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ENVIRONMENTAL LAW

Proposed Amendments to State Stormwater Rules

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Special to the Legal

On Aug. 29, the Pennsylvania Environmental Quality Board, or EQB, published proposed amendments to the existing regulations governing erosion and sediment control and stormwater management. The proposed rules codify and enhance stormwater management requirements during and after earth disturbance activities. These proposed amendments are a regulatory companion to the Pennsylvania Stormwater Best Practices Manual, which specifies various best management practices, or BMPs, and design standards that can be used to control stormwater run-off. Developers, agricultural operators and site managers should review these proposed amendments closely. The public comment period is open until Nov. 30.

An effective, efficient stormwater program is essential to achieving the goals of the federal Clean Water Act and the Pennsylvania Clean Streams Law. Stormwater run-off carries sediment and other pollutants into water bodies causing significant degradation. If not properly managed, run-off may also diminish groundwater recharge and promote



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flooding. Farms, construction sites, industrial facilities and other properties each present significant stormwater management challenges.

By 1987, Congress recognized that limiting pollutant concentrations in industrial and municipal wastewater would not alone sufficiently protect the nation's waterways. The 1987 amendment to the Clean Water Act sought to control the adverse impacts of stormwater by, among other things, requiring implementation of a comprehensive stormwater program in two stages.

The Phase I program implemented through the Environmental Protection Agency's 1990 regulations required sources such as large municipal separate storm sewer systems (MS4s) and construction sites that disturb five acres or more of land to obtain NPDES permits regulating their discharges. The Phase II program that the EPA promulgated in

1999 expanded the federal stormwater program to include smaller MS4s in urban areas and construction sites disturbing one acre or more of land. In addition, Section 319 of the Clean Water Act required states to prepare and submit to the EPA state non-point source management programs.

The EPA has delegated to Pennsylvania the authority to implement the NPDES program. The Clean Streams Law and, with respect to stormwater, 25 Pa. Code chapter 102 provide the Pennsylvania Department of Environmental Protection (PADEP) with permitting and other regulatory authority to manage stormwater discharges. Because the Clean Streams Law in many respects is broader than federal law, it offers opportunities for a more flexible and targeted approach to stormwater management. Since 1972, the PADEP has required persons performing earth disturbance activities to employ BMPs. The proposed amendments constitute the latest efforts to update the commonwealth's stormwater management program.

The proposed amendments would expand the use of BMPs by enhancing and codifying requirements imposed by federal regulations, Environmental

Hearing Board decisions and PADEP actions. The key components of the proposed amendments to Chapter 102 are changes to agricultural planning and implementation requirements; updates of erosion and sediment control requirements; incorporation of the Phase II requirements for discharges associated with construction activities; imposition of post-construction stormwater management (PCSM) requirements; addition of riparian forest buffer provisions; and creation of a permit-by-rule option.

Agriculture

Agricultural activities, including earth disturbance and application of fertilizers and pesticides that are carried off farms in storm events, are significant sources of pollutants. Dense housing of farm animals may also contribute to erosion and nutrient discharges, particularly where large concentrated animal feeding operations are conducted. Throughout Pennsylvania, run-off from agricultural operations is a significant source of the conventional pollutants choking some of our ecosystems.

Currently, Chapter 102 requires persons performing agricultural plowing or tilling activities to submit a written Erosion and Sediment Control (E&S) plan if they disturb 5,000 square feet or more of land. Under the proposed rule, the E&S plan must include cost-effective and reasonable BMPs designed to minimize the potential for accelerated erosion and sedimentation. The rule also seeks to ensure that sustainable practices are employed by requiring use of BMPs that limit soil loss from accelerated erosion to amounts that allow a high level of crop production to

be sustained. The proposed amendments also expand the agricultural E&S requirements beyond tilling to include “animal heavy use areas” on which “because of the concentration of animals it is not possible to establish and maintain vegetative cover of a density capable of minimizing accelerated erosion and sedimentation by usual planning methods.” Imposing E&S requirements on areas where animals have destroyed vegetation and deposited wastes is an important step in controlling pollutant loadings from agricultural sources.

E&S Control

The proposed changes to E&S control requirements recognize the impacts of earth disturbance activities on both water quality and water quantity. Under the amendments, activities must be planned and implemented to the extent practicable to minimize earth disturbance, maximize protection of existing drainage features and vegetation, minimize soil compaction, prevent or minimize the generation of increased stormwater run-off and protect water quality. The E&S plan must control both the volume and the rate of run-off from the project site and its upstream watershed area. Periodic inspection and repair of BMPs are also essential components of the E&S plan.

