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RECEIVED

November 28, 2009

DEC - 7 REC'D

Submitted electronically to RegComments@state.pa.us
 Environmental Quality Board
 P.O. Box 8477
 Harrisburg, PA 17105-8477

INDEPENDENT REGULATORY
 REVIEW COMMISSION

RE: Proposed Rulemaking
 25 PA Code Ch. 102, Erosion and Sediment Control and Stormwater Management

General Comments

1. Scope of the Permit-by-Rule

The proposed rulemaking should exclude the availability of the proposed permit-by-rule (PBR). Pike County Conservation District believes that the PBR will negatively impact land and water resources, add to an already confusing and complex permitting system, increase the costs of land development and create complicated enforcement scenarios that will be very difficult to manage. The District is particularly concerned with the prospect of addressing plan deficiencies in the field, *after construction has started*, with an already shorthanded DEP compliance staff. Currently, District staff work proactively with developers and their consultants during the planning phases of development projects to assure that water resource protections are in place *before construction starts*. Based on many years of hands-on experience reviewing plans for compliance with Chapter 102 and addressing common plan deficiencies, we envision PBR-related scenarios where pollution, citizen complaints and downstream property damages will have to be addressed after the fact, while construction is in full swing and when time and money issues are greatly magnified. This was demonstrated recently when DEP revoked three erosion and sediment control permits because of numerous technical deficiencies discovered after the permits were approved. The permits, issued by DEP in an "expedited" process similar to that outlined in the proposed PBR, were appealed to the Environmental Hearing Board, prompting DEP to re-examine and eventually revoke the permits.

It should also be recognized that the permit-by-rule idea was introduced at a time when DEP was under pressure to manage a backlog of NPDES Permits, primarily in the Northeast Region. Several conservation districts in this region, including Pike, took on expanded responsibilities under a new delegation agreement for post construction stormwater management (PCSM) plan review and inspection. This is a long-term investment by conservation districts (with no additional funding from DEP) which is addressing the permit backlog with detailed technical reviews that protect the public interest and water resources in our region.

problems. Ironically, many of the low impact development principles incorporated in the PBR (for example 102.15(c)(2)(i) and (ii), 102.15 (f)(3) and (4), 102.15(g)(1), 102.15(h)(1) and (2)) and which are known to be of real benefit in meeting these goals, are not included as requirements for other projects needing permits under the proposed regulation. We urge that this oversight be addressed in the final regulation.

5. Organization of the Proposed Regulation

Having spent many years administering the Erosion and Sediment Control and NPDES Stormwater Permitting programs and providing assistance to the regulated community in meeting regulatory requirements, Pike County Conservation District continuously seeks out ways to simplify the process, reduce paperwork and duplicate information while maximizing the environmental benefits of planning and permitting. We find the overall organization of the proposed regulation to be very confusing and cumbersome, with E&S, PCSM and permitting information scattered throughout in non-contiguous sections lacking a logical order. For example, 102.11 General Requirements (for E&S and PCSM BMPs) appears late in the document, after E&S requirements (102.4) and PCSM requirements (102.8). Site Stabilization (102.22), an integral component of E&S control, is inserted at the end of the document rather than being included with the E&S requirements in 102.4. While it may seem insignificant given the scope of the proposed revisions, we believe that better organizing the document will greatly improve the utility of the regulation for the people attempting to meet the requirements.

6. Consistency with DEP Post Construction Stormwater Management Delegation

The proposed regulation fails to recognize the Department's relatively new PCSM delegation agreement with certain conservation districts, including Pike, which have incurred significant costs to hire and train Professional Engineers (PEs) to oversee PCSM plan reviews/site inspections at the district level. Throughout the proposed regulation, there are provisions relating to Department review of alternative designs, BMPs or stormwater management strategies or district consultation with the Department on these issues. Examples include 102.4(b)(4), 102.4(b)(5)(xiv), 102.4(b)(6), 102.4(c), 102.8(d), 102.8(f)(16), 102.8(g)(6), 102.8(k), 102.8(m), 102.11(b). For PCSM delegated districts with PEs on staff, this added step contradicts roles and responsibilities set forth in the delegation agreements and may unnecessarily delay the NPDES Permit review process.

