DRAFT ARGUMENT

TO: Attorney Name, Esquire[1]

FROM: National Legal Research Group, Inc.
Matthew T. McDavitt, Senior Attorney

RE: PA-Federal/Environmental/Waters/Clean Water Act And Storm Water Management Act

FILE: 25-xxxxx-317 Date, 2010

YOUR FILE: File Reference

[1]**Names, dates, and other identifying information have been redacted to protect privacy.**

STANDING OF PLAINTIFF

I. PLAINTIFF MEETS THE CLEAN WATER ACT'S PERMISSIVE PRUDENTIAL STANDING REQUIREMENTS.

To sue under the Clean Water Act ("CWA"), citizens must have both prudential and constitutional standing. Prudential standing is conferred by federal statute, while constitutional standing derives from the "case or controversy" requirement of Article III of the U.S. Constitution. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004); *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 187 (D.D.C. 2002) ("Prudential standing is established by showing that the interest the plaintiff seeks to protect arguably falls within the zone of interests to be protected or regulated by the statute at issue.").

The CWA citizen-suit provision, 33 U.S.C. § 1365, is considered among the most permissive, obviating the need for detailed prudential standing analysis. *See, e.g.*, *Ecol. Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) ("The CWA's citizen suit provision extends standing to the outer boundaries set by the 'case or controversy' requirement of Article III of the Constitution . . . . [and thus] the statutory and constitutional standing issues therefore merge[.]"); *Natural Res. Def. Council v. EPA*, 437 F. Supp. 2d 1137, 1145 (C.D. Cal. 2006).

By the plain language of the CWA grant of authority for citizens to sue, "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter . . . . [D]istrict courts shall have jurisdiction . . . to enforce such an effluent standard or limitation[.]" 33

U.S.C. § 1365(a) (paragraphing omitted). Regarding state-issued National Pollutant Discharge Elimination System ("NPDES") permits, federal courts share with state courts concurrent jurisdiction to enforce permit conditions. *Chesapeake Bay Found., Inc. v. Va. State Water Control Bd.*, 453 F. Supp. 122, 127 (E.D. Va. 1978); *Frilling v. Vill. of Anna*, 924 F. Supp. 821, 840 n.21 (S.D. Ohio 1996).

In the present action, Plaintiff sues to enforce permit conditions established by the Commonwealth of Pennsylvania pursuant to federal mandate under the CWA. Permit conditions expressly qualify as "effluent standard[s] or limitation[s]" under the CWA citizen-suit provision. 33 U.S.C. § 1365(f).

Citizens are granted broad authority to bring citizen suits under the CWA to enforce any effluent limitation, including any permit condition. *Id.* The definition of "effluent limitation" under the CWA includes "any restriction established by a State," as well as those established by the EPA Administrator. *Id.* § 1362(11). Any state requirement added as a condition of an NPDES permit is fully enforceable as a CWA effluent limitation because state NPDES permitting occurs only under the CWA. It is well settled that citizens can bring suit under the CWA to enforce any state standards included in an NPDES permit.

> [T]he principal means of enforcing the pollution control and abatement provisions of the [the CWA] is to enforce compliance with . . . . the conditions of an NPDES permit. . . . This is true both for conditions imposed in accordance with EPA-promulgated effluent limitations and standards and for those imposed in accordance with more stringent standards and limitations established by a State[.]

EPA v. California, 426 U.S. 200, 223-24 (1976); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986-88 (9th Cir. 1995) ("The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions . . . . [including citizen suits] to enforce permit conditions

based on both EPA-promulgated effluent limitations *and state-established standards*." (second emphasis added)). Thus, any conditions incorporated in the NPDES permit pursuant to state law become enforceable under the CWA citizen-suit provision because state control of NPDES permitting occurs solely pursuant to federal law. *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541, 1552 (N.D. Ga. 1996).

Thus, the prudential or statutory standing requirement is satisfied.

