

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

MEMORANDUM

2783

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

RECEIVED

DEC - 7 REC'D

From: Mark S. Mitman, on behalf of
Home Builders Association of Chester/Delaware Counties
Home Builders Association of Bucks/Montgomery Counties

INDEPENDENT REGULATORY
REVIEW COMMISSION

Date: November 1, 2009

Subj: Proposed 25 Pa. Code Chapter 102 Rulemaking Comments

SENT VIA US POST & EMAIL

On behalf of the Home Builders Association of Chester/Delaware Counties and the Home Builders Association of Bucks/Montgomery Counties, I thank you for the opportunity to offer the following comments on the proposed 25 Pa. Code Chapter 102 rulemaking.

These two Home Builders Associations ("HBAs"), located in suburban Philadelphia, are non-profit trade associations that represent home building professionals, sub-contractors, suppliers, and housing-related service providers. Their combined membership totals roughly 750 member companies. And, they are local affiliate organizations to the Pennsylvania Builders Association.

GENERAL COMMENTS

NPDES Applications

1. **Fee Schedule.** Our organizations feel 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

MORE...

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

Page 2

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.

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 NOIs, 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".

Permit-by-rule

1. Our organizations are supportive of any effort to simplify and streamline an already overly-complicated and expensive regulatory review process. And, we appreciate the Department's attempt to create such a process in its proposed voluntary Permit-by-Rule ("PBR") program for low-impact projects. We feel that the Department has incorporated many additional safety factors to decrease the likelihood of pollution events occurring at the site; including, in part, the aggressive use of riparian buffers, restrictive criteria on what slope & soil classifications are eligible, using an engineer's professional seal, eliminating the social or economic justification process, and the sole utilization of non-discharge BMPs.

MORE...

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

Page 3

Before exploring whether the program should be expanded to include EV watersheds, the Department may want to examine ways to accommodate small (five acres or less) projects more readily into the program. The current slope & soil criteria disqualify much of the remaining buildable land in Chester County, and, consequently the PBR program will be used infrequently. By adding a little flexibility to those small sizes, the program may see greater use.

Operation & Maintenance of PCSM BMPs

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.

MORE...

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

Page 4

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.

3. **Buffering Requirements.** There has been some confusion within our organizations as to what streams and in what situations the buffers would be required. For example, the proposed rulemaking requires riparian buffers if earth disturbance activity is within an EV watershed. Must the entire activity fall within EV waters to trigger the buffer requirements? What if only a small portion is in an EV watershed? Must the entire project, even the non-EV portion, then incorporate the buffer requirements? The proposed rules should make clear that only EV rivers, streams, etc. should be buffered.

How is the applicant expected to address required buffers that may need to be installed on another land owner's property? If the stream runs within 150 feet of a property line, it seems the expectation is that the applicant would need permission from the adjacent property owner. In many cases, gaining this approval would seem

MORE...

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

Page 5

unlikely and would place the entire project in jeopardy. In general, this provision seems to be ripe with potential problems. The Department should incorporate more flexibility to the buffer widths and/or add a waiver process in certain instances.

SPECIFIC COMMENTS

102.1 Definitions. "NPDES Permit for Stormwater Discharges Associated With Construction Activities", sub-section (i) – This section stipulates that NPDES permits are only required for earth disturbances of one to five acres where a point source discharge to surface water exists. Later in the Definitions section, a "Point Source" excludes sheet flow. The HBAs seek confirmation that projects of one to five acres without a point source discharge do not need to seek an NPDES permit. Or perhaps, the Department can offer situations where a permit on a one to five acre site would be required, and what would constitute a "point source". In the Southeast, applicants have been required to seek NPDES permits for projects that would not seem to qualify.

102.1 Definitions. "Nondischarge 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 "[p]rotect, 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 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 Permit requirements. Sub-section (a)(1) Please confirm that an NPDES permit is not needed for a project that disturbs between one and five acres which does not have a point source discharge. (See previous comment relating definitions.)

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.

MORE...

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

Page 6

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. The Department should remove references to specific stormwater standards and instead rely on guidance provided through the SWM BMP Manual. Furthermore, the Department should sponsor an effort to convene a consortium of consulting engineers to review the effectiveness and appropriateness of the current BMP Manual, and to use their professional experience to recommend revisions to the current BMP Manual.

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.

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.

MORE...

Home Builders Associations of Southeastern Pennsylvania

HBA of Bucks & Montgomery Counties HBA of Chester & Delaware Counties
721 Dresher Road #1200 1502 McDaniel Drive
Horsham, PA 19044 West Chester, PA 19380
(215) 657-1300 (610) 692-7733

Page 7

102.14 Riparian forest buffer requirements. The HBAs 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 which reduce sediment pollution before being received by the stream.

102.14 (a)(1)(i) Must all, or just a portion, of the activity fall within an EV watershed to trigger the requirement for establishing a buffer? The language should be modified to state that the majority of the activity must drain to an EV watershed in order to trigger the buffer requirements. How does the Department envision the applicant dealing with buffers that would be required to extend onto an adjacent property owner's land?

102.14 (a)(2) What "other approvals that include buffer" requirements does this language refer to?

