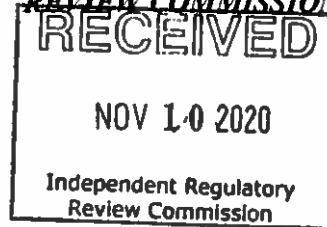


Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

INDEPENDENT REGULATORY
REVIEW COMMISSION



IRRC Number: 3278

(1) Agency

Environmental Protection

(2) Agency Number: 7

Identification Number: 556

(3) PA Code Cite: 25 Pa. Code Chapter 105 Dam Safety and Waterway Management

(4) Short Title: Dam Safety and Waterway Management

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Laura Griffin, (717) 772-3277; laurgriffi@pa.gov

Secondary Contact: Jessica Shirley, (717) 783-8727; jessshirley@pa.gov

(6) Type of Rulemaking (check applicable box):

- ☒ Proposed Regulation
- ☐ Final Regulation
- ☐ Final Omitted Regulation

- ☐ Emergency Certification Regulation;
 - ☐ Certification by the Governor
 - ☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The Board is proposing amendments to 25 Pa. Code Chapter 105 (relating to waterway management and dam safety) to clarify existing regulations; delete or update obsolete requirements and references; incorporate new or revised definitions; and correct typographical errors in certain sections of Chapter 105. The proposed regulatory revisions would allow the Department to focus resources on projects that pose significant threat to public health, welfare, safety and the environment. These amendments would provide for efficient management and oversight of low-impact structures and activities to ensure compliance with objectives of the Dam Safety and Encroachments Act (32 P.S. §§ 693.1—693.27). The proposed regulatory revisions would add new subsections or update existing regulations to clarify application requirements for mitigation plan, alternatives analysis, impacts analysis, cumulative impacts analysis, environmentally beneficial projects or activities, and aquatic resource assessment and mitigation criteria. The Board previously promulgated amendments to Chapter 105 regulations to update fees in 2013 (43 Pa.B. 967), and to make specific technical revisions regarding dam safety in 2011 (41 Pa.B. 219); however, the Chapter 105 regulations have not been substantively revised since 1991 (21 Pa.B. 4911).

(8) State the statutory authority for the regulation. Include specific statutory citation.

This proposed rulemaking is authorized under sections 5, 7, 10, 11 and 17 of the Dam Safety and Encroachments Act (act) (32 P.S. §§ 693.5, 693.7, 693.10, 693.11 and 693.17); sections 5 and 402 of The Clean Streams Law (35 P.S. §§ 691.5 and 691.402); sections 302 and 402 of the Flood Plain Management Act (32 P.S. §§ 679.302 and 679.402); section 11(2) of the Conservation District Law (3 P.S. § 859(2)); and sections 514(a), 1901-A(1) and (20), 1908-A, 1917-A and 1920-A of The Administrative Code of 1929 (71 P.S. §§ 194(a), 510-1(1) and (20), 510-8, 510-17 and 510-20), unless otherwise noted.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

This proposed rulemaking is not mandated by any federal or state law, federal or state court order, or federal regulation. No state or federal court decisions mandate a new or revised rulemaking. The Board, however, is proposing to provide clarifying revisions to Chapter 105 relating to water-dependent projects and practicable alternatives based on the Environmental Hearing Board's (EHB) January 18, 2018 opinion in *Clean Air Council et al. v. DEP*, 2018 EHB 35, 40 and the U.S. Court of Appeals for the Third Circuit decision in *Del. Riverkeeper Network v. Sec'y of the Pa. Dep't of Env'tl. Prot.*, 870 F.3d 171, 183 (3d Cir. 2017).

While not mandated, this proposed rulemaking is consistent with the Commonwealth's authority under the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*), as amended. Under Section 510 of the Clean Water Act, the function of developing water quality standards and antidegradation implementation requirements has long been a function reserved to the states. 33 U.S.C. § 1370. See also, 40 C.F.R. § 131.4. Section 303 of the Clean Water Act (33 U.S.C. § 1313), authorizes states to establish water quality standards within their jurisdictions. In section 303(a)(2) of the Clean Water Act (33 U.S.C. § 1313(a)(2)), Congress mandated that the state water quality standards adopted by states pursuant to their own laws prior to October 18, 1972, remain in effect unless the U.S. Environmental Protection Agency (EPA) determines they are inconsistent with the Clean Water Act (CWA). Section 303(c)(1) of the Clean Water Act (33 U.S.C. § 1313(c)(1)), gives states the authority to review and revise water quality standards for surface waters within their borders.

This proposed rulemaking would be consistent with the Department's current coordination efforts with the U.S. Army Corps of Engineers (Corps) under section 17(d) of the Dam Safety and Encroachments Act (32 P.S. § 693.17(d)). See also 25 Pa. Code § 105.24 (relating to coordination of permits). Section 404(e) of the Clean Water Act (CWA) (33 U.S.C. § 1344(e)), provides for the issuance of Department of the Army (DA) general permits (GPs) on a statewide basis, which operate in conjunction with a State regulatory program that protects the aquatic environment in a manner that the Corps has determined to be equivalent to the DA regulatory program, provided that the activities permitted under each category of such GPs are similar in nature and result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This joint coordination process is undertaken through the implementation of the Pennsylvania State Programmatic General Permit (PASPGP) which has been issued by the Corps pursuant to Clean Water Act Section 404(e) in Pennsylvania since 1991 and is based upon consistency with the requirements of 40 CFR, Part 230 (relating to section 404(b)(1) guidelines for specification of disposal sites for dredged or fill material). The Department and Corps also utilize a joint

permit form to coordinate efficient processing of applications for larger-scale projects that are not eligible for PASPGP. The Department coordinates with the Corps and other states and federal agencies and commissions regarding projects that require compensatory mitigation through the existing state and federal permitting processes.

The proposed regulatory revisions to update the compensatory mitigation requirements framework in § 105.20a would be consistent with the Department's authority under section 2 of the Dam Safety and Encroachments Act (32 P.S. § 693.2), Sections 4 and 5 of The Clean Streams Law (35 P.S. §§ 691.4 and 691.5) and the existing Chapter 105 requirements relating to mitigation. These proposed amendments would also generally be consistent with the existing requirements established by the U.S. Environmental Protection Agency (EPA) and the Corps under the April 10, 2008 joint final rule entitled *Compensatory Mitigation for Losses of Aquatic Resources* (2008 Federal Mitigation Rule) (73 FR 15,594). See 33 CFR Part 332 and 40 CFR Part 230, subpart J.

Upon the Board's promulgation of this proposed rule as a final-form regulation, the Department will submit the final-form regulation to EPA for approval as an amendment to Pennsylvania's water quality standards in effect for Clean Water Act purposes.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This proposed rulemaking is needed to clarify Chapter 105 requirements for project applicants, while enabling the Department to administer the Dam Safety and Encroachments Act and the Chapter 105 regulations in a more efficient and effective manner. The proposed amendments would add new subsections or update existing regulations to clarify the application requirements for a mitigation plan, alternatives analysis, impacts analysis, cumulative impacts, environmentally beneficial projects or activities, and aquatic resource assessment and update the existing compensatory mitigation criteria for unavoidable impacts to aquatic resources. The proposed regulations do not add new permit application or registration fees or revise current permit application or registration fees.

This proposed rulemaking would provide regulatory clarity to improve the quality of permit applications received from project applicants. The proposed amendments specify what information project applicants must include in their applications to meet certain existing regulatory standards under Chapter 105. Through administration of the Chapter 105 program in recent years, the Department has determined that providing additional clarifying information will foster a better understanding of the Chapter 105 regulations by the regulated community and improve the quality of applications or registrations received from project applicants. Notably, the proposed amendments provide added clarity regarding the information an applicant must include in the mitigation plan, alternatives analysis, antidegradation demonstration, impacts analysis, cumulative impacts analysis and updates the compensatory mitigation framework for unavoidable impacts to aquatic resources. The antidegradation demonstration is currently required as part of the Environmental Assessment (EA) and is explained in the EA form instructions (3150-PM-BWEW0017) and referenced in the Joint Application for a Pennsylvania Water Obstruction and Encroachment Permit form instructions (3150-PM-BWEW0036). These Chapter 105 application forms can be accessed on the Department's website at <http://www.dep.greenport.state.pa.us/elibrary/GetFolder?FolderID=4088>. The proposed amendments would also clarify that the impacts analysis and compensatory mitigation requirements are not the same as evaluations or assessments of protected water uses made under 25 Pa.

Code Chapter 93. These proposed amendments are intended to address common deficiencies in permit application submittals. The proposed amendments are also intended to remove unnecessary barriers and delays for applicants seeking to undertake low impact structures and activities.

The regulated community, including businesses in the agriculture, forestry, commercial and residential construction, transportation, utilities, mineral resources sectors; municipalities; non-profit organizations; state agencies and commissions; and individuals would benefit from the proposed revisions to Chapter 105. These benefits would include new or revised waivers for certain low impact structures and activities, exemptions for annual charges for certain activities in submerged lands of the Commonwealth, consolidated permit application submittal, and flexibility for disturbance fee submittal to the Department. Amendments to allow electronic submittal of seals, certifications and signatures would also benefit the regulated community by allowing application submittal flexibility and the environment by reducing the need for additional paper submissions. Benefits would also include savings in resources associated with permit applications, project delays, project completion and realizing environmental improvements in a more expeditious manner. In addition, the proposed regulatory revisions will allow the Department to focus attention on projects that may pose higher risks or more significant threats to public health, welfare, safety and the environment.

The Department met with stakeholders, including representatives of several county conservation districts, United States Department of Agriculture (USDA)- Natural Resource Conservation Service (NRCS), State Conservation Commission (SCC), Pennsylvania Association of Conservation Districts (PACD), and Pennsylvania Department of Conservation and Natural Resources (DCNR) representatives during the development of this proposed rulemaking. The proposed revisions to Chapter 105 are intended to provide efficiencies in the regulatory oversight of these types of low impact projects. The proposed addition of definitions, such as crop production, and new structures and activities eligible for the waiver of permit requirements (waivers) would benefit the agricultural community, fire departments, environmental organizations, parks and recreation organizations, and a wide variety of industries that perform environmental and geologic testing in advance of permit submission and use standard mats and pads for erosion control best management practices (BMPs) in wetlands.

The proposed regulations would provide additional exemptions from annual charges for occupying submerged lands of the Commonwealth. The proposed exemptions would include projects and activities constructed for the significant benefit of the environment such as stream restoration and reclamation. In addition, projects that are temporary in nature will be exempt from these prohibitive costs. The annual charges for these types of projects had been a detriment and the Department anticipates that these proposed exemptions would enable non-profits, environmental groups and others to conduct more of these types of beneficial projects.

Legacy abandoned structures that pose hazards exist in aquatic resources are generally a product of Pennsylvania's industrial history. Remnants of these structures pose a threat to waterway users and, in some cases, also impact public health. Proposed revisions to § 105.47(b) would add clarifying language regarding removal of abandoned water obstructions and encroachments. This proposed amendment would specify that the permittee or owner must remove structures that pose a threat to public health, safety or the environment or no longer serve a purpose.

The Board is proposing the addition of a new subsection under § 105.15 to clearly outline environmental assessment requirements associated with aquatic resource restoration projects such as a stream or

floodplain restoration. The addition of this subsection is needed to differentiate application requirements for environmentally beneficial projects that reestablish or rehabilitate aquatic resources to natural characteristics and aquatic resource functions from the application requirements for other types of projects regulated under the act and Chapter 105.

Waivers

Waivers provide important efficiencies in regulatory oversight for low-impact and environmentally friendly projects. The Board is proposing to add new waivers and simplify requirements for aquatic resource restoration projects after evaluating the implementation history of the program as it relates to these activities. The proposed structures and activities eligible for a permit waiver under § 105.12(a) will be required to comply with requirements of the act and Chapter 105, therefore subsection 105.12(d) is proposed for addition to emphasize the need for these structures and activities to be properly designed and comply with other requirements in Chapter 105. Subsection 105.12(c) would be amended to include restrictions on the applicability of waivers where a structure or activity otherwise eligible for a waiver under § 105.12(a) would occupy submerged lands of the Commonwealth. This eligibility restriction is proposed to ensure that the Commonwealth retains these lands for public trust purposes. This subsection would include additional eligibility requirements to eliminate potential impacts to: threatened or endangered species; historic, cultural, or archaeological resources; and locally recognized historical sites. The Board is proposing to add language to specify that this restriction does not apply to Commonwealth agencies or commissions.

The new activities proposed for permit waiver eligibility would include the removal of legacy structures or sediments in aquatic resources; allow for the construction and maintenance of a streambank fencing conservation practice associated with crop production or a temporary fencing for protection of a conservation planting practice located in or along a body of water or along watercourses and their floodways; low-impact and non-motorized recreational activities such as walking or biking trails; elevated boardwalks in wetlands when utilized for educational and interpretive purposes; temporary emergency placement, and operation and maintenance of dry fire hydrants or other structures associated with water withdrawal for crop production or fire protection; archeological, geotechnical or environmental testing, monitoring activities, or investigative activities of a temporary nature ; and placement, maintenance and removal of temporary mats and pads used as a best management practice for minimizing erosion and sedimentation at wetland crossings.

Each of these proposed waivers will provide a time savings benefit for the regulated community and the Department, while not resulting in an adverse risk to public health, safety or the environment. Many of the proposed revisions were initiated from consultation meetings with stakeholders. For example, the Pennsylvania Turnpike Commission, and a Chapter 105 Agricultural Workgroup comprised of representatives from several county conservation districts, U.S. Department of Agriculture- Natural Resource Conservation Service (NRCS), State Conservation Commission (SCC), Pennsylvania Association of Conservation Districts (PACD), and Department of Conservation and Natural Resources (DCNR) representatives helped to formulate the waiver for streambank fencing conservation practices associated with crop production or a temporary fencing for protection of a conservation planting. This waiver would allow for the placement of fencing in or along a body of water or along a watercourse and floodways when used as a conservation practice associated with crop production, grazing, or government set aside programs or provide temporary protection for the establishment of riparian buffer or other conservation plantings. Chapter 105 regulations require authorizations for water obstructions, not only in the stream, but also in the

floodway which is a minimum of 50 feet from each streambank. Costs associated with application fees for this type of conservation practice may disincentivize their implementation.

DCNR representatives worked with stakeholders regarding the need for permit waivers for walking or biking trails and the elevated boardwalks in wetlands when utilized for educational and interpretive purposes. Many of these stakeholders are non-profit or local municipal organizations that receive environmental grants to construct or maintain trails for the use of the general public. The proposed amendments will waive permit application requirements for these low impact activities and incentivize projects. In particular, this waiver will enable nonprofit organizations to better employ volunteers and participants that assist in implementation of trail construction and maintenance practices.

The Board proposes to add a waiver under § 105.12(a) for the temporary emergency placement, operation and maintenance of dry fire hydrants for water withdrawals. This waiver would allow placement of temporary pumps, hoses or pipes in a watercourse or a body of water in an emergency. Agricultural entities could use this waiver for crop production during times of drought and community fire companies could obtain water for fire protection, especially in rural areas.

The Board also proposes to add a permit waiver for construction, operation or removal of temporary archeological, geotechnical or environmental testing, monitoring activities, or investigative activities. These activities are generally short-term, low risk activities which are necessary to collect data, evidence, or other information to complete a Department permit application.

Lastly, the Board proposes to add a permit waiver for the use of temporary mats or pads when used as an erosion and sediment control best management practice for wetlands. This new waiver will provide the opportunity for persons working around wetlands to install, maintain and remove these practices to adequately protect water resources and ensure a safer work environment. It is important to note that although the requirement to obtain a permit would be waived for these activities, they are still regulated under the act and Chapter 105. Wetlands must be restored to their previous condition after temporary use of mats or pads.

Environmentally Beneficial Projects

The addition of a new subsection in § 105.15 for environmentally beneficial projects would remove the need for entities to complete unnecessary permit application or registration requirements, avoid unnecessary costs and provide for more timely completion of projects. Benefits associated with environmental restoration projects include cleaner water, improved habitats for wildlife, fish and other aquatic life, improved recreational opportunities for citizens, economic development in communities, developing resilience from flooding and other effects of extreme storm events.

The proposed regulatory amendments have the potential to affect any person, business, or local or state government entity proposing to construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment located in, along or across or projecting into aquatic resources. The specific number of entities effected by the amendments is not known, however most of the approximate 8,000 industry, and local or state government entities historically regulated have already developed experience and technical capacity under the existing Chapter 105 regulations.

The proposed amendments will not have a significant effect on these entities as most of the amendments clarify existing requirements, incorporate existing authorized regulated practices, and are being provided for transparency and consistency, so compliance costs are not expected to increase.

Compensation for impacts to aquatic resources

The amendments to § 105.20a would benefit applicants by providing the compensatory mitigation framework for unavoidable impacts to aquatic resources, including wetlands, watercourses and their floodways and other bodies of water in one consolidated section. The existing Chapter 105 regulations currently provide standardized replacement criteria for wetlands, but not watercourses and their floodways or other bodies of water. The proposed amendments would be consistent with section 2 of the act, The Clean Streams Law, the existing mitigation requirements in Chapter 105 and current scientific principles and practices. The proposed amendments to Chapter 105 are generally consistent with the EPA and Corps joint final rule entitled *Compensatory Mitigation for Losses of Aquatic Resources* (2008 Federal Mitigation Rule) (73 FR 19,594; April 10, 2008) and will improve compensatory mitigation planning, implementation and management by emphasizing a watershed approach in selecting project locations, requiring measurable, environmental performance standards for all forms of aquatic resource compensation.

The proposed amendments will establish equivalent standards for permittee-responsible compensatory mitigation where the permittee maintains responsibility for the construction and long-term success of the site, as well as mitigation banks and in-lieu fee mitigation methods. Availability of mitigation banking and an in-lieu fee mitigation program in Pennsylvania would provide the opportunity for an alternative to the permittee in designing, constructing and operating individual mitigation sites, considered as “permittee responsible” mitigation sites. Larger-scale compensatory mitigation projects, made possible by mitigation banking and in-lieu fee programs, also provide for greater natural resource improvements. The addition of these compensatory mitigation options through this proposed rulemaking would reflect updated practices and provide greater flexibility and predictability for applicants. This will translate into time savings for both applicants and the Department while benefitting natural resources through improved quality of mitigation projects. Potential benefits to social and environmental wellbeing from mitigation banking and in-lieu fee methods would be recognized through the restoration of historically impaired or impacted aquatic resources, such as removal of legacy sediment.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The proposed amendments are consistent with Pennsylvania’s authority under the federal Clean Water Act to review and revise water quality standards and to adopt standards more stringent than Federal requirements. See, 33 U.S.C. §§ 1313 and 1370; See also, 33 U.S.C. 131.4. The Chapter 105 regulations were promulgated under state law authority in the act and The Clean Streams Law, not Section 404 of the Clean Water Act (33 U.S.C. § 1344). The act and The Clean Streams Law are generally more comprehensive and protective than Section 404 of the Clean Water Act. For example, the act and implementing Chapter 105 regulations provide for the regulation of dams, contain more stringent protections for wetlands, include the Commonwealth’s submerged lands license program requirements and expressly incorporates PA. CONST. Article I § 27 environmental rights and Commonwealth trustee obligations, whereas Clean Water Act Section 404 and the Corps implementing regulations do not.

The proposed amendments to Chapter 105 relating to dam safety are more stringent because the Corps does not have companion regulations under Federal law that apply to non-federal dams. Pennsylvania has a unique history with dams that has influenced the need for a state regulatory program that ensures the protection of public health and safety. Proposed amendments to Chapter 105 application information requirements derives from separate and distinct state law authority under the act and The Clean Streams Law, but the Department coordinates with the Corps through the administration of the Pennsylvania State Programmatic General Permit and joint permitting processes when it is practical to do so. See, 32 P.S. § 693.17(d) and 25 Pa. Code § 105.24 (relating to coordination of permits). The proposed amendments relating to compensatory mitigation, while based on state law authority, are generally consistent with Federal requirements under the 2008 Federal Mitigation Rule and the Department's coordination efforts.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

The Commonwealth's Chapter 105 wetland protection and dam safety regulatory program has traditionally been one of the leading wetlands and dam safety programs in the Mid-Atlantic States, as well as nationally. Dam safety, water obstruction and encroachment regulations vary across different regions of the United States. The proposed amendments to Chapter 105 would generally be similar to surrounding states' regulatory requirements.

This proposed rulemaking reflects a continuing commitment to effective compensation for unavoidable impacts to aquatic resources by incorporating current mitigation practices into the regulatory framework. The proposed regulatory revisions reflect the existing obligation established for the regulated community under the 2008 Federal Mitigation Rule. See, 33 CFR Part 332 and 40 CFR Part 230, subpart J. These Federal regulations were intended to improve compensatory mitigation planning, implementation, and management nationwide by applying similar standards to all compensation projects and emphasizing a watershed approach to selecting project sites. In 2014, the Association of Wetland Managers (ASWM) reported that thirteen states have formalized stream mitigation programs, the majority of which were initiated after the Corps and the EPA issued the 2008 Federal Mitigation Rule and at least thirty-two stream mitigation guidance documents and policies have been developed by states and Corps districts throughout the United States. ASWM also provides that nineteen states have wetland restoration as a core element in their wetland program. The nineteen states include: California, Delaware, Florida, Georgia, Kansas, Massachusetts, Montana, Maine, Nebraska, New Mexico, New Hampshire, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, Wisconsin and West Virginia.

The Board proposes to address compensation for unavoidable impacts to aquatic resources in a manner that is generally consistent with the 2008 Federal Mitigation Rule by: maintaining a no net loss of wetlands requirement; revising siting criteria on a watershed basis; allowing mitigation banking, in-lieu fee, and permittee responsible mitigation options; providing for long-term monitoring; and requiring financial assurances, where applicable. The Board also references the Department's Function Based Aquatic Resource Compensation Protocol and Aquatic Resource Assessment Protocol guidance documents and provides applicants with the flexibility to submit mitigation proposals using other demonstrated acceptable methodologies. The addition of these guidance documents and methodologies will provide the regulated community with clarity and a more predictable process in evaluating the appropriate level of compensatory mitigation needed to offset impacts for a given project. The proposed amendments would clarify that these assessments are not the same as evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93. These compensatory mitigation actions are

necessary to allow the Department to fulfill its purpose of protecting, maintaining, and improving the Commonwealth's aquatic resources.

The Department compared the proposed waivers for addition under § 105.12(a) with existing waivers in other neighboring states. The proposed waiver for an emergency temporary structure associated with water withdrawal for crop production or fire protection is similar to an existing waiver in New York. Specifically, proposed subsection § 105.12(a)(20) would waive water obstruction or encroachment permit requirements for the temporary emergency placement, operation and maintenance of a water obstruction or encroachment, including dry fire hydrants, associated with water withdrawal for crop production or fire protection. The water obstruction or encroachment for water withdrawal may not alter the bed or bank of the watercourse or body of water. This waiver does not apply to parking or other areas for ancillary activities. This waiver is similar to a waiver established for irrigation purposes established by the New York Department of Conservation. Other states either do not specify waivers or they do not have any other comparable waivers identified similar to proposed § 105.12(a)(20).

New Jersey has a permit by rule authorization which provides approval for certain activities and conditions within the floodway or across a regulated water. Under the permit-by-rule, the construction of trails or boardwalks, construction of footbridges, conducting geotechnical and archeological activities, construction of fencing to manage livestock may be conducted. Specifically, the following proposed amendments to § 105.12(a) are comparable to existing regulations in New Jersey.

Subsection 105.12(a)(17) is proposed as a new subsection to allow construction and maintenance of a streambank fencing conservation practice associated with crop production or temporary fencing for protection of a conservation planting or practice located in or along a body of water or along watercourses and their floodways. This proposed waiver is not intended for fencing that would collect flood debris or restrict the flow of aquatic resources or that would extend across streams or watercourses. Similarly, New Jersey Department of Environmental Protection has a permit-by-rule authorization which provides approval for the construction of fencing to manage livestock.

Subsection 105.12(a)(18) is proposed as a new subsection that would waive water obstruction or encroachment permit requirements for low impact and non-motorized recreational activities such as walking or biking trails with certain specific length and design restrictions. The New Jersey Department of Environmental Protection has a similar authorization under a permit-by-rule which provides for the construction of trails or boardwalks, construction of footbridges within the floodway or across a regulated water.

Subsection 105.12(a)(19) is proposed as a new subsection that would waive authorized elevated boardwalks in wetlands when utilized for educational and interpretive purposes. This waiver would require the development and submittal of a plan to the Department for approval. Similarly, New Jersey Department of Environmental Protection has a permit-by-rule authorization for the construction of boardwalks within the floodway or regulated water.

Subsection 105.12(a)(21) is proposed as a new subsection that would waive water obstruction or encroachment permit requirements for the construction, operation or removal of temporary environmental testing, monitoring activities, or investigative activities of a temporary nature. This waiver will include boring or placement of sensors to sample or test soil or rock material and other similar activities, however it will not apply to parking or other ancillary areas. Similarly, the New Jersey

Department of Environmental Protection has a permit-by-rule authorization for conducting geotechnical and archeological testing activities.