II. PLAINTIFF MEETS THE CWA'S CONSTITUTIONAL STANDING REQUIREMENTS.

To establish Article III standing regarding substantive harm, a plaintiff must prove (1) an actual or imminent injury-in-fact, (2) traceable to the defendant, (3) which will likely be redressed if the action is successful. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000); *see also Lockett v. EPA*, 319 F.3d 678, 682 (5th Cir. 2003) ("To satisfy the standing requirement of Article III in a citizen suit under the CWA, a plaintiff must show (1) an actual or threatened injury, (2) 'fairly traceable' to the defendant's action, and (3) likely redress if the plaintiff prevails in the lawsuit.").

> [T]he interest of the citizen-suit is forward-looking and the harm sought to be addressed by the citizen-suit lies in the present or future, not in the past.
>
> The [Plaintiff] must meet one of two requirements [to attain standing], to wit, (1) allege that the violations to the Act are continuing, either on or after the date the complaint was filed, or (2) convince the Court that said violations are likely to occur in the future.

P.R. Campers' Ass'n v. P.R. Aqueduct & Sewer Auth., 219 F. Supp. 2d 201, 216 (D.P.R. 2002) (citation omitted) (internal quotation marks omitted).

The injury-in-fact prong is satisfied where the plaintiff's (or any member's, if the plaintiff is an organization) use or enjoyment of his or her property or a waterway is negatively impacted by the complained-of discharges or flow. The classic example of injury-in-fact sufficient to confer standing upon a plaintiff occurs where a landowner's use and enjoyment of waters on his property is curtailed due to concern about sedimentation or pollutants flowing into the water body.

> In environmental cases, the injury in fact requirement is met if an individual member adequately shows that she or he has an economic, aesthetic, or recreational interest in a particular place, animal, or plant species and that the interest is impaired by the challenged conduct. Individual members must distinguish themselves from the public at large by demonstrating that the injury alleged will affect them in a personal and individual way. An individual can establish 'injury in fact' by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has suffered or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded. . . . [I]njury in fact [may be] sufficiently established by evidence that plaintiffs avoid[] a river because of concerns about defendants' discharges . . . . An increased risk of harm is sufficient to establish injury in fact for standing purposes.

Natural Res. Def. Council, 437 F. Supp. 2d at 1146 (citations omitted) (internal quotation marks omitted). Here, Plaintiff's property is being visibly and routinely impacted by storm water runoff and sedimentation flowing onto Plaintiff's land and waters from Defendants' inadequately maintained construction site. Thus, the injury-in-fact prong is met.

The second prong requires that the injurious discharge or flow be fairly traceable to the defendant's property or activities.

> The plaintiff's injury must be fairly traceable to the challenged action of the defendant and not the result of some independent action. . . . Traceability does not mean that plaintiffs must show to a scientific certainty that defendant's effluent caused the precise harm suffered by the plaintiffs. Rather, a plaintiff

> must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged.

Piney Run Preserv. Ass'n v. Carroll County Comm'rs, 268 F.3d 255, 263-64 (4th Cir. 2001) (citations omitted) (internal quotation marks omitted). To show traceability, "[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged" in the specific geographic area of concern." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 161 (4th Cir. 2000) (citation omitted) (internal quotation marks omitted). Visual confirmation that sediments are flowing in storm water flows from the defendant's property is more than sufficient to satisfy the fairly traceable prong.

> The Plaintiff says that the Defendants have discharged sediment-laden storm water into the Stream. Its evidence includes testimony from Whiteside (the Plaintiff's biology expert), Steven Rowe (the Plaintiff's erosion control expert), and Joey Vaughn (an employee of the Douglasville-Douglas County Water and Sewer Authority). Whiteside found that, "based on field observations, aerial photographs and defined drainage basins that the source of the[ ] recently deposited sediments in the stream and wetlands is from the ongoing upstream Tributary [at New Manchester] development." (Expert Report of Richard W. Whiteside, at 4.) Rowe testified in his deposition that the failure of the Defendants' erosion control measures caused sediment to escape from the Defendants' property and deposit downstream onto the Plaintiff's property. (Rowe Dep. at 104-07.) Vaughn made the same observation as Rowe, even agreeing that "there [was no] question in [his] mind that [sediment] went into the stream." (Vaughan Dep. at 35.) The testimony from Whiteside, Rowe, and Vaughn is sufficient evidence of traceability.
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> . . . .
>
> . . . To show traceability, the Plaintiff only needs to show that the Defendants are a source—not the only source—of sediment accumulation. It has made that showing.