7. Use of Surface Waters vs. Waters of this Commonwealth

Throughout the proposed regulation, the terms *surface waters*, *surface waters of this Commonwealth* and *waters of this Commonwealth* are used inconsistently. We have attempted to address these inconsistencies in comments on individual sections below to reflect that stormwater discharges to *waters of this Commonwealth*, both during construction and post construction, should meet the water quality protection standards set forth in the regulation.

Comments by Section

Recommended changes in the sections specified below are noted in *bold italics*.

102.1. Definitions.

1. *Conservation District* definition should read as follows: *a portion of the erosion and sediment control and stormwater management*.....

102.4. Erosion and sediment control requirements.

14. 102.4(a)(4)(i) would create an E&S plan requirement that limits soil loss to T. Natural Resources Conservation Service (NRCS) conservation plans can allow for two times T within their alternative cropping system. This inconsistency should be addressed, preferably with the more protective option.
15. 102.4(a)(4)(ii). It is unclear in this section whether *less than 25% cover* refers to temporary cover (crop in season, such as corn) or permanent cover (permanent cover crop).
16. 102.4(b)(4) should read as follows: ***Unless otherwise authorized by the Department or conservation district, earth disturbance activities.... Remove after consultation with the Department as per General Comment #6.***
17. 102.4(b). Add to the list of E&S Plan requirements ***identification of all offsite staging, borrow and waste areas and associated E&S BMPs.***
18. 102.4(b)(5)(v) should read as follows: ***The location of all waters of this Commonwealth which may receive runoffand their classification pursuant to Chapter 93.***
19. 102.4(b)(5)(xv). For clarity and flow, we suggest moving this section (*Identify existing and proposed riparian buffers*) ahead of section 102.4(b)(5)(xiii).
20. 102.4(b)(5)(xiii) should read as follows: ***Evaluate the potential for thermal impacts to surface waters from the earth disturbance activity during construction and include BMPs.....***
21. 102.4(b)(5)(xiv) should read as follows: ***.....Unless otherwise approved by the Department or conservation district, the E&S Plan.....***
22. 102.4(b)(6). There are important Special Protection E&S BMPs currently included in 102.4(b)(6)(i,ii,iii,iv) that have been removed from the revised regulation. Instead, the regulation refers to nondischarge alternatives and ABACT BMPs and their design standards listed in the Department's Erosion and Sediment Pollution Control Program Manual, which is currently under revision. We have some concern that these BMPs may be "lost" if they are not included in the final version of the Manual and feel that they should be retained in the regulation. Per previous comments, the last sentence of this section should be revised to read as follows: ***The Department or conservation district may approve alternative BMPs....***

102.5. Permit requirements.

23. 102.5(a)(1) should read as follows: ***...or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves...***
24. 102.5(h) should read as follows: ***Operators who are not the permittee shall be co-permittees after acknowledgment of a co-permittee agreement by the Department or conservation district.***

Commonwealth, not just rivers, streams, creeks, lakes, ponds or reservoirs when required by 102.14 (1) and 102.14(2).

