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Tate, Michele

From: Michael Stover [smokeystover@embarqmail.com]
Sent: Thursday, October 29, 2009 11:54 AM
To: EP, RegComments
Subject: Comments on proposed Chapter 102 revisions

Attached are my comments concerning the proposed chapter 102 regulation revisions and includes a Summary sheet.

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SUMMARY OF COMMENTS
PROPOSED CHAPTER 102 REGULATION REVISIONS
BY: Michael E. Stover, P.E.

To adopt the proposed Chapter 102 revisions as written will result in severe negative economic, political and environmental impacts to the Commonwealth. On one hand, the agricultural community will benefit immensely as the revisions remove any remaining vestiges of responsibility for farmers to control accelerated erosion and sediment releases due to plowing and tilling operations. Despite long standing recognition that such operations contribute between 60 and 80% of the total sediment pollution occurring in Pennsylvania, DEP has seen fit to remove any and all control over such work and in fact, is attempting to illegally delegate oversight of agricultural activities to the NRCS, a federal agency with no statute authority to regulate or enforce Commonwealth laws and regulations. One example of the apparent influence by that federal agency is the proposed adoption of the soil loss tolerance factor "T", a non field measurable amount of sediment releases which will only serve to shield the agricultural community from any liability in its continuing annual release of millions of tons of sediment into Commonwealth waterways. This one act will ultimately demonstrate to the people and governments involved in restoring the Chesapeake Bay that Pennsylvania is only providing lip service to it's pledges to be a major contributor in such efforts. With no requirements for E&S plan preparers, no permitting requirements, no plan reviews and with no way to measure "T" compliance, there will be no regulation whatsoever of the agricultural community under the Chapter 102 regulations. As a final item to ensure non interference by DEP, Ag E&S plans only have to incorporate measures that are "cost effective and reasonable". How can anyone dispute or enforce this standard?

The selective application of involvement by "licensed professional" in these revisions represents an illegal interpretation of the provisions of Act 367 of 1945, P.L. 913. No. 367, as amended. Either the work of preparing E&S and PCSM plans meets the Act 367 definition of "Practice of Engineering" or it does not. If, as I strongly believe, it does, then all such plans must be prepared by a licensed professional engineer. The same requirement would apply to site inspections and completion certifications. Other definitions in Act 367 specifically prohibit geologists and land surveyors from engaging in engineering work. These two professionals are included in the 102 revisions' definition of "licensed professional" and must be removed. If, by some legal determination, it is decided that this work does not meet the "Practice of Engineering" definition, it remains that no licensed engineer that I know of will accept the liability for inspecting or certifying work designed by persons "trained and experienced", a term not defined in the regulations and for which no screening criteria exists.

The costs of adopting these revisions for most of the regulated community will be extreme. The objective of charging application/review fees (which will prompt unspecified fee increases by the conservation districts) to make this program economically self sufficient, and the increased engineering fees will effectively destroy residential and small commercial development across rural Pennsylvania. The agricultural community will, of course, bear none of these costs and large residential/commercial developments will easily absorb the increases. But for a small subdivision or single new home owner/builder, these increased costs along with other recent DEP on-lot sewage disposal requirements will result in increases of $20,000+ and effectively destroy this opportunity for rural home ownership. The overall economic loss for this loss of future development in Pennsylvania may be catastrophic.

October 28, 2009
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Environmental Quality Board
P.O. Box 8477
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Re: Chapter 102 Revisions

The Board:

The periodic review and revision of environmental protection regulations is an important and necessary step to ensure both a comprehensive and fair address of said regulations to the social, economic and environmental concerns of the Commonwealth. Unfortunately, the proposed Chapter 102 revisions fail to achieve any of the stated or logically assumed goals in this regard. If adopted in their current form, regulatory control of the largest potential sediment and related items polluters will be diminished over current levels, significant increased costs associated with plan designs, inspections and permit fees will cripple rural residential and commercial development, and no measurable statewide gains in water quality will be realized.