New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC, Civ. Act. No. 1:09-CV-504-TWT, 2010 WL 3271509, at *5 (N.D. Ga. Aug. 16, 2010) (slip op.) (alterations in original).

The final prong is satisfied where the complained-of harm will likely be ameliorated if the court grants the relief requested. "Redressability is not a demand for mathematical certainty. It is sufficient for the plaintiff to establish a 'substantial likelihood that the requested relief will remedy the alleged injury in fact.'" *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 143 (3d Cir. 2009) (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)). To redress the concrete and actual damage to its property, Plaintiff asks for an injunction terminating further construction until Defendants fully comply with all of the terms of their NPDES Permit and their Erosion and Sedimentation Plan, civil penalties, compensatory and punitive damages, and attorney's fees. "[I]t is likely, as opposed to merely speculative," that Plaintiff's injuries will be addressed by a favorable decision granting Plaintiff's requested relief. *Laidlaw*, 528 U.S. at 187. Therefore, the redressibility prong is met.

Plaintiff's injury can be redressed effectively by the adequate control of storm water through the enforcement of the storm water management provisions called for under the Permit and the E&S Plan. Thus, all of the requirements of constitutional and prudential standing are met.

ARGUMENT

The federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq., prohibits the discharge of any pollutant from a point source into navigable waters unless the discharge complies with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit. *See* 33 U.S.C. §§ 1311(a), 1342. "NPDES permits establish discharge conditions

aimed at maintaining the chemical, physical, and biological integrity of the Nation's waters." *Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1014-15 (8th Cir. 2003). Since October 1, 1992, when the NPDES permit system took effect, NPDES permits have been required for storm water discharges from "construction activity." Construction, as described in 40 C.F.R. § 122.26(b)(14)(x), is a CWA-regulated point source activity.

NPDES permits are required for storm water discharges from construction activity that disturbs at least five acres of total land area. 40 C.F.R. § 122.26(a)(1)(ii), (b)(14)(x). NPDES permits are also required for storm water discharges from construction activity that disturbs less than five acres of total land area if the activity is part of a common plan of development that disturbs at least five acres. *Id.* The Environmental Protection Agency ("EPA") delegated its authority to issue NPDES permits to individual states that wish to assume this duty, and the Pennsylvania Department of Environmental Protection ("PADEP") has in fact assumed control over NPDES permitting for point sources in the state. *See* 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1; 25 Pa. Code §§ 92.1–.94 (current version at 92a.1–.94)(statutes governing NPDES permitting); 35 Pa. Code § 691.5(b)(5) (empowering PADEP to review and enforce permits, including NPDES permits). Pennsylvania NPDES permits, by statute, incorporate by reference the federal NPDES regulations not contrary to Pennsylvania law (meaning that federal regulations are not deemed to be incorporated where they are less stringent than the Pennsylvania equivalent). 25 Pa. Code § 92.2 (current § 92a.2).

