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INDEPENDENT REGULATORY
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PROPOSED AMENDMENTS TO 25 PA CODE CHAPTER 102

Comments on Behalf of:

Waste Management of Pennsylvania, Inc.

Jonathan E. Rinde
Michael M. Meloy
Manko, Gold, Katcher & Fox, LLP
Suite 500
401 City Avenue
Bala Cynwyd, PA 19004
(484) 430-5700

November 30, 2009

I. Introduction

On August 29, 2009, the Pennsylvania Environmental Quality Board ("EQB") published in the Pennsylvania Bulletin proposed regulations that contain significant changes to the current rules governing erosion and sedimentation control measures set forth in 25 Pa. Code Chapter 102. See 39 Pa. Bull. 5135-5152 (Aug. 29, 2009). These proposed regulations not only revise existing requirements pertaining to erosion and sedimentation controls, but significantly expand the scope of 25 Pa. Code Chapter 102 by including requirements governing the management of stormwater discharges during construction activities and after construction activities have been completed. If the proposed regulatory amendments are finalized without significant changes, the reach of Pennsylvania's erosion and sedimentation control program will expand dramatically, not only in terms of the universe of activities subject to regulation but in terms of the duration of various requirements, such as those proposed amendments imposing post-construction stormwater management obligations in perpetuity.

The comments that are presented herein have been prepared on behalf of Waste Management of Pennsylvania, Inc.

II. Comments Regarding Specific Elements of the Proposed Regulations

A. General Comments - Costs of Implementation

In the preamble to the proposed amendments, the EQB states that "[t]hese regulatory revisions should not result in significant increased compliance costs for persons proposing or conducting earth disturbance activities." 39 Pa. Bull. at 5135. The preamble cites "moderate" increases in costs due to increased permit fees (discussed hereinafter), and costs associated with the preparation, operation and maintenance of Post Construction Stormwater Management Plans.

The EQB and PADEP underestimate the costs to the regulated community if the proposed amendments are adopted without further modification. The EQB and PADEP must acknowledge that in addition to the increase in permit fees, the imposition of any mandatory riparian forest buffer removes the value of the land for alternative uses, thereby reducing the value of the property without any corresponding monetary compensation. The preservation of land for riparian buffers is a real cost to a landowner if the proposed amendments are adopted without further modification. Moreover, given the number of surface waters that have been designated as "Exceptional Value," the potential amount of land bordering rivers, streams, creeks, lakes, ponds, and reservoirs in EV watersheds is large indeed.

Moreover, although the preamble to the proposed regulations states without further amplification that the proposed amendments eliminate "outdated and necessary requirements" (which reference appears to only concern the elimination of the special sediment basin requirements at 25 Pa. Code § 102.4(i)), the overall effect of the proposed amendments will be to dramatically increase the time and costs to prepare applications, and the costs to comply with new conditions set forth in permits and approvals.

Given the foregoing, we request that the EQB and PADEP reexamine the proposed amendments as suggested below to ensure that the significant costs that will be imposed on the regulated community if these amendments are adopted are properly balanced with the expected environmental benefits.

B. Comments on the Proposed Riparian Forest Buffer Provisions - Proposed Section 102.14

The proposed amendments to 25 Pa. Code Chapter 102 seek to create for the first time mandatory riparian forest buffers in connection with earth disturbances located within EV watersheds where the project site contains, is along or within, 150 feet of a river, stream, creek, lake, pond or reservoir. In addition, to be eligible for the proposed Permit-By-Rule ("PBR") set forth in proposed 25 Pa. Code § 102.15, the Registration of Coverage ("ROC") to be submitted to PADEP must include a riparian forest buffer. With respect to earth disturbances requiring a permit and located within an EV watershed, or projects qualifying for the PBR and located in either a High Quality watershed or a non-special protection watershed impaired for either sediment or stormwater, the proposed amendments impose an average minimum 150 foot wide riparian forest buffer lying on either side of the waterway. For other projects qualifying for a PBR and not located in such watersheds, the proposed amendments impose an average minimum 100 foot wide riparian forest buffer lying on either side of the waterway.

