

# Municipal Workshop

## January 26, 2011



Final Rulemaking  
Chapter 102  
*Erosion and Sediment  
Control and Stormwater  
Management*

Summary of Revisions

# Why New/Revised Rulemaking?

- Earth disturbance activities regulated under Ch. 102 since 1972 - regs. last updated in 2000
- Amendments to the existing regulations
  - Incorporate the federal “Phase II” National Pollutant Discharge Elimination System (NPDES) permit requirements for stormwater discharges associated with construction activities;
  - Codifies post construction stormwater management (PCSM) requirements (in place since 2002, updated in 2006), including long-term operation and maintenance requirements of PCSM BMPs;
  - Includes antidegradation implementation provisions (from Ch. 93) to “keep clean water clean”;
  - Establishes riparian buffer and riparian forest buffer provisions.
  - Updates agricultural planning and implementation requirements;
  - Updates non- ag. erosion and sediment (E&S) control requirements;

# Addressing EHB Decisions

- DEP and regulated community unsuccessfully defending decisions
- Focus on implementation of “antidegradation” requirements, which in Pennsylvania are found in 25 Pa. Code Chapter 93.
- Environmental Hearing Board (EHB) decisions:
  - *Zlomsowitch v. DEP*, 2004 EHB 756;
  - *Blue Mountain Preservation Association v. DEP and Alpine Rose Resorts*, 2006 EHB 589; and
  - *Crum Creek Neighbors v. DEP and Pulte Homes of PA, LP*, EHB Docket No. 2007-287-L, October 22, 2009
- EHB disagreed with how DEP was implementing antidegradation requirements in the NPDES construction permits program
- Cases identified that **Chapter 102 did not provide an adequate regulatory framework for compliance with Chapter 93 and “keeping clean water clean”**

# Rulemaking Process

- Stakeholders, public and advisory committee participation played a substantial role over a number of years in shaping the final form of this rulemaking
- Draft rule published in *Pa Bulletin* on August 29, 2009
- 90-day public comment period - over 1,300 commentators
  - 3 public hearings
  - Citizens (86%), environmental groups, non-governmental groups & academia (3%), industry (8%), government (federal, state agencies municipalities and conservation districts) (3%), state legislators (31 legislators from the House & Senate) and the Independent Regulatory Review Commission (IRRC).
- Published in *Pa Bulletin* as final on August 21, 2010
- Effective date: November 19, 2010

# Agricultural E&S Requirements- 102.4 (a)

- A plan or BMPs must be installed for agricultural plowing and tilling\* and animal heavy use areas (new)
- For areas under 5000 ft<sup>2</sup>, BMPs must be installed to minimize erosion and sedimentation\*
- For areas 5000 ft<sup>2</sup> or greater, a written E&S plan is required\*

\* Required in  
previous version of  
Ch. 102.



# Non-Agricultural E&S Requirements-102.4(b)

- For areas under 5000 ft<sup>2</sup>, BMPs must be installed to minimize erosion and sedimentation\*
- For areas 5000 ft<sup>2</sup> or greater, a written E&S plan is required\*
- Written E&S plan also required when:
  - Potential to discharge to special protection waters\*
  - Required by other Department regulation (e.g. Chapter 105)\*

\* Required in previous version of Ch. 102.



# Activities Requiring a Permit-102.5

- Any construction related earth disturbance (with a few exceptions) must have an NPDES Permit if it disturbs 1 acre or greater (prior threshold was 1 acre + point source discharge)
- Timber harvesting and road maintenance activities 25 acres or greater must have an E&S permit\*
- Oil and gas activities 5 acres or greater must have an E&S permit
- All permits (NPDES and E&S) must contain PCSM plans unless provided for in other ways\*

\* Required in previous version of Ch. 102 or by previous NPDES Permit standards

# Preconstruction Meeting-102.5

- Permittee will invite DEP and CD to meeting and give at least 7 days notice of the meeting\*
- Meeting is required unless the DEP or CD inform the permittee in writing otherwise
- Attendees must include permittees, co-permittees, operators, and licensed professionals (or designees)
  - ❖ Licensed professionals should be the person overseeing the critical stages of BMP installation

\* Permittees & contractors have long attended voluntary pre-construction meetings with PCCD

# Permit Fees-102.6

E&S and NPDES permits required under Chapter 102

- General Permits
  - \$500 + \$100/acre disturbance fee (was \$250)
- Individual Permits
  - \$1500 + \$100/acre disturbance fee (was \$500)
- Adequacy of the fees will be reviewed
  - At least once every 3 years
  - A written report provided to the EQB
- Conservation districts may charge additional fees per Conservation District Law (not new)

# Notice of Termination (NOT)\* - 102.7

- NOT must contain information on the person who agreed to and will be responsible for the PCSM long-term O&M (new)
- Permittee (and co-permittee, when applicable) will remain responsible for the site and any violations on the site until written confirmation is provided\*
- DEP or CD will conduct a final inspection and act on the NOT in 30 days\*

\* Previously required by NPDES Permit standards

# Post Construction Stormwater Management (PCSM) Requirements-102.8

- Grandfathering provision – provides relief for projects in progress or previously permitted
  - Complete permits received before November 19, 2010 are grandfathered from meeting long term O&M requirements and buffer provisions
  - Complete renewals received by January 1, 2013 are also grandfathered from meeting long term O&M requirements and buffer provisions

