

Sewage Advisory Committee
DRAFT
Minutes of the Meeting
November 4, 2021

VOTING SEWAGE ADVISORY COMMITTEE (SAC) MEMBERS PRESENT

Andrew Bockis, Pennsylvania Bar Association
John Brady, United States Department of Agriculture Rural Development Mission
Adam Browning, Pennsylvania Onsite Wastewater Recycling Association (POWRA)
Terry Carcella, Pennsylvania Municipal League
Brian Chalfant, Governor's Policy Office, Alternate
Carl Cox, Pennsylvania State Association of Boroughs
Robert Decker, American Council of Engineering Companies of Pennsylvania
Christopher Graf, National Association of Water Companies
Keith Heigel, Pennsylvania Society of Land Surveyors
David Horvat, Vice-chair, Pennsylvania Association of Sewage Enforcement Officers (PASEO),
Alternate
Ginnie Anderson Kane, Pennsylvania State Association of Township Commissioners
Keith Klingler, Pennsylvania Landowners' Association, Inc.
Bette McTamney, Pennsylvania Association of Realtors, Alternate
Duane Mowery, Chair, Pennsylvania Water Environment Association (PWEA)
Laurel Mueller, Pennsylvania Builders Association
Eileen Nelson, Pennsylvania Society of Professional Engineers
John Peffer, County Departments of Health and Health Agencies
Paul Racette, Pennsylvania Environmental Council, Alternate
Jeffrey Rachlin, Pennsylvania Septage Management Association (PSMA), Alternate
William Rehkop III, Pennsylvania Municipal Authorities Association
Esten Rusten, American Institute of Architects, Pennsylvania (AIA)
Keith Valentine, Pennsylvania Association of Professional Soil Scientists (PAPSS)
John Wagman, American Society of Civil Engineers

MEMBERS OF THE PUBLIC PRESENT

Members of the public were present but not identified.

DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP) STAFF PRESENT

Annamaria Ether De Sanctis, Environmental Engineering Specialist, Planning Section, Division
of Municipal Facilities (DMF), Bureau of Clean Water (BCW)
Charles Klinger, Water Program Specialist, Planning Section, DMF, BCW
Leda Lacomba, Legal
Brian Schlauderaff, Environmental Group Manager, Planning Section, DMF, BCW
Janice Vollero, Water Program Specialist, Planning Section, DMF, BCW

CALL TO ORDER AND APPROVAL OF MINUTES

The meeting was called to order by Chair Duane Mowery at 10:01 AM. The meeting was a hybrid meeting, meaning that it was being conducted both in-person and on-line. Chair Mowery recommended that when a vote is called for, if a member on the phone is voting 'Yes', they remain muted and make no response; if voting 'No' or 'abstaining', they should unmute and make themselves known.

Charles Klinger took a roll call by SAC member organization. Voting members identified themselves when their organization was called. A quorum was present.

Keith Klingler requested a change to the May 25, 2021, meeting minutes. On page 9, Mr. Klingler's name was misspelled three (3) times. Mr. Klingler asked that this be corrected.

Motion: Chair Mowery called for a motion to approve the May 25, 2021, meeting minutes.

Ginnie Anderson Kane made a motion to approve the May 25, 2021, meeting minutes as corrected. Carl Cox seconded the motion, which was unanimously approved by the Committee. John Brady abstained since he did not attend the May 25, 2001, meeting.

DISCUSSION/INFORMATION ITEMS

1. Act 34 Frequently Asked Questions (FAQ) updated document.

Brian Schlauderaff explained that the updated FAQ document was created to simplify the original FAQ document due to a lot of complaints from sewage enforcement officers (SEOs) and soil scientists who said they could not follow the previous document. The policy itself, developed earlier this year, has not changed. Clarification and additional questions were added. Mr. Schlauderaff did not walk through the document but did call for comments on it.

