Environmental Quality Board
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February 3, 2021

Re: Proposed Rulemaking to Amend 25 Pa. Code Chapter 105

On December 5, 2020, the Environmental Quality Board announced a proposed rulemaking to amend 25 Pa. Code Chapter 105 ("Chapter 105"), relating to dam safety and waterway management. Clean Air Council, Delaware Riverkeeper Network, EarthJustice, PennEnvironment, PennFuture, and Mountain Watershed Association (collectively, "Commenters") timely submit the following comments with respect to this proposed rulemaking. Commenters were aided in the preparation of these comments by Schmid & Company, Inc., Consulting Ecologists. At a time when our freshwater resources are imperiled with potential new impacts and threats, we appreciate the opportunity to further engage in this rulemaking revision process.

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Background on Commenters

Clean Air Council is a member-supported environmental and health organization that has worked for over 50 years to protect everyone's right to a clean and healthy environment. Clean Air Council works throughout Pennsylvania and has extensive experience advocating for the public and the environment with respect to Chapter 105 permitting. The Council has also worked with the Department to improve policies related to Chapter 105.

Delaware Riverkeeper Network is a nonprofit membership organization established in 1988 to protect and restore the Delaware River, its tributaries and habitats. DRN has more than 25,000 members who live, work, and/or recreate throughout the Delaware River Watershed, including Pennsylvania. Delaware Riverkeeper Network has participated in various Chapter 105 permitting processes over the years, particularly in the Delaware River Watershed, and routinely offers up practical and technical information regarding how these regulations help protect or not protect Pennsylvania's streams, floodplains, riparian buffers, and wetlands. In recent years, much of this effort has focused around linear pipeline projects for which Clean Air Council and Mountain Watershed Association have also been fundamental watchdogs on behalf of the public. Delaware Riverkeeper Network has conducted stream restoration and dam removal projects over the past 25 years that involved the Chapter 105 permitting process.

PennEnvironment is a statewide, citizen-based, environmental advocacy non-profit organization. PennEnvironment works to ensure all Pennsylvanians have clean air to breathe, clean water to drink, open spaces to enjoy, and a safe, liveable climate powered by 100% renewable energy to call home.

PennFuture is a public interest membership organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture strives to protect

our air, water and land, and to empower citizens to build sustainable communities for future generations. One focus of PennFuture's work is to improve and protect water resources and water quality across Pennsylvania through public outreach and education, advocacy, and litigation.

Mountain Watershed Association, home of the Youghiogheny Riverkeeper, is a non-profit, community-based environmental organization located at 1414 Indian Creek Valley Rd., Melcroft, Pennsylvania 15462, with more than 1,400 members. Our major purposes include bringing about remediation of the numerous abandoned mine discharges, developing community awareness, promoting cooperative community efforts for stewardship, and encouraging sound environmental practices throughout Pennsylvania's Laurel Highlands region and surrounding areas. Our mission is the protection, preservation, and restoration of the Indian Creek and greater Youghiogheny River watersheds.

Overview of Comments

Commenters provide detailed comments, organized by the specific subsection of the proposed revisions, below. Some comments include specific recommendations for changes to language, others provide a framework for needed change that may serve as a start for dialogue with the Board and/or the Department that Commenters are eager to have. One overarching issue is that these revisions—the first major revisions to Chapter 105 since 1991, according to the Board—represent a missed opportunity. The Board could have updated the regulations to reflect the realities of Pennsylvania's increasingly impaired streams and waterways as well as the realities of the threats posed by climate change. The Board also could have focused on increasing the requirements on permit applicants to provide additional supporting evidence and

additional information to the Department to reduce the Department's burdens on review. The Board could also have taken the opportunity to clarify key terms that have been either twisted or unused in enforcement. Instead, many of the revisions are focused on flexibility for applicants, such as the submission of one application for multi-county permits, potentially resulting in decreased local oversight and less fees for an already under-funded Department. Some of the proposed revisions introduce additional undefined terms, such as "temporary" and "low-impact," which may turn out to be regulatory loopholes leading to increased damage to aquatic resources.

Pennsylvania is a water-rich state with approximately 85,500 miles of streams and rivers connecting over 700,000 acres of lakes, bays, and wetlands. The Department's draft 2020 integrated water quality report found that of 25,468 miles of streams in Pennsylvania, about 30% have impaired water quality for one or more uses: water supply (84 miles), aquatic life (17,547 miles), recreation (9,935 miles), or fish consumption (2,817 miles). Commenters urge the Board to consider their suggestions and to use this opportunity to revise Chapter 105 to strengthen the authority of the Department to ensure that future impacts and proposed projects do not sacrifice Pennsylvania's freshwater resources. Finally, given the significance of this rulemaking and the implications it will have for aquatic resources across the state and the residents who rely upon and enjoy them, Commenters urge the Board to hold public presentations explaining the proposed revisions, as well as public hearings.

Comments on Proposed Rulemaking, Organized by Section

Commenters first address the preamble of the Proposed Rulemaking in the *Pennsylvania Bulletin*, before later diving into the proposed revisions to the language in Chapter 105 itself.

Proposed Rulemaking: Background and Purpose

In the introduction to the *Background and Purpose* section of the Proposed Rulemaking, the following is offered in support of the rulemaking: "These proposed regulatory revisions would allow the Department to focus resources on activities and threats to public health, welfare, safety and the environment, while providing general management, oversight and review for more routine activities to ensure compliance with the objectives of the act." Commenters agree that it is crucial, and indeed, required, that the Department manage threats to public health, welfare and safety, and the environment. In this ambiguous phrasing though, it is unclear what attention and resources will be diverted away from. This is not spelled out in the suggested changes to Chapter 105 language either. "Routine" activities could refer to projects that are authorized through general permit, or activities that are simply deemed routine by the applicant and accepted as such by the Department with supporting evidence from the applicant. Either circumstance could prove problematic, especially if by providing only "general management, oversight, and review," the intent is to avoid field inspections that might have otherwise taken place. A project should not be pre-judged as routine, and thus subject to less scrutiny, without substantive review by the Department.

In addition, the section preamble notes, "In recent years, the Department's emphasis on improved clarity and consistency in the implementation of Chapter 105 has centered on large scale projects, including linear and phased projects. As a result, the Board has identified a need for multiple revisions and updates to Chapter 105." It is unclear, however, that the revisions set forth in the rulemaking actually address the litany of concerns that have arisen in recent years related to linear and phased projects. One exception is the recommendation to consolidate multi-county projects into a single application, which presents concerns, as Commenters will address

in more detail later in this comment. If the intent of this rulemaking is truly to address concerns related to linear and phased projects, those concerns should be laid out and addressed squarely so the public has the benefit of this context.

Proposed Rulemaking: Federal Consistency and Coordination

The Board should include in the revisions to Chapter 105 language ensuring the Department fully and properly engages with federal agencies and laws, in particularly with the Federal Energy Regulatory Commission (FERC) and the U.S. Army Corps of Engineers (the Corps).

It is critical the Commonwealth does not undermine its own authority through the joint permitting process or by giving approvals before it has received all data and information. It has too often been the Department's practice to provide the requisite certification under Section 401 of the Clean Water Act (33 U.S.C. § 1341) for a project *before* Chapter 105 and Chapter 102 applications are completed and reviewed. This cart-before-the-horse mentality of approving the Section 401 certification before the applications are evaluated undermines the Department's own duty to protect the waters and wetlands of the Commonwealth. Maintaining the Commonwealth's authority over its own permitting process can be particularly critical with linear pipeline projects, where federal agency requirements and state requirements intersect and may diverge.

Despite the clear legal mandate that Pennsylvania's Section 401 Certification should precede federal approvals, FERC, often with court acquiescence, circumvents the requirement by issuing conditional certifications, including language that the FERC certification is conditional on an applicant securing the appropriate state Section 401 certification. While this "conditional" language is used to rationalize FERC's advance approvals, FERC's failure to fully enforce the

condition undermines the truthfulness of the rationalization. In fact, FERC does not fully enforce the conditional mandate before allowing pipeline companies to exercise the power of eminent domain, to engage in preliminary construction activities such as tree felling, or even to undertake full construction on some segments of the project prior to securing Section 401 certifications from all impacted states. FERC often wastes no time in authorizing the use of eminent domain and irreparable aspects of construction such as tree clearing, sometimes issuing such authorizations just hours after receiving a request, once the FERC Certificate has been issued but prior to Section 401 certification from all affected states. As a result, FERC undermines the rights of states to prevent pipeline construction activities that will result in violation of state water quality standards by using their Section 401 certification authority to reject a project outright or to mandate modifications regarding the route, construction practices and/or mitigation obligations. More recently, FERC has overtly stripped a state of its Section 401 certification authority by rejecting the state's denial of such a certification.[1] However, members of FERC, including the recently-designated chair Richard Glick, have declared that FERC should end its practice of issuing conditional approvals to pipelines due to the unnecessary harm done to landowners.[2] Similarly, and in keeping with its obligations under Article I, Section 27 of the Pennsylvania Constitution, the Department should cease the practice of issuing conditional Section 401 certifications. Instead, the Department's issuance of a Section 401 certification should be contingent on demonstrated compliance with all Pennsylvania laws protective of the Commonwealth's water resources.

[1] *See* People's Dossier of FERC Abuses: Undermining State Authority, *available at* https://www.delawareriverkeeper.org/ongoing-issues/peoples-dossier-ferc-abuses-undermining-state-authority.
[2] *See PennEast Pipeline Co., LLC*, 174 FERC ¶ 61,056, 61,062 (2021) (Glick, Comm'r, and Clements, Comm'r, Concurring).

The Department has broad authority to coordinate its activities with the Corps. More can and should be done to maximize the benefits of collaboration between these agencies. The Department has never required permit applicants to have their proffered wetland/water boundaries confirmed by the Corps, and the Department lacks the staffing and resources to confirm boundaries in the field, often relying on desk-top reviews or the applicant's delineation reports. A Corps jurisdictional determination can be done at the federal government's expense upon request by a permit applicant or landowner and would add a third-party check on the delineations to help ensure they are accurate and thorough. As a 2019 Environmental Hearing Board decision concluded, the Department does not go out and verify wetland boundaries or characterizations presented in permit applications:

> Scott Williamson, the Department's environmental program manager for the waterways and wetlands program, who signed the Chapter 102 and 105 permits, testified that the Department does not go out to verify wetland boundaries and instead relies on the information presented in the application. (T. 1167-69.) Although we think it is entirely reasonable for the Department to rely on the information presented in permit applications, and it would be untenable for the Department to field-verify all the information presented on wetlands and streams in every application, we simply point this out because it reduces the Department's credibility for opining on how Wetland L24/25 existed and what its dominant vegetation was *before* it was disturbed by Sunoco's clear-cutting. … all of the witnesses for the Department and Sunoco blindly relied on the forms completed by the mystery wetland assessors. In the absence of any sponsoring testimony …, we are troubled by the heavy reliance on Tetra Tech's wetland determination forms.