The proposed revisions to the existing regulation will not affect Pennsylvania's ability to compete with other states as many of the proposed revisions are consistent with existing practices and clarify existing requirements.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This regulation will not affect any other regulations for the Department or other state agencies.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Department engaged several groups of key stakeholders in the development of the proposed rulemaking, including: a Chapter 105 Agricultural Workgroup comprised of representatives from several county conservation districts, NRCS, SCC, PACD, and DCNR; a county conservation district workgroup comprised of staff from conservation districts, PACD, and SCC; and representatives from several state agencies and commissions, including DCNR, the Pennsylvania Fish and Boat Commission, the Pennsylvania Turnpike Commission, and the Pennsylvania Department of Transportation.

The Department also met to update and discuss the draft Chapter 105 regulations with SCC on November 12, 2019, February 11, 2020, and March 10, 2020; and the Citizens Advisory Council on November 19, 2019 and February 18, 2020.

Another outreach effort occurred on February 19, 2020 when the Department met with and discussed the proposed rulemaking with the Pennsylvania Chamber of Business and Industry.

The Department also met with the Water Resources Advisory Committee (WRAC) on July 25, 2019 and on October 30, 2019, and the Agricultural Advisory Board (AAB) on November 7, 2019 to provide an update of the regulatory revisions. The draft proposed amendments were presented for review and discussion with the AAB on January 27, 2020. The AAB concurred with the Department's recommendation to move the proposed rulemaking forward in the regulatory review process. The draft proposed amendments were also presented for review and discussion with WRAC on January 30, 2020. WRAC also concurred with the Department's recommendation.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

The proposed regulatory amendments have the potential to affect any person or entity that proposes to construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment located in, along or across aquatic resources in Pennsylvania. The number of entities specifically

affected by the amendments related to water obstructions and encroachments is not known; however, below is information on the past number of entities affected by the Chapter 105 regulations.

The Chapter 105 regulations apply to any owner or operator of a dam. There are approximately 2,333 owners of 3,256 dams that are affected by the existing regulation. This table shows a breakdown of the ownership per dam hazard potential category type. Of the 2,319 dams listed as privately owned, 537 are further listed as business owned. The Dam Hazard Potential Category listed in the table reflects:

Dam Ownership	Dam Hazard Potential Category			
	Category 1	Category 2	Category 3	Category 4
County Owned	78	0	2	22
Municipally Owned	183	10	38	331
Privately Owned	340	73	221	1685
State Owned	89	5	17	162

Category 1: Substantial population at risk, 10 or more people, or numerous small businesses or a large business or school.
 Category 2: Few people at risk, less than 10 people or a small number of small businesses.
 Category 3: No population at risk, but significant damage to private or public property and short duration public inconvenience.
 Category 4: No population at risk and only minimal damage to private or public property and no significant public inconvenience.

In fiscal year 2017-2018, the Department authorized an estimated 3,100 general permits and 300 individual permits for water obstructions or encroachments to different entities, including individuals, utility companies, residential and commercial developers, contractors, state and local government agencies, and others. It is not expected that the proposed rulemaking would expand the group of entities. Information obtained from the Pennsylvania Department of Community and Economic Development's State Profile website disclosed that 8,000 businesses across the agricultural, forestry, construction, transportation, warehousing, and mineral industry sectors operate in Pennsylvania. These business sectors are representative of potential applicants for water obstruction and encroachment permit authorizations. Since the proposed amendments remove the antiquated provisions, improve clarity and consistency through cross-referencing, and include existing program provisions in the Dam Safety Program and the Water Obstructions and Encroachments Program, the Department anticipates a positive effect on the regulated community since they are already familiar with the proposed concepts.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Any person proposing to construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment located in, along or across aquatic resources in Pennsylvania will be required to comply with this regulation. Data on the magnitude and portion of specific number of business entities, including small businesses, required to comply with the proposed amendments is not known.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

The Department is not able to identify the total number of persons, businesses, and organizations that would be affected by the proposed regulatory amendments, or potential exact associated costs or savings to those entities. Since there are no fee increases, nor new fees, and the group of impacted entities is not expected to increase, a significant financial or economic impact is not expected. The proposed amendment to § 105.13(d) will enable applicants to submit a single permit application for a project extending through multiple counties, providing a reduction in the base administrative application fee of \$1,750 that would otherwise have been charged for each additional county. In particular, the Department occasionally receives applications for long linear utility projects that cross several counties, and in those cases, applicants will save on the cost of the administrative filing fee based on the number of counties spanned by the project. The Department estimates four projects per year could fall into this category crossing four counties on average, which would roughly translate to a savings of \$5,250 per application.

Rather than a cost savings, it is anticipated that new permit waivers and added exemptions from submerged lands license agreement (SLLA) charges, would incentive low-impact, environmentally sensitive, and environmentally beneficial activities that may have been deterred or abandoned in the past due to associated application fees, SLLA charge or both.

The proposed revisions are expected to benefit the regulated community and the Department by improving the Department's recordkeeping regarding dam ownership; and improve efficiency through addition of activities where a permit requirement is waived; reducing cost and improving timeliness of permit applications due to improved clarity of application completeness and essential requirements necessary for Department review; highlighting existing financial responsibility alternatives of permittees and environmental improvement by providing an alternative to permittee-responsible mitigation (which has been demonstrated to perform poorly); improving the flexibility of addressing the compensation of impacted aquatic resources through mitigation banking, an in-lieu fee program mitigation where responsibility for compensatory mitigation project is transferred to a mitigation banker or in-lieu fee sponsor, and permittee responsible mitigation; and an incentive, through Submerged Lands License Agreement charge exemptions, for permittees to complete projects and activities related to construction, implementation, operation or maintenance of an environmental remediation or reclamation project, aquatic resource restoration, or agricultural conservation practices.

The proposed amendments to Chapter 105 are consistent with the 2008 Mitigation Rule and improve the compensatory mitigation planning, implementation and management by emphasizing a watershed approach in selecting project locations, requiring measurable, environmental performance standards for all forms of aquatic resource compensation. The proposed amendments will establish equivalent standards for permittee-responsible compensatory mitigation where the permittee maintains responsibility for the construction and long-term success of the site, as well as mitigation banks and in-lieu fee mitigation methods. A survey conducted by the Department in 2006 determined permittee-responsible compensatory mitigation has an average range in cost of \$60,000 to \$90,000 per acre, not including land purchase costs. Adjusted for inflation, that cost ranges from approximately \$78,350 to \$117,520 in 2020. Mitigation costs for stream and floodway impacts in 2006 ranged in costs from \$400 to \$600 per linear foot. Those mitigation costs in 2020 are estimated to be \$520 to \$785 per linear foot. Availability of mitigation banking and an in-lieu fee mitigation program in Pennsylvania provides the

opportunity for an alternative to the permittee in designing, constructing and operating individual mitigation sites, considered as "permittee responsible" mitigation sites. Also, larger-scale projects, made possible by mitigation banking and in-lieu fee programs, also provide for greater natural resource improvements. Adding these mitigation options through this proposed rulemaking will reflect updated practices and provide greater flexibility and predictability for applicants. This will translate into time savings for both applicants and the Department while improving natural resources through improved quality of mitigation projects. Potential benefits also exist to social and environmental wellbeing from mitigation banking and in-lieu fee program by restoring historically impaired or impacted aquatic resources, such as removal of legacy sediment.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The proposed revisions are intended to clarify existing regulations to assure proper planning, design, construction, operation, maintenance and monitoring of dams, reservoirs, water obstruction and encroachments to ensure protection of health, safety, environment, and property of the public and protect water quality and natural regime of watercourses and other aquatic resources. The proposed amendments would foster a greater understanding of the Chapter 105 permit application requirements and generally lead to the submittal of higher quality applications to the Department. Further, the regulated community and natural resources will benefit from adding categories of structures and activities eligible for permit waivers; and addition of new projects or activities eligible for SLLA charge exemptions or revised SLLA charges for groin structures. Providing greater detail in the regulations and updating regulations to reflect current practices and for accuracy purposes would provide a benefit to regulated entities without incurring additional costs.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The proposed revisions to the existing regulation do not create any new or additional costs associated with legal, accounting or consulting procedures, or additional reporting, recordkeeping or other paperwork above what is already required in the existing regulation or existing practices. In addition, no new permit application fees are being proposed in this rulemaking.

Compensatory mitigation for unavoidable aquatic resource impacts may be accomplished through three approaches: permittee-responsible compensatory mitigation, mitigation banking and in-lieu fees. Inclusion of these options in the regulations regarding compensation for aquatic resource impacts will provide an incentive-based approach of existing practice and should result in an overall cost savings for the regulated community. Addition of mitigation banking and in-lieu fee compensation with traditional permittee-responsible compensatory mitigation will provide more alternatives for offsetting unavoidable impacts to aquatic resources. Mitigation banking and an in-lieu fee program offer several advantages over permittee responsible mitigation including extensive planning and mitigation site selection, scientific expertise, mitigation site review time, and long-term monitoring. Using traditional permittee-responsible mitigation, permittees may be uncertain whether compensatory mitigation will be successful in mitigating aquatic resource impacts, or if additional costs in corrective actions and ongoing compliance monitoring that may be necessary to ensure successful mitigation; while not creating these alternatives, this proposed regulation will provide additional flexibility to alleviate uncertainties. The Environmental Protection Agency (EPA) identified that aquatic resource mitigation banking represents

an increasingly important economic component of the environmental consulting sector, showcasing synergies between effective environmental protection and economic expansion. Sixty-two percent of banks identified in an Environmental Law Institute (ELI) 2002 study were privately-owned entrepreneurial mitigation banks; entrepreneurial providers of bank credits have emerged as a nationally-organized industry, contributing hundreds of millions of dollars annually to domestic product.

Under the Department's enhanced mitigation banking program, mitigation bankers can create, restore, and enhance wetlands and waterways at different sites and then sell the mitigation credits earned at these sites to permit applicants to meet the Chapter 105 mitigation requirements. This allows for timelier application reviews and better controlled and more effective wetland and stream mitigation projects. While 8 acres of wetland mitigation have been approved for the 2018-2019 fiscal year, it is expected that many more acres of wetland mitigation will be approved over upcoming fiscal years as more entrepreneurial bankers become established and permitted. Overall, the net positive effect on competitiveness of regulated firms occurs because such policies promote cost-cutting efficiency improvements, which in turn reduce or completely offset regulatory costs, and foster innovation in new mitigation strategies.

The proposed amendment to § 105.13(d) allowing projects crossing county boundaries to submit one permit application or registration, as opposed to a permit application or registration in each county, will result in additional cost savings for the regulated community. The Department estimates that it receives roughly 25 multi-county projects per year on average based on experience in recent years. Most of these applications are for linear projects from non-governmental entities, such as utilities, and typically span two counties. About 15 of those projects were individual permit applications. Applicants for individual permits will save money by not having to pay an additional \$1,750 administrative filing fee per county. The Department occasionally receives applications for long linear utility projects that cross several counties, and in those cases the applicant would save on the cost of the administrative filing fee based on the number of counties spanned by the project. The Department estimates four projects per year could fall into this category crossing four counties on average, which would roughly translate to a savings of \$5,250 per application.

The incentive for an applicant to obtain one of the proposed waivers, is that the current cost for an individual permit application includes a \$1,750 administrative filing fee plus \$800 per 0.1-acre permanent disturbance fee and \$400 per 0.1-acre temporary disturbance fee. Likewise, if qualifying for general permit under the current regulations, applicants may see a savings of up to \$750 under the proposed waivers for a given project. Projects eligible for proposed waivers are considered environmentally beneficial, emergency, educational, or temporary type structures and these costs are a disincentive to implementation. Under the proposed exemptions of certain projects and activities from SLLA charges, entities would be incentivized to complete eligible projects, whereas the current minimum annual charge is \$750. The projects associated with the proposed charge exemptions are environmentally beneficial projects or temporary in nature.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The proposed waivers and inclusion of options for offsetting unavoidable aquatic resource impacts are expected to provide an overall time savings during project planning, permit processing, and project implementation.

The proposed revisions to existing regulations should not result in additional costs for local governments since the amendments do not create any new or additional costs associated with legal, accounting or consulting procedures, or additional reporting, recordkeeping or other paperwork above what is already required in the existing regulation or existing practices.

Local governments are exempt from application or registration fees and SLLA charges.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

The proposed revisions to existing regulations should not result in additional costs for state government since the amendments do not create any new or additional costs associated with legal, accounting or consulting procedures, or additional reporting, recordkeeping or other paperwork above what is already required in existing regulation or existing practices.

The proposed waivers and inclusion of options for offsetting unavoidable aquatic resource impacts are expected to provide an overall time savings during the permit application process and would allow the Department to focus resources on projects that may pose a significant threat to public health, welfare, safety and the environment.

State governments are exempt from application or registration fees and SLLA charges. State and local governments will also benefit from the proposed new waivers, such as certain construction and maintenance activities associated with trails and wetland educational facilities.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The proposed revisions to existing regulations do not create any new legal, accounting or consulting procedures, or additional reporting, recordkeeping or other paperwork above what is already required in the existing regulation or existing practices.

(22a) Are forms required for implementation of the regulation?

New forms will not be necessary to implement this rulemaking. The Department would modify existing application forms and instructions to reflect the proposed revisions. The forms identified for modification include: Chapter 105 Fee Calculation Worksheet, Application for Transfer of Permit and

Submerged Lands License Agreement, Environmental Assessment form and instructions, registration forms and instructions for General Permits 1 through 11 and 15, the Chapter 105 Water Obstruction and Encroachment Joint Permit Application form and instructions and the Chapter 106 Floodplain Management Site Restoration Permit form and instructions.

The existing forms would be modified to incorporate the proposed amendments as follows: update cross-references to the applicable regulatory citations; amend the forms and instructions where necessary to incorporate language of the proposed Chapter 105 revisions; amend, reorganize and consolidate application information requirements under § 105.13(e) and the compensation requirements under § 105.20a; incorporate new proposed waivers under § 105.12(a); add new sections to the forms for waiver eligibility criteria under § 105.12, add a new section specific to aquatic resource restoration project requirements under § 105.15, add a new section pertaining to the discharge of dredged and fill material under § 105.401. These minor modifications are intended to be incorporated consistent with the proposed revisions.

Consistent with § 105.15(d), the Department would also be required to complete and publish environmental assessments for the six proposed new waivers under § 105.12(a)(17)–(22).

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here.** If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

The existing Chapter 105 application forms and instructions can be accessed on the Department's website at www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=4088.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$0	\$	\$	\$	\$	\$
Regulated Community	0	56,250	56,250	56,250	56,250	56,250
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	0	56,250	56,250	56,250	56,250	56,250
COSTS:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	0	0	0	0	0	0

REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	56,250	56,250	56,250	56,250	56,250
Total Revenue Losses	0	56,250	56,250	56,250	56,250	56,250

Although there may be fiscal savings and costs associated with implementation and compliance, such savings and costs are difficult to predict with any reasonable degree of precision for several reasons, including: (1) application fees for some Chapter 105 permits/authorization types vary with the size and scope of each project; and (2) the level of activity of the regulated community varies markedly depending on factors such as changing economic conditions, availability of funding, and contract negotiations. Further, no permit application fees are currently required for state or local governments, and no permit application fee changes are proposed in this rulemaking.

Two of the proposed waivers will eliminate costs associated with low-risk, minimal environmental impact or environmentally beneficial projects, such as trails and educational boardwalks, which will allow more non-profit groups, such as trail associations and environmental groups, to complete projects that would otherwise cost \$1,750 plus disturbance fees based on impact acreage (per tenth acre: \$4,000 temporary; \$8,000 permanent) for projects not qualifying for general permits, or \$350 per crossing for general permits. Another proposed waiver for temporary emergency placement of intakes used to withdraw water for fire protection will eliminate fee costs for farmers and volunteer fire companies that would otherwise cost \$1,750 plus disturbance fees based on impact acreage (per tenth acre: \$4,000 temporary; \$8,000 permanent) for projects not qualifying for general permits, or \$200 per structure for general permits.

The proposed change to allow projects that cross county boundaries to be submitted under one permit application or registration will result in additional cost savings for the regulated community. The Department estimates that it receives roughly 25 multi-county projects per year on average based on experience in recent years. Most of these applications are for linear projects from non-governmental entities, such as utilities, and typically span two counties. About 15 of those projects were individual permit applications. The applicant for an individual permit would save on not having to pay an additional \$1,750 administrative filing fee per county. The Department occasionally receives applications for long linear utility projects that cross several counties, and in those cases the applicant would save on the cost of the administrative filing fee based on the number of counties spanned by the project. The Department estimates four projects per year would fall into this category crossing four counties on average, which would roughly translate to a savings of \$5,250 per application.

The proposed amendment of SLLA annual charges for 26 groin structures in and along the shoreline of Lake Erie would result in a reduction of the annual charge of \$750 to an annual charge of \$250. This reduction could result in an annual savings to the regulated community from \$19,500 to \$6,500 or a total of \$13,000 annually.

The proposed amendments to § 105.35(c) would add exemptions to SLLA annual charges for environmentally beneficial projects and would result in annual cost savings for the regulated community for qualifying projects. The Department estimates that less than 10% of projects require an SLLA and

that roughly 7% incur charges. It is infeasible to estimate cost savings of this proposed regulatory change, as charges are based on the facility area needed to be occupied for which long term operation and maintenance activities may be necessary. Stream restoration projects on average span 3,000 linear feet, which would have incurred an annual fee of \$9,000. The Department estimates that one project of this type may occur in a 5-year period.

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY 2016-2017	FY 2017-2018	FY 2018-2019	FY 2019-2020 (Current/Projected)
Environmental Program Management (161-10382)	\$26,885,000	\$29,413,000	\$30,932,000	\$28,420,000
Environmental Protection Operations (160-10381)	\$86,462,000	\$89,215,000	\$93,190,000	\$84,523,000

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.

It is difficult to determine the number of small businesses that may seek to conduct a project in the future that would require a Chapter 105 permit to construct, operate and maintain a dam, water obstruction or encroachment, or that may seek to conduct activities that would otherwise be subject to the Chapter 105 regulatory requirements. The potential exists for small businesses in the agriculture, forestry, commercial and residential construction, transportation, utilities, mineral resources sectors; professional scientific, and technical services; and non-profit or similar organizations to be subject to the proposed rulemaking.

(b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.

The Board expects there to be reduced costs based on proposed waivers, exclusion of annual charges for some submerged lands license agreements, and inclusion of options for offsetting unavoidable aquatic resource impacts.

(c) A statement of probable effect on impacted small businesses.

Other than identified previously, no financial, economic or social impact from the proposed regulation is expected.

(d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

None. No adverse impact on small businesses are expected with this rulemaking.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

Proposed amendments include revised and new requirements to provide clarification of existing waivers, and to develop new permit waivers for certain low-risk activities. New permit waivers have been added for construction and maintenance of stream bank fencing associated with crop production; the construction, operation or removal of temporary environmental testing, monitoring or investigative activities; construction, operation and maintenance of single span water obstructions or encroachments related to passive, non-motorized recreational activities; temporary water obstructions or encroachments for emergency water withdrawal for agricultural and fire protection; and temporary wetland mats and pads for erosion and sediment control practices. Waiving permit requirements for these activities may be beneficial to small businesses, farmers, not-for-profit organizations, and other groups or individuals planning to conduct these activities.

The proposed new exemptions in § 105.35(c) from annual SLLA charges for a project or activity constructed and operated for the significant benefit of the environment, including exemptions for: restoration of aquatic resources; agricultural conservation practices; environmental reclamation or remediation; environmental treatment or clean-up; and other similar activities performed under a Department-authorized Chapter 105 permit or registration, would be beneficial to small businesses, farmers, and environmental or conservation groups seeking to conduct these types of projects or activities.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The proposed revisions clarify existing requirements and make the existing regulations easier to understand for the regulated community. The proposed revisions do not place any additional burden on the regulated community, so no alternative regulatory provisions were considered.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

a) The establishment of less stringent compliance or reporting requirements for small businesses;

This proposed rulemaking will not adversely affect small businesses, as neither the existing or proposed Chapter 105 regulations distinguish differing levels of permitting requirements, fees or charges based on the size of a business.

b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

This proposed rulemaking will not affect small businesses in this manner.

- c) The consolidation or simplification of compliance or reporting requirements for small businesses;

This proposed rulemaking will not affect small businesses in this manner.

- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation;

This proposed rulemaking will not affect small businesses in this manner.

- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

This proposed rulemaking will not exempt small businesses from any part of the requirements, as neither the existing Chapter 105 regulations nor proposed amendments to this chapter distinguish differing levels of permitting requirements, fees or charges based on the size of a business.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

The proposed changes to this regulation are not based on data.

(29) Include a schedule for review of the regulation including:

- | | |
|-----------------------------------------------------------------------------------------------|--------------------------------|
| A. The length of the public comment period: | 60 days |
| B. The date or dates on which any public meetings or hearings will be held: | None scheduled |
| C. The expected date of delivery of the final-form regulation: | Quarter 3, 2021 |
| D. The expected effective date of the final-form regulation: | Quarter 4, 2021 |
| E. The expected date by which compliance with the final-form regulation will be required: | Final Pa. Bulletin publication |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | Final Pa. Bulletin publication |

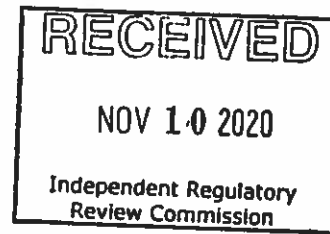
(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Department will continue to closely monitor these regulations for their effectiveness and recommend updates as necessary.

CDL-1

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
BUREAU**

(Pursuant to Commonwealth Documents Law)



DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality,
Attorney General

By: **Amy M. Elliott**
(Deputy Attorney General)
Digitally signed by Amy M. Elliott
DN: cn=Amy M. Elliott, o=Pennsylvania
Office of Attorney General, email=Amy.Elliott@state.pa.gov,
c=US
Date: 2020.10.14 11:51:26 -0400

10/14/20

DATE OF APPROVAL

☒ Check if applicable
Copy not approved. Objections attached.


Copy below is hereby certified to be true and
correct copy of a document issued, prescribed or
promulgated by:

**DEPARTMENT OF ENVIRONMENTAL
PROTECTION
ENVIRONMENTAL QUALITY BOARD**

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-556

DATE OF ADOPTION JULY 21, 2020

BY 

TITLE **PATRICK MCDONNELL
CHAIRPERSON**

EXECUTIVE OFFICER CHAIRPERSON OR SECRETARY

Copy below is hereby approved as to form and legality
Executive or Independent Agencies

BY 

DATE OF APPROVAL

8/11/2020
(Deputy General Counsel)
(Chief Counsel - Independent Agency)
--- (Strike inapplicable title) ---

☒ Check if applicable. No Attorney General Approval
or objection within 30 days after submission.

NOTICE OF PROPOSED RULEMAKING

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

Dam Safety and Waterway Management

25 Pa. Code Chapter 105

**PROPOSED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
[25 PA CODE CH. 105]
Dam Safety and Waterway Management**

The Environmental Quality Board (Board) proposes to amend Chapter 105 (relating to Dam Safety and Waterway Management) to read as set forth in Annex A. This proposed rulemaking would amend Chapter 105 to clarify existing regulations; delete or update obsolete and antiquated requirements; incorporate new or revised definitions to support the proposed amendments and clarify existing regulations; and correct previous typographical errors discovered in certain sections of Chapter 105. The new and amended sections are §§ 105.1, 105.3, 105.4, 105.12—17, 105.18a, 105.20a, 105.21, 105.25, 105.35, 105.43, 105.47, 105.53, 105.81, 105.82, 105.89, 105.96—105.98, 105.121—123, 105.134, 105.161, 105.171, 105.245, 105.401, 105.411, 105.446, 105.451 and 105.452.

This proposed rulemaking would amend this Chapter 105 to add structures and activities eligible for a permit waiver and clarify existing waivers, add antidegradation and cumulative impacts subsections to the applicant information requirements and revise existing information requirements for better clarity and organization, provide a new option for dam owners to satisfy proof of financial responsibility obligations, amend the environmental assessment section to add application information requirements specific to environmentally beneficial projects, amend the Wetland replacement criteria section to update provisions relating to the compensatory mitigation framework for unavoidable impacts to aquatic resources and their aquatic resource functions, add notice of transfer requirements for the owners of dams eligible for a permit waiver, add new structures and activities that may be exempt from submerged lands licensing charges, require periodic inspections by high hazard dam owners and update the application information requirements for projects seeking to discharge dredged or fill material into aquatic resources. This proposed rulemaking would amend various sections of Chapter 105 to further clarify existing requirements, delete or update obsolete requirements and correct previously identified typographical errors. The proposed rulemaking would add or revise definitions to support these revisions.

This proposed rulemaking was adopted by the Board at its meeting on July 21, 2020.

A. Effective Date

These amendments will be effective upon final-form publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information contact Pamela Kania, Acting Director, Bureau of Waterways Engineering and Wetlands, P.O. Box 8460, Rachel Carson State Office Building, Harrisburg, PA 17105-8460, (717) 787-3411, or Jesse C. Walker, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding the submittal of comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling

1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov ("Public Participation Center," select "Environmental Quality Board (EQB)").

