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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

December 30, 2009

Honorable John Hanger, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-440 (IRRC #2783)
Environmental Quality Board
Erosion and Sediment Control and Stormwater Management

Dear Chairman Hanger:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Mary Jo White, Majority Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-440 (IRRC #2783)

Erosion and Sediment Control and Stormwater Management

December 30, 2009

We submit for your consideration the following comments on the proposed rulemaking published in the August 29, 2009 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

**1. Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.
(71 P.S. § 745.5b(b)(4))**

In a letter dated November 30, 2009, Majority Chairman of the House Environmental Resources and Energy Committee, Representative George, provided extensive comment expressing his “grave concern” with the proposed permit-by-rule option and calls upon the EQB to “remove it in its entirety.”

Individual letters were submitted by legislators in favor of riparian forest buffers, but requesting rigorous review of permits. These legislators include three members of the House Environmental Resources and Energy Committee, Representatives Houghton, Santarsiero and Vitali, along with Representatives Freeman, Grucela, Josephs, Lentz, McIlvaine Smith and Vereb. Representative Eachus also commented in support of riparian forest buffers.

In addition, a joint letter dated December 9, 2009, was submitted and signed by 18 members of the House of Representatives recommending that the EQB “withdraw this regulation in its entirety.” That letter was signed by Representative Hutchinson, Republican Chairman of the House Environmental Resources and Energy Committee, five members of the House Environmental Resources and Energy Committee, Representatives Pyle, Causer, Vulakovich, Everett and Gabler, and by House of Representative members Stern, Oberlander, Stevenson, Kauffman, Roae, Cox, Swanger, Metcalfe, Brooks, Rock, Helm and Sonney. They state a general concern that the proposed regulation will hinder development and increase the costs to design and

implement projects. In regard to riparian forest buffers, they “believe this would be a major shift in policy which would in effect, amount to a taking of property without legislative oversight or approval.” They are also concerned with the provisions for permit-by-rule, the effect on renewal of National Pollutant Discharge Elimination System (NPDES) permits and the increase of fees.

Senator Mary Jo White, Chairman of the Senate Environmental Resources and Energy Committee, commented in favor of the permit-by-rule, opposing riparian forest buffers and requesting more information on the proposed fees.

In our determination of whether a regulation is in the public interest, the Commission must consider the criterion of “Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.” (71 P.S. § 745.5b(b)(4))

Despite the environmental benefits and preservation of the Commonwealth’s natural resources envisioned by the proposed regulation, the regulation proposed by the EQB raises very significant concern regarding this criterion because its requirements:

- Are of interest to a total of 30 members of the Pennsylvania Senate and House of Representatives, most of whom oppose provisions in the regulation. Included among the legislators raising concerns are the leadership of the Senate and House Environmental Resources and Energy Committees.
- Impose significant costs and operational burdens on other state agencies;
- Significantly affect business, industry and farming in the Commonwealth;
- Raise significant problems and potential litigation relating to property ownership including land use, leases, rights of way, easements and maintenance;
- Increase operating costs and rates for electric and gas utility services and potentially affect their reliability;
- Impose requirements for perpetuity; and
- Impose significant economic impacts that appear to not have been considered by the EQB in its description of costs.

We acknowledge both the intent to enhance environmental protection and the public comments submitted in support of the regulation. At the same time, the

EQB has not fully contemplated the regulation's impact beyond its environmental benefit. Our specific concern relates to the breadth of the issues raised by commentators. Provisions in the EQB's proposal significantly affect a multitude of persons, entities and their interests. For these reasons, we believe the regulation represents a policy decision of such a substantial nature that it requires legislative review. To satisfy this criterion, we recommend that the EQB submit this regulation, along with a full and balanced explanation of its impacts, for legislative consideration before proceeding with a final-form regulation.

2. Economic or fiscal impacts of the regulation. (71 P.S. § 745.5b(b)(1))

In the Preamble, the EQB describes extensive outreach in the development of this regulation in the section titled, "Public Participation and Outreach." The Preamble also includes a section titled, "Compliance Costs" which states:

These regulatory revisions should not result in significant increased compliance costs for persons proposing or conducting earth disturbance activities. Moderate increased costs may be incurred due to: increased permit application fees for activities requiring permits; PCSM [Post Construction Stormwater Management] Plan licensed professional oversight and preparation of record drawings; and long-term operation and maintenance of PCSM facilities.

Generally, there may be cost savings as a result of eliminating the outdated and unnecessary requirements, while increasing the protection of this Commonwealth's valuable water resources. Additionally, the emphasis in the proposed rulemaking on nonstructural "low-impact" stormwater management approaches should result in lower long-term operation and management costs. The permit-by-rule may provide the regulated community cost savings through a new permitting option that provides a definitive timeframe for review and determination of coverage.

Despite the public outreach conducted in developing this regulation, the EQB's evaluation of compliance costs is, by and large, discredited and contradicted by the comments submitted by other state agencies, associations and individual businesses. Many of these entities are listed by the EQB as stakeholders and part of its outreach in developing the proposed regulation. These public comments describe extensive impacts from the regulation. We strongly recommend that the EQB work directly with all of the commentators to explore and address economic and fiscal impact. The EQB should present its findings in the final-form regulation so that the public, state government, local government, the legislature and this Commission can evaluate the full impact

of the costs imposed by the regulation in considering whether the final-form regulation is in the public interest.

Direct and indirect costs to the Commonwealth and to its political subdivisions

The direct and indirect costs to the Commonwealth must be evaluated. The Department of Transportation and the Department of Conservation and Natural Resources commented on their respective concerns with the regulation. As discussed below, the Public Utility Commission is also affected by this regulation. We also believe there will be an impact on local government that was not fully evaluated.