(B. Labuskes, Adjudication, S. & E. Gerhart v. PADEP and Sunoco Pipeline, EHB 2017-013, p. 21-22)

To achieve the protections established in Chapter 105, it is essential for the Department to field-verify all the information presented on wetlands and streams in every application, unless the Corps has already done so and issued a formal jurisdictional determination. Even then, there

may still be a need to do so if a credible technical challenge has been raised. Unfortunately, applicants have proven to be untrustworthy when it comes to accurately delineating and characterizing wetlands. As a result, without the independent investigation and judgment of qualified Department staff, the Department has no knowledge as to the extent and nature of aquatic resources when it grants permits resulting in damage to these aquatic resources. This dynamic undermines the Department's ability to execute its constitutional trustee duties.

Applicants have an incentive to furnish self-serving information, and in practice, often do not provide accurate and complete information. Knowing much of their wetland information will never be field-verified by the Department, they have no incentive for accuracy. Technical reviews of wetland and waterbody applications as well as Delaware Riverkeeper Network's volunteer monitor field-truthing for pipelines have time and time again uncovered inadequate, missing, and incomplete information on the mapping of these sensitive water bodies and wetlands that are deserving of protection. Residents themselves are sometimes left to identify these mistakes. To reverse this dynamic, applicants should be paying fees sufficient to cover the costs of independent field review by the Department or the Corps.

Finally, Commenters note that this section should and does not mention consistency with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. § § 1271—1287).

Proposed Rulemaking: Consultations

The *Pennsylvania Bulletin* announcement for this proposed rulemaking asserts that in developing this proposed rulemaking, the Department "sought input from principal stakeholders that would be affected by the proposed amendments." Reasonably, most of these stakeholders were other agencies that have a role in implementing Chapter 105. In addition, according to the *Bulletin* notice, "the Department provided a presentation of this proposed rulemaking to the

Pennsylvania Chamber of Business and Industry and provided an opportunity for feedback." Glaringly absent from the Department's chosen stakeholders, or those given the chance to provide early feedback in an early exclusive meeting, are *any* non-profit organizations who represent the public interest. This undermines the legitimacy of the public comment process.

As acknowledged in the *Background and Purpose* section of the *Bulletin* notice, the purpose of Chapter 105 is first to "protect the health, safety, welfare and property of the people" and also to "protect natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve and protect the water quality, natural regime and carrying capacity of watercourses." These are the big-picture values that underlie the goals of assuring proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs, water obstructions, and encroachments. And yet, the very voices that speak for the safety of the public and the environment have not so much been acknowledged as stakeholders. They have also been excluded from important early stages of the rulemaking process, while industry has been given special access. Early access should either be universal or else should not be part of the public participation process.

Early feedback can prove critical in shaping a rulemaking; the later in the process opportunity for input arises, the more likely ideas have become entrenched and the less likely there will be change. In light of this, Commenters urge the Environmental Quality Board first to give these comments consideration commensurate with the additional, early feedback industry has given, and second, to regard these comments not as final input, but also opportunity for further dialog. Commenters are interested in providing additional input to balance the fact that industry, and not public interest groups, were given previous opportunity to participate.

Comments on Proposed Revisions to Chapter 105, Organized by Section

Commenters next address the text of the proposed revisions to the language in Chapter 105 itself.

Section 105.1 -- Definitions

Several of the proposed revisions and additions in Section 105.1, the definitions section, are vague and would benefit from additional clarity. The revisions as proposed are a missed opportunity—instead of using these revisions as an opportunity to clarify key terminology that has become contorted to serve industry, the Board has proposed vague or incomplete definitions that may not advance the goal of these revisions to strengthen the Department's ability to implement and enforce the regulations.

- **Aquatic Resources:** The proposed definition of "aquatic resources" excludes groundwater, which also is regulated in the Commonwealth under the Clean Streams Law. This definition should be revised to more clearly state that it addresses all resources regulated by the Clean Streams Law, including groundwater, and not only surface aquatic resources.

- **Aquatic Resource Functions:** The proposed definition of "aquatic resource functions" specifically excludes protected water uses and water quality standards under 25 Pa. Code Chapter 93 except for wetlands. It is unclear why these protected water uses and water quality standards are excluded from this definition. This exclusion of such standards is in conflict with the proposed new technical guidance documents for compensatory mitigation.

- **Aquatic Resource Impacts:** Similarly, the proposed definition of "aquatic resource impacts" excludes evaluations and assessments of protected water uses under Chapter 93. Again, it is unclear why these protected water uses are excluded, and Commenters note that this exclusion appears to contradict 25 Pa. Code § 93.4c(a)(1)(i) et seq.

  Within the definition of "aquatic resource impacts," Commenters note that the proposed definition of "indirect impacts" appears to have a grammatical/typographical error. Within this same definition, the sub-definition of "secondary impacts" appears to include longwall mine-induced subsidence. Such subsidence often results in a need for additional encroachments to attempt damage mitigation; Commenters query whether the Board's

intent is to include such additional potential encroachments as secondary impacts here. Intentional longwall coal mine subsidence damaged 44% of the stream miles undermined during the most recent 5-year period (2013-2018). The Department currently only regulates predicted intentional mining damage, but then requires Chapter 105 review for any efforts to repair unpredicted stream damage by cutting gates or attempting to reestablish flow. Stream damage is rarely predicted by applicants, and accuracy of predictions is never reported. Stream restoration, when possible at all, typically requires many years. Commenters urge the Board to consider the real and likely impacts on streams from longwall mine-induced subsidence in evaluating applications before permits are issued, at a time when harms can potentially be avoided.

Commenters additionally note that this definition of "aquatic resource impacts" appropriately views impacts, simply, as impacts, before any consideration of mitigation is factored in. Commenters support this definition and suggest that this plain-meaning definition of "impacts" should be applied consistently.

Further, Commenters note that though the term "adverse impacts" appears in multiple places, it remains undefined in this definitions subsection. Commenters encourage the Board to consider adopting, and the Department to consider enforcing, a similar plain-meaning definition of "adverse impacts" as harm to a resource, before any consideration of whether such harm can be mitigated. Mitigation can and should be assessed separately without muddling the concept of adverse impact itself.

- **Crop Production:** Within the definition of "crop production," Commenters note that "crop rotation" presumably includes some length of time when land remains fallow; however, no length of time is stated. Federal guidance allows croplands to remain fallow up to 5 years in rotation, by which time wetlands can become revegetated by hydrophytes on hydric soil where drainage has not been carefully maintained. There are also many programs encouraging, through subsidies and payments, farmers to preserve buffers, wetlands, and other sensitive lands.[3] This definition should incorporate this concept and avoid an interpretation that might disincentive the use of such restoration and conservation programs.

- **Hydrologic and Hydraulic Analysis:** The Department has not added any revisions to the definition of "hydrologic and hydraulic analysis" to include groundwater, a critically relevant element in any such analysis. This definition should be revised to refer to analysis of the impact of encroachments, obstructions, and dams on groundwater.

[3] *See* The Pennsylvania Riparian Forest Buffer Handbook, https://www.creppa.org/wp-content/uploads/2015/10/Pennsylvania-Riparian-Forest-Buffer-Handbook-2017_Part1.pdf

- **Project:** The proposed definition of "project" is unclear. While the added term is meant to "clearly identify the geographic area of the site" under consideration, the terms "entire area of the site" and "reasonably foreseeable areas" are ambiguous and unhelpful in gaining geographical clarity and specificity. Furthermore, the phrase "reasonably foreseeable areas" raises project approval issues and warrants its own definition. The term "project" could be more clearly defined as something such as, "the entire set of tax parcels potentially affected by the proposed activity that have been approved for permitting activities." This would encompass both the "entire area of the site" and "reasonably foreseeable areas" into one specified "project" area. A separate definition of "reasonably foreseeable areas" or potentially affected areas would be needed to explain whether every proposed project must now also gain approval for potential future buildout, if such buildout is now being preemptively approved under the addition of "reasonably foreseeable areas," or if these potentially affected areas would necessitate a new or updated permit.

- **Project Purpose:** The definition of "project purpose" should not include the phrase "and the necessity for the project to be in or in close proximity to aquatic resources." That necessity is evaluated when determining whether the project is water dependent. By including that necessity within the definition of "project purpose" and then referring to the project's "basic purpose" within the definition of "water dependency," the Board has all but guaranteed that every project application will feature a water dependent project. As an example, under the currently proposed rule, an applicant may define its "project purpose" as "building a waterfront shoe store." Then, when evaluating water dependency, that "purpose" will be incorporated into the inquiry, eliminating any non-waterfront option and ensuring that the project will be deemed "water dependent."

- **Restoration:** The definition of "restoration" should refer to the existing statutory sections it is supporting, namely, Section 105.12(a)(16) and the proposed amendments to Section 105.15, to clarify that this term refers specifically to the restoration processes that are eligible for permit waivers, and not measures constructed for the significant benefit of the environment or mitigation efforts not entitled to permit waiver.

- **Service Area:** "Service area" should be defined so as to limit compensatory mitigation areas to the sub-watersheds affected by the project. If compensatory mitigation within the same sub-watershed is not possible, then the mitigation should occur in an area as close to the project as possible. As an example, the Corps requires the following considerations when selecting a mitigation site: "In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity,

relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses." 33 C.F.R. § 332.3(b)(1); *see generally* 33 C.F.R. § 332.3. In addition, it is critical that the local watershed groups and watershed partners have an opportunity to weigh in on the mitigation process and projects being considered. It is also important that the sub-watershed being harmed receives the benefit of restoration, particularly because small sub-watersheds and headwater streams can be significantly damaged. For example, a typical transmission pipeline cut across a headwater tributary can cause tremendous cascading impacts, both onsite and to the larger downstream watershed community all the way to public water supply intakes. The impacts range from riparian buffer destruction, steep slope erosion issues, compaction for temporary work spaces adjacent to open stream cuts, in-stream disruption of benthic habitat alterations, thermal impacts from open cuts, to the large in-stream impacts and changes in the water quality downstream due to upstream harms and disruption.

- **Stormwater Management Facilities:** The definition explains that swales or ditches that have "developed into a watercourse" are not included, but does not give a definition for watercourse. If a temporal requirement (permanence and/or comparison with ephemeral waterways) is the key requirement, that should be made clear.