# Post Construction Stormwater Management (PCSM) Requirements-102.8

- PCSM Plan development, implementation and maintenance – parallel construction to E&S plan requirements\*
- Licensed professional must be present for critical stages of construction (**new**)
  - i.e. installation of underground storage or treatment BMPs, installation of structurally engineered BMPs
- Licensed professional must provide record drawings (**new**) to certify construction of BMPs per plan

\* Previously required by NPDES Permit standards

# PCSM Long-Term Operation and Maintenance Requirements

- Permittee and co-permittee remain responsible for long-term O&M with land owner unless a different person is identified in the NOT
- Person responsible for long-term O&M may enter into an agreement with another party to
  - Transfer responsibility for PCSM BMPs
  - Perform O&M
- An instrument shall be recorded with recorder of deeds (**new**) to
  - Identify the PCSM BMPs
  - Provide access
  - Provide notice that the responsibility for O&M of PCSM BMPs runs with the property

# Riparian Buffers-102.14 (new)

- Definition – *A BMP that is an area of permanent vegetation along surface waters*
- Required as a Post Construction Stormwater Management BMP in special protection (HQ or EV) watersheds **WHEN A PERMIT IS REQUIRED**
- No earth disturbance within 150 feet of perennial or intermittent river, stream, creek, lake, pond or reservoir
- Protect any existing riparian buffer – i.e. existing vegetation

# Riparian Buffers-102.14

- A number of exceptions and waivers are included for special situations

# 102.14(d) (1) – Exceptions

## No Mandatory Riparian Buffer Required

- Project site greater than 150 feet from river, stream, creek, lake, pond or reservoir
- Less than 1 acre earth disturbance
- No permit required under this chapter
- Permit application prior to 11/19/10
- Road maintenance *so long as existing riparian buffer undisturbed to extent practicable*
- Repair/maintenance of existing pipelines and utilities *so long as existing riparian buffer undisturbed to extent practicable*

## 102.14(d) (1) – Exceptions

### No Mandatory Riparian Buffer Required

- Oil and gas, timber harvesting, or mining for which site reclamation or restoration is part of permit authorizations in Chapters 78 and 86-90 *so long as existing riparian buffer undisturbed to extent practicable*
- Single family home that is not part of larger common plan of development or sale and parcel acquired by the applicant prior to 11/19/10
- DEP permit under another chapter of this title which contains *setback requirements and the activity complies with the setback requirements*

## 102.14(d)(2) Waivers

- Project necessary to abate substantial threat to public health or safety
- Linear projects which may include pipelines, public roadways, rail lines and utilities
- Abandoned mine reclamation activities under DEP permit
- Temporary disturbance that will be fully restored to preexisting conditions within the term of the permit
- Redevelopment
- Not feasible due to site characteristics or existing structures

# 102.14(d)(2) Waivers

- different than exceptions

- Written request to District/DEP
- Alternatives analysis
- Existing riparian buffer to remain undisturbed
- May require offsite riparian buffer protection, conversion or establishment or \$\$ compensation

# 102.14(f)(2) Activities Allowed Within a Riparian Buffer With DEP Authorization\*

- Roads, bridges, trails, storm drainage, utilities or other structures
- Water obstructions or encroachments
- Restoration projects

\* Not new - these activities already require DEP permits or authorization

# 102.14(f)(3) Activities Allowed Within a Riparian Buffer

- Buffer maintenance
- Timber harvesting in accordance with RFB Management Plan as part of PCSM plan
- Passive or low impact recreational activities so long as the functioning of the buffer is maintained
- Emergency Response
- Research and data collection which may include water quality monitoring and stream gauging

## 102.14(g) Permanent Protection of Riparian Buffers (new)

- Protect in perpetuity through deed restriction, conservation easement, local ordinance, permit conditions
- Clearly mark the boundary limits of the riparian buffer

# Coordination with local government- 102.42, 102.43

- If a municipality or county issues building permits or other permits and receives an application for a project of 1 acre (**was 5 acres**) or greater, they shall notify the CD or DEP within 5 days
- A municipality or county may not issue a building or other permit or approval until the DEP or CD has issued/authorized the permit for the project (**not new but slight wording change – removal of *final* - potentially broadens applicability**)

# Coordination with local government- 102.42

- If a municipality or county issues building permits or other permits and receives an application for a project of 1 acre (*of earth disturbance*) or greater, they shall notify the CD or DEP within 5 days

**What is the best way for municipalities to do this?**

# Coordination with local government- 102.43

- A municipality or county may not issue a building or other permit or approval\* until the DEP or CD has issued/authorized the permit for the project
- Remember permit earth disturbance thresholds:
  - NPDES – 1 acre or more over life of project
  - E&S – 25 acres or more for timber harvest or road maint. and 5 acres or more for oil & gas activities

\* DEP's interpretation – This includes those permits/approvals that *allow for the commencement of earth disturbance activities*, including preliminary subdivision or land development approvals or building permits. *It would not include long-term planning approvals such as zoning approvals, planning approvals or sewage planning modules.*

# Enforcement

- Actions that can be pursued include:
  - Investigations and inspections; response to complaints; orders; civil penalty proceedings; summary proceedings; suspension, revocation, withholding, or denial of permits or approvals; notices of violation; actions in court; other actions authorized by law
- DEP or CD can recover from the responsible party costs and expenses incurred in taking actions **(new to regulation but not to DEP practice)**
- Person aggrieved by an action of a conservation district shall request an informal hearing with DEP; determination will be made within 30 days of the request and may be appealed to the EHB **(new)**

# Questions?