- Laurel Mueller - Commented in writing and requested those comments to be incorporated in the minutes. (Attachment 1) (Mr. Klinger put Ms. Mueller's comments on the screen.)
 - The updated document had more brevity and clarity but has a weak legal standing.
 - It uses many words that don't have a definition in statute or regulation; general site suitability, marginal conditions or marginal site conditions, new land development and residual lot. There is an Environmental Hearing Board decision in § 71.61 that states "the standard for approving or disapproving a plan revision can no longer be general site suitability". (Mr. Schlauderaff corrected that citation to be § 71.62.)
 - This document is going to regulate land development in PA by disallowing alternate technologies and systems until DEP can update the regulations to support the amendment that specifically allows alternate technology systems. This concept will be challenged by some land developer that has experienced a taking.

- On behalf of the Pennsylvania Builders Association (PBS), we request that DEP limit the regulation changes to surgical changes to address the issue of Act 34 and not venture into all the other wish list changes. Chair Mowery asked Mr. Schlauderaff if there is a chance there may be a revision to the regs merely to address the Act 34 issues or is the intent to incorporate the Act 34 issues into a more comprehensive revision. Mr. Schlauderaff explained that the regs were not updated since 1997, although previous attempts were made before by the planning program. This update is a comprehensive revision to bring the regs up to a more modern standing and clarify a lot of issues that are in the tab index. The tab index consists of questions asked by the public/regions that the program answered as policy. Updating a few things in the regs can still take up to two (2) years; might as well just do it all.
- Chair Mowery agreed it was fair to incorporate Ms. Mueller's comments into the meeting minutes.
- Chair Mowery - Drew Shaw sent a comment to the SAC, "Deed restrictions on replacement areas should be a condition of permit issuance, not lot creation as the final location of absorption area(s) is not always known at the planning stage." (Mr. Klinger put Mr. Shaw's comments on the screen.) Chair Mowery stated he would not want Mr. Shaw's recommendation to be misconstrued to mean that lots can be created without a viable absorption area and where required, a viable replacement area. He suggested if the municipal ordinance requires both absorption areas to be provided, there should be some indication that they both can be provided on the lot at the time the lot is created, to avoid creation of a non-conforming lot. Ideally, the replacement area would be protected from disturbance. In the event that more than one location is suitable for a replacement area, they should all be noted on the plan when the lot is created, and a note added to the plan stating that the selected replacement area will be deed restricted on receipt of permit.
- Paul Golrick - Alternate systems are allowed in the current regs under § 73.72 and § 73.72(a) where alternate systems shall be considered for individual and community on-lot systems to overcome specific engineering problems. The FAQ does not address that sufficiently. The focus is on the general site suitability issue and that pushes aside the specific site engineering issues. Mr. Golrick wants to ensure DEP is aware of our concern in trying to address sewage disposal needs on multiple lots, not just new lots, all along the testing process, and that alternate systems are supposed to be considered for individual and community systems.
- Bette McTamney - Her association echoes a lot of the concerns raised by some of the other organizations. The policy change on some of this has the possibility to impact development statewide which dramatically eliminates the future uses of lots that really could have been subdivided from private lands for new home construction. This is concerning. The purpose of Act 26 in 2020 was to provide for the use of alternate septic systems which would allow responsible development of land parcels where traditional sewage or septic is not conducive. Her organization is also concerned that the FAQ will impact new construction already in the pipeline. Ms. McTamney believed her association did send a letter in and stated it could be resent if needed.

- Chairman Mowery - There are many on the committee who share the concerns that Ms. McTamney raised and perhaps the perspective that Mr. Golrick has. The committee has the opportunity to make official communication to DEP as a reflection of the entire committee or the committee can just keep comments in the meeting minutes. The FAQ is a living document and it sounds like DEP is open to changing the document to more adequately address concerns brought to them or with issues due to the enactment of the document. Mr. Schlauderaff stated Chair Mowery was correct; the overall policy is not going to change but the FAQ could change to provide more clarification – that’s the living part of it.
- Ms. Mueller - Requested to amend the FAQ to remove the section that states if you completed testing under Act 26, got the project in by the June 1st deadline, and then the project gets denied, you have no protection under your original submission under the rules of Act 26. It is entirely unfair to have allowed projects to continue under a set of rules they understood, specifically commercial or non-residential projects with shallow limiting zone absorption areas. If all of the testing was done, the submission was complete, the Resolution of Adoption was passed and then it was denied for any reason that project is killed. That project cannot come back except under the new rules. I request DEP reconsider if a developer followed the rules of Act 26, followed the guidance to make their submission to the township by June 1st and documented it, that they be allowed to proceed under the rules that they understood. Ms. Mueller also requested a separate FAQ to allow alternate systems for non-residential projects.