- **Temporary:** Commenters encourage the Board to add a definition for "temporary." The word temporary is often used throughout this rule, but is usually not defined. However, in three places where the term is defined, the definition is either "one year or less" or "not to exceed one year." "Temporary road crossings" in GP-8 are also limited to "one year." However, without an overarching definition, the term might take problematic meanings in certain contexts. For example, the Bureau of Mining Programs (and not the Department's regional offices) administers Chapter 105 for mining activities. For the Bureau, "temporary" can mean 20 to 40 years. Commenters have encountered claims that if an impact lasts anything short of forever, it should be considered "temporary." As plate tectonics erase all impacts eventually, such a reading would render the word meaningless. Clarity is needed. A definition of "temporary" as not exceeding one year, unless a shorter timeframe is specified in a particular section, would provide additional clarity and consistency.

  Of course, temporary impacts are still impacts. In the Commenters' experience, pipeline operators often characterize cutting a trench through a mature forested steep slope and riparian buffer and stream for a pipeline as "temporary." They also characterize "temporary work spaces" as causing only "temporary" harm, regardless of whether full restoration is possible or how long it would take. However, this does not reflect the ecological facts on the ground in terms of succession. When a mature forest is cut and an

open trench is dug, soils are forever changed with compaction and destruction of forest soils and fragile top soil layers. Forests including important sensitive riparian forests are clear cut and destroyed, and in the case of often rural pipelines, interior forest is fragmented. This leads to invasive plant and animal species colonizing, destruction of soils, and subsequent languishing of replanting of forests, as well as thermal and benthic impacts to wetlands and waterbodies that these linear projects cut across. Forests and riparian buffers take decades to grow back and are an integral part to stream and wetland health.[4] As a result, when a forest is cut, this impact should never be considered temporary.

Furthermore, any impacts involving blasting, digging through rock, or otherwise breaking boulders or bedrock should be considered permanent, not temporary. Rock once broken cannot be restored by human hands. Especially in the context of blasting affecting steep slopes or water-bearing formations, what is done for "temporary" construction measures can leave marks lasting thousands or millions of years. Under no circumstances should any of that be considered "temporary."

- **Water dependent:** As discussed previously in these comments, water dependency should be determined *after* defining the project purpose but *before* engaging in an alternatives analysis. Water dependency should inform the burden the applicant faces in showing that there are no practicable alternatives to the project as desired. This concept of water dependency was discussed and argued at great length in the alternative analyses stakeholder work group convened by the Department to draft guidance on that portion of Chapter 105. With climate change and increased flooding, the necessity for more forward-thinking floodplain development must be considered by the Department in evaluating an application. Building up and filling in a floodplain or riparian corridor, as is often allowed, should be avoided especially if the project is a discrete project where a healthy riparian buffer or floodplain can be avoided (clear examples include shopping centers or non-linear projects). Keeping properties and people out of harm's way in floodways and floodplains is a critical needed step. Commenters point to the Drexel Line Chapter 105 permit in Upper Darby, Delaware County, as an example of this kind of threat for an activity that is not, by its nature, water dependent but where a developer is

[4] "Without more effective protection for riparian buffers, we estimate an annualized loss of approximately $981 thousand to $2.5 million in the value of monetized ecosystem services. Translated to a single acre, buffers provide over $10,000 per acre per year in monetized benefits (Table ES2), with additional non-monetized benefits expected to increase this total. Considering these benefits over time, policies that protect riparian corridors represent one of the most efficient investment opportunities facing communities in the Basin." ECONorthwest, The Economic Value of Riparian Buffers in the Delaware River Basin 7 (2018), https://www.delawareriverkeeper.org/sites/default/files/Riparian%20Benefits%20ECONW%200818.pdf.

looking to re-develop an older project that should ideally be moved farther from the banks of the Darby Creek.

- **Wetlands:** The definition of wetlands should be broad enough to include vernal pools in order to protect these often-missed, important resources. While vernal pools are not present for the majority of the year, they exist at key points for the life cycles of many sensitive animals. The current definition's use of the phrase "and that under normal circumstances do support" suggests that the wetland must be present a majority of the time. Commenters also suggest that the term "vernal pool" be added to the listing of examples, so no ambiguity remains.

Section 105.4 -- Delegations to Local Agencies

Collaboration with and delegation to county conservation districts can be an effective way to ensure the protections set forth in Chapter 105 are achieved. Unfortunately, not all conservation districts are up to the task, and even ones that are sometimes get dismissed by the Department. This rulemaking presents an opportunity to address both issues, but it currently does not.

The Beaver County Conservation District provides a recent and glaring example of an agency failing to act in accordance with its delegated responsibility to the public. In 2019, the Department learned the Beaver County Conservation District had significant conflicts of interest, engaged in a *quid pro quo* with entities it was supposed to oversee, issued permits inappropriately, and failed to keep necessary records, among other problems. While the Department took action to remedy these issues, damage had already been done, including activities proceeding under permits that had never undergone proper review, loss of opportunity for concurrent record keeping, and erosion of public trust. Some of this could be prevented in this rulemaking.

First, increased transparency, including requiring conservation districts to digitize and make their records easily accessible to the public, could help prevent this sort of dereliction of

duty from happening again. Even if the Beaver County Conservation District issues are uncommon and particularly egregious, lapses and inconsistencies in recordkeeping, difficulty in accessing records, and a general need for transparency certainly are not. Making records available online would benefit the public and would make communication with and oversight by the Department easier. This would not present an additional burden for applicants; the professionals who prepare most applications already are generating electronic text and drawings. Such a requirement would also be consistent with the Department's ongoing efforts to make more information available online. In the context of this rulemaking, this could easily be addressed by specifying under Section 105.4(d) that delegation agreements require not just that records be maintained, as presently set forth under Section 105.4(d)(4), but that records also be made publicly available online.

Second, future conflicts of interest might be avoided by specifically calling for them to be addressed in delegation agreements under Section 105.4(d). This, again, is a matter of transparency. By requiring decision makers in conservation districts to disclose any connections they may have to the regulated community they are charged with overseeing, as well as any financial interest they may have to projects or land in question, situations like the *quid pro quo* from Shell to the Beaver County Conservation District can be avoided.

At the same time, it is important that the rules reflect the value that conservation districts provide the public when they are working as intended, and that the Department not ignore their input. When residents have concerns related to how permit activities are affecting them on the ground or when permit enforcement is required, it is often the delegated conservation districts that are called to respond and assess field conditions. The public and volunteer monitors often use the conservation districts as a first line of defense when documenting a harm that is or could

lead to a large violation or pollution event. This is an appropriate role for conservation districts to play, especially given their increased familiarity with local landscapes and natural resources. Yet, when it comes to permit review and issuance, the Department can and does ignore this valuable localized expertise.

Prior to the Chapter 105 and Chapter 102 water permits being issued for Sunoco's Mariner East 2 Pipelines, technical staff from conservation districts expressed concerns about outstanding deficiencies in the permit applications and insufficient time for their teams to complete a proper review of the applications. These concerns were a harbinger of the years of disastrous construction that would ultimately follow the rushed permit issuance. They went unheeded. In the future, if the Department is going to overrule a conservation district's concern, it should have to provide an explanation for that particular decision. This can be addressed in the delegation agreement.

Section 105.12 -- Waiver of Permit Requirements

In general, waivers should not be used lightly by the Department, and should never be used in impaired watersheds or in aquatic resources subject to anti-degradation requirements (HQ and EV watersheds). This is especially important given that the issuance of waivers is not subject to public process like the issuance of a permit is, eliminating this opportunity for public oversight. Commenters support the use of waivers for justified restoration projects, though most resource-focused restoration practitioners have no difficulty complying with requirements imposed via permit. Department oversight can be critical in many of these instances. Ensuring best practices for erosion and sedimentation control (E&S) are being followed even during restoration is an important piece that should not be waived for any projects. Along these same lines, as shared during the alternatives analysis stakeholder process, restoration should also

employ innovative best management practices (BMPs), such as using native plants with beneficial pollinator habitat for E&S, and efforts employed to limit soil disturbance from the start to allow better restoration with reduced soil impacts. For example, measures to preserve topsoil and existing seed sources should be used, as opposed to the mixing of soils which is typically allowed with open trench cuts and steep slope disturbance. Horizontal directional drilling (HDD) is another very viable and important method for linear projects (if possible) under forests, steep slopes and other sensitive habitats, so long as it is planned properly and executed with care.

Section 105.12(a) states that, "[i]f the Department on complaint or investigation finds that a structure or activity which is eligible for a waiver, has a *significant* effect on safety or the protection of life, health, property or the environment, the Department may require the owner of the structure to apply for and obtain a permit under this chapter." Proposed Section 105.12(a) (emphasis added). Per the Dam Safety and Encroachments Act, EQB has the authority only to "waive the permit requirements for any category of dam, water obstruction or encroachment which it determines *has insignificant effect* upon the safety and protection of life, health, property and the environment." 32 P.S. § 693.7(a) (emphasis added). There are many actions that are conceivably neither "insignificant" nor "significant" that are subject to the permitting requirement. This sentence sets too high of a bar for requiring a permit and allows many structures or activities to fall within a "no-man's land," where a waiver was not justified, but the activity does not have a "significant effect." Therefore, unless the Department, on complaint or investigation, finds that a structure or activity which is eligible for a waiver has an insignificant effect on safety or the protection of life, health, property, or the environment, a waiver is inappropriate and the project proponent must obtain a permit. In addition, where an applicant

seeks waivers for multiple so-called "insignificant" encroachments (in an application as described in Section 105.13(d)), the Department should evaluate the cumulative effects of these encroachments when determining if a waiver is appropriate. To leave the text as proposed would be to contradict the statute, which the regulations can never do.

Subsection 105.12(a) is also unclear regarding mitigation for waived activities for which it requires a permit after-the-fact. It is unclear if the ratio for mitigation is still 1:1 or if it is now 2:1. Details would be helpful to understand the implications. Furthermore, the fact that some activities require after-the-fact permitting is suspect and must be further explained to justify this choice.

Moving on to the first of the specific waivers in the subsection, it is not appropriate for any dam, even one less than three feet in height, to be given a waiver. *See* Proposed Section 105.12(a)(1). Pooling of this size can be harmful. Small headwater dams cause tremendous cascading ecological harms to streams fifty feet or less, including thermal impacts, disruption of fish passage, inundation of important benthic habitat, inundation of riffles, and flooding of important floodplains, forested buffers, and forested headwaters.[5] In an era where the Department, sister agencies, and environmental preservation groups are working hard (often with taxpayer money) to remove owned legacy dams and so-called "orphan dams," this proposed dam waiver flies in the face of the more sustainable trends of dam removal being undertaken and facilitated in the Commonwealth.

