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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 23, 2010

Honorable John Hanger, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-452 (IRRC #2835)
Environmental Quality Board
Dam Safety and Waterway Management

Dear Chairman Hanger:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Mary Jo White, Majority Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-452 (IRRC #2835)

Dam Safety and Waterway Management

June 23, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the April 24, 2010 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Section 105.1. Definitions. – Statutory authority; Need; Clarity.

Person

Subsection (i) contains provisions not included in the definition of “person” in the Dam Safety and Encroachments Act (Act). See 32 P.S. § 693.1 et. seq. For example, the terms “firm” and “estate” are not included in the statutory definition, and neither is the phrase “or other legal entity which is recognized by law as the subject of rights and duties.” Existing language contained in the regulation, such as the term “public utility” and “political subdivision of this Commonwealth” also are not included in the Act. The EQB should use the statutory definition in the regulation or explain its statutory authority for adding these terms and phrases to the proposed definition.

2. Section 105.4. Delegations to local agencies. – Clarity.

Subsection (b)

The existing language of the regulation prohibits delegating the authority to issue permits. The proposed regulation changes this provision to allow such delegations, but does not provide a reason for this change. The Preamble to the final-form regulation should explain the basis for this revision.

Subsection (e)

The proposed regulation removes a statutory citation from this subsection. Like Subsection (b), the Preamble also should provide an explanation for this amendment.

3. Section 105.13b. Proof of financial responsibility. – Economic and fiscal impact; Clarity.

This section allows permit approval for Hazard Potential Category 1 or 2 dams only if they submit proof of financial responsibility or security assuring proper construction, repair, etc. of the facility. In the Preamble, the EQB states there are approximately 2,333 owners of 3,256 dams that are affected by these regulations. The EQB also provides a breakdown of the dams by ownership and category. The EQB explains that the cost is “dam-specific based on the size and type...of dam.” The EQB also states that “if this amendment is not approved, the cost to the Commonwealth could be significant.” While we recognize it is difficult to predict how dam owners will provide financial assurance, we request further information on the potential economic and fiscal impact of the regulation on Category 1 or 2 county owned, municipally owned, privately owned and state owned dams by category.

Subsection (1)(i) includes as an example of proof of financial responsibility: “[a] certificate of public convenience from the Public Utility Commission if the owner of the proposed facility is subject to regulation under 66 Pa.C.S. (relating to the Public Utility Code).” A commentator is concerned that the proposed regulation did not contemplate deregulation of the utility industry, and as a result did not envision the undue hardship this provision could cause, given that many financial institutions are unwilling to provide these financial assurances in today’s economy. Does the EQB know the number of deregulated companies that would be impacted by this proposed rulemaking? What would be the fiscal impact on these types of utilities?

4. Section 105.14. Review of applications.- Clarity.

Paragraph (b)(1) states a broad declaration that the Department of Environmental Protection (Department) will consider potential threats to the environment created by a dam in its determination of impact. However, Paragraph (b)(4) specifically identifies several factors that will be considered and includes, in existing language, “other significant environmental factors.” A commentator is concerned that Subsection (b)(1) could be interpreted to mean that threats do not have to be significant to determine impact. We agree and question the need to amend Paragraph (b)(1) in addition to the detail provided in Paragraph (b)(4). We recommend deleting the amendment to Paragraph (b)(1). Alternatively, if it is retained, the EQB should explain why the amendment is needed and consistent with Paragraph (b)(4).

Also, a commentator suggests that the “existing and designated uses” mentioned in the last sentence of Subsection (b)(4) are those defined in Chapter 93. The EQB should explain what uses will be considered and provide a cross-reference in the regulation to the existing and designated uses the Department will consider.

5. Section 105.42. Terms and conditions of Department permits and approvals. – Reasonableness; Economic impact; Clarity.

This section has been revised to make the permittee or the owner responsible for both informing the contractor and for completing the acknowledgement form regarding the terms and conditions of the permit. The PA Department of Transportation (PennDOT) is concerned that this provision would result in PennDOT being responsible for permits obtained by developers for Highway Occupancy Permits that require roadway improvements within PennDOT’s right-of-way. Could PennDOT be responsible for the construction of roadway improvements that are required as a result of private development? Similar concerns apply to Section 105.46. We will review the EQB’s response to this issue in our consideration of whether the final regulation is in the public interest.