C. Statutory Authority

This proposed rulemaking is authorized under sections 5, 7, 10, 11 and 17 of the Dam Safety and Encroachments Act (act) (32 P.S. §§ 693.5, 693.7, 693.10, 693.11 and 693.17); sections 5 and 402 of The Clean Streams Law (35 P.S. §§ 691.5 and 691.402); sections 302 and 402 of the Flood Plain Management Act (32 P.S. §§ 679.302 and 679.402); section 11(2) of the Conservation District Law (3 P.S. § 859(2)); and sections 514(a), 1901-A(1) and (20), 1908-A, 1917-A and 1920-A of The Administrative Code of 1929 (71 P.S. §§ 194(a), 510-1(1) and (20), 510-8, 510-17 and 510-20), unless otherwise noted.

D. Background and Purpose

Pennsylvania's Dam Safety and Waterway Management regulations are codified at Chapter 105. Under section 2 of the act (32 P.S. § 693.2), the Department regulates dams and other water obstructions and encroachments located in, along or across or projecting into aquatic resources to: protect the health, safety, welfare and property of the people; assure proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs; assure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments; and 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. *See also* 25 Pa. Code § 105.2.

This Commonwealth's Chapter 105 wetland protection and dam safety regulatory program has traditionally been one of the leading wetlands and dam safety programs in the mid-Atlantic states, as well as nationally. 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. 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.

The purpose of this proposed rulemaking is to amend Chapter 105 to strengthen the Department's implementation of the dam safety, and water obstruction and encroachment programs, provide clarity for project applicants and the public on existing regulations, and enable the Department and local delegated agencies to utilize resources in a more effective and efficient manner. The proposed amendments would revise several sections of Chapter 105 to clarify existing requirements; delete or update obsolete and antiquated requirements; incorporate new or revised definitions to support proposed amendments and existing terminology used in Chapter 105; integrate new or revised sections by codifying existing requirements; and correct previous typographical errors.

Regulatory History

Pennsylvania has a long history of regulating dams, water obstructions and encroachments. The Act of June 8, 1907 (P.L. 496, No. 332) established the Pennsylvania Navigation Commission for the Delaware River and authorized the Commission to issue licenses for the construction, extension, alteration, improvement and repair of wharves, piers, bulkheads, docks, slips and basins along the waterfront. As a result of the Austin Dam failure in Potter County on September 30, 1911, which claimed 78 lives, the General Assembly enacted the Water Obstructions Act — act of June 25, 1913 (P.L. 555, No. 355), to enable a Department predecessor, the Water Supply Commission, to regulate dams, water obstructions and encroachments in the Commonwealth. The Department's predecessor, the Department of Environmental Resources (DER), adopted the initial Title 25, Chapter 105 regulations (relating to water obstructions and encroachments) on September 11, 1971 (1 Pa.B. 1804).

The General Assembly recognized the need for this Commonwealth's dredged and fill program to contain proper inspection and enforcement provisions after the failure of the Laurel Run Dam, Sandy Run Dam and four others near Johnstown, Pennsylvania, in 1977. The General Assembly repealed the Water Obstructions Act and enacted the act on November 26, 1978 (P.L. 1375, No. 325). The act provided for the regulation of dams, water obstructions and encroachments; consolidated and clarified the programs of DER and the Commissions; established penalties; and repealed certain acts. The General Assembly amended the act on October 23, 1979 (P.L. 204, No. 70). On September 26, 1980, the Board rescinded the entire 25 Pa. Code Chapter 105 and adopted new Chapter 105 regulations under the authority of the act and The Clean Streams Law (10 Pa.B. 3843).

The Board promulgated the last comprehensive revisions of the Chapter 105 regulations on October 11, 1991 (21 Pa.B. 4911). The main purpose of those amendments was to ensure more adequate protection of wetlands in Pennsylvania by establishing more specific information requirements for the permitting of structures and activities in wetlands, clear standards for permit review, and specific criteria for wetlands replacement. *Id.* In addition, the 1991 rulemaking sought to streamline permitting, and better focus the Department's resources through the addition of: a simpler permitting process for small projects; additional categories eligible for waiver of permit requirements; authority to issue emergency permits; creation of a simplified transfer process; and other administrative changes. *Id.*

The Board promulgated amendments to Chapter 105 on January 7, 2011 to address issues pertaining to dams and reservoirs (41 Pa.B. 219). Specifically, those amendments clarified dam permit and engineering requirements necessary for the proper design and construction of dams, updated dam classification categories and improved protection of the public by providing the Department with the ability to remove or modify unsafe or deficient high-hazard dams. The amendments also provided five years for owners to comply with proof of financial responsibility or security for the operation and maintenance or permit approval for existing Hazard Potential Category 1 or Category 2 dams, as classified in § 105.91 (relating to classification of dams and reservoirs), and water obstructions or encroachments, which present a substantial risk to life or property.

The proposed amendments are consistent with section 2 of the act (32 P.S. § 693.2) and sections 5 and 402 of the Clean Streams Law. The proposed amendments would protect the health, safety, welfare and property of Pennsylvania residents; ensure proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs; ensure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments; and enhance the protection of natural resources, environmental rights and values, and conserve and protect the water quality, natural regime and carrying capacity of watercourses.

Federal Consistency and Coordination

This proposed rulemaking is consistent with the Commonwealth's authority under the Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1388), as amended. Under section 510 of the Clean Water Act, the function of developing water quality standards and antidegradation implementation requirements has long been a function reserved to the states. 33 U.S.C.A. § 1370. See also 40 CFR 131.4. Section 303 of the Clean Water Act (33 U.S.C.A. § 1313), authorizes states to establish water quality standards within their jurisdictions. In section 303(a)(2) of the Clean Water Act (33 U.S.C.A. § 1313(a)(2)), Congress mandates that the state water quality standards adopted by states pursuant to their own laws prior to October 18, 1972, remain in effect unless the U.S. Environmental Protection Agency (EPA) determines they are inconsistent with the Clean Water Act. Section 303(c)(1) of the Clean Water Act (33 U.S.C.A. § 1313(c)(1)), gives states the authority to review and revise water quality standards for surface waters within their borders.

The Commonwealth's water quality standards in 25 Pa. Code Chapters 93, 96 and 105 have been promulgated by the Board under The Clean Streams Law (35 P.S. §§ 691.1—691.1001), enacted in 1937. The Department's 25 Pa. Code Chapter 96 regulations implement the Chapter 93 water quality standards. Section 96.3(b) provides that antidegradation requirements found in §§ 105.1, 105.15, 105.17, 105.18a, 105.20a and 105.451 shall apply to surface waters. In addition, § 96.3(g) establishes that the functions and values of wetlands shall be protected pursuant to Chapters 93 and 105. EPA has approved Pennsylvania's antidegradation regulations as meeting the federal requirements at 40 CFR 131.12. 75 FR 29899-29900 (May 28, 2010). Upon the Board's promulgation of this proposed rule as a final-form regulation, the Department will submit the final-form regulation to EPA for approval as an amendment to Pennsylvania's water quality standards in effect for Clean Water Act purposes.

This proposed rulemaking would be consistent with the Department's coordination efforts with the U.S. Army Corps of Engineers (Corps) under section 17(d) of the act (32 P.S. § 693.17(d)). See also 25 Pa. Code § 105.24 (relating to coordination of permits). Section 404(e) of the Clean Water Act (CWA) (33 U.S.C.A. § 1344(e)), provides for the issuance of Department of the Army (DA) general permits (GPs) on a statewide basis, which operate in conjunction with a State regulatory program that protects the aquatic environment in a manner that the Corps has determined to be equivalent to the DA regulatory program, provided that the activities permitted under each category of such GPs are similar in nature and result in no more than minimal individual or cumulative adverse effects on the aquatic environment. The Department's coordination process is undertaken through the implementation of the Pennsylvania State Programmatic General Permit (PASPGP) which has been issued by the Corps in Pennsylvania pursuant to Clean Water Act Section 404(e) since 1991 and is based upon consistency with the

requirements of 40 CFR, Part 230 (relating to section 404(b)(1) guidelines for specification of disposal sites for dredged or fill material). The Department and Corps also utilize a joint permit application form to coordinate efficient processing of applications for larger scale projects. The Department coordinates with the Corps and other state and federal agencies and commissions regarding projects that require compensatory mitigation through the PASPGP and joint permitting processes.

On April 10, 2008, the U.S. Environmental Protection Agency and the Corps, through a joint final rule entitled *Compensatory Mitigation for Losses of Aquatic Resources* (2008 Mitigation Rule), amended 33 CFR chapter II by adding Part 332 (relating to compensatory mitigation for losses of aquatic resources) and 40 CFR Part 230, by adding subpart J (relating to compensatory mitigation for losses of aquatic resources), respectively, to include more comprehensive standards for compensatory mitigation (73 FR 19594). Compensatory mitigation involves actions taken to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources authorized by Department of the Army permits, after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem pursuant to 40 CFR Part 230. See 40 CFR 230.93(a)(1) and 33 CFR 332.3(a)(1). The Corps defines compensatory mitigation as restoration, establishment, enhancement, and/or preservation of aquatic resources to offset unavoidable impacts to waters of the United States. 40 CFR 293.92 (relating to definition of compensatory mitigation).

The Department has its own authority to require mitigation for impacts to aquatic resources and aquatic resource functions that cannot be eliminated. The purpose of the act is, among other things, to “[p]rotect the natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses.” 32 P.S. § 693.2; See also, 25 Pa. Code § 105.2. Under Section 4 of The Clean Streams Law, “[i]t is the objective of the Clean Streams Law not only to prevent further pollution of waters of the Commonwealth, but to also reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted.” 35 P.S. § 691.4. See also 35 P.S. § 691.5. The existing definition of *mitigation* in Chapter 105 requires project proponents to: (A) Avoid and minimize impacts by limiting the degree or magnitude of the action and its implementation. (B) Rectify the impact by repairing, rehabilitating or restoring the impacted environment. (C) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action. If the impact cannot be eliminated by following clauses (A) –(C), compensate for the impact by replacing the environment impacted by the project or by providing substitute resources or environments. 25 Pa. Code § 105.1. Mitigation is incorporated throughout this chapter under §§ 105.13(e), 105.16, 105.18a and 105.20a.

Consistent with the Department’s authority under the act, The Clean Streams Law and existing Chapter 105 requirements relating to mitigation, this proposed rulemaking would amend § 105.20a (relating to wetland replacement criteria) to update provisions relating to the compensatory mitigation framework for proposed impacts to aquatic resources and aquatic resource functions that cannot be eliminated. These revisions include the addition of siting criteria for compensatory mitigation projects, compensation factors, acceptable methodologies and monitoring and performance standards. This proposed rulemaking would add the definition of “aquatic resources” and “aquatic resource functions” to support these revisions and further

coordination efforts with the Corps during its implementation of the 2008 Mitigation Rule under 40 CFR 230, subpart J. These proposed amendments to § 105.20a are generally consistent with the EPA and Corps 2008 Federal Mitigation Rule by: (1) maintaining a “no net loss” of wetlands requirement; (2) revising siting criteria on a watershed basis; (3) providing for mitigation banking, in-lieu fee, and permittee responsible mitigation options; and (4) requiring financial assurances for long-term management and protection of a compensation site.

Although the Federal government does not have companion dam safety regulations for non-federal dams, this proposed rulemaking would revise the terminology used in Chapter 105 relating to stability of dam structures while utilizing appropriate uplift pressures, ice loads, and silt loads to make it consistent with the Corps’ standard design terminology and manual.

This proposed rulemaking would also amend references to the determination of prior converted cropland for agricultural crop production purposes in § 105.452 (relating to status of prior converted cropland — statement of policy) to provide further clarity. This proposed revision would be consistent with the Federal guidance provided by the United States Department of Agriculture (USDA) *National Food Security Act Manual*.

Consultations

In developing this proposed rulemaking, the Department sought input from principal stakeholders that would be affected by the proposed amendments. The Department’s outreach included participation in a Chapter 105 Agricultural Workgroup consisting of the U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS); Pennsylvania Department of Agriculture (PDA), State Conservation Commission (SCC); Pennsylvania Association of Conservation Districts (PACD), Pennsylvania Department of Conservation and Natural Resources (DCNR), representatives from select county conservation districts; and the Pennsylvania State University, Dirt, Gravel and Low Volume Road program.

The Department has solicited input from Commonwealth agencies and commissions during the development of this proposed rulemaking, including DCNR, PDA, the Department of Transportation, the Fish and Boat Commission, and the Turnpike Commission. The Department also conducted a separate workgroup with PACD. There are currently 34 conservation districts that the Department has delegated Chapter 105 authority in the Commonwealth. These delegated conservation districts would be affected by the proposed rulemaking as co-regulators. The workgroup included both delegated and non-delegated conservation districts.

On February 29, 2020, the Department provided a presentation of this proposed rulemaking to the Pennsylvania Chamber of Business and Industry and provided an opportunity for feedback.

The Department consulted the Agricultural Advisory Board (AAB) and Water Resources Advisory Committee (WRAC) on the proposed rulemaking. The Department provided pre-proposal updates to WRAC on July 25, 2019 and the AAB on November 12, 2019. On January 27, 2020, and January 30, 2020, respectively, the AAB and WRAC unanimously concurred with the Department’s recommendation to move this proposed rulemaking forward to the Board for consideration for adoption and publication as a proposed rulemaking for public comment.

The Department conferred with the SCC on November 12, 2019 and February 11, 2020, and the Citizens Advisory Council (CAC) on November 19, 2019 and February 18, 2020. This proposed rulemaking is consistent with sections 2, 5, 7, 10, 11 and 17 of the act and sections 5 and 402 of the Clean Streams Law. The Board is proposing to adopt these amendments to the Chapter 105 Dam Safety and Waterways Management Regulations.

E. Summary of Regulatory Requirements

A summary of the proposed amendments to Chapter 105 in this rulemaking and the purpose for each proposed amendment is provided below.

§ 105.1. Definitions

This proposed rulemaking would revise § 105.1 to amend the terms “Cross section,” “Incremental dam breach analysis,” “Levee,” “Stormwater management facilities,” and “Wetland functions” and add the terms “Abandonment,” “Aquatic resources,” “Aquatic resource functions,” “Aquatic resource impacts,” “Conservation district,” “Crop production,” “Groin structure,” “Maintenance,” “Probable Maximum Flood (PMF),” “Probable Maximum Precipitation (PMP),” “Project,” “Project purpose,” “Reservoir,” “Restoration,” “Service areas” and “Water dependent” to support the proposed amendments to Chapter 105. The proposed rulemaking would delete and replace the term “PMF”.

“Abandonment” is proposed to be added as a defined term. This term is used extensively in Chapter 105, but has not been previously defined. The identification of the discontinued construction, or operation and maintenance of a dam, water obstruction or encroachment is crucial to provide a clear understanding of the term as it is used in this chapter. The addition of this definition would provide further clarity to the meaning and use of the term in Chapter 105 as opposed to how this term is interpreted to constitute deactivation from service under the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration regulations at 49 CFR 192.3 (definition of abandoned) and 49 CFR 192.727 (relating to abandonment or deactivation of facilities).

“Aquatic resources” is proposed to be added to support the proposed amendments to §§ 105.15 and 105.20a. This term is defined as “regulated waters of this Commonwealth” to provide a more convenient use of the terminology in the proposed revisions. This proposed term would also serve the additional purpose of building a bridge between the Department and Corps regulatory programs for coordination purposes under section 17(d) of the act.

“Aquatic resource functions” is proposed to be added as a new definition to support amendments to this chapter, including amendments to § 105.20a. This new definition identifies ecosystem services that result from the chemical, physical, or biological processes that occur in “aquatic resources” as defined in § 105.1, including hydrologic, biogeochemical and habitat functions as recognized under current environmental principles and practices. This terminology is used in the Department’s functional assessment protocol and compensatory mitigation technical guidance documents and for coordination purposes with the Corps under the 2008 *Compensatory Mitigation for Losses of Aquatic Resources* final rule (73 FR 19594).

This proposed rulemaking would add the definition “Aquatic resource impacts”. This new definition would be added to support the proposed amendments to §§ 105.13(x) and 105.20a. The terms direct and indirect impacts are already defined in the Department’s environmental assessment form instructions (3150-PM-BWEW0017) and the term secondary impacts is already defined under the factors the Department will consider when making a determination of impact under § 105.14(b)(12). Aquatic resource impact assessments do not refer to evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93.

“Conservation district” is proposed for addition to clearly identify a delegated conservation district is one that has authority under the Conservation District Law (3 P.S. § 851(c)) in this Commonwealth to administer and enforce all or a portion of the program covered under delegation from the Department.

“Crop production” is proposed to be added to § 105.1. This term was previously included in § 105.12(a)(7), but moved to § 105.1, as the term is used in other sections of Chapter 105.

This proposed rulemaking would amend the definition of “Cross section” to provide clarity and consistency for all regulated waters of the Commonwealth covered by this chapter.

The proposed rulemaking would define “Groin structure”. This term is proposed for addition to identify a specific structure used for controlling wave action, shore erosion or for trapping and accumulating sand. The term is predominately used for the activities in and along the Lake Erie shoreline, and in the context of submerged lands license agreements.

“Incremental dam breach analysis (IDBA)” is proposed to be amended to add the acronym to the term, since this acronym is used elsewhere in the proposed rulemaking.

“Levee” is proposed to be amended to correct a reference to the term watercourse.

“Maintenance” is proposed to be added as a defined term to identify that periodic activities may be conducted to preserve the condition of a dam, water obstruction or encroachment as authorized by the Department. This new definition provides further clarity for the regulated community and general public as the term is used frequently throughout this chapter.

This proposed rulemaking would delete “PMF”. The Board proposes to add a new definition of “Probable Maximum Flood (PMF)” to replace this definition.

“Probable Maximum Flood (PMF)” is proposed to be added as a new defined term to include precipitation data from site-specific studies when such studies are available as opposed to just data from the National Oceanographic and Atmospheric Administration (NOAA). This would enable the use of alternative studies that are available. This term would replace the current definition of “PMF”.

This proposed rulemaking would add “Probable Maximum Precipitation (PMP)” to identify the depth of precipitation for dam safety design purposes. This proposed definition would specify that the PMP may be derived from using the most recently published Probable Maximum Precipitation Study for Pennsylvania or by completion of a detailed site-specific study.

“Project” is proposed to be added as a new defined term to clearly identify the geographic area of the site which needs to be considered when a proposed or existing dam, water obstruction or encroachment is being considered.

“Project purpose” is proposed to be added as a defined term to clarify that an applicant must provide a description of the proposed structures and activities that may impact aquatic resources, for which the applicant is seeking a permit authorization, and the necessity for the proposed project to be located in or in close proximity to aquatic resources.

This proposed rulemaking would add the term “Reservoir”. This term is already defined in section 3 of the act (32 P.S. § 693.3), used extensively in this chapter and is distinguishable as a certain type of jurisdictional body of water.

This proposed rulemaking would add the term “Restoration”. This term is already used in Chapter 105 and would be added to support the existing permit waiver for restoration activities under § 105.12(a)(16) and proposed amendments to § 105.15 relating to the information requirements for projects proposing the restoration of aquatic resources.

“Service areas” is proposed to be added as a defined term to support proposed language under § 105.20a(b) and (c) relating to the siting of compensatory mitigation.

The proposed rulemaking would amend the existing definition “Stormwater management facilities” to improve applicability, provide clarity, and update the terminology used for man-made stormwater management facilities.

“Water dependent” is a new proposed defined term to support proposed amendments and the existing use of the term in this chapter. The term is proposed for addition to § 105.1 since it is used in multiple sections and would clarify the demonstration that an applicant needs to make as part of a permit application when proposing a dam, water obstruction, encroachment in or in close proximity to aquatic resources.

The proposed rulemaking would amend and update the existing definition “Wetland functions” to include other aquatic resource functions that may be recognized using current scientific principles.

§ 105.3. Scope

Proposed subsection (b) would update current elevation data for Lake Erie and allow for the incorporation of future updates from the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), National Geodetic Survey (NGS) International Great Lakes Datum elevation criteria.

§ 105.4. Delegation to local agencies

Proposed subsections (b) and (e) would be amended to incorporate the authorization of general permit registrations. These amendments would more accurately reflect the terminology that is

used for permits and registrations and distinguish that water obstruction and encroachment permits may be issued or general permit registrations may be authorized depending on the level of delegation.

§ 105.12. Waiver of permit requirements

The Board is proposing to amend subsection (a) to revise or clarify existing waivers and add permit waivers for certain low impact structures and activities. The addition of the proposed waivers for certain low impact structures and activities would enable the Department to more effectively and efficiently utilize its resources, while enabling those structures and activities to be conducted without delay. The proposed structures and activities eligible for waiver under this subsection would be required to comply with requirements of the act and this chapter. Subsection (b) would be revised to provide further clarity. The Board would revise current subsection (c) to add criteria to limit eligibility for a structure or activity to qualify for a waiver in subsection (a). A new proposed subsection (d) would be added to retain the current requirements of existing subsection (c).

Subsection (a) is proposed to be amended to clarify existing waivers and add permit waivers for certain low impact structures and activities. Amendments would also make eligibility for a waiver under subsection (a) subject to the new proposed eligibility criteria in subsection (c) and compliance with this chapter under new subsection (d).

Subsection 105.12(a)(1) would be amended to include the formal title of the Pennsylvania Fish and Boat Commission.

Subsection 105.12(a)(2) would be amended to provide a waiver for a water obstruction or encroachment in a stream or floodway with a drainage area of 100 acres or less. This existing waiver is proposed to be amended to ensure that the water obstruction or encroachment does not impede flow or aquatic life passage. The amendments to subsection (a)(2) would further specify that a water obstruction or encroachment proposing to impact a wetland in a floodway, or a stream enclosure is not eligible for this waiver.

Subsection 105.12(a)(3) would be amended to include clarifying deletions and additions. The proposed deletion of “nonnavigable” would be addressed through a blanket restriction for the applicability of waivers where otherwise eligible structures and activities would occur in submerged lands of the Commonwealth under new proposed subsection (c). The eligibility restriction for monopoles or single poles with concrete foundations or pilings is proposed to address large diameter structures located in or along a stream or wetland.

Subsection 105.12(a)(4) would be amended to correct the Hazard Potential Classification for mine related dams eligible for a waiver. The current Hazard Potential Classification “3” is an overlooked error and would be corrected to Category “4” to correspond to the new dam classifications established under the 2011 amendments to Chapter 105 (41 Pa.B. 219; January 7, 2011).

Subsection 105.12(a)(7) would be amended to remove the definition of “crop production”. This term was moved to § 105.1 as it is used in other sections of this chapter.

Subsection 105.12(a)(9) would be amended to reference the new proposed term “aquatic resources”.

Subsection 105.12(a)(11) would be amended to provide further clarity regarding use of this waiver to remove dams, water obstructions and encroachments and abandon water obstructions or encroachments. The revisions to this subsection are consistent with subsections 105.47(b) and (c) and intended to specify that an applicant can submit an environmental assessment form under § 105.15 to demonstrate eligibility for this waiver.

Subsection 105.12(a)(16) would be amended to incorporate the current requirement for an applicant seeking to conduct restoration activities to provide an environmental assessment under § 105.15.

Subsection 105.12(a)(17) is proposed as a new subsection that would allow the construction and maintenance of a streambank fencing conservation practice associated with crop production or a temporary fencing for protection of a conservation planting or practice located in or along a body of water, along watercourses and along or in their floodways or along a lake, pond or reservoir. This amendment is intended to include protective fencing for riparian buffers. This proposed waiver is not intended for fencing that would collect flood debris or restrict the flow of a body of water or watercourse or that would extend across a stream or watercourse.

Subsection 105.12(a)(18) is proposed as a new subsection that would waive authorized water obstruction or encroachment permit requirements for low impact and non-motorized recreational activities such as walking or biking trails with certain specific length and design restrictions. This waiver would require the development and submittal of a plan to the Department for approval and would specify the information that must be provided in the plan submittal.

Subsection 105.12(a)(19) is proposed as a new subsection that would waive authorized elevated boardwalks in wetlands when utilized for educational and interpretive purposes. This waiver would require the development and submittal of a plan to the Department for approval and would specify the information that must be provided in the plan submittal.

Subsection 105.12(a)(20) is proposed as a new subsection that would waive permit requirements for the temporary emergency placement, operation and maintenance of a water obstruction or encroachment for water withdrawal, including dry fire hydrants for crop production or fire protection. The water obstruction or encroachment for water withdrawal may not alter the bed or bank of the watercourse or body of water. This waiver would not apply to parking or other areas for ancillary activities.

Subsection 105.12(a)(21) is proposed as a new subsection that would waive water obstruction or encroachment permit requirements for archeological, geotechnical or environmental testing, monitoring activities, or investigative activities of a temporary nature. This waiver would

include boring or placement of sensors to sample or test soil or rock material and other similar activities, but would not apply to parking or other ancillary areas.

Subsection 105.12(a)(22) is proposed as a new subsection that would waive the placement, maintenance and removal of temporary mats and pads used as a best management practice for minimizing erosion and sedimentation at wetland crossings. This new subsection would further specify that the wetland must be fully restored to its pre-existing condition after the removal of the temporary mats and pads.