If a riparian forest buffer is required, the proposed amendments further state that the permit applicant must establish, through the planting of native woody plants, a riparian forest buffer if one is not present, and manage and maintain the riparian forest buffer in accordance with PADEP's regulation and policies. (PADEP has recently published for public comment a guidance document entitled "Riparian Forest Buffer Guidance" which sets forth PADEP's guidance on the management of riparian forest buffers.)

1. Mandatory Riparian Forest Buffer Requirements are Neither Warranted Nor Justified

Although PADEP suggests that a riparian forest buffer is one measure that may be effective in protecting waterways from the potential adverse effects of nearby earth disturbances, the regulatory imposition of a mandatory riparian buffer requirement of an average minimum of 150 feet in width to both sides of an EV watercourse is troublesome in many respects. First, a riparian buffer which averages 150 feet wide or greater may be, in many circumstances, much too wide for the water quality improvements that the buffer provides, thereby imposing disproportionate burdens on the regulated community. Unnecessarily encumbering land for presumed, but not actual, water quality benefits removes the encumbered land from other productive uses with no corresponding benefit to the adjacent watercourse. If this occurs, worthwhile economic activity within the proposed riparian forest buffer area will be needlessly prohibited.

Second, the proposed amendments to 25 Pa. Code Chapter 102 do not allow for any waiver of the mandatory imposition of an average minimum 150 foot wide riparian forest buffer in EV watersheds. For properties located along an EV waterway, including but not limited to smaller

parcels, the imposition of a mandatory average minimum 150 foot wide riparian forest buffer along both sides of the waterway could remove all or a significant portion of the value of the property, and thereby result in an impermissible taking of private property without just compensation.

To avoid these problems, we suggest that the proposed amendments be modified to allow that a riparian forest buffer be one of a suite of BMPs that a project proponent could employ when seeking an individual or general permit or requesting authorization to proceed under a PBR. If a riparian forest buffer is proposed at the discretion of the permit applicant, the width of the forest buffer would be properly determined on the basis of site-specific conditions set forth in the permit application, which would thereafter be reviewed and approved by PADEP. These site specific conditions could include such factors as project site topography, existing and proposed vegetative cover, soil type, and so forth, thereby allowing the use of riparian buffers to be tailored to the conditions that are actually encountered. The "one size fits all" approach embodied in the proposed amendments ignores the type of technical nuances that are often critically important to the actual effects from various types of earth disturbance activities, and eliminates that possibilities that other approaches may achieve the desired outcomes in less onerous ways.

If the proposed amendments are not modified to remove the requirements imposing a 150 foot wide riparian forest buffer in EV watersheds, we strongly recommend that the mandatory width of the riparian forest buffers be reduced significantly. The proposed amendments do not contain any compelling supporting documentation to justify why a riparian buffer averaging a minimum of 150 feet wide is necessary and how much additional benefit is gained by having a riparian buffer of that width compared to a riparian buffer of 25 feet or less. In addition, we strongly suggest that the proposed amendments include a provision allowing riparian buffers to be waived under circumstances where imposition of riparian buffers are not technically justified, would result in significant hardship on the permit applicant, or would result in the possibility of regulatory taking of private property without just compensation.

2. If Mandatory Riparian Forest Buffer Requirements are Retained, the Proposed Amendments Must be Clarified and/or Revised

While we strongly suggest that mandatory riparian forest buffer requirements be eliminated, if the concept is retained, we believe that it is vital to modify the proposed regulations so that the requirements pertaining to riparian forest buffers can be properly understood by the regulated community and applied by PADEP. Key areas of clarification and/or revisions include the following:

First, if the "project site" is located in both an EV and non-EV watershed, the proposed amendments must clarify that any mandatory riparian forest buffers to be imposed by 25 Pa. Code Chapter 102 should only apply to the property located within the EV watershed, and not to the portions of the project site that are in the non-EV watershed and do not drain into the EV watershed. If the intent of the mandatory riparian forest buffer requirements is to protect EV waters, then it only makes sense that areas located outside of EV watersheds not be encumbered in any way by any type of mandatory riparian forest buffer.