The Department of Transportation comments are extensive stating, among many issues, that the regulation will increase their agency's costs due to several provisions. Those concerns include the scope of the regulation, the effect on many miles of roadways along streams, forced purchase of land or acquisition of conservation easements, increased design and construction costs, the requirement for maintenance in perpetuity, site stabilization requirements, cover types required, studies, delays caused by required meetings, maintenance of roadways and bridges, potential increase in the length of bridges to accommodate required buffer areas and multiple permit fees.

Based on the impacts described by the Department of Transportation, we believe it is reasonable to conclude that there are similar impacts on any political subdivision that owns, builds and maintains roads along streams. We question, for example, how many miles of local roadways would be affected by the regulation and how that may affect local governments who must comply with the regulation's requirements. This information is needed for a full evaluation of the regulation's impact on local government.

The Department of Conservation and Natural Resources commented that permit fees may affect the viability of a project and that it is concerned it will not have the time or staffing resources to fulfill the requirement of Section 102.14(e)(5)(iv) that requires Department of Conservation and Natural Resources approval.

Additionally, while it did not comment, the Public Utility Commission would be affected by the proposed regulation. Costs for riparian forest buffers will be passed on to utility ratepayers according to the comment of the Energy Association of Pennsylvania. There are also safety, reliability and indirect cost concerns because the riparian forest buffer requirements contradict existing safety requirements that require utilities to keep gas and electric lines clear of woody brush.

The direct and indirect costs to the Commonwealth and its political subdivisions must be fully evaluated. The findings of this evaluation must be included with the submittal of the final-form regulation.

Direct and indirect costs to the private sector

The direct and indirect costs to the private sector must be evaluated. Many cost issues were raised by commentators, including, in alphabetical order:

- Energy Association of Pennsylvania,
- Marcellus Shale Committee,
- PennAg Industries Association,
- Pennsylvania Builders Association,
- Pennsylvania Chamber of Business and Industry,
- Pennsylvania Coal Association,
- Pennsylvania Farm Bureau,
- Pennsylvania Forest Products Association,
- Pennsylvania Oil and Gas Association, and
- Pennsylvania Waste Industries, Inc.

Among the many concerns raised, cost issues related to riparian forest buffers, burdensome permit-by-rule requirements, a multitude of property issues (e.g., restriction of land use without compensation, leases, land acquisition, retroactive application of the regulation, the effect on agriculture in general and the effect on use of agricultural land), maintenance and restriction in perpetuity, studies, meetings, the definition of “animal heavy use areas,” distinction from nutrient management regulations, permit fees, returning streams to “existing use,” possible lack of public notice of stream classifications and the impact on the state forest industry. These public comments describe extensive direct and indirect costs to the private sector. The EQB must fully evaluate these costs. The findings of this evaluation must be included with the submittal of the final-form regulation.

Adverse effects on prices of goods and services and competition

Related to the direct and indirect costs is the effect on prices of goods, services and competition. There were many comments by associations whose ultimate concern is the effect on their businesses. The Energy Association of

Pennsylvania stated costs would be passed on to ratepayers. Pennsylvania Waste Industries, Inc. outlined costs that would be passed on to consumers. The price of farm products would be affected if farmers lose the use of lands, and furthermore continue to pay taxes on that land. The Pennsylvania Builders Association stated the regulation would affect development. The Pennsylvania Forest Products Association commented that the regulation threatens the future viability of the state's forest products economy. The Pennsylvania Coal Association commented that if the regulation is applied to its members it would suffer a competitive disadvantage from coal produced in other states. The EQB should fully evaluate the effect of the regulation on the prices of goods, services and competition in Pennsylvania. The findings of this evaluation must be included with the submittal of the final-form regulation.

Nature of required reports, forms or other paperwork and the estimated cost of their preparation; Nature and estimated cost of legal and consulting services

There were many comments relating to these criteria. The comments include general concerns, such as the planning and implementation of earth disturbance activities could become an avenue for third-party attacks on any plan, implying increased legal costs. There are concerns with confusion and possible duplication between erosion and sediment control plans and post construction stormwater plans. Commentators questioned the relationship between proposed Chapter 102 and existing regulations in other chapters. The comments include concerns with details such as the change of wording from a "stormwater event" to "measurable rainfall." The regulation also includes requirements for preparation of plans by trained persons, evaluation of thermal impact, inspection reports, monitoring records, studies, meetings and oversight. Under Section 102.7(k), a licensed professional or designees must be onsite during critical stages of implementation of a Post Construction Stormwater Management (PCSM) Plan. The EQB should evaluate the costs imposed by the requirements that will require legal and consulting services. The EQB should also evaluate the cost of reports, forms and paperwork required to comply with the regulation.

In summary, relating to the criterion of economic and fiscal impact, the EQB should fully evaluate the compliance costs of the regulation described by the commentators along with any other impacts. The EQB should use this evaluation to present a comprehensive, accountable review of the persons and entities impacted by the final-form regulation and the costs imposed by the final-form regulation. We will review and consider these impacts in our determination of whether the final-form regulation is in the public interest.

3. Need for the regulation; Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources. (71 P.S. § 745.5b(b)(2) and (3)(iii))

The Preamble states that:

...Since 1972, earth disturbance activities related to agricultural plowing and tilling, as well as, non-agricultural earth disturbance activities have been regulated under this chapter by requiring persons to develop, implement and maintain BMPs [best management practices].

The proposed amendments elaborated in this preamble, incorporate specific language which enhance requirements related to agriculture; clarify existing requirements for accelerated E&S control; incorporate updated Federal requirements; update permit fees; codify PCSM requirements; add requirements related to riparian forest buffers; and introduce a permit-by-rule option.

Several commentators challenged the need for the rulemaking. Commentators stated that existing regulation has been sufficient to protect Pennsylvania's waters from erosion, sediment and stormwater. While the regulation may represent an upgrade of protection, the EQB should explain the specific problems the regulation addresses. For example, is there a documented widespread erosion, sediment control and stormwater problem that demonstrates the need for the regulation? The EQB should provide an explanation of the need for this regulation.