Subsection 105.12(b)(1) would be revised to provide further clarity. This subsection would replace the term “nonnavigable” with submerged lands of this Commonwealth, a defined term in § 105.1.

Subsection 105.12(c) would be revised to add circumstances which would limit the eligibility of a structure or activity for a permit waiver under subsection 105.12(a). The proposed circumstances that would limit eligibility for a permit waiver have been identified by the Department as warranting additional review through the Chapter 105 permitting process due to the Commonwealth’s public trustee obligations. 25 Pa. Code § 105.2(4); see also 25 Pa. Code § 105.21.

Subsection (d) would be added to incorporate the requirements under existing § 105.12(c). This new subsection would also specify that a structure or activity eligible for a waiver under section 105.12 must be properly designed.

§ 105.13. Regulated activities—information and fees

The proposed amendments to this section would: incorporate updated processes for submitting payment to the Department; provide applicants with the option to submit the disturbance review fee during technical review; clarify the type of dam permit transfers that are subject to the existing fees; eliminate redundancy in the permit application process; and clarify existing requirements regarding what information a project applicant must submit to the Department for review as part of a permit application. The proposed amendments to subsection 105.13(e) would provide further specificity for applicants regarding existing information requirements such as, the cumulative impact analysis, water dependency demonstration, a stormwater management demonstration, floodplain management consistency, alternatives analysis, antidegradation analysis, impacts analysis and mitigation plan. The proposed amendments to this section would also identify authorized signatories on a Chapter 105 application and add subsection (j), to clearly set forth the seal requirements for geologists and engineers. Subsection (k) would be amended to specify that the Department has the discretion to waive specific information requirements under this chapter for restoration projects and other similar activities.

Subsection 105.13(a) would be amended to specify that an applicant may submit permit application or registration fees to the Department by check or other forms of payment. Other methods of payment acceptable to the Department would include electronic transactions. Subsection (a) would also incorporate the use of electronic systems for the submission of applications or registrations.

Subsection 105.13(c)(1)(vii) would be revised to correct the type of dam permit transfers associated with existing fees. The fees in this subsection were initially published in reverse order by error. The fee for a dam permit transfer for dams classified as hazard potential category 1 or 2 under § 105.91, for which proof of financial responsibility is required under § 105.13b, would be \$550. The fee for a dam permit transfer for dams classified as hazard potential category 3 or 4 under § 105.91, for which no proof of financial responsibility is required under § 105.13b, would be \$300.

Subsection 105.13(c)(2)(iii)(A) would be amended to provide applicants with the option to submit the disturbance review fee to the Department during the technical or eligibility review and specify that the entire disturbance review fee due must be submitted before the Department's decision on a permit application. This subsection would also be amended to explain how the Department calculates a disturbance review fee for a project. These proposed revisions reflect that the Department works with the applicant to avoid and minimize impacts during the permit application process and are also being proposed to address the practical reality that the scope and purpose of an applicant's proposed project may change after the submission of a permit application and administrative filing fee.

Subsection 105.13(d) would be amended to provide flexibility for applicants relating to permit applications for single projects located in more than one county. This subsection would be amended to allow for the submission of a single permit application for a single project proposed to be located in more than one county. This proposed amendment would benefit applicants by eliminating the need for the submission of multiple permit applications with redundant information and additional fees for the same project. A consolidated permit application review for multi-county projects is practical because the Department now has a more efficient means of reviewing Chapter 105 applications through electronic permitting. In addition to better organization of application material for a single project, the Department would benefit in terms of staffing needs for reviewing multi-county projects.

Subsection 105.13(e) would be amended to provide further clarity regarding existing application requirements. In some instances, current subsection (e) contains permit application components that are already required for the Department's review under § 105.14 but lacks specificity as to what information the applicant must submit to the Department as part of a permit application. The proposed revisions by the Board would provide better clarity and organization regarding the information that is required to be submitted, and therefore, would improve the quality of the application submittals to the Department.

Subsection 105.13(e)(1) would be amended to specify that applicants must conduct a field verification of aquatic resources, and identify proposed temporary and permanent structures or activities as part of a permit application submittal for a dam, water obstruction or encroachment. Proposed revisions to § 105.13(e)(1)(i)(G) clarify what cross sections must contain to be acceptable to the Department and would prevent inconsistent application submittals in this respect. Proposed revisions to § 105.13(e)(1)(iii) would specify the manner in which an applicant is required to meet project description requirements and specifically provides information on what demonstration an applicant must provide to show that a project is water dependent. This amendment would set forth that the dependency must be based on the

unavailability of practicable alternatives. *Clean Air Council et al. v. DEP*, (“*Clean Air Council*”) 2018 EHB 35, 40 (“[a]n alternative is not really available if it is not practicable.”); *see also Del. Riverkeeper Network v. Sec’y of the Pa. Dep’t of Env’tl. Prot.*, (“*Del. Riverkeeper Network*”) 870 F.3d 171, 183 (3d Cir. 2017).

Subsection 105.13(e)(1)(v) and (vi) would be revised to clarify stormwater management demonstration and floodplain management consistency requirements. These proposed revisions are intended to provide further clarity regarding what the applicant is responsible for submitting as part of a permit application and under what standards the Department will review these demonstrations.

Subsection 105.13(e)(1)(vii) would be amended to specify what information requirements should be included for the risk assessment in coastal zone management areas. The proposed amendment specifies that the applicant include an evaluation of short-term and long-term water elevation changes projected by the National Oceanic and Atmospheric Administration.

Subsections 105.13(e)(1)(viii)—(xiii) would be amended to specify what information requirements an applicant must provide as part of the application review process. These particular information requirements have been the subject of frequent technical deficiency letters throughout the history of the Department’s implementation of the Chapter 105 program. The proposed amendments would improve the quality of application submittals. The proposed amendments would incorporate existing requirements for a project alternative demonstration for wetlands under §§ 105.18a(a)(3) and (b)(3) and other aquatic resources under § 105.16. The proposed amendments would also require the applicant to consider reasonably foreseeable development within the watershed when assessing alternatives to ensure that impacts are avoided and minimized to the maximum extent practicable.

Proposed amendments to § 105.13(e)(1)(ix) would specify what information an applicant must include in a mitigation plan and would add a cross reference to other mitigation requirements in § 105.20a (relating to compensation for impacts to aquatic resources). Proposed amendments to § 105.13(e)(1)(x) would provide further specificity regarding what an applicant’s impacts analysis must include. The proposed reorganization of this subsection is intended to be consistent with the factors the Department uses to make a determination of impact under §§ 105.14(b)(1)—(5) and 105.14(b)(12) and would incorporate the terms “direct impacts” and “indirect impacts” from the existing environmental assessment form and “secondary impacts” from existing subsection 105.14(b)(12) under aquatic resource impacts in proposed subsection 105.13(e)(1)(x)(D). The new definition of “aquatic resource impacts” would be added to § 105.1 to support these amendments. The proposed amendments would also clarify that the impacts analysis is not the same as evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93. Finally, the Board is proposing to add new subparagraphs 105.13(e)(1)(xii) relating to antidegradation and (xiii) relating to cumulative impact analysis to incorporate existing factors that the Department evaluates to make a determination of impact under § 105.14(b) into the information requirements section. These proposed additions to subsection 105.13(e) would provide better clarity and organization for applicants regarding what an applicant’s demonstration or analysis must include to meet these existing requirements as part of an application submittal.

Subsection 105.13(e)(4) would be amended to incorporate flexibility for the Department, conservation district or delegated local agency regarding the period for applicants to submit information to remedy incomplete applications or registrations and information requirements. Under this proposed revision, the Department, conservation district or delegated local agency would make a case-by-case determination regarding how long of an extension the applicant should have to remedy an inadequate application or registration submittal. Through the current implementation of the Chapter 105 program, the Department has determined that some incompleteness items do not warrant the current full 60 day period. The proposed revisions to this subsection would help the Department, conservation districts and local agencies process applications in a more efficient manner and avoid backlogs. Applicants would still be able to request a specific extension to the Department, conservation district or delegated local agency, in writing, and would be required to provide justification for the extension as part of a request. The proposed revisions to this subsection would also add a cross-reference to § 105.21 (relating to criteria for permit issuance and denial).

Subsection 105.13(f) would be revised to clarify what cross sections must contain to be acceptable to the Department and would prevent inconsistent application submittals in this respect.

Subsection 105.13(g) would be revised to more clearly explain the expectation that an applicant for a Chapter 105 permit must provide proof of an application for a permit or erosion and sedimentation control plan under Chapter 102. The proposed amendments are intended to reiterate the applicant's obligations to comply with Chapter 102 during the construction, operation, maintenance, modification, abandonment or removal of a dam, water obstruction or encroachment under this chapter.

This proposed rulemaking would amend subsection 105.13(h) to consolidate the existing requirements under current subsection 105.13(i) since both subsections deal with application signature requirements. This amendment is also intended to incorporate current technology and practices consistent with the Commonwealth's Electronic Transactions Act of 1999 (73 P.S. §§ 2260.101—2260.501).

Existing subsection 105.13(i) is proposed for deletion. This subsection also involves signature requirements for persons who own or have primary responsibility for a dam, water obstruction or encroachment, and would be consolidated into subsection 105.13(h).

The proposed amendments would reorganize existing subsection 105.13(j) as new subsection 105.13(i). New subsection 105.13(i) would add a citation to the Commonwealth's Engineer, Land Surveyor and Geologist Registration Law (63 P.S. §§ 148—158.2) for consistency requirements for professional seals, certifications and signatures and would add a citation to 73 P.S. § 2260.303 (relating to Legal recognition of electronic records, electronic signatures and electronic contracts) for consistency requirements if those seals, certifications and signatures would be submitted electronically.

This proposed rulemaking would add a new subsection 105.13(j) to specify what application materials must be submitted to the Department with the affixed seal of a registered professional

geologist or engineer as required under Pennsylvania law. This new subsection would also add reference to standards for electronic submission of professional seals, certifications and signatures. This new section is being proposed to eliminate ambiguity regarding what application materials must be submitted with a seal.

Subsection 105.13(k) would be amended to specify that the Department may waive information requirements determined to be unnecessary under the chapter in writing as opposed to just information requirements in § 105.13. The proposed amendments would specify that the Department also has discretion to waive unnecessary information requirements under this chapter for environmentally beneficial projects. The Board is proposing this amendment because environmentally beneficial projects often require similar information which the Department is proposing to incorporate into § 105.15, but have historically encountered delay due to applicants having to address information requirements under this chapter that are not even applicable to these types of projects. By making application preparation and submittal more concise and less burdensome, these types of projects would encounter less delay and the Commonwealth would more expeditiously recognize environmental benefits.

§ 105.13a. Complete applications

Proposed amendments to subsection 105.13a(a) would specify what the Department, conservation district or other delegated agency determines to be a complete application or registration. The Board is proposing this amendment to eliminate situations where applicants have experienced confusion or misunderstanding regarding what constitutes a complete application or registration.

Proposed revisions to subsection 105.13a(b) would address inadequate application or registration submittals by applicants. The Board is proposing to provide the Department, conservation districts and other delegated agencies with more flexibility to make case-by-case determinations on how long of an extension an applicant should have to remedy an inadequate application or registration submittal. Through the current implementation of the Chapter 105 program, the Department has determined that some incompleteness items do not warrant the current full 60 day period. This added flexibility would enable the Department, conservation district and other delegated agencies to use resources in a more efficient manner and help ensure that review backlogs do not accrue due to inadequate application submittals. The amendments to this subsection would require applicants to provide a justification for an extension as part of a request. The proposed revisions to this subsection would also add a cross-reference to § 105.21.

§ 105.13b. Proof of financial responsibility

Section 105.13b would be amended to add potential environmental risks as a consideration where the Department may require financial assurances, and would also be amended to specify that for dams, water obstructions and encroachments, the Department may require proof of financial responsibility for compensatory mitigation project sites under § 105.20(a), where applicable. The proposed amendments would also add another option for owners of a high hazard dam that presents a substantial risk to life or property to meet proof of financial responsibility requirements under this chapter.

§ 105.14. Review of applications and registrations

Subsections 105.14(a) and (b) would be amended to further clarify existing regulations. Subsection 105.14(a) and subparagraph 105.14(b)(1) would be amended consistent with sections 2 and 5 of the act. See also, 25 Pa. Code § 105.2. The proposed amendments to subsection 105.14(b)(6) would clarify that a dam, water obstruction or encroachment must comply with applicable laws administered by other Commonwealth agencies or commissions. The proposed amendment to subsection 105.14 (b)(7) would specify that the Department will consider whether an alternative location, route or design is practicable during its review of an application. This amendment is consistent with the recent opinions of the Environmental Hearing Board in *Clean Air Council* and the Third Circuit Court of Appeals in *Del. Riverkeeper Network*. Subsection 105.14(b)(13) would be amended to clarify that the Department will evaluate the effects of the proposed project on aquatic resources and their functions when making a determination of adverse environmental impact. The proposed amendments to this subsection would further specify that the Department will evaluate proposed compensatory mitigation demonstrations under § 105.20a for proposed environmental impacts to aquatic resources and their functions.

§ 105.15. Environmental assessment

The Board proposes to add subsection 105.15(a)(4) to identify environmental assessment requirements for aquatic resource restoration projects such as a stream or floodplain restoration. Through the implementation of Chapter 105 over the past several years, the Department has discovered a need to differentiate the application requirements for environmentally beneficial projects that reestablish or rehabilitate aquatic resources to their natural characteristics and aquatic resource functions from the application requirements for other projects.

Proposed amendments to subsection 105.15(d) would specify that the Department has conducted environmental assessments for the new categories of waivers proposed in § 105.12(a).

§ 105.16. Environmental, social and economic balancing

This section, which applies to aquatic resources other than wetlands, would be amended to add a cross-reference to compensation requirements in § 105.20a.

§ 105.17. Wetlands

The Board is proposing to amend § 105.17(1) by splitting current subsection (iii) into 3 new subsections for clarity. The new subsections will be as follows: new subsection (iii) would refer to wetlands associated with wild trout streams; new subsection (iv) would refer to wetlands associated with exceptional value streams; and new subsection (v) would refer to wetland associated with wild and scenic rivers. Subsequently, current subsections (iv) and (v) would be renumbered to (vi) and (vii) respectively.

§ 105.18a. Permitting of structures and activities in wetlands

Proposed amendments to subsections 105.18a(a)(7) and (b)(7) would incorporate the title of § 105.20a as proposed to be amended by the Board.

§ 105.20a. Compensation for impacts to aquatic resources

Proposed amendments to this section would update the existing compensatory mitigation framework for proposed impacts to aquatic resources and aquatic resource functions that cannot be eliminated. These amendments would be consistent with section 2 of the act, The Clean Streams Law, existing requirements under this chapter relating to mitigation and current scientific principles and practices. These amendments would generally be consistent with the Corps 2008 Mitigation Rule at 40 CFR part 230, subchapter J.

Subsection 105.20a(a) would be updated to require an applicant to provide compensation for unavoidable impacts to aquatic resources by replacing the aquatic resource functions that will be impacted or by providing substitute resources or environments. Amendments to this subsection are intended to incorporate compensation requirements for watercourses and their floodways, wetlands and other bodies of water into one section. These requirements are found in the definition of *mitigation* in §§ 105.1, 105.13(e)(ix), 105.16(a), 105.18a(a)(7) and (b)(7) and 105.20a.

The proposed amendments would add “no net loss” of wetlands in subsection 105.20a(b) consistent with the Department’s longstanding goal and set forth general considerations for siting criteria for service areas in subsection 105.20(c) for the three types of mitigation sites. Subsection 105.20a(d) would be added to specify the compensation information that the applicant will provide for the Department to evaluate as part of a compensatory mitigation determination for impacts to aquatic resources and their aquatic resource functions. In addition, the proposed amendments would add subsection 105.20a(e) to reference to the Department’s function based aquatic resource compensation protocol (technical guidance 310-2137-001) and aquatic resource assessment protocols (technical guidance 310-2137-002, 310-2137-003, 310-2137-004) and other equivalent methodologies as methodologies that may be used for assessing a project’s proposed effects on aquatic resources and aquatic resource functions. The proposed amendments would clarify that these assessments are not the same as evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93.

Subsection 105.20a(f) would be added to specify monitoring and performance standards for compensatory mitigation to ensure the proper achievement of replacement criteria for aquatic resources and aquatic resource functions..

Subsection 105.20a(g) would be added to provide the Department with the authority to require compensatory mitigation at a higher ratio 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. This subsection is intended to address willful non-compliance with the permitting requirements of this chapter to protect and maintain aquatic resources and aquatic resource functions.

The definitions “aquatic resources,” “aquatic resource functions,” and “aquatic resource impacts” are proposed to be added as definitions in § 105.1 to support these proposed amendments.

§ 105.21. Criteria for permit issuance and denial

Section 105.21 would be revised to provide consistency with updated terminologies and to clarify that issuance or denial of a permit under this chapter constitutes issuance or denial of a Clean Water Act Section 401 water quality certification as integrated under § 105.15 for structures and activities only seeking authorization from the Corps under Section 404 of the Clean Water Act (33 U.S.C.A. § 1344) or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §§ 401 and 403).

§ 105.25. Transfer of Permits

Proposed amendments to § 105.25 would require the permittee and owner to report a change in ownership of a dam, water obstruction or encroachment to the Department in writing within 30 days of the transfer of ownership; and would also include the transfer of ownership of a dam not needing permit under this chapter. These proposed amendments to § 105.25 would help the Department track the owner and permittee responsible for operating and maintaining for a dam, water obstruction and encroachment.

§ 105.35. Charges for use and occupation of submerged lands of this Commonwealth

This proposed rulemaking would amend § 105.35 to clarify existing requirements and add new categories of activities.

Subsection 105.35(a)(1)(ii) would be amended to clarify that the mooring areas are associated with barge fleeting only; subsection 105.35(a)(2) would be amended to clarify that the \$250 annual charge for occupying submerged lands of this Commonwealth is only applicable to coverage under the general permit, for small docks and boat launching ramps (currently GP-2). These clarifications would resolve confusion that has arisen during the Department’s implementation of the submerged lands license program regarding structures and activities that are required to pay charges for occupying submerged lands of this Commonwealth.

The addition of subsection 105.35(a)(3) is intended to clarify that a groin structure that occupies submerged lands of this Commonwealth in and along the shoreline of Lake Erie would have an annual submerged lands license charge of \$250. Groin structures are generally unique to the Lake Erie shoreline area in Pennsylvania.

Subsections 105.35(c)(6) and (7) would be amended to clarify references; the Board is proposing to add new subsections 105.35(c)(8) and (9) to make projects and activities constructed for the significant benefit of the environment and projects or activities of a temporary nature not to exceed one year eligible for exemptions from annual charges.

§ 105.43. Time limits

Proposed amendments to subsection 105.43(c) relating to dams would delete the existing language and add subparagraphs 105.43(c)(1)—(c)(3) to provide more clarity regarding the expiration of dam permits unless extended by the Department; specify the notification requirements by the permittee or owner. The Department has determined to revise this section due to confusion that has resulted from dam owners.

§ 105.47. Removal of dams and removal or abandonment of water obstructions and encroachments

Section 105.47(b) would be amended to specify that the permittee or owner is required to remove a water obstruction or encroachment which may pose a threat to public health, safety or the environment, or that no longer serves a purpose. This language is proposed due to the legacy of abandoned industrial and commercial structures in Pennsylvania's waterways and to ensure that water obstructions or encroachments that may pose a threat are being properly addressed by the owner or permittee. Section 105.47(c) would be amended to incorporate reference to public health and property in addition to safety and the environment.

§ 105.53. Inspections by permittees and inspection reports

This section would be revised to add conduit inspection criteria in new proposed subsection (a)(3) for Hazard Potential Category 1 and Category 2 dams as classified in § 105.91. Existing subsections 105.53(a)(3) to (a)(7) would be reorganized into subsections 105.53(a)(4) to (a)(8).

§ 105.81. Permit applications for construction and modification of dams and reservoirs

This section would be amended to correct a cross-reference by replacing § 105.13(d)(1)(i) with § 105.13(e)(1)(i) (relating to permit applications-information and fees).

§ 105.82. Permit applications for operation and maintenance of existing dams and reservoirs

Subsection 105.82(a)(1) would be amended to correct a cross-reference by replacing § 105.13(d)(1)(i) with § 105.13(e)(1)(i). Subsection 105.82(a)(9) is proposed for amendment to clarify the need for dams constructed or modified after July 1, 1979 to obtain easements.

§ 105.89. Permit applications for operation and maintenance of existing dams and reservoirs

This section would be amended to correct a cross-reference by replacing § 105.13(d)(1)(i) with § 105.13(e)(1)(i).

§ 105.96. Outlet works

Section 105.96 would be amended to clarify criteria for the drawdown rate of reservoirs impounded by earthfill dams, how to determine the drawdown rate, and address seepage control along conduits. This section would also be amended to provide the Department with the discretion to waive one or more of the conditions of this section if necessary.

§ 105.97. Stability of structures

Specific Corps design requirements would be added to § 105.97 for earth fill and concrete dams. Existing subsections 105.97(d)(1) —(g)(2) would be deleted and existing subsection 105.97(h) would be reorganized as 105.97(e). The terminology used in the existing regulation differs from the design requirements set by the Corps which represents the standard in design. The current version of Chapter 105 refers to normal pool and maximum pool while the Corps refers to usual, unusual and extreme pools. The proposed amendments would make this section consistent with the Corps' standard design terminology.

§ 105.98. Design flood criteria

Section 105.98 would be revised to clarify flood ranges and reference incremental dam breach analysis (IDBA). For dams of Hazard Potential Category 1 or 2, the design flood is proposed to be based on the results of an IDBA or in cases where an IDBA is not performed, the design flood shall be the Probable Maximum Flood (PMF). This proposed revision would help clarify the discharge and storage capacity requirements under this section.

§§ 105.121—105.123. relating to Fishways; Drawdown of impounded waters; and Restoration of aquatic life

Amendments to §§ 105.121—105.123 would add formal reference to the Pennsylvania Fish and Boat Commission.

§ 105.134. EAP

Proposed amendments would update subsection 105.134(a)(4) to specify that the permittee or owner must use the most recent EAP template developed by the Department and PEMA; and that the EAP is required to be uploaded into the online EAP system for submission and acknowledgement of EAPs. Subsection (g) would be amended to provide further clarity as to when an EAP must be updated.

§ 105.161. Hydraulic capacity.

Subsection 105.161(a)(3) would be revised to include reference to geomorphic stability as part of the natural regime of a stream. Subsection 105.161(e) would be revised to remove antiquated references.

§ 105.171. Maintenance.

The Board proposes to delete an antiquated reference to the Bureau's former address.

§ 105.245. Disposal of waste materials.

The board proposes to correct an erroneous reference to the Resource Conservation and Recovery Act of 1976.

§ 105.401. Permit applications

Proposed amendments to § 105.401 would update application information requirements, including the criteria for discharges of dredged or fill material into aquatic resources. The existing requirements of this section do not explicitly address the location of water supply wells, and certain language in this section is not current or does not reference applicable state requirements. The proposed amendments to § 105.401(1) would require project applicants to identify all public water supply wells within a one mile radial distance of proposed project boundaries. The proposed amendments to subsection 105.401(5) would require the applicant to provide a demonstration that dredged or fill material is not contaminated and provides that the applicant may use the Department's *Management of Fill Policy* (258-2182-773) or other equivalent alternative methodology to make this demonstration. The demonstration must show that the dredged or fill material does not contain a toxic material regulated under section 6 of the Toxic Substances Control Act (15 U.S.C.A. § 2605), a hazardous waste as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §§ 691—6985) or a hazardous material as defined by regulation at 49 CFR 171.8 (relating to definitions and abbreviations) that is not included in the *Management of Fill Policy* in an amount that will cause an adverse impact to human health, safety or the environment. The proposed amendments to this section would also add a new subsection, § 105.401(6), to limit the quantity of dredged or fill material to the amount necessary to complete the project.

§ 105.411. General criteria

Proposed revisions to § 105.411 would incorporate reference to applicable criteria under this chapter and are intended to ensure that adverse impacts to the public health, safety and the environment are nullified.

§ 105.446. Procedure for issuance

Subsection 105.446(e) would be amended to provide for the Department to periodically review issued general permits for adequacy and revise, update, or revoke a general permit when necessary.

§ 105.451. Identification and delineation of wetlands—statement of policy

Proposed revisions to § 105.451 would remove the Bureau's outdated contact information and indicate that the 1987 *Corps of Engineers Wetland Delineation Manual* along with regional supplemental guidance can be found online.

§ 105.452. Status of Prior Converted Cropland —statement of policy.

This proposed rulemaking would update this section to: provide further clarity for coordination with USDA; update references to the latest version of the *National Food Security Act Manual*; provide for future amendments; and reference terms as used in the *National Food Security Act Manual* relating to determination of prior converted cropland for agricultural crop production purposes. The proposed updates to this section would provide the opportunity for consistency with Federal agency determinations relating to prior converted cropland, including the Corps and

EPA, and to the implementation of best management practices for agricultural crop production purposes.

Proposed revisions to § 105.452 would provide clarifications regarding the Department's implementation of policy regarding prior converted cropland for making wetland determinations. The proposed update also clarifies circumstances where the Department would consider these areas abandoned, reverting to wetlands and therefore subject to this chapter.