In its implementation of CWA NPDES permitting regarding construction activities, the Pennsylvania Code mandates that entities or persons, prior to groundbreaking, obtain an

individual or general NPDES permit for "Stormwater Discharges Associated with Construction Activities." *Id.* § 102.5(a). The PADEP also requires by regulation that NPDES permit holders engaged in construction activity displacing 5,000 square feet or more also develop and implement an Erosion and Sedimentation Plan ("E&S Plan") which implements PADEP-approved Best Management Practices ("BMPs"), so as "to minimize the potential for accelerated erosion and sedimentation." *Id.* § 102.4(b); *see also id.* § 102.11 (mandating that developers implement and maintain E&S Plan BMPs as found in the PADEP's *Erosion and Sediment Pollution Control Program Manual* ("the *Manual*"). The E&S Plan and its BMPs are themselves merely state implementation of the federal CWA requirements. *Solebury Twp. v. Dep't of Envtl. Prot.*, 593 Pa. 146, 161, 928 A.2d 990, 999 (2007) (observing that the PADEP implementation of the E&S Pollution Control Plan requirement was made "in accordance with Chapter 102 of DEP's regulations, which were promulgated pursuant to Sections 5 and 402 of the Clean Streams Law").

Through the present citizen's suit, Plaintiff seeks to (1) enforce the terms of Defendants' state-implemented federal NPDES Permit, (2) enforce Defendants' duties under the Pennsylvania Clean Streams Law and the Pennsylvania Storm Water Management Act, and (3) enjoin Defendants' harmful torts against Plaintiff's land under the theories of public nuisance, private nuisance, negligence, and trespass.

Regarding state-issued NPDES permits, federal courts share with state courts concurrent jurisdiction to enforce permit conditions. *Chesapeake Bay Found.*, 453 F. Supp. at 127; *Frilling v. Vill. of Anna*, 924 F. Supp. 821, 840 n.21 (S.D. Ohio 1996). In the present action, Plaintiff sues to enforce permit conditions established by the Commonwealth of

Pennsylvania pursuant to federal mandate under the CWA. Permit conditions expressly qualify as "effluent standard[s] or limitation[s]" under the CWA citizen-suit provision. 33 U.S.C. § 1365(f).

Citizens are granted broad authority to bring citizen suits under the CWA to enforce any effluent limitation, including any permit condition. *Id.* The definition of "effluent limitation" under the CWA includes "any restriction established by a State" as well as those established by the EPA Administrator. *Id.* § 1362(11). Any state requirement added as a condition of an NPDES permit is thus fully enforceable as a CWA effluent limitation because state NPDES permitting occurs only under the CWA. It is well settled that citizens can bring suit under the CWA to enforce any state standards included in an NPDES permit.

> [T]he principal means of enforcing the pollution control and abatement provisions of the [CWA] is to enforce compliance with . . . . the conditions of an NPDES permit. . . . This is true both for conditions imposed in accordance with EPA-promulgated effluent limitations and standards and for those imposed in accordance with more stringent standards and limitations established by a State[.]

EPA, 426 U.S. at 223-24; *Nw. Envtl. Advocates*, 56 F.3d at 986-88 ("The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions . . . . [including citizen suits] to enforce permit conditions based on both EPA-promulgated effluent limitations *and state-established standards*." (second emphasis added)). Thus, any conditions incorporated in the NPDES permit pursuant to state law become enforceable under the CWA citizen-suit provision because state control of NPDES permitting occurs solely pursuant to federal law. *Upper Chattahoochee Riverkeeper Fund*, 953 F. Supp. at 1552.

In the action at bar, the NPDES Notice of Intent for Coverage Under the General (PAG-2) NPDES Permit, executed by Defendants on Date, 2006, incorporates by reference

the PADEP state environmental standards implementing the CWA, namely the E&S Plan and BMPs mandated under 25 Pennsylvania Code § 102.4(b), as well as "other controls" needed to "ensure that water quality standards and effluent limits are attained" (Township Project Construction NPDES Notice of Intent 7). Therefore, the terms of the E&S Plan and the mandatory implementation of the PADEP BMPs are CWA NPDES permit conditions fully enforceable through a citizen-suit action pursuant to 33 U.S.C. § 1365.

Defendants' violations of the Pennsylvania Clean Streams Law and the Pennsylvania Storm Water Management Act are also enforceable pursuant to state law citizen-suit provisions.

