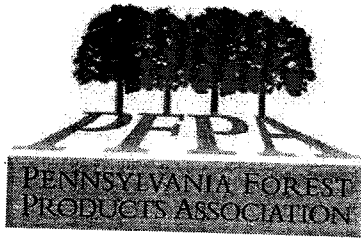


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INDEPENDENT REGULATORY
REVIEW COMMISSION

TO: Pennsylvania Environmental Quality Board

FROM: Paul Lyskava, Executive Director, Pennsylvania Forest Products Association

DATE: November 25, 2009

RE: Comments on Proposed Rulemaking - Title 25, Chapter 102 (Erosion Control and Stormwater Management)

On behalf of the members of the Pennsylvania Forest Products Association, I wish to offer the following comments on the Department's draft rulemaking in Title 25, Chapter 102 (Erosion and Sediment Control and Post-Construction Stormwater Management).

GENERAL COMMENTS:

We recommend that the proposed rulemaking be revised to provide forestry with the same exemption from permitting, forested riparian buffers and PCSM Plan requirements, as are provided to agricultural activities. Our reasons are as follows:

1. Forestry and timber harvesting are not a major cause of Pennsylvania's water quality problems. At its core, forestry and timber harvesting does not convert the landscape, but rather maintains land at its current use and only imposes minor and temporary earth disturbance. For nearly two decades, foresters and timber harvesters have been trained in the use and practice of solid, successful voluntary Best Management Practices for erosion control and other activities and have operated under the existing Chapter 102 regulations with the assistance of the Professional Timber Harvesters Action Packet. These efforts have resulted in forestry and timber harvesting being identified as a negligible contributor to water quality impairment in the Commonwealth.

The 2008 Pennsylvania Integrated Water Quality Monitoring and Assessment Report prepared by DEP in compliance with the federal Clean Water Act indicates that silviculture and logging roads were identified as the source of impairment on less than two-tenths of one percent of the state's impaired stream miles. This compares to the leading sources of water impairment in the report: abandoned mine drainage (cause in 49% of impaired miles), agriculture (46%) and urban runoff (19%). Further evidence is the fact that many of the state's existing EV and HQ streams are located in regions of the state where timbering has been historically most active, further demonstrating the minimal impact caused by working forests.

2. The mandatory riparian area provisions in the proposed rulemaking are a significant taking of a private landowner's utilization of their land. While the proposed rulemaking limits riparian forested buffers to permitted activities in EV watersheds and utilization of permit-by-rule, the impact of this provision will nonetheless be significant on many landowners. Under the rulemaking, an acre of land will be impacted by restrictions for every 145 to 220 of linear footage of perennial or intermittent stream within a project boundary. Depending on the project and property, the overall impact for landowners would be permanent restrictions on a significant percentage of their land (10-50%), with additional acres possibly becoming economically inaccessible for forestry or other activities.¹

The impacted acreage would not only have significant restrictions on the ability of landowners to conduct forestry and timber harvesting, but also prohibit those landowners from accessing their land for other activities that generate revenue or provide benefits to the landowner. The mechanism for securing permanent protection of these buffers – easement transfer or local ordinance – will open the possibility of additional restrictions both inside the buffer and on their entire tract. This overall impact of this regulatory taking could have unforeseen consequences on landowner attitudes impacting forestry, recreational access and maintaining open space.

3. Any additional land regulation threatens the future viability of the state's forest products economy. We recognize that the direct impacts of the proposed rulemaking on most forestry and timber activities are limited and pale in comparison to the impacts on more substantive earth disturbance activities. Still, we contend that the proposal will place significant regulatory restrictions and financial hardship on affected forest landowners and their agents who conduct forestry and timber harvesting on their land. The state's forest products industry has been an economic driver and major source of jobs in Pennsylvania. Rising regulatory costs and growing removal of acreage from timber access will make it more difficult for the state's forest products industry to recover from the ongoing economic recession and continue to remain competitive compared to other hardwood producing regions domestically and internationally. These same costs will also negatively impact the ability for Pennsylvania to effectively develop and sustain biomass based alternative energy.

CHAPTER/SECTION SPECIFIC COMMENTS:

The following comments are offered related to specific sections or specific language in the proposed rulemaking.

