



VIA EMAIL

1141 Riverview Road
Dauphin, PA 17018

April 19, 2021

Mr. Rod Nesmith, P.E., Director
Department of Environmental Protection
Southcentral Region
909 Elmerton Avenue
Harrisburg, PA 17110

Dear Rod,

I write concerning a complaint investigation¹ that took place on property adjacent to 179 Botts Road in Washington Township, Dauphin County. The responsible party, who is not the property owner allegedly dumped materials from a landscape business into the channel at the headwaters of a perennial stream.² Following the inspection, during which the inspector spoke to the alleged violator rather than the property owner, additional material was placed in the channel.

Headwater streams provide many important economic and ecological functions. Not only do they contain their own unique species assemblages, they also serve as refugia for mainstream species during ecological perturbations. In addition, they provide downstream nutrients as part of the river continuum.

The activity clearly changed and diminished the current and cross section of the perennial stream meeting the definition of an encroachment as outlined in 25 Pa. Code §105.1.³ The inspector determined the activity to be a water obstruction rather than an encroachment. Conveniently, 25 Pa. Code § 105.12(a)(2) provides a waiver for water obstructions in streams with a drainage area of 100 acres or less.

However, 25 Pa. § (a) provides, in part, "If the Department upon complaint or investigation finds that a structure or activity which is eligible for a waiver, has a significant effect upon safety or the protection of life, health, property or the environment, the Department may require the owner of the structure to apply for and obtain a permit under this chapter."

The activity has had a significant effect on the protection of property and the environment. Clearly, the regulations do not contemplate waiving permits to allow individuals to obstruct or encroach perennial streams on property they do not own or otherwise have permission to intrude upon. Such would no doubt constitute a regulatory taking.

To add insult to injury, the complaint was referred to other programs for follow-up. Imagine hearing that there is nothing wrong with one party burying a stream with landscape waste on another's property but the regulatory agency will need to have another inspector come out evaluate whether the erosion controls are adequate. The irony and absurdity are beyond comprehension.

¹ CTS 351152

² Contrary to the inspector's determination of the stream being intermittent, an investigation conducted April 8, 2021 found it to be perennial. I believe this information will be provided under separate cover by Robert Schott.

³ Please note the attached photograph of the site taken facing upstream toward the changed cross section

I note that the draft proposed changes to Chapter 105⁴, include amending §105.12(a)(2) to provide a waiver for a water obstruction or encroachment in a stream or floodway with a drainage area of 100 acres or less. This existing waiver is proposed to be amended to ensure that the water obstruction or encroachment does not impede flow or aquatic life passage. Please take another look at the attached photograph. Clearly, this activity is an impediment to flow and aquatic life passage. I will be sending a copy of this letter to the IRRC and EHB requesting changes in the waiver process to, at a minimum, protect innocent landowners from DEP regulatory actions in the future.

As you are aware I spent 35 years working for the Department, including 20 years as an aquatic biologist. I find these types of regulatory shenanigans embarrassing. The Department I worked for is better than this.

I would hope that you would see that this complaint is revisited and appropriate enforcement initiated to ensure the stream channel is properly restored. It would not hurt to also offer an apology to the landowner, William Botts.

Thank you for your time and attention to this matter. Should you have any questions or need additional detail, feel free to contact me at MSEmbeck@comcast.net.

Sincerely,



Mark S. Embeck

Cc: A. Blosser
D. Herb, Esq.
D. Stares, Esq.
S. Williamson
M. Bebenek
D. Gates

⁴ <http://www.irrc.state.pa.us/regulations/RegSrchrslts.cfm?ID=3289>

Photo of Perennial Stream with diminished cross section and current – April 8, 2021