[5] "Many regions in the Delaware River Basin face repetitive flood loss claims. To help avoid flood damages, the state of Pennsylvania has voluntarily 'bought out' and demolished nearly 1,400 homes and removed 3,500 people from dangerous flood areas since 1996." ECONorthwest, The Economic Value of Riparian Buffers in the Delaware River Basin 7 (2018), https://www.delawareriverkeeper.org/sites/default/files/Riparian%20Benefits%20ECONW%200818.pdf.

More broadly, there should be no new dams permitted in EV or HQ watersheds in addition to wild trout or Class A streams. Important headwater and forested wetlands also should not be allowed to be inundated by new dams. For example, Shohola Creek in Pike County provides an example where a small headwater anti-degradation stream has been allowed to degrade to the whims of a private landowner creating a private "golf motif" with a series of constructed low head dams. These dam impoundment projects should not receive waivers, and blanket pooling of any and all small streams lead to irreparable harm. Technical expert Schmid & Co. has documented pooling (including as a result of longwall mining) as highly destructive.

Regarding the exemption for obstructions or encroachments in smaller drainage basins, headwater streams are sensitive habitats, and impacts can cause cascading effects farther downstream. *See* Proposed Section 105.12(a)(2). To better understand the implications of this waiver based on drainage area, a map indicating how many headwater streams could be impacted by this cut-off point of 100 acres could assist in determining the gravity of this waiver for headwater habitats. It is unclear how this number was calculated and decided upon. There should be no waivers allowed in EV, HQ, Class A, wild trout streams, or impaired waterbodies, no matter how small the stream size. Furthermore, by adding the proposed "or encroachment" to this waiver section, the Department is weakening existing protections in the absence of any obvious problem needing to be resolved.

In subsection 105.12(a)(4), it is not clear why a dam subject to the requirements of the Mine Safety and Health Administration (relating to water, sediment or slurry impoundments, and impounding structures) is allowed a waiver. Commenters suggest specifying and adding throughout the waiver sections that no waivers are allowed for EV and HQ streams, Class A, wild trout streams, and impaired and listed 303(d) waterbodies. Furthermore, it is important that

streams with an Existing Use of HQ or EV are also specified as not appropriate waterbodies for waivers.

In Section 105.12(a)(7), the Board's addition of crop production terms (plowing, cultivating, seeding, grazing or harvesting) is a good idea. However, the Department should ensure that these revisions do not interfere with federal conservation programs. In particular, the U.S. Department of Agriculture's Conservation Reserve Enhancement Program (CREP) encourages restoration of wetlands that may have been historically farmed. Wetland vegetation may reestablish in those drained fields. The proposed provision does not address what happens when a farmer's "continued use" of drained fields ends. The Board needs to ensure that Section 105.12(a)(7) does not encourage the maintenance of field drainage in contradiction to USDA efforts and in derogation of the Department's responsibility to apply its protections under Chapter 105 "broadly."

The Board should add to Section 105.12(a)(8) the following language: "that does not bring unfarmed or abandoned wetlands into cultivation." Again, ideally, wetlands that remain should be unfarmed or restored to match with current restoration strategies.

Section 105.12(a)(9), pertaining to fords, exempts "exceptional value streams as listed under Chapter 93 ... or in wild trout streams." As noted previously, waivers should not be allowed in any anti-degradation waters that have HQ or EV designation. This additional language could be added to each waiver criterion to adequately protect and list special protection state-listed waters in addition to Class A and wild trout streams. Attained-use EV streams also should be excluded from this and other waivers. It is possible that having private ford crossings (only for private personal use) of HQ and wild/scenic streams waived is acceptable in order to reduce clutter of the landscape with bridges.

Section 105.12(a)(11) is unclear and should be revised. It is uncertain whether this subsection is referring to a separate application required at the time that an encroachment is proposed to be removed or abandoned, or whether it is claiming that the Department will review the applicant's environmental assessment at the time of construction in order to determine how removal or abandonment might affect water resources in the future. If this subsection refers to the former, then it is not clear how it will be enforced, since the Dam Safety and Encroachments Act does not require a permit for removal. *See* 32 P.S. § 639.6(a). If it refers to the latter, this proposal is untenable, because it is nearly impossible to predict the effect that removal or abandonment may have at some point in the future, both due to climate change and advances in technology.

This issue is very clear when examining abandonment of past pipelines, for example, those that cross the Delaware River watershed. In some instances, those pipelines are left in place as they are decommissioned. At the same time, the repeated cuts over the life of a pipeline must be considered at the start, since maintenance and repeated harms will continue over the life of the pipeline once a pipeline path is permitted, with routine vegetation cutting or herbicide spraying. Innovative ways to allow shrubs and shallow rooted shrubs to take hold over a right-of-way is a theme that was explored during the stakeholder alternatives analysis process (discussed elsewhere in these comments). Some of these innovative shrub plantings have been instituted where land conservancies have been cut across by pipelines in Delaware County—for example, dogwood, arrowwood, and other shrubs have been planted on active pipeline rights-of-way. These woody shrubs provide good habitat and soil stability but can be removed if an emergency or spill occurs. By requiring more innovative restoration practices, the Department

and the conservation districts would be helping to minimize some harm that comes with these projects—though, again, avoidance in the first place is best.

The removal of dams and other water obstructions and encroachments is encouraged to restore migratory pathways and water quality for free-flowing streams. With the proposed changes, the Department still reserves the ability to review the application under Section 105.15 to ensure that the removal plans take into account the controlled release of sediment behind the dam and restoration and stabilization of the soils and riparian buffer banks with native vegetation and ideally woody native trees and shrubs. As written, it is unclear how the Department would be empowered to follow through on these considerations after implementation if permitting is waived. Clarity is needed here. Based on Delaware Riverkeeper Network's experience removing dams often in cooperation with sister agencies, it is important and necessary for the community public water intakes below the dam to be alerted to the dam removal timing to protect drinking water. Furthermore, no waiver should be available for removal/abandonment in special protection waters.

In Section 105.12(a)(12), the Board should add the following language: ". . . and small buildings *constructed solely for the purpose of containing* required instruments and similar scientific structures." Otherwise the term "small buildings" could be applied too broadly.

The Board should clarify whether fencing would be discouraged over tree shelters for this restoration practice in Section 105.12(a)(17). Fencing for deer browse-protection of young planted saplings would be an acceptable waiver since the goal is establishment of a riparian buffer, and stakes and implementation do not cause sedimentation problems. The requirement that fencing cannot collect flood debris resulting in restriction of flow is a good proposed addition. Commenters encourage the Department to enforce this requirement by reviewing the

design of the fencing. Finally, as stated previously in this comment, the term "temporary" must be defined in order to give meaning to the term "temporary fencing."

Regarding Section 105.12(a)(18), trails are popular for recreation along streams in the Commonwealth and their appeal is growing. As part of the description required, Commenters suggest adding detailed information about the existing riparian buffer and forest, if there is one, and efforts to protect and avoid mature trees and forest to the best of the trail builder's ability. While Commenters, of course, value recreational trails as an important way for the public to access and enjoy nature, it is also important to ensure forested buffers are not cut down for the trail but rather preserved, as they directly impact the water quality of the nearby stream. Trails should be designed to work with the riparian forest buffer and natural landscape. Commenters have seen ploys by developers to build a trail as a token for the community as they develop floodplains for private uses, yet at the same time encroach on and damage a larger riparian buffer that should remain protected. This waiver must not create a loophole for such projects. Furthermore, this section should be clear that the plans submitted to the Department must contain detailed scale drawings of the proposed walking path and boardwalk, not just a description and location map.

Section 105.12(a)(20) provides a waiver for the temporary emergency placement, operation, and maintenance of a water obstruction or encroachment for water withdrawal related to crop production. There should be an explicit time limit for such withdrawals as well as a requirement that they be removed after that date certain. In addition, this waiver should include limitations to ensure "temporary emergencies" do not become recurring seasonal events. Droughts will become more frequent with climate change, so it is a reasonable prediction that a withdrawal considered an unusual emergency in one year starts becoming normal every year,

perhaps even increasing in duration or volume. Instead of relying on emergency use of the Commonwealth's aquatic resources, crop producers facing recurring emergencies should reevaluate their crop production methods in response to increased drought conditions, climate science, and soil health as well as conservation practices and BMPs. This subsection should include the following: "A 'temporary emergency' under this waiver does not include recurring emergencies due to weather conditions such as drought or flood." In addition, the Board should specify that this waiver should make clear that it does not apply to access roads within aquatic resources.

The waiver proposed for Section 105.12(a)(21), while appropriate in theory, must account for the frequency of such scientific activities. If there is a whole series of tests and surveys, for example, each may rightly be considered temporary, triggering this waiver, but together they may be very disruptive and span a longer period of time. This provision should also specify that this waiver only applies where any disruption of landscape required for the activity is trivial and that it will result only in temporary impacts. Some scientific surveys, for example, might be easier to complete if vegetation is eliminated, and it is important that this waiver not be used as a loophole to achieve clearing or other disruption that might otherwise have to be reviewed through permitting. This waiver should also explicitly exclude access roads.

As discussed above in the comments on the "definitions" section, it is important to define what temporary means in Section 105.12(a)(22), and it is also important to somehow capture the repeated harms and disturbance Commenters have observed monitoring these temporary mats across wetlands during linear projects. All too often, wetlands are subject to sustained use or placement of temporary mats or pads even after installation of a project, as there is a lack of incentive for project operators to remediate and restore the site after construction. For example,

some wetlands are trenched and restoration does not occur until over a year after the trenching and pipeline placement. During that time, repeated disturbance can affect multiple life cycles of aquatic life. "Restoration" as used in this subsection should also explicitly include reestablishment of pre-construction soil compaction to the conditions measured prior to installation of mats. There should be a site inventory and plan required before authorization of this waiver, and a follow-up report on site restoration should be required. This waiver should be excluded from use in Exceptional Value wetlands.

The Board should specify in subsection (c) that among the triggers for lack of eligibility for waiver should be coverage of the water under the Pennsylvania Scenic Rivers, *see* 32 P.S. Ch. 38, et seq., or the federal Wild and Scenic Rivers Act, 16 U.S.C. Sec. 1271, et seq. This inclusion will ensure that these protected water resources are not degraded or impaired by obstructions and encroachments that meet any of the multiple permit waivers.