I. DEFENDANTS ARE IN VIOLATION OF THE PENNSYLVANIA STORM WATER MANAGEMENT ACT, AS IMPLEMENTED BY TOWNSHIP ORDINANCES; CONSTRUCTION SHOULD THUS BE ENJOINED UNTIL DEFENDANTS ARE IN COMPLIANCE, AND DEFENDANTS ARE STATUTORILY LIABLE TO PLAINTIFF FOR COMPENSATORY DAMAGES AND LITIGATION COSTS.

As part of state implementation of the CWA, the General Assembly enacted a set of storm water control statutes, the Pennsylvania Storm Water Management Act ("the Act"), 32 P.S. §§ 680.1–680.17, based upon a policy concern that

> Inadequate management of accelerated runoff of storm water resulting from development throughout a watershed increases flood flows and velocities, contributes to erosion and sedimentation, overtaxes the carrying capacity of streams and storm sewers, greatly increases the cost of public facilities to carry and control storm water, undermines flood plain management and flood control efforts in downstream communities, reduces ground-water recharge, and threatens public health and safety.

32 P.S. § 680.2(1). Under § 680.11, each municipality in the state was required to enact ordinances so as to comply with the storm water controls mandated under the Act's implementation of the CWA. The Act

> imposes duties on landowners and persons engaged in the alteration or development of land to ensure that development does not increase the rate of storm water run-off or to manage the increased run-off in a manner that protects health and property.

Youst v. Pa. Dept. of Transp., 739 A.2d 625, 628 (Pa. Commw. Ct. 1999).

Under the Act, landowners engaging in construction development have an affirmative, statutory duty to follow the strictures and methods mandated under the relevant local storm water plan, so as to prevent deleterious impacts on health, safety, and property interests of the community.

> Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics *shall implement such measures consistent with the provisions of the applicable watershed storm water plan* as are reasonably necessary to *prevent injury to* health, safety *or other property*. Such measures shall include such actions as are required:
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> > (1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
> >
> > (2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately *protects* health and *property from possible injury*.

32 P.S. § 680.13 (emphasis added).

Landowner-developer violations of the duty imposed under § 680.13 may be remedied via a citizen suit. Importantly, the citizen-suit statute declares (1) that landowner violation of the storm water ordinances and regulations constitutes a per se "public nuisance," (2) that

the citizen-suit plaintiff may attain injunctive relief to enjoin further violations, and (3) that the citizen-suit plaintiff is entitled to recovery of his or her litigation costs, as well as compensatory damages to restore his or her property to the state it enjoyed prior to damage by the defendant's violative storm water discharges.

> (a) *Any activity conducted in violation* of the provisions of this act or of any watershed storm water plan, *regulations or ordinances* adopted hereunder, is hereby *declared a public nuisance.*
>
> (b) *Suits to restrain, prevent or abate violation* of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, *may be instituted in equity or at law* by the department, any affected county or municipality, *or any aggrieved person*. . . . [T]he court may, in its decree, fix a reasonable time during which the person responsible for the unlawful conduct shall correct or abate the same. The *expense of such proceedings shall be recoverable from the violator* in such manner as may now or hereafter be provided by law.
>
> (c) *Any person injured* by conduct which violates the provisions of section 13 [establishing the duty of the landowner to comply with storm water management statutes, regulations, and ordinances] may, in addition to any other remedy provided under this act, *recover damages caused by such violation from the landowner or other responsible person*.

Id. § 680.15 (emphasis added). "Violation of an express statutory provision *per se* constitutes irreparable harm for purposes of evaluating the sufficiency of a complaint seeking injunctive relief." *Unified Sportsmen of Pa. v. Pa. Game Comm'n*, 950 A.2d 1120, 1133 (Pa. Commw. Ct. 2008). The remedies available under § 680.15 are in addition to any common-law causes of action assertable by an injured citizen-suit plaintiff; "[i]t is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate nuisances." 32 P.S. § 680.16(b). Case law construing the Act confirms that "Section 15 of the Act permits private individuals to bring suit to enforce provisions of the Act," *Merlino v. Del. County*, 711 A.2d 1100, 1104 (Pa. Commw. Ct. 1998), and that "Section 13 of the Act

imposes duties on landowners and persons engaged in the alteration or development of land to ensure that development does not increase the rate of storm water run-off or to manage the increased run-off in a manner that protects health and property," *Youst*, 739 A.2d at 628.

