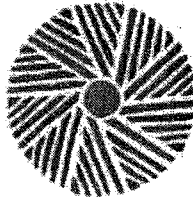


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INDEPENDENT REGULATORY
REVIEW COMMISSION

ENVIRONMENTAL MANAGEMENT CENTER
BRANDYWINE CONSERVANCY

P.O. BOX 141 CHADDS FORD PENNSYLVANIA 19317 • 610/388-2700 • FAX 610/388-1575

November 23, 2009

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477
regcomments@state.pa.us

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ENVIRONMENTAL QUALITY BOARD

RE: Comments on Proposed Chapter 102 Regulations

Dear Environmental Quality Board:

The Brandywine Conservancy's Environmental Management Center is pleased to submit these written comments on the proposed revisions to 25 Pa. Code Chapter 102.

The Brandywine Conservancy has been instrumental in preserving the agricultural, natural, and cultural resources of the Brandywine and adjacent regional watersheds for more than 40 years. Through remarkably successful private stewardship efforts resulting in nearly 45,000 acres of land preserved by conservation easements and through technical assistance to local governments at the site, community, and regional levels, the EMC has worked to keep natural systems in balance with new growth and development. Brandywine's staff of professional planners, landscape architects, and historic and natural resource protection specialists are skilled in comprehensive planning, ordinance writing, open space planning and management, and land development review, using a multidisciplinary approach to land and water conservation that benefits private landowners and municipal planning and management staff.

Stormwater runoff from construction and new development is one of the largest sources of pollution to Pennsylvania rivers and streams. Over 3,600 miles of streams in Pennsylvania are polluted by stormwater runoff from our developed and developing areas. Earth disturbance activities that do not properly control erosion and manage stormwater pollute our streams with nutrients, sediment, and other pollutants, accelerate stream bank erosion and property loss, and contribute to severe flooding.

The Environmental Quality Board (EQB) has proposed new regulations to be administered by the Pennsylvania Department of Environmental Protection (PADEP) for the control of erosion and sedimentation and stormwater runoff associated with new earth

disturbances. These regulations would substantially revise the existing regulations, often referred to as Chapter 102.

The Conservancy, working closely with the Pennsylvania Campaign for Clean Water, would like to make the follow specific comments on the proposed revisions to Chapter 102:

1. The new "permit-by-rule" option should be eliminated.

PADEP proposes the creation of a new "permit-by-rule" option for certain earth disturbance activities which would require PADEP and County Conservation Districts to conduct expedited review of permit applications. We strongly oppose the permit-by-rule. An expedited permit review process puts rivers and streams at risk, is poor policy, and violates core requirements of the Clean Water Act. Particularly problematic are:

- *The applicability of the permit-by-rule option in High Quality (HQ) watersheds.* These watersheds require special protections to ensure that water quality is protected and maintained. Those special protections cannot be ensured through an expedited permit review process. Rather, PADEP should be reviewing such permits carefully and ensuring that the permits require sufficient protections.
- *The applicability of the permit-by-rule in impaired watersheds.* The Clean Water Act requires that PADEP not issue permits for new discharges in impaired watersheds that cause or contribute to the impairment and, for watersheds where Total Maximum Daily Loads (TMDLs) have been approved, NPDES permits are consistent with the waste load allocations set forth in the TMDL. Ensuring that these legal requirements are met requires a much more thorough analysis than what is afforded by an expedited permit-by-rule approach.
- *The lack of provisions providing public participation opportunities.* Notice of permit applications and a minimum 30 day comment period must be provided.
- *The lack of a requirement to conduct a technical review of erosion and sediment control (E&S) plans and post-construction stormwater management plans.* It is absolutely critical for PADEP and County Conservation District staff to conduct thorough technical reviews of the detailed and highly technical E&S and stormwater management plans to ensure that rivers and streams are protected from erosion and stormwater runoff. Such a review is required by the Clean Water Act. Moreover, simply because buffers may be required for projects permitted under the permit-by-rule option does not mean that good stormwater management and overall site design can be ignored. Buffers of 100 feet or greater are only part of an appropriate stormwater management plan. Along with buffers, stormwater management plans must also employ upslope best management practices (BMPs) that seek to minimize disturbance, maximize the use of existing and planted native vegetation and good

infiltrating soils, and treat stormwater runoff at the source – all achieving peak rate, total volume, and water quality stormwater management objectives.. Without requiring technical review of such plans, PADEP cannot ensure that the development will employ these necessary stormwater management practices to adequately control stormwater runoff and prevent pollution.