F. Benefits, Costs, and Compliance

Benefits

The regulated community is expected to benefit from the proposed Chapter 105 regulatory amendments by way of incorporating updated and revised sections and definitions, providing further clarity regarding existing application requirements, updating planning, design, construction, monitoring and maintenance of dams, and updating the compensatory mitigation framework for proposed impacts to aquatic resources and aquatic resource functions that cannot be eliminated.

The incorporation of updated and revised sections and accompanying definitions would provide an opportunity for improved understanding of the requirements under this chapter, foster the submission of better-quality applications by the regulated community, and result in more timely permit decisions by the Department.

The proposed addition of structures or activities eligible for a permit waiver under § 105.12(a) and structures and activities eligible for exemptions from annual submerged lands license charges in § 105.35(c) would provide incentive for trail associations, conservation and environmental groups to undertake low-risk, minimal environmental impact or environmentally beneficial projects, such as trails and educational boardwalks, which would otherwise entail application fees, annual submerged lands charges or both. The addition of a proposed waiver for the temporary emergency placement, operation and maintenance of water withdrawal intakes for crop production or fire protection would eliminate application fee costs for farmers and volunteer fire companies.

The proposed amendment to § 105.13(d) allowing projects crossing county boundaries to be submitted under one permit application or registration would result in additional cost savings for the regulated community. The Department estimates that it receives roughly 25 multi-county projects per year on average based on experience in recent years. Most of these applications are for linear projects from non-governmental entities, such as utilities, and these projects typically span two counties. About 15 of those projects required individual Chapter 105 permit applications. The applicant for an individual permit would save on not having to pay an additional \$1,750 administrative filing fee per county. The Department occasionally receives applications for long linear utility projects that cross several counties, and in those cases, an applicant would save on the cost of the administrative filing fee based on the number of counties the proposed project would be located in. The Department estimates that four projects per year would fall into this category, crossing four counties on average, which would translate to an estimated savings of \$5,250 per application.

This proposed rulemaking would improve compensatory mitigation planning, implementation and management by emphasizing a watershed approach in selecting project locations, requiring measurable environmental performance standards for each form of aquatic resource compensation. This proposed revisions to § 105.20a would address compensation of unavoidable impacts to aquatic resources in a manner that is generally consistent with the 2008 Federal Mitigation Rule by: (1) maintaining a “no net loss” of wetlands requirement; (2) revising siting criteria on a watershed basis; and (3) allowing mitigation banking, in-lieu fee, and permittee responsible mitigation options. The proposed amendments would incorporate the Department’s Rapid Assessment and Aquatic Resource Functional Assessment Protocols for compensatory mitigation by reference and allow flexibility for project applicants to submit mitigation proposals using other demonstrated acceptable methodologies. The addition of these guidance documents and methodologies would provide a standardized and predictable process for the regulated community in evaluating the appropriate level of compensatory mitigation needed to offset unavoidable impacts to aquatic resources for a given project. These compensatory mitigation actions are necessary to allow the Department to fulfill its purposes under section 2 of the act and section 4 of The Clean Streams Law to protect, conserve, and improve aquatic resources and their aquatic resource functions.

A survey conducted by the Department in 2006 determined permittee-responsible compensatory mitigation has an average range in cost of \$60,000 to \$90,000 per acre, not including land purchase costs. Adjusted for inflation, that cost ranges from approximately \$78,350 to \$117,520 in 2020. Mitigation costs for stream and floodway impacts in 2006 ranged in costs from \$400 to \$600 per linear foot. Those mitigation costs in 2020 are estimated to be \$520 to \$785 per linear foot. The availability of mitigation banking and an in-lieu fee mitigation program in Pennsylvania provides the opportunity for an alternative to the permittee in designing, constructing and operating individual mitigation sites, considered as “permittee responsible” mitigation sites. Also, larger scale projects, made possible by mitigation banking and in-lieu fee programs, also provide for greater natural resource improvements. Adding these mitigation options through this proposed rulemaking will reflect updated practices and provide greater flexibility and predictability for applicants. This will translate into time savings for both applicants and the Department while improving natural resources through improved quality of mitigation projects. Potential benefits also exist to social and environmental wellbeing from mitigation banking and in-lieu fee program by restoring historically impaired or impacted aquatic resources, such as removal of legacy sediment.

The proposed addition of § 105.35(a)(3) to revise submerged lands license agreement (SLLA) charges for 26 groin structures in and along the shoreline of Lake Erie would result in the reduction of the annual charge of \$750 to an annual charge of \$250, a savings of \$500 annually. Under the existing regulations, the owners of these groin structures pay \$19,500 in total annual charges. This proposed rulemaking would result in the regulated community paying only \$6,500 in total annual charges, a total savings of \$13,000 annually.

The proposed addition of § 105.35(a)(8) to exempt SLLA charges for projects or activities constructed and operated for the significant benefit of the environment would provide an annual cost savings for the regulated community. The Department estimates that less than 10 percent of projects require an SLLA and that roughly 7 percent incur charges. It is infeasible to estimate

the cost savings that would be affected by this proposed regulatory change, as the charges are based on the facility area needed to be occupied for long-term operation and maintenance activities.

Costs

The Board is proposing minor regulatory revisions that would have a direct effect on costs to some parties. These revisions include clarifying that the submission of disturbance fees may occur during the Department's permit application review; establishing additional permit waivers for specific water obstructions or encroachments associated with a streambank fencing conservation practice or temporary fencing for the protection of a conservation planting or practice, non-motorized low impact trails, emergency water withdrawals, environmental testing, and erosion and sediment control practices for wetlands; and the exclusion of annual charges for submerged lands license agreement charge exemptions for permittees with projects and activities which consist of construction, implementation, operation or maintenance of an aquatic resource restoration project, agricultural conservation practices, environmental reclamation or remediation, environmental treatment or clean-up; and other similar activities.

The clarification of existing requirements are not expected to result in any substantial indirect cost increase for persons constructing, operating or maintaining a dam, water obstruction or encroachment as most of the amendments are a codification of existing practices that are being provided for clarity, so compliance costs are not expected to increase.

There is an expectation that cost savings would result from: providing clarification for improved quality and timeliness of permit application and registration materials; through the elimination of the outdated and unnecessary requirements; and by the addition of activities qualifying for Department permit waivers.

The Board also expects that the financial responsibility of permittees and environmental benefits would both improve by providing an alternative to permittee-responsible mitigation which has been demonstrated to succeed less often due to site and landowner constraints, and perform suboptimally due to smaller size which limits the potential for effective environmental benefits. By amending § 105.20a to update the compensation framework, permit applicants would have improved flexibility to address the compensation of impacted aquatic resources through mitigation banking, in-lieu fee program or permittee responsible mitigation.

Under the Department's enhanced mitigation banking program, mitigation bankers can create, restore, and enhance wetlands and waterways at different sites and then sell the mitigation credits earned at these sites to permit applicants to meet the Chapter 105 mitigation requirements. This allows for timelier application reviews and better controlled and more effective wetland and stream mitigation projects. While 8 acres of wetland mitigation have been approved for the 2018-2019 fiscal year, it is expected that many more acres of wetland mitigation will be approved over upcoming fiscal years as more entrepreneurial bankers become established and permitted. The Department approved one new mitigation bank site in the 3rd quarter of the current fiscal year approving 2,137 linear feet of stream and floodplain restoration and approximately 6 acres of wetlands. The Department also approved two additional mitigation

bank sites in the 4th quarter to repair and rehabilitate over 36,600 linear feet of streams and their floodplains, and create, reestablish, rehabilitate or enhance over 38 acres of wetlands. The Department is currently reviewing 6 additional mitigation bank sites (acreage figures not yet available) and it expects to approve in the 4th quarter. Overall, a net positive effect on competitiveness of regulated firms occurs because such policies promote cost-cutting efficiency improvements, which in turn reduce or completely offset regulatory costs, and foster innovation in new mitigation strategies.

The proposed regulatory amendments have the potential to affect any person or entity that is proposing to construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment located in, along or across or projecting into aquatic resources. Data on the magnitude and portion of specific number of business entities, including small businesses, required to comply with the proposed amendments is not known. The Department cannot predict with any degree of confidence the number of permit applications or the size, scope, or types of proposed projects. Several factors play into this unpredictability, including that; 1) application fees are tied to the number of crossings for some types of projects and are based on impact acreage or per linear footage for other types; 2) the type of Chapter 105 permit/authorization is dependent on eligibility criteria, including whether there are crossings of exceptional value waters; and 3) the activity levels of industry and other regulated entities ebbs and flows with market conditions, contract negotiations and availability of funding.

Compliance assistance plan

The Board will provide the necessary modifications to forms, fact sheets, and technical guidance, and provide supplemental training through webinars, workshops, or other public venues.

Paperwork requirements

Most of the revisions to this proposed rulemaking are updates, clarifications, waivers, or codifications of existing requirements. The Board envisions that the rulemaking will require less forms, reports, or other paperwork. For a minor component of the proposed revisions, the Board anticipates only minor modifications to forms, fact sheets, and technical guidance.

G. Pollution Prevention

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. DEP encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This regulation has incorporated the following pollution prevention incentives:

This proposed rulemaking would address pollution prevention in several ways. One way is by introducing amendments to simplify the environmental assessment requirements for aquatic

resource restoration projects, including stream restoration or a floodplain restoration project. These types of projects are of a similar nature and seek to reestablish or rehabilitate aquatic resources to their natural characteristics and aquatic resource functions.

The proposed Chapter 105 rulemaking would clarify permit application information and plan requirements, including the mitigation plan, impacts analysis, cumulative impact analysis, water dependency, alternatives analysis, antidegradation implementation requirements for ensuring the protection, maintenance, reclamation and restoration of aquatic resources.

H. Sunset Review

The Board is not proposing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on November 10, 2020, the Board submitted a copy of the proposed Chapter 105 amendments and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed amendments within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor.

J. Public Comments

Interested persons are invited to submit to the Board written comments, suggestions, support or objections regarding the proposed rulemaking. Comments, suggestions, support or objections must be received by the Board by February 3, 2021. In addition to the submission of comments, interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by February 3, 2021. The one-page summary will be distributed to the Board and available publicly prior to the meeting when the final-form rulemaking will be considered.

Comments, including the submission of a one-page summary of comments, may be submitted to the Board online, by e-mail, by mail or express mail as follows. Comments submitted by facsimile will not be accepted.

Comments may be submitted to the Board by accessing eComment at:
<http://www.ahs.dep.pa.gov/eComment>.

Comments may be submitted to the Board by e-mail at RegComments@pa.gov. A subject heading of the proposed rulemaking and a return name and address must be included in each transmission.

If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt.

Written comments should be mailed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477. Express mail should be sent to the Environmental Quality Board, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

K. Public Hearings

If sufficient interest is generated as a result of this publication, a public hearing will be scheduled at an appropriate location to receive additional comments.

Patrick McDonnell,
Chairperson

PROPOSED RULEMAKING
Annex A
TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION
SUBPART C. PROTECTION OF NATURAL RESOURCES
ARTICLE II. WATER RESOURCES
CHAPTER 105. DAM SAFETY AND WATERWAY MANAGEMENT
SUBCHAPTER A. GENERAL PROVISIONS

GENERAL

§ 105.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Abandonment—The discontinued construction, or operation and maintenance of a dam, water obstruction or encroachment by the owner or permittee.

Act—The Dam Safety and Encroachments Act (32 P.S. §§ 693.1—693.27).

* * * * *

Appurtenant works—Structures or materials incident to or annexed to dams or water obstructions which are built or maintained in connection with the dams or water obstructions and are essential to their proper functioning. For dams, the term includes, but is not limited to:

- (i) Structures such as spillways, either in the dam or separate therefrom.
- (ii) Low level outlet works.
- (iii) Conduits such as tunnels, pipelines or penstocks through the dam or its abutments.

Aquatic resources—Regulated waters of this Commonwealth, including watercourses, streams, wetlands or other bodies of water and their floodways.

Aquatic resource functions—Ecosystem services that result from the chemical, physical, or biological processes that occur in aquatic resources. Except for wetland functions protected under 25 Pa. Code § 96.3(g) (relating to water quality protection requirements), this term does not refer to protected water uses or water quality standards under 25 Pa. Code Chapter 93 (relating to water quality standards). This term includes hydrologic, biogeochemical, and habitat functions that may be recognized using current scientific principles.

Aquatic resource impacts—Changes associated with or resulting from a dam, water obstruction, or encroachment. This term does not refer to evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93. The term includes the following types:

(i) *Direct impacts*—The filling or draining of an aquatic resource that results in an area loss or the conversion of an aquatic resource to another type such as converting a wetland to a pond or a stream to a reservoir.

(ii) *Indirect impacts*—Altering the chemical, physical, or biological characteristics of an aquatic resource to the extent that changes to the functions of the resource results.

(iii) *Secondary impacts*—Changes associated with but not the direct result of the construction or substantial modification of the dam or reservoir, water obstruction or encroachment in the area of the project and in areas adjacent thereto and future impacts associated with dams, water obstructions or encroachments, the construction of which would result in the need for additional dams, water obstructions or encroachments to fulfill the project purpose.

Archaeological site—A known site of archaeological significance based on the Comprehensive State Plan for Conservation of Archaeological Resources. The Comprehensive State Plan is available from the Historic and Museum Commission.

* * * * *

Commercially navigable waters of the Delaware River and its navigable tributaries—Portions of the Delaware River from the Delaware border in the south to the railroad bridge at Morrisville in the north; the Schuylkill River below Fairmount Dam; Chester Creek below Ninth Street; Crum Creek below the Route 291 (Industrial Highway) Bridge; Darby Creek below 84th Street; Neshaminy Creek below the Route 13 Bridge; Pennypack Creek below the Frankford Avenue Bridge; and Ridley Creek below the Baltimore and Ohio Railroad Bridge in Chester.

Conservation district—As defined in section 3(c) of the Conservation District Law (3 P.S. § 851(c)), the term means the entity which has the authority under a delegation agreement executed with the Department to administer and enforce all or a portion of the categories of water obstructions and encroachments, or all or a portion of the erosion, sediment and stormwater management program covered by the delegation in this Commonwealth.

Construct—To erect, build, place or deposit including preliminary preparation of a site for construction.

* * * * *

Course—The path taken by a stream, floodway or body of water.

Crop production—An activity relating to agricultural products. The term includes:

(i) *Plowing, cultivating, seeding, grazing or harvesting.*

(ii) *Crop rotation.*

(iii) *Federal or state government set aside programs.*

Cross section—The area from the top of the bank to the top of the opposite bank of a stream, **floodway** or body of water as cut by a vertical plane passed at a right angle to the course of [the] **a stream, floodway or body of water.**

* * * * *

Encroachment—A structure or activity which changes, expands or diminishes the course, current or cross section of a watercourse, floodway or body of water.

* * * * *

Freeboard—The vertical distance between the water surface elevation experienced during the design flood and the crest elevation of a dam levee, floodwall or other embankment.

Groin structure—A long, narrow structure built out into the water from the shoreline to control wave action, manage shoreline erosion or trap and accumulate sand that would otherwise drift along the shoreline and nearshore zone.

Height of dam—The vertical measurement expressed in feet as measured from the downstream toe of the dam at its lowest point to the elevation of the top of the dam.

* * * * *

Hydrologic and hydraulic analysis—

- (i) A study of the effects of an encroachment or water obstruction on the flow carrying capacity of a watercourse.
- (ii) A study determining the watershed runoff into a dam and reservoir and the resulting routed outflow from the dam and its spillway structures.

[Incremental dam breach analysis] Incremental Dam Breach Analysis (IDBA)—A process to determine the highest runoff event during which a dam failure would cause a threat to life, health, property or the environment in areas below the dam in excess of the threat level caused by the same runoff event with no dam failure.

Inundation area—The land area subject to flood waters as the result of failure of a dam.

* * * * *

Letter of Authorization for dams—A letter from the Department approving major maintenance, repair or improvement projects which do not involve modification to the top-of-dam elevation or modification of the normal pool reservoir elevation of a dam which has not been previously permitted by the Department and meets the waiver of permit requirements under § 105.12(b)(1) or (2) (relating to waiver of permit requirements).

Levee—An earth embankment or ridge constructed along a [water course] **watercourse** or body of water to confine water within prescribed limits; the term is also known as a dike.

Limited Power and Water Supply Act—The act of June 14, 1923 (P. L. 700, No. 293) (32 P. S. § § 621—625); and the act of June 14, 1923 (P. L. 704, No. 294) (32 P. S. § § 591—600), regarding Limited Power Permits and Limited Water Supply Permits from the Water Supply Commission of Pennsylvania and the conditions thereof, to the flooding and use by holders of Limited Power Permits of lands owned by the Commonwealth, to the unlawful use for water or steam power developments of dams and changes in streams hereafter constructed or made otherwise than under Limited Power Permits, and to proceedings for the enforcement of this act.

Maintenance—Periodic activities conducted to preserve the condition of a dam, water obstruction or encroachment as authorized by the Department.

Maintenance dredging—Periodic dredging conducted to accomplish one or more of the following purposes:

- (i) Maintain adequate depths for navigation.
- (ii) Assure proper passage of ice and flood flows.
- (iii) Preserve the safety, stability and proper operation of the dam, water obstruction or encroachment.
- (iv) Restore the natural or previously permitted reservoir capacity.
- (v) Restore flood protection projects to original design dimensions.

* * * * *

Mitigation—

- (i) An action undertaken to accomplish one or more of the following:
 - (A) Avoid and minimize impacts by limiting the degree or magnitude of the action and its implementation.
 - (B) Rectify the impact by repairing, rehabilitating or restoring the impacted environment.
 - (C) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.
- (ii) If the impact cannot be eliminated by following clauses (A)—(C), compensate for the impact by replacing the environment impacted by the project or by providing substitute resources or environments.

Normal pool elevation—

- (i) For bodies of water which have no structural measures to regulate height of water, the height of water at ordinary stages of low water unaffected by drought.
- (ii) For structurally regulated bodies of water, the elevation of the spillway, outlet control or dam crest which maintains the body of water at a specified height.

(iii) This term does not apply to wetlands.

* * * * *

Owner—A person who owns, controls, operates, maintains or manages a dam or reservoir, water obstruction or encroachment.

[PMF—Probable maximum flood—The flood that may be expected from the most severe combination of critical meteorologic and hydrologic conditions that are reasonably possible in an area. The PMF is derived from the probable maximum precipitation (PMP) as determined on the basis of the most recent data available from the National Oceanographic and Atmospheric Administration (NOAA).]

Parcel—A portion of land formally set forth and described in a conveyance.

* * * * *

Political subdivision—A county, city, borough, incorporated town, township, school district, authority or other governmental unit or a combination thereof acting jointly.

Probable Maximum Flood (PMF)—The flood that may be expected from the most severe combination of critical meteorological and hydrologic conditions that are reasonably possible in an area. The PMF is derived from the probable maximum precipitation (PMP).

Probable Maximum Precipitation (PMP)—Theoretically, the greatest depth of precipitation for a given duration that is physically possible over a given storm area at a geographic location during a certain time of the year. The PMP may be derived from using the most recently published Probable Maximum Precipitation Study for Pennsylvania or by completion of a detailed site-specific study.

Project—The entire area of the site encompassing a proposed or existing dam, water obstruction or encroachment. The term includes reasonably foreseeable areas planned to contain future dams, water obstructions or encroachments.

Project purpose—A description of the applicant's proposed project and the necessity for the project to be in or in close proximity to aquatic resources.

Public service corporation or public utility—A corporation, association or other corporate body having the powers and privileges of corporations not possessed by individuals or partnerships which entity renders a public utility service. The term does not include a municipality or municipal authority.

* * * * *

Replacement—The construction of a new wetland or restoration of a previously destroyed wetland, or both.

Reservoir — Any basin which contains or will contain the water or other fluid or semifluid impounded by a dam.

Reservoir filling plan—A plan that sets a schedule for the initial filling of the reservoir behind a new dam or the refilling of a reservoir after the rehabilitation of an existing dam.

Restoration—The process of reestablishing or rehabilitating aquatic resources to natural characteristics and functions.

* * * * *

Safety—Security from the risk or threat of significant loss or injury to life, health, property and the environment.

Service areas—Watershed-based geographic areas that are used in siting the location of compensatory mitigation for unavoidable impacts to aquatic resources.

Small projects—Water obstructions or encroachments located in a stream or floodplain which will have an insignificant impact on safety and protection of life, health, property and the environment.

* * * * *

Storage capacity—The volume as expressed in acre-feet of the impounded water to the maximum storage level, that is, the top of the dam.

Stormwater management facilities—Manmade measures **[designed and constructed]** **designed, constructed and maintained** to convey stormwater runoff away from structures or improved land uses, or to control, detain or manage stormwater runoff to avoid or reduce downstream damages. The term includes[, but is not limited to,] transportation and related facility drainage systems and manmade stormwater detention **[basins] facilities, swales and ditches**. The term does not include **swales or ditches that have not been maintained and have developed into watercourses or other bodies of water, including wetlands**. The term also **does not include** replacement wetlands or major dams and reservoirs constructed for water supply, recreation, river basin flood control or other regional or basin-wide purposes.

Stream—A watercourse.

* * * * *

Watercourse—A channel or conveyance of surface water having defined bed and banks, whether natural or artificial, with perennial or intermittent flow.

Water dependent—The circumstance which requires a dam, water obstruction or encroachment to have access or proximity to, or siting within, aquatic resources to fulfill the basic purposes of the project.

Water obstruction—

(i) A dike, bridge, culvert, wall, wingwall, fill, pier, wharf, embankment, abutment or other structure located in, along or across or projecting into a watercourse, floodway or body of water.

(ii) In the case of ponds, lakes and reservoirs, a water obstruction is considered to be in or along the body of water if, at normal pool elevation, the water obstruction is either in the water or adjacent to and abutting the water's edge.

Water Obstructions Act—The act of June 25, 1913 (P.L. 555, No. 355) (32 P.S. §§ 681—691), repealed by section 27 of the act of October 23, 1979 (P.L. 204, No. 70) (32 P.S. § 693.27).

Wetland functions—Include[, but are not limited to,] the following:

(i) Serving natural biological functions, including food chain production; general habitat; and nesting, spawning, rearing and resting sites for aquatic or land species.

(ii) Providing areas for study of the environment or as sanctuaries or refuges.

(iii) Maintaining natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, natural water filtration processes, current patterns or other environmental characteristics.

(iv) Shielding other areas from wave action, erosion or storm damage.

(v) Serving as a storage area for storm and flood waters.

(vi) Providing a groundwater discharge area that maintains minimum baseflows.

(vii) Serving as a prime natural recharge area where surface water and groundwater are directly interconnected.

(viii) Preventing pollution.

(ix) Providing recreation.

(x) Other aquatic resource functions pertaining to wetlands that may be recognized using current scientific principles.

Wetlands—Areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.

* * * * *

§ 105.3. Scope.

(a) The following structures or activities are regulated under the act and section 302 of the Flood Plain Management Act (32 P.S. § 679.302):

* * * * *

(b) For the purposes of this chapter, the Department's jurisdiction in and along Lake Erie will be defined by the high water elevation of [572.8] 573.4 feet International Great Lakes Datum (IGLD) and low water elevation of [568.6] 569.2 IGLD. Dams, water obstructions and encroachments constructed between elevation [572.8] 573.4 IGLD and elevation [568.6] 569.2 IGLD require a permit under section 6 of the act (32 P.S. § 693.6). Dams, water obstructions and encroachments constructed lakeward of elevation [568.6] 569.2 IGLD require both a permit under section 6 of the act and a Submerged Lands License Agreement under section 15 of the act (32 P.S. § 693.15). New or revised IGLD datum is incorporated when established by the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA).

(c) The environmental assessment conducted under this chapter ~~[is applicable]~~ applies to dams, water obstructions and encroachments for which a permit or approval is required under this chapter.

§ 105.4. Delegations to local agencies.

(a) Under section 17 of the act (32 P.S. § 693.17) and subject to this section, the Department may by written agreement delegate to a county conservation district or other county agency one or more of its regulatory functions including enforcement and the power to permit, inspect and monitor specified categories of water obstructions and encroachments.

(b) No delegation may be made of the authority to issue permits or authorize registrations for a water obstruction or encroachment constructed, owned or maintained by the Commonwealth, a political subdivision or a public utility. Delegations may be made of the powers to inspect and monitor the activities, if the Department retains final authority to approve or disapprove permits, and concurrent authority to inspect, monitor and enforce the act.

* * * * *

(d) A delegation agreement will:

- (1) Specify the powers and duties to be performed by the delegated agency.
- (2) Specify the categories of water obstructions and encroachment activities to be covered by the delegated agency.
- (3) Provide for the commitment by the delegated agency of sufficient trained staff and resources to perform the powers and duties to be delegated.
- (4) Require the delegated agency to maintain records of activities performed under the delegation.
- (5) Provide for monitoring and supervision by the Department of performance by the delegated agency of the functions delegated under the agreement.

