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PENNSYLVANIA/
DELAWARE CHAPTER

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November 24, 2009

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

Subject: Proposed Rulemaking – Chapter 102, Erosion and Sediment Control and Stormwater Management

Dear Members of the Board:

On behalf of the Executive Committee of the Pennsylvania – Delaware Chapter of the American Society of Landscape Architecture, I would like to offer the attached Policy Statement that provides comments pertaining to the proposed rulemaking referenced above. I have also attached a one-page summary for your use.

Please contact me if you have any questions. My contact information is:

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Sincerely,

Sidney R. Kime, Jr., RLA, FASLA
Chair, Government Affairs Committee
Pennsylvania-Delaware Chapter of ASLA

Enclosures: Summary of Policy Statement (1 page)
Policy Statement (4 pages) with attachments

cc: Rich Rausso, President, Pennsylvania-Delaware Chapter of ASLA

SUMMARY
November 24, 2009

Position Paper of the Pennsylvania-Delaware Chapter of the American Society of Landscape Architects (ASLA)
Re: Proposed Rulemaking – Chapter 102, Erosion and Sediment Control and Stormwater Management

Primary Concerns:

- Record Plan Certification. The certification required by Section 102.8, Subsection (l) pertaining to Record Plans transfers added liability from the contractor, owner and PCSM plan preparer to the licensed professional observing the construction. The certificate is too absolute, especially since a PCSM is not required to be prepared by a licensed professional. By signing the certificate, the licensed professional is assuming a level of liability well beyond the standard of care required by law.

- Permit-by-rule Certification. The certification required by Section 102.15, Subsection (c)(7) pertaining to the E & S and PCSM Plans required by the permit-by-rule have some of the same wording problems as noted with the PCSM Record Plan certificate.

- Responsible Professional. There appear to be inconsistencies in who is permitted to prepare what plans. This may further confuse who is responsible for work performed.
  - In Section 102.1, licensed professional is defined as "Professional engineers, landscape architects, geologists and land surveyors licensed to practice in this Commonwealth."
  - In Section 102.4, Subsection (b)(3), E & S Plans are required to be prepared by "a person trained and experienced in E & S control methods and techniques."
  - In Section 102.5, Subsection (e), the "licensed professional" responsible for critical stages of construction must attend the preconstruction meeting when an NPDES permit is required.
  - In Section 102.8, Subsection (e) a PCSM Plan is required to be prepared by "a person trained and experienced in PCSM design methods and techniques."
  - In Section 102.8, Subsection (k) a "licensed professional" or a designee shall be responsible during critical stages of implementation of the approved PCSM Plan.
  - In Section 102.8, Subsection (l) a "licensed professional" is required to certify the Record Plans.
  - In Section 102.15, Subsection (c)(1) a "professional engineer, geologist or landscape architect" is required to attend a pre-submission meeting prior to submitting an ROC for a permit-by-rule.
  - In Section 102.15, Subsection (c)(7) the applicant is required to retain the services of a "professional engineer, geologist or landscape architect" for preparation of E & S and PCSM Plans to be submitted with the ROC.

- Increase in Permit applications and fees. Section 102.6, Subsection (b)(2) establishes fees that are ten times the current fee. We agree the fees should offset the cost of review and monitoring by the Department, but we disagree with the one cost for all projects. A gradated scale based on the limit of earth disturbance is more appropriate. As proposed, the amount of these fees is out of scale for smaller projects.

Position Paper of the Pennsylvania-Delaware Chapter of the American Society of Landscape Architects (ASLA)
Re: Proposed Rulemaking – Chapter 102, Erosion and Sediment Control and Stormwater Management

The Environmental Quality Board (Board) is proposing changes to the rules and regulations within Chapter 102 pertaining to Erosion and Sediment Control and Stormwater Management. The Government Affairs Committee of the Pennsylvania-Delaware Chapter of the American Society of Landscape Architects has reviewed these proposed changes and would like to make the following comments on behalf of the Chapter Executive Committee:

Section 102.1. Definitions.
Licensed professional is defined as "Professional engineers, landscape architects, geologists and land surveyors licensed to practice in this Commonwealth." However, throughout the text, this term is sometimes replaced by specific references to "professional engineer, geologist or landscape architect". While these references do not adversely affect the landscape architect profession, this wording appears to be an inconsistency by excluding land surveyors from some practices.

Section 102.4. Erosion and sediment control requirements.
Subsection (b)(3) requires that E & S Plans be prepared by "a person trained and experienced in E & S control methods and techniques." We have no issue with this requirement; however, in comments made below, a licensed professional will be required to certify the record plans based on the E & S Plan possibly prepared by a nonprofessional.