Second, the proposed amendments do not address situations, which will be abundant throughout the Commonwealth, where there are existing structures or activities located within areas that fall within the boundaries of mandatory riparian forest buffers required by the proposed amendments, or structures or activities existing within areas to be designated as riparian forest buffers that are inconsistent with riparian forest buffers but nevertheless were permitted or approved prior to the adoption of the proposed amendments. Because these structures and activities are supported by an investment-backed expectations of time, money and effort by their proponents, as well as the authorization of the governmental entity which provided the permit or approval (to the extent a permit or approval was required), the proposed amendments must be clarified to explicitly state that these structures and activities can be built, maintained, repaired, replaced or reasonably expanded despite any prohibitions which would otherwise be required by the later imposition of a mandatory riparian forest buffer.

This comment is especially meaningful in situations regarding the siting and operation of municipal waste landfills. The Department's existing regulations at 25 Pa. Code § 273.202 set forth areas in which municipal waste landfills are prohibited. The Department's existing regulations also provide an exception to most of the prohibited areas, which exception is generally based on the prior issuance of a municipal waste landfill permit. See 25 Pa. Code § 273.202(b). In addition, features that would otherwise prohibit the siting of a municipal waste landfill, but which come into existence after the date of the first newspaper notice of a new or expanded municipal waste landfill, does not act to prohibit the siting, permitting and operation of the new or expanded municipal waste landfill. Id. at §§ 273.202(d) and (e)

In the same manner, the imposition of any mandatory riparian forest buffer to be imposed by the proposed amendments should not act to prohibit the siting, permitting and operation of a municipal waste landfill that was previously approved, or which was the subject of a newspaper notice prior to the identification of a requirement to create a mandatory riparian forest buffer.

Third, the proposed amendments should be clarified to specify that any requirements that are triggered by the presence of EVs waters means that those waters have a designated use as EV waters as set forth in 25 Pa. Code Chapter 93. PADEP makes a distinction between waters that have a designated use as EV waters, and waters that have an existing use as EV waters. The term "designated uses" is defined by regulation as "those uses specified in Sections 93.4(a) and 93.9a-93.9z for each waterbody or segment whether or not they are being attained." 25 Pa. Code § 93.1. The designated use of each waterbody or waterbody segment has passed through both a scientific and regulatory review process conducted and managed by PADEP, has been subjected to public review and comment, and is set forth in duly promulgated regulations. See 25 Pa. Code § 93.4d. Project proponents, landowners, citizens and governmental entities can easily obtain information on the designated use of a waterway when a project is being considered and permit applications are being prepared.

In contrast, those waters that may qualify as EV based on an existing use are not necessarily listed in Pennsylvania's water quality regulations, and therefore the existing use of a waterbody is not easily obtained by project proponents, landowners, citizens and governmental entities. The term "existing use" is defined by regulation as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Id. In the context of NPDES permitting for stormwater discharged from construction activities,

PADEP typically makes an existing use determination during its review of a permit application. See 25 Pa. Code § 93.4c(a)(1)(iv). PADEP's determination may be in conflict with the designated use for that waterbody on which the proposed project was planned. A determination of existing use made by PADEP is not subject to the regulatory review process, nor is it subject to public review and comment. In short, existing use determinations made by PADEP during permit application review which are in conflict with the published designated use as set forth in the applicable regulations only serve to delay or deny otherwise properly planned projects.

We therefore recommend that if the proposed amendments require a severe restriction on property such as a mandatory riparian forest buffer, the amendments be clarified to state the imposition of a mandatory riparian forest buffer be done based on the waterway's designated use as EV as set forth in the regulations at 25 Pa. Code Section 93.9a-93.9z , rather than its existing use as EV. This suggestion could be achieved by noting in proposed Section 102.14(a)(1)(i) that the activity "is located within an Exceptional Value Watershed as designed in § 93.9a-93.9z; and the project contains . . ."