The failure of this document (revisions) is that it fails to recognize and categorize the different levels of pollution potential between the various types of earth disturbance and post construction stormwater runoff. Department staff are to be commended in their attempt to produce a workable set of revised regulations, but the lack of problem recognition and scope at the administrative level dooms these efforts from the start. Accordingly, my comments will be presented in an overall perspective view since it is at this level, and not the line by line review approach that the criticism must be provided. However, there are a few line item issues that must be addressed individually and comments relating to same will be provided at the end of the primary comment fields.

1. **102.4(a) – Erosion and Sediment Control Requirements** (for Agricultural plowing or tilling activities or for animal heavy use areas: It can be argued that the failure to improve overall statewide water quality degraded by sediment pollution and other attached pollutants is directly attributed to the traditional failure of DEP to effectively regulate the agricultural community. This is a community that everyone recognizes contributes between 60 and 80% of the total statewide amount of sediment releases into our waterways. One only has to look at the 30+ year failure to improve pollution levels in the Chesapeake Bay as proof of this statement. Accordingly, it defies description as to any rationale why the revised chapter 102 regulations seek to further lessen regulatory oversight of the agricultural community. Not only do agricultural operators **not** have to hire someone "**trained and experienced**" in E&S plan design and development, but

any plan that is developed only has to **"include cost effective and reasonable BMPs".** By these two regulatory standards alone (lack of standards is a better description) the agricultural community is stripped of any responsibility to minimize current high levels of sediment releases/pollution. Add to this the fact that no E&S or NPDES permitting requirements exist for agricultural plowing and tilling activities (102.5(j)), and whatever written E&S plans are developed are not required to be reviewed or approved by DEP. What is even worse is DEP's illegal transfer of regulatory review of such plans to the NRCS (102.4 (a)(4)(iii). This fits in with the long recognized discredited NRCS design standard that sediment releases from farmland can occur under the "T" soil loss formula (102.4(a)(4)(i). Virtually impossible to field measure to ensure any type of compliance, "T" losses do not occur uniformly across a field much less the total farm. But, why would one segment of the regulated community be given the right to purposely pollute to any amount and not any of the others? The final insult is 102.4(a)(4)(ii) where, while every other segment of the regulated community is being encouraged or even required to implement "Riparian forest buffers" when earth disturbance activities approach a watercourse, this subsection relieves the agricultural community of any such obligations, mandatory or otherwise. Accordingly, farming up to the top of streambanks will continue to be an unofficial agricultural community "standard".

Instead of using this opportunity to address the very real problems associated with agricultural activities producing the majority of sediment pollution to Commonwealth water resources, it appears that DEP has deliberately used this process to ensure future overall program failure. As will be highlighted in subsequent comments, this at the significant increased costs that will occur to the remainder of the regulated community. This should have been an opportunity to directly address agricultural E&S plan design and implementation. It was also an opportunity to develop a DEP Agricultural E&S BMP program manual. Instead, we get a weak, and illegal attempt to transfer administration of Commonwealth laws and regulations to a federal agency (NRCS), using a pollution release standard immeasurable and therefore unenforceable by DEP, should the very rare event occur and they actually visit a farm.

2. **102.1 *(licensed professional)*; 102.4(a)(3); 102.4(b)(3); 102.5(e); 102.8(e); 102.8(k); 102.8(l); 102.15(c)(1); 102.15(c)(7); 102.15(c)(7)(i), (ii), (iii) & (iv); 102.15(f)(5); 102.15(i)((2) & (3):** The laws under which the Chapter 102 Rules and Regulations are developed DO NOT include the legal authority to selectively impose requirements of the Act of 1945, P.L.913, No.367, as amended, the Engineer, Land Surveyor and Geologist Registration Law, (or similar law concerning licensure of Landscape Architects) on limited sections of these regulations. Simply, either the design of E&S controls and stormwater facilities, their during construction inspection and certification of as-built controls meets the definition of "Practice of Engineering" contained in Section 2(a)(1) & (2) of Act 367 (with the term "inspection" further defined under subsection (b)), OR THESE ACTIVITIES DO NOT! The Chapter 102 regulations cannot pick and choose