Additionally, the Department of Transportation requested an exemption provision for purposes of protecting the public safety on roadways. The Department of Transportation also contends that over time, a riparian forest buffer may produce large trees and debris that could block streams and flood roadways. The EQB should evaluate these concerns, explain the balance of protecting the environment versus the public safety of roadways, and amend the regulation as appropriate.

4. Water Resources Advisory Committee Issues

The Water Resources Advisory Committee asked the EQB to solicit input on three issues. We commend the Water Resources Advisory Committee for the cogency of the three key issues it raised. The Water Resources Advisory Committee understood and anticipated the controversy of these three issues: permit-by-rule, long-term maintenance of PCSM and riparian forest buffers. For example, virtually the full spectrum of interested parties who commented on the permit-by-rule provision found the EQB's proposal to be fatally flawed either in its protection of the environment or in its practicality for a potential

permit holder. Given this insightful guidance, we request an explanation of what factors caused the EQB to override its advisory committee and move forward with the regulation without further consideration of these issues. We will consider the EQB's response as part of our determination of whether the final-form regulation is in the public interest.

Scope of the permit-by-rule

It is clear from the comments of the Environmental Protection Agency, legislators and the public that these parties find the permit-by-rule, as proposed by the EQB, not acceptable to protect the environment or useful to potential permit holders. Majority Chairman of the House Environmental Resources and Energy Committee, Representative Camille "Bud" George provided extensive comments on why the proposed permit-by-rule is not acceptable. Several other committee members and legislators also questioned this provision. The EPA commented that the permit-by-rule does not satisfy the Clean Water Act unless it meets 40 CFR 122.41. Many public comments in general support of the regulation also included opposition to the permit-by-rule provision. Entities who would actually be the permit holders find that the permit-by-rule has devolved to such a point that the attendant restrictions, conditions and timeframes have all but eliminated its usefulness. We recommend deleting the permit-by-rule provisions.

Responsibility for long-term PCSM operation and maintenance

In its Preamble, the EQB states that "assignment of long-term O&M responsibility for PCSM has been, and continues to be, a challenging issue for the Department [of Environmental Protection] and the regulated community." The public comment on this regulation has raised a multitude of complex considerations including economic impact on projects, economic impact on land owners, subsurface leases, rights of way and many other considerations. Some commentators raised a reasonable question as to why there even needs to be long-term operation and maintenance for many projects that restore the soil to its pre-disturbance condition. The EQB should explain the need for long-term maintenance, why it is reasonable to extend it beyond soil stabilization on the project site and how the final-form regulation represents a legally viable, economical, reasonable and feasible assignment of responsibility.

Mandatory Riparian Forest Buffers

While riparian forest buffers may present a very good solution from an environmental perspective, as proposed by the EQB these buffers clearly raise many issues of cost, reasonableness and practicality. Based on public comment, including the Department of Transportation, the economic impact of riparian forest buffers has not been properly developed, represented or addressed. It raises issues that are in some cases indistinguishable from the

issues raised with long-term PCSM operation and maintenance including economic impact on projects, economic impact on land owners, land ownership rights, subsurface leases, rights of way, land use taking without compensation and many other considerations. We also question why this particular BMP rises to the level of regulation while the many other BMPs do not. The EQB should explain the need for riparian forest buffers in regulation and why they are mandated in certain circumstances over other potential BMPs. It should also provide a full explanation of their impact including the impact on state government, local government, land owners, lease holders, utilities, and taxes.

5. Relationship of Chapter 102 to other regulations, decisions and laws.

Several comments included concerns about the relationship of Chapter 102 to other chapters in Department of Environmental Protection (DEP) regulation including Chapters 78, 92, 93 and 105. The Pennsylvania Coal Association does not believe Chapter 102 applies to its members' operations because their operations are regulated by DEP's Bureau of Mining and Reclamation. In its comments on Section 102.4(b)(6) and 102.8(h), the Pennsylvania Chamber of Business and Industry lists several decisions by the Environmental Hearing Board. These decisions emphasize the importance of the relationship between different chapters under DEP regulation. Additionally, the Pennsylvania Oil and Gas Association cites an exemption of oil and gas activities from NPDES permitting in the Federal Energy Policy Act of 2005.

The EQB should explain how it considered decisions by the Environmental Hearing Board in the development of this regulation. The EQB should also explain how the regulated community, DEP and the Environmental Hearing Board can properly distinguish Chapter 102 from or integrate Chapter 102 with other chapters of regulation under DEP. It should add language to Chapter 102 to more clearly explain its relationship to or distinguish its requirements from other chapters.

6. Public comment and the need for an advanced notice of final rulemaking.

More than 1,300 comments were submitted in support of the regulation citing improved environmental benefits from requirements such as buffers. At the same time, many of those supportive comments included opposition to the permit-by-rule provisions. Additionally, the proposed regulation raised many serious concerns from legislators, state agencies and trade associations on a broad range of issues. Should the EQB wish to proceed, we suggest that prior to submittal of a final-form regulation, the EQB allow for public comment on its amended final-form regulation in the form of an advanced notice of final rulemaking. This will allow the EQB to discover and address remaining concerns with the regulation prior to submittal of a final-form regulation.

7. Section 102.1. Definitions. – Need; Reasonableness; Clarity.

Agricultural plowing or tilling activity

Subsection (ii) states the term includes “no-till cropping methods.” What specifically are “no-till cropping methods”? Also, Subsection (ii) is confusing because it includes “no-tilling” under the defined term “tilling activity.” Also, the term “agricultural plowing and tilling” is used to describe exemptions throughout the regulation, including for example, Section 102.4(b). Therefore, “no-tilling” should be grouped together with the other activities. However, the EQB should consider replacing the term “agricultural plowing and tilling activities” with another term that is clearer, but still encompasses the same activities.

