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Public Comments
Proposed Rulemaking
25 Pa. Code Chapter 102

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

INDEPENDENT REGULATORY
REVIEW COMMISSION ENVIRONMENTAL QUALITY BOARD

Please find below Herbert, Rowland & Grubic, Inc.'s comments regarding the proposed Chapter 102 Regulations. Questions or responses can be addressed to:

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General #1

The 2006 BMP Manual is no longer current in many areas and DEP has denied a recent attempt to update it using volunteer professionals due to internal funding and staffing constraints. But, Chapter 102 refers to the BMP Manual both explicitly and by using standards from it. Chapter 102 updates can not be founded on a static BMP Manual that doesn't grow with the quickly changing stormwater field. Instead, the BMP Manual must be updated regularly and Chapter 102 needs to be more flexible by allowing the use of other and more current standards found in other reliable guidance. The first update to the BMP Manual must occur before Chapter 102 is finalized.

General #2

Chapter 102 must provide more tools to the designer/owner. For instance, if the project site is unsuitable for infiltration, then allow for in-kind offsite infiltration in the same watershed or BMP trading. If other landowners can not or will not reasonably cooperate, then allow for a contribution to a BMP Bank. In this manner, we would stop forcing infiltration in areas that don't work and actually get better results that we are all looking for.

General #3

DEP, the Conservation Districts and engineering community all need additional training in the quickly changing stormwater field. This will help with better designs and both quicker and more consistent reviews of PCSM plans. PCSM reviews, however, are taking way too long, in excess of 6-12 months for many applications...especially in Special Protection Watersheds. DEP needs to implement a review process that includes hiring consultants to conduct reviews when the money-back guarantee time period of 150 days can not be achieved for Individual NPDES Permits.

- General #4** There is a discussion that says, "...there may be cost savings as a result of eliminating the outdated and unnecessary requirements..." What requirements are being eliminated and how does the Department justify a cost savings to the applicants with new fees and additional requirements?
- General #5** Remove duplicate reporting of area by acres and hectares by deleting all references to hectares...no one uses hectares.
- Section 102.1** Expand definition of "ROC" (registration of coverage).
- Section 102.1** Clarify definition of "nondischarge alternative to be clear that "nondischarge" does not mean "zero discharge".
- Section 102.1** The definition of "perennial stream" is too complicated to understand or to realistically implement. We propose a simpler definition "A stream that flows 12 months per year during an average year."
- Section 102.2.a** Why has the Department decided to implement and enforce post construction stormwater management regulations in Chapter 102 when there are other Department and local programs that already have stormwater regulations? There needs to be one comprehensive set of stormwater regulations instead of the confusing/conflicting current federal MS-4 program, Act 167 program, DEP model ordinance, municipal ordinances, and DEP BMP Manual compounded by the now proposed Chapter 102 revisions. Which one takes precedence? In reality, engineers need to design to the most restrictive of all which leads to overdesign and increased design/construction costs.
- Section 102.4.b.5.iv** Which storm event should the volume and rate of runoff from the project site and its upstream watershed area be presented?
- Section 102.4.b.5.x** BMPs include post construction BMPs. Is it necessary to inspect stabilized post construction BMPs weekly and after each stormwater event and document the inspection? Is it the Department's expectation that individual homeowners who purchase land with a post construction BMP on it have to do inspections and documentation? Are these homeowners educated and qualified to complete such inspections?