Section 105.12(c)(3) and (c)(4) uses unclear language: "located within an area." It is not clear whether this language means that the structure or activity must overlap with an actual site or whether close proximity to the site would be sufficient. Commenters recommend that the Board make clear that close proximity to a historic, cultural, or archaeological site requires a permit.

Section 105.13 -- Regulated Activities—Information and Fees

Regarding the table in subsection 105.13(c)(2), the distinction between a permanent disturbance and a temporary disturbance is unclear without, as discussed above, a chapter-wide definition of "temporary." It is also unclear why a "temporary" disturbance warrants a lower fee. Permanent disturbance is once and done; temporary disturbance presumably must be followed by site restoration. There then will be a cost to taxpayers to see that the restoration was done

successfully, probably considerably more than the cost of inspecting once-and-done damage. The established disturbance fees are much too low to discourage proposed encroachments.

The proposed change to subsection 105.13(c)(2)(iii)(A) regarding timing of disturbance fees disincentivizes early planning to minimize disturbance and ignores actual costs to the Department, and in turn, taxpayers. Applicants have always been required to submit permit applications averring that they have avoided and minimized encroachments, obstructions, and impacts. It is an empty averment. They seldom actually minimize impacts without being forced to and have little reason to under these rules. Applicants typically apply for as much damage as they think they can get away with and then push the bounds further, knowing they might have to make some small changes but will mostly go unchecked. Whatever disturbance they may have to pay for at the end of the process is well worth it to the applicant. The Department's review, on the other hand, must address the entire initial proposal, including the full scope of potential disturbance, and, in theory, all opportunities to limit impacts. This workload is only increased by applicants failing to make a sincere effort to minimize disturbance at the onset of the process and waiting for the Department to pick up the pieces. More twisted still, the harder the Department works to minimize impacts, the less the applicant will ultimately pay in disturbance fees under this scheme.

At the same time, the Department is the victim of a shameful pattern of gross underfunding.[6] When it comes to the systemic problem of applications that attempt to get away with as much damage as possible, this means one of two things: the Department must pull resources from other priorities to complete a proper review, or harms get overlooked. The public

[6] See: Cusik, Marie; *State funding to DEP is Inadequate, says advisory panel;* State Impact, February 21, 2017*, available at:* https://stateimpact.npr.org/pennsylvania/2017/02/21/state-funding-to-dep-is-inadequate-says-advisory-panel/.

loses regardless, either in the form of taxpayers footing a bill for the Department needing to fix problems the applicant should have fixed itself, or through the environmental harms that go unchecked. This is the lens through which all fee determinations should be viewed. Calculating disturbance fees based on initial proposed disturbance will not fully address the problem, but it would be a start.

In addition, the Department should collect a fee for all proposed waivers, even if only an associated disturbance fee, to a) create a record of the proposed disturbance, b) cover paperwork generated, and c) encourage minimization of incursion into the aquatic resource.

Commenters are concerned that the proposed amendment to Subsection 105.13(d) regarding applications for multi-county permits may make it more difficult for local officials and the public to become aware of and participate in the application process for permits potentially affecting their regions. The Board indicates that it is proposing these revisions to provide flexibility for applicants relating to permit applications for single projects located in more than one county, allow applicants to submit only one application, and pay only one fee. While Commenters appreciate revisions designed to increase the Department's efficiency of review, that efficiency should not come at the cost to the public trust. The Department should use all available technologies to assist with review, but applications have been electronic for some time, and so there are minimal efficiencies gained from this change. Reviewers, from the Department as well as from the county conservation districts, have developed cumulative knowledge of resources in their respective regions, whether viewing an application in only one or crossing multiple counties. Moreover, lumping vast quantities of site-specific data from multiple sites into huge tables may not make reviewing any easier for the Department or the public. Instead, Commenters are concerned that members of the public may struggle more to track projects or

applications in their counties and may be less able to participate in large linear projects that cross county lines. For example, if a member of the public is searching for information regarding a permit application in her county, or is signed up to receive electronic notifications from the Department regarding permit activity in her county, it is unclear if she would be able to find or would receive information about a multi-county project that is in her county but which has been submitted under one of the other counties it crosses.

Commenters agree with the proposed addition to subsection 105.13(e)(1)(i)(A) requiring applicants to verify the demarcation of aquatic resources through on-the-ground investigation. An even more accurate and protective option would be to require all applicants to obtain a jurisdictional determination (JD) confirming the presence of aquatic resources. Furthermore, electronic mapping and GIS layers should be provided to the public and the agencies for assistance with desktop review. These electronic layers, especially for linear projects like pipelines, should be required for the Chapter 105 process for accurate inspections and review by the agency and community watchdog groups. Also, to improve clarity, Commenters suggest adding a comma before and after "or larger" in proposed subsection 105.13(e)(1)(i)(D), so that the "larger" could not be associated with 200 feet (if the number of feet in the denominator of the fraction is increased, the map scale is decreased, with information shown actually smaller).

For equity, and especially if no requirement is added for applicants to obtain a jurisdictional determination, the Chapter 105 regulations should allow for the public to inspect the site of any proposed permit activity and confirm the accuracy of information on waters and wetlands. That would at least enable *someone* to question the applicant's information submitted to the Department. Applicants must grant Department staff or the Corps or other parties the opportunity to inspect project sites; a public representative should be allowed to accompany

them. The Department has invested time and energy in training volunteers to assist with water monitoring and field truthing in other contexts pertaining to listing impaired waters and restoring waters. It would behoove the permitting arm of the Department to better embrace this community monitoring aspect more routinely, especially in light of strapped agency budgets and resources. That said, fully funding agency oversight is a critical component to long-term sustainability of our natural water resources.

The required location map should include locations of private water supplies, with a requirement that applicants make a good faith effort to determine whether private wells or springs exist. *See* Proposed Section 105.13(e)(1)(ii). Private wells and springs serve users of the groundwater supply and typically provide the only insight into quantity and quality of the local hydrologic system unless an applicant is required to drill test wells.

As discussed above with regard to the definition of "project purpose," the Board should revise the water dependency/alternatives analysis so that the two tests are separate.[7] *See* Proposed Section 105.13(e)(1)(iii)(D). First, an applicant should establish whether its project is "water dependent" per the definition in Section 105.1. Next, if the project is *not* water dependent, there should be a presumption that there is an available alternative that does not impact water resources, and applicant should have the burden of proof to *clearly demonstrate* that there are no practicable alternatives. If the project *is* water dependent, then the applicant should engage in a straightforward alternatives analysis that includes all calculations to be transparent. This way, the process would be similar to the Clean Water Act Section 404(b)(1) guidelines used by the U.S.

[7] Several of the commenters, including Clean Air Council, Delaware Riverkeeper Network, and Mountain Watershed Association, have participated with the Department in a work group regarding the alternatives analysis required by this subsection. These workgroups convened in a series of meetings beginning in January 2019. This group had a narrow focus on the alternatives analysis and met 5 times in 2019 to provide input to the DEP and as well as to draft recommendations to the DEP technical guidance document (Guidance for Developing Chapter 105 Alternatives Analysis for Proposed Impacts to Aquatic Resources).

Army Corps of Engineers, *see* 40 C.F.R. § 230.10(a)(1)(ii), and would be more protective of the Commonwealth's water resources by ensuring that non-water-dependent projects do not unnecessarily degrade those resources. As stated above, all too often in Pennsylvania, projects that do not require proximity to water are labeled water dependent because of the result of an applicant's offered alternatives analysis, rather than the Department's independent examination of the project's purpose.

The confining of analysis to floodways on FEMA maps is too narrow and may result in the omission of important floodway protection measures in proposed subsection 105.13(e)(1)(vi). The language should say "FEMA map or in the default floodway area of 50 feet from the tops of each of the banks…". In addition, in proposed subsection 105.13(e)(1)(vii), the language should read "peak rates *or volumes* of runoff" in the first sentence to ensure that all increases in total runoff are captured.

The word "immediately" before the word "downstream" should be stricken from subsection 105.13(e)(1)(viii)(D). "Immediately" is too vague and may unjustifiably limit the scope of analysis. Future development farther downstream of a project is relevant because effects within a stream are cumulative, such as increased stormwater flows, and areas far downstream are often impacted by those effects.

An applicant's mitigation plan should be required when impacts to aquatic resources cannot be avoided, thus, the Board should remove "or minimized" from the second sentence in subsection 105.13(e)(1)(ix).

Commenters agree with the distinction between the impacts analysis required by 105.13(e)(1)(x) and the separate evaluation of protected uses or water quality standards under Chapter 93, but the regulation should also recognize that protected uses will likely be also

addressed when analyzing aquatic resource impacts. As highlighted above, an applicant should be required to evaluate the impacts on identified private water supplies as well as public water supplies. *See* Proposed 105.13(e)(1)(x)(D). While the Department does not regulate installation of private wells, there is no reason impacts on existing private water supplies should not be scrutinized and minimized under this chapter. Groundwater, of course, is a resource of the Commonwealth protected by Article 1, Section 27, of the Constitution. There is existing precedent for its protection by regulation. For example, this statute directive in Act 54 of 1994, §18.1:

> (b) Such data [as contained in permit applications, monitoring reports, etc.] shall be analyzed by the department, utilizing the services of professionals or institutions recognized in the field, for the purpose of determining, to the extent possible, the effects of deep mining on subsidence of surface structures and features and on water resources, including sources of public and private water supplies."

To elaborate, wetland protection throughout Chapter 105 is to be construed broadly (§105.17). Wetlands along EV streams and their tributaries are EV wetlands. (§105.17(1)(iv)). Wetlands along public or private water supplies, whether surface or groundwater, that maintain the quality or quantity of drinking water are also EV wetlands (§105.17(1)(iv), proposed §105.17(1)(vi)). To the Commenters' knowledge, the Department has not yet identified a wetland protecting a private water supply as EV and has not determined those protecting public water supplies to be EV either (for example, Pickering Creek Reservoir) despite repeated requests from the public to apply this category of defining criteria. In sum, more can and should be done under this chapter to protect private drinking water supplies.

The applicant's cumulative impacts analysis as required by subsection 105.13(e)(1)(xiii) should not be limited to wetlands and should not be limited to evaluating the effects of other dams, water obstructions, or encroachments. Cumulative impacts should be evaluated on a sub-

watershed and watershed level and should include the overall effect of concurrent or reasonably foreseeable development within that area.

