

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 1380 Session of 2012

INTRODUCED BY MENSCH, McILHINNEY, D. WHITE, FOLMER, ALLOWAY,  
SMUCKER, ARGALL AND EICHELBERGER, FEBRUARY 29, 2012

REFERRED TO ENVIRONMENTAL RESOURCES AND ENERGY, FEBRUARY 29,  
2012

AN ACT

1 Amending the act of June 22, 1937 (P.L.1987, No.394), entitled,  
2 as amended, "An act to preserve and improve the purity of the  
3 waters of the Commonwealth for the protection of public  
4 health, animal and aquatic life, and for industrial  
5 consumption, and recreation; empowering and directing the  
6 creation of indebtedness or the issuing of non-debt revenue  
7 bonds by political subdivisions to provide works to abate  
8 pollution; providing protection of water supply and water  
9 quality; providing for the jurisdiction of courts in the  
10 enforcement thereof; providing additional remedies for  
11 abating pollution of waters; imposing certain penalties;  
12 repealing certain acts; regulating discharges of sewage and  
13 industrial wastes; regulating the operation of mines and  
14 regulating the impact of mining upon water quality, supply  
15 and quantity; placing responsibilities upon landowners and  
16 land occupiers and to maintain primary jurisdiction over  
17 surface coal mining in Pennsylvania," providing for access by  
18 abutting landowners, for use of equal or superior alternative  
19 design measures, for pre-application grant of design waiver  
20 or waiver or variance requests, for offsite mitigation and  
21 funding, for use of non-fact-based assumptions, for permitted  
22 professional certifications and for recorded notice of  
23 postconstruction storm water management best management  
24 practices; and making an editorial change.

25 The General Assembly of the Commonwealth of Pennsylvania  
26 hereby enacts as follows:

27 Section 1. Article VII heading of the act of June 22, 1937  
28 (P.L.1987, No.394), known as The Clean Streams Law, is amended

1 to read:

2 ARTICLE VII

3 [SCOPE AND PURPOSE] MISCELLANEOUS PROVISIONS

4 Section 2. The act is amended by adding sections to read:

5 Section 703. Access by Abutting Landowners.--No  
6 administrative agency of the Commonwealth or any political  
7 subdivision thereof, whether by regulation, ordinance or  
8 otherwise, shall prohibit access by a landowner whose property  
9 contains or abuts any stream, river, lake or pond from:

10 (1) accessing and using the stream, river, lake or pond for  
11 recreational purposes, including, but not limited to, boating,  
12 fishing and swimming; or

13 (2) constructing on the property of the landowner reasonable  
14 facilities relating to such access and use, including, but not  
15 limited to, accessways, ramps and docks.

16 Section 704. Use of Equal or Superior Alternative Design  
17 Measures.--(a) (1) Whenever a permit or approval is required  
18 by this act, or by the regulations, rules or administrative  
19 policies issued under this act, the applicant for the permit or  
20 approval may propose storm water or water quality design  
21 practices other than those required or mandated by the  
22 regulations, rules or administrative policies. The department  
23 shall approve the permit or issue the approval if the applicant  
24 demonstrates and the department finds that the alternative  
25 approach:

26 (i) will be at least as protective to the regulated waters  
27 as the measures required or mandated by the regulations, rules  
28 or administrative policies; or

29 (ii) will maintain and protect existing water quality and  
30 existing and designated uses by maintaining the site hydrology,

water quality and erosive impacts of the conditions prior to the initiation of any earth disturbance activities for the project.

(2) The burden of establishing the compliance of the alternative approach to the standards set forth in this section shall be upon the applicant.

(b) The following procedure shall apply to an application for a permit or approval subject to subsection (a):

(1) The applicant must request in writing that the department specify the scientific results which the specific measures required or mandated by the regulations, rules or administrative policies issued under this act are intended to achieve with respect to stream quality.

(2) Within thirty days of the receipt of the request, the department shall provide in writing the requested information and the reference to the scientific studies upon which the department's findings are based.

(3) Thereafter, the applicant may submit an alternative design with supporting scientific studies confirming that the alternative design will achieve or exceed the scientific results, with respect to stream quality, that would have been achieved based upon the department's response to the applicant's written request. The applicant may rely upon published, peer-reviewed studies or on site-specific studies and tests.