52. 102.14(a)(1)(i) should be revised to read as follows: *The activity requires a permit under this chapter, is located within an Exceptional Value watershed pursuant to Chapter 93 (relating to water quality standards), and the project site contains, is along or within, 150 feet of a river, stream, creek, lake, pond or reservoir.*
53. 102.14(a)(3): *Discharges into the buffer.* This requirement may have the unintended result of interfering with predevelopment hydrologic regimes and creating unstable, erosive discharges. This section appears to contradict Section 102.14 (e)(4)(i) which allows for the construction or placement of roads, bridges, trails, storm drainage, utilities or other structures within the riparian forest buffer.
54. 102.14(a)(4). *Existing buffer composition.* The District questions imposing this requirement which could mandate alteration of intact, healthy and ecologically functioning buffers in relatively undisturbed Special Protection watersheds.
55. 102.14(a)(6). *Buffer establishment.* Many streams in Pike County meander through wetlands without 60% uniform canopy cover. We do not believe that it is the intent of the Chapter 102 revisions to force forestation of buffers in wetland areas that currently do not support 60% uniform canopy cover. This may, however, be the result.
56. 102.14(a)(8) should be revised to read as follows: The riparian forest buffer management plan must describe how the management requirements of this section and *all other requirements included under this chapter* will be met.
57. 102.14(a) General requirements. Add a section to make *applicants responsible for all applicable state and federal permits for riparian buffer activities that constitute obstructions and/or encroachments under Chapter 105.*
58. 102.14(b)(1&2). The District questions the inclusion of buffer zones in the proposed regulation when there is little information included to distinguish between acceptable activities in the 2 zones.
59. 102.14 (d)(1, 2, 3). These sections should be clarified to reflect that *both sides* applies to all rivers, perennial or intermittent streams, not just intermittent streams.
60. 102.14(f)(1). *Permanent protection of riparian buffers.* We recommend removing *permit conditions* and *local ordinances* from the list of permanent protections for buffers. Permit conditions no longer exist once the permit expires or is terminated and local ordinances are often revised or repealed by actions of local governments. Neither of these options provides permanent protection.

102.15. Permit-by-rule for low impact projects with riparian forest buffers.

61. For reasons previously noted, Pike County Conservation District believes that the proposed rulemaking should exclude the availability of the proposed permit-by-rule (PBR). We offer the comments below in the event that the PBR provision is retained in some form in the final regulation.

74. 102.15(l). We feel that the 90 days provided *after PBR authorization is revoked, terminated or suspended* for submittal of a general or individual NPDES Permit application is excessive. **60 calendar days** would be a more reasonable time frame given that construction is likely underway and the reason for the revocation, termination or suspension is the registrant's *failure to meet the requirements of this section*.
75. 102.15(m). Clarify whether ROC here means *renewal of coverage* versus the *registration of coverage* ROC used in previous sections of 102.15. We recommend a **60 calendar day** time frame prior to expiration of coverage for submittal of renewal requests and recommend a limit of **one renewal request** per PBR authorization.
76. 102.15(o) should be revised to read as follows: *Termination of coverage. A permit-by-rule registrant covered under this section shall comply with 102.7 and 102.8(l) (relating to permit termination) to terminate permit coverage.* 102.8(l) contains important language relative to submittal with the NOT of record drawings and a final certification statement from a licensed professional that the site was constructed according to the plans.
77. 102.15(p)(1) should include a specified time frame for the proposed PBR audits and a mechanism for reporting publicly the results of the audits.

102.22. Site stabilization.

78. 102.22 (a)(1). Requiring removal of temporary E&S BMPs is a good addition to the regulation.
79. 102.22(b)(1) should be revised to read as follows: *Upon temporary cessation of an earth disturbance activity or any stage or phase thereof, the site shall be immediately seeded, mulched....* Remove the arbitrary 3-day threshold for cessation of earth disturbance activities, which we predict will be universally applied as an excuse to avoid temporary stabilization.

102.32. Compliance and enforcement provisions.

80. 102.32(c) should be revised to read as follows: *Any person aggrieved by an action of a conservation district under this chapter may request an informal hearing with the Department and conservation district within 30 days....*
81. 102.32(d). The District is in favor of this reinforcement of the ability of conservation districts to recover expenses associated with enforcement actions.