Animal heavy use area

Several commentators believe this definition needs to be clarified regarding entrances and pathways used by animals to access keeping areas. The EQB should review this definition to evaluate the areas it needs to include and amend the definition as appropriate.

BMPs – Best management practices

The EQB has added the phrase “before, during, and after earth disturbance activities.” The addition of the phrase “after the earth disturbance activity” is open ended, particularly as it relates to earlier phrases such as “manage stormwater” and “reclaim and restore the quality of waters.” The EQB should explain why and how long BMPs must continue after earth disturbance activities.

Diversion

The word “offsite” may not be needed and would limit “diversions” to waters “offsite.” There may be instances when the clean runoff water comes from onsite. The EQB should explain the need for the word “offsite.”

E & S Plan – Erosion and Sediment Control Plan

The wording is amended from “identifying” BMPs to requiring “both drawings and a narrative that identifies” BMPs. Are drawings and a narrative needed for all plans? The EQB should explain the intent of this change and how the regulated community is expected to comply with it.

Additionally, the amended definition ends with “before, during and after earth disturbance activities.” Given the definition of “earth disturbance activities” why is it necessary to include the word “before”? Also, given the requirements under Post Construction Stormwater Plans, why is it necessary for the E & S

Plan to address erosion and sediment after earth disturbance activities, particularly after the soil is stabilized? How long after the earth disturbance must the plan address?

Intermittent stream

This definition is not clear. What specifically is the meaning of the phrase “composed primarily of substrates associated with flowing water”? What degree of composition does “primarily” imply? Are “substrates associated with flowing water” specific types of soil and rock? Also, could the flow come from surface runoff and not groundwater discharges? The EQB should review this definition for clarity.

Licensed Professionals

We question the general description of “professional engineer” in that professional engineers cover a broad range of specialties, including electrical and mechanical engineers. We recommend limiting professional engineers to those who have the appropriate expertise.

Nondischarge alternative

There are two vague phrases in this definition. First, the phrase “preexisting stormwater volume” is not clear. Why is the word “preexisting” needed and what does it imply?

Second, it is not clear what standard is imposed by the phrase “environmentally sound and cost-effective.” The definition should clearly describe what constitutes a nondischarge alternative.

Perennial stream

What specifically is the meaning of the phrase “composed primarily of substrates associated with flowing waters”? What degree of composition does “primarily” imply? Are “substrates associated with flowing waters” specific types of soil and rock? The EQB should review this definition for clarity.

Point source

The Environmental Protection Agency (EPA) commented on concern with Subsection (iii), which excludes sheet flow. The EQB should review and comply with EPA’s concern.

PPC Plan – Preparedness, Prevention and Contingency Plan

What degree of “external factors” must a PPC plan accommodate?

Riparian forest buffer

There are four clarity concerns in this definition. First, it is not clear how the phrase “permanent vegetation” can be consistent with the phrase “natural state.” Natural acts, such as fires, floods and wildlife activities, destroy vegetation. Would the phrase “permanent area for natural vegetation” be clearer and sufficient?

Second, how can the standard of “predominantly native trees, shrubs and forbs” be measured?

Third, what is meant by the phrase “maintained in a natural state”? A “natural state” implies an area that is not “maintained.” Should the word “protected” be used rather than “maintained”?

Finally, the definition is vague because it does not specify what is meant by the alternative phrase “or sustainably managed.” If riparian forest buffers include management in anything other than a natural state, the regulation should clearly state what BMPs meet the alternative to “sustainably manage” a riparian forest buffer.

Road Maintenance activities

This term is defined in existing regulation as “Earth disturbance activities within the existing road cross-section, such as grading and repairing existing unpaved road surfaces, cutting road banks, cleaning or clearing drainage ditches and other similar activities.” The term is used in the proposed regulation throughout Section 102.5. The Department of Transportation believes this definition is too vague and requests clarification. The EQB should review this definition for clarity.

Surface waters

Why is this definition needed in addition to the existing definition of “waters of this Commonwealth”? Having two very similar definitions can be confusing. The EQB should explain why both are needed and the difference that is intended between them.

8. Section 102.2. Scope and purpose. – Clarity; Reasonableness.

The Pennsylvania Chamber of Business and Industry, along with other commentators, asked for clarification regarding the scope of post construction stormwater management where the project is restored to preconstruction conditions. The EQB should add language to this section describing when an entity has satisfied the requirements of Chapter 102.

The Pennsylvania Coal Association commented with its interpretation that “mining activities permitted under the Pennsylvania Department of Environmental Protection, Bureau of Mining and Reclamation need not obtain an Erosion and Sediment Control Permit...” If this is the EQB’s intent, we recommend adding language to this section explaining that intent.

9. Section 102.4. Erosion and sediment control requirements. – Reasonableness; Need; Implementation procedures; Clarity.

Animal heavy use area

The phrase “animal heavy use area” is added throughout Subsections (a) and (b). The EQB should explain the need to regulate animal heavy use areas and the reasonableness of the requirements.

Implementation procedures

Paragraph (b)(4) specifies requirements using the words “maximize” and “minimize” for requirements. These provisions are subjective. We question how these vague requirements can be met or implemented consistently by conservation districts. How can a conservation district discern at what point it must seek DEP approval of the proposed activity? We recommend that the EQB review this provision and amend it so that the requirements can be discerned from the regulation.

Reclaim and restore

Subparagraph (b)(4)(v) requires an earth disturbance activity, to the extent practicable, to “protect, maintain, reclaim and restore the quality of water...” A commentator believes this could be read to place responsibility for water quality restoration on a project that did not cause the degradation. We agree that the words “reclaim and restore” imply either that the earth disturbance was allowed to be conducted incorrectly or that a higher duty is placed on the permit holder than may be reasonable. The same concern applies to Sections 102.8(b)(9) and 102.11(a)(2). The EQB should amend these provisions or explain why they are reasonable.

