



**Testimony of**

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**Informational Meeting on Third Party Review of Permits**

**Senate Environmental Resources & Energy Committee**

**June 5, 2019**

Good morning Chairman Yaw, Chairman Yudichak, and members of the committee. On behalf of the Department of Environmental Protection, I'd like to thank you for the opportunity to discuss third party private consultant review on behalf of the Department of Environmental Protection of applications for earth disturbance activities under Chapter 102 of Pennsylvania's regulations.

I preface my remarks today on the observation that the Department and the General Assembly agree on these objectives:

- Efficient, timely and consistent permit application reviews;

- Protection of Pennsylvania's water resources and the prevention of development induced flooding, landslides, sinkholes and damage to infrastructure and property;
- Transparent permit application review processes.

Our agency's mission statement is: The Pennsylvania Department of Environmental Protection (DEP) exists to protect Pennsylvania's air, land and water from pollution and to provide for the health and safety of its citizens through a cleaner environment. We will work as partners with individuals, organizations, governments and businesses to prevent pollution and restore our natural resources.

### **Recommendations for Process Improvements to Achieve Shared Objectives**

DEP acknowledges that permitting processes have slowed in the last decade and that companies are seeking more certainty in the permitting process. Because of that, DEP has undertaken a number of initiatives related to permitting process improvements. We are in the process of developing an electronic permitting or "ePermitting" system for Chapter 102 NPDES permit applications. It is expected that this system will improve the efficiency of the Chapter 102 permitting program by ensuring all submissions are complete upon submission and reducing processing time for correspondence and documentation. The system will not, however, address fundamental issues that result in deficiencies. DEP is seeking to improve the technical understanding of the regulated community through the update to the Stormwater BMP Manual and new training initiatives. DEP has developed a Clean Water Academy website that serves as a resource for training Department, Conservation District staff, and the regulated community.

DEP is also moving forward with plans to develop a model post construction stormwater (PCSM) plan for well pads and will issue a new statewide NPDES general permit for small

construction activities under 5 acres of earth disturbance, which would be in addition to the current PAG-02. This proposed general permit, which is being referred to as PAG-01, will include a standard suite of low maintenance BMPs to select from, which will streamline the development of PCSM plans and their review.

DEP also recently approved a statewide alternative BMP known as the Managed Release Concept that will allow projects in sensitive environmental areas to move forward. These sensitive areas include contaminated sites, karst areas, sites with limited infiltration capabilities, and for sites which otherwise cannot reduce the post-construction runoff volume.

Finally, DEP continues to implement a permit management tool which we developed two years ago resulting in a drastic reduction in permit backlog.

Use of private consultant third parties to do the work of DEP professionals related to review of applications for erosion and sediment control and stormwater management permits will not achieve these mutual objectives for a number of reasons.

#### *Makes the Commonwealth More Vulnerable to Legal Challenges*

Because the activities authorized under these permits - such as pipelines, box stores or other industrial development activities - affect neighboring landowners and downstream communities, permits are typically the vehicle used to challenge projects. Under Pennsylvania law and the Pennsylvania Constitution, DEP is obligated to ensure that permits issued comply with those laws and will not unreasonably impair the public's rights under Article I, Section 27 of the Pennsylvania Constitution. In order to be able to defend challenges to permits, DEP must have undertaken some level of "independent" review of the applications. If DEP has not undertaken an independent substantive review, the permit action will be vulnerable if challenged, and more likely to be revoked if appealed, which will add time, uncertainty and unpredictability to the projects.

### *DEP is Best Positioned with a Statewide View of Complexity and Variability*

The complexity and uniqueness of the reviews of these applications argues against private party performance of these government functions. This permitting program has tremendous variability due to the wide range of land development proposals regulated, coupled with diverse site characteristics across the state related to geology, soils, vegetation and surface waters that must be evaluated related to stormwater management. Regulated projects range from one-acre to hundreds of acres, on flat terrain or mountainous terrain, in wetlands, crossing streams or on brownfields or agricultural lands. Some parts of the state are prone to landslides; some parts of the state have geology that is more susceptible to sinkhole development; soil types and vegetation vary across the state. In recent years, Pennsylvania has received significantly more rainfall which has led to more flooding, which can be exacerbated by development that changes stormwater runoff. The complex and varying nature of this program makes it particularly unsuitable to effective, efficient and protective “outsourcing.”

### *Potential for Conflicts of Interest*

Likewise, it is DEP’s experience that the consultants with experience and expertise in preparing complete and adequate applications for these permits will want to maintain their business relationships with the regulated community and permit applicants. Participation by these consultants in a DEP permit application review process thus inherently creates conflicts of interest that undermine the public confidence in the permitting process and creates additional litigation vulnerabilities. On the other hand, it has also been DEP’s experience that private consultants who do not have experience with these permitting programs would not be well suited to undertaking the review of the applications, and would likely add time, expense and uncertainty to projects.

### *Would Jeopardize Federal Delegation and State Primacy of Programs*

Use of private consultants to review applications for permits could also add another layer of process to the reporting and accountability requirements that DEP must meet to maintain the delegation of the NPDES program from EPA, and could ultimately jeopardize DEP's delegation of the program from EPA.

Use of private consultants to review applications for permits may also conflict with or impact the work of local County Conservation Districts. The County Conservation Districts provide invaluable regulatory support to the Department and the communities which they serve. DEP, through agreements with these Conservation Districts, delegates the implementation of erosion and sediment control program, and the authorization of activities eligible for coverage under the Chapter 105 General Permits relating to water obstructions and encroachments. The Conservation Districts also review and approve nutrient management plans, and assist with flood response and stream improvement projects. The Conservation Districts provide these services at the local level which maximizes accessibility of these programs to the public at low cost.

#### *Public Participation and Equity in Environmental Protection*

Finally, the related issue of public participation through the comment and response process is an important aspect of the permitting process for Chapter 102 permits. The public participation process is integral to protection of public resources and infrastructure as well as private property. Part of DEP's mission is "to provide for the health and safety of its citizens through a cleaner environment." That includes giving the citizens of Pennsylvania the ability to weigh in on potential environmental impacts in their communities. DEP often uses this process to mitigate impacts to the local community, something a private third-party permitting company would not have the ability, perspective, or responsibility to do. This process should not be truncated as proposed by HB 509.

Thank you again for inviting DEP to testify before the committee on this important topic. We look forward to continuing to work with the legislature to address these issues. I thank you for your time, and I am available to respond to any questions you may have.