- Section 102.4.b.5.xiii** Thermal impacts should be defined and it may be beneficial to provide guidance on the Department's expectation for the evaluation of potential thermal impacts. As currently written, thermal impacts are not defined and will result in court cases. How can you require an engineer to design to a standard that is not defined?
- Section 102.5.e** Does the term "permit" in this section include an E&S Permit or only a NPDES Permit?
- Section 102.5.e** Clarify – A pre-construction meeting would not be required if 0.90 acres of disturbance is proposed, since an NPDES permit would not be required, although an E&S Plan would need to be approved. Certain conservation districts required pre-construction meetings even for projects that do not require a NPDES permit.
- Section 102.5.i** Clarify – If an applicant is required to obtain a Section 404 Permit and a Water Obstruction and Encroachment Permit, does this section mean that an E&S approval and NPDES Permit is not required to be obtained? An example would be a bridge replacement project.
- Section 102.6.a.1** "Other information the Department may require" – Should all pertinent information the Department may review be included in the proposed regulations? Would this "catch all" requirement open the door for reviewers to ask for irrelevant and sometimes costly information that does not significantly affect the proposed BMPs and plan?
- Section 102.6.a.3** How can a PPC Plan be prepared during an initial design of a site if the design professional does not know who or by what means the construction of the site will be completed? Should PPC plans be prepared by contractors who know what equipment and supplies will be onsite, prior to the commencement of an earth disturbance activity?
- Section 102.6.a.3:** Clarify if PPC plans have to be submitted for review?
- Section 102.6.b:** Are conservation districts still going to charge resubmission fees based on a percentage of the initial application fee?
- Section 102.6.b.2** Why are Pennsylvania municipalities required to pay the permit application fees when they are exempt from application fees for other Department activities? Municipalities need to remain exempt from permit application fees.

- Section 102.6.b.2** Would a sliding fee schedule, based on area of disturbance be a more practicable way to assess fees on applicants?
- Section 102.6.b.2** With the increased fees, should the Department formulate a money-back guarantee program to ensure timely reviews and issuance of permits?
- Section 102.6.c.1** Should the specific requirements under the Clean Streams Law be listed that the Department would like to see in order for the application or NOI to be considered complete?
- Section 102.7.b.5** How can a NOT be submitted by a developer (or contractor) who has installed all post construction BMPs on a site, but has not yet sold lots to individual homeowners, as this new section requires an identification of persons who will be responsible?
- Section 102.8.b.3:** This section states that for PCSWM, the applicant is to "minimize any increase in stormwater runoff volume". Does that mean that a small increase may be acceptable? What would an acceptable increase be?
- Section 102.8.f.4** Which storm event should the volume and rate of runoff from the project site be presented?
- Section 102.8.g.2** Define "current" in "current Act 167". Does that mean an Act 167 plan approved after a specific year or a plan that contains certain criteria?
- Section 102.8.g.2** If there is conflicting criteria in the Act 167 plan and Chapter 102, which one controls? For example, if the Act 167 plan contains no stream buffer or a 50' buffer for all streams, will Act 167 control or will Chapter 102 control and require no buffers except for a 150' buffer in EV watersheds?
- Section 102.8.2** Chapter 102 is using control guidance 1 (CG-1) from the 2006 BMP Manual that was never intended to be codified by the members of the BMP Manual Committee! CG-1 over infiltrates in most cases creating many problems including setting a standard that often can't be achieved resulting in uneven and unknown implementation by DEP and Conservation Districts; forcing infiltration above what happens naturally that will likely result in sinkholes, leaking basements, groundwater contamination; and unnecessary design and construction costs. Instead, some form of CG-2 from the BMP Manual or capturing 90% (or some other appropriate %) of the average annual rainfall needs to be added as an equal alternative in all cases. There is currently a group of professionals reviewing CG-1 and CG-2 and making recommendations to DEP. It will be a huge mistake to blindly codify CG-1.

- Section 102.8.g.3** The BMP Manual suggests controlling the peak rate of runoff for the 1-year storm in addition to the other storms. Should the 1-year storm be added to this Section?
- Section 102.8.g.2** As Act 167 plans are now being completed by counties, should the word "watershed" be removed and the wording be "Act 167 Stormwater Management Plan"?
- Section 102.8.g.3** As Act 167 plans are now being completed by counties, should the word "watershed" be removed and the wording be "Act 167 Stormwater Management Plan"?
- Section 102.8.h** The ABACT BMPs are referenced to the PABMP Manual which is a different reference than in Section 102.4.b.6 (E&S Manual).
- Section 102.8.k** Who is responsible for ensuring that a licensed professional is present during critical stages of implementation? The design engineer may not be under contract with the developer at the time of construction. In addition, who determines what "critical stages of implementation" are?
- Section 102.8.l** How can a licensed professional provide a certification statement on Record Drawings if they are not on-site at all times? Would this certification better be signed by the contractor or permittee, in lieu of a licensed professional?
- Section 102.8.l** As licensed professionals are required to seal drawings, would it be beneficial to have similar qualified licensed professionals review the applications at the Department or conservation district?
- Section 102.14.a.1.i** The implementation of a 150' buffer will be very difficult. Some of the literature suggests that a smaller buffer would be just as beneficial. We would recommend a buffer closer to 50' from top of bank which would be consistent with the restrictions already in place in Chapter 105 through the implementation of the 50' floodway rule.
- Section 102.14.a.2** Clarify exactly what other rules, regulations, order, permit or other approval of the Department requires a riparian forest buffer.
- Section 102.14.a.4** Clarify the Department's expectation in regards to removing or controlling noxious weeds and invasive species. Guidance should be provided.
- Section 102.14.a.5** Should this section reference paragraph (4) instead of (3)?

