



November 27, 2009

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DEC - 7 REC'D

INDEPENDENT REGULATORY  
REVIEW COMMISSION

Environmental Quality Board  
P.O. Box 8477  
Harrisburg, PA 17105-8477

2783

**Re: Proposed Rulemaking 25 PA. Code Ch. 102  
Erosion and Sediment Control and Stormwater Management**

Environmental Quality Board:

We have reviewed the Proposed Rulemaking for 25 PA. Code Chapter 102, Erosion and Sedimentation Control and Stormwater Management that appeared in the *Pennsylvania Bulletin* on August 29, 2009. The Pennsylvania State University offers the following comments for your considerations:

Comment 1. §102.1

- *Earth Disturbance Activity* - it appears the definition is being amended to specifically include activities that the public now finds controversial (e.g., animal heavy use areas, oil and gas activities and well drilling) the definition is being amended to address activities that the public now finds disturbing. The existing definition which states "...or other human activity which disturbs the surface of the land..." should suffice to define any earth disturbance.
- If the proposed definition for *Earth disturbance activity* remains, please define *well drilling*.
- The definition of a *point source* does not include sheet flow associated with stormwater. However, sheet flow is defined as a relatively thin and uniform depth of runoff, which is considered to be less than 0.1 ft in depth and generally less than 1/4". Most concentrated discharges will not remain as sheet flow regardless if level spreaders, etc. are employed. The sheet flow concept has been problematic where designers use level spreaders at the end of concentrated flows, especially when discharged to wooded areas.
- *Riparian forest buffer* - This definition appears to be vague and written to allow for a wide range of future interpretations. The definition does not supply any quantitative standards to which permanent vegetation needs managed. At a minimum, this definition should supply an acceptable scientific reference that clearly describes an acceptable method to identify this buffer.

Comment 2. §102.2.

The proposed revision will now require management of post construction stormwater. The Clean Streams Law regulates contaminants as pollution. This proposed regulation now identifies post construction stormwater as pollution by the mere fact that water is discharged from areas that have undergone construction activities, even if the water contains little or no contaminants. The University recommends that post construction stormwater should be managed under separate regulations and guidelines.

Comment 3. §102.4(b)(2)(ii).

Remove the word “under” and replace with the original “pursuant”.

Comment 4. §102.4(b)(4)(v).

The University recommends this requirement be changed to read: “Protect and maintain the quality of water and the existing and designated uses of waters within this Commonwealth.” The phrase “reclaim and restore” implies that a proposed construction project must correct all existing surrounding stormwater management deficiencies. The Commonwealth should not rely on future construction activities to correct inadequate stormwater management decisions from past activities.

Comment 5. §102.4(b)(5)(viii).

The document states: “Supporting calculations and measurements.” What is implied by the term measurements? The information contained in the plan drawings (Under §102.4(b)(5)(ix)) provide sufficient information to develop supporting calculations. The words “and measurements” should be removed.

Comment 6. §102.4(b)(5)(x)

The document states: “... inspection of BMPs on a weekly basis and after each stormwater event, ...” The document should be written to clarify this inspection program is specific to E&S BMP’s employed during construction activities. This is excessive for PCSM requirements. The document should state inspection as required based on the size and type of PCSM BMP’s, so that engineering judgment can be used.

Comment 7. §§102.4(b)(5)(xiii) and 102.8(f)(14).

The document states: “Evaluate the potential for thermal impacts to surface waters...” However, no guidance is provided in how to do this and no wide spread accepted methods exist in practice. If required, the regulation should say how this is to be implemented.

Comment 8. §102.4(b)(6)(v).

The University recommends the conservation district also be given authority to approve alternative BMP’s.

Comment 9. §102.5(a).

General Comment: The University suggests this section be expanded to identify and explain the differences of an individual NPDES Permit, general NPDES Permit and NPDES Permit-by-rule for Stormwater Discharges Associated with Construction Activities. What criteria will the Department use to require a person to obtain these three types of permits? This should clearly be identified in the first section of this requirement or in §102.1 Definitions.

Additionally, this section needs to be expanded to codify the Department’s “*Permit Guidelines for Phased NPDES Stormwater Discharges Associated with Construction Activities*”, Document No. 363-2134-013, dated March 29, 2003. This document provides guidelines allowing an owner to present multiple phases for review in one common submission; saving the owner’s submission and the agencies’ review efforts.

Comment 10. §102.6(a)(3).

This section or §102.1 Definitions should include a reference to the Department’s Guidelines on the preparation of a PPC Plan.

Comment 11. §102.6(b)(1).

The permit fees for the General E&S Permit and the Individual E&S Permit are excessive and onerous.

Comment 12. §102.6(c)(2).

The document states: "Requests for a specific extension may be sought by the applicant in writing". What guidelines and criteria will the Department use to grant a specific extension to an applicant?