Fourth, the proposed requirements to enhance, establish and/or manage and maintain any riparian forest buffer is unnecessary, and appears to be at odds with the intention of the proposed amendments to preserve certain riparian forest buffers. In situations in which a riparian forest buffer is required to be designated, the proposed amendments also require that the Post-Construction Stormwater Management Plan ("PCSM Plan") include a plan to establish, enhance, maintain and manage the riparian forest buffer. The entity responsible for the implementation of the PCSM Plan would also be responsible for the management of the riparian forest buffer. Since the intention of the riparian forest buffer requirements is, in part, to create natural areas removed generally from all human activity, then it seems inapposite to require active management on those areas, and force the entity responsible for the implementation of the PCSM Plan to do so. Therefore, if the amendments as adopted include the mandatory imposition of a riparian forest buffer, we suggest that such provisions do not require any active management of the riparian forest buffer, and that the buffer area be generally left in its existing state to undergo natural succession. The proposed definition of the phrase "riparian forest buffer" would be revised accordingly. However, if the creation and width of a riparian forest buffer was voluntary, and reviewed by PADEP on a site-specific basis, then the permit applicant should be able to propose forest management techniques which are consistent with its proposed project and included in the PCSM Plan.

C. Grandfathering and Transition Requirements for Existing NPDES Permits and E&S Approvals

If amendments to 25 Pa. Code Chapter 102 are finalized, they should not apply to the reissuance or renewal of existing NPDES permits and E&S approvals. As noted above, when a project proponent obtains an NPDES permit or E&S approval, there has always been a significant amount of time, money and effort expended to design the project, prepare the E&S Plan and the PCSM Plan, and complete the application forms. For many larger projects, the five year term of the NPDES permit does not provide sufficient time to complete the permitted project. The application of any new, different, or inconsistent requirements found in the amended regulations

could cause a partially completed project to be revised mid-stream, which could have an enormous impact on the viability of the previously permitted project.

To address the problems associated with potentially integrating new requirements into existing projects where permits and approvals that have already been issued need to be reissued or extended, we suggest that the proposed amendments be modified to include transition provisions to describe the manner in which the proposed amendments will be implemented. We strongly recommend that as part of such transition requirements, the regulations explicitly provide that new, different or inconsistent requirements found in the amendments not apply to the reissuance or renewal of NPDES permits or E&S approvals for earth disturbances.

D. Permit Application Fees

The proposed amendments to 25 Pa. Code Chapter 102 propose to dramatically raise the permit application fees associated with erosion and sedimentation control measures and stormwater management requirements. Specifically, under the proposed amendments, the permit application fees will be increased to $5,000 for individual NPDES and E&S permit applications, and $2,500 for general NPDES and E&S permit applications and PBR ROCs. By contrast, the current application fees are $500 for individual permit applications, and $250 for general permit applications. In addition to the increases to the application fees, the proposed amendments also state that Conservation Districts may charge "additional fees" in accordance with the Conservation District Law.

The proposed increases in application fees, amounting to ten times their current levels, are unreasonable and should be reduced. For certain smaller projects and activities which may not qualify for a PBR or general NPDES permit, a $5,000 application fee in addition to the cost increases associated with the preparation of the permit application are unwarranted. The enormous changes in the application fee schedule that have been proposed are unjustified, particularly with the lowering thresholds for requiring permits.

In addition, the proposed amendments leave open the potential for Conservation Districts to charge "additional fees" of unknown amounts. We suggest that any proposed modification to the permit application fees set a "cap" on the total application fees to be imposed by both PADEP and the Conservation Districts. If the Conservation Districts are actually performing the review of permit applications pursuant to cooperative agreements with PADEP, it unfair for PADEP to collect and keep permit application fees for work that the Conservation Districts are performing in the actual review of permit applications, while at the same time allowing the Conservation Districts to charge additional fees for their review of permit applications.

E. PCSM Plans

The proposed amendments to 25 Pa. Code Chapter 102 add a new set of provisions to the regulations governing PCSM Plans. While PADEP has required PCSM Plans as a matter of policy in recent years as part of the NPDES permitting process, there has been no explicit regulatory authority to support such requirements. The proposed amendments to Chapter 102 are designed to close this gap in legal authority.

