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Memorandum

TO: John Hines, Deputy Secretary for Water Management
Pennsylvania Department of Environmental Protection

FROM: Grant Gulibon, Regulatory Specialist

Date: August 11, 2009

Subject: Comments on Draft Rulemaking—Title 25, Chapter 102
(Erosion & Sediment Control and Post-Construction Stormwater
Management)

On behalf of the members of the Pennsylvania Builders Association, I am pleased to submit the following comments on the Department's draft rulemaking in Title 25, Chapter 102 (Erosion & Sediment Control and Post-Construction Stormwater Management). The comments are organized into general observations regarding the draft rulemaking and specific comments on its individual provisions.

General Comments

1. This proposed regulation will hinder development and significantly drive up the cost to design and install projects, creating a great deal of additional paperwork for everyone involved. Certain jurisdictions will use this regulation to make it even more difficult to get necessary approvals in order to develop land.
2. The proposed regulation increases fees significantly (in the case of a general NPDES permit, by 1,000 percent). The fee for the proposed "permit-by-rule" has been raised from \$500 in the April 8, 2009 version of the draft Chapter 102 submitted to the Water Resources Advisory Committee to \$2,500 in the current version, which lessens the incentive for potential applicants to choose that option. At the same time, the fee for an individual permit would be twice (\$5,000) that of the "permit-by-rule," despite the fact that both require the same information. Questions also exist as to whether the training and compliance piece of the costs are properly recovered, and there are also municipal costs involved that must be considered.

3. There is internal confusion with respect to the rate requirements between the language in the proposed Chapter 102 and the Department's model stormwater management ordinance. Given the Department's desire to integrate all of its water management programs, it is important to make sure that the requirements are consistent. All references to the one-year storm should therefore be eliminated.
4. Some of the language in the proposed regulation reinforces the Department's ability to demand information on unrelated project sites.
5. There are a number of issues in the proposed regulation concerning inconsistent or non-existent definitions. For example, the definition of "earth disturbance activity" in the Department's model stormwater management ordinance is different than that found in the proposed Chapter 102. At the same time, no definition exists in the proposed Chapter 102 for the terms "permittee," "registrant," "registration of coverage," and "registered professional"—all of which are used on multiple occasions and should be formally defined.
6. It appears that the Department is attempting to bring multiple parties into the "registration of coverage" in order to make every party, be they a builder, developer, licensed professional, or landowner, involved with a project responsible for long-term operation and maintenance of PCSM BMPs. If this is the case, those parties whose connection to a project will end once their given function is completed need to have a mechanism to terminate such responsibility once that connection ceases.
7. If a project must be designed to infiltrate an entire site, it must be recognized that some areas of a site are better than others for infiltration purposes. If the entire site is used, water discharges in every direction, and it is very difficult to infiltrate each individual discharge.
8. The scope of the proposed regulation has been expanded beyond its original intent of addressing erosion and sediment control and now includes the promotion of "low-impact development." Such requirements could affect every subdivision and land development ordinance, and they are problematic with traditional neighborhood developments, as many developers are walking away from such projects due to their cost. Pursuing this objective eliminates choice, and many municipalities are not doing low-impact development because they see it as a conduit to higher density. The Department needs to guard against trying to dictate a land-use template for sovereign townships, as townships do have the ability to do low-impact development if they so choose.
9. The terms "low-impact project" and "low-impact development" are not defined in the proposed Chapter 102. This has the potential to create a great deal of confusion, as the Department has often referred to the applicability of the proposed "permit-by-rule" to "low-risk" projects. What does the term "low-risk" mean? One could argue that a "low-risk" or "low-impact" project would not

require nearly the level of protection required under the proposed “permit-by-rule.” At the same time, what would happen in a situation in which, regardless of the definition of a “low-impact project,” a municipality does not permit such development, such as in the case in which a municipality does not permit cluster development? If such a project does not fit with a municipal subdivision and land development ordinance, what happens in that instance?