(c) With respect to any municipal ordinance, in existence on or after the effective date of this section, which regulates the subject matter of this act, the municipality shall apply the same procedures specified in subsections (a) and (b) for approving proposed alternative designs submitted by the applicant and that alleged will achieve or exceed the scientific results, with respect to stream quality, that would have been

1 achieved based upon the municipality's response to the  
2 applicant's written request to the municipality to specify the  
3 scientific results which the specific measures required or  
4 mandated by the municipal ordinance are intended to achieve,  
5 with respect to stream quality, and the reference to the  
6 scientific studies upon which the municipality's conclusions are  
7 based.

8 (d) If the measures required or mandated by the regulations,  
9 rules or administrative policies issued under this act from  
10 which the applicant seeks relief by alternative design are also  
11 required by municipal ordinance, the applicant shall process its  
12 request for use of alternative design only with the department  
13 and the decision of the department shall also be binding on the  
14 municipality.

15 Section 705. Pre-application Grant of Design Waiver or  
16 Waiver or Variance Requests.--(a) (1) Whenever this act, or  
17 the regulations, rules or administrative policies issued under  
18 this act, allow an applicant to request a variance or waiver  
19 from the requirements and mandates of this act, or the  
20 regulations, rules or administrative policies issued under this  
21 act, the department shall determine the grant or denial of the  
22 variance or waiver prior to the submission of the actual permit  
23 application for the project.

24 (2) The applicant and the department shall follow the  
25 procedures in this section with respect to the proposed variance  
26 or waiver.

27 (3) If requested by the applicant, the department shall hold  
28 a pre-variance or waiver application meeting with the applicant  
29 to discuss the proposed design and the materials the department  
30 deems to be essential to the issuance of its decision on the

request for the variance or the waiver.

(4) The applicant must request in writing the issuance of the variance or waiver, which request must include:

(i) A narrative and, where necessary, supporting plans and materials describing the proposed variance or waiver.

(ii) The alternative design proposed by the applicant.

(iii) A description of the manner in which the application complies with the regulatory or statutory requirements, if any, for the grant of a variance or waiver.

(5) The applicant may rely upon published, peer-reviewed studies or on site-specific studies and tests as supporting materials for its variance or waiver request.

(6) Within thirty days of the receipt of the request, the department shall issue a written decision on the issuance or denial of the variance or waiver or inform the applicant what additional materials are needed by the department in order to issue its decision, including a reference to this section of the act, the regulations, rules or administrative policies issued under this act, to which the requested additional information relates.

(7) If additional materials are requested by the department and supplied by the applicant, within thirty days of its receipt of the additional materials, the department shall issue a written decision on the issuance or denial of the variance or waiver. The department may condition any grant of a variance or waiver upon the subsequent permit application's being consistent with the materials submitted by the applicant in support of its variance or waiver request.

(8) An approved variance or waiver shall govern any permit application which is filed within two years of the issuance of

1 the variance or waiver for development or use of the property  
2 for which the variance or waiver was granted by the department.

3 (9) Failure of the department to issue a decision, or a  
4 request for additional materials with the required references to  
5 the relevant section of this act, or the regulations, rules or  
6 administrative policies issued under this act, within the  
7 applicable thirty-day period shall be deemed an approval of the  
8 variance or waiver as requested.

9 (10) At any time after an applicant has received a variance  
10 or waiver, either by written decision or deemed approval, the  
11 applicant, at the applicant's expense, may publish notice of the  
12 grant of the variance or waiver in a newspaper of general  
13 circulation for the area in which the project is located. The  
14 notice shall state the name of the applicant, the address of the  
15 property, the nature of the variance or waiver and the date of  
16 issuance or deemed approval.

17 (11) Any appeal of the grant or deemed approval of a  
18 variance or waiver not filed with the Environmental Hearing  
19 Board within thirty days of the publishing of the notice shall  
20 be quashed as untimely.

21 (b) With respect to any municipal ordinance, in existence on  
22 or after the effective date of this section, which regulates the  
23 subject matter of this act, the municipality shall provide for  
24 and apply the same procedures specified in subsection (a) for  
25 approving design waiver or variance requests.

