

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,

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

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

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

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

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

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

24 (c) With respect to any municipal ordinance, in existence on
25 or after the effective date of this section, which regulates the
26 subject matter of this act, the municipality shall apply the
27 same procedures specified in subsections (a) and (b) for
28 approving proposed alternative designs submitted by the
29 applicant and that alleged will achieve or exceed the scientific
30 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

1 request for the variance or the waiver.

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

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

6 (ii) The alternative design proposed by the applicant.

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

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

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

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

29 (8) An approved variance or waiver shall govern any permit
30 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

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

4 Section 708. Permitted Professional Certifications.--(a)

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

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

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

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

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

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

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

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

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