when these legal requirements apply based on a special selection of one party or group of the overall regulated community. Either all of the regulated community, including agricultural interests are included or none are. It is further noted that under Section 2 (n) "Practice of Geology" the last sentence reads: "The term shall not include the practice of engineering, land surveying or landscape architecture for which separate licensure is required. Similarly, under subsection (f) "professional Land Surveyor" the last sentence reads: "A professional land surveyor may perform engineering land surveys but may not practice any other branch of engineering". I would differ judgment on whether a definition for a licensed professional landscape architect's duties would include the type of work needed to provide for the design of E&S and stormwater BMPs. As just one indication of this problem, under Section 102.8(k) of the revisions, it states that "A licensed professional (engineer, geologist, land surveyor or landscape architect) or their designee shall be present on site and be responsible during critical stages of implementation of the approved PCSM plan .....". What this is saying is that a geologist or land surveyor (or worse their designee) shall be responsible for doing something that they are specifically prohibited to do by law.

If the listed standard for development/design of E&S and PCSM plans is a person "trained and experienced" in such work, then the regulations cannot subsequently impose the work of a "licensed professional" for inspection, certification and even plan development under other sections of the regulations. The creation of a third requirement, the lack of any requirements for development of agricultural E&S plans, likewise indicates a total lack of program understanding and administration. From a very practical viewpoint the "trained and experienced" criteria is non-enforceable since DEP provides no criteria for their staff, or those of the county conservation districts to apply in determining if someone meets this standard. Likewise, neither I nor any other licensed engineer that I have communicated with will agree to inspect or certify design work prepared by such an individual. It's just not going to happen. DEP must also look into its requirement for inspections and certification by a P.E. from an economic viewpoint. This work will add thousands of dollars to small and medium sized projects and is unnecessary. It should and must be the contractor's responsibility to certify that the project was completed and functions as designed. After all, contractors carry just that type of liability insurance.

3. **Costs:** Under the Board's issuance of this proposed rulemaking, the section "Compliance Costs" states that "These regulatory revisions should not result in significant increased compliance costs for persons proposing or conducting disturbance activities". This statement is only true for the agricultural community which has been stripped of any responsibility whatsoever in preventing sediment pollution or stormwater control. For all other sections of the regulated community, the proposed revisions will result in very significant compliance costs. Just the requirements under sections 102.5(e), 102.8(k) & (l) and 102.15 will add thousands of dollars to project costs due to the newly required involvement of licensed engineers in project inspection and final certifications. It

can be argued that Permit by Rule participation is voluntary. True, but only large projects where such increased costs represent a small portion of the overall project cost will benefit from this format availability. The Permit by Rule option is simply not available for small and medium sized projects since the high costs involved will represent a too large percentage of the overall project costs. What is truly shocking, but again is a further indication of the lack of program understanding by DEP, are the proposed new permit fees under section 102.6(b)(2). Again noting hat the proposed $2,500 fee for Permit by Rule applications will be easily absorbed by large projects, the $2,500/5,000 fees for General and Individual NPDES applications are ridicules. Not only do these amounts not recognize the difference in processing and review fees between small and large projects, but any argument on DEP's part to justify them as averages or to state that there is not much difference between the processing and review of large versus small projects represents a huge admission that small projects are being seriously over regulated. Even county conservation districts, in establishing E&S plan review fees, provide a graduated schedule starting with a base fee and then adding set amounts for each separate development unit or acre of disturbance. Currently, the PCSM plan submitted as part of General NPDES permit applications are not reviewed by conservation districts. If the intent of the new fees is to allow districts to hire staff to perform such reviews this should be clearly stated in the reasons for such stiff fee increases. It then becomes necessary for DEP to provide documentation that the fees are necessary for such review costs. However, the real underlying problem is that the permit applications are unfairly cumbersome for small projects where the time of earth disturbance exposure, size of disturbance and actual threat to water resources are significantly less than for large projects. DEP remains unable or unwilling to recognize this problem and the new regulation requirements and fees will very likely be the proverbial "straw that broke the camel's back" as far as small to medium sized development is concerned. New residential and commercial construction for the rural single lot and small (10 unit or less) will cease to exist in Pennsylvania. Coupled with recent additions of nitrate studies and enhanced on lot nitrate removal systems within special protection watersheds, the combined new additional costs to a perspective home owner are estimated to be: $1,000 for nitrate study, $14,000 for new nitrate removal systems and $5,000 for a NPDES permit application, totaling $ 20,000 of completely new development costs. And, this does not include the other engineering costs mentioned previously. One has to truly wonder if these actions by DEP represent a specific effort to impose so many restrictive regulations and costs to rural land owners and perspective home owners that rural development will simply cease. What better way to preserve statewide water quality. A taking of land by regulation that hopefully won't be recognized as such.