10. As we have expressed on numerous prior occasions, while some Pennsylvania municipalities have ordinances requiring buffers for new development (despite the lack of a state law specifically authorizing such measures), imposing any type of mandatory buffer requirement deprives landowners of the use of their property without compensation, and PBA opposes any mandatory statewide buffer requirement. The imposition of a buffer requirement, as proposed in this draft regulation, also discriminates against properties in exceptional value (EV) watersheds, discriminates against developers as a class, and fails to impose similar requirements on agricultural operations, which contribute far more nutrient and sediment pollution to Pennsylvania waterways than do new developments.

While many buffer supporters attempt to minimize the costs associated with their proposals, the reality is that significant financial hardships would be established on the individual residential level, and significant economic impact would be established at the developer level. This is so because buffers impose costs not only for their installation, operation and maintenance, but also due to the economic losses landowners experience when they are denied use of the land taken to establish the buffer. For instance, consider a case in which a property owners has no access to a lake or waterway from lakefront or waterfront property. That use is then taken away from that landowner, who may have purchased such land for just that reason. At the same time, many local jurisdictions tend to believe that lakefront or waterfront property is more valuable, and tax it at higher rates. Finally, when developable land becomes artificially scarcer, its price increases, thus harming housing affordability and slowing badly needed job creation.

In addition, if new buffers were installed at the E & S level, they would not be functioning adequately for years to come, as it takes time for the vegetation to mature and reach its full potential of reducing pollutants. E & S permits will be long closed before new buffers reach maturity. It is also important to consider that there likely exists a point at which a buffer’s effectiveness at reducing pollutants begins to decrease, and that increasing the width of the buffer beyond that point imposes costs on homeowners and builders that exceed any additional environmental benefits derived.

Questions also exist about how a buffer requirement would address off-site stream channels, such as in an instance in which a property owner has a stream channel located 50 feet from his property boundary, and a buffer could extend 50 feet (100 feet in some cases, as contemplated by the draft regulation) into his site. What

would the responsibilities of each property owner be in such a case? There is also potential conflict with wetlands and floodplain requirements in order to do the buffer. Additionally, if a project meets all other E&S and stormwater management requirements, where is the polluted water coming off a developed site that necessitates a buffer? Or, for a site on which the topography grades away from a stream, why would a buffer be necessary in that case?

In short, the environmental benefits of riparian buffers must be carefully balanced against the associated economic costs, and we do not believe that a statewide buffer requirement meets this standard. We understand that in the case of EV watersheds, the Department's position is that a 150-foot buffer is necessary to protect water quality and meet anti-degradation requirements. We would appreciate the opportunity to review any legal justification that the Department may have developed in support of this position. Furthermore, we would also appreciate the opportunity to explore alternative methods of meeting the aforementioned requirements for EV watersheds, as the Secretary expressed his willingness to consider such alternatives, if presented, during a meeting with PBA representatives this past March 16.

11. We do believe that the optional "permit-by-rule" proposal developed by the Department is an encouraging, enlightened approach to the twin issues of protecting Pennsylvania's waterways and preserving economic opportunity, and we reiterate our offer of assistance to the Department in crafting the right incentives that will ensure that this optional approach is a viable one that project applicants will choose to utilize. We stand ready, at Secretary Hanger's discretion, to work with him, other Department staff and representatives of other interested groups to craft the above referenced incentives.
12. The regulation must make explicit that builders and developers will be able to transfer responsibility for the long-term operation and maintenance of post-construction stormwater management (PCSM) BMPs to another party once a project is completed.

Specific Comments

Page 4, definition of "intermittent stream"—What does the term "substrates" mean? This is vague and needs work.

Page 4, definition of "nondischarge alternative"—This definition is too subjective—the terms "environmentally sound and cost-effective" may be interpreted differently by different observers.

Page 5, definition of "perennial stream"—Please see the preceding point regarding the definition of the term "substrates." This could also be what is shown on the USGS. The definition is specific, but there will then be a need for a biologist at times.

Page 6, definition of “point source”—Would this include a roof drain (section (i))? Also, the term includes “concentrated” flow associated with stormwater—clarification is needed to ensure that it excludes sheet flow, and that the definition recognizes that this may be the historical condition of the property.

Page 7, definition of “riparian forest buffer”—This definition includes “native trees, shrubs and forbs”—the assumption is that the Department is using the E&S program to advance native trees, meaning that non-native trees are being removed and kept out. We question the appropriateness of using the E&S program to establish a preference for native plants.