Comment 13. §102.6(c)(3).

The document states: "If the incomplete or deficient application is returned or withdrawn, the fees associated with filing the application will not be refunded." This needs additional clarification to prevent reviewers from rejecting a submission based on a technical deficiency and then charging another fee claiming the document is "administratively incomplete." This already has occurred in some areas of the Commonwealth.

Comment 14. §§102.8(g) and (h).

The University recommends that all stormwater management technical criteria be removed from the document and instead that the regulation point to guidance manuals, which can be modified as the supporting science continues to improve.

In its effort to incorporate stormwater management into the Chapter 102 document, we believe that the Department has made a critical error, which will plague land development activities due to an unrealistic and flawed use of the *Pennsylvania Stormwater Best Management Practices Manual* control guidance (from here-on referred to as the Stormwater BMP Manual).

The concept of a "Nondischarge Alternative" is fundamentally flawed and will allow future litigation to stop any project through overzealous litigation. The reason is that the Department's definition of the Waters of the Commonwealth is:

*"Waters of the Commonwealth shall be construed to include any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth."*

By this definition, underground water includes groundwater or perched soil water. Using this definition, it is physically impossible not to change the Waters of the Commonwealth by almost any development activity. The Department's definition of a Nondischarge Alternative is something that is intended to eliminate the net change from preexisting stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm. However, the Department's guidance overemphasizes the use of artificial or engineered infiltration to protect surface waters that will create a distinct change in groundwater and/or soilwater. Once groundwater is contaminated, baseflow will be contaminated resulting in future surface water contamination.

Additionally, the Department has assumed that meeting the Stormwater BMP Manual Control Guidance 1 (used in the proposed Chapter 102 change), ensures the anti-degradation of streams. However, this was not found to be defensible in the Environmental Hearing Board's Crum Creek Neighbors decision (EHB Docket No. 2007-287-L, Issued: October 22, 2009).

The Stormwater BMP Manual guidance was never intended to be regulatory document (refer to Stormwater BMP Manual meeting minutes) due to the lack of sound science. Additionally, it was concluded by the Stormwater BMP Manual Oversight Committee that the Stormwater BMP Manual and

guidance should be a continuously changing document. By simply inserting the guidance criteria into Chapter 102, allowing change or better science to be used has been negated.

Additionally, by inserting the Stormwater BMP Manual control guidance directly into the regulation, DEP is removing all checks and balances in the State's 2006 BMP Manual, which could significantly impair groundwater. The proposed Chapter 102 does not provide for engineering judgment to be used in karst, brownfields, mined lands, superfund sites, or in areas of water supplies when artificial infiltration is not safe or justified. Section 7.4.1 of the BMP Manual states: "Karst aquifers are vulnerable to contamination when the natural filtration capability of soil is bypassed due to thin soils, sinkholes or subsurface open fractures and voids. Contaminants can enter the karst system and travel long distances over a relatively short period of time." Section 7.4.2 of the Stormwater BMP Manual states: "A decision must be made to either promote infiltration at a karst site or eliminate infiltration altogether as an attempt to curb sinkholes or contamination liability." The Chapter 102 regulation should clearly state that in areas where karst, brownfields, superfund sites, or mined lands exist; or in areas close to public water supplies, the volume requirements should be waived or reduced.

Instead of using the Stormwater BMP Manual Control Guidance 1 criteria, the Department should indicate how someone can meet the definition of anti-degradation.

Comment 15: §102.14.

This section (Riparian forest buffer requirements) has no place in this document and all references to the "Riparian Forest buffer requirements" should be removed from Chapter 102.

Comment 16: §102.15.

This section (Permit-by-rule for low impact projects with riparian forest buffers) should be removed from Chapter 102.

Thank you for the opportunity to present these comments.

Sincerely,

*Stephen C. Weyandt, For*

Ian M. Salada, P.E.  
Manager, Engineering Services

cc: Larry Fennessey  
File

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**Chambers, Laura M.**

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**From:** Steve Weyandt [SCW15@nw.opp.psu.edu]  
**Sent:** Friday, November 27, 2009 11:33 AM  
**To:** EP, RegComments  
**Cc:** Ian Salada; Larry Fennessey  
**Subject:** Comments: Proposed Rulemaking 25 PA. Code Ch. 102 (E&S Control and Stormwater Management)

INDEPENDENT REGULATORY  
REVIEW COMMISSION

Environmental Quality Board:

We have reviewed the Proposed Rulemaking for 25 PA. Code Chapter 102 that appeared in the *Pennsylvania Bulletin* on August 29, 2009. The Pennsylvania State University offers the attached comments for your consideration. An original copy of this document is being sent to the Board in today's mail. Thank you for the opportunity to comment on this proposed regulation.

Steve Weyandt

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