Volume and rate of runoff

Clause (b)(5)(iv) requires an E & S Plan to include the volume and rate of runoff. Since volume and rate are relative to rainfall, the regulation should include what rainfall parameters are to be used in this determination.

Measurable rainfall

Clause (b)(5)(x) deletes the phrase “measurable rainfall event” and replaces it with “stormwater event.” Commentators believe that “measurable rainfall

event” is clearly understood and should be retained. The EQB should explain the need for the amendment.

The Energy Association of Pennsylvania requests that the EQB consider the nature of its multi-mile linear projects in relation to storms and inspections. The Department of Transportation has similar projects. We agree that inspection on a weekly basis after each stormwater event may be impractical in relation to these “linear” projects that may cover many miles, but only be several feet wide. The EQB should consider amending this provision to accommodate the types of projects described by the commentators.

In addition, a commentator questions the need for the requirement to complete a “written report documenting each inspection.” Would only requiring documentation of the inspections be sufficient?

Thermal impacts

Clause (b)(5)(xiii) requires an evaluation of the potential for thermal impacts to surface waters from earth disturbance activities. Commentators state there is no guidance on how to meet this requirement. One commentator believes that rather than an evaluation they should only be required to identify the potential for thermal impacts. We recommend that the regulation clearly state what evaluation of thermal impacts will be acceptable to DEP.

Reports and records available at the site

In relation to Paragraph (b)(7), the Energy Association of Pennsylvania commented asking for flexibility on maintaining the E & S Plan, inspection reports and monitoring records onsite. It requests that the records be allowed to be kept electronically at a remote office. There is a similar requirement for agricultural operations in Paragraph (a)(8). The EQB should explain why records are needed onsite and consider allowing electronic records offsite.

10. Section 102.5. Permit requirements. – Need; Reasonableness; Economic impact; Feasibility; Clarity.

Applicability of permit requirements

Commentators, including the Home Builders Association of Southeastern Pennsylvania, appear to be confused as to whether they are affected by permit requirements. Paragraphs (a)(1) and (2) require a person to obtain “an individual NPDES permit or coverage under a general NPDES permit or NPDES permit-by-rule.” We recommend that the EQB review the permit requirements and make it clear to readers of the regulation whether they must obtain a permit and if so, what type.

Oil and gas activities and exemptions

The exemptions at the beginning of Paragraphs (a)(1) and (2) and Subsection (d) do not include the oil and gas industries. Commentators believe the oil and gas industries are exempt under the Clean Water Act. On the other hand, the Pennsylvania Council of Trout Unlimited commented in support of permitting oil and gas development. The EQB should explain why the exemption is not included in these provisions or add this exemption to these provisions.

Additionally, the Pennsylvania Oil and Gas Association requests clarification of Subsection (c) regarding whether it requires a general E&S permit. The EQB should make this amendment or explain why it is not needed.

Preconstruction meeting

Subsection (e) states "...a preconstruction meeting is required unless the permittee has been notified otherwise in writing by the Department or conservation district." The Department of Transportation commented that this may overload DEP staff and delay projects. The EQB should explain the need for this meeting and how it would impact the timeline for completing a project.

Long-term maintenance of the PCSM Plan

Subsection (f) states:

A person proposing earth disturbance activities requiring a permit or permit coverage under this chapter shall be responsible to ensure implementation and long-term operation and maintenance of the PCSM Plan.

The Pennsylvania Builders Association and others commented on two concerns with this provision. First, who specifically is "a person proposing earth disturbance activity"? We agree that this needs to be made clear. For example, if a person contracts with a developer, is the owner or developer responsible? We recommend that this provision clearly state who bears responsibility.

Our second concern, upon consideration of public comments, is with the requirement for "long-term operation and maintenance of the PCSM Plan." This provision is vague and potentially unreasonable and cost prohibitive. What does the EQB mean by "long-term"? Who determines what "operation and maintenance" will be required? Can responsibility be transferred to another entity such as a local government? What if the party assigned responsibility is no longer in business? What if the PCSM plan for a property works as it was designed, but is later compromised by storm water from development elsewhere in the watershed? Until these concerns can be made clear and answerable, the person responsible cannot know what responsibility is assigned to them. Further, if these phrases are meant to be for perpetuity,

Subsection (f) would essentially prohibit any activity because its risk and liabilities might be too great. The EQB should amend Subsection (f) to make it clear, but must also explain how Subsection (f) is feasible, reasonable, and how it would be implemented.

Applicability of exemption in Subsection (i)

Subsection (i) provides an exemption from an E & S Permit and NPDES Permit for activities covered by a permit under section 404 of the Clean Water Act. While supportive of this exemption, the Department of Transportation's comments list four clarifications it seeks on the application of this exemption. We will review the EQB's response in our consideration of whether the final-form regulation is in the public interest.

11. Section 102.6. Permit application and fees. – Economic impact; Reasonableness; Need; Clarity.

Pennsylvania Natural Diversity Inventory

Paragraph (a)(2) is amended to replace the Pennsylvania Natural Diversity Inventory (PNDI) with the Pennsylvania Natural Heritage Program (PNHP). The EQB should explain why this amendment was made and why the PNHP is the best resource for this information.

PPC Plan (Preparedness, Prevention and Contingency Plan)

Paragraph (a)(3) requires “a person...to prepare and implement a PPC plan....” The Department of Transportation commented that PPC Plans are prepared and implemented by contractors and not the person proposing the activity by a permit application. The Department of Transportation asked for an amendment stating the PPC Plan is a condition of the permit rather than a permit application requirement. We recommend that the EQB clarify this paragraph.