(e) A ~~[permit for a]~~ water obstruction or encroachment permit issued or a registration authorized by a delegated agency is subject to review by the Department, unless the right of review is waived by the Department. A permit issued or registration authorized by a delegated

agency shall become effective 30 days following the receipt of notice by the Department of issuance or authorization, unless the permit is disapproved by the Department or an appeal is filed with the Department under section 17 of the act.

(f) When the Department delegates one or more of its regulatory functions to a local agency, the Department will retain the concurrent power to inspect and monitor categories of water obstructions and encroachments and to enforce the act and this chapter.

PERMIT APPLICATIONS

§ 105.12. Waiver of permit requirements.

(a) Under section 7 of the act (32 P. S. § 693.7), the requirements for a permit are waived for the following structures or activities, regardless of when commenced, unless the project does not meet the eligibility criteria in subsections (c) and (d). If the Department [upon] on complaint or investigation finds that a structure or activity which is eligible for a waiver, has a significant effect [upon] 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.

(1) A dam not exceeding 3 feet in height in a stream not exceeding 50 feet in width[, except] and not designated as a wild trout [streams designated]stream by the Pennsylvania Fish and Boat Commission.

(2) A water obstruction or encroachment in a stream or floodway with a drainage area of 100 acres or less that will not impede flow or aquatic life passage. This waiver does not apply to [wetlands] a water obstruction or encroachment proposing to impact a wetland located in the floodway, or to a stream enclosure.

(3) An aerial crossing of a [nonnavigable] stream or wetland by electric, telephone or communications lines which are not located in a Federal wilderness area or watercourse or body of water designated as a wild or scenic river under the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or the Pennsylvania Scenic Rivers Act (32 P. S. §§ 820.21—820.29). This waiver applies to one or more wires attached aboveground to single poles. This does not apply to the maintenance and construction of towers, single poles with concrete foundations or pilings, roads or other water obstructions or encroachments.

(4) A dam subject to the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2 (relating to water, sediment or slurry impoundments and impounding structures; identification; and water, sediment, or slurry impoundments or impounding structures; minimum plan requirements; changes or modifications; certification), if the Department determines on the basis of preliminary data submitted by the applicant that the dam is of Size Classification C and Hazard Potential Classification [3]4 as defined in § 105.91 (relating to classification of dams and reservoirs) and is not located in a watercourse or body of water designated as a wild and scenic river under the Wild and Scenic Rivers Act of 1968 or the Pennsylvania Scenic Rivers Act.

(5) A water obstruction or encroachment located in, along, across or projecting into a wetland or impoundment, constructed and maintained for the purpose of treating acid mine drainage, sewage or other waste, if the wetland or impoundment is a treatment facility constructed under a valid permit issued by the Department under the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.31), The Clean Streams Law (35 P. S. §§ 691.1—691.1001), the Noncoal Surface Mining Conservation and Reclamation Act (52 P. S. §§ 3301—3326), the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003), the Oil and Gas Act (58 P. S. §§ 601.101—601.605) and the Pennsylvania Sewage Facilities Act (35 P. S. §§ 750.1—750.20).

(6) A water obstruction or encroachment located in, along, across or projecting into a stormwater management facility or an erosion and sedimentation pollution control facility which meets the requirements in Chapter 102 (relating to erosion and sediment control), if the facility was constructed and continues to be maintained for the designated purpose.

(7) Maintenance of field drainage systems that were constructed and continue to be used for crop production. **[Crop production includes:**

- (i) **Plowing, cultivating, seeding, grazing or harvesting.**
- (ii) **Crop rotation.**
- (iii) **Government set aside programs.]**

(8) Plowing, cultivating, seeding or harvesting for crop production.

(9) Construction and maintenance of ford crossings of streams for individual private personal use which require only grading of banks for approach roads and the placement of not more than 12 inches of gravel for roadway stability. Fords may not be used for commercial purposes and shall cross the **[regulated waters of this Commonwealth] aquatic resource** in the most direct manner. This waiver does not apply in exceptional value streams as listed under Chapter 93 (relating to water quality standards) or in wild trout streams.

(10) A navigational aid or marker, buoy, float, ramp or other device or structure for which a permit has been issued by the Fish and Boat Commission under 30 Pa.C.S. § 5123(a)(7) (relating to general boating regulations).

(11) The removal of **[abandoned]** dams, water obstructions and encroachments **or the abandonment of water obstructions and encroachments [if the Department determines in writing on the basis of data, information or plans submitted by the applicant that the removal of an abandoned dam, water obstruction or encroachment]. The Department will review the applicant's demonstration under § 105.15 (relating to environmental assessment) to determine whether the removal of a dam, water obstruction or encroachment [the abandoned] or abandonment of a [dam] water obstruction or encroachment [cannot] may imperil life or property, have a significant effect on coastal resources or have an adverse impact on the environment, and whether the applicant's plans provide for restoration and stabilization of the project area.**

(12) The construction, operation or removal of staff gages, water recording devices, water quality testing devices, including, but not limited to, sensors, intake tubes, weirs and small buildings which contain required instruments and similar scientific structures.

* * * * *

(15) The construction and maintenance of an encroachment or water obstruction on an abandoned mining site, where the Department has issued a notice of intent to forfeit the bond for a mining activity permitted after July 1982.

(16) Restoration activities undertaken and conducted pursuant to a restoration plan and environmental assessment under § 105.15 which [has] have been approved, in writing, by the Department.

(17) The construction and maintenance of a streambank fencing conservation practice associated with crop production, or temporary fencing for the protection of a conservation planting or practice located in or along a wetland, along a watercourse and along or in its floodway or along a lake, pond or reservoir. Fencing may not be constructed of materials that will collect flood debris resulting in the restriction of flow or the creation of a backwater condition and may not be installed in or across a watercourse, pond, lake or reservoir.

(18) The construction, operation and maintenance of a water obstruction or encroachment associated with low-impact and non-motorized recreational activities that include walking, hiking or biking trails under a plan which has been approved, in writing, by the Department. The single span bridge, culvert or other structure must be 75 feet or less in length and must not result in the inundation of adjacent property not in possession of the owner of the water obstruction or encroachment or impede the passage of aquatic life through aquatic resources. This waiver does not apply to stream enclosures. The plan must include:

(i) A detailed description of the proposed structure or activity.

(ii) The specific purpose, goals and objectives of the proposed structure or activity.

(iii) Resource identification information.

(iv) A location map.

(v) A determination or delineation of wetlands and accompanying data sheets.

(vi) Photographs.

(vii) The identification of the preparer and their qualifications.

(19) The construction, operation and maintenance of a walking path with an elevated boardwalk in a wetland for educational and interpretive purposes under a plan which has been approved, in writing, by the Department. The plan must include:

(i) A detailed description of the proposed structure or activity.

(ii) The specific purpose, goals and objectives of the proposed structure or activity.

(iii) Resource identification information.

(iv) A location map.

(v) A determination or delineation of wetlands and accompanying data sheets.

(vi) Photographs.

(vii) The identification of the preparer and their qualifications.

(20) The temporary emergency placement, operation and maintenance of a water obstruction or encroachment for water withdrawal related to crop production or fire protection if no alteration of the bank or bed of the watercourse, lake, pond, or reservoir is needed. This includes the placement, operation and maintenance of dry fire hydrants. This waiver is not eligible for use in wetlands and does not apply to parking or other areas for ancillary activities.

(21) Archeological, geotechnical or environmental activities where testing, monitoring or scientific investigations are of a temporary nature, not to exceed one year, including boring or placement of sensors to sample or test soil or rock material and other similar activities. This waiver does not apply to parking or other areas for ancillary activities.

(22) The placement, maintenance and removal of temporary mats and pads used for minimizing erosion and sedimentation at a wetland crossing. The wetland must be fully restored to its pre-existing condition.

(b) The requirements for a permit for existing structures or activities, as provided in section 6(c) of the act (32 P. S. § 693.6(c)), are waived for the following structures or activities, if construction was completed prior to July 1, 1979. If the Department ~~upon~~on complaint or investigation finds that a structure or activity which is eligible for a waiver, has a significant effect ~~upon~~on safety or the protection of life, health, property or the environment, the Department may require the owner of the structure or activity to apply for and obtain a permit under this chapter.

(1) **[A dam not exceeding 5 feet in height in a nonnavigable stream operated and maintained for water supply purposes.] A dam operated and maintained in a stream for water supply purposes, which does not exceed 5 feet in height and does not occupy submerged lands of this Commonwealth.**

(2) A dam which the Department determines, on the basis of preliminary data submitted by the applicant, is of Size Category C and Hazard Potential Category 4, as defined in § 105.91 (relating to classification of dams and reservoirs) and does not have a significant effect on coastal resources or an adverse impact on the environment.

(3) A fill not located on navigable lakes and navigable rivers.

(4) A streambank retaining device.

(5) A stream crossing other than a crossing located on submerged lands of this Commonwealth and a crossing by pipelines for conveyance of petroleum products and gas.

(6) An outfall, headwall or water intake structure.

(7) A culvert, bridge or stream enclosure on a watercourse where the drainage area above the culvert, bridge or stream enclosure is 5 square miles or less.

(c) **[Structures and activities shall meet the construction, operation, maintenance, monitoring and other requirements of this chapter. No other permits which may be required under a law other than the act are waived by this section.] A structure or activity is not eligible for a permit waiver under subsection (a) above if one of the following circumstances apply:**

(1) The structure or activity will occupy submerged lands of the Commonwealth, except for a structure or activity constructed, operated and maintained by a Commonwealth agency or commission.

(2) The structure or activity is located within an area which serves as a habitat of a threatened or endangered species protected by the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. §§ 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543) or for a species which has been designated as a threatened or endangered species under the Wild Resource Conservation Act (32 P. S. §§ 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code).

(3) The structure or activity is located within an area of historic, cultural, or archaeological sites as identified in the latest published version of the Pennsylvania Inventory of Historical Places or the National Register of Historical Places.

(4) The structure or activity is located within an area officially approved or recognized by a political subdivision as a local historical site.

(d) A structure or activity eligible for a permit waiver under this section must be properly designed, constructed, operated, maintained and monitored and otherwise must meet the requirements of this chapter. No other permits which may be required under a law other than the act are waived by this section.

§ 105.13. Regulated activities—information and fees.

(a) Application **or registration** for permits under this chapter **[shall] must** be submitted to the Department, in writing **or electronically**, **[upon] on** forms **or through electronic systems** provided by the Department. Applicants are encouraged to request a meeting with the Department prior to submission of **[their applications] an application or registration**. An application for a permit, registration for a general permit, request for permit amendment, major or minor letter of amendment or authorization, major dam design revision, environmental assessments, permit transfer or annual dam registration under this chapter shall be accompanied

by a check or other method of payment acceptable to the Department for the applicable fees except for submissions by Federal, State, county or municipal agencies or a municipal authority.

(b) Fees collected by the Dam Safety Program and Water Obstruction and Encroachment Program, including delegations to local agencies, will be deposited into a restricted revenue account known as the Clean Water Fund and utilized to offset the operating costs to implement respective programs.

(c) The fees are as follows:

(1) *Dams based on size and hazard potential category as defined in § 105.91 (relating to classification of dams and reservoirs).*

* * * * *

(vi) *Environmental assessment review fees for nonjurisdictional dams, letters of amendment or letters of authorization.*

<i>Size Category</i>	<i>Fee</i>
A	\$1,400
B	\$1,000
C	\$900

(vii) *Transfer of dam permit as required under § 105.25 (relating to transfer of permits).*

<i>Type of Dam Permit Transfer</i>	<i>Fee</i>
<u>[No Proof of Financial Responsibility Required] Hazard Potential Category 1 and Category 2 dams as classified under § 105.91</u>	\$550
<u>[Proof of Financial Responsibility Required] Hazard Potential Category 3 and Category 4 dams as classified under § 105.91</u>	\$300

(viii) *Annual dam registration fees as required under § 105.131a (relating to annual dam registration).*

	<i>Hazard Potential Category</i>			
	1	2	3	4
<i>Size Category</i>				

A	\$1,500	\$1,500	\$800	\$0
B	\$1,500	\$1,500	\$800	\$0
C	\$1,500	\$1,500	\$800	\$0

(A) Annual registration fees are due by July 1 of each year.

* * * * *

(2) *Water obstructions and encroachments.*

<i>Fee Title/Type</i>		<i>Fee</i>
<i>Water Obstruction and Encroachment Permit Application Fees</i>		
Joint application	Administrative filing fee (* plus applicable disturbance review fees)	\$1,750
<i>General Permit</i>		<i>Registration Fees</i>
GP-1	Fish habitat enhancement structures	\$50
GP-2	Small docks and boat launching ramps	\$175
GP-3	Bank rehabilitation, bank protection and gravel bar removal	\$250
GP-4	Intake and outfall structures	\$200
GP-5	Utility line stream crossings	\$250
GP-6	Agricultural crossings and ramps	\$50
GP-7	Minor road crossings	\$350
GP-8	Temporary road crossings	\$175
GP-9	Agricultural activities	\$50
GP-10	Abandoned mine reclamation	\$500
GP-11*	Maintenance, testing, repair, rehabilitation or replacement of water obstructions and encroachments	\$750
GP-15*	Private residential construction in wetlands	\$750

* Disturbance review fees added to application, registration or other fees where applicable		
Permanent disturbance	Waterways, floodways/floodplains and wetlands per tenth acre, minimum 0.1 acre	\$800
Temporary disturbance	Waterways, floodways/floodplains and wetlands per tenth acre, minimum 0.1 acre	\$400
<i>Other Fees not Added to Initial Application or Registration Fees</i>		
	Environmental assessment for waived activities (§ 105.12(a)(11) and (16) per § 105.15(d) <u>(relating to environmental assessment)</u>)	\$500
	Major amendment to Water Obstruction and Encroachment Permit*	\$500
	Minor amendment to Water Obstruction and Encroachment Permit	\$250
	Transfer of permit with Submerged Lands License Agreement (SLLA)	\$200
	Transfer of permit without SLLA	\$100

(i) Small projects require a joint application for a Water Obstruction and Encroachment Permit and follow the same fee requirements.

(ii) Additional General Permit registration requirements are as follows:

(A) General Permit registration for GP-11 and GP-15 also requires disturbance review fees when applicable.

(B) Conservation districts may charge additional review fees in accordance with section 9(13) of the Conservation District Law (3 P. S. § 857(13)).

(C) Registration fees for coverage under a General Permit issued under Subchapter L (relating to general permits) not otherwise specified in this section will be established in the General Permit. The applicability of the disturbance review fees will also be established in the General Permit.

(iii) Disturbance review fees are calculated by **[individually]** adding all of the **individual** permanent and temporary impacts to waterways, floodways, floodplains and bodies of water including wetlands, **rounding this sum** to the next highest tenth acre and multiplying the permanent and temporary impacts by the respective fees **[and then these amounts are added to the other applicable fees]**.

(A) [The disturbance review fees are added to the joint application administrative filing fee, applicable General Permit registration fees and major amendments to Water Obstruction and Encroachment Permits.] Submission of the disturbance review fee to the Department may occur during the technical or eligibility review and the entire disturbance review fee due must be submitted before the Department's decision on a permit application or registration. The disturbance review fee shall consist of the largest total area of disturbance to aquatic resources as determined during the final permit application or registration review.

(B) If a permit applicant is subject to payment of royalties to the Commonwealth under 58 Pa. Code § 51.92 (relating to royalty rates), the disturbance review fees are not required for the area of disturbance subject to the royalty payment.

(iv) Environmental Assessment for waived activities fee applies to use of the waivers at § 105.12(a)(11) and (16). Environmental Assessment for these waivers is required under § 105.15(d) [(relating to environmental assessment)].

* * * * *

(vi) A major amendment of an existing Water Obstruction and Encroachment Permit, permit authorization or water quality certificate before its expiration is an amendment that is not a minor amendment.

(d) A single application may be submitted, or a single permit may be issued for multiple structures and activities which are part of a single project or facility or part of related projects and facilities, located in a single county or multiple counties, constructed, operated or maintained by the same persons. When a single application covers multiple structures or activities other than a single structure and related maintenance dredging, the application fee shall be the sum of fees in subsection (c) for the applicable structures and activities. Water obstructions and encroachments located within a single county or multiple counties shall be treated as a single structure or activity, but the application fee shall be the sum of fees for each water obstruction and encroachment.

(e) An application for or a registration of a permit must be accompanied by the following information, maps, plans, specifications, design analyses, test reports and other data specifically required under this chapter and additional information as required [under] by the Department to determine compliance with this chapter.

(1) [For all permit applications, except small projects, this information includes, but is not limited to, the following:] Permit applications for a dam, water obstruction or encroachment, except a permit application for a small project in subsection (f), must include the following information:

(i) A site plan. A site plan must include:

(A) A complete demarcation of the floodplains and [regulated waters of this Commonwealth] aquatic resources on the site. The wetlands shall be identified and delineated in accordance with the Department's Wetland Delineation Policy in § 105.451 (relating to

identification and delineation of wetlands—statement of policy). **The demarcation of aquatic resources, including wetlands, must be verified through on-the-ground investigation or must otherwise be field-verified. Copies of FEMA floodplain maps must be included for the project, when the project is located in areas where FEMA maps have been prepared.**

(B) Existing roads, utility lines, lots, other manmade structures and natural features such as contour lines and drainage patterns.

(C) Proposed **temporary and permanent** structures or activities included in the project, which **[shall] must** be identified by labeling.

(D) A **minimum** scale of one inch equals 200 feet or larger **that adequately illustrates the scope of work proposed.**

(E) A north arrow.

(F) The name of the persons who prepared the plan, and the date and name of the applicants.

(G) [A cross sectional view] **Cross sections** of the [regulated waters] **aquatic resources** to be impacted [before and after the structure or activity is constructed]. **The cross sections must show the current or existing conditions and the proposed conditions of the aquatic resources. The cross sections must be provided at a minimum scale of one inch equals 20 feet so that the cross sections adequately illustrate the scope of work proposed.**

(ii) A location map. The location map must be of a scale factor of 1:24000 (standard U.S.G.S. Topographic Map). The location map must show [all natural features including the names and boundaries of regulated waters of this Commonwealth, natural areas, wildlife sanctuaries, natural landmarks, political boundaries, locations of public water supplies and other geographical or physical features including cultural, archeological and historical landmarks within 1 mile of the site. U.S.G.S. maps may be reviewed at County Conservation District Offices or obtained by writing to United States Geological Survey Map Distribution, Box 25286 Federal Center, Denver, CO 80225.]

(A) Topographic features.

(B) Names of aquatic resources.

(C) Locations of public water supplies.

(D) Names and boundaries of natural areas, wildlife sanctuaries, and political jurisdictions.

(E) Names and locations of natural, cultural, archaeological, and historical landmarks within one mile of the site.

(iii) Project description. A narrative of the project shall be provided which includes[, but is not limited to]:

(A) A description of the proposed [structure or activity] **structures and activities.**

(B) [The] A narrative discussion of the project purpose.

(C) [The] A narrative discussion of the effect the project will have on public health, safety or the environment.

(D) A [statement] narrative discussion and analysis on water dependency. [A project is water dependent when the project requires access or proximity to or siting within water to fulfill the basic purposes of the project.] Water dependency must be based on the demonstrated unavailability of any practicable alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and to protect the public natural resources of this Commonwealth.

(iv) Color photographs. Color photographs of the proposed site, including the location of all proposed or existing dams, water obstructions and encroachments, [shall] must be submitted. The [photos] photographs must accurately depict the project area and provide a relative scale of the project to the surrounding area, [and a] A map showing the location and orientation of each photograph must also be included.

(v) Stormwater management [analysis. If a watershed stormwater management plan has been prepared or adopted under the Storm Water Management Act (32 P. S. § § 680.1—680.17), an analysis of the project's impact on the Stormwater Management Plan and a letter from the county or municipality commenting on the analysis shall be included.]. A demonstration that the project is consistent with the Storm Water Management Act (32 P.S. § § 680.1—680.17) and that any associated Post Construction Stormwater Management (PCSM) plan meets the requirements under 25 Pa. Code § 102.8 (relating to PCSM requirements).

(A) If a watershed stormwater management plan has been prepared or adopted, and is current under the Storm Water Management Act (32 P. S. § § 680.1—680.17) and a letter commenting on the project's consistency with that plan has been provided by the county or municipality, that letter must be included as part of the application.

(B) If a PCSM plan was prepared under 25 Pa. Code § 102.8 (relating to PCSM requirements), the applicant must reference the corresponding Department Chapter 102 permit or permit application. The Department will use the PCSM plan for the analysis under this section.

(vi) Floodplain management [analysis] consistency. If the proposed dam, water obstruction or encroachment is located within a floodway delineated on a FEMA map, include an analysis of the project's impact on the floodway delineation and water surface profiles and [a letter from], when provided by the county or municipality, a letter commenting on the analysis as part of the application. When a dam, water obstruction or encroachment is being proposed by a Commonwealth agency, a political subdivision of the Commonwealth or a public utility, the floodplain management plan must be consistent with the Flood Plain Management Act (32 P.S. § § 679.101—679.601) and Chapter 106 (relating to floodplain management).

(vii) Risk assessment. If the stormwater or the floodplain management analysis conducted in subparagraphs (v) and (vi) indicates increases in peak rates of runoff or flood elevations, include a description of property and land uses which may be affected and an analysis of the degree of increased risk to life, property and the environment. For coastal zone management areas, include an evaluation of short-term and long-term water elevation changes projected by the National Oceanic and Atmospheric Administration.

(viii) Alternatives analysis. [A] An alternatives analysis is a detailed analysis of onsite and offsite alternatives to the proposed [action] dam, water obstruction or encroachment, including alternative locations, routings or designs to avoid or minimize adverse environmental impacts. The alternatives analysis must meet the following criteria:

(A) The level of detail required must be commensurate with the anticipated environmental impact.

(B) A project alternative that may impact a wetland must demonstrate with reliable and convincing evidence that the requirements under § 105.18a(a)(3) and (b)(3) (relating to permitting of structures and activities in wetlands) will be met.

(C) A project alternative that may impact aquatic resources other than a wetland must include a reliable and representative demonstration consistent with § 105.16 (environmental, social and economic balancing).

(D) The analysis must identify present conditions and the effects of reasonably foreseeable future development within the affected body of water, including a wetland, wetland complex, or watercourse upstream and immediately downstream of the proposed dam, water obstruction or encroachment.

(E) A dam, water obstruction or encroachment must be designed, constructed, operated and maintained to assure adequacy and compliance with this chapter, taking into account reasonably foreseeable development within the watershed.

(ix) Mitigation plan. [Actions to be taken in accordance with the definition of mitigation in this chapter.] When an applicant or the Department identifies impacts to aquatic resources, the applicant must provide statements, plans, maps or other materials demonstrating that the impacts have been avoided and minimized to the maximum practicable extent. If impacts to aquatic resources are identified and cannot be avoided or minimized, the applicant must provide a plan to compensate for the impacts under the mitigation requirements of this chapter consistent with § 105.20a (relating to compensation for impacts to aquatic resources).

(x) Impacts analysis. A detailed analysis of the [potential impacts, to the extent applicable, of the] proposed project [on water quality, stream flow, fish and wildlife, aquatic habitat, Federal and State forests, parks, recreation, instream and downstream water uses, prime farmlands, areas or structures of historic significance, streams which are identified candidates for or are included within the Federal or State wild and scenic river systems and other relevant significant environmental factors.] impacts. This analysis is not an

assessment or evaluation of protected water uses or water quality standards performed pursuant to 25 Pa. Code Chapter 93. This analysis must address the following:

- (A) Potential threats to life or property created by the dam, water obstruction or encroachment.**
- (B) Potential threats to safe navigation created by the dam, water obstruction or encroachment.**
- (C) The effect of the dam, water obstruction or encroachment on the property or riparian rights of owners upstream, downstream or adjacent to the project.**
- (D) Aquatic resource impacts. The direct, indirect and secondary impacts of the construction, modification or operation of the dam, water obstruction or encroachment on aquatic resources and aquatic resource functions, including impacts on flow regime and ecology, water quality, stream flow, fish and wildlife, aquatic habitat, public water supplies, instream and downstream water uses, and other relevant significant environmental factors.**
- (E) Other impacts. The direct, indirect and secondary impacts of the dam, water obstruction or encroachment on nearby local, Federal and State forests or parks, recreation, natural areas, wildlife sanctuaries, prime farmlands, areas or structures of National, State or local cultural, historical or archeological significance, streams which are identified candidates for or are included within the Federal or State wild and scenic river systems, recreational areas and other relevant significant environmental factors. [If a project will affect wetlands the project description shall also include:**

(A) A narrative of the delineation process supported by the appropriate data sheets and copies of appropriate soil maps and descriptions from soil conservation service soil surveys. Soil conservation service soil surveys may be obtained from the county conservation district offices.

(B) An analysis of whether the wetland is exceptional value as classified in § 105.17 (relating to wetlands).

(C) A statement on water dependency. A project is water dependent when the project requires access or proximity to or siting within water to fulfill the basic purposes of the project.]

(xi) When a project will affect a wetland, the project description, narrative discussion and analysis on water dependency must also include:

(A) A narrative of the delineation process supported by the appropriate information, including data sheets and copies of appropriate soil maps and descriptions from USDA Natural Resource Conservation Service soil surveys.