4. **<u>Other line item comments:</u>**

a. Section 102.1 – A definition for "watercourse" matching that provided under the Chapter 105 regulations should be added and the term used throughout the 102 regulations instead of stream, creek, river, etc.
b. Section 102.1 – Remove the definition of "*soil loss tolerance*" as this is an immeasurable and unenforceable standard which implies that agricultural plowing and tilling operations may pollute commonwealth waterways.
c. Section 102.1 – Revise the "*surface waters*" definition to include "watercourses" and delete all other terms that are contained in the definition of this word.
d. Section 102.4(b)(5)(xiii) – Delete this requirement until such time as DEP fully explains this condition and provides technical data to show how to calculate these impacts and provides acceptable BMPs to mitigate such impacts. Also delete Section 102.8(f)(14).
e. Section 102.5(a)(3) – The Chapter 93 Regulations do not specifically define "antidegradation" nor list such requirements under a title or section by that name. DEP must provide a more definitive connection between Chapters 93 and 102 concerning specific requirements.
f. Section 102.5(d) – It is unclear in this section and others as to the exact permit requirements for road maintenance activities. Every year, thousands of miles of rural roadside ditches are scraped to maintain drainages without any form of E&S planning or controls. Is this another example of DEP looking the other way where significant releases of sediments and other pollutants are released directly into Commonwealth waterways?
g. Section 102.5(i) – Should not the coverage provided under the Chapter 105 Regulations (permits) be included in this paragraph? It is a joint state/federal permitting program.
h. Section 102.8(b)(9) – DEP has not demonstrated that standard E&S and PCSM BMPs will "reclaim and restore the quality of water and the existing and designated uses of waters of the Commonwealth". Unless there is wording to that effect in the manuals prepared to incorporate these BMPs into plan designs, these terms should be deleted.
i. Sections 102.8(e) & (f) – Does anyone truly believe that persons "trained and experienced (but unlicensed by any agency) in PCSM design methods, an unpublished criteria, can be held responsible for or satisfactorily meet the subsequent design standard of: "designed to minimize the threat to human health, safety and the environment"? Is this a joke?
j. One of two options must be selected for this requirement. To remain as written, these regulations must establish that the work of preparing E&S and PCSM plans meets the definition of "Practice of Engineering" as defined in Act 367, and so applies to the development of E&S and PCSM plans FOR EVERYONE. Also, the inclusion of geologists and land surveyors must be removed from the definition of "licensed professionals" since they are specifically prevented from undertaking engineering work by that Act. If it is to remain that E&S and PCSM plans may be prepared by "trained and experienced" individuals then the actual plan preparer

should be assigned this responsibility. However, it is this writer's strong suggestion that certification of work (notice of termination) should be completed by the contractor who truly bears the responsibility for this certification and carries liability insurance to that effect.

k. Section 102.14(a)(1)(i) – Substitute "watercourse" and "body of water" for river, creek, lake, pond and reservoir, making sure that both terms are included in Section 102.1 and match the definitions provided in Chapter 105.

l. Section 102.14(a)(2) – What are these "other" rules, regulations, order, permit or DEP approvals that would require incorporation of a riparian forest buffer? Can't comply if we don't know the score sheet!

m. Section 102.14(a)(6) – What??? Plant trees out in the middle of a open meadow or farm fields? The limits or application of this requirement must be better explained/listed.

n. Section 102.15(c)(2) – Same comment as for comment "k".