Subsection (x) requires a maintenance program that includes inspections to occur on a weekly basis and after each stormwater event; however, stormwater event is not defined. Does this include a half hour drizzle? This term replaces "measurable event", a term that is still somewhat ambiguous, but better than "each stormwater event".

Section 102.5. Permit requirements.
Subsection (e) pertains to the preconstruction meeting when an NPDES permit is required. The licensed professional responsible for critical stages of construction must attend the preconstruction meeting. This is either requiring E & S Plans involving an NPDES permit to be designed by a licensed professional (different than the requirement in Subsection 102.4(b)(3) mentioned previously), or it is requiring a licensed professional to participate in the monitoring of E & S controls even when not designed by a licensed professional. There is a liability issue here if the licensed professional is monitoring an E & S Plan prepared by another individual.

Section 102.6. Permit applications and fees.
Subsection (b)(2) establishes fees that are ten times the current fee. There is no difference whether the project site is 1 acre or 100 acres. While we agree that the fees should offset the cost of review and monitoring by the Department of Environmental

Protection, we disagree with the one cost for all project sites. We believe a gradated scale based on the limit of earth disturbance is more appropriate. As proposed, the amount of these fees is out of scale with smaller developments.

Subsection (c)(2) requires certain time parameters pertaining to processing of NPDES permit applications. If an application is determined to be incomplete, the applicant shall have 60 days to complete the application or the Department will consider the application to be withdrawn and the fees forfeited. There is a concern that this time frame may not provide ample time for resubmission. A small firm, or a firm that is very busy, may not have the resources or time to adequately respond within the 60 days. This will put undue pressure on such firms, especially when their clients are threatened with loss of the application fee.

Section 102.8. PCSM Requirements.

Subsection (e) requires that PCSM (post-construction stormwater management) Plans be prepared by "a person trained and experienced in PCSM design methods and techniques." We have no issue with this requirement; however, in comments made below, a licensed professional will be required to certify the record plans based on the PCSM Plan prepared by a nonprofessional.

Subsection (k) requires "a licensed professional or a designee shall be present onsite and be responsible during critical stages of implementation of the approved PCSM Plan including underground treatment or storage BMPs, structurally engineered BMPs, or other BMPs as deemed appropriate by the Department." This is transferring the liability of the design from the preparer of the plan, and it is transferring the liability for construction from the owner and contractor to the licensed professional.

Subsection (l) states: The permittee shall include with the notice of termination "Record Drawings" with a final certification statement from a licensed professional, which reads as follows:

> "I (name) do hereby certify pursuant to the penalties of 18 Pa.C.S.A. Section 4904 to the best of my knowledge, information and belief, that the accompanying record drawings accurately reflect the redline drawings, are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environmental Protection and that the project site was constructed in accordance with the approved PCSM Plan and accepted construction practices."

We have significant concerns with this certificate. First of all, we believe, as licensed professionals, that we will be taking on undue liability with the wording of this certificate. As worded the certificate goes well beyond the typical standard of care. Secondly, the PCSM Plan is not required to be prepared by a licensed professional, yet a licensed professional is required to sign the certificate after all construction is completed. Finally, we believe we could be taking on added liability if the plan was implemented correctly, but the plan itself was deficient in some manner? Attached is the chapter from

the *DPIC's Contract Guide* pertaining to Certifications, Guarantees and Warranties. DPIC is a well known liability insurer of design professionals. We believe the certificate as written will jeopardize our liability insurance as noted in the attachment. Specific reference is made to the second paragraph on Page V-4 which states the following:

> "By certifying or warranting something, you are assuming a level of liability well beyond the standard of care required by law. As a design, geotechnical or environmental consultant, all you need do is conform to the standard of care as practiced by your peers. And that's what your professional liability insurance covers. By certifying something, you raise that standard of care. If you certify someone else's work, you may be assuming that person's liability too. Under the law, you do not have to guarantee your work or the work of others."

Also refer to the attached November 9, 2009 email from Stephen Whitehorn of the Whitehorn Financial Group, Inc. stating his concern about this certificate.

In addition, to certify to the completeness of the record plans would require a substantial amount of site observation. The Rules and Regulations imply site visits every week and at all critical times. We believe site observation would need to be continual throughout all construction activities, and even then, the design professional would not be able to certify to the degree required by this certificate. Specific reference is made to the third paragraph under "The Problem" in the attached DPIC Contract Guide which states the following (examples are primarily to architecture but are still applicable to stormwater management facilities):

> ". . . you cannot certify that a contractor has correctly placed *all* the rebar in a foundation. Even if you were looking over the contractor's shoulder day and night, you couldn't absolutely guarantee that the contractor had completed *all* aspects of the Work without defect. Similarly, you cannot warrant that a site is free of all toxic materials, even if your Preliminary Site Assessment uncovered no indications of hazardous materials. No matter how thorough you were, you could not have observed or tested every cubic inch of that site. You cannot certify without qualification that a building complies with the ADA, since this is a legal determination, not an architectural or engineering finding. Nor can you certify that a building was constructed in strict accordance with your plans and specifications. You simply do not know that every detail conforms in every respect to your design. You cannot certify that the building was designed and constructed in conformance with all applicable laws, codes and ordinances. It is entirely possible that codes, regulations and rules of various overlapping jurisdictions will conflict with each other, so that compliance with one will mean noncompliance with the other."