(B) The type, size, a description of wetland functions, an analysis of whether the wetland is exceptional value as classified in § 105.17 (relating to wetlands), and a

demonstration that satisfies the requirements contained in § 105.18a (relating to permitting of structures and activities in wetlands).

(xii) Antidegradation. A demonstration must be provided that the proposed project is consistent with State antidegradation requirements under this chapter and 25 Pa. Code Chapters 93, 96 and 102 (relating to water quality standards; water quality standards implementation; and erosion and sediment control) and the Clean Water Act (33 U.S.C.A. § § 1251—1376).

(xiii) Cumulative impact analysis. A permit applicant shall provide a projectwide cumulative impact analysis using available resources, which assesses the cumulative impact of the project and other reasonably foreseeable or existing dams, water obstructions or encroachments on wetlands. The applicant's analysis must identify piecemeal impacts and the impacts on each wetland resource in the proposed project area and must consider the wetland resource as part of a complete and interrelated wetland area. The applicant must demonstrate that the proposed project, along with other potential or existing dams, water obstructions or encroachments, does not result in an impairment of the Commonwealth's wetland resources under § 105.18a(a)(6) or a major impairment of the wetlands under § 105.18a(b)(6).

(2) An application for a project which will affect less than 1 acre of wetland where the wetland is not exceptional value wetland shall also include a description of functions and values of the existing wetlands to be impacted by the project, as defined in § 105.1.

(3) An application for a project which may have an effect on an exceptional value wetland or on 1 or more acres of wetland must also include an assessment of the wetland functions and values using a methodology accepted by the Department and a survey, conducted by a licensed professional land surveyor, of the wetland boundary as delineated and of the property lines of the parcel where the project is located.

(4) When the Department, conservation district or delegated local agency determines that an application or registration is incomplete or [~~contains insufficient~~] inadequate [~~information~~] to [~~determine~~] demonstrate compliance with this chapter, it will notify the applicant in writing. The applicant shall have [~~60 days~~] a specified period, as stated by the Department in writing, to provide the information necessary to complete the application or registration and provide the information necessary to demonstrate compliance with this chapter. [~~Thereafter,~~] If the applicant does not submit the items for completeness or additional information to demonstrate compliance with this chapter, the Department, conservation district or delegated local agency [~~will~~] may either consider the application or registration to be withdrawn by the applicant or deny the application or registration under § 105.21 (criteria for permit issuance and denial). [~~Requests for~~] An applicant may request a specific extension [~~may be sought by the applicant~~] in writing, setting forth the need for the extension. The Department, conservation district or delegated local agency will confirm or reject the applicant's request for a time extension in writing. The applicant will be notified in writing when an application or registration is considered withdrawn or denied. When an application or registration is

considered withdrawn, the Department, conservation district or delegated local agency will close the application file and will not take further action to review the [file] application or registration. The Department, conservation district or delegated local agency will evaluate an application or registration under the criteria in § 105.21 after the applicant has submitted additional completeness and information items in the time period provided by the Department.

(5) If the application has been withdrawn or denied [in accordance with] under paragraph (4), the fees associated with filing the application will not be refunded.

(f) A permit application for a small [projects] project located in [streams] a stream or [floodplains] floodplain must be accompanied by the following information. This permit application may not be used for [projects] a project located in [wetlands] a wetland. If [upon] on review the Department determines that more information is [required] necessary to determine whether a small project will have an insignificant impact on safety and protection of life, health, property or the environment, the Department may require the applicant to submit additional information and processing fees required under this chapter.

* * * * *

(2) [A cross sectional view. A cross sectional view of the affected regulated waters of this Commonwealth before and after the structure or activity is constructed.] Cross sections. The upstream and downstream cross sections must show the current or existing conditions and the proposed conditions of aquatic resources. The cross sections must be provided at a minimum scale of one inch equals 20 feet so that the cross sections adequately illustrate the scope of work proposed.

(3) A location map. A map showing the geographic location of the project. U.S.G.S. topographic maps, FEMA maps or municipal maps are acceptable. [FEMA and municipal maps may be obtained from local government offices. U.S.G.S. maps may be reviewed at county conservation district offices or obtained by writing to United States Geological Survey Map Distribution, Box 25286 Federal Center, Denver, CO 80225.]

(4) Project description. A narrative of the project shall be provided which includes, but is not limited to:

- (i) A description of the proposed structure or activity.
- (ii) The project purpose.
- (iii) The effect the project will have on public health, safety or the environment.
- (iv) The project's need to be in or in close proximity to water.

(5) Color photographs. Color photographs of the proposed site must be submitted. The [photos] photographs must accurately depict the project area and provide a relative scale of the project to the surrounding area. [and a] A map showing the location and orientation of each photograph must also be included.

(g) [Except for small projects, an] An application for a permit under this chapter [shall] must be accompanied by proof of an application for [an Earth Disturbance Permit] a permit or an erosion and sedimentation control plan under Chapter 102 (relating to erosion and sediment control) [for activities in the stream and earthmoving activities]. The erosion and sedimentation control plan must conform to requirements [in] under Chapter 102 [(relating to erosion and sediment control)] and, unless reviewed by the Department, must include a copy of a letter from the conservation district in the county where the project is located indicating that the conservation district has reviewed the erosion and sediment control plan [of] provided by the Chapter 102 permit applicant and considered it to be satisfactory, if applicable. [Earthmoving] Earth disturbance activities, including small projects, [shall] must be conducted [pursuant to] under an [earth disturbance] erosion and sediment control plan that satisfies Chapter 102 requirements. The erosion and sediment control plan must be available at the project site. Best management practices required under the erosion and sediment control plan must be implemented and maintained before, during and after construction.

(h) An application [shall] must be signed and submitted by the person who owns or has primary responsibility for the proposed dam or reservoir, water obstruction or encroachment. In the case of a partnership, one or more members of the partnership authorized to sign and submit on behalf of the entire partnership shall sign and submit the application. In the case of a corporation, the president or vice president and the treasurer, assistant treasurer, secretary or assistant secretary authorized to sign on behalf of the corporation shall sign and submit the application. In the case of a political subdivision, the chief officer of the political subdivision or other responsible official empowered to sign for the political subdivision shall sign and submit the application. If an application is submitted by a person with primary responsibility for the structure or activity, the owner of a dam or reservoir, water obstruction or encroachment will not thereby be relieved of legal duties or responsibilities for the structure or activity as imposed by the act or this chapter. An applicant may electronically sign and submit an application to the Department, consistent with the Electronic Transactions Act of 1999 (73 P.S. § § 2260.101 — 2260.501).

[(i) An application shall be signed by the owners of the dam or reservoir, water obstruction or encroachment, or the persons exercising primary responsibility for the dam or reservoir, water obstruction or encroachment. In the case of a partnership, one or more members of the partnership authorized to sign on behalf of the entire partnership shall sign the application. In the case of a corporation, it shall be signed by the president, vice president or other responsible official empowered to sign for the corporation. In the case of a political subdivision, it shall be signed by the chief officers of the political subdivision or other responsible official empowered to sign for the political subdivision, with the seal affixed and attested by the clerk.]

[(j)](i) Plans, specifications and reports accompanying [applications] an application for any category of [dams] dam, or for [bridges] a bridge and other water [obstructions] obstruction or [encroachments which] encroachment that would pose a threat to human life or substantial

potential risk to property, [shall] **must** be affixed with the seal of a registered professional engineer and a certification, signed by the registered professional engineer **consistent with the requirements under the Commonwealth's Engineer, Land Surveyor and Geologist Registration Law (63 P.S. § § 148—158.2)** or, if submitted electronically, **consistent with the requirements under 73 P.S. § 2260.303 (relating to Legal recognition of electronic records, electronic signatures and electronic contracts)**, which [shall] **must** read as follows:

“I (name) do hereby certify pursuant to the penalties of 18 Pa.C.S.A. Sec. 4904 to the best of my knowledge, information and belief, that the information contained in the accompanying plans, specifications and reports has been prepared in accordance with accepted engineering practice, is true and correct, and is in conformance with Chapter 105 of the rules and regulations of the Department of Environmental Protection.”

(j) The following application materials must be affixed with the seal of a registered professional geologist or engineer consistent with the requirements under the Commonwealth's Engineer, Land Surveyor and Geologist Registration Law (63 P.S. § § 148—158.2), or if submitted electronically, consistent with the requirements under 73 P.S. § 2260.303:

(1) Plans, specifications, reports and other information that accompanies an application for a dam or levee, or other type of water obstruction or encroachment, that details geologic borehole locations, profiles, logs and interpretations.

(2) A report on coastal geology concerning bluff and beach erosion and subsequent transportation and deposition of sediment, if applicable.

(k) The Department may waive the specific information requirements of this [section] chapter in writing[, in the record of decision,] if [upon review of the permit application,] the Department finds that the specific information is not necessary to [review the application] ensure compliance with this chapter. This waiver of specific information requirements includes information related to the restoration of aquatic resources and other activities which protect the natural ecosystem characteristics and aquatic resource functions.

(l) The Department will review the adequacy of the fees in this [section] chapter at least once every 3 years and provide a written report to the [EQB] Environmental Quality Board. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and it will contain recommendations to adjust fees to eliminate the disparity, including recommendations for regulatory amendments.

§ 105.13a. Complete applications and registrations.

(a) 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. A complete application or registration is one that meets both of the following:

(1) Satisfies principal completeness requirements.

(2) Contains information that is necessary to demonstrate compliance with the Act, the Clean Streams Law and this chapter, including the identification of all proposed impacts to aquatic resources.

(b) When the Department, **conservation district or other delegated agency** determines that an application **or registration** is incomplete or **[contains insufficient information]** **substantially inadequate**, it will notify the applicant in writing. The applicant **[shall have 60 days]** **will be provided a specified period** from the date of **[the] a [Department's] Department, conservation district or other delegated agency [letter] notification** to complete the application **or registration and to provide the information necessary for the Department, conservation district or other delegated agency to determine compliance with this chapter.** **If the applicant fails to complete the application or registration or fails to provide the necessary information,** the Department, **conservation district or other delegated agency** **[will] may either** consider the application **or registration** to be withdrawn **or deny the application or registration under § 105.21 (criteria for permit issuance and denial).** **[Requests for] An applicant may request** a specific extension **[shall be submitted by the applicant] in writing, setting forth the need for the time extension. The Department, conservation district or other delegated agency will confirm or reject in writing the applicant's request for a specific extension.** The applicant will be notified in writing when an application **or registration** is considered withdrawn **or denied.** **The Department, conservation district or delegated local agency will evaluate an application or registration under the criteria in § 105.21 after the applicant has submitted additional completeness and information items in the time period provided by the Department.** If the applicant chooses to reapply **or re-register** **[for a permit], a new complete application or registration** and fee will be required.

§ 105.13b. Proof of financial responsibility.

For continued operation and maintenance of all existing Hazard Potential Category 1 or Category 2 dams, as classified in § 105.91 (relating to classification of dams and reservoirs), and water obstructions or encroachments which present a substantial potential risk to life, **[or] property, or the environment**; and as a requirement for approval of a permit under this chapter for a Hazard Potential Category 1 or Category 2 dam, and water obstruction or encroachment which presents a substantial potential risk to life, **[or] property, or the environment**, the Department will require proof of financial responsibility or security assuring the proper construction, repair, operation and maintenance, inspection and monitoring and removal, if necessary, of the facility **or project.** **For dams, water obstructions or encroachments, the Department may require proof of financial responsibility or security to assure the proper construction, repair, operation and maintenance, inspection and monitoring of a compensatory mitigation project site under § 105.20a.**

(1) As proof of responsibility or security, the Department may require one or more of the following:

(i) 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 Public Utility Code).

(ii) Ownership or management of the facility or project by an agency of the Federal, State, county or municipal government or of an interstate compact.

(iii) A bond or other legal device of a form acceptable to the Department, payable to the Commonwealth, which guarantees proper construction, repair, operation and maintenance, inspection and monitoring, and removal, if necessary, of the facility or project. The amount of bond or legal device must be sufficient to cover the costs of entry, repair, correction, operation, maintenance, inspection, monitoring or removal of the facility or project by the Commonwealth in the event of failure of the owner to comply with orders of the Department, terms and conditions of the permit, this chapter and the act and section 302 of the Flood Plain Management Act (32 P. S. § 679.302).

(iv) Enrollment and continued good standing in the Commonwealth's Private Dam Financial Assurance Program (PDFAP) established under Section 1603-N of the act of June 22, 2018 (P.L. 281, No. 42), known as the Fiscal Code.

(2) The Department may, upon review, request an increase in the amount of the bond or other legal device noted in paragraph (1)(iii) as necessary to ensure that sufficient funds are available. The Department may not increase this amount more than once every 10 years unless the facility is being modified by permit.

* * * * *

§ 105.14. Review of applications and registrations.

(a) An application or registration will be reviewed under this chapter to determine the proposed project's effect on life, health, safety, property and the environment, [in accordance with] with an adequate margin of safety, using prevailing practices in the engineering profession, and in accordance with current scientific and environmental principles and practices.

(b) In reviewing an application or registration for a permit [application] under this chapter, the Department will use the following factors, when applicable, to make a determination of impact:

(1) Potential threats to [life or property] life, health, safety, property, or the environment created by the dam, water obstruction or encroachment.

(2) Potential threats to safe navigation created by the dam, water obstruction or encroachment.

(3) The effect of the dam, water obstruction or encroachment on the property or riparian rights of owners upstream, downstream or adjacent to the project.

(4) The effect of the dam, water obstruction or encroachment on regimen and ecology of the watercourse or other body of water, water quality, stream flow, fish and wildlife, aquatic habitat, instream and downstream uses and other significant environmental factors.

(5) The impacts of the dam, water obstruction or encroachment on nearby natural areas, wildlife sanctuaries, public water supplies, other geographical or physical features including cultural, archaeological and historical landmarks, National wildlife refuges, National natural landmarks, National, State or local parks or recreation areas or National, State or local historical sites.

(6) Compliance by the dam, water obstruction or encroachment with applicable laws administered by the Department, the Pennsylvania Fish and Boat Commission, other Commonwealth agencies or commissions and the river basin commissions created by interstate compact.

(7) The extent to which a project is water dependent and thereby requires access or proximity to or siting within water to fulfill the basic purposes of the project. The dependency must be based on the demonstrated unavailability of any practicable alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth.

(8) Present conditions and the effects of reasonably foreseeable future development within the affected watershed upstream and downstream of the dam, water obstruction or encroachment:

(i) A dam, water obstruction or encroachment shall be designed, constructed and operated to assure adequacy and compliance with this chapter, taking into account reasonably foreseeable development within the watershed.

(ii) In assessing the impact of future development upon a dam, water obstruction or encroachment, the Department may require the applicant to submit data regarding estimated development potentials and municipal, county and regional planning related to the affected watershed.

(9) Consistency with State and local floodplain and stormwater management programs, the State Water Plan and the Coastal Zone Management Plan.

(10) Consistency with the designations of wild, scenic and recreational streams under the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. § § 1271—1287) or the Pennsylvania Scenic Rivers Act (32 P. S. § § 820.21—820.29)[, **including identified 1-A candidates**].

(11) Consistency with State antidegradation requirements [**contained in** under this chapter and 25 Pa. Code Chapters 93[, 95[, 96 and 102 [(relating to water quality standards; wastewater treatment requirements; and erosion and sediment control)] and the Clean Water Act (33 U.S.C.A. § § 1251—1376).

(12) Secondary impacts associated [**with** with, but not [**the direct result of**] directly resulting from, the construction or substantial modification of the dam or reservoir, water obstruction or encroachment in the area of the project and in areas adjacent thereto and future impacts associated with dams, water obstructions or encroachments, the construction of which

would result in the need for additional dams, water obstructions or encroachments to fulfill the project purpose.

(13) For dams, water obstructions or encroachments located in, along, across or projecting into [a wetland] aquatic resources, including wetlands, [as defined in § 105.1 (relating to definitions),] the Department will [also consider the impact] evaluate the effects of the proposed project on aquatic resources, [on the] including [wetlands values and] aquatic resource functions, in making a determination of adverse [impact] environmental impact. The Department will evaluate whether the proposed compensatory mitigation demonstration under § 105.20a provides adequate compensation for the proposed environmental impacts.

(14) The cumulative impact of this project and other potential or existing projects. In evaluating the cumulative impact, the Department will consider whether numerous piecemeal changes may result in a major impairment of the wetland resources. The Department will evaluate a particular wetland site for which an application is made with the recognition that it is part of a complete and interrelated wetland area.

(c) In reviewing a permit application under § 105.11(c) (relating to permit requirements) and section 6(c) of the act (32 P. S. § 693.6(c)) for the operation and maintenance of an existing dam, water obstruction or encroachment, the Department will use the following factors:

(1) Potential threats to life, property or safe navigation created by the continuing operation or maintenance of the project.

(2) Adverse impact on stream flow, water quality or the environment which might be reduced or mitigated by reasonable changes in the operation of the project.

(3) Compliance of the operation and maintenance of the project with applicable laws administered by the Department, the Pennsylvania Fish and Boat Commission, other state agencies and commissions and the river basin commissions created by interstate compact.

(d) The Department may review a permit application for the operation and maintenance of existing projects without regard to the design criteria and construction requirements in Subchapters B—J. If the Department finds that an existing dam, water obstruction or encroachment is unsafe or adversely affects property or the environment, it may consider application of criteria and requirements reasonably necessary to correct the conditions.

§ 105.15. Environmental assessment.

(a) A person may not construct, operate, maintain, modify, enlarge or abandon the following categories of structures or activities until an Environmental Assessment has been approved in writing by the Department. The Environmental Assessment must be on a form provided by the Department and include the following information:

(1) For dams, water obstructions or encroachments permitted under this chapter, the Department will base its evaluation on the information required [by] under § 105.13 (relating to permit applications—information and fees) and the factors included in §105.14(b) (relating to review of applications) and this section.

(2) For dams, water obstructions or encroachments located in, along or projecting into a wetland for which a permit is not otherwise required under this chapter, the Department will base its evaluation on the information required [by] under [§ 105.13(d)] § 105.13(e) and the factors included in § 105.14(b) and this section.

(3) For dams located in, along or projecting into an exceptional value water as defined in Chapter 93 (relating to water quality standards) for which a permit is not otherwise required under this chapter, the Department will base its evaluation on the information required [by] under the factors included in Chapter 93 and §§ [105.13(d)] 105.13(e) and 105.14(b) and the following information submitted by the applicant:

- (i) The surface area of the impoundment.
- (ii) The height of the dam.
- (iii) The mean depth and maximum depth of the stream at the location of the dam.
- (iv) A description of the release structure.
- (v) The rate of a conservation release.
- (vi) The design of bypass structures.
- (vii) The use of the dam.
- (viii) The material used for construction of the dam.

(4) For restoration of aquatic resources, the Department will base its evaluation on the following information:

(i) A detailed project description that includes the specific purpose, goals and objectives of the restoration project.

(ii) A project plan which includes:

(A) Resource identification and data.

(B) A location map.

(C) A determination or delineation of wetlands and accompanying data sheets.

(D) Watercourse reports.

(E) Photographs.

(F) Identification of the plan preparer.

(G) Qualifications of the plan preparer.

(iii) A description of aquatic resources at the project site.

(iv) For surface waters, other than wetlands, as defined in 25 Pa. Code § 93.1, provide the resource type, size, designated and existing uses of surface waters under 25 Pa. Code Chapter 93.

(v) For wetlands, provide the type, size, a description of wetland functions, an analysis of whether wetlands at the project site are exceptional value as classified in § 105.17, and a demonstration that satisfies the requirements contained in § 105.18a.

(vi) Information related to historic and modern land uses. This includes a demonstration and identification of historic and modern impacts on or degradation of aquatic resources, as applicable.

(vii) An impacts analysis identifying the anticipated aquatic resource restoration improvements and benefits, including water quality, aquatic habitat, floodway and floodplain re-establishment, reconnection to groundwater and wetlands restoration.

(viii) Plans, cross sections, an erosion and sediment control plan, geomorphic measurements and analyses, geologic characteristics and geotechnical data, paleo-aquatic or target ecosystem characterization, identification of existing constraints such as upstream channel instability, potential sediment contributions and need for transition zones and other factors which may constrain restoration capacity.

(ix) Other relevant information, data or analyses pertaining to the restoration site that the applicant would like the Department to consider in its evaluation.

(b) For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. § 1341), an applicant requesting water quality certification under section 401 shall prepare and submit to the Department for review, an environmental assessment containing the information required [by] under subsection (a) for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth.

(c) Based on the results of the environmental assessment required under subsection (a), the Department may require the applicant to undertake further studies and submit additional information, analyses and reports as found necessary by the Department.

(d) The environmental assessment has been conducted by the Department for all general permits, categories of structures and activities listed in [§ 105.12(a)(1)—(10) and (12)—(15)] § 105.12(a)(1)—(10), (12)—(15) and (17)—(21) (relating to waiver of permit requirements). The environmental assessment has also been conducted for the structures or activities listed in § 105.12(b) or for which water quality certification has been granted for a Nationwide permit regulating the structure or activity and the environmental assessment requirements have been deemed satisfied.

§ 105.16. Environmental, social and economic balancing.

(a) If the Department determines that there may be an impact on natural, scenic, historic or aesthetic values of the environment, the Department will consult with the applicant to examine

ways to reduce the adverse environmental impact. If, after consideration of mitigation measures **and consistency with § 105.20a (relating to compensation for impacts to aquatic resources)**, the Department finds that the adverse environmental impact will occur, the Department will evaluate the public benefits of the project to determine whether the public benefits outweigh the environmental harm.

* * * * *

(e) This section does not apply to dams, water obstructions or encroachments located in, along, across or projecting into wetlands. These structures or activities will be evaluated under §§ 105.17 and 105.18a—105.20a.

§ 105.17. Wetlands.

Wetlands are a valuable public natural resource. This chapter will be construed broadly to protect this valuable resource.

(1) Exceptional value wetlands. This category of wetlands deserves special protection. Exceptional value wetlands are wetlands that exhibit one or more of the following characteristics:

(i) Wetlands which serve as habitat for fauna or flora listed as “threatened” or “endangered” under the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. §§ 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543), the Wild Resource Conservation Act (32 P. S. §§ 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code).

(ii) Wetlands that are hydrologically connected to or located within 1/2-mile of wetlands identified under subparagraph (i) and that maintain the habitat of the threatened or endangered species within the wetland identified under subparagraph (i).

(iii) Wetlands [that are] located in or along the floodplain of the reach of a wild trout stream [or waters listed as exceptional value under Chapter 93 (relating to water quality standards) and the floodplain of streams tributary thereto, or wetlands within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or designated as wild or scenic under the Pennsylvania Scenic Rivers Act (32 P. S. §§ 820.21—820.29)] **and the floodplain of streams tributary thereto.**

(iv) Wetlands located in or along the floodplain of waters listed as exceptional value under 25 Pa Code Chapter 93 and the floodplain of streams tributary thereto.

(v) Wetlands located within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or designated as wild or scenic under the Pennsylvania Scenic Rivers Act (32 P. S. §§ 820.21—820.29)

[(iv)](vi) Wetlands located along an existing public or private drinking water supply, including both surface water and groundwater sources, that maintain the quality or quantity of the drinking water supply.

[(v)](vii) Wetlands located in areas designated by the Department as “natural” or “wild” areas within State forest or park lands, wetlands located in areas designated as Federal wilderness areas under the Wilderness Act (16 U.S.C.A. § § 1131—1136) or the Federal Eastern Wilderness Act of 1975 (16 U.S.C.A. § 1132) or wetlands located in areas designated as National natural landmarks by the Secretary of the Interior under the Historic Sites Act of 1935 (16 U.S.C.A. § § 461—467).

(2) Other wetlands. This category includes wetlands not categorized as exceptional value wetlands.

(3) Permits. The Department will maintain a list of permit decisions involving wetlands. This list will be a matter of public record and will be available for inspection at the Department’s offices.

§ 105.18a. Permitting of structures and activities in wetlands.

(a) *Exceptional value wetlands.* Except as provided for in subsection (c), the Department will not grant a permit under this chapter for a dam, water obstruction or encroachment located in, along, across or projecting into an exceptional value wetlands, or otherwise affecting an exceptional value wetland, unless the applicant affirmatively demonstrates in writing and the Department issues a written finding that the following requirements are met:

* * * * *

(7) The applicant [shall] **must** replace affected wetlands in accordance with § 105.20a (relating to [wetland replacement criteria] **compensation for impacts to aquatic resources**).

(b) *Other wetlands.* Except as provided for in subsection (c), the Department will not grant a permit under this chapter for a dam, water obstruction or encroachment in, along, across or projecting into the wetland which is not an exceptional value wetland, or otherwise affecting the wetland, unless the applicant affirmatively demonstrates in writing and the Department issues a written finding that the following requirements are met:

* * * * *

(7) The applicant [will] **must** replace the affected wetlands to compensate for unavoidable impacts, in accordance with § 105.20a (**relating to compensation for impacts to aquatic resources**).

