

Proposed Erosion and Sediment Control and Stormwater Regulations
(Chapter 102)
Public Comment Opportunity

Proposed by the Environmental Quality Board

Talking Points for Written Comments

Background:

Stormwater runoff from construction and new development is one of the largest sources of pollution to Pennsylvania rivers and streams. Over 3,600 miles of streams in Pennsylvania are polluted by stormwater runoff from our developed and developing areas. Earth disturbance activities that do not properly control erosion and manage stormwater pollute our streams with nutrients, sediment, and other pollutants, accelerate stream bank erosion and property loss, and contribute to severe flooding.

The Environmental Quality Board (EQB) has proposed new regulations to be administered by the Pennsylvania Department of Environmental Protection (DEP) for the control of erosion and sedimentation and stormwater runoff associated with new earth disturbances. These regulations would substantially revise the existing regulations, often referred to as Chapter 102.

The proposed regulations are now open for public comment. Written comments will be received until November 30, 2009.

Public Comment Information:

Written Comments:

The EQB will accept written comments through November 30, 2009. Comments should be submitted to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301), or emailed to regcomments@state.pa.us. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by November 30, 2009. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

The Campaign for Clean Water encourages you to submit your own written comments, using the information provided below as a guide. In addition, the Campaign stormwater workgroup will be preparing comprehensive written comments that will be circulated to the entire Campaign for signature.

Talking Points for Hearing Participants:

1. The new “permit-by-rule” option should be eliminated.

DEP proposes the creation of a new “permit-by-rule” option for certain earth disturbance activities which would require DEP and County Conservation Districts to conduct expedited review of permit applications. We strongly oppose the permit-by-rule. An expedited permit review process puts rivers and streams at risk, is poor policy, and violates core requirements of the Clean Water Act. Particularly problematic are:

- *The applicability of the permit-by-rule option in High Quality (HQ) watersheds.* These watersheds require special protections to ensure that water quality is protected and maintained. Those special protections cannot be ensured through an expedited permit review process. Rather, DEP should be reviewing such permits carefully and ensuring that the permits require sufficient protections.
- *The applicability of the permit-by-rule in impaired watersheds.* The Clean Water Act requires that DEP not issue permits for new discharges in impaired watersheds that cause or contribute to the impairment and, for watersheds where Total Maximum Daily Loads (TMDLs) have been approved, NPDES permits are consistent with the waste load allocations set forth in the TMDL. Ensuring that these legal requirements are met requires a much more thorough analysis than what is afforded by an expedited permit-by-rule approach.
- *The lack of provisions providing public participation opportunities.* Notice of permit applications and a minimum 30 day comment period must be provided.
- *The lack of a requirement to conduct a technical review of erosion and sediment control (E&S) plans and post-construction stormwater management plans.* It is absolutely critical for DEP and County Conservation District staff to conduct thorough technical reviews of the detailed and highly technical E&S and stormwater management plans to ensure that rivers and streams are protected from erosion and stormwater runoff. Such a review is required by the Clean Water Act. Moreover, simply because buffers may be required for projects permitted under the permit-by-rule option does not mean that good stormwater management and overall site design can be ignored. Buffers of 100 feet or greater are only part of an appropriate stormwater management plan. Along with buffers, stormwater management plans must also employ upslope best management practices (BMPs) that seek to minimize disturbance, maximize the use of existing and planted native vegetation and good infiltrating soils, and treat stormwater runoff at the source. Without requiring technical review of such plans, DEP cannot ensure that the development will employ these necessary stormwater management practices to adequately control stormwater runoff and prevent pollution.

- *The applicability of the permit-by-rule option for proposed developments that are not near a stream.* The expedited permit review process offered through the permit-by-rule appears to be a tradeoff for requiring streamside buffers. Yet this expedited process would be available to developers who want to develop land that is not within 100 feet of a stream, resulting in the expedited approval of plans for development projects that do not come with the environmental benefits of streamside buffers.
- *The applicability of the permit-by-rule for large developments.* While the permit-by-rule is billed as only applicable for “low risk” sites, it would be available for very large construction sites, as long as only 15 acres are being disturbed at a time. This allows very large projects to receive expedited permit approval without adequate technical review of plans, as long as the construction work is phased in 15 acre increments.