Mr. Schlauderaff stated he will discuss this with program staff and Jay Patel. He clarified that Central Office gave a lot of discretion on this point and talked to the regions to ensure denials for these projects should only occur if the project is not implementable. Staff are doing their best to work with the consultants and municipalities on these issues so there is no denials. Mr. Schlauderaff stated if you are getting a denial for a minor issue, reach out to him outside of the meeting and he will investigate the issue.

- Ms. Mueller - When we tried to change the regs before, it largely ended because the Act wasn’t amended to support the change in regs. We are now working in reverse order. The Act was changed first to support the change to the regs. Therefore, if we are doing a full reg change, the act may need to be amended first to support the reg changes so the changes are not in conflict with the Act. Chair Mowery reminded everyone that the legislature must amend the Act and if we want that, it will have to be done through organizations or lobbying our officials. At this point everyone is stuck with reacting to changes or revisions to the Act.
- Ms. McTamney stated for the record that she agreed with a lot of Ms. Mueller’s points.
- Chair Mowery stated that he hoped Mr. Schlauderaff took Ms. Mueller’s request for a non-residential FAQ to heart and would contact her for her insights on that before the FAQ is drafted.

2. SAC Workgroup Report on Technical Guidance Document (TGD) *Sewage Management Program and Annual Reporting*

This TGD is a pre-draft. It was reviewed by policy and attorneys but no one else. Some of the material in this TGD is now in the reg update so the program may not proceed with this document. If the TGD does move forward, the SAC will see it again for comment as a draft document.

Chair Mowery - A SAC workgroup met virtually on August 25, 2021; DEP was present. It was a good discussion. SAC asked DEP how this TGD was going to be implemented and what sort of enforcement will be brought to bear for those municipalities who choose not to enforce it? Mr. Mowery said what he heard was that DEP has wide discretion in enforcing the implementation of the TGD; what he didn't hear was a mandate to all municipalities that by xxx date you will all have a sewage management program (SMP) in place and DEP will expect to see all reports within xxx years. Mr. Schlauderaff agreed that DEP has wide discretion in enforcement but stated that the SMP will be a mandate. There will be a set time to develop an ordinance and an update to the municipal official plan. DEP will have discretion if a municipality cannot comply due to bankruptcy, etc. There will be a cost involved that will be pushed to the homeowners. Homeowners will have to pay for operation and maintenance for their system just like they do for their cars. The amount of time municipalities will have to comply will be in the final document.

Chair Mowery's recommendations to DEP were placed on the screen. He asked SAC for comments.

- Mr. Klingler asked if there was any response from the Pennsylvania State Association of Township Supervisors (PSATS) on this document? Chair Mowery and Mr. Schlauderaff did not see any comments. Mr. Klingler stated that was very disappointing.
- Ms. Mueller's written comments were placed on the screen. Her comments were similar to Chair Mowery's. Ms. Mueller mentioned her organization was overall supportive of the TGD. The official plan map on the DEP website shows that 2/3 of the state have plans older than 20 years so there is a lot of work to be done. There is a whole skill set to conducting the inspections. Inspections should be left to the companies who know how to do that and administration of the SMP should be left to the municipalities and SEOs.
- Ms. Anderson Kane - Smaller communities need financial aid to hire engineering firms to update their official plans. Chair Mowery agreed that funding is the biggest impediment.
- Mr. Klingler - What is DEP's reasoning for implementing mandatory on-lot inspections annually? When there is something this massive, this costly, there is usually a huge environmental problem that caused it to happen. Mr. Klingler stated he does not see a huge problem but rather sees malfunctions getting corrected due to real estate transactions. The TGD is being implemented like a one size fits all and it will be a battle with the property owners.

