

Myths vs. Facts Concerning Draft Technical Guidance for Septic Systems in High Quality and Exceptional Value Watersheds

The Pennsylvania Department of Environmental Protection (DEP) published a notice in the *Pennsylvania Bulletin* on March 2, 2013 announcing that DEP will, through June 3, 2013, accept comments on a draft version of technical guidance that describes the process by which new onlot sewage treatment systems, or onlot systems, may be sited in High Quality (HQ) and Exceptional Value (EV) watersheds. Such systems must meet the state's anti-degradation regulations, which preserve the water quality of these special protection watersheds.

Recently, DEP has been in discussion with stakeholders, conducted webinars and met with the Sewage Advisory Committee. This document serves to address some of the common questions DEP has been asked about the guidance. The purpose of this document is to highlight elements of the guidance. This document should not be used in lieu of reference to the draft technical guidance itself. The information in this guidance is solely advisory and does not represent a legal interpretation by the department. Nothing in this summary shall affect any statutory requirements.

Q: Why did DEP develop this technical guidance?

A: DEP has routinely approved onlot systems in HQ and EV watersheds. Based on our experience, onlot systems are relatively protective of water quality in rivers and streams, even considering that onlot systems can be a source of nitrate-nitrogen in groundwater. Recently, DEP's approval of a new land development near an EV stream in Berks County was appealed to the State's Environmental Hearing Board (EHB). The EHB required DEP to determine whether nitrate from the proposed onlot systems would reach the stream and degrade water quality (*Pine Creek Watershed Assn. v. DEP* (Docket 2009-168)). The EHB ruled that the methodology that DEP relied upon in that case was inadequate. In response, DEP has developed this draft guidance to establish a more defensible but flexible methodology based on the use of best management practices (BMPs) to control pollutant loadings from onlot systems. These systems are nonpoint sources and our regulations require that BMPs be used to protect and maintain water quality in HQ and EV streams.

Comment – We agree that some formal technical guidance or re-wording of the current regulations is need.

Q: What does an EHB decision for a matter in Berks County have to do with approving septic systems across the state?

A: At this time, DEP does not have a proven, accepted approach to rely on when approving development projects using onlot systems in HQ and EV watersheds. As such, DEP does not

have the confidence that any such approvals would withstand a challenge. Absent a defined and reliable approach, great uncertainty will remain for the regulated community, including local governments and developers.

Comment – We agree that some formal technical guidance or re-wording of the current regulations is need, but we do not agree with the mechanism and approach presented in the proposed policy.

Q: How many BMPs should I use?

A: The draft technical guidance discusses six BMPs: onlot system density, setback distances, riparian forested buffers, riparian buffers, permeable reactive barriers, and denitrification systems. An applicant can implement BMPs as necessary to reach the protection factor identified in the guidance. The guidance also allows for regional offices to approve projects with other BMPs comparable to these six.

Comment – The use of buffers has never been used as a BMP for septic systems. The Permeable barrier has never been field tested or demonstrated in Pennsylvania. The policy does not seem to recognize the existing BMPs we use site-specific testing, primary and reserve disposal area, more advanced treatment including aeration, numerous horizontal isolation distances, and the use of trained SEOs and where necessary soil scientists.

Q: Is this technical guidance a regulation?

A: No. Technical guidance cannot in itself establish binding requirements. Based on the EHB's decision, new land development projects in EV and HQ watershed proposing to use onlot systems must demonstrate that the existing water quality will be maintained and protected. DEP has in this draft technical guidance proposed one method to provide such a demonstration. DEP is open, however, to alternative approaches and will consider them on a case-by-case basis.

Comment – PADEP has a long history of developing guidance that ultimately implemented as if it was a regulation. The proposed guidance is not consistent with current law and does not address specific questions and concerns that were identified in the original legal action. In addition, the guidance treats HQ and EW watersheds the same, where the regulations do not permit this treatment.

Q: Does it apply to existing septic systems or systems that have already secured sewage planning?

A: The draft technical guidance does not apply to any existing onlot systems or any systems that have already been granted sewage planning approval.

Comment – there is a significant inconsistency in what is said and what is written for this policy. The policy states one answer, but suggests it could apply to existing systems via repairs in the document and in webinars. We did not create the conflict the authors of the policy created this situation.