A developer or landowner who violates the Act by failing to manage storm water runoff is subject to injunctive relief mandating that the violator comply with the mandates of the Act and its implementing regulations and ordinances. *Frisch v. Penn Twp., Perry County*, 662 A.2d 1166, 1169-1170 (Pa. Commw. Ct. 1995) (evidence supported injunction requiring developer to satisfy his obligations under Act and implementing regulations to manage runoff from subdivision and to provide storm water management plan to the township).

Under the present facts, Defendants, in failing to control storm water runoff from their construction site—having willfully failed to follow the plain PADEP-mandated storm water control BMPs contained in the E&S Plan and incorporated by reference into their NPDES Notice of Intent and Permit, and having failed to comply with the local ordinances (including Chapter x of the Township Municipal Code)—have caused injury to the property of Plaintiff and have breached their duty imposed by § 680.13, thereby necessitating this citizen suit by Plaintiff as an "aggrieved person," pursuant to § 680.15.

Defendants have furthermore violated § 680.13 of the Act by failing to comply with the supplemental E&S Plan (entitled "New Construction and Demolition Project . . . Additional E&S Controls Plan") filed by Defendants on Date, 2009, in which Defendants incorporated by reference BMPs from the PADEP *Manual*. These *Manual* requirements, written by Defendants into their own E&S Plan and thereby incorporated by reference into

their NPDES Permit, are therefore terms of the NPDES Permit enforceable under both the CWA and the Act.

As a result, Plaintiff is entitled to injunctive relief mandating that Defendants comply with their duty under § 680.13 to manage storm water runoff by following the Act and its implementing regulations and ordinances, so as to protect the property of neighboring landowners. Furthermore, in addition to injunctive relief, under the plain terms of § 680.15(b), Plaintiff is entitled to its costs in this litigation, and under § 680.15(c), Plaintiff is entitled to compensatory damages so as to restore its land back to its pre-violation condition.

II. DEFENDANTS ARE IN VIOLATION OF THE PENNSYLVANIA CLEAN STREAMS LAW, AND, THEREFORE, DEFENDANTS SHOULD BE ENJOINED TO COME INTO COMPLIANCE.

Pennsylvania's Clean Streams Law, 35 P.S. §§ 691.1–.1001, and its implementing regulations are intended to protect the water quality of this state by preventing and eliminating the pollution of Pennsylvania waterways. 35 P.S. § 691.4. Under the Law,

> It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or *allow or permit to be discharged from property owned or occupied by such person* or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. *Any such discharge is hereby declared to be a nuisance*.

Id. § 691.401 (emphasis added). Any such violative discharge of pollutants may be remedied through a citizen suit by landowners injured by the violative discharges.

> [A]ny person having an interest which is or may be adversely affected *may commence a civil action on his own behalf* to compel compliance with this act

> or any rule, regulation, order or permit issued pursuant to this act . . . against any . . . person alleged to be in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act.

Id. § 691.601(c) (emphasis added). In addition to the injunctive relief attainable by an aggrieved citizen under § 691.601(c), other provisions of the Clean Streams Law assess substantial civil penalties payable to the Commonwealth for each day of violation, as well as possible jail time for violators. A violator who knowingly fails to follow statutory, regulatory, or permit Clean Streams Law mandates faces a fine of up to $50,000 per day of violation and imprisonment of up to seven years:

> *Any person* or municipality who intentionally or knowingly *violates any provision* of this act, any rule or *regulation* of the department, any order of the department, or *any condition of any permit* issued pursuant to the act is guilty of a felony of the third degree and, upon conviction, shall be subject to a fine of not less than five thousand dollars ($5,000) nor more than *fifty thousand dollars ($50,000)* for each separate offense or to *imprisonment* for a period of not more than *seven years*, or both.