Permit fees

Commentators subject to these fees commented that the fees are excessive, particularly compared to the current fees. The Department of Transportation requested an exemption as the proposed fees would impose an estimated cost of \$300,000 to \$500,000 per year. Several legislators also commented that the fees may be excessive. A commentator also requested a multi-level fee structure that matches the fee to the size of the project. The EQB should explain how it calculated the fees in Subsection (b) and why they are appropriate.

Complete applications or NOI (Notice Of Intent)

Paragraph (c)(2) does not state how long DEP may take to make its determination and send notification. We note that this same provision only allows 60 days for the applicant to make an application complete. We recommend requiring DEP to determine that an application is complete within a specified timeframe. We also recommend that the regulation specify what happens if DEP does not meet that timeframe.

Additionally, Paragraph (c)(2) only allows DEP to determine an application or NOI is incomplete. Can this function also be performed by a conservation district?

12. Section 102.7. Permit Termination. – Reasonableness; Economic impact; Clarity.

Written acknowledgement of an NOT (Notice Of Termination)

Subsection (c) states:

Until the permittee has received written acknowledgement [of] an NOT, the permittee will be responsible for compliance with the permit terms and conditions including operation and maintenance....

Commentators are concerned that this action is open-ended and, without a response from DEP within a reasonable time, a person could be held responsible for unreasonable costs long after a project is completed. We agree that DEP should be required to respond in a reasonable timeframe.

Also, the EQB should review the sentence quoted above and fix the grammatical error in the final-form regulation.

13. Section 102.8. PCSM requirements. – Economic impact; Need; Reasonableness; Clarity

“Or other Department permit that requires compliance with this Chapter”

Relating to Subsection (a), the Pennsylvania Chamber of Business and Industry commented that the phrase “or other Department permit that requires compliance with this chapter” is extremely broad and would encompass many projects. It suggests that Subsection (a) be limited to earth disturbances that require an NPDES permit. We agree and recommend that the EQB amend this provision accordingly.

Minimize and maximize

Subsection (b) uses the vague terms “minimize” and “maximize.” These requirements are subjective. For example, under Paragraph (7) there could be considerable disagreement over whether a plan would “minimize soil compaction.” We recommend replacing these provisions with quantifiable standards.

Utilize other measures or controls

Paragraph (b)(8) is vague. It follows seven requirements and considerations, including Paragraphs (2) and (3) which require the plan to minimize stormwater runoff and volume. We also question why the concept of pollutants is included and what it implies. We recommend deleting Paragraph (8) or that it be amended to provide a specific standard for compliance.

A person trained and experienced in PCSM design methods and techniques

Subsection (e) is nonregulatory language. It imposes no definable level of expertise. It should either be deleted in its entirety or replaced with specific credentials for a person to design PCSM Plans.

Other supporting documentation

Subsection (f) states a PCSM Plan must contain “other supporting documentation.” How will a person know how to comply with this requirement? We recommend deleting this phrase or providing detail in the regulation specifying what other information is required.

Immediate surrounding area

Paragraph (f)(1) requires a description of the “immediate surrounding area.” This is a vague requirement. The regulation should provide specific guidance on how far from the project the topographic features must be described.

Limitations of the soils and geologic formations

Paragraph (f)(2) requires a PCSM Plan to include “limitations of the soils and geologic formations.” Without a context to what is considered a “limitation,” the regulation is not clear. We recommend that the EQB amend this paragraph for clarity.

Past land uses

Paragraph (f)(3) requires the characteristics of “past, present and proposed land uses.” Why is the past use relevant and needed, and how far into the “past”

must a plan go to comply? We recommend deleting the requirement for the characteristics of past land uses.

Supporting calculations and plan drawings

In subsection (f), Paragraph (8) requires “supporting calculations,” and Paragraph (9) requires “plan drawings.” The regulation should specify what supporting calculations and plan drawings are required.

“Long-term operation and maintenance schedule and inspection which provides for inspections” and “effective and efficient operation”

Paragraph (f)(10) requires a “long term operation and maintenance schedule which provides for inspection” and this schedule is “to ensure effective and efficient operation.” Both of these phrases are vague. What is “long-term”? Who does the inspections? What standards are to be used to determine “effective and efficient operation”? Paragraph (10) needs to be rewritten to establish binding norms for how it can be complied with and who is responsible for the requirements.

We further question the economic impact of Paragraph (f)(10). The EQB should include an estimate of the cost for long-term maintenance and inspection of PCSM Plans.

Thermal impacts

Similar to E & S Plans, Paragraph (f)(14) requires PCSM Plans to include an evaluation of the potential for thermal impacts to surface waters from earth disturbance activities. Commentators state there is no guidance on how to meet this requirement. One commentator believes that rather than an evaluation, they should only be required to identify the potential for thermal impacts. We recommend that the regulation clearly state what evaluation of thermal impacts will be acceptable to DEP.

Costs to comply with Subsection (g)

The Department of Transportation cited several specific concerns with the costs imposed by Subsection (g) and the effect of the requirements, including Paragraphs (1), (2) and (3). The Department of Transportation has provided suggested alternatives. The Pennsylvania Builders Association believes the provisions in Clauses (g)(2)(i) and (ii) are not reasonable and should be modified. The EQB should review these concerns and consider amendments to decrease costs and ease compliance. Also, the EQB should review Clauses (g)(2)(i) and (ii) and explain why they are needed.

The Department of Transportation also requests an exception to Subsection (g) to cover instances when standards may not be satisfied due to health, safety

and welfare issues. The EQB should include this exception or explain why it is not needed.

Require additional information or BMPs

Paragraph (g)(6) is a broad provision that allows DEP to require additional information or additional BMPs. Why is this provision needed? How can a demand made under this provision be appealed?