Q: Does this guidance apply to lots of a certain size?

A: It is important to recognize that this BMP refers to average lot size, not necessarily the size of individual lots. Some lots may be smaller than one acre if other lots are larger than one acre. The technical guidance allows all of the lots in a proposed development to be less than one acre, such as in cluster housing, in conjunction with green space, parks, or other open or undeveloped areas, allowing for greater buffers and setbacks. The acreage of the green space may be credited towards the assessment of average lot size.

Comment – This green space credit is not clearly stated in the guidance and the points system is based on a lot by lot approach. If the point system is used, it should be applied to the subdivision as a whole and not individual lots. This appears to be a rethinking of the approach that is not outlined in the proposed policy.

Q: Does this guidance require denitrification technology and how much will that drive up development costs?

A: Denitrifying systems are just one of the BMPs that can be employed using the approach outlined in this draft technical guidance. Other BMPs generally are less costly and should be chosen whenever possible, but in some cases denitrifying systems may make the most sense.

Comment – Based on numerous analyses, the cost will go up. This cost may be the need to have a larger lot size to obtain all of the credits or install a more advanced treatment system. At a minimum, it appears the base cost would increase by about \$ 10,000.00 or more.

Q: Won't this guidance impede development by driving up costs?

A: This guidance is designed to support development, not hinder it, by providing a method to demonstrate that water quality in HQ and EV streams is protected when onlot systems are proposed for new land development. Unless this demonstration can be made and defended, the use of such systems may be challenged in an appeal of DEP's approval of the project to the EHB.

Comment – These depends on the effectiveness of the guidance document. The proposed guidance would drive up cost, creates significant uncertainty, and as proposed would be further challenged in court. We agree that guidance must be defensible. This proposed guidance is NOT defensible or attainable.

Q: Will DEP deny applications for projects that don't use the BMP-based approach in this guidance?

A: No, provided that the applicant has demonstrated that water quality in the HQ or EV waters will be protected and maintained in a manner that DEP believes can be defended before the EHB. The BMP-based method in the guidance is a method that can be applied anywhere in Pennsylvania. In finalizing this guidance, DEP will review and consider all comments it receives. Other methods, such as the site-specific approach used in Wayne and Pike Counties, may also be acceptable to DEP and the EHB. DEP will clarify in the final guidance that other approaches can be used. DEP did not focus on these site-specific approaches in the draft guidance because they generally require the use of qualified professionals, the cost of which must be paid by the applicant, and the outcome is uncertain. In other words, the analysis may not provide sufficient demonstration that water quality is protected, resulting in wasted expense for the applicant. At some point, the cumulative effect of development projects in a watershed will preclude any further development. The BMP-based methodology is designed to avoid these limitations, and DEP will consider any demonstration that water quality will be maintained and protected on a case-by-case basis.

Comment – These is not the approach mentioned in the original guidance documents, but this is the approach that is needed.

Q: Does this guidance punish me for wanting to develop near HQ and EV waters?

A: No. This guidance provides a method to obtain DEP approval of your proposed development using an approach that DEP will defend as protective of the water quality in the nearby HQ or EV stream in an appeal to the EHB. DEP welcomes alternative approaches, both during the technical guidance comment period and when applicants are seeking planning approval from DEP of new land development projects proposing to use onlot sewage systems. These alternative approaches will be evaluated on a case-by-case basis.

Comment –The guidance as proposed does place a significant burden that is beyond current law for individuals in HQ watersheds and creates a standard of Zero Impact in both HQ and EQ watersheds. This standard is not achievable and beyond was is technically feasible and can be proven.

Q: Who do I send my comments to?

A: DEP is accepting comments on this draft technical guidance through June 3. Comments should be sent in writing to Thomas Starosta, Department of Environmental Protection, Bureau of Point and Non-Point Source Management, Division of Planning and Permits, P. O. Box 8774, Harrisburg, PA 17105-8774, (717) 787-4317, tstarosta@pa.gov. Be sure to include your name and full mailing address.

Comment – We are planning to submit formal comments, but we are glad to see some positive changes in the guidance.

Comments by
Mr. Brian Oram, Professional Geologist
B.F. Environmental Consultants Inc.
15 Hillcrest Drive
Dallas, PA 18612
<http://www.bfenvironmental.com>
<http://www.water-research.net>