



ENVIRONMENTAL

CURRENTS

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Measuring Progress with a Community Sustainability Assessment



In 2009, the Conservancy's Environmental Management Center (EMC) sought ways to help the region's municipalities become more sustainable. While there is no standard definition of sustainability, it refers to the ability to meet the needs of the present while ensuring that future generations have the same or better opportunities. But how can municipal officials determine if they are achieving their sustainability goals or know what goals to set?

While checklists from other parts of the country generally assess and develop recommendations for particular areas of focus, such as greenhouse gas emissions, most of these evaluation systems have proved either too broad or too narrow to produce meaningful results for many of our region's municipalities—especially those with relatively sophisticated planning programs, policies, and ordinances. Therefore, the EMC developed a new metric, tailored to southeastern Pennsylvania: the Community Sustainability Assessment (CSA). This guided evaluation provides a rapid, yet in-depth, assessment of community sustainability across a broad spectrum of issues, and, from that evaluation, the EMC can develop specific planning-, policy-, and ordinance-related recommendations for improving municipal or regional sustainability.

The CSA addresses the following nine categories: natural resource protection; water quality and conservation; land use and community character; climate change; alternative energy and energy conservation; mobility and transportation; community health and safety; food production and security; and open space including parks and trails.

Each category includes additional subsets of detailed criteria to actually measure community sustainability. For example, if a municipality or region has adopted policies or plans supporting public transportation to serve local residents and businesses, it earns a "plus" assessment rating under "mobility and transportation." An even higher rating is awarded if public transportation is available to residents through steps taken by the municipality. However, a community receives a "minus" score in the category if existing ordinances and plans do not require or even encourage "complete streets" (i.e., roads designed for use by pedestrians, bicyclists, cars and public transportation). Minus ratings are accompanied by one or more short- or long-term recommendations categorized by their capacity to remove obstacles, create incentives or enact standards.

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Crum Creek Neighbors v. DEP by Brian Glass, Esq.

A recent decision by the trial court that hears environmental cases in Pennsylvania likely will impact the way that environmental permitting is conducted in Exceptional Value (EV) watersheds.

In Crum Creek Neighbors v. DEP,¹ the Pennsylvania Environmental Hearing Board (EHB) suspended a National Pollutant Discharge Elimination System (NPDES) permit for stormwater discharges associated with construction activities issued by the Pennsylvania Department of Environmental Protection (DEP) to Pulte Homes of PA, L.P. (Pulte), for a residential development project located near Holland Run, the only EV stream in Delaware County.

EV waters are those surface waters in Pennsylvania that have been identified as deserving the greatest level of protection. The state's "antidegradation" regulations provide that the water quality of EV waters "shall be maintained and protected"² and set forth the procedures for implementing this requirement. For example, a person proposing a point source discharge to an EV water must use any available "nondischarge alternatives" that are "environmentally sound and cost-effective."³ If all discharges cannot be eliminated through the use of such alternatives, the person must use the "best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies" (often referred to as ABACT)⁴ and "demonstrate that the discharge will maintain and protect the existing quality of" the receiving surface water.⁵

In the Crum Creek Neighbors case, DEP and Pulte argued that they had satisfied the antidegradation regulations because Pulte proposed to implement several best management practices (BMPs) that qualified as "nondischarge alternatives," including basins that were designed to provide enough capacity to infiltrate up to a two-year storm.⁶

The EHB rejected this argument for two main reasons. First, it found that the BMPs did not qualify as "nondischarge alternatives," because the basins would in fact overflow in very heavy storms, causing a discharge to Holland Run. As a result, Pulte needed to continue on to the next steps in the antidegradation procedures and demonstrate that it was using ABACT and that any discharges during the large storms would not degrade the existing quality of Holland Run.⁷ The problem, according to the EHB, was that "[t]o a large extent, [DEP] and Pulte approached this issue by listing BMPs, describing compliance with [DEP's] checklists, policy manuals, the local ordinance, and accepted engineering practices, and justifying the use of particular engineering models instead of showing that there would in fact be no discharges to the stream."⁸ Rejecting this formulaic approach, the EHB stated that "there is either a discharge or there is not. Determining whether there will be a discharge is not about checking off boxes on a form."⁹