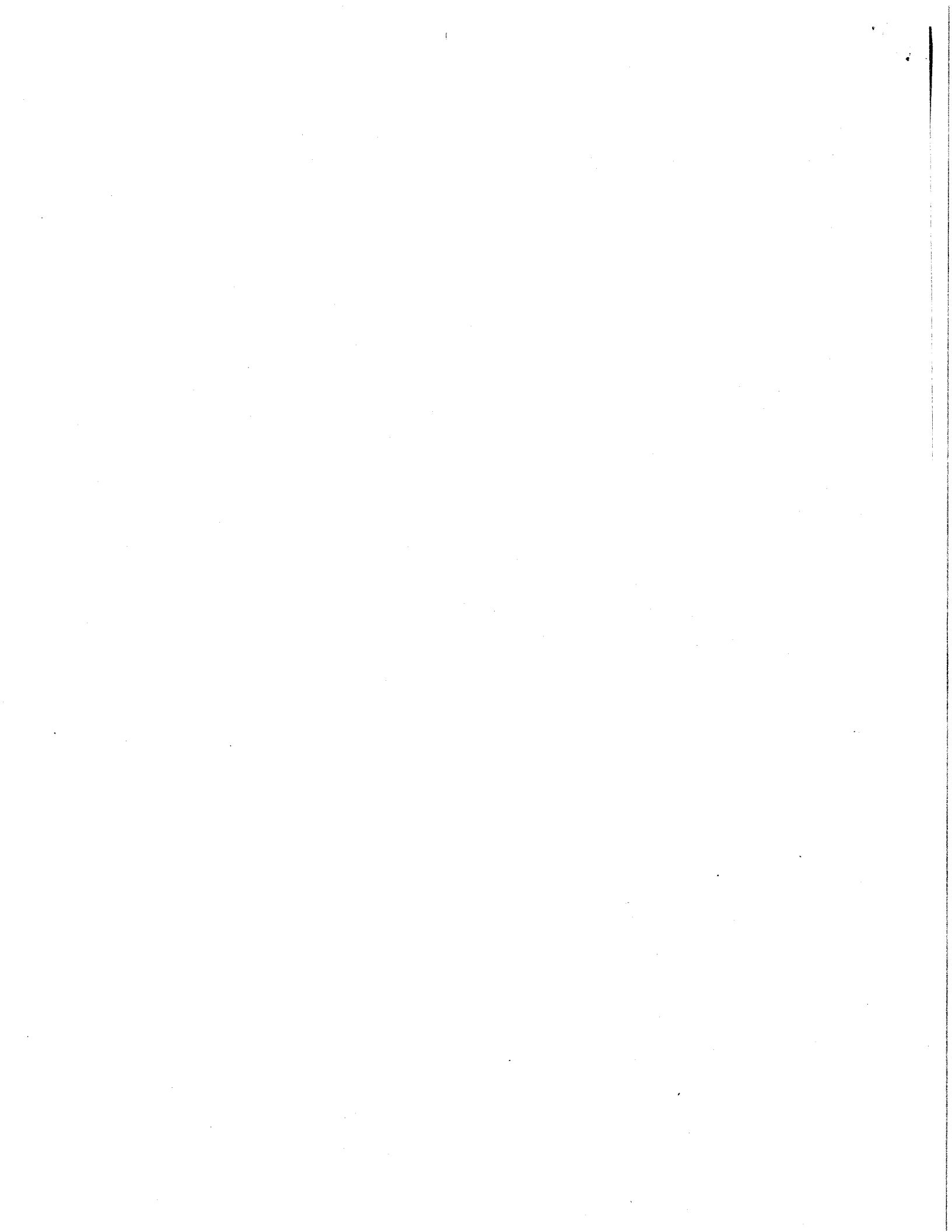
102.14 (a)(6) On sites with no native woody vegetation, the buffer should mature naturally versus requiring the applicant to establish and care for the buffer. Doing otherwise would pose a financial hardship to the applicant and expose the stream to potential pollution events while the soil is disturbed 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 contact me at mark@mitman-group.com.

###



2783

RECEIVED

DEC 7 REC'D

Chambers, Laura M.

From: Mark S Mitman [mark@mitman-group.com] **INDEPENDENT REGULATORY REVIEW COMMISSION**
Sent: Monday, November 30, 2009 11:27 AM
To: EP, RegComments
Cc: mwhite@pasen.gov; eerickson@pasen.gov; musto@pasenate.com; shutchin@pahousegop.com
Subject: Chapter 102 Comments

To: PA Environmental Quality Board (via US Post & Email)

Cc: Hon. Mary Jo White, Chair
 Hon. Edwin Erickson, Vice-Chair
 Hon. Raphael Musto, Minority Chair
 Hon. Camille "Bud" George, Chair (via US Post)
 Hon. Scott Hutchinson, Minority Chair

Attached, please find comments on the proposed Chapter 102 regulations submitted by the Home Builders Association of Bucks/Montgomery Counties and the Home Builders Association of Chester/Delaware Counties.

Thank you for the opportunity to offer the concerns & suggested improvements from these trade associations as part of the public commenting process.

Sincerely,
Mark S. Mitman

on behalf of
 HBA of Bucks/Montgomery Counties
 HBA of Chester/Delaware Counties

.....
Mark S. Mitman

The Mitman Group, LLC
Government Relations Management
 26 West Broad Street
 Bethlehem, PA 18018

Office (610) 419-1684
 Mobile (610) 597-1814
 Fax (215) 689-4263
 Email: mark@mitman-group.com

Follow gov't affairs updates at www.Twitter.com/Mitman_Group