- Section 102.14.a.6** Does this section conflict with Section 102.14.a.1? If not, it should be reworded to better clarify the intent.
- Section 102.14.b.2.ii** Clarify how Zone 2 is measured "horizontally on a line perpendicular from the top of streambank or normal pool elevation". If Zone 2 starts on the edge of Zone 1, it would not be near the streambank or normal pool.
- Section 102.14.c** Clarify the intent of the maximum 10% variation.
- Section 102.14.d.1:** Clarify this section as it is unclear if the riparian buffer requirement is only for EV watersheds, permit-by-rule, or any site with a river traversing it.
- Section 102.14.d.1:** If a site abuts a stream, clarify if you have to provide a riparian buffer on "both sides" if your site is not on both sides of the stream. Or, if your site is on both sides of a stream, but you are only proposing disturbance on one-side, is a buffer required on both sides? Or, what if your site is within the required buffer distance, however, there is another property in between your site and the stream?
- Section 102.14.f.2** Clarify if "identification" and "clearly marked" refer to the field conditions and how does the Department want the buffers marked?
- Section 102.14.g** Clarify how often the reports need to be submitted.
- Section 102.14.g:** Where can the data forms for riparian forest buffers be found?
- Section 102.15:** Permit by rule – Besides the proposed 30-day review time, clarify the benefits of this process. It does not appear that the process is simplified any.
- Section 102.15:** Provide the Department's definition of "low impact".
- Section 102.15.b.2.ii** Clarify which specific geological formations are exempt from coverage under the permit by rule.
- Section 102.15.b.2.iii** Does this section mean that if you apply for a Water Obstruction and Encroachment or General Permit that impacts wetlands or floodplains -- you still qualify for coverage under the permit by rule?

- Section 102.15.b.5** Clarify what the Department means by "adversely affecting a PA or federal endangered or threatened species". How/who makes that determination?
- Section 102.15.c.1:** When will the ROC checklist be available for review?
- Section 102.15.c.1.ii** When will the ROC presubmission meeting checklist be available for review?
- Section 102.15.c.6** Should the 1-year/24-hour storm event be included in the analysis to be consistent with requirements of the Department's BMP Manual?
- Section 102.15.c.7.iii** Clarify exactly what constitutes "oversight". Has the Department considered the professional's obligations, authority, and liabilities under this provision? What is the Department's opinion on the impact on the liability exposure to professional firms, as well as the liability of the individual licensed professional? How does the Department expect a professional to control site operations if they are not under contract with the contractor?
- Section 102.15.d.1:** Regarding impaired watersheds, the link to the Chapter 303(d) list on the Department's website appears to be down and not functioning. The Department should have a user-friendly data base for impaired streams.
- Section 102.15.d.1:** If non-discharge BMPs are required, and are being used to protect water quality, why does the Department feel the additional need for riparian buffers?
- Section 102.15.i.5:** What are the Department's intents/actions going to be with the comments generated from the public comment period for high quality watersheds?
- Section 102.15.l.1** Clarify in what situations the Department would revoke coverage under a previously approved permit by rule.
- Section 102.22.b.1** This will be interpreted that all areas left disturbed for more than 3 days must be seeded and mulched which is unrealistic.

