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DEPARTMENT OF TRANSPORTATION

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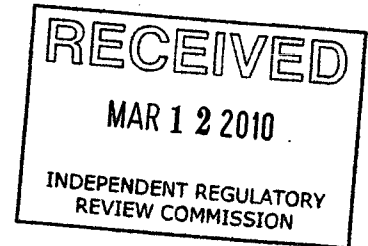
ENVIRONMENTAL QUALITY BOARD

DATE: March 3, 2010

SUBJECT: 25 PA Code, Chapter 92a Proposed Rulemaking Comments

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

FROM: Brian G. Thompson, P.E.
Director
Bureau of Design



Brian G. Thompson

PennDOT offers the following comments on the PROPOSED RULEMAKING for 25 PA. CODE Ch. 92a, National Pollution Discharge Elimination System Permitting, Monitoring and Compliance as published in the Saturday, February 13, 2010 PA Bulletin. If you have any questions please contact Mr. Gary C. Fawver, P.E. of my staff at telephone number (717) 787-1024.

1. Section 92a.12, addressing treatment requirements, has made several revisions that could result in the broader application regarding changes in treatment requirements.

First, references to Chapters 16, 77, 88, 90, 92a and 102 were added to subsection (d) addressing new or changed water quality standards or treatment requirements. This subsection provides that "a permittee of an affected facility shall promptly take the steps necessary to plan, obtain a permit or other approval, and construct facilities that are required to comply with the new water quality standards or treatment requirements". Facility is defined as any NPDES point source subject to regulation under the NPDES program. The drainage systems for PennDOT's roads are covered under an NPDES MS4 permit. PennDOT is concerned with including a reference to Chapter 102 in this subsection. This could open the door to retroactively applying certain standards, e.g., post construction controls, to PennDOT's existing roadways. That may not be what DEP intends with this section, but future administrations or County Conservation Districts may choose to interpret the language differently. The retroactive application of revised Chapter 102 standards would be extremely costly to PennDOT.

The Federal NPDES program for stormwater runoff associated with construction activities does not authorize the retroactive application of post-construction controls absent a qualifying project. Specifically, the Federal NPDES regulations provide for the

inclusion of post-construction controls for **“new development and redevelopment projects that disturb greater than or equal to one acre”**. 40 C.F.R. 122.34(b)(5)(i). “Redevelopment” has been defined as “alterations of a property that change the footprint of a site or building in such a way that results in the disturbance of equal to or greater than 1 acre of land.” 64 Fed. Reg. 68760 (1999).

To avoid the potential retroactive application of revised Chapter 102 standards to existing impervious surfaces, PennDOT requests that Section 92a.12(d) be revised to delete the reference to Chapter 102. This request is consistent with the Chapter 102 program which, like the Federal program for stormwater associated with construction activities, is triggered by a qualifying project. Also, please explain how this section would be applied to PennDOT roadways, when the standards contained in Chapter 102 are revised under the following three scenarios: (1) PennDOT has planned a project and has obtained an NPDES permit, but the construction is not completed; (2) PennDOT has no improvements planned to an existing section of roadway; and (3) PennDOT has maintenance activities planned on an existing section of roadway.

Second, subsection (f), addressing new potable water supplies, has been expanded. Under the existing regulations DEP could impose additional limitations on dischargers of total dissolved solids, nitrate-nitrate nitrogen, and fluoride. The revision has expanded the application to dischargers of any pollutant. PennDOT requests that the language in the existing regulations be used. In the alternative, PennDOT would like to know how this section would be applied to an existing PennDOT roadway located adjacent to a new potable water supply. Would PennDOT or the water supplier be responsible for constructing post construction BMPs if deemed necessary?

2. Section 92a.26(b), addressing new or increased discharges, provides that DEP will decide whether a new or amended permit is needed prior to initiating any new or expanded disturbed areas. PennDOT requests clarification on the application of this section. Does this section only apply to projects requiring a permit? PennDOT would want this interpretation due to its ongoing maintenance efforts of the existing roadway network.
3. Sections 92a.28 and 92a.62, addressing the proposed permit and annual fees, have been revised in such a way to no longer include a reference to Chapter 91, which excluded agencies of the Commonwealth from fee provisions. It appears that PennDOT would be subject to fees under the revised regulations. PennDOT expressed similar concerns to DEP regarding the revisions to the Chapter 102 regulations. PennDOT requests and explicit exclusion from the fee provisions for agencies of the Commonwealth. Specifically, PennDOT requests the following revision to 92a.28(a): “The application fee is payable to the Commonwealth, except by agencies of the Commonwealth, according to the fee...”. PennDOT requests the following revision to 92a.62(a): “Permittees, except agencies of the Commonwealth, shall pay an annual fee...”.

These revisions are consistent with the fee provisions in 25 Pa. Code §91.22. Also, the Chapter 105 permit program includes an exemption to the fee provisions for

state agencies. See 25 Pa. Code §105.13(b). This exemption remained in the proposed revisions to the Chapter 105 regulations.

4. PennDOT requests the addition of a public health or safety exception to permit requirements. DEP has included public health or safety exceptions in other regulatory programs – See 25 Pa. Code §105.18a(c).
5. Section 92a.38(b), addressing DEP actions on NPDES permit applications, provides for the consideration of local comprehensive plans and zoning ordinance. The section does contain preemption language for the plans. PennDOT requests that this language be extended to include ordinances to preserve PennDOT's position that it has exclusive jurisdiction over state roads, and therefore does not have to comply with local ordinances. PennDOT requests the following revision: "...provided that such plans *and ordinances* are not preempted by State law."
6. Section 92a.61(j), addressing monitoring, includes a provision that provides that DEP can require a permittee to perform additional sampling for purposes of TMDL development under an NPDES permit. PennDOT requests that this provision be deleted. In the alternative, PennDOT requests an explanation of under what circumstances this section would apply (1) to activities involving only stormwater runoff associated with construction activities generally and (2) to PennDOT projects specifically?

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