Resubmittal of a PCSM Plan

Subsection (i) states:

Upon complaint or site inspection, the Department or conservation district may require that the PCSM Plan be submitted for review and approval to ensure compliance with this chapter.

Subsection (i) is redundant with Subsection (j). We recommend deleting Subsection (i).

Cost and Redundancy of Subsections (k) and (l)

Subsection (k) requires a licensed professional to be onsite during “critical stages” of implementation. The phrase “critical stages” is vague. Also, we question what phases of implementation are not critical. The regulation should state the specific periods a licensed professional must be onsite.

In addition, the requirement for a licensed professional to be onsite will be costly. The EQB should explain what need this serves and how much it will cost.

Finally, Subsection (l) requires a licensed professional to certify that the project was constructed properly. Why are both Subsections (k) and (l) needed?

Record drawings

Commentators stated that record drawings required in Subsection (l) are not applicable to all earth disturbance activities. The EQB should amend the language in Subsection (l) to only require record drawings if they were required to meet another requirement.

Responsibility of the landowner and covenants

Subsection (m) states the operation and maintenance of PCSM BMPs shall be “the responsibility of the landowner” and the deed for the property shall contain a covenant that runs with the land. The EQB should explain the need to regulate post construction activity to such a degree as to require deed amendments and covenants. The EQB should also explain how this is a viable

way to protect the environment given the inherent presumption that all landowners can afford to maintain and rectify any failure of a BMP for perpetuity.

The Department of Transportation commented that its projects are along the roadway and within a right of way, and covenants could pose problems for future improvement of roadways. Therefore, the Department of Transportation requests an exemption. The EQB should either include an exemption or explain why it is not needed.

Additionally, the Pennsylvania Builders Association suggests that this provision instead require an easement. The EQB should consider using easements.

14. Section 102.11. General requirements. – Clarity.

Mimic

Under Paragraph (a)(2), a person is required to “...maintain PCSM BMPs to mimic preconstruction stormwater runoff conditions...” The word “mimic” is vague. It implies a subjective imitation. We recommend replacing the word “mimic” so that the regulation sets a definable standard.

15. Section 102.14 Riparian forest buffer requirements. – Need; Economic impact; Reasonableness; Feasibility; Clarity.

Need, reasonableness, and economic and fiscal impact

This section requires riparian forest buffers for many earth disturbance activities. It encompasses all earth disturbances within 150 feet of EV waters and all permit-by-rule activities. Riparian forest buffers may be required by DEP and upgrades to existing riparian forest buffers may be needed. The rest of the subsections include management requirements, permanent protection and reporting requirements. Commentators believe this section is unjustifiably burdensome and ignores other BMPs. We also question why this BMP is needed in regulation while others are not. The EQB should explain the need for and reasonableness of Section 102.14. In addition, the EQB should explain the full economic impact of this provision and explain why it is cost effective.

Specific activities and areas affected

There are six concerns with Subsection (a). First, commentators are confused about which activities are affected. For example, the Department of Transportation requests four clarifications. The EQB should amend Subsection (a) to clearly identify the activities affected.

Second, Clause (a)(1)(ii) includes all permit-by-rule activities regardless of the circumstances. Why did the EQB include all permit-by-rule activities in all

circumstances? In addition to evaluating the economic impact, the EQB should justify the need for and reasonableness of riparian forest buffers for all permit-by-rule activities.

Third, Paragraph (a)(1) also raises concern with its application to roadway, gas line and electric transmission line projects. The “boundary” of these projects is narrow and can be miles in length. Under Paragraph (a)(1), these projects would come within 150 feet of multiple rivers, streams, creeks, lakes, ponds and reservoirs. Several commentators question how it would be feasible to incorporate riparian forest buffers for this type of project. We agree that the impact of Paragraph (a)(1) is quite significant for these projects and may limit them. The EQB should explain how it considered this type of project in development of the regulation and why this provision is reasonable for these projects.

Fourth, the Energy Association of Pennsylvania commented that the requirements for riparian forest buffers would contradict safety and reliability of gas lines and electric lines. Gas lines and electric lines need to remain clear of trees and other woody plants. The EQB should consider the applicability of Section 102.14 to these projects and consider exempting them from the exclusive use of riparian forest buffers as a BMP.

Fifth, the Department of Transportation requests an exemption for public health and safety. It states that planting trees close to streams can, over time, become a source of flooding from large debris. We presume this concern would also apply to local governments who maintain roadways. The EQB should add an exception for public health and safety concerns.

Finally, Subsection (a) provides no allowance or recognition of other BMPs. As commentators stated, activities can occur in dense populations or along cliffs that would not be feasible for a riparian forest buffer. Why is a riparian forest buffer the exclusive BMP that can be used for activities that fall under Subsection (a)?

Other approvals that may require a buffer

Paragraph (a)(2) states:

A riparian forest buffer may be required to be incorporated within the boundaries of a project site in accordance with this section by other rules, regulations, order, permit or other approval of the Department.

Paragraph (a)(2) is vague and its purpose is not clear. Under what circumstances will DEP require a riparian forest buffer rather than other BMPs? It appears this could be used as a de facto disapproval of a permit by

imposing high costs on a project, even if that is not the EQB's intent. The EQB should either delete this paragraph or justify why it is needed.

Existing buffer composition and existing site enhancement

Paragraph (a)(4) states:

An existing riparian forest buffer must: meet the requirements of subsection (d); consist predominantly of native trees and shrubs that provide at least 60% uniform canopy cover; noxious weeds and invasive species must be removed or controlled to the extent possible.

Paragraph (a)(5) is similar. These provisions go well beyond erosion and sediment control and stormwater management. These provisions impose retroactive regulation on existing buffers and costs. The Pennsylvania Coal Association asked if existing buffers will be grandfathered. We question the feasibility of expecting every landowner with an existing riparian forest buffer to invest the time and resources to analyze and upgrade their buffers.

