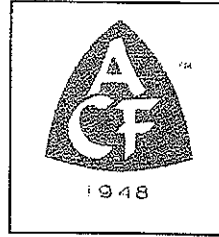


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November 23 2009

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ENVIRONMENTAL QUALITY BOARD

Environmental Quality Board
P. O. Box 8477
Harrisburg, PA 17105-8477

Re: Proposed Rule Making Erosion and Sediment Control and Storm Water Management
[39 PA.B. 5131] Saturday, August 29, 2009

Members of the Environmental Quality Board:

What you have proposed in the above mentioned Proposed Rule Making (PRM) - represented as a minor change to Chapter 102 at the three public hearings - is in truth a major expansion of Chapter 102 that dwarfs the existing Chapter 102 regulations. Does this misleading representation made at the hearings frame the true intent of the PRM?

My response will have a strong relationship to forest management activities. I am a forester. But my comments will also be addressed toward all activities where forested buffers are proposed or required as a forester's expertise is the expertise that should be employed.

You have posed three questions concerning the PRM which I will address in reverse order:

Question 3: Mandatory Riparian Forest Buffers: Should the Proposed Rule Making include a provision for mandatory riparian forest buffers? No, they should not! Particularly as they would apply to forest management as follows:

- Management is essential to the health and sustainability of forested areas.
- Management requires expenditures (investment) on the part of the landowner.
- Investment by the landowner needs to return income to the landowner that includes a profit from the investment.
- The Department of Environmental Protections intends to;
 - burden the landowner with the duty to control invasive and exotic species,
 - support the Chapter 102 program through egregious permit costs imposed on the landowner.
 - This is represented to not result in significant increased compliance costs for persons proposing or conducting earth disturbance activities. Really! The PRM states "This proposed rulemaking is the first effort by the Department to cover the Chapter 102 program costs through permit fees."
- Management in the forested buffers is needlessly restricted to the point that the forested buffer cannot be maintained in a healthy sustainable condition.

- The maintenance of a "60% uniform canopy cover" in the buffers is a financial and otherwise unnatural and unattainable requirement. It is simply not possible in the short term and certainly not in perpetuity.
- The buffer requirements defy the science and logic of management of the forest.
- Not one forester from the private sector was, and very few others were, included in the discussion and drafting of the PRM. Government foresters have little understanding of the economics of the management of small private ownerships and, along with others, tend to falsely believe that landowners have deep pockets.
- The cost of establishing and maintaining forested buffers is grossly underestimated.
- Forests do provide high quality water. However, buffers needlessly complicate the management of forested properties. When buffers are managed differently from the remainder of the similar forest the buffers will indeed be different and under the PRM less healthy and safe than the surrounding forest. Present best management practices provide sufficient protection for water quality particularly when the services of professional foresters are utilized in the management of the forest.
- Pennsylvania foresters need to be licensed to attain the best management of all of the forest!

Question 2: Responsibility for long-term PCSM operation and maintenance (O & M): How should the proposed rule making address responsibility for long-term maintenance of PCSM BMP's?

- It is perhaps easier to argue that costs of managing post construction storm water structures should be placed upon the owner(s) of the property when major earth disturbance is involved in development and construction activities. The PRM makes the professional and contractor (Operators) co-permitties along with the owner with the implication that all three should be responsible for maintenance in perpetuity. In most instances of large development the PCSW maintenance structures become in effect public ownership which should be the responsibility of the public owners. Professionals and contractors should not be burdened with perpetual maintenance responsibility.
- In the case of a timbersale within 150 feet of an Exceptional Value (EV) stream which requires a full blown permit process where:
 - a PCSW plan (Post Construction Storm Water),
 - a PPC Plan (Preparedness, Prevention and Contingency Plan),
 - a Buffer Management Plan, and
 - a DCNR approved Forest Stewardship Plan all apply
 - a \$5,000 permit fee is to be paid along with the additional ten to fifteen thousand dollars to satisfy permit development requirements
 - with Conservation District costs added;
 - it will simply be impossible to manage the buffer and the sale will have to stay 151 feet away from the stream, and
 - the buffer forest will have to be abandoned to the whims of nature with no one responsible for long term maintenance.

This is a total failure to address the best interests of the forest, water quality and landowner.

Question 1: Scope of the permit-by-rule: Should the proposed rulemaking limit or expand the availability of the proposed permit-by-rule?

This question should be considered only after the biases and the self interests of the parties that oppose the permit-by-rule are examined.

- On the one hand if those parties who espouse a buffer on every stream and a permit on every timbersale with additional statements accusing licensed professionals of less than diligent adherence to

professional standards are combined with threats of retaliation against licensed professionals then perhaps there should not be any permit requirement at all!