4. Sec. 102.1 Definitions: The determination of intermittent streams and their banks are subjective, and the impact of requiring riparian forested buffers for intermittent streams will impact substantial acreage across the typical forested ownership, create significant negative impact on a landowner's control of their property and ability to conduct forestry activities in a cost effective manner. We question the scientific grounds to support the necessity to

¹ See comments of Penn State School of Forest Resources Professor Dr. Jim Finley before Joint Legislative Air and Water Pollution Control and Conservation Committee, Forest Task Force Hearing, February 12, 2009.

require 100 foot buffers on intermittent streams, particularly as it relates to forestry or timber harvesting activities that are temporary and will not change the land use.²

5. Sec. 102.4 Erosion and sediment control requirements: Forestry's good record on water quality is due to implementation of voluntary BMPs by foresters and timber harvesters who have been trained through the efforts of the Sustainable Forestry Initiative. This training and the Timber Harvesters Action Packet – developed by DEP in collaboration with conservation districts, DCNR, industry and others - has provided these individuals with the knowledge to assemble E&S plans. DEP must ensure that any additional information proposed for the E&S plan can still be easily obtained, calculated and provided by these same individuals through updates in the Action Packet and SFI training.
6. Sec. 102.5 Permit Requirements: We recommend that forestry and timber harvesting activities be given the same exemption from permitting as is granted to agricultural activities. Like agriculture, forestry related earth disturbance is temporary and in many cases, an even shorter timeframe of disturbance than many agricultural activities. Forestry activities do not result in a conversion of the land. Furthermore, DEP has documented through the 2008 Pennsylvania Integrated Water Quality Monitoring and Assessment Report that agricultural activities have impaired nearly 250 times more stream miles compared to forestry activities and logging roads.

Since forestry and timber harvesting involve limited and temporary earth disturbance and do not result in a change in land use, these activities should be exempt from the requirements for a PCSM plan, which involves long-term maintenance of constructed stormwater management facilities.

7. Sec. 102.6 Permit applications and Fees: The regulation seeks to raise fees for timber harvesting and road maintenance activities from \$500 to \$2,500, an excessive and unreasonable five-fold increase. These fees would be paid to the Department on top of fees charged by County Conservation Districts that, in nearly all cases, are the exclusive reviewers of plans and permit applications according to formal delegations of that authority from the Department. If an increase can be justified as being reasonable in relation to services performed, then it should be either phased in over a period of time; limited to permit applications that are not subject to the review, approval and supervision of conservation districts; or offset dollar-for-dollar by fees charged by the Districts.
8. Sec. 102.14 Riparian forest buffer requirements: Riparian buffers can be a useful tool in protecting water quality, but mandating their establishment and permanent protection is an unnecessary and costly government intrusion into private property and will often lead to negative impacts on forest health and productivity. The continued use of voluntary BMPs, promoted through the Action Packet and SFI training, is the preferred mechanism to ensure proper and sustainable forestry activities near streams.

The proposed width and restrictions of riparian forest buffers on EV, other perennial and intermittent streams will involve substantial acreage on tracts where it is required, making it difficult for landowners to conduct the appropriate sustainable forestry activities necessary to

² Additional comments of Penn State School of Forest Resources Profession Dr. Jim Finley and Dave Trimpey, Resource Manager for Kane Hardwoods before Joint Legislative Air and Water Pollution Control and Conservation Committee, Forest Task Force Hearing, February 12, 2009.

ensure future forest health and productivity on their land. It also will restrict the ability for landowners to mitigate safety issues through the removal of dead and dying trees. Ash, hemlock, maple, oak, pine and birch are among the species that face significant decline and mortality due to disease and invasive pests. Forested tracts with concentrations of these species will suffer under the proposed rulemaking, as landowners will be restricted or prohibited from being able to adequately mitigate this decline.

The requirement to maintain at least 60% canopy cover will make it difficult to regenerate certain tree species, encourage the proliferation of fern and generally degrade forest productivity. Furthermore, the canopy requirement fails to recognize the continued water absorption and erosion control benefits provided by the remaining trees and stumps, which in most cases will be the source of natural tree regeneration. The proposed buffer mandates are more restrictive than those in other wood producing states, more restrictive than the guidelines utilized by federal and state land management agencies and more restrictive than the buffer criteria of major 'green' certification forest certification systems, including the Forest Stewardship Council.

We question the benefits of requiring full buffers on intermittent streams. Requiring a 100 for riparian forest buffers on intermittent streams, which could be judged to be any ditch in a forest, will dramatically increase the impacted acreage on an affected tract. The inclusion of intermittent streams will make many, if not most, impacted tracts economically unviable for future forestry activities. The economic burden on forest landowners will far outweigh the benefits of buffering these intermittent streams.

Sec. 102.14 (e) (5) should be amended to clearly allow single or multi-tree removal and the sale or utilized of these trees by the landowner should also be allowed. This both encourages good maintenance of the forest buffer and helps offset the costs of maintaining the buffer.

Language in Sec. 102.14 (e) (5) (iv) should be changed to "Timber harvesting activities" to make it consistent with the definition in the Chapter.

The 60% canopy cover requirement will be problematic to measure in the winter, when much timber harvesting occurs. An option for use of basal area should be included if a buffer requirement is maintained in the final rule.