Page 7—A definition for “registration of coverage” (ROC) is needed.

Page 7, definition of “top of streambank”—Not all streams have this, especially intermittent streams.

Page 7—Is it necessary to include definitions for both “surface waters” and “waters of this Commonwealth?” Could the definition of “waters of this Commonwealth” be construed to include swimming pools? The term “natural” should be added between the words “underground” and “water,” and the following should be excluded: roof drains, all storm pipes, and street underdrains.

Page 8, Section 102.2(b)—The requirement to “restore” water quality using BMPs is a problem. It makes the applicant responsible for historical conditions on a project site, and also for runoff from the entire site. The applicant would also have to provide for the rate and volume of runoff from adjoining lands.

Page 10, Section 102.4(b)(5)(iii)—The E&S plan is to contain drawings and narrative describing the characteristics of the past earth disturbance activity, including past land uses. This must define how far back into the past this requirement extends.

Page 10, Section 102.4(b)(5)(iv)—Why is it necessary for the E&S plan to contain drawings and narrative that describe the volume and rate of runoff from the project area site and its upstream watershed? This is not used for E&S design and will increase the time and resources needed. If this is done, it should not apply to the whole site, but to each BMP.

Page 10, Section 102.4(b)(5)(x)—The requirement that the maintenance program provide for completion of a written report documenting each inspection and all BMP repair and maintenance activities will require a large amount of additional paperwork. Also, what is meant by the term “stormwater event?” It is not defined.

Page 11, Section 102.4(b)(5)(xii-xiii)—Clarification is needed regarding these proposed requirements, specifically regarding criteria used to measure thermal impacts. Also, certain local jurisdictions in Pennsylvania will likely use these proposed requirements to restrict development in certain areas.

Page 12, Section 102.4(c)—What happens in a case in which the permitting agency requires an approved E&S plan before granting other necessary permits and authorizations? A “chicken or the egg”-style dilemma could result.

Page 12, Section 102.5(a)(1)—This provision specifies that a point source discharge to surface waters takes place—what happens if there is no such discharge?

Page 13, Section 102.5(f)—This refers to a “person proposing earth disturbance activities” as responsible for implementation and long-term O&M of the PCSM plan. Should this refer instead to the “permittee,” as the term “person” has a clear definition? Once the issue of who has to get a permit or who is on a registration of coverage is resolved, all of these should read “permittee.” There is no definition of “permittee” or “registrant” in the draft, but it does use “person.” The draft needs to use definitions consistently, and once again, it must be clear that the builder and/or developer can transfer responsibility for long-term operation and maintenance once he has no further connection to a project.

Page 14, Section 102.6(a)(1)—The term “registration of coverage” is not defined—see earlier comment regarding its absence from the “Definitions” section.

Page 15, Section 102.6(b)(2)(1)(iv)—The proposed \$2,500 fee for a general NPDES permit is ten times the current fee. How can such an increase be justified, especially in addition to the additional E&S fees that may be charged by conservation districts?

Page 16, Section 102.6(c)(2)—The Department should have to determine administrative completeness within 30 days.

Page 16, Section 102.7(b)(5)-(c)—As noted in a previous comment, these provisions call for identifying the “person” responsible for operation of the PCSM BMPs in accordance with the approved PCSM plan in the notice of termination (NOT)—and for the permittee to remain in compliance with all terms and conditions of the permit until receiving written acknowledgment of a NOT. The draft regulation seems to indicate that once a co-permittee (including a project manager, engineer or developer) joins a project, he becomes a permittee. Since the draft also identifies the permittee as responsible for compliance with all permit terms and conditions, including operation and maintenance of PCSM BMPs—despite not defining the term “permittee”—the regulation must clarify who is intended to be responsible, when a transfer of that responsibility can occur, and when persons involved in the project can be released from that responsibility.

Page 17, Section 102.8(b)(8)—If the management of post-construction stormwater is planned and conducted in a manner that prevents an increase in the rate of discharge and minimizing any increase in volume, as in (2) and (3), why would other measures or controls be necessary? Why is an E&S regulation promoting low-impact development (LID)?