Id. § 691.602(b.1) (emphasis added). Each day of violation is a separate punishable offense. *Id.* § 691.602(d). In addition, the PADEP may assess a separate civil penalty up to $10,000 for each day of violation, a penalty that is mandatory where a cessation order is granted the plaintiff. *Id.* § 691.605(a), (b)(2).

One regulation implementing the Clean Streams Law, 25 Pa. Code § 102.11, addresses erosion control requirements, mandating that persons engaging in construction activities that disturb the soil implement and comply with PADEP-approved BMPs to reduce erosion and sedimentation on construction sites, as detailed in the PADEP's official *Manual* on the subject:

> A person conducting or proposing to conduct an earth disturbance activity *shall design, implement and maintain BMPs* to minimize the potential

> for accelerated erosion and sedimentation in order to protect, maintain, reclaim and restore water quality and existing and designated uses. Various BMPs and their design standards are listed in the *Erosion and Sediment Pollution Control Program Manual (Manual)*, Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (January 1996), as amended and updated.

25 Pa. Code § 102.11(a) (emphasis added).[2]

Here, Defendants, contrary to the plain mandate of Clean Streams Law regulation § 102.11, have wholly failed to comply with and implement the PADEP BMPs expressly incorporated into their own E&S Plan (and its supplement), and Defendants are therefore subject to injunctive relief pursuant to the citizen-suit provisions of 35 Pennsylvania Statutes § 691.601(c) to compel compliance, as well as to the civil and criminal penalties assessed under §§ 691.602 and 619.605.

III. DEFENDANTS CANNOT ARGUE THAT UNDER THE "COMMON ENEMY" DOCTRINE, THE INCREASED STORM WATER RUNOFF IS UNACTIONABLE.

As a defense regarding Plaintiff's common-law claims, it is likely that Defendants will argue that under the so-called "common enemy" doctrine, the increased flow of storm water runoff proximately caused by their construction activities is not actionable. However, this argument is demonstrably without merit, as the common-enemy doctrine cannot apply where changed surface flow is caused by sudden change, as opposed to gradual development in a region, or where the change occurs due to artificial manipulation of the flow channels.

[2]An amended version of this regulation, effective November 19, 2010, references the 2000 version of this *Manual*.

Failure to adequately prevent alterations of surface flows leaves the developer liable for restoration costs to any impacted landowners.

2. Common Law Remedy

> The law of the Commonwealth regards surface waters as a common enemy which every landowner must struggle to dispose of as best as possible. *Strauss v. Allentown*, 215 Pa. 96, 63 A. 1073 (1906). Under this rule, an upgrade landowner is not liable for damage to a lower landowner's property caused by water which naturally flows from one level to the other. Further, an upgrade landowner is normally entitled to improve his property without liability for diversion of surface waters. *Chamberlin v. Ciaffoni*, 373 Pa. 430, 96 A.2d 140 (1953). However, *in response to the rapid expansion of urban- and suburban-type developments in rural areas, the courts carved out an exception to the general law of surface waters, and held that an "unnatural" use of rural land carries with it a special "responsibility on the developer to properly accommodate the increased flow of surface waters off the land, where such increase was predictable and preventable.*" *Laform v. Bethlehem Tp*., 346 Pa. Super. 512, 527, 499 A.2d 1373, 1380 (1985). In other words, an upgrade landowner is liable for damage to a lower landowner's property where he has unreasonably or unnecessarily increased the quantity or altered the quality of surface waters or *where he has diverted the water from its natural path by artificial means*.
>
> The pools of water on plaintiffs' property cannot be characterized as incidental to development. *Incidental changes in water flow occur gradually, as land is developed, rather than suddenly, as a result of a single identifiable act* [like construction excavation]. *Id.* at 525, 499 A.2d at 1379. It was reasonable for defendant to develop their land. However, their manner of development was unreasonable. Here, *defendant constructed a driveway without regard to the path of surface waters*. This is just the type of dramatic change in landscape which causes a sudden pickup in water flow. *Defendant's failure to take necessary precautions to accommodate surface waters when developing rural land artificially diverted the path of water on their land* and caused an unreasonable increase in the quantity and quality of water flowing onto their neighbor's land. *This increase was both predictable and preventable*. *See: Westbury Realty Corp. v. Lancaster Shopping Center, Inc*., 396 Pa. 383, 152 A.2d 669 (1959) (defendant liable for damages where 17 acre tract of rural land was developed into a shopping center); *Miller v. C.P. Centers, Inc.,* 334 Pa. Super. 623, 483 A.2d 912 (1984) (apartment development in rural area an "artificial" use of land); *Ridgeway Court, Inc. v. Landon Courts, Inc*., 295 Pa. Super. 493, 442 A.2d 246 (1981) (defendant liable where its development of land included removal of a hill, resulting in part of the surface water flow