The requirement for a Forest Stewardship Plan should be eliminated, as this requirement is a significant expansion beyond the intent of the Chapter. It is inappropriate for a regulatory entity to force private landowners into a voluntary program. Furthermore, DCNR does not have the staff, resources or established mechanism to implement the reviews required in the proposal. The E&S Plan remains a sufficient mechanism to ensure appropriate activities within the buffers. If an additional harvest plan is required, the definition of Forest Stewardship Plan should be amended to explicitly allow for plans other than those produced from the federal Forest Stewardship Program.

Legal protection should be encouraged, but not mandated. The system of permitting and E&S planning in the Chapter is sufficient to ensure protection of these buffers. The language requiring the permanent protection of the buffers is problematic, as it promotes the use of a conservation easement or local ordinance as a protection mechanism – both of which will likely lead to even more excessive restrictions on the landowner forestry in both in the

riparian buffer areas and the surrounding land. This overall impact of this regulatory taking could have unforeseen consequences on landowner attitudes impacting forestry, recreational access and maintaining their land as open space.

The requirement to post buffers is excessive and costly for the forest landowner, who may or may not currently be providing public access to their land. Given these costs and the overall mandates in the Chapter – including the impact of intermittent streams - many landowners may elect to post their entire tract of land, removing it from public recreational access.

9. Victimization of Landowners: It must be recognized that the proposed mandates in the Chapter will be imposed upon some forest landowners due to actions outside the control of these individuals. Specifically, landowners who do not own their subsurface rights are subject to oil, gas and mineral development from these subsurface owners. In most cases, the landowner has no input how or when these subsurface rights are developed. When development of these subsurface rights require permit under the Chapter, the mandates and costs, including the regulatory taking associated with the buffers, are imposed upon landowner. This situation will be quite common in northern and western Pennsylvania where gas and oil development is active. The proposal needs to address this situation and provide relief for these landowners.
10. Sec. 102.22 Site Stabilization: Site stabilization is best addressed in BMPs, rather than mandated within the Chapter.

RESPONSE TO THE COMMENTS OF OTHERS:

PFPFA attended the three public meetings related to the proposed rulemaking and offers these responses to comments offered at those meetings.

11. Lowering of 25 acre threshold for E&S permit: During the public hearing process, a number of individuals and environmental groups have suggested that timber harvest and road activities should be required to obtain an E&S permit upon the disturbance of five acres, rather than the current threshold of 25 acres of disturbance. The rationale for this recommendation - that other activities require a permit for 5 acre impacts, and so should timber harvesting – is overly simplistic and unsupported by facts. We obviously disagree with this opinion and recommend that timber harvesting and road maintenance activities maintain the current permit threshold. Unlike other activities, timber harvesting is a minor and temporary disturbance, which does not convert the landscape. Residual stumps from harvested trees continue to provide soil stability and erosion control. The linear nature of a logging road disturbance offers greater area of interface with undisturbed vegetation, compared to more permanent and concentrated development activities. The strongest argument for the status quo is the historic results, which show timber harvesting to be a negligible contributor toward water impairment in the state. Lowering the threshold is not supported by either the data or experience and would create an unjustifiable burden for both industry, the Department and conservation districts.³

³ Similar comments were offered by Robb Piper, Manager of the Cambria County Conservation District in testimony before the Joint Legislative Air and Water Pollution Control and Conservation Committee, Forest Task Force Hearing, October 29, 2009.

Expand buffer requirements to waters other than EV: Others have called for an expansion of the buffer requirements to all permitted activities that interact with any body of water. We oppose such as proposal, as it would magnify the problems and concerns we have outlined with the current buffer proposal.

Licensing of foresters: The public hearings have also seen a small group of foresters call on the Department to support the state licensing of those practicing forestry, and have the proposed rulemaking require the use of licensed foresters. There is no legal basis for this proposal. Pennsylvania has no law requiring the licensure of foresters. PFPA believes that the current system of well-trained foresters and timber harvesters engaged in E&S Plan development and implementation has proven both workable and productive as a means of controlling erosion.

CONCLUSION:

Given the broad scope and regulatory expansion contained in the proposed rulemaking, we believe that there will be sufficient comment from stakeholders to necessitate the publishing of revised rulemaking for additional comment.

PFPA and its members also request meetings with the Department to work on implementation of the final rulemaking, including development of an update of the current Timber Harvesters Action Packet and related SFI training.

The Pennsylvania Forest Products Association is the leading trade association for all sectors of the state's forest products industry. PFPA also is the administrative host and sponsor of the Pennsylvania State Implementation Committee of the Sustainable Forestry Initiative, which has provided environmental and safety training to nearly 7,000 loggers, foresters and forest landowners.

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Chambers, Laura M.

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From: Paul Lyskava [plyskava@paforestproducts.org]
Sent: Wednesday, November 25, 2009 11:46 AM
To: EP, RegComments
Subject: Proposed Rulemaking - Title 25, Chapter 102

Please find attached our comments on the Proposed Rulemaking to Title 25, Chapter 102.
Also attached is supporting document referenced in our comments.

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