Page 17, Section 102.8(e)—This language is more general than in other areas of the draft regulation and should be consistent with that found in other portions of the document. The requirement should be phrased in a way that strengthens the expectation that the PCSM plan is prepared by an individual competent to perform these duties.

Page 17, Section 102.8(f)(2-4)—The PCSM plan should not require information on geologic formations. It should specify how far into the past that information will be required on past land uses on a project site, and the net change in the volume and rate of stormwater should be identified for each significant drainage area, not every drainage area.

Page 18, Section 102.8(f)(10)—This proposed requirement states that a PCSM plan must provide for a long-term O&M schedule that provides for the inspection of the PCSM BMPs. Who is doing the inspection? This question would arise in a case in which a plan is being designed to satisfy a given conservation district and the Department, and a municipal official decides he wants something different. In such a situation, whose definition supersedes? The proposed draft regulation needs to provide that BMPs in place at the time of the current version of Chapter 102 need to be grandfathered.

Page 18, Section 102.8(f)(13)—According to the proposed draft, the PCSM plan must identify natural occurring geologic formations or soil conditions that may cause pollution after earth disturbance activities are completed and PCSM BMPs are operational. What is included here? This could be something as potentially innocuous as a depression at a given project site that could indicate a sinkhole. What does the Department mean in this case, and is there a difference in the treatment of pre- and post-construction BMPs?

Page 19, Section 102.8(g)(2)(i-ii)—These requirements for the analysis of the 2-year/24-hour storm are not reasonable and should be modified to use actual land use. Not doing so substantially increases the difficulty of the necessary analysis.

Page 19, Section 102.8(g)(6)—This provision states that the Department, or a conservation district consulting with the Department, may require additional information needed to review a PCSM plan, or additional BMPs, on a case-by-case basis. The potential requirement for additional information is extremely open-ended, allowing for additional BMPs to be imposed after a project is built based upon an approved stormwater management plan (including BMPs), and raising the possibility that new requirements could be added even after it seems that a plan is finalized.

Page 20, Section 102.8(i)— A PCSM plan should already be completed and on file before a project commences.

Page 20, Section 102.8(k-1)—These requirements should be removed. Their primary effect will be to create a great deal of additional cost. At the same time, the final certification statement from a licensed professional could be problematic, as despite all best efforts, it is very difficult to install the planned facilities exactly as designed.

Page 20, Section 102.8(m)—This requirement states that operation and maintenance of the PCSM BMPs shall be the responsibility of the landowner of the property where the PCSM BMPs are located (unless a different person is approved in writing by the Department). This should also be a deed requirement. The Department has also proposed language stating that responsibility for a PCSM BMP is a covenant that runs with the land and is enforceable by subsequent grantees. This is a benefit to the grantor and grantee, not to the Department, and should be done instead as an easement.

Page 22, Section 102.14(a)(2)—What are the other rules, regulations, orders, permits or other approvals of DEP under which a buffer may be required?

Page 22, Section 102.14(a)(4-5)—How would the 60 percent uniform canopy cover requirement be measured? It would be difficult, if not impossible, scientifically to do so. What would be the case if this were to be evaluated during the winter? At the same time, the requirement that noxious weeds and invasive species in the buffer be controlled to “the extent possible” is problematic, as the cost of doing so is likely to be extremely high. What if native material is interspersed with the noxious weeds? How does one keep these plants from spreading? Invasive plants would only be “controlled” on the project site, which may abut property on which invasive plants exist without management.

Page 22, Section 102.14(a)(6)—Rather than establishing a riparian forest buffer on a site with no native woody vegetation, such vegetation should be allowed to grow in naturally.

Page 22, Section 102.14(a)(7)—This requirement needs clarification—would or would not such wetlands need to be planted with trees?

Page 23, Section 102.14(b)(1)—If concentrated flow must be managed in the area upgrade and in the buffer as prescribed earlier in the draft regulation, how can a project discharge to a stream as required by DEP?

Page 23, Section 102.14(b)(2)(i)—What if the area in question is a wetland? What if a project is an urban/suburban area and a landowner wants to install ornamental gardens?

Page 23, Section 102.14(d)(2)—Whose definition of “impaired waters” is being used?

