Chambers, Laura M.

From: Jeff Nagorny [rev_jeff@verizon.net]
Sent: Monday, November 30, 2009 9:04 PM
To: EP, RegComments
Subject: Comments - Proposed Rulemaking, Chapter 102

Attached is a PDF copy of a letter I drafted outlining some of my concerns regarding the proposed rulemaking for revisions to 25 PA Code Chapter 102. in the event that you cannot accept my comments in PDF format, I have copied and pasted them here in the body of this email.

The Honorable John Hanger, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
P.O. Box 8477
Harrisburg, PA 17101-8477

Re: Comments on Proposed 25 PA Code Chapter 102 Rulemaking

Dear Secretary Hanger:

I am a licensed professional engineer who has been involved in the design of stormwater and erosion control facilities for many years, and has prepared many permit applications, E&S Plans, and PCSM Plans for members of the regulated community (private developers, public entities, and institutional interests). I offer the following comments regarding the Proposed Rulemaking of the Department Environmental Protection to revise Chapter 102.

- Increase in Permit Fees

I have a significant concern with the proposed increase in fees being included as part of this Rulemaking (Section 102.6). Stakeholders in this process who are most impacted by the fee increase include both the development community and the licensed professionals who prepare the various plans and permit applications. A ten-fold increase in permit fees, even with the laudable intent of covering the actual program costs, must be clearly justified, especially in light of the current economic crisis in which we find ourselves.

While the justification laid out for the increase in permit fees for both the E&S and NPDES programs is understandable, i.e., to cover the actual costs of administering the program, the cost basis outlined in the May 4, 2009 "Fee Report Form" issued by PADEP only lists "fee collections" for FY 2006 and FY 2007, and provides no information on the actual costs incurred by PADEP or the Conservation Districts. Not only should those "actual cost" totals be provided, but a detailed breakdown of the various elements discussed in the memo (training, permit review, inspections, program oversight, compliance) should be included in order to provide full disclosure on costs. For example, only those "training" and "program oversight" costs directly associated with the E&S/NPDES permit programs should be considered for coverage by the fees. The costs for any other program responsibilities (for PADEP and/or the conservation districts) should not be included in the cost analysis.

One final point on the proposed fee schedule relates to the inordinate lack of fairness in using a flat-

rate fee approach for both E&S and NPDES. It appears that the proposed fees to be paid by a developer of a 2.5 acre pad site development would be the same as those for a 100-acre business park and/or a 200-acre residential development. I cannot imagine that the time required for permit review, inspections, and compliance for the 2.5-acre project would anywhere near the time required for these larger projects. This would result in the developer of smaller projects would essentially be underwriting the costs for the larger developments, a patently unfair and unjust situation. Many Conservation Districts presently apply a sliding scale or tiered fee schedule based on the size (number of acres) of the project, and that approach should absolutely be incorporated in any changes to the fee schedule.

- Reclaim/Restore Quality of Water

Section 102.4(b)(4)(v) states that "*...all earth disturbance activities shall be planned and implemented to... Protect, maintain, reclaim, and restore the quality of water and the existing and designated uses of waters within this Commonwealth.*" It is not clear why those who are proposing to undertake new land development activities are now going to be responsible to "reclaim and restore" the quality of the waters of the Commonwealth. While I believe most of us agree that improving the water quality for ourselves and future generations is a laudable and worthy goal, it is clear that the language as proposed in this subsection could be used to force a permittee to undertake costly measures to "reclaim and restore" the deteriorated quality of a local water body which was caused in no way by that landowner. I could see a more reasonable approach whereby the Commonwealth would offer to partner with the permittee and pay for said reclamation and restoration measures, but the specific wording of this section simply dumps those costs on the permittee, a private citizen, for the benefit of the entire public. My recommendation is to simply remove the words "reclaim" and "restore" and let the permittee be responsible to "protect" and "maintain" the existing water quality.

- E&S Inspections after "Each Stormwater Event"

Section 102.4(b)(5)(x) states that the approved E&S Plan shall include a maintenance program that provides for "*...the inspection of BMPs on a weekly basis and after each stormwater event...*" Although it is true that not every term or phrase in the regulations can have its own definition, the lack of a definition for the defining phrase "stormwater event" raises a concern, in particular because that phrase replaces the former language "after each measurable rainfall event." A misting or light rainfall that totals no more than 1/16-inch precipitation (or less) could be considered a stormwater event in the eyes of a regulatory official, resulting in unnecessary and unfair enforcement activities against a permittee. If such language is going to be added to the regulations, I strongly urge the addition of a clear, objective, measurable definition of "stormwater event."

- Refusal to Refund Fees on Withdrawn

Section 102.6(c)(2) states that, if an application or NOI is deemed incomplete or contains insufficient information, the applicant has 60 days to provide the required additional information, with the possibility of a time extension if needed. If the applicant fails to provide the required additional information, the Department will then withdraw the application and close the file. However, Section 102.6(c)(3) states "*If the incomplete or deficient application is returned or withdrawn, the fees associated with filing that application will not be refunded.*" This is simply an egregious misuse of authority on the part of the Department and/or the conservation districts. The only funds to which the reviewing entities should be entitled are those funds necessary to cover the costs of conducting the Administrative Completeness review of the application or NOI. It would be bad enough with the current fee schedule, but with the outrageous increase in fees being proposed in

the review Chapter 102 regulations this is unconscionable case of greed, if not outright theft from the applicant. This provision should be struck and replaced with language that allows the reviewing entities the right to retain that portion of the permit fees necessary to cover the cost of their actual expended effort – nothing more.

- Riparian Forest Buffers

The requirements of Section 102.14 are extremely burdensome and lack the scientific basis normally required in support of such legislation. Without clear scientific evidence to support the specific requirements contained in 102.14, i.e., substantiated research that defines the level of protection of water quality provided by the minimum widths and planting densities of required new buffers, as well as documentation supporting the idea of removing existing vegetation in areas bordering existing waterways, this requirement is simply without merit. A 100-foot wide buffer along each side of a 200-foot long section of stream that passes through the middle of a 2-acre property essentially reduces that property to 1 usable acre, at most. This kind of aggressive legislation is a taking of real property, and is unfair and unjust to those who own undeveloped or partially developed property. This section should just be removed from the proposed Rulemaking and withheld until such time as sufficiently detailed documentation supporting the proposed requirements is produced.

As you can see, I am passionate about these proposed regulations, and they directly affect my profession and my business. I do not own or develop real estate, but those who do are my clients, and the net effect of these regulations is a significant increase in the cost of doing business in the Commonwealth. This is something we can ill afford in these extremely trying economic times. I would appreciate your due consideration of the comments contained herein, and would gladly respond to any specific questions you may have. Thank you for your assistance in this matter.

Sincerely,

Jeff

W. Jeffery Nagorny, P.E.
Director of Engineering
Linn Architects

cc: The Honorable Andrew Dinniman; 19th State Senatorial District
One North Church Street, West Chester, PA 19380
The Honorable Barbara McIlvaine Smith; 156th State Legislative District
107 E. Chestnut Street, West Chester, PA 19380

Jeff Nagorny

"Our only hope today lies in our ability to recapture the revolutionary spirit and go out into a sometimes hostile world declaring eternal hostility to poverty, racism, and militarism. With this powerful commitment we shall boldly challenge the status quo and unjust mores and thereby speed the day when "every valley shall be exalted, and every mountain and hill shall be made low, and the crooked shall be made straight and the rough places plain." M.L. King, Jr. - 1967

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