6. Section 105.45. Inspections by the Department. – Clarity.

Who does the EQB consider an “authorized agent” of the Department? The final-form regulation should clarify this issue.

7. Section 105.81. Permit applications for construction and modification of dams and reservoirs. – Implementation procedures; Clarity.

In Subsection (a)(3), what does the EQB consider “sufficient detail” contained in plan specifications and design reports to evaluate the safety and suitability of the proposed dam, reservoir and appurtenant works? This language should either be clarified in the final-form regulation, or deleted.

8. Section 105.91. Classification of dams and reservoirs. – Implementation procedures; Clarity.

This section classifies dams and reservoirs based on size and hazard potential. Hazard potential is based on the amount of the population at risk and the degree of economic loss. A commentator recommends that the EQB incorporate environmental losses into the determination of hazard potential. Has the Board considered including these losses as a factor?

9. Section 105.96. Outlet works. – Implementation procedures; Clarity.

Subsection (a) indicates that draining devices must be sized to pass a minimum of 70% of the “highest mean monthly inflow.” How is this type of inflow calculated? For example, is it based on storm potential, such as a 2-year/24-hour storm? The final-form regulation should clarify this issue.

10. Section 105.97. Stability of structures. – Need; Implementation procedures; Clarity.

This section requires a safety factor for gravity dams of 1.7 for maximum pool in paragraph (d)(2). A commentator notes that this factor is greater than that imposed by national standards. How did the EQB determine that 1.7 is an appropriate safety factor?

11. Section 105.102. Personnel and supervision. – Clarity.

Subsection (a) refers to a “professional engineer or **a Department-approved representative.**” (Emphasis added.) When would the Department use a representative in lieu of a professional engineer and what qualifications would be required for approval as a representative?

12. Section 105.134. EAP. – Feasibility; Implementation procedures; Clarity.

This section requires Hazard Potential Category 1, 2 and 3 dams to develop an Emergency Action Plan (EAP) to follow in the event of a dam hazard emergency.

We raise three issues.

First, this section is not clear regarding the role of local governments. Subsection 105.134(a) replaces “local emergency management officials” with “the Pennsylvania Emergency Management Agency (PEMA)” for approval of a plan. Paragraph 105.134(a)(2) requires the signature of “county emergency management coordinators.” However, it is only after approval of the plan that a copy is given to the “municipal emergency management agencies” under Subsection (b). We request an explanation of why this section is being amended so that local governments are no longer included in the review and approval of the EAP.

Second, Paragraph (a)(4) states: “[T]he EAP must be prepared in accordance with the most recent EAP guidelines developed by the Department and PEMA.” How will the applicant know what are the most recent guidelines? Where can these be found? The same concern applies to Subsection (f).

Third, Subsection (d) requires notice of the EAP to be posted in the “city, borough and township buildings in the affected municipalities.” Does the Department or a dam owner have the feasibility to require these locations to display these postings? The final-form regulation should clarify this issue.

13. Sections 105.134. EAP. and 105.135. Dam hazard emergencies. - Protection of the public health, safety and welfare; Implementation procedures; Clarity.

These sections are not clear regarding the role of local governments in amended Section 105.134 and as it relates to Section 105.135. For example, relating to Subsection 105.135(c), a commentator suggests that the municipality or county should be notified and will be the authority to take action. We note that the following terms are used in these sections:

- Paragraph 105.134(a)(2) “county emergency management coordinators.”
- Subsection 105.134(b) “municipal emergency management agencies.”
- Subsection 105.135(c) “appropriate emergency management officials” and “authorities.”

We recommend that the EQB review these sections and clearly identify which government entities would participate, approve, receive notifications and take action under each section.

Facsimile Cover Sheet



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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Debra L. Failor
Agency: Environmental Quality Board
Phone: 7-2814
Fax: 705-4980
Date: June 2, 2010
Pages: 7

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-452 (IRRC #2835). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: James J. Adams **Date:** 6/23/10