Page 24, Section 102.14(e)(2)—The requirement that the buffer be managed in a manner such that 60 percent canopy cover is achieved and noxious weeds and invasive species are removed or controlled to the extent possible is scientifically unrealistic.

Page 24, Section 102.14(e)(3-5)—While maintenance activities or practices, such as the disturbance of existing vegetation, tree removal and shrub removal, are “allowable” within the buffer, the proposal also states that soil disturbance by grading, stripping of topsoil, plowing, cultivating, and other practices are prohibited in the buffer. Given these provisions, how are noxious weeds to be removed? Also, the draft regulation prohibits off-road vehicular travel in the buffer, but allows for trails, roads and bridges if permitted by DEP. Such a provision does not belong in an erosion and sediment control regulation.

Page 24, Section 102.14(e)(4)(i)—Why are storm drainage activities acceptable in the buffer when permitted by the Department, but an applicant is not allowed to use concentrated flow?

Page 25, Section 102.14(f)(2)—How are the boundary limits of riparian forest buffers to be marked? This requirement is highly impractical.

Page 25, Section 102.14(g)—This requirement will simply create more paperwork to be processed and stored by the Department.

Page 26, Section 102.15(b)(2)(ii)(A)—Excluding geological formations that would present a risk of sinkhole development would mean that the permit-by-rule option could not be used in much of the Cumberland Valley area.

Page 26, Section 102.15(b)(4)—The provision prohibiting 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 from using the permit-by-rule could, for instance, penalize a developer for the actions of a sub-contractor or other, more tangentially related entity. There are also concerns that the Department could use a violation on one project to shut down another, unrelated project, which clearly should not be the outcome of this policy.

Page 26, Section 102.15(c)(1)—This provision refers again to the ROC and the “registrant,” neither of which are defined in the draft proposal. In addition, surveyors should be added to the list of professionals who may be responsible for a given site’s design.

Page 26, Section 102.15(c)(2)(i)—What happens in the event that a project starts 80 feet from a creek? Why is the “registrant” responsible in this case? Why should an engineer be held responsible, as these are activities going on after the site is developed? Again, it is not clear who is responsible for what and why.

Page 27, Section 102.15(c)(5)—As noted in previous comments, these requirements for the analysis of the 2-year/24-hour storm are not reasonable and should be modified to use actual land use. Not doing so substantially increases the difficulty of the necessary analysis.

Page 28, Section 102.15(c)(6)(i)—What is a “hydrologic routing analysis”?

Page 28, Section 102.15(c)(7)—Surveyors should be added to the list of eligible professionals in this section.

Page 29, Section 102.15(d)(2)—Why must a public notice be posted once a week for 3 consecutive weeks in a general circulation newspaper prior to the submission for the ROC? As noted previously, ROC still needs to be defined, particularly as to which parties

are responsible. This also applies to the PPC plan.—when can parties be released from responsibility for the PPC plan?

Page 35, Section 102.22(b)—The requirement to seed, mulch or otherwise protect a site on which a cessation of earth disturbance activities will exceed three days, and the related requirement for a disturbed area that is temporarily stabilized to be covered with a minimum uniform coverage of mulch and seed, is not practical.

Page 36, Section 102.32(c)—If an aggrieved person requests an informal hearing with DEP under this section, how long does the Department have to hear the case? Also, if the aggrieved person does not choose an informal hearing, how does he get a final determination? This section is written in such a way that it is not clear how an appeal would take place. There is no final determination that is appealable unless you have this informal hearing.

Page 36, Section 102.43—The proposal to allow a municipality or county to withhold a building or other permit or final approval until the Department has issued the E&S or NPDES permit, or approved coverage under the General NPDES Permit for Stormwater Discharges Associated With Construction Activities, is not prudent. This is existing language, but with it added, it will come to municipalities' attention and they may start denying approvals. It completely reverses the land development process. Would conditional approvals be allowed?

Thank you for the opportunity to submit these comments, and we look forward to meeting with you and other Department staff involved in the development of this regulation. If you have questions or require additional information concerning the comments submitted here prior to our meeting, please contact me at the address, phone or fax number listed in the header of this document, or e-mail me at ggulibon@pabuilders.org.