The applicant should be required to provide inventory information sufficient to document the currently attained, existing use of the affected water resources in proposed subsection 105.13(e)(1)(xi). There should be a cross-reference here to 25 Pa. Code § 93.4c(1) to require that an applicant always provide adequate data to document existing stream use. The Department must make a final determination of existing use as part of any final permit or approval. *See* § 93.4c(1)(iv). In Commenters' experience, this is rarely a fulsome determination and instead often relies only on the published Chapter 93 lists to identify designated uses. Sometimes the Department consults the published existing use list, which is only partial, or potentially also consults the list of active petitions to upgrade per Section 93.4d. This practice is not sufficient to meet antidegradation requirements.

In proposed subsection 105.13(f)(2), the Board should provide an illustration of a sample cross-section showing what is required, as the written description is not clear. In proposed subsection 105.13(f)(3), Applicants should be warned that USGS topographic maps, National Hydrography maps, National Wetland Inventory maps, and PASDA maps do *not* show all regulated streams and wetlands, and do not substitute for field investigation of site conditions to identify all aquatic resources at risk, as is required in the site plan per proposed subsection 105.13(e)(1)(i)(A).

Regarding the requirement to conform to an erosion and sediment control plan in proposed subsection 105.13(g), this subsection should also require good recordkeeping of best management practices. Records must be maintained, furnished to the approving agency, and made available for public inspection upon request, if this "requirement" is to have any meaning.

Subsection 105.13(k), as proposed, would provide an extremely broad exception. It would grant the Department discretionary authority to waive *any* information otherwise required under Chapter 105 regulations, even if that information turns out to be necessary to identify, protect, avoid, and/or restore aquatic resources, ecosystems, and functions. As it stands, the Department does not routinely gather new resource information on its own and usually does little to check the information given by applicants. Large linear infrastructure projects like pipelines and highways are not given a commensurate level of scrutiny from the Department. The subsection imposes no consequences on applicants who provide incomplete, inaccurate, and/or self-serving information. The proposal would create a major new loophole. Therefore, Commenters recommend that it be removed.

The only time information should not be gathered is if the information does not apply to that particular project. There is no need for this expansion. If an applicant attends a preapplication conference, it is told what is relevant to its particular project and what is not. That has been the case for years. If the Board chooses to retain this subsection in the final regulations, then it should make clear that if the Department finds that information required by these regulations is not necessary to ensure compliance, that information waiver will be included in the public notice for the permit application, so that the public can comment on the appropriateness of the waiver.

Section 105.13a -- Complete Applications and Registrations

As Commenters explain throughout this comment, the protections established in Chapter 105 cannot be meaningful without consistent, thorough verification of claims made by permit applicants. This applies to everything from assertions about wetland characteristics and delineations, which need to be verified in the field, to claims regarding potential benefits of the

proposed project. This is a responsibility that is necessarily shared by the Department and the applicant and need not be unduly burdensome for the Department. Each of an applicant's claims needs to be supported by clear evidence provided by the applicant; if such evidence is not provided by the applicant, the assertion should not be accepted by the Department as true. Section 105.13a should be crafted to reflect this basic approach.

New language proposed for section 105.13a(a) suggests the Department may be on the right track in this regard. That section, as proposed, provides in part: "An application or registration for a permit is complete when the necessary information is provided and requirements under the act and this chapter have been satisfied by the applicant or registrant **and verified by the Department**, conservation district or other delegated agency." (emphasis added). If the intention of this addition was to ensure substantive verification of application materials, that is a significant step in the right direction, and Commenters commend the Department for acknowledging this issue. The explanation in the preamble for the proposed change, however, does not explicitly state this was the intent, focusing instead on providing clarity for applicants. Regardless, the proposed addition should be modified slightly so it can be more easily understood, as it is presently a long sentence with multiple connectors. Commenters suggest the sentence read: An application or registration for a permit is complete when: 1.) the necessary information is provided and requirements under the act and this chapter have been satisfied by the applicant or registrant and 2.) that information has been substantively verified by the Department, conservation district or other delegated agency.

Subsection 105.13a(a)(1)'s use of the term "principal completeness requirements" is unclear. In theory, Commenters do not dispute that principal completeness requirements must be met, but absent an explanation of what this is referring to, the addition probably achieves little.

Consistent with the discussion above, one of the principal elements of completeness that should be highlighted is that an applicant must provide clear evidence in support of all claims made in an application. Without such evidence, the Department is not positioned to provide necessary verification.

Section 105.13a(b) explains when the Department or delegated authority reviewing an application will notify an applicant that they must provide additional information. The change in that section from "contains insufficient information" to "substantially inadequate" suggests that there may be situations where an application can be "inadequate" but the Department will not seek additional information. If an application is inadequate, review must not proceed without additional information. The proposed change, therefore, should be rejected, or simply modified from "substantially inadequate" to "inadequate."

In instances where a submission is substantially inadequate, the public should have an opportunity to review and comment on any supplemental materials the applicant provides. Presently, whether there will be additional opportunity for public comment after supplemental materials are provided appears to be fully at the Department's discretion and determined on a case-by-case basis. Commenters agree some discretion is necessary. However, if an application was substantially inadequate and the only pre-issuance comment period expired before necessary information was provided, the public would be denied a meaningful opportunity to comment. This rulemaking should acknowledge the importance of public participation by requiring a comment period following the submission of supplemental materials in such instances.

Section 105.13b -- Proof of Financial Responsibility

Section 105.13b reasonably expands the scope of financial responsibility, but the proposed language still appears too limited to cover potential cost to taxpayers. The language

could be strengthened by stating that, "the Department requires proof of financial responsibility," removing the "may" in the case of water obstructions or encroachments. The proposed language also omits the essential requirement for a permanent conservation easement or deed restriction on lands that are altered for compensatory mitigation project sites. This requirement should be added to the proposed revision. Moreover, the financial security offered by this section should be mandatory not only for compensatory mitigation project sites, but also for all proposed site restoration.

To enforce this financial security, the section should add a guarantee ensuring that taxpayers will not bear the burden of financial responsibility resulting from a facility or project's expected and unexpected costs. This guarantee should specify that both anticipated and unanticipated costs will be covered by the responsible party, i.e. the permittee. Taxpayers footing the bill for costs associated with private, profit-driven ventures is a pattern in various areas of Department jurisdiction, and while the problem is too large in scope to be fully resolved here, this rulemaking can address the problem as it pertains to Chapter 105.

Section 105.14 -- Review of Applications and Registrations

Commenters' overarching concern with Section 105.14 is that, despite providing a number of important factors to consider when reviewing a permit, it is unclear how those factors are ultimately ensured to inform a decision to grant or deny a permit in practice. In practice, the Department seems to give these factors cursory consideration, often accepting self-serving claims applicants make in regard to a given factor. More accountability regarding the application of these factors is needed, including from permit applicants.

Section 105.16 provides for a balancing test that weighs environmental harms against public benefit, and Section 105.21 provides criteria for permit denial, but neither refers back to

the factors in Section 105.14. Including cross-references would be a helpful start and provide some clarity. However, to actually make the review of factors in Section 105.14 meaningful and protective, a thorough discussion of each factor should be included in the Department's records of decision. A requirement to that effect should be added to Section 105.14. Of course, the burden should not be expected to fall solely on the Department either; as is true for so many aspects of this Chapter, applicants must provide accurate, substantive input, not unverified or unverifiable claims. As Commenters have discussed with respect to application completeness requirements and elsewhere in this comment, this can be achieved by explicitly requiring applicants to provide supporting data.

Aside from an overarching concern about this section, Commenters have a number of specific comments regarding particular subsections and will address each in turn. First, consistent with Commenters' desire to see a more protective application of these factors, Commenters agree with additions to Section 105.14(a) and (b)(1) that clarify the broad intent of this provision to protect the public and the environment. As set forth in the proposed language, there must be an adequate margin of safety when determining a project's impacts. It is also appropriate to explicitly list effects on life, health, safety, property, and the environment as considerations when determining a project's impacts. Commenters urge that a clearer mechanism for applying the factors in Section 105.14 be included so these additions do not merely amount to unenforceable, aspirational statements.

Section 105.14(b)(5) rightfully includes impacts to public water supplies. It should also explicitly include private water supplies. The Department need not regulate private water supplies themselves to protect them, and certainly does not need jurisdiction over private water supplies in order to evaluate the impact projects it is considering will have on them. In recent

years, the destruction of private water supplies across the state as a result of sloppy pipeline development has triggered numerous investigations and other actions by the Department. It is appropriate and necessary for protections to be memorialized here as a step toward preventing future problems.

Section 105.14(b)(6), regarding compliance with other laws, should include compliance with municipal laws. Even where a municipal law is preempted and failure to comply with that law would not, by itself, result in permit denial, it is still worth considering in the broader context of these factors in order to understand the impacts of a project. Someone needs to be keeping an eye on the big picture on behalf of the public. There are also instances where a project may not ultimately be able to go forward as proposed to the Department because of municipal laws that are not preempted, such as some zoning ordinances. If the Department grants a permit without considering this, the applicant will simply use the permit issuance to pressure the municipality, despite local-level concerns not having been considered by the Department.

As stated earlier in this comment, the water dependency determination as outlined in Section 105.14(b)(7) should not be based on an alternatives analysis and practicability, but rather by examining the purpose of the project. For example, a linear project such as a pipeline does not need to be located within a water resource in order to serve its purpose, thus, it should not be deemed "water dependent." However, an applicant seeking to build a linear project may be able to establish that total avoidance of water resources is not practicable. This impracticability should be "clearly demonstrated," a standard used by the Corps in evaluating compliance with the Clean Water Act 404(b)(1) Guidelines. It is important not to muddle the meaning of water dependency itself by building this separate analysis into the actual definition.

The mention of "practicable" alternatives in Section 105.14(b)(7) lacks a definition within this section; however, a definition does appear in Section 105.18a(a)(3) and (b)(3): "An alternative is practicable if it is available and capable of being carried out after taking into consideration construction cost, existing technology and logistics." For the sake of consistency throughout, it would be most appropriate for "practicable" to be in the definitions section.

Crucially, though, practicability must be based on objective, verifiable criteria, not an applicant's vague or unsupported claims of cost or delay. Purported costs to the applicant should also be considered in relation to the overall cost of the project as well the profit it will generate. For example, it is disingenuous to claim a more environmentally protective alternative with a price tag of one million dollars is impracticable in the context of a multi-billion project with a double digit return on investment. By adding "practicable" to the consideration of water dependency in Section 105.14(b)(7), the Department has codified its practice of reading this provision to benefit industry instead of closing a loophole that has been exploited at the expense of the public and the environment. Relying only on an applicant's claims of practicability renders this provision all but meaningless.