2. Forest riparian buffers should be mandatory for all earth disturbances requiring an NPDES permit.

Forest buffers along our streams provide a wealth of benefits. They filter pollution, enhance the ability of streams to process pollutants, cool streams to offset thermal impacts, reducing flooding and flood damage, increase property values, and help combat climate change.

DEP is requiring 150 foot forest buffers for new development in Exceptional Value (EV) watersheds only. This is not an adequate buffer requirement and does little to advance the goal of cleaning up our streams. EV streams are our highest quality streams in Pennsylvania, and need greater protection than 150 foot buffers. Buffers of at least 300 feet are needed. Moreover, by limiting the buffer requirement to only EV streams, the requirement would only apply to 1.6% of streams in the state. One of DEP’s stated goals for a buffer requirement is to create new forested buffers along streams. However, if buffers are only mandatory for EV streams, then the potential to create new buffers only applies to 0.3% of Pennsylvania’s streams, since most of these EV streams are already forested.

The regulations should require a minimum 100 foot forested buffer along both sides of *all* streams and rivers for any new earth disturbance requiring an NPDES permit. Minimum 100 foot forested buffers are a key part of any good stormwater management plan and site design for new development. The science is clear that minimum 100 foot forest buffers are required to maximize the many benefits that buffers provide, such as reducing pollution and prevent flooding. Where forest buffers exist along our streams, water quality is improved, flood waters are reduced, wildlife habitat is provided, and healthier communities are created.

For all new earth disturbance activities that require an NPDES permit, the regulations should be revised to require as part of the post-construction stormwater management plan:

- 100 foot forest buffers on all streams.
- 150 foot forest buffers on small headwaters streams and impaired streams.
- 300 foot forest buffers on all Exceptional Value (EV) and High Quality (HQ) streams, which are our highest value rivers and streams and require special protection under the law.

3. Permittees should bear the legal responsibility of ensuring long term operation and maintenance of post-construction stormwater management best management practices.

As the legally responsible party for meeting permit limits to control stormwater pollution under the Clean Water Act, permit holders of NPDES permits must bear responsibility for ensuring the long term operation and maintenance of post-construction stormwater management BMPs. Individual landowners or homeowner associations cannot be counted on to have the expertise and knowledge to shoulder this legal responsibility and burden.

We believe a good long term option for developers is to enter into long term O&M agreements with County Conservation Districts to administer O&M on a fee for service basis, so that District staff can be supported financially. Districts have the expertise to monitor stormwater BMPs and conduct the necessary maintenance activities to ensure they continue to operate properly.

4. We support the requirement for earth disturbance activities associated with oil and gas development to obtain NPDES stormwater permits.

The proposed regulations require earth disturbance activities associated with oil and gas development to obtain NPDES permits for stormwater discharges associated with construction. We fully support this regulation, as such earth disturbance activities can result in sediment and stormwater pollution during both the construction and post-construction phases, just as with other forms of development. There is no good reason to treat oil and gas developers differently from commercial and residential developers with respect to erosion and sediment control and stormwater permitting.

5. The threshold for requiring an E&S permit for timber harvesting and road maintenance should be reduced to 5 acres.

The current proposal keeps this threshold at 25 acres. Timber harvesting and road maintenance activities of such a large size can result in significant earth disturbance and corresponding potential for accelerated erosion and sedimentation. Reducing the threshold to projects of 5 acres or greater would be more protective of water quality, and would be consistent with requirements for other regulated activities.

6. New regulations requiring temporary stabilization of construction sites and erosion and sediment control plans for animal heavy use areas are positive steps, but a soil amendment and restoration requirement should be added.

Both open construction sites and animal heavy use areas on farms, if not managed correctly, can result in serious impacts to water quality. Requiring practices to minimize erosion and sedimentation from such sites should result in improved water quality in Pennsylvania rivers and streams.

However, the regulations do not contain a requirement to restore soils for any of the NPDES-regulated earth disturbance activities. Such a requirement is among the key stormwater management practices to improve stormwater infiltration and reduce runoff on developed sites. Soil amendment and restoration should be required in all disturbed development areas not converted to impervious, with Class A and B infiltrating soils being restored to their equivalent.

7. The increase of application fees will help cover current costs associated with reviewing applications and plans.

We support the increase in application fees. The fees should be at levels that can sustain the program. We recognize the challenges that DEP faces in implementing the stormwater program given limited staff and funding, and an increase in fees should help address these challenges.