In addition, the provisions are vague by requiring, but not specifying how to comply with requirements for "predominantly" native species, "at least 60% uniform canopy cover" and control of noxious weeds and invasive species "to the extent possible." How can these requirements be reasonably enforced?

We recommend deleting Paragraphs (a)(4) and (5). If they are maintained, the EQB needs to justify why they are needed and provide a fully detailed analysis of how many acres of land they affect in Pennsylvania and the costs they impose.

Buffer establishment

Paragraph (a)(6) states:

On sites with no native woody vegetation, a riparian forest buffer shall be established in accordance with this chapter.

This would require an upgrade over existing land use. We question why a permit holder who will temporarily disturb the soil would be required to then upgrade an area beyond its preconstruction condition. The EQB should delete Paragraph (a)(6) or explain the need for it.

Plan submission

Paragraph (a)(8) requires submission of a "plan for riparian forest buffer management." It is not clear what is required in the plan, other than it is

supposed to describe how the plan will meet the requirements of this section. The regulation should set forth what an acceptable plan must include.

Average minimum widths

The Department of Transportation says it cannot comply with Subsection (d) due to ownership and rights issues. The Pennsylvania Chamber of Business and Industry, among others, strongly objects and describes the requirements as unreasonable and unachievable. Several commentators also question why Subsection (d) requires buffers on both sides of streams. The EQB should explain reasonableness of these provisions and how to comply with these provisions without incurring significant and perhaps prohibitive costs.

Additionally, it is not clear what “impaired waters” are in Paragraph (d)(2). The EQB should define this term.

Management requirements

Paragraph (e)(1) states:

Both existing and newly established riparian forest buffers, including wetlands and floodplains, shall be managed and maintained to enhance and maximize the unique value of these resources.

This is nonregulatory language and it should be deleted. Alternatively, this provision should be replaced with an enforceable standard.

Paragraph (e)(2) is vague by requiring, but not specifying how to comply with requirements for “predominantly” native species, “at least 60% uniform canopy cover” and control of noxious weeds and invasive species “to the extent possible.” The EQB should amend this provision to state clear compliance standards and how to meet them.

The EQB should provide a cost estimate for complying with the five year requirement in Paragraph (e)(2).

Paragraph (e)(3) severely restricts land use in a riparian forest buffer. We agree with commentators that these restrictions will deter landowners from allowing any earth disturbances on their property because they will lose the use of their land. We recommend that the EQB review and reconsider the viability of riparian forest buffers in relation to the prohibitions listed in Paragraph (e)(3).

We have two concerns with Paragraph (e)(5). First, the Department of Conservation and Natural Resources is concerned that it may not be able to handle the volume of approvals required by Clause (iv). The EQB should

explain why its regulation requires the Department of Conservation and Natural Resources approval for timber harvesting within riparian forest buffers.

Our second concern is that Clause (v) is unclear in allowing “passive recreational activities.” What specifically are passive recreational activities?

Permanent protection of riparian forest buffers

Paragraph (f)(1) states:

Existing and newly established riparian forest buffers including access easements must be protected in perpetuity through deed restriction, conservation easement, local ordinance or permit conditions.

It appears that the requirement for protection in perpetuity goes far beyond protecting against erosion and sediment control and possibly stormwater management. We agree with commentators that this requirement is onerous for landowners and may require land acquisition by the permit holder. The EQB should explain how this requirement to protect the buffer in perpetuity is feasible, why it is reasonable to require protection in perpetuity and the cost it will impose on permittees and landowners.

Paragraph (f)(2) requires the boundary of the buffer to be clearly marked. The EQB should state in the regulation what is acceptable marking and its cost.

16. Section 102.15. Permit-by-rule for low impact projects with riparian forest buffers. – Economic impact; Reasonableness; Clarity.

Permit-by-rule exclusions

Paragraph (b)(4) is an exclusion that states:

The earth disturbance is being proposed or conducted by a person who has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit and schedule of compliance or order issued by the Department.

This provision is not clear. For example, if a person was cited for past violations, there would be a record of that event and an ability to appeal the result. However, this provision penalizes the person for “lack of ability or intention to comply.” How will this provision be enforced and how can an action taken under it be appealed? The EQB should explain the intent of this provision, its reasonableness and how it would be enforced.

Permit conditions

The Department of Transportation cited several specific concerns with provisions in Subsection (c) that are similar to its concerns with Subsection 102.8(g) relating to meadow requirements, hydrologic routing analysis, presubmission checklists. We recommend that the EQB consider the concerns raised by the Department of Transportation and make amendments as appropriate.

Written E & S Plan, PCSM Plan and PPC Plan

Under Subsection (f), the registrant develops the PPC Plan. The Department of Transportation commented that this is inappropriate for contract jobs because the Department of Transportation cannot control the contractor's use of these materials. We recommend that the EQB clarify this paragraph.

17. Section 102.22. Site stabilization. – Economic impact; Reasonableness.

Temporary stabilization

Paragraph (b)(1) states:

Upon temporary cessation of an earth disturbance activity or any stage or phase of an activity where a cessation of earth disturbance activities will exceed 3 days, the site shall be immediately seeded, mulched, or otherwise protected from accelerated erosion and sedimentation pending future earth disturbance activities.

The Department of Transportation commented that it could have some extremely large areas that would not be active for three days and this requirement would be impractical and costly. The Pennsylvania Chamber of Business and Industry commented that this requirement would include holiday weekends and observes grass germination takes ten days. We recommend that the EQB explain why coverage after three days is needed.

Facsimile Cover Sheet



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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Debra L. Failor
Agency: Environmental Quality Board
Phone: 7-2814
Fax: 705-4980
Date: December 30, 2009
Pages: 28

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-440 (IRRC #2783). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Karen Cordy **Date:** 12-30-09