Requirements relating to PCSM plans are not part of the federal NPDES permit program for stormwater discharges during construction activities. Instead, they are an independent creature of state law. Unlike permitting requirements that apply to stormwater discharges during construction activities which are necessarily of limited duration, requirements associated with managing stormwater from post-construction discharges are potentially of unlimited duration. It appears that once a PCSM Plan has been approved by PADEP and implemented, the proposed amendments to 25 Pa. Code Chapter 102 envision that the requirements will be added to the deed for the property and become an obligation that runs with the land and is imposed on each succeeding property owner. The proposed regulations are completely silent as to what happens if changes are made to the property that obviate the need for post-construction stormwater management BMPs or different BMPs are employed in the future. The proposed regulations fail to recognize the consequences of encumbering property and create the potential for property records to be cluttered with competing and conflicting requirements for BMPs that may become obsolete or unnecessary.

In addition, the proposed requirements relating to PCSM Plans are written so broadly and with so much latitude for interpretation that they create a minefield of potential problems in the context of permitting decisions. For example, 25 Pa. Code § 102.8(b) (proposed) directs that to the extent practicable, management of post-construction stormwater be done so as to, among other things, minimize impervious areas, maximize the protection of existing vegetation, minimize land clearing and grading, minimize soil compaction, and protect, maintain, reclaim and restore the quality of water and the existing and designated uses of waters within the Commonwealth. These type of criteria allow individuals reviewing PCSM Plans, and litigants appealing permit decisions by PADEP, to second guess virtually every element of a proposed project and impose their own subjective views as to whether the criteria have been met "to the extent practicable."

We therefore suggest that the requirements for PCSM Plans be streamlined to identify a limited universe of key objectives to be achieved by PCSM Plans, so that project proponents can then have flexibility to use different combinations of design elements to achieve those objectives. Otherwise, significant amounts of time and energy may be devoted to compiling information and providing analyses within a permit application that may have little overall benefit.

F. Timelines Associated with Permit Application Reviews, Revisions and Decisions

The proposed amendments include a number of provisions which concern the timelines associated with permit application reviews, revisions and decisions. We would make the following suggestions to these provisions.

1. § 102.6(c)(2) (proposed) – This provision states, in part, that if PADEP determines an application or Notice of Intent ("NOI") to be incomplete or containing insufficient information to determine compliance with the regulations, PADEP will notify the applicant, who "shall have 60 days to complete the application or NOI, or [PADEP] will consider the application to be withdrawn by the applicant." Given the scope and complexity of permit applications and NOIs, it is suggested that the proposed amendments provide a much longer time period, perhaps 120 days, to respond to PADEP's comments.

2. § 102.7(c) (proposed) – This provision states that until a permittee receives written acknowledgement of its Notice of Termination ("NOT"), the permittee will remain responsible for compliance with the permit terms and conditions as well as any violations occurring on the project site. Since there is no requirement that PADEP timely act upon NOT submissions, a permittee may be responsible for compliance long after it submitted a NOT and when it no longer owns or controls the property which was the subject of the permit. Therefore, it is recommended that the amendments be revised to state that unless the permittee receives written notification from PADEP within 30 days of the submission of the NOT, a NOT shall be "deemed approved."

3. § 102.15(j) (proposed) – This provision concerns the processing of ROC for PBRs, and states, in part, that PADEP or the Conservation District will "make a determination of coverage within 30 days" of the submission of a complete ROC meeting the requirements of the regulations. However, a "determination of coverage" may be interpreted to mean something other than the formal written issuance or denial of a PBR. Since the PBR process has been developed by PADEP to provide for relatively quick approvals for low impact projects containing riparian forest buffers, we recommend that this provision be clarified to state that PADEP or the Conservation District will inform the applicant for a PBR in writing whether it is covered by a PBR within 30 days of the submission of a complete ROC meeting the requirements of the regulations.