Second, the EHB found that determining that the water quality of Holland Run will be "maintained and protected" involves more than just avoiding direct discharges to the stream. The EHB noted that water entering Holland Run would "in all likelihood be diverted as a result of" Pulte's alterations to the topography of the site. That neither DEP nor Pulte properly considered how this diversion of water would impact the baseflow of Holland Run, a headwater stream fed by groundwater and surface runoff, provided an independent basis for suspending the permit.¹⁰ In reaching this conclusion, the EHB noted that "[a] permittee may not degrade a stream by altering its physical or biological properties any more than it may degrade a stream by the direct discharge of pollutants."¹¹

The Crum Creek Neighbors decision need not signal the end of development in EV watersheds, nor is it necessarily an indictment of the BMPs that were proposed by Pulte.¹² Notably, the EHB did not find that the water quality of Holland Run would not be "maintained and protected" by the proposed project. The EHB merely found that a full and proper analysis had not been conducted to make that determination. What the Crum Creek Neighbors decision does mean is that in EV watersheds, developers and DEP cannot shortcut the procedures set forth in the anti-degradation regulations by, for

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example, calling an alternative that will in fact result in a discharge a “nondischarge alternative.” It also means that developers and DEP must analyze not just the impacts of potential discharges, but all of the impacts a project might have on EV waters, to ensure that the quality of these surface waters will be “maintained and protected.”

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¹EHB Docket No. 2007-287-L (Adjudication issued Oct. 22, 2009).

²25 Pa. Code § 93.4a(d).

³25 Pa. Code § 93.4c(b)(1)(i)(A).

⁴Id.

⁵25 Pa. Code § 93.4c(b)(1)(i)(B).

⁶In addition to these infiltration basins (also referred to as recharge or retention basins), BMPs proposed by Pulte included rain gardens, vegetated swales, and porous pavement.

⁷EHB Docket No. 2007-287-L, slip op., at 13-19.

⁸Id., slip op., at 16.

⁹Id., slip op., at 17. The EHB based this part of the decision on a couple of its previous decisions. In Zlomsowitch v. DEP, 2004 EHB 756 (Adjudication issued Nov. 15, 2004), the EHB found that an impoundment system at a mining operation that would overflow to an exceptional value water during severe rain events did not constitute a “nondischarge alternative.” In Blue Mountain Preservation Association v. DEP, 2006 EHB 589 (Adjudication issued Sept. 7, 2006), the EHB found that the use of BMPs prescribed by the erosion and sedimentation control regulations for earth disturbance activities that may result in a discharge to an exceptional value (or high quality) water does not automatically constitute compliance with the antidegradation regulations.

¹⁰EHB Docket No. 2007-287-L, slip op., at 19-27.

¹¹Id., slip op., at 20. This part of the decision is akin to another recent decision issued by the EHB. In Lipton v. DEP, EHB Docket No. 2007-026-MG (consolidated with EHB Docket No. 2008-038-MG) (Opinion and Order on Motions for Summary Judgment and Motion to Dismiss issued May 20, 2008), the EHB found that the use of on-lot sewage disposal systems did not satisfy the antidegradation regulations merely because they were designed to discharge effluent to absorption areas in the ground and allow the effluent to percolate through the soil to be assimilated into groundwater; the developer did not adequately evaluate whether the groundwater would then reach a nearby exceptional value stream and, if so, what impact that might have on the stream.

¹²Nor, for that matter, was Lipton necessarily an indictment of on-lot sewage disposal systems.



Community volunteers from scout groups and local corporations helped the Brandywine Conservancy kick off its reforestation campaign by planting thousands of trees on lands in the Conservancy's Laurels Preserve in West Marlborough Township. Major plantings will improve the the water quality and hydrology of the Brandywine. Future issues of *Environmental Currents* will explore the benefits that this watershed reforestation will generate.