The proposed amendments also address special situations, such as exceptional value watersheds and oil and gas extraction activities. Persons required to obtain an NPDES permit for a project proposed in a special protection watershed must evaluate and use BMPs in accordance with the water quality standards antidegradation requirements

of Chapter 93. Persons conducting oil and gas activities that involve five acres or more of earth disturbance over the life of the project must obtain an E&S permit.

Incorporation of Phase II Requirements

The proposed amendments expand NPDES permitting requirements to persons “proposing an earth disturbance activity that involves equal to or greater than one acre and less than five acres ... of earth disturbance with a point source discharge to surface waters.” Activities that are part of a larger common plan of development or sale are aggregated for purposes of the one-acre threshold. This expansion conforms the rule to federal Phase II regulations and allows Pennsylvania to retain federal program delegation. The person conducting the project must obtain an individual NPDES permit or coverage under a general NPDES permit or NPDES permit-by-rule for stormwater discharges associated with construction activities before commencing earth disturbance activity. Persons operating agricultural plowing or filling activities, animal-heavy use areas, timber harvesting activities or road maintenance activities are excluded from this section.

PCSM Requirements

As originally implemented, E&S requirements governed activities during construction when earth disturbance posed a risk of adversely affecting water bodies, but terminated upon completion of construction. Because construction may have created impervious surfaces

or otherwise promoted conditions necessitating post-construction stormwater management, controls lasting only during construction activities proved inadequate.

In response to these conditions, as well as to EHB decisions and statutory requirements, as of 2002, the PADEP has included PCSM requirements in NPDES construction permits. Under the proposed amendments, a person proposing earth disturbance activities requiring a permit or permit coverage must develop a PCSM plan and ensure that it is implemented, operated and maintained.

Proposed Section 102.8 sets forth the PCSM requirements. These provisions recognize the multifaceted harms that unregulated run-off may create. To the extent practicable, the permittee must preserve stream channels, protect the qualities of the receiving stream, minimize run-off and pollutants, prevent an increase in the rate of stormwater run-off and minimize any increase in stormwater run-off volume, impervious areas, land clearing and soil compaction. In high-quality or exceptional value waters, the permittee must use nondischarge and antidegradation best available combination of technologies BMPs to protect the water from degradation. In these waters, BMPs must achieve no net change in stormwater run-off volume, rate and water quality as a result of storm events up to the two-year/24-hour storm.

To ensure ongoing BMP implementation, the deed to the project site must provide notice of the PCSM BMPs. The landowner shall have responsibility for operation and maintenance (O&M) of the BMPs unless

the PADEP approves a different responsible party. This O&M requirement may be problematic where the present or a future landowner does not have the resources to maintain the BMPs or otherwise fails to do so. The EQB has requested comment on the proposed provisions relating to O&M responsibilities.

Riparian Forest Buffers

Forest buffers protect aquatic resources by reducing run-off and capturing sediment. They play a prominent role in the proposed amendments as a required tool or as a component of a “permit-by-rule” alternative to an individual permit.

Persons proposing or conducting earth disturbance activities must incorporate a riparian buffer within the project site if the earth disturbance is located within an exceptional-value watershed and the project site contains or is within 150 feet of a water body, or if coverage under a permit-by-rule is utilized.

A newly established riparian buffer must contain a zone of undisturbed forest composed predominantly of native riparian tree species and a zone of managed forest composed predominantly of a variety of native riparian tree and shrub species. The proposed rule specifies a minimum width of 50 feet for each riparian buffer forest zone for all waters and greater widths for impaired waters and special protection waters. Various earth disturbance activities are prohibited within the buffers and the buffers must be protected in perpetuity.

A permit-by-rule is offered for low-impact projects with riparian buffers other than those projects located in environmentally sensitive areas. The

permit-by-rule when applicable may be used in lieu of an NPDES permit or an E&S permit. To meet the conditions of the permit-by-rule, the person conducting the earth disturbance must retain a registered professional engineer, geologist or landscape architect who will be responsible for the project design. The permittee must also satisfy the applicable requirements for preparation and implementation of E&S plans, PPC plans and PCSM plans. Earth disturbance must not exceed 15 acres at a time. The amendments contemplate that the administrative convenience of the permit-by-rule option will cause project sponsors to choose permit-by-rule coverage, notwithstanding the riparian buffers and other enhanced environmental protections required by the permit-by-rule.

The success of Pennsylvania’s stormwater management program will properly be measured by its effectiveness in minimizing erosion and sedimentation, controlling peak run-off rates and fostering groundwater recharge. Achieving these goals without undue curtailment of economic activity requires knowledge of the needs and operations of the businesses potentially affected. Persons performing earth disturbance and other activities should carefully analyze the potential impact of the proposed amendments on their operations, and submit comments describing how the proposed amendments can be improved. •

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