- Mr. Schlauderaff - When the regs were created, DEP viewed on-lot systems as temporary and therefore never enforced SMPs. It was anticipated that public sewerage systems would replace on-lots. The on-lots were not meant to last forever. That concept has changed. There are properties that will never see a public sewerage system. SMPs are not meant to protect the municipality; they are meant to protect the homeowner and future buyers at a reasonable cost. Inspections will prevent malfunctions. SMPs are a best management practice to protect the waters of the Commonwealth. DEP has a lack of data and the SMPs will give us that data; they will eventually drive our policy and regulation. DEP believes SMPs are beneficial and it is DEP's job to promote them. DEP expected municipalities to implement SMPs on their own and that didn't happen, so now DEP is going to use their regulatory authority to enforce them.
- Mr. Klingler - Does DEP have data to back up what we are saying that thousands of miles of streams are impacted due to on-lot malfunctions? Mr. Schlauderaff stated that we have stream designations and reasons for impairment. Impairment due to bacteria can be from farms or on-lot systems. Malfunctioning on-lot systems impact wells, streams and property values. Otherwise, why else would Act 537 exist.
- Chair Mowery - Can pumping ordinances suffice as an SMP, especially in rural townships? Mr. Schlauderaff stated we would have to defend that a pumping ordinance is sufficient to protect waters of the Commonwealth across the state. It is possible we could require pumping ordinances and inspections to begin with, and then move into more robust inspections.
- Mr. Klingler stated he sees no research that went into this TGD, no talking to the regions or PSATS. In Venango County one (1) or (2) calls a year come in concerning malfunctions and then only half of the calls are valid. He stated that a tank pumping ordinance is a good start for where there are problems, high density, small lots or older systems.
- Mr. Schlauderaff – Only getting two (2) calls about malfunctions does not mean there are not more malfunctions that don't get called in. There may be a different way to implement the TGD. We are sure SMPs are a good thing for homeowners, municipalities and the Commonwealth. How to go about it is what we are discussing here.
- Mr. Klingler – Most homeowners are responsible, appreciate the value of their property, intend to sell it or pass it to their children someday, so they maintain it. It is like DEP is saying nobody is responsible, nobody will maintain their system and DEP is going to come in and make sure they do. This sounds pretty heavy handed. Mr. Schlauderaff stated they are going to have to agree to disagree.
- Chair Mowery – Most of the SAC members believe that SMPs are a good thing if implemented in an appropriate manner, which is up for debate. He suggested combining Laurel's comments and his; adding her bullet points one (1) and four (4). He will draft the letter to DEP. Chair Mowery called for further comments.

- Terry Carcello – Lots of municipalities have American Rescue Plan Funds (ARP) that they don't know how to use because the final rules aren't written yet but water quality is one (1) avenue that these funds can be used for. We have money available now that can be used for this. If we work in a multi-municipal way, at the county level, we can make this happen.
- Paul Racette asked what BTG meant. Chair Mowery explained it is best technical guidance and can be found in § 73.3.

Motion: Chair Mowery called for a motion to combine his document with Ms. Mueller's and send to DEP.

Carl Cox made a motion to combine the two (2) documents and send it to DEP. Bette McTamney seconded the motion, which was unanimously approved by the Committee.

3. Regulation Update

Mr. Schlauderaff – Program staff is done with Chapters 71 and 72 and 1/3 of the way through Chapter 73. Legal is already involved with the process. Potentially by the end of the year or beginning of the next, the update will be out of the program's hands and at the executive level for review. That is the part of the process where the program would start developing the preliminary regulatory documentation and then it would come to SAC for review. We would like to share all three (3) chapters at once but it may end up we share one (1) at a time.

- John Wagman – Will SAC have a draft review of the regs? Mr. Schlauderaff answered that DEP is required to give SAC a chance to review and comment.
- Chair Mowery – In addition, advisory groups are required to send comments about the regs to the Environmental Quality Board. Brian Chalfant replied that this varies by advisory group. SAC will get a pre-draft look before public comment and then again during the public comment period on the proposed rulemaking. SAC members can also comment personally.
- Mr. Wagman asked if Act 34 requirements will be incorporated into the regs? Mr. Schlauderaff replied yes.

NEW BUSINESS

Mr. Chalfant asked if the 2022 meetings have been scheduled? He also stated that all meetings in the unforeseeable future will be hybrid meetings. Chair Mowery said the meetings have not been scheduled and he asked the committee if there were any date preferences. There were none so Chair Mowery suggested March 23 and September 14 of 2022. Committee members had no issues with these dates.