Finally, with respect to water dependency, it is important to note how the term applies in the context of Section 105.14 in particular, as compared with other subsections of Chapter 105. Section 105.14 provides factors to be considered when assessing the impact a project will have. Thus, a project that is truly water dependent, and therefore must cross or encroach upon a waterbody, will necessarily impact that waterbody. In other words, the extent to which a project is water dependent corresponds to the extent the project will have unavoidable impacts if approved. As such, water dependency under Section 105.14 is a factor that tends to prove adverse impact, and should be viewed as such, rather than being viewed as a free pass or

justification for the harm. To ensure proper framing, Commenters recommend this reality be reflected in Section 105.14(b)(7).

Section 105.14(b)(10) proposes to remove from consideration 1-A stream candidates. No explanation for this proposed change was provided, but Commenters are concerned it could result in less protection for these water bodies. For example, the Nationwide Rivers Inventory (NRI), maintained by the National Park Service, has identified additional river segments in Pennsylvania as potential candidates for study and/or inclusion into the National Wild and Scenic Rivers System.[8] This change appears to undercut that resource-intensive process and could even result in stream impacts that ultimately would prevent a more protective designation.

Section 105.15 -- Environmental Assessment

Commenters urge the Board to add additional requirements and restrictions for Environmental Assessments. First, in subsection 105.15(a), the regulation should make clear that an Environmental Assessment is also required for the removal of structures. Removing structures from aquatic resources can disrupt flow patterns, degrade water quality, and disturb habitat for aquatic plants and animals.

In addition, although Commenters urge the Board to revise subsection 105.12(c) to make clear that waivers are not available for structures or activities in EV and HQ waters, should the Department reject that suggestion, then subsection 105.15(a) should include the following as a numbered subsection:

> For water obstructions or encroachments located in, along or projecting into an exceptional value or high quality water as defined in Chapter 93 (relating to water quality standards) for which a permit is not otherwise required under this chapter,

[8] *See* https://www.nps.gov/subjects/rivers/nationwide-rivers-inventory.htm; https://www.nps.gov/subjects/rivers/pennsylvania.htm.

the Department will base its evaluation on the information required under Section 105.13(e) and the factors included in Section 105.14(b) and this section.

Next, subsection 105.15(a)(3) should be expanded to include high quality waters as defined in Chapter 93, in order to ensure that a structure or activity complies with antidegradation requirements in that chapter. *See* 25 Pa. Code § 93.4c(b)(1)(iii) (permitting a degradation of water quality only under limited circumstances).

With regard to the submission of information required in subsection 105.15(a)(4), subsection (ii) (requiring project plans) should also include all access roads or other appurtenant structures. In that same subsection, at (ii)(D), the term "watercourse reports" should either be defined or a clearer term should be used. Subsection 105.15(a)(4)(iii) should clarify that the information sought is the pre-restoration extent and condition of aquatic resources at the project site, including existing aquatic resource functions. In subsection (iv), the language should make clear that it is the applicant's responsibility to document the existing uses as defined in 25 Pa. Code § 93.1, using the methodology in 25 Pa. Code § 93.4b. Commenters encourage the Board to require the "impacts analysis" of subsection 105.15(a)(4)(vii) to explicitly include aquatic resource functions created or preserved by the project and also to include a plan by the applicant to generate information pursuant to the methodology in 25 Pa. Code § 93.4b that would inform whether the aquatic resource qualifies as HQ or EV post-restoration. This requirement would ensure that the restored aquatic resource's existing and designated uses remain protected under Department regulations.

Finally, as a grammatical point, in subsection 105.15(a)(4)(v), the last parenthetical should say "relating to" rather than "relating of."

Section 105.16 -- Environmental, Social and Economic Balancing

A balancing test which considers harms to the environment and benefits to the public could be the lynchpin of Chapter 105 protections. Unfortunately, that analysis is only meaningful if it is taken seriously and supported by full and accurate information; that is not what always happens in practice. The Department admittedly does not verify much of the information applicants provide.[9] While this is a serious issue across programs and across Chapter 105, lack of verification has been an especially glaring problem when it comes to weighing the espoused public benefit of a project. The value of this balancing test is further undermined by unclear terminology that has been twisted to benefit industry.

Section 105.16(a) refers to "impact" and "adverse environmental impact," both of which are likely intended to mean the same thing as the term "adverse impact" in Section 105.16(b) and other parts of the Chapter. For the sake of clarity and consistency, as noted previously, "adverse impact" should be defined in the definition section and should be read to have its plain meaning, i.e, a harmful effect, as determined before mitigation. Once adverse impact is a defined term, Section 105.16(a) should be updated to use that term instead of the variations used now. As described previously, present practice seems to be that adverse impacts are defined away based on mitigation plans instead of being acknowledged as harms and *then* addressing mitigation.

This rulemaking proposes no changes to Section 105.16(b), which lists types of public benefits. This is a mistake. The list as presently written undercounts environmental benefits to

[9] Deposition of Domenic Rocco, Program Manager for Wetlands and Waterways and Corporate Designee, October 26, 2017, p. 135-36, available on EHB Docket No. 2017-09-L, at https://ehb.courtapps.com/efile/documentViewer.php?documentID=42499

the public while painting with a broad brush profit-driven development that oftentimes does not benefit the public.

Section 105.16(b)(4), by listing "development of energy resources" as public benefit without qualification is unreasonable and ignores the realities of energy markets as well as the climate crisis we are all facing. Some development of energy resources is certainly beneficial, even necessary, for the public. Much is not. In a race to market, fossil fuel resources are being extracted far in excess of present market demand with no attention to future energy needs. Even if there is some demand for a particular project, that demand might be short-lived and destined to dry up well before the operational lifespan of the project has expired, leaving defunct infrastructure that no longer provides value to anyone, but nonetheless continues to harm the environment. Unfortunately, to the extent any information about the purported need for an energy project is provided as part of this review process, the Department accepts the applicant's statements at face value without verification. A recent example of this is the Chester County Chapter 105 Permit issued for the Mariner East 2 Pipeline Project. Regarding the "purpose and need" for that project, the Department provided the following in its Environmental Record of Decision:

> **SPLP has identified** a shortage of natural gas liquids (NGL) transportation options and proposes the Pennsylvania Pipeline Project in response to the identified demand. In addition, **SPLP stated** that the proposed project will provide exit points along its route across Pennsylvania for the provision of what are described as desperately needed propane supplies to local Pennsylvania distributors for use as heating and/or cooking fuel by consumers in Pennsylvania and neighboring states. **According to SPLP** the proposed pipeline project will also allow butane to be shipped to local markets as a component of gasoline to ensure suppliers can meet seasonal vapor pressure restrictions.

(emphasis added). The Department cites exclusively to the applicant's own statements, with no pretense that these claims, which are pivotal to justifying the harm caused by the project, are

supported by reliable evidence. Commenters therefore suggest Section 105.16(b) be amended to say "development of energy resources for which there is a clearly demonstrated public need when considered over the full lifespan of the project, as verified by the Department." This change would also reflect that fact that ensuring claims are factually accurate should not fall solely on the Department. Applicants should have the burden to provide evidence in support of those claims.

Similarly, Section 105.16(b)(5) lists creation of "significant employment" as a public benefit but lacks meaningful detail, leaving the provision vulnerable to abuse. There is no dispute that good jobs are a public benefit. But employment that lasts a handful of months is different than long-term employment that sustains families and local economies. When applicants tout the number of jobs that come with their project, they often fail to acknowledge this distinction and other important details, such as whether the jobs will be generated in the communities that will be suffering the brunt of the project impacts, or from out of state. These factors are important for a fair and meaningful balancing by the Department.

Section 105.20a -- Compensation for Impacts to Aquatic Resources

The Board has proposed significant revisions to Section 105.20a. First, though the Board indicates that the proposed revisions will align with applicable federal requirements, the Commonwealth's in-lieu fee program for small wetland impact mitigation, which remains in the proposed revisions at subsection (c), has never gained federal approval.

In new subsection (d)(3), Commenters suggest that the Department provide a definition or guidance for how to evaluate the "level of effect of the proposed project on the aquatic resource functions" or to remove this factor. An applicant has an incentive to minimize the likely impacts of a project in the absence of criteria. The new definitions proposed for "aquatic

resource impacts," and direct and secondary impacts within that definition, do not differentiate between "levels" of impact and instead rightly treat impacts as impacts. Commenters urge the Department to consistently treat impacts as impacts within the plain meaning of the term. As discussed above, the Board should consider adding a definition for "adverse impacts" similarly defined based on its plain meaning—a harmful effect, as determined before mitigation.

Commenters question some of the methodologies indicated in Section 105.20A(e) for evaluating a project's impact on aquatic resources. The referenced technical guidance documents are those that were applicable under the previous regulations, and the revisions do not include any criteria by which the Department will determine whether to approve "other equivalent methodologies." For example, would the Department accept an evaluation conducted under methodology developed by another state? If so, how would the Department evaluate whether it is appropriate to choose such methodology over those established in the Department's own technical guidance documents? Commenters are concerned that this may lead to misuse of the procedures set forth in otherwise accepted methodologies by applicants or methodology-shopping.

In the proposed new subsection (f)(iv), it appears that assurances are required only for a compensation site, not for onsite restoration. Assurances should be required for all compensatory mitigation, regardless of location. Additionally, it is not clear what "long-term protection" means; Commenters suggest that this suggestion include a requirement of permanent conservation easement, deed restriction, or some other legal protection for the continued status of the site.

Commenters support the proposal, in Subsection 105.20a(g), to provide the Department with the authority to require compensatory mitigation at a higher ratio in the event of violations

based on factors including the area affected, the functions impacted, and the willfulness of the violation. Commenters suggest adding authority clarifying how the Department will evaluate "willfulness" of violations and suggest that the project proponent should bear the burden of proof that its violation was not willful. Moreover, Commenters suggest that the Department retain the authority to require such projects to be removed, rather than remain in place, and appropriate restoration be required based on the determination of the area(s) affected, the functions destroyed or adversely affected by an unauthorized project and the willfulness of the violation.

Section 105.21 -- Criteria for Permit Issuance and Denial

This section, as presently enacted, creates a broad duty for the Department to deny certain permit applications. Section 105.21(a)(1), in particular, which provides that a permit cannot be approved unless "the application is complete and accurate," has the potential to be strongly protective. And yet, many permits are approved despite lacking important information and containing material inaccuracies.

One step toward a remedy is to clarify what it means for a permit application to be complete, as Commenters have suggested with respect to Section 105.13a. Specifically, an application should not be considered complete unless: 1) each of the claims therein is supported with clear evidence from the applicant, and 2) the Department has substantively verified that information. If Commenters' suggested changes are made to Section 105.13a, all that would be needed in this section is a cross-reference to that framework for determining completeness.