being diverted from its natural course and redirected across plaintiff's property).

3. Damages

Plaintiffs are entitled to be compensated for the cost of restoring that part of their pasture damaged by flooding. Plaintiffs are *also entitled to relief which will prevent flooding on their property in the future*. . . .

Plaintiffs also request an award of $4,831.55 for the cost of Yerkes Associates, Inc. [i.e., legal fees]. . . . These . . . amounts have been . . . award[ed].

Magee v. Marshman, 20 Pa. D. & C.4th 184, 189-91 (C.P. 1993) (emphasis added).

Regarding the circumstance where construction activity increases the flow of storm water runoff onto neighboring properties, at least one Pennsylvania opinion has held that such diversion of the natural flow of storm water runoff is artificial and sudden, removing the diversion from protection under the common-enemy doctrine, instead relegating the injurious flow diversion to the realm of tort law, even absent negligence by the upland landowner.

[T]he plaintiffs never experienced any flooding problems on their property prior to the construction of the Village of Tripp Park. However, plaintiffs contend that since the construction of the development began in or around 2001, high volumes of water, eroded material and debris have flowed toward and entered upon their property during rainstorm events. This continuous runoff problem has caused great distress as well as damage to the plaintiffs and allegedly constitutes a continuous trespass. Plaintiffs allege that the collective defendants have directly or indirectly altered the natural flow of surface waters in the course of construction activities by concentrating water through inadequate artificial channels thus causing discharge upon their property. Accordingly, plaintiffs sought to recover monetary damages, as well as injunctive relief, forcing defendants to correct the situation. Plaintiffs eventually withdrew their claim for damages.

* * *

> . . . The law in Pennsylvania is clear that *a landowner may not alter the natural flow of surface water on his property by concentrating it in an artificial channel and discharging it upon the lower land* of his neighbor even though no more water is thereby collected than would naturally have flowed upon the neighbor's land in a diffused condition. *A land-owner who does so divert water in such a manner is liable even if he is not guilty of negligence and such diversion of water causes legal injury*. *Rau v. Wilden Acres Inc.,* 376 Pa. 493, 494-95, 103 A.2d 422, 423-24 (1954); *Westbury Realty Corp. v. Lancaster Shopping Center Inc*., 396 Pa. 383, 388, 152 A.2d 669, 672 (1959); *Chamberlin v. Ciaffoni*, 373 Pa. 430, 435, 96 A.2d 140, 143 (1953).

Medallis v. Ne. Land Dev., 8 Pa. D. & C.5th 411, 412-16 (C.P. 2009) (emphasis added).

As in *Medallis*, Defendants here suddenly and materially changed the surface flow of the storm water runoff through their construction activities, a diversion proximately caused by new artificial channels and inadequate storm water runoff controls, controls mandated by federal and state law and expressly referenced by Defendants in their own E&S Plan and its supplement.

As a result, the common-enemy doctrine is no bar to Plaintiff's common-law claims against Defendants for injunctive relief, compensatory damages, attorney's fees, and costs, under the theories of negligence, public nuisance, private nuisance, and trespass.