- *The applicability of the permit-by-rule option for proposed developments that are not near a stream.* The expedited permit review process offered through the permit-by-rule appears to be a tradeoff for requiring streamside buffers. Yet this expedited process would be available to developers who want to develop land that is not within 100 feet of a stream, resulting in the expedited approval of plans for development projects that do not come with the environmental benefits of streamside buffers.
- *The applicability of the permit-by-rule for large developments.* While the permit-by-rule is billed as only applicable for “low risk” sites, it would be available for very large construction sites, as long as only 15 acres are being disturbed at a time. This allows very large projects to receive expedited permit approval without adequate technical review of plans, as long as the construction work is phased in 15 acre increments.

2. Forest riparian buffers should be mandatory for all earth disturbances requiring an NPDES permit.

Forest buffers along our streams provide a wealth of benefits. They filter pollution, enhance the ability of streams to process pollutants, cool streams to offset thermal impacts, reducing flooding and flood damage, increase property values, and help combat climate change.

PADEP is requiring 150 foot forest buffers for new development in Exceptional Value (EV) watersheds only. This is not an adequate buffer requirement and does little to advance the goal of cleaning up our streams. EV streams are our highest quality streams in Pennsylvania, and need greater protection than 150 foot buffers. Buffers of at least 300 feet are needed. Moreover, by limiting the buffer requirement to only EV streams, the requirement would only apply to 1.6 percent of streams in the state. One of PADEP's stated goals for a buffer requirement is to create new forested buffers along streams. However, if buffers are only mandatory for EV streams, then the potential to create new buffers only applies to 0.3 percent of Pennsylvania's streams, since most of these EV streams are already forested.

The regulations should require a minimum 100 foot forested buffer along both sides of *all* streams and rivers for any new earth disturbance requiring an NPDES permit. Minimum 100 foot forested buffers are a key part of any good stormwater management plan and site design for new development. The science is clear that minimum 100 foot forest buffers are required to maximize the many benefits that buffers provide, such as reducing pollution and prevent flooding. Where forest buffers exist along our streams, water

quality is improved, flood waters are reduced, wildlife habitat is provided, and healthier communities are created.

For all new earth disturbance activities that require an NPDES permit, the regulations should be revised to require as part of the post-construction stormwater management plan:

- 100 foot forest buffers on all streams.
- 150 foot forest buffers on small headwaters streams and impaired streams.
- 300 foot forest buffers on all Exceptional Value (EV) and High Quality (HQ) streams, which are our highest value rivers and streams and require special protection under the law.

3. Permittees should bear the legal responsibility of ensuring long term operation and maintenance of post-construction stormwater management best management practices.

As the legally responsible party for meeting permit limits to control stormwater pollution under the Clean Water Act, permit holders of NPDES permits must bear responsibility for ensuring the long term operation and maintenance of post-construction stormwater management BMPs. Individual landowners or homeowner associations cannot be counted on to have the expertise and knowledge to shoulder this legal responsibility and burden.

We believe a good long term option for developers is to enter into long term O&M agreements with County Conservation Districts to administer O&M on a fee for service basis, so that District staff can be supported financially. Districts have the expertise to monitor stormwater BMPs and conduct the necessary maintenance activities to ensure they continue to operate properly.

4. We support the requirement for earth disturbance activities associated with oil and gas development to obtain NPDES stormwater permits.

The proposed regulations require earth disturbance activities associated with oil and gas development to obtain NPDES permits for stormwater discharges associated with construction. We fully support this regulation, as such earth disturbance activities can result in sediment and stormwater pollution during both the construction and post-construction phases, just as with other forms of development. There is no good reason to treat oil and gas developers differently from commercial and residential developers with respect to erosion and sediment control and stormwater permitting.

5. The threshold for requiring an E&S permit for timber harvesting and road maintenance should be reduced to 5 acres.

The current proposal keeps this threshold at 25 acres. Timber harvesting and road maintenance activities of such a large size can result in significant earth disturbance and corresponding potential for accelerated erosion and sedimentation. Reducing the