

“What keeps you up at night?”

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Pennsylvania DEP offers revisions to its proposed Chapter 102 E&S regulations

By Andrew T. Bockis

Anyone who has read them knows that Pennsylvania's Erosion and Sediment Control and Stormwater Management regulations are complex. Additionally, they can play a significant role in a variety of development projects across many different industries. Generally speaking, if you want to move dirt in Pennsylvania, these regulations apply. Following the Pennsylvania Department of Environmental Protection's (DEP's) proposed changes to these regulations in August 2009, DEP received over 1,300 public comments regarding the changes. DEP is now making revisions to the proposed regulations based on those comments.

BACKGROUND

DEP regulates earth disturbance activities in its Chapter 102 regulations. 25 Pa. Code Ch. 102. These regulations require persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPs (best management practices) to minimize the potential for accelerated erosion and sedimentation, and to protect the water quality of Pennsylvania's waterways. The regulations contain requirements for all earth disturbance activities regardless of their size. However, if the activity is larger in scope, additional requirements come into play, such as the preparation of an Erosion and Sediment Control Plan (E&S Plan) (5,000 square feet or more), and an NPDES permit for stormwater discharges associated with construction activities (5 acres or more).

WHAT HAPPENED?

On February 19, 2010, DEP met with its Water Resources Advisory Committee to discuss the 1,300+ public comments it received. DEP did not present any alternative language at the meeting. However, it informed the Advisory Committee that it plans to make changes to the proposed regulations based on the public comments, and it is welcoming the Advisory Committee's suggestions for specific language for the revisions between now and the Advisory Committee's next meeting in mid-March. DEP will be working with the Advisory Committee during that time to revise the proposed regulations.

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Specifically, during the Advisory Committee meeting, DEP announced the following in response to the public comments:

- DEP will redraft the “Riparian Forest Buffer Requirements” under 25 Pa. Code § 102.14 (proposed). As originally proposed, the regulation would have required a mandatory 150-foot riparian forest buffer for NPDES-permitted development projects that are within an “Exceptional Value” watershed. In response to comments, DEP is proposing to expand the buffer requirements to include projects within “High Quality” watersheds as well. However, under the revised proposal, the requirement to maintain or establish a riparian forest buffer will depend on whether the applicable watershed is maintaining its current use as prescribed by the regulations. If it is, the revised proposal would allow for a riparian buffer (not a riparian forest buffer). Although a riparian buffer, as opposed to a riparian forest buffer, was not defined in DEP’s original proposed changes, DEP informed the Advisory Committee that the term would allow a permittee essentially to “leave what is there” at the site for 150 feet. Additionally, DEP intends to draft new regulatory language incorporating a “variance” provision for when compliance with the buffer requirements is difficult due to the specifics of a project. DEP also indicated that it is considering a credit trading / offsetting program for buffers that go beyond the Chapter 102 requirements.
- DEP intends to draft additional language, to be incorporated into 25 Pa. Code § 102.14 (proposed), that establishes a legal presumption that compliance with the buffer requirements equals compliance with DEP’s Antidegradation regulations set forth in 25 Pa. Code Chapter 93. By way of background, one of the purposes of DEP’s Antidegradation regulations is to protect the existing quality of “Exceptional Value” and “High Quality” waters. This purpose, when read together with the revised proposal for a legal presumption of compliance, may help explain DEP’s revised proposal, discussed above, to expand the buffer requirement to “High Quality” waters.
- DEP intends to revisit and provide more clarity to the definition of “animal heavy use area” in 25 Pa. Code § 102.1 (proposed).
- DEP stated it will provide clarity to what it means for an Erosion and Sediment Control Plan to include “cost-effective and reasonable” BMPs in 25 Pa. Code § 102.4(a)(4) (proposed).
- DEP stated it will delete some language in 25 Pa. Code § 102.5(a)(1) (proposed) (relating to an earth disturbance with a point source discharge) in order to avoid the appearance of inconsistencies with federal requirements. Also, DEP plans to retain the “timber harvesting activities” threshold at 25 acres.
- DEP stated that it will revise its proposed permit fees that were set forth in 25 Pa. Code § 102.6. Currently the fees are set at \$250 / \$500 for general / individual permits. DEP originally proposed increasing the fees to \$2,500 / \$5,000. Based on public comments, however, it is now proposing to calculate fees on a two-tiered basis. Under the new proposal, all general permits would have a \$500 base fee, and all individual permits would have a \$1,500 base fee. On top of the base fee, DEP is proposing to assess a “disturbed area” fee at the rate of \$100 per acre of disturbed area.
- DEP plans to retain most of the proposed language in 25 Pa. Code § 102.8 regarding post-construction stormwater monitoring (PCSM) requirements. However, DEP plans to clarify the performance standard for storm event compliance. In addition, DEP plans to clarify the requirements for long-term operation of PCSM BMPs.
- DEP stated it will incorporate into 25 Pa. Code § 102.11 the new federal stormwater construction Effluent Limit Guidelines (ELGs) that went into effect in February 2010. These ELGs apply to monitoring turbidity levels in all storms that are less than the two-year / 24-hour storm event. DEP states that it intends to develop guidance on how to measure compliance with these ELGs.
- DEP stated it will eliminate the proposed Permit-by-Rule regulation at 25 Pa. Code § 102.15.

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DEP reversed course on the proposed Permit-by-Rule as most commentators, including industry consultants and the EPA, voiced general opposition to the proposal on the grounds that it was too complicated and unworkable. That said, DEP informed the Advisory Committee that it will revisit this in relation to the general permit application process in an effort to make the process more expedient.

Although DEP typically does not request assistance from the general public in drafting revisions between public comment periods, affected parties need to be aware of the potential impact that DEP's proposed revisions will have, and that DEP is currently drafting language to match these proposed revisions.

A copy of the regulations DEP initially proposed in August 2009 is available at <http://www.pabulletin.com/secure/data/vol39/39-35/1610.html>.

WHY IS IT IMPORTANT?

These changes will impact many persons and industries involved in the design and implementation of development projects, in addition to those involved with agricultural activities. This includes virtually all industrial and commercial enterprises that “move dirt,” ranging from builders and real estate developers to those involved with the construction and operation of oil and gas activities, such as pipelines and Marcellus shale gas operations. Just as DEP's initial proposed changes in August 2009 garnered significant public interest, these revisions will do the same.

DEP is welcoming assistance from its Water Resources Advisory Committee in drafting these proposed revisions between now and the next Advisory Committee meeting in mid-March. Once drafted, these revisions will likely be incorporated into a revised regulatory package for final public comment. It is possible that the final public comment period will be as early as summer 2010.

A copy of DEP's presentation to the Water Resources Advisory Committee is available at <http://files.dep.state.pa.us/PublicParticipation/Advisory%20Committees/AdvCommPortalFiles/WRAC/CH102WRACPRESENTATION0001.pdf>.

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