26 Section 706. Off-site Mitigation and Funding.--(a) Whenever  
27 compliance with the regulations, rules or administrative  
28 policies issued under this act is not practicable due to actual  
29 site characteristics, the department, based upon documentation  
30 by the applicant of the actual site characteristics and their

1 impact on compliance with the regulations, rules or  
2 administrative policies, shall allow the applicant to vary the  
3 requirements and mandates of the regulations, rules or  
4 administrative policies so that the storm water volume reduction  
5 and water quality treatment or infiltration on-site will be  
6 required only to maintain the existing water quality and the  
7 existing volume of flow leaving the site given the actual site  
8 characteristics.

9 (b) The department shall allow the variance if the applicant  
10 provides additional mitigation measures that improve water  
11 quality on a separate site in the same watershed or, in lieu  
12 thereof, provides a payment in an amount not to exceed the cost  
13 of providing such off-site mitigation measures to a fund  
14 established by the department.

15 Section 707. Use of Non-Fact-Based Assumptions.--(a) In  
16 order to assure to the greatest extent possible that the effects  
17 of storm water management designs will not degrade the quality  
18 or use of existing streams and waters, the department shall only  
19 permit or require the use of non-fact-based assumptions in the  
20 calculation of existing or projected flows, infiltration,  
21 evapotranspiration or other factors relevant to storm water  
22 management design or permit issuance, when, and then only to the  
23 extent that, factual information is unavailable or is available  
24 at an unreasonable or within an unreasonable time. Where non-  
25 fact-based assumptions are used, the department shall do so  
26 based on existing or, where relevant, expected conditions.

27 (b) With respect to any municipal ordinance in existence on  
28 or after the effective date of this section, which regulates the  
29 subject matter of this act, the municipality shall apply the  
30 same requirements, prohibitions and procedures specified in

subsection (a) with respect to the use of non-fact-based assumptions in the design of plans or processing of permits or approvals under the municipal ordinance.

Section 708. Permitted Professional Certifications.--(a) (1) With respect to any permit issued by the department pursuant to this act, the department may require the issuance of a certification or certifications from registered professionals that the improvements constructed pursuant to the permit have been constructed pursuant to the permit, its conditions and any plans upon which the permit was based, including any field or post-permit issuance modifications approved by the department. In issuing such certifications, the registered professionals may rely upon, including, but not limited to, the contents of municipal inspection reports issued by inspectors for the municipality whose observations were based on on-site verification or scientifically acceptable testing.

(2) The department may not require that the certification by registered professionals or the applicant that the proposed improvements, constructed pursuant to the permit, its conditions and any plans upon which the permit was based, comply with this act, or the regulations, rules or administrative policies issued under this act.

(b) With respect to any municipal ordinance, in existence on or after the effective date of this section, which regulates the subject matter of this act, the municipality shall apply the same requirements, prohibitions and procedures specified in subsection (a) with respect to the issuance of a certification or certifications from registered professionals.

Section 709. Recorded Notice of Postconstruction Storm Water Management Best Management Practices.--(a) (1) Whenever a



permit with postconstruction storm water management best management practices is required by this act, or the regulations, rules or administrative policies issued under this act, the permittee or co-permittee shall record a notice instrument with the recorder of deeds in the county in which the property is located which will assure disclosure of the practices, and the related obligations under the permit relating to the practices, in the ordinary course of a title search of the subject property.

(2) The recorded instrument must identify the permit by date of issuance and permit number, identify the practices and provide notice that the responsibility for long-term operation and maintenance of the practices is an obligation that runs with the land for so long as the practices are required by law.

(3) The extinguishment or modification of the practices shall terminate or modify the obligations under the permit to maintain and, unless elected by the permittee or co-permittee, the notice shall not be a permanent covenant or restriction that binds the land once the requirement for the practices are extinguished.

(4) The department may not require the creation of a permanent deed restriction or easement, including, but not limited to, one which would remain even when the practices are no longer required, as a condition of the issuance of a permit pursuant to this act, or the regulations, rules or administrative policies issued under this act.

(b) With respect to any municipal ordinance in existence on or after the effective date of this act, which regulates the subject matter of this act, the municipality shall apply the same requirements, prohibitions and procedures specified in

1 subsection (a) with respect to recording notice of  
2 postconstruction storm water management best management  
3 practices.

4       Section 3. All existing rules, regulations and policies of  
5 the department that are inconsistent with the provisions of this  
6 act are hereby abrogated to the extent of such inconsistency.

7 The department shall not enforce or adopt any rule, regulation  
8 or policy which is inconsistent with the provisions of this act.

9       Section 4. This act shall take effect in 60 days.