2783

Chambers, Laura M.

From: Lane, Michael [mlane@brickhouse-environmental.com]
Sent: Monday, November 30, 2009 3:53 PM
To: EP, RegComments
Cc: nflood@pasen.gov; thenness@pahousegop.com
Subject: Proposed Rulemaking EQB 25 PA Code Chapter 102

Attached are comments on the proposed Chapter 102 revisions in pdf format. Following are the comments in their entirety:

November 30, 2009

Michael E. Lane
1655 Walnut Road
Honey Brook, PA 19344

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

via email *RegComments@state.pa.us*

Re: Proposed 25 Pa. Code Chapter 102 Rulemaking Comments

To Whom It May Concern:

Please carefully consider the following comments on the proposed 25 PA Code Chapter 102 rulemaking as it applies to the permit-by-rule, post construction stormwater management operation and maintenance, and mandatory riparian forest buffers.

The regulations are proffered under the authority of the Clean Streams Law and are alleged to support the goals and requirements of the Stormwater Management Act and the Federal Clean Streams Law. It is unclear from where the impetus springs for certain proposed revisions, particularly the requirement for mandatory forested buffers along waters in Exceptional Value Watersheds. Clearly the impetus is not from any recent lawmaking by the Pennsylvania State Legislature. It is my understanding that the PA Clean Streams Law was last revised in 1980 and the PA Stormwater Management Act was signed in 1978. Neither law requires any *specific* stormwater controls.

Without specific requirements in effect through law, the Department is overreaching when it seeks to mandate any one best management practice (BMP) over another to meet the goals of the law. The Department has produced no evidence that existing water quality is being degraded under the current regulations, but instead seems to rely on the dreadful maxim that more is better. More mandatory requirements are not always better, but always more expensive.

1. Permit-by-rule: The requirements of **§102.15 Permit-by-rule for low impact projects with riparian forest buffers** are so limited in their applicability that its inclusion is not necessary. I can conceive of very

few projects that would be covered by the permit-by-rule and fewer applicants willing to make the economic sacrifices necessary to meet the requirements. Additionally, recent Environmental Hearing Board adjudications indicate that infiltration systems and other BMPs traditionally categorized as "non-discharge" alternatives are not sufficient in name only to comply with anti-degradation standards (see Lipton v. DEP and Pine Creek Valley Watershed Association and Crum Creek Neighbors v. DEP and Pulte Homes). These recent decisions make it apparent that applying a uniform requirement to all sites, no matter how restrictive it may appear, does not mean that the standard will protect water quality [proposed 102.15(d)(1)]. Section 102.15 should be removed from the draft regulations.

2. Post construction stormwater management operation and maintenance: The Department's difficulty in assigning long-term operation and maintenance responsibility is a function of the inadequacy of the law to match the sweeping reach of post construction stormwater management regulations. Ultimately, the owner of the property is responsible for meeting the requirements of the Clean Streams Law and the Stormwater Management Act. The Department is overreaching when it concerns itself with implementing regulations in a manner contrary to existing environmental laws and established property law.

3. Mandatory riparian forest buffers: Until such time as the Department can show that water quality is not being protected under current regulations – that is, until it can prove the degradation of water quality in exceptional value watersheds due to earth disturbance activities that comply with current regulations – then it is unwise to require any mandatory stormwater management practices. Until such time as the Department can show that a buffer of less than 150 feet is insufficient to achieve pollutant and sediment reduction adequate to maintain water quality, then it is a flagrant usurpation of legislative authority to mandate a taking of property for no benefit. The proposed rules do not recognize the burden to be placed on landowners in EV watersheds that do not own more than 150 feet from a stream. Will landowners with relatively small lots along EV streams lose all future use of their property, aside from passive recreation? Is there an exemption to the forested buffer requirement for such situations? How will an applicant comply with the buffer requirement if their project site is within 150 feet of an EV water but they do not own the property adjacent to the stream? Will a farmer in an EV watershed be forced to choose between building a new barn or taking land out of production within 150 feet of a stream or farm pond [102.14(e)(3)]? It is obvious that this requirement will increase costs of development and construction and render entire parcels off limits to improvement. At the same time, there is no obvious environmental benefit that cannot be achieved through other, more cost-effective means. The previously mentioned EHB decisions also make it clear that the Department must consider project sites in EV watersheds on a case-by-case basis and that blanket requirements and administrative checklists do not adequately document compliance with anti-degradation rules.

The proposed rulemaking is the latest attempt by the Department to legislate by regulation. Based on the potential harm to property owners through the decreased value

and use of their land, it is evident that the impact of the rules was either not considered or was ignored in an attempt to restrict lawful private use of land for some uncertain environmental benefit. The touting by the Department of outreach efforts on permit-by-rule and riparian forest buffers during 2007-2009 reads more like a list from a scavenger hunt than a serious attempt to represent stakeholders' interests when it is considered that the rules were conceived before the outreach meetings.

The revisions to the regulations that attempt to address shortcomings of the permitting process as it now exists, and the revisions that are required to implement requirements of the Federal Clean Water Act are necessary and applauded. The permit-by-rule and mandatory riparian forest buffers should be removed in their entirety.

If you have any questions regarding my comments, please call me at 610-692-5770 or email mlane@brickhouse-environmental.com.

Sincerely,

Michael E. Lane, CPSS
1655 Walnut Road
Honey Brook, PA 19344

cc: State Senator Michael Brubaker, c/o Nathan Flood, nflood@pasen.gov
State Representative Tim Hennessey, thenness@pahousegop.com

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