102.43. Withholding permits.

82. We question the addition of *With the exception of local stormwater approvals or authorizations* in this context and recommend it be removed.
83. We recommend the removal of *final* from this section, which is problematic because municipal *preliminary* approval allows the developer to begin earth disturbance for projects requiring NPDES Permits before permit issuance. To improve coordination between municipal and NPDES reviews/approvals, 102.43 should be revised to read as follows: *A municipality or county may not issue a building or other permit, authorization or approval to those proposing or conducting earth disturbance activities requiring Department permit....*



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**Summary of Comments on Proposed Rulemaking: 25 PA Code Ch. 102
Submitted electronically November 28, 2009**

- 1. Scope of the permit-by-rule:** The proposed rulemaking should exclude the availability of the proposed permit-by-rule (PBR). Pike County Conservation District believes that the PBR will negatively impact land and water resources, add to an already confusing and complex permitting system, increase the costs of land development and create complicated enforcement scenarios that will be very difficult to manage. This was demonstrated recently when DEP revoked three erosion and sediment control permits because of numerous technical deficiencies discovered after the permits were approved and subsequently appealed. At the very least, the PBR option should not be available in any Special Protection (High Quality or Exceptional Value) watersheds given the high potential for water quality degradation in the absence of a detailed technical review of E&S and PCSM plans.
- 2. Responsibility for long-term PCSM operation and maintenance (O&M):** A site-specific and enforceable operation and maintenance plan for both structural and non-structural BMPs is critical for meeting stormwater management goals. Comments are provided regarding legal instruments to better define O&M responsibilities, but those options are only as good as the will and resources available to enforce them, especially after permits expire or are terminated and properties change hands. Rather than focusing on complex O&M schemes that ultimately depend on non-existent enforcement mechanisms, a better approach would be to produce a regulation requiring sustainable development strategies and site design that limit the amount of stormwater that must be managed and reduce reliance on maintenance-intensive structural PCSM BMPs.
- 3. Mandatory Riparian Forest Buffers:** The rulemaking should include a provision for mandatory riparian buffers with widths appropriate for protection of designated and existing uses. There is a significant body of scientific data supporting the importance of riparian buffers in stormwater management and water resources protection. Making buffers voluntary hasn't worked. In not including mandatory buffers in the final proposal, the Commonwealth is missing an enormous opportunity to protect and maintain existing and designated uses of waters of the Commonwealth, reduce and mitigate flood impacts, ease streambank erosion and related infrastructure damages, and reap the long-term economic benefits of the ecosystem services known to be provided by buffers.
- 4. Codification of Post Construction Stormwater Management Plan requirements**
We support the inclusion of post construction stormwater management requirements in the proposed regulation as a codification of existing requirements in the NPDES stormwater permitting program. However, we believe the proposed regulation fails to take full advantage of site design and non-structural BMP approaches to meet erosion control and post-construction stormwater management and antidegradation goals and reduce long-term operation and maintenance problems.
- 5. Organization of the Proposed Regulation**
We find the overall organization of the proposed regulation to be very confusing and cumbersome, with E&S, PCSM and permitting information scattered throughout in non-contiguous sections lacking a logical order. While it may seem insignificant given the scope of the proposal, we believe that better organization will greatly improve the utility of the regulation for the regulated community.
- 6. Consistency with DEP Post Construction Stormwater Management Delegation**
The proposed regulation fails to recognize the Department's relatively new PCSM delegation agreement with certain conservation districts, including Pike, which have hired and trained Professional Engineers to oversee PCSM plan reviews/site inspections at the district level. Throughout the regulation, there are provisions relating to Department review of alternative designs, BMPs or stormwater management strategies For PCSM delegated districts with PEs on staff, this added step contradicts roles and responsibilities set forth in the delegation agreements and may unnecessarily delay the NPDES Permit review process.

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DEC 7 REC'D

Chambers, Laura M.

INDEPENDENT REGULATORY
REVIEW COMMISSION

From: Susan Beecher [sbeecher@pikepa.org]
Sent: Saturday, November 28, 2009 12:54 PM
To: EP, RegComments
Subject: Proposed Rulemaking - 25 PA Code Ch 102 E&S Control and Stormwater Management

See attached complete Pike County Conservation District comments re: Proposed Ch. 102 Rulemaking.

1 page summary is also attached.

Thank you.

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