<u>Section 102.15. Permit-by-rule for low impact projects with riparian forest buffers.</u> Subsection (c)(1) requires a pre-submission meeting with the Department or the

Conservation District prior to submitting an ROC (Registration of Coverage) for a permit-by-rule. The professional engineer, geologist or landscape architect that will be responsible for the design is required to attend this meeting. This reference is different from the previous references to licensed professionals in Sections 102.5 and 102.8. Again, we are not sure if this change was made intentionally, or whether it was determined by DEP that land surveyors should be excluded from the permit by rule process.

Subsection (c)(7) requires that the applicant "retain the services of a professional engineer, geologist or landscape architect registered in the Commonwealth who shall: (i) Prepare and seal E & S and PCSM Plans to be submitted with the ROC which contain the following certification:"

> "I (name) do hereby certify, pursuant to the penalties of 18 Pa.C.S.A. Section 4904, to the best of my knowledge, information and belief, that the ROC, E & S and PCSM Plans are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environmental Protection."

As with the first certificate in Section 102.8(l), we believe, as licensed professionals, that we will be taking on undue liability with the wording of this certificate.

Finally, as a general comment, we see virtually no advantage in using the Permit-by-rule alternative as described in Section 102.15. Based on the listed requirements, we do not see an incentive with this alternative, and we do not see a cost or time savings for the applicant.

CERTIFICATIONS, GUARANTEES AND WARRANTIES

Architects, engineers and environmental consultants are often asked to certify, warrant or guarantee that something has been accomplished or that certain conditions exist. Such certification requirements may lurk in unsuspected places: in a client-drafted contract, a document from the owner's lender or a form from a governmental agency. Although certifications, guarantees and warranties may be commonplace in a constructor's contract, they have no place in a design or environmental professional's agreement.

THE PROBLEM

By definition, the words *certify, warrant* or *guarantee* mean to assure the total accuracy of something or to confirm absolute compliance with a standard. Legally, these words and their derivatives are virtually synonymous. Therefore, if you certify or warrant something, you are guaranteeing that something is unequivocally true or correct or perfect.

If pushed, you can certify known facts, such as your name, for instance, and your professional registration number. You can certify that you visited a jobsite on a certain date and that you observed certain conditions during your visit — things you know for sure. What you should not do, however, is guarantee something you do not positively know as fact.

This also means avoiding the use of extreme or absolute wording, such as *all* or *every*. For instance, you cannot certify that a contractor has correctly placed *all* the rebar in a foundation. Even if you were looking over the contractor's shoulder day and night, you couldn't absolutely guarantee that the contractor had completed *all* aspects of the Work without defect. Similarly, you cannot warrant that a site is free of all toxic materials, even if your Preliminary Site Assessment uncovered no indications of hazardous materials. No matter how thorough you were, you could not have observed or tested every cubic inch of that site. (See ***Hazardous Materials*** for more information.) You cannot certify without qualification that a building complies with the ADA, since that is a legal determination, not an architectural or engineering finding. (See ***Americans with Disabilities Act.***) Nor can you certify that a building was constructed in strict accordance with your plans and specifications. You simply do not know that every detail conforms in every respect to your design.

You cannot certify that the building was designed and constructed in conformance with all applicable laws, codes and ordinances. It is entirely possible that codes, regulations and rules of various overlapping jurisdictions will conflict with each other, so that compliance with one will mean noncompliance with another. (See *Code Compliance.*)

By certifying or warranting something, you are assuming a level of liability well beyond the standard of care required by law. As a design, geotechnical or environmental consultant, all you need do is conform to the standard of care as practiced by your peers. And that's what your professional liability insurance covers. By certifying something, you raise that standard of care. If you certify someone else's work, you may be assuming that person's liability too. Under the law, you do not have to guarantee your work or the work of others. (See ***Standard of Care*** for more information.) It is important to remember that your professional liability insurance is not intended to cover breach of contract or breach of warranty, the assumption of someone else's liability, or a promise to perform to a higher standard of care than required by law. (See *Insurance* and *Non-Negligent Services* for more information.) What's more, claims against you involving alleged breaches of contract or warranty may be subject to a longer statute of limitations period than would be applicable to claims involving allegations of negligence.