In addition, when the Department determines the various conditions of Section 105.21 have been met, its rationale should be memorialized, in detail, in its records of decision. Present practice allows for records of decision that sometimes give only cursory explanations. Adding a

requirement in this section that detailed justification must be included in the records of decision would help emphasize the importance of this accountability.

Commenters also have two suggestions with respect to specific language in this section. First, Section 105.21(c)(2) is unclear as written. Commenters suggest changing the language as follows: "The Department determines that the structure or activity does not comply with the standards and criteria of this title and with other laws administered by the Department, the Pennsylvania Fish and Boat Commission and river basin commissions created by interstate compact, **but** that the effect on wetlands will be mitigated under Section 105.20a, and at least one of the following is met…"

Second, with regard to Section 105.21(f), as Commenters explained above in comments on the section of the preamble entitled Federal Consistency and Coordination, the Department should cease its current practice of issuing conditional Clean Water Act Section 401 Certifications. As a result, this subsection should not include a reference to conditional certifications. All Section 401 Certifications should be based on demonstrated compliance with the Commonwealth's laws protecting water quality, whether by obtaining permits or by submitting information about the federally licensed or permitted activity to the Department for substantive review.

Section 105.25 -- Transfer of Permits

How Section 105.25(f) will be enforced and monitored is unclear. There is no established or proposed mechanism for identifying a dam that does not need a permit but still requires a change in ownership to be reported. If a permit is not required for the transfer in ownership, it would seem the Department might not discover the change within the required time frame, if at all. It is also unclear how the Department keeps track of dams, water obstructions,

and encroachments that require operation and maintenance, many of which antedate permit requirements. The same concern holds true for Section 105.25(a)(2). A mechanism for documentation and oversight should be built into this rule.

The changes to Section 105.25(a)(3) seem to restrict the need for permit transfers only to dams, excluding obstructions or encroachments. It is unclear if this is intended to be true and if so, why. This change must be clarified further.

Section 105.35 -- Charges for Use and Occupation of Submerged Lands of This Commonwealth

Section 105.35(c)(8) creates a fee exception for environmentally beneficial projects. Commenters support this concept. It is important, however, that the primary purpose of such projects is truly to benefit the environment, as opposed to being a profit-driven venture, or some other private interest that happens to include a secondary environmental benefit. Similarly, it is important that it is the Department, and not the applicant, who is making the determination as to whether a project is environmentally beneficial. For the Department to adopt an applicant's claim that a project is environmentally beneficial without verifying that claim would undermine the purpose of this section. The Board should revise Section 105.35(c)(8) to address this concern.

Section 105.134 -- EAP

Throughout this section, requirements associated with the Department approving EAPs were replaced with the Department simply acknowledging EAPs. The exception is that an EAP associated with a proposed dam must still be approved by the Department. The shift from approving EAPs to acknowledging EAPs suggests a move to limit oversight and review by the Department of EAPs associated with existing dams. In practice, perhaps the Department was only merely acknowledging these EAPs anyway and never undertook to provide meaningful

review. But to simply codify that practice instead of following the more protective, existing language is unacceptable.

Despite the shift from approval to acknowledgement, indicating a reduction in oversight from what is contemplated in the current rule, that rationale is not addressed in the explanation of the change for this section. Even if that was not the intent, the suggested changes are still problematic for lack of clarity and the implication of reduced oversight. To the extent EAPs for existing dams require less review, perhaps, for example, because previous EAPs have been reviewed and approved, that should be explained in the rationale and reflected in the language of the rulemaking instead of suggesting there be no review at all.

Section 105.161 -- Hydraulic Capacity

The proposed revision to Section 105.161(a)(3), relating to criteria for bridge construction, provides: "The structure may not materially alter the natural regimen and the geomorphic stability of the stream." The intent of the proposed changes to paragraph 3 is likely to ensure that a structure does not materially alter the natural regimen *or* the geomorphic stability of a stream. The use of "and," however, suggests the conjunctive interpretation, and as a result, it could be interpreting as permissible for a structure to alter the natural regimen of the stream or the geomorphic stability of the stream, just not both. This could be addressed easily by mirroring the phrasing in (a)(2) and changing the language in (a)(3) to: "The structure may not materially alter the natural regimen or the geomorphic stability of the stream, or both."

Subsection (e) sets forth requirements related to 100-year floods. It is crucial that any provisions relating to flood prediction account for climate change. As flooding is becoming, and will continue to become, more severe and more frequent, basing this provision on even slightly-outdated data on flooding may result in insufficient protection. Climate change models are being

updated regularly and this provision should be flexible enough to account for increasing flood risks.

Section 105.401 -- Permit Applications

The threat activities regulated under Chapter 105 can pose to private drinking water supplies has come into laser focus in recent years as residents across the state have lost their access to clean drinking water as a result of poorly planned pipeline construction. While the Department does not regulate private wells or springs, it does have the responsibility to protect them and the groundwater resources they are part of. Paragraph 1 of this subsection requires an applicant to document public water supplies as part of the application process. There is no reason why applicants should not also be required to document private drinking water supplies in the vicinity of a proposed project. That information is key to fully understanding the potential impacts of a project and protecting the public health and safety.

Paragraph 4 of this subsection would also benefit from additional clarity. Indigenous aquatic life includes macroinvertebrates, but in practice, despite macroinvertebrates being vital to the aquatic ecosystems, applicants frequently do not account for or even document their populations. Macroinvertebrates should be explicitly included in this paragraph so they are not overlooked.

Section 105.411 -- General Criteria

The proposed revisions to this section, according to the Board, are "intended to ensure that adverse impacts to the public health, safety and the environment are nullified." To that end, the provision gives additional detail to the requirement that the public benefit of a dredge and fill project must outweigh adverse impact to the public health, safety, and environment. Commenters believe this test is critical to implementation of Chapter 105. However, the bigger

problem with this subsection is that it could be construed as only requiring the public benefit of a dredge and fill project to outweigh harm to the public and the environment in the specific instances enumerated in this subsection. If the harm a dredge and fill project would cause to the public health, safety, and environment outweighs the public benefit, it simply should not be permitted. It is inconsistent with the Department's responsibilities, the Clean Streams Law, Chapter 105, and the Environmental Rights Amendment of the Pennsylvania Constitution to allow a project that does more harm than good.

With respect to the specific circumstances that are enumerated in this subsection, it is unclear why resident waterfowl were not included, with the projection focusing only on migratory waterfowl. Similarly, aquatic resources are necessary components of critical habitat for non-aqueous species which are not accounted for here.

Section 105.446 -- Procedure for Issuance

Recognizing that general permits need to be reviewed and revised is a key addition in theory. The proposed additional language that this be done "periodically," however, does not offer any meaningful change. Providing a timetable for reviews, in addition to specific circumstances that might trigger more frequent review, would provide much needed accountability and would better serve the public. If the frequency of review is left entirely to the Department, review and improvement of general permits will be deprioritized. Ensuring more public comment and input is important.

Regarding Section 105.446(s)(2), the National Park Service should be a federal agency added to the list of agencies to receive written notice.

IRRC Regulatory Analysis Form

Commenters provide the following additional input on the numbered sections of the accompanying Regulatory Analysis form.

Block 10

The form states that the proposed regulations do not revise current application or registration fees. However, proposed 105.13(c)(iii)(A) would reduce fees, as would proposed 105.13(d) also would reduce application fees. Proposed 105.12(a) does include some new fees for waiver situations. As discussed elsewhere in these comments, Commenters believe that any fee reduction is unwarranted.

As discussed above in subsection 105.12, the Board is proposing changes to the criteria of projects eligible for a waiver of the application and permit requirements. This form indicates that the revisions are intended to remove barriers and delays for applicants seeking to undertake "low-impact structures and activities." However, "low-impact" remains undefined. Moreover, it is unclear how the Department will be able to evaluate whether a project is "low-impact" without inventory information, because the revisions include a waiver of the requirement to submit such information.

Commenters are also concerned that the term "environmentally beneficial projects" appears without definition. While in the abstract it may seem obvious which projects are environmentally beneficial and which are environmentally harmful, there may be situations where a project touted as environmentally beneficial in fact damages natural resources. The Department should be able to evaluate a project, based on sufficient and verifiable information submitted by the applicant, and determine whether the project requires the full permitting process, some lesser process, or a waiver of the permitting requirements. However, the

Department will need information in order to be able to make this determination. Commenters are concerned that leaving terms such as "low-impact" and "environmentally beneficial" undefined, and reducing the amount of information required from projects purportedly eligible for a waiver, may create regulatory loopholes that undermine the Department's intentions and instead allow additional harm to aquatic resources.

Block 11

Pennsylvania's statutory and regulatory obligations exceed those required by federal law, and Commenters specifically point out that Pennsylvania's Clean Streams Law protects groundwater and is not limited to protection of navigable waters. Small headwater streams are vitally important to Pennsylvania's aquatic resources and are protected by the language of Pennsylvania law.

Block 15

There is no way to evaluate the number of waivers relied upon to construct more encroachments and obstructions without a permit.

Block 17

As discussed above, the revisions propose to reduce the fees for applicants for certain projects. It is unclear what effect that fee reduction will have on the Department, which is severely and chronically underfunded. This form estimates that consolidating multi-county projects into single applications might save four projects crossing four counties $5,250 each application in a typical year. While this savings may not represent much to the applicant on a multi-billion-dollar infrastructure project, it may represent a significant loss in terms of lesser

agency review and lessened aquatic resource protection. Commenters strongly oppose the proposed fee reductions.

Block 22

The form indicates that the Department will have to prepare environmental assessments for the proposed new waivers. Commenters are surprised that this task has not been done before or in conjunction with the Board's decision to propose these new waivers. The Board cannot decide that the new waivers will have insignificant environmental impacts before conducting an assessment of their impacts. That these regulations are proposed, and could be finalized **before** assessing their environmental impact suggests that the assessment to be conducted is without teeth, and is merely an exercise in rubber-stamping. Any meaningful environmental assessment should be conducted before proposing these waivers to be finalized.

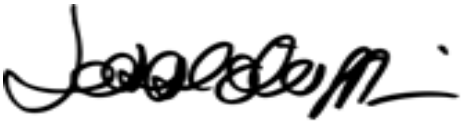
Block 23

The form reflects the expectation that the revisions to fees will result in a reduction in fees from applicants for large, significant projects of $56,250; presumably this cost is merely passed from the applicants to the taxpayers. This result is not acceptable, particularly for an underfunded agency such as the Department.

Conclusion

Commenters thank the Board for its consideration of these comments and respectfully reiterate their request for a public presentation and hearing on these proposed regulatory revisions.

Respectfully submitted,



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