proposed project and impose their own subjective views as to whether the criteria have been met "to the extent practicable."

We therefore suggest that the requirements for PCSM Plans be streamlined to identify a limited universe of key objectives to be achieved by PCSM Plans, so that project proponents can then have flexibility to use different combinations of design elements to achieve those objectives. We also suggest that the requirements for PCSM Plans be modified to provide greater flexibility in the universe of information that must be submitted to PADEP in the context of applications. It is not at all clear that the array of information required by the proposed amendments is necessary or

warranted for all projects. If these changes are not made, significant amounts of time and energy may be devoted to compiling information and providing analyses within a permit application that may have little overall benefit.

F. Earth Disturbance Activities at Developed Sites

The proposed amendments to 25 Pa. Code Chapter 102 include a provision that specifies that for project sites that already contain impervious areas, "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 condition." 25 Pa. Code § 102.8(g)(2)(ii) (proposed). In many areas where development activities have already taken place, the effect of this requirement may be to limit or preclude needed or desirable redevelopment activity or enhancements to a site because it will become cost-prohibitive or technically impracticable to reduce stormwater runoff by the required increment below existing conditions.

The unintended consequences of such a requirement are potentially numerous and far-reaching. Developing "greenfields" sites may become more desirable rather than making improvements in areas that are already developed. Needed improvements may be postponed or eliminated because of the additional challenges posed by meeting such a requirement. Previously developed sites in urban areas where space is at a premium may not be able to meet the requirements and still retain viability. Moreover, in urban locations and elsewhere, the environmental conditions at a particular site may not be suitable for infiltration of stormwater due to the presence of regulated substances in soils that could be transported into groundwater through the use of stormwater infiltration systems.

Rather than prescriptively mandate that earth disturbance activities meet the bright-line standards that are proposed, it may be more appropriate to develop a system that provides incentives to reduce existing stormwater discharges by whatever degree is practicable, taking into account the nature of the sites to be redeveloped and the types of projects that are being proposed.

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Chambers, Laura M.

From: Jonathan Rinde [JRinde@mgkflaw.com]
Sent: Monday, November 30, 2009 3:48 PM
To: EP, RegComments
Cc: Murphy, Margaret O; Michael Meloy; Jonathan Rinde
Subject: Comments on the Proposed Amendments to 25 PA. Code Chapter 102

Attached please find comments on the Proposed Amendments to 25 Pa Code Chapter 102 (Erosion and Sediment Control and Stormwater Management) submitted on behalf of Consolidated Rail Corporation, CSX Transportation, Inc. and Norfolk Southern Railway Company.

At her request, I am also transmitting a copy of this email and the attachment to Margaret O. Murphy, Assistant Counsel, Bureau of Regulatory Counsel, Pennsylvania Department of Environmental Protection.

Jonathan

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