- On the other hand if it can be shown that the permit-by-rule is effective and can be implemented at reduced impact and cost to both the economy and landowner through licensed professionals then the permit-by-rule should be expanded to include EV streams. It can only be shown to be effective if it is first applied to all stream classifications.
- However, the permit-by-rule is the area where the largest impact from buffers is felt with all projects on all streams being subjected to the establishment and maintenance of riparian forested buffers with restrictions on use in perpetuity as well as egregious harm to private property rights.
 - Further the defined licensed professionals are not qualified to establish or manage forests and forested area. This is properly the domain of the forestry profession.
 - In those areas where forests do not exist and the land surface has been subject to other uses that have resulted in compacted soil conditions the buffer may need treatment that is prohibited in the PRM.

Unfortunately, the tone of the PRM fits well with the cancer of ever growing governmental disregard for individual and personal property rights. There is a better approach, at least to the health and proper management of the forest and the quality of water that the forest produces, and that is the utilization of licensed professional foresters to assist forest landowners in the management of their forests. Imposing unrealistic and indeed impossible standards to the management of a biological system will just not work. Professionalism is required to produce the results required. Licensing foresters will produce better results quicker.

I suggest that the PRM be returned to the Environmental Quality Board for further consideration with the panel containing significant representation by foresters from the private sector. The PRM should not be forwarded to the IRRC or endorsed by the IRRC unless and until returned to the Environmental Quality Board for further consideration as previously stated.

Sincerely,



Donald P. Oaks CF ACF
Donald P. Oaks, Forestry Consultant

Attachment: One Page Summary

Summary of Donald P. Oaks, Forestry Consultant CF ACF Comments on Proposed Rule Making Erosion and Sediment Control and Storm Water Management [39 PA.B. 5131] Sat., Aug. 29, 2009

Buffers as proposed are:

- A detriment to the health of the forest.
- A safety hazard to forest users.
- An injury liability concern for the forest landowner and forest users.
- A property value liability.
- A financial liability to the landowner.
- A reason for the landowner to exclude recreation use by others.

Landowner use and enjoyment of the property is restricted to the point that it is a taking.

- No off road vehicular travel is permitted.
 - Off road vehicular travel is not defined in the PRM
- Housing, grazing or otherwise maintaining animals is prohibited
 - Are domestic animals excluded from all activities including work in the buffer?
- Zone 1 of buffer is taken outright.
 - Landowner is burdened with cost of excluding invasive and exotic species.
 - Landowner is burdened with cost of maintaining continuous 60% crown closure.
 - The landowner would appear to be required to manage the buffer to prevent defoliation by insect pests.
- Zone 2 of buffer is unrealistically and inappropriately regulated.
 - Maintenance of at least 60% uniform crown closure is unrealistic and inappropriate.
 - More light is needed at times to provide opportunity for natural regeneration of the forest.
 - The buffer requirements defy the science and logic of management of the forest.
- The landowner is denied the enjoyment of the buffer except for passive recreational activities.
 - Passive recreational activities are not defined in the PRM.
- The landowner is inappropriately legally obligated to surrender the buffer area in perpetuity to either:
 - A recorded deed restriction, or
 - A conservation easement, or
 - A local ordinance, or
 - Conditions contained within the Permit.
- However, the landowner is inappropriately legally obligated to pay taxes, costs and suffer economic loss for the required management of the buffer and restricted from otherwise profitable management of the buffer.
- The PRM must be considered in its total future impact which will be progressively restrictive of landowner rights. Even this PRM asks shall we be more restrictive.
- The imposition of regulation upon landowners is partially a result of or an effort to attain political support from groups that seeks to inappropriately remove landowner rights to enjoyment of property.
- The Riparian Forest Buffer Guidance Document No. 394-5600-001 September 26, 2009 Draft is evidence of administrative expansion of regulations beyond the PRM.
 - Expansion of buffer widths to top of slopes in steep terrain which could be the top of the mountain.
 - Expansion of buffer width to compensate for other ownerships, structures highways etc.
 - Inclusion of protection of values otherwise not within the legislated responsibility of DEP.
 - Wildlife travel corridors
 - Protection of Plants
 - Any protection for purposes other than water quality and aquatic organisms.
- The PRM hearings were rife with calls for buffers on every stream and permits for every timbersale. It is clear that the agenda is to impose governmental control upon the landowners far beyond that which is reasonable to protect water quality. The agenda of the 140+ Environmental Non Governmental Organizations (NGO's) that claim ownership of this effort is solely to control otherwise legitimate landowner activities that the NGO's disagree with. DEP should not be a weapon inflicting harm upon the landowner.
- The Environmental Quality Board should return this PRM to the table where private sector forestry professionals are fully represented (they were not) and a reasonable approach is applied to insure water quality. If the EQB does not do this then the IRRC should do so. **This is unreasonable regulation!**