PUBLIC COMMENT

There was no public comment.

NEXT MEETING

Wednesday, March 23, 2022, 10:00 a.m., to be held virtually and in person.

ADJOURNMENT

Motion: Chair Mowery thanked everyone for their attendance and called for a motion to adjourn the meeting.

Ms. Anderson Kane made a motion to adjourn the meeting. Mr. Klingler seconded the motion, which was unanimously approved by the Committee. The November 4, 2021, SAC meeting was adjourned at 11:56 AM.

ATTACHMENT 1

Pennsylvania Builders Association Comments on

"Act 34 of 2020, Frequently Asked Questions (FAQ)," dated October 13, 2021

Submitted to SAC by Laurel F. Mueller on behalf of PBA Nov 4, 2021

This FAQ document includes words which lack statutory and regulatory definitions:

- General Site Suitability (GSS)
- Marginal conditions or marginal site conditions
- New Land Development (NLD)
- Residual lot

General Site Suitability (GSS)

FAQ begins by noting the "GSS criteria" are defined. It does not say that "GSS" is defined.

FAQ cites 71.62, and 73.12 (Site location), 73.15 (minimum horizontal isolation distances), 72.15 (Percolation tests), and 73.17 (Sewage Flows). There are no definition in these sections.

FAQ refers to GSS criteria for IRSIS under 71.62, 73.14(b) (Spray field) and 73.16 (e) (Spray Field Table B)

The term "General Site Suitability is not in Act 537 or Chapters 72 and 73. In Chapter 71, the following are referenced, but again there are no definitions:

§ 71.53 . Municipal administration of new land development planning requirements for revisions. 71.53(d)(5)(i), "general site suitability is a listed item for SEO comment on planning revisions.

§ 71.61. General, Notes of Decisions: "Given the express language of subsection (d) of this regulation, **the standard for approving or disapproving a plan revision can no longer be general site suitability.** Montgomery Township v. Department of Environmental Resources, 1995 EHB 483.

§ 71.62. Individual and community onlot sewage systems, 71.62 (a) Official plans and official plan revisions proposing individual and community onlot sewage systems shall evaluate general site suitability to establish their use as a feasible alternative, as specified in subsection (b).

Marginal conditions or marginal site conditions

FAQ refers to "marginal site conditions." Under Act 34 Planning, it references needing replacement absorption areas to address "marginal site conditions." FAQ #3 states that an IRSIS qualified lot does not have "marginal conditions." FAQ #9 states that the residual lot

with "marginal site conditions" may use a shallow LZ OAT.

The only reference to "marginal" in Act 537, Ch 71, 72, or 73 is:
§ 73.11. SITE LOCATION AND ABSORPTION AREA, General "Notes of Decision" referring to DER having no liability for "soil suitability that was marginal."

Planning Module Components 1 & 2 **Instructions** (not regulations) refer to "marginal conditions," not "marginal site conditions."

New Land Development (NLD)

FAQ uses "New Land Development" and NLD throughout.

Act 537 uses "new land development" throughout, but it is never defined.

In Act 537 Section 2. Definitions:

" "Lot" means a part of a subdivision or a parcel of land used as a building site or intended to be used for building purposes, whether immediate or future, which would not be further subdivided. Whenever a lot is used for a multiple family dwelling or for commercial or industrial purposes, the lot shall be deemed to have been subdivided into an equivalent number of single family residential lots as determined by estimated sewage flows." " This is repeated in Chapters 71 and 72

"Residential subdivision plan" means a subdivision in which at least two-thirds of the proposed daily sewage flows will be generated by residential uses."

Residual lot

FAQ refers to "residual lot".

The word "residual" only appears in Act 537, and Chapters 71, 71, and 73 with respect to chlorine.

Planning Module Components 1 & 2 Instructions refer to "residual tract" with respect to "residual tract waiver," Section H for SEO action, and the fee tabulation.

This FAQ document is intended to regulate land development in Pennsylvania, by disallowing "onlot alternate technology" systems until DEP can update Regulations to support an existing amendment to Act 537 which specifically allows "onlot alternate technology systems" in land development. This document could be in place for years. With no regulatory or statutory basis, the FAQ has a weak footing legally, and is expected to be challenged.