When you certify or warrant or guarantee that something is perfect, you also hand your client an effective weapon to use against you. The smallest error — even if caused by someone else — could produce another cause of action for breach of warranty, which is somewhat easier to prove than professional negligence.

For the same reasons, beware of the "sure" words: *insure, ensure* or *assure.* Once again, if you ensure something is true, you might be setting yourself up for a breach of contract and/or a breach of warranty claim. Even the innocent-sounding words *state* or *declare* (for instance, "I hereby state that the building was constructed in conformance with . . . ") may be interpreted as a warranty. An unequivocal declaration that something is true is tantamount to guaranteeing it.

The Solution

There are several possible solutions available to you. If your client has drafted a contract that requires you to certify, guarantee or warrant anything, or has absolute declarations or statements, your first line of defense is to delete those provisions. Explain why you cannot and should not be expected to expand your liability and jeopardize your insurance coverage. If your client or a lender thrusts a certification form in front of you for signature, you have the right (and should maintain it) to modify the form sufficiently to be insurable. Here is an example of a bad (and uninsurable) client certification form that has been made reasonably acceptable:

CONSULTANT'S ~~CERTIFICATION~~ OPINION

I hereby certify that I am a licensed architect in the State of _____. ~~I further certify~~ To the best of my knowledge, information and belief, the building was constructed in ~~strict~~ general conformance to the plans and specifications and insert, in my professional opinion, is in compliance with ~~all~~ applicable laws, codes and ordinances.

A more aggressive approach is to add a clause to your contract that prevents your client from requiring certifications proposed by anyone. Some clients use fee payments as leverage to force you to sign unexpected certification documents after your contract has been signed and sealed. The following wording would protect you from an attempt to withhold your fees because of your refusal to certify something:

CERTIFICATIONS, GUARANTEES AND WARRANTIES

The Consultant shall not be required to sign any documents, no matter by whom requested, that would result in the Consultant's having to certify, guarantee or warrant the existence of conditions whose existence the Consultant cannot ascertain. The Client also agrees not to make resolution of any dispute with the Consultant or payment of any amount due to the Consultant in any way contingent upon the Consultant's signing any such certification.

A different strategy is to include a contract provision that prohibits any action that would jeopardize your professional-liability insurance coverage. This would also protect you from being forced to sign any documents for the client's lender without your review and consent. (To avoid duplication or conflict, coordinate the following clause with any Lenders' Requirements provision in your agreement.)

Execution of Documents

The Consultant shall not be required to execute any documents subsequent to the signing of this Agreement that in any way might, in the sole judgment of the Consultant, increase the Consultant's risk or the availability or cost of its professional or general liability insurance.

If your contract gives you the right to refuse to sign certification documents that are unreasonable or too risky, you are then in a position to substitute acceptable language. For instance, although you can "certify" facts you know to be true, you cannot sign most broad certification forms because you cannot be certain of all the facts. One way to handle this is to add the words "in my professional opinion" or "to the best of my information, knowledge and belief." This reduces much of the risk of a certification form. After all, as a professional, you are trained and paid to render professional opinions — not to be a guarantor or a surety. This approach is used in the *Application and Certificate for Payment (AIA Form G702).*

Another way to dilute a dangerous guarantee or warranty is to define the offensive terms with the precise meanings you intend. You can either define these dangerous words as they appear or include them in a Definitions section in your contract. (See *Definitions.*) Carefully explain the meaning of *certify* or *declare* or *state* in acceptable terms. For instance:

Definition of "Certify"

As used herein, the word *certify* shall mean an expression of the Consultant's professional opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by the Consultant.

Some public agencies, lenders or owners may insist that the wording on their forms is non-negotiable and must be signed "as is." Most, however, are willing to listen to reasonable explanations of why you cannot "certify" or "warrant" something. A client unwilling to make such an obviously necessary and reasonable change is going to be difficult to work with.

Finally, the federal EPA and several states' civil codes have defined *certification* by law to give some protection to architects and engineers. This may or may not apply to your

jurisdiction or project, however, and you should not depend on such protection. Check with your state professional association or knowledgeable local counsel.

We consider a client's requirement for inappropriate certifications, warranties and guarantees to be a **Deal Breaker**. If you cannot delete or change the clause to your satisfaction, consider walking away from the project.

See Also:

Americans with Disabilities Act
Code Compliance
Definitions
Hazardous Materials
Insurance
Lenders' Requirements
Non-Negligent Services
Standard of Care
Year 2000

Relevant Standard Form Agreement Provisions:

AIA B141-1997:	Articles 1.3.7.8; 2.63
EJCDC 1910-1 (1996 edition):	Article 6
	Exhibit A 2.01A.21
	Exhibit E