* * * * *

§ 105.20a. [Wetland replacement criteria.] **Compensation for impacts to aquatic resources.**

[(a) Wetlands replacement must meet the following general criteria:

(1) *Area ratio.* The wetland shall be replaced at a minimum area ratio of replacement acres to affected acres of 1:1. The Department may require the area ratio to exceed 1:1 based on a determination of the area affected and the functions and values which will be destroyed or adversely affected by the project. For structures or activities constructed without a permit, and for which mitigation, as defined in § 105.1 (relating to definitions), cannot be achieved, the wetland shall be replaced at a minimum area ratio of 2:1 (replacement acres: affected acres). The Department may require the area ratio to exceed 2:1 based on a determination of the area affected and the functions and values which were destroyed or adversely affected by the project.

(2) *Function and value replacement.* Functions and values that are physically and biologically the same as those that are lost shall be replaced at a minimum ratio of 1:1. The Department may require the functions and values ratio to exceed 1:1 based on the area affected and on the functions and values which will be destroyed as adversely affected by the project and the replacement ratio. For structures or activities constructed without a permit, and for which mitigation, as defined in § 105.1, cannot be achieved, the wetland shall be replaced at a minimum area ratio of 2:1. The Department may require the area ratio to exceed 2:1 based on a determination of the area affected and the functions and values which were destroyed or adversely affected by the project.

(3) *Siting criteria.* Replacement shall be located adjacent to the impacted wetland unless an alternative replacement site is approved by the Department. Alternative replacement sites will generally not be approved unless the replacement site is located within the same watershed as the wetland being replaced or within the designated boundaries of the coastal zone management area where the loss occurs.

(b) In addition to the general criteria in subsection (a), the Department will use its guidelines entitled “*Design Criteria for Wetlands Replacement*” in making decisions under this section. These guidelines provide for design, flexibility and utilization of best available technology in environmental engineering. These guidelines are available from the Division of Rivers and Wetlands Conservation, Post Office Box 8761, Harrisburg, Pennsylvania 17105-8761.]

The requirements of this section are necessary and proper to carry out the purposes of the act and are consistent with Federal mitigation requirements under section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108-136), Section 404 of the Clean Water Act (33 U.S.C. § 1344) and the regulations thereunder at 40 CFR part 230, subpart J.

(a) *Compensatory mitigation for a proposed project.* Where the applicant proposing a dam, water obstruction or encroachment demonstrates that impacts to aquatic resources cannot be avoided or further minimized by limiting the degree or magnitude of the proposed project or its implementation, or by rectifying the impact by repairing, rehabilitating or restoring the affected aquatic resources, the applicant must reduce or eliminate the impact through compensatory mitigation by replacing the aquatic resource functions that will be impacted or by providing substitute resources or environments.

(b) No net loss of wetlands. The Department will track wetland losses and gains that occur as a result of the implementation of this chapter and ensure that, at a minimum, there is a no net loss of wetland resources within the service areas as identified in subsection (c) below.

(c) Siting criteria for service areas. An applicant may plan for compensatory mitigation by including a proposal to use a Department approved mitigation bank, in-lieu fee program or permittee responsible mitigation site. Compensatory mitigation for impacts to aquatic resources will generally not be approved unless the compensatory mitigation site is located within the same designated watershed boundaries identified by the Department.

(d) Compensation factors. The applicant must provide information for, and the Department will evaluate, the following factors when determining the appropriate amount of compensatory mitigation for impacts to aquatic resources that cannot be eliminated following clauses (i)(A)—(C) of mitigation as defined under § 105.1.

(1) The area impacts, including the following aquatic resource impacts under § 105.13(e)(1)(x):

(i) Direct impacts.

(ii) Indirect impacts.

(iii) Secondary impacts.

(2) The aquatic resource functions affected by the proposed project.

(3) The level of effect of the proposed project on the aquatic resource functions.

(4) The ecological and public value of the aquatic resource.

(5) The value of proposed compensatory mitigation actions to reestablish and rehabilitate environmental and aquatic resources.

(e) Methodologies. When determining the appropriate amount of compensatory mitigation, an applicant may use the Department's function based aquatic resource compensation protocol (technical guidance 310-2137-001), as amended, and aquatic resource assessment protocols (technical guidance 310-2137-002, 310-2137-003, 310-2137-004), as amended, or another equivalent alternative methodology acceptable to the Department for assessing a project's proposed effects on aquatic resources and aquatic resource functions.

(f) Monitoring and performance standards.

(1) The permittee must provide a plan to monitor compensatory mitigation which includes:

(i) The monitoring period and frequency.

(ii) Site-appropriate performance standards.

(iii) A means to identify and correct performance deficiencies.

(iv) Assurances for management and long-term protection of the compensation site, including proof of financial responsibility under § 105.13b, where applicable.

(2) The permittee must monitor for performance deficiencies and implement corrective actions in accordance with a plan approved by the Department.

(3) Compensatory mitigation must be designed to achieve self-sustaining environmental benefits, aquatic resources, or aquatic resource functions.

(4) If a permittee transfers ownership or responsibility for a mitigation site, the Department must be notified in writing within 30 days of the transaction. The new owner or responsible party must acknowledge in writing to the Department adherence to the monitoring and performance standards of the plan and all related special conditions of the permit, when applicable.

(g) Structures or activities constructed without a Department permit. For structures or activities constructed without a Department permit or registration issued under this chapter, and for which mitigation cannot be achieved, the compensatory mitigation as determined above must be performed at a minimum ratio of 2:1 (replacement area to affected area). The Department may require the ratio to exceed 2:1 based on a determination of the area(s) affected, the aquatic resource functions destroyed or adversely affected by the project and the willfulness of the violation.

PERMIT ISSUANCE, TRANSFER AND REVOCATION

§ 105.21. Criteria for permit issuance and denial.

* * * * *

(c) The Department may not issue a permit to operate and maintain a dam, water obstruction or encroachment constructed without a permit unless one of the following is met:

(1) The Department determines that the structure or activity complies with the standards and criteria of this title, including [replacement in accordance with] compensatory mitigation under § 105.20a (relating to [wetland replacement criteria] compensation for impacts to aquatic resources), and with other laws administered by the Department, the Pennsylvania Fish and Boat Commission and river basin commissions created by interstate compact.

(2) 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 Fish and Boat Commission and river basin commissions created by interstate compact, that the effect on wetlands will be mitigated, and at least one of the following is met:

(i) Restoration would cause destruction of a dwelling occupied by a person who had no role in the planning or construction of the project.

(ii) Restoration may result in more long-term damage than would be caused by allowing the project to remain in place.

(iii) Restoration would be unsuccessful due to material changes in the condition of the site and its surrounding area.

(iv) There are extraordinary circumstances which preclude restoration.

* * * * *

(f) Issuance or denial of a permit under this chapter also constitutes concurrent issuance or denial of a Clean Water Act Section 401 water quality certification request under § 105.15 for structures and activities that do not require any Federal authorization other than authorization from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act (33 U.S.C. § 1344) or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 and 403) unless the structures or activities qualify for the State Programmatic General Permit program or nationwide permit coverage and the Department has issued conditional certification or has otherwise waived certification for those categorical structures and activities.

* * * * *

§ 105.25. Transfer of permits.

(a) A permit must be transferred, or notification **must be** provided to the Department, as follows:

* * * * *

(2) If the owner and permittee are not the same person and there is a change of permittee, but not ownership of the dam, water obstruction or encroachment, the permit must be transferred to the new permittee.

(3) If the owner and permittee are not the same person and there is a change in ownership **of the dam**, but not **of the** permittee [of the dam, water obstruction or encroachment], the change in ownership must be reported by the permittee to the Department in writing within 30 days **of the transfer of ownership**.

(b) A permit will only be transferred **[upon] on** application to and approval by the Department. An application for transfer **[shall] must** be submitted on forms provided by the Department.

* * * * *

(e) The original permittee will not be relieved of an obligation to comply with this chapter, the terms and conditions of the permit or an order issued by the Department until the transfer has been approved.

(f) An owner of a dam that does not require a permit shall notify the Department in writing of a change in ownership within 30 days after the transfer of ownership occurs.

~~[(f)](g)~~ **[Upon]** On receipt of the approved application for transfer, the applicant shall affix the approved application for transfer to the original permit. The approved application for transfer shall become part of, and remain affixed to, the original permit. The Department may prepare a new permit to replace worn or obsolete documents.

SUBMERGED LANDS OF THE COMMONWEALTH—LICENSES AND ANNUAL CHARGES

§ 105.35. Charges for use and occupation of submerged lands of this Commonwealth.

(a) Except as provided in subsections (b) and (c), the following charges apply to the granting of an easement, right-of-way, license or lease to occupy submerged lands of this Commonwealth issued under section 15 of the act (32 P. S. § 693.15) and § 105.32 (relating to projects—proper purpose):

(1) For commercial utility and other dams, water obstructions and encroachments except as listed in subsection (c), annual license charges:

- (i) For areas occupied by facilities, \$150 per tenth of an acre.
- (ii) For barge fleeting and **barge** mooring areas, \$30 per tenth of an acre.
- (iii) Minimum annual charge, \$750.

(2) For private recreation docks, owned and used solely by the owners of adjacent riparian property, unless the project is otherwise authorized by a general permit **for small docks and boat ramps** issued under section 7 of the act (32 P. S. § 693.7), an annual charge of \$250.

(3) For a groin structure in or along the shoreline of Lake Erie, an annual charge of \$250.

(b) Licenses for public service lines crossing or occupying submerged lands of this Commonwealth, issued under section 15 of the act or section 514 of The Administrative Code of 1929 (71 P. S. § 194) are subject to the following schedule of annual charges:

<i>Length of Crossings (in feet)</i>	<i>Charges (in dollars)</i>
Less than 500	750
500 to 999	1,500
1000 to 1499	3,000
1500 to 1999	4,500
2000 to 2499	6,000

2500 to 2999	7,500
3000 to 3499	9,000
3500 to 3999	10,500
4000 to 4499	12,000
4500 to 4999	13,500
5000 and over	15,000

(c) Charges may not be imposed under section 15 of the act or section 514 of The Administrative Code of 1929 for the following categories of activities and structures:

* * * * *

(6) A structure or facility constructed and operated exclusively to improve fish habitat, under a cooperative agreement with the Pennsylvania Fish and Boat Commission.

(7) A private recreational dock constructed, operated or maintained under a general permit registration issued under section 7 of the Act (32 P.S. § 693.7).

(8) A project or activity constructed and operated for the significant benefit of the environment, including the following:

(A) Restoration of aquatic resources.

(B) An agricultural conservation practice.

(C) Environmental reclamation or remediation

(D) Environmental treatment or clean-up.

(E) Other similar activities performed under a Department authorized permit or registration under this chapter.

(9) A project or activity of a temporary nature of one year or less, unless the Department authorizes a longer period in writing, for which the site of the project or activity will be fully restored to its previous condition consistent with one or more Department authorized permits or registrations under this chapter.

(d) The annual charges imposed in subsections (a) and (b) may be revised by the [EQB]Environmental Quality Board after approval by the Governor and reasonable notice to the holder of a license issued under this section.

* * * * *

CONSTRUCTION REQUIREMENTS AND PROCEDURES

§ 105.43. Time limits.

(a) The Department will set time limits for the commencement and completion of work under a permit and may set time limits for the commencement and completion of work under a Letter of Amendment or Letter of Authorization issued under this chapter that it deems reasonable and appropriate to carry out the purposes of this chapter.

(b) For water obstruction and encroachments, if the construction is not completed on or before the dates established in the permit, unless extended by the Department in writing, the permit shall become void without further notification by the Department.

(c) [For dams, unless otherwise stated, if work authorized by the dam permit or other Department approval has not commenced on or before December 31 of the 5th year following permit issuance or other Department approval, the permittee or owner shall notify the Department 6 months prior to the anticipated commencement of work so that the project design can be reassessed and reauthorized in writing. During the design reassessment, the permittee or owner may be required to make revisions due to changes in site conditions, dam classification, new technology or revisions to this chapter. At any time if the permittee or owner does not intend to perform the work, the Department shall be notified in writing and the Dam Permit or Department approval will become void without further notification by the Department.] For dams, the following apply:

(1) If work authorized under a dam permit or other Department approval has not commenced on or before the date established in the permit or other Department approval, the permit or other Department approval shall become void without further notification by the Department, unless the permittee requests and is granted an extension by the Department in writing.

(2) If work authorized under a dam permit or other Department approval will commence but will not be completed on or before the date established in the permit or other Department approval, unless extended by the Department in writing, the permittee or dam owner shall notify the Department 90 days before the anticipated commencement of work so that the Department can reassess the project design and reauthorize or extend the approval. During the project design reassessment, the Department may require the permittee or dam owner to revise the project design due to changes in site conditions, changes in dam classification, new technology or revisions to this chapter.

(3) If the permittee or dam owner does not intend to perform the work authorized under a dam permit or other Department approval, the Department must be notified in writing. The dam permit or other Department approval will become void on receipt of the notice by the Department, without further notification by the Department.

§ 105.47. Removal of dams and removal or abandonment of water obstructions and encroachments.

(a) If construction work has not been completed within the time specified in the permit or other Department approval and the time limit specified in the permit has not been extended in writing by the Department or if a permit has been revoked for any reason, the permittee or owner shall,

at his own expense and in a manner that the Department may prescribe, remove all or any portion of the work as the Department requires and restore **[the regulated waters of this Commonwealth] aquatic resources** to their former condition.

(b) Prior to discontinuing use or abandonment, the permittee or owner of a water obstruction or encroachment covered by this chapter, shall remove all or part of the **[facility] water obstruction or encroachment which poses a threat to public health, safety, property, or environment, or no longer serves a purpose** and **shall** take other actions as necessary to protect **the public health, safety, property** and the environment **[in accordance with] under** a permit or other approval issued by the Department.

(c) The owner of a dam covered by this chapter, shall remove all or part of the facility and take other actions as necessary to protect **public health, safety, property, or [and] the environment [in accordance with] under** a permit or other approval issued by the Department.

OPERATION, MAINTENANCE AND INSPECTION

§ 105.53. Inspections by permittees or owners and inspection reports.

(a) The permittee or owner of a dam, water obstruction or encroachment shall inspect the facility and appurtenant works according to the following schedule:

(1) Dams, reservoirs and their appurtenant works shall be inspected at least once every 3 months.

(2) For Hazard Potential Category 1 dams and Category 2 dams as classified in § 105.91 (relating to classification of dams and reservoirs), annual reports regarding the condition of the dam, affixed with the seal of a registered professional engineer and certification, which reads “This is to certify that the above dam has been inspected and the following are the results of the inspection.”, **[shall] must** be submitted to the Department on or before December 31 of each year. **[More frequent reports of dam conditions may be required by the Department if, in its discretion,] The Department may require more frequent reports of dam conditions if conditions indicate the reports are necessary to assure adequate protection of health, safety and property.**

(3) For Hazard Potential Category 1 and Category 2 dams as classified in § 105.91 (relating to classification of dams and reservoirs), internal conduit inspections of all piping systems passing through or under the dam must be performed at least once every 10 years. The inspection must include the outlet conduit, intake, gates, valves and other appurtenant features. A report detailing the conduit inspection must contain color photographs or video and must be submitted to the Department for review within 120 days of the close of the 10-year period. The Department may accept less frequent reports of conduit conditions if the Department determines that conditions indicate an acceptable serviceable life of the conduit remains to assure the adequate protection of health, safety and property.

[(3)](4) For local flood protection projects, annual reports regarding the condition of the flood protection facility **[shall] must** be submitted to the Department on or before December 31 of each year.

[(4)](5) The permittee or owner of a water obstruction or encroachment shall conduct periodic inspections to ensure the safe operation, monitoring and maintenance of the facility in accordance with this title, terms and conditions of the permit and approved operating or monitoring plans.

[(5)](6) The permittee or owner shall retain records of the inspections, including records of actions taken to correct conditions found in the inspections. Copies of the records shall be provided to the Department on request.

[(6)](7) The Department may, through terms and conditions of the permit or by request at any time, require the permittee or owner to submit certified reports regarding the condition of the facility to the Department.

[(7)](8) For water obstructions and encroachments, in lieu of inspections conducted by the permittee or owner and certified reports submitted by the permittee or owner, the Department may accept reports of equivalent inspections conducted and prepared by governmental agencies. In addition, the Department may accept equivalent inspection reports certified by the permittee or owner and submitted to other governmental agencies.

(b) Regardless of the date of construction of a dam, water obstruction or encroachment or whether it was permitted by the Department or its predecessors, it shall be the duty of the permittee or owner of a dam, water obstruction or encroachment to evaluate the safety of the facility and appurtenant structures and to modify the facility in accordance with the permit requirements of § 105.11 (relating to permit requirements) to ensure the protection of life and property with respect to changed conditions and current safety criteria. If structural or operation modifications are required as a result of the inspection findings, the permittee or owner shall apply for a permit, or request an amendment to an existing permit to perform the modifications.

Subchapter B. DAMS AND RESERVOIRS PERMITS, LETTERS OF AMENDMENTS AND LETTERS OF AUTHORIZATIONS

§ 105.81. Permit applications for construction and modification of dams and reservoirs.

- (a) In addition to the information required under §§ 105.13, 105.13a, 105.13b and 105.15, permit applications under this subchapter for the construction or modification of dams and reservoirs must provide the following information:

* * * * *

- (2) Site plan and cross **[sectional views] sections** required under **[§ 105.13(d)(1)(i)] § 105.13(e)(1)(i)** (relating to permit applications-information and fees).

(3) Construction plans, specifications and design reports to evaluate the safety, adequacy and suitability of the proposed dam, reservoir and appurtenant works in order to determine compliance with this chapter.

* * * * *

§ 105.82. Permit applications for operation and maintenance of existing dams and reservoirs.

(a) In addition to information required under §§ 105.13, 105.13b and 105.15 (relating to permit applications—information and fees; proof of financial responsibility; and environmental assessment), a permit application for the operation and maintenance of existing dams and reservoirs must provide the following information:

(1) Site plan and cross [sectional views] sections required under [§ 105.13(d)(1)(i)] § 105.13(e)(1)(i).

(2) “As built” construction plans, specifications and design reports not already on file with the Department, which show the type, size, height and other pertinent dimensions and features of the existing dam and reservoir and appurtenant works.

* * * * *

(8) The EAP for the dam or reservoir, if completed, or work plan to prepare and submit an EAP in accordance with § 105.134 (relating to EAP).

(9) For dams constructed or modified after July 1, 1979, [Proof] proof of title or flowage easements for land areas below the top of the dam elevation that is subject to inundation.

(10) Reports of the most recent inspections of the dam conducted by the owner or by the State or Federal government agencies.

* * * * *

§ 105.89. Letters of Amendment and Letters of Authorization for modification of dams and reservoirs.

(a) Projects which do not modify top of dam elevation, normal pool elevation, or normal operation of the pool level may be authorized by Letter of Amendment when the dam has an existing permit or by Letter of Authorization when the dam meets § 105.12(b) (relating to waiver of permit requirements). The permittee or owner shall provide the following information:

* * * * *

(2) In addition to the site plan and cross [sectional views] sections required under [§ 105.13(d)(1)(i)] § 105.13(e)(1)(i) (relating to permit applications—information and fees), construction plans, specifications and design reports in sufficient detail to evaluate the safety, adequacy and suitability of the proposed dam, reservoir and appurtenant works, and a schedule indicating proposed commencement and completion dates for construction.

(3) For projects involving storage of fluids or semifluids other than water, information concerning the chemical content, viscosity and other pertinent physical characteristics of the fluid or semifluid impounded.

* * * * *

**CLASSIFICATION AND DESIGN CRITERIA FOR APPROVAL OF CONSTRUCTION,
OPERATION, MODIFICATION
AND MAINTENANCE**

§ 105.96. Outlet works.

(a) Dams must include a device to allow the complete draining of the reservoir unless the Department determines that an outlet works is not feasible for a specific dam. At minimum, the device must be sized [to pass a minimum of 70% of the highest mean monthly inflow at the site plus the capacity to drain the top 2 feet of reservoir storage below normal pool in 24 hours. The highest mean monthly flow shall be determined from statistics of an appropriate stream gage, as approved by the Department, transferred to the dam site by the ratio of the drainage areas. The Department may require an increased size to provide for the integrity of the dam and to protect life and property with an adequate margin of safety.] with a combined capacity to achieve both of the following:

(1) Drain the top 2 feet of reservoir storage below normal pool in 24 hours.

(2) Convey the reservoir inflow, which must be based on the mean annual flow. The mean annual flow must be determined through use of U.S.G.S. regression equations, from an analysis of stream gages or other Department-approved methodologies.

(b) The maximum drawdown rate for reservoirs impounded by earthfill dams may not exceed 1 foot per day without prior approval by the Department unless a partial or complete drawdown is being conducted under §§ 105.63 and 105.135 (relating to emergency procedures and dam hazard emergencies). In determining the reasonable time period for drainage of the reservoir, the dam owner, the dam owner's engineer, and the Department may consider, without limitation, the following factors:

(1) The damage potential posed by possible failure of the dam.

(2) The risk and nature of potential failure and the time likely to be available to avert the failure after notice of conditions threatening the safety or stability of the dam.

(3) The purpose of the dam and reservoir.

(4) The capacity and stability of available drainage courses to convey the waters released from the reservoir in the event of emergency drainage.

(5) The influence of rapid drawdown on the stability of the dam, its appurtenant works and the upstream natural slopes of the reservoir.

[(c) Under normal conditions, the maximum rate of drawdown for reservoirs impounded by earthfill dams should not exceed 1 foot per day without prior approval by the Department. Under emergency conditions, the maximum rate of partial or complete drawdown of reservoirs must be approved by the Department, when feasible.]

[(d)][(c) Each outlet works must include upstream closure, trashrack, [and] a means of dissipating the energy of flow at its outlet and, if applicable, seepage filtering diaphragms to assure conveyance of flow without endangering the safety and integrity of the dam or the natural environment of the stream.

(d) The Department may waive or modify one or more of the requirements under subsections (a) through (c) to provide for the integrity of the dam and to protect life, health, safety, property, and the environment with an adequate margin of safety.

§ 105.97. Stability of structures.

* * * * *

(d) Gravity dams must be demonstrated to be stable under the most recent engineering manuals developed by the United States Army Corps of Engineers relating to stability of dam structures. The demonstration must use appropriate uplift pressures, ice loads and silt loads. [for the following conditions:

(1) Normal pool with appropriate uplift pressures, ice loads and silt loads with a factor of safety of 2.0.

(2) Maximum pool with appropriate uplift pressures and silt loads with a factor of safety of 1.7.

(3) Normal pool with appropriate uplift pressures and silt loads under seismic forces produced by the maximum credible earthquake with a factor of safety of 1.3.

(e) For gravity dams, the overturning stability is acceptable when the resultant of all forces acting on the dam is located as follows:

(1) Within the middle third of the structure for normal pool conditions.

(2) Within the middle half of the structure for maximum pool conditions.

(3) Within the structure for earthquake conditions.

(f) For gravity dams, the foundation bearing pressures must be less than or equal to the allowable for no pool, normal pool and maximum pool conditions and less than 133% of the allowable for earthquake conditions.

(g) The factors of safety for earthfill dams or gravity dams must be the higher of:

(1) The factors of safety in subsections (c) and (d).

(2) The factors of safety in the most recent Engineering Manuals developed by the United States Army Corps of Engineers relating to stability of dam structures.]

~~[(h)]~~(e) The Department may, in its discretion, consider a revised factor of safety for a class of dams or reservoirs when it can be demonstrated that the factor of safety provides for the integrity of the dams or reservoirs and adequately protects life and property.

§ 105.98. Design flood criteria.

The discharge capacity or storage capacity, or both, must be capable of safely accommodating the recommended design flood for the dam as classified under § 105.91 (relating to classification of dams and reservoirs). **[The design flood must be determined by an incremental dam breach analysis. The minimum required design storm duration is 24 hours.] For dams of Hazard Potential Category 1 or 2, the design flood must be based on the results of an IDBA or in cases where an IDBA has not been performed, the design flood must be the PMF.**

When considered appropriate by the Department, engineering judgment may be used to determine the design flood within the design flood range indicated below for dams of Hazard Potential Category 3 or 4. The classification or damage, or both, resulting from dam failure will determine the design flood within the design flood range.

<i>Classification</i>	<i>Design Flood Range</i>
<u>A-1, A-2, B-1, B-2, C-1, C-2</u>	<u>PMF unless IDBA performed</u>
A-3, B-3	1/2 PMF to PMF
A-4, B-4, C-3	100 year to 1/2 PMF
C-4	50 year to 100 year frequency

PROTECTION AND RESTORATION OF AQUATIC LIFE

§ 105.121. Fishways.

~~[Upon]~~On the request of the Pennsylvania Fish and Boat Commission, the permittee shall install and maintain chutes, slopes, fishways, gates or other devices that the Fish and Boat Commission may require under 30 Pa.C.S. § § 3501—3505.

§ 105.122. Drawdown of impounded waters.

Impounded waters which are inhabited by fish may not be drawn down except with the written approval of the Pennsylvania Fish and Boat Commission under 30 Pa.C.S. § 3506 (relating to drawing off or interference with dams or devices).

§ 105.123. Restoration of aquatic life.

If the Department finds that construction of a dam or reservoir has substantially disrupted aquatic life to preclude natural restoration of the stream ecology within a reasonable period, the permittee shall be required to submit and implement a plan to restore the aquatic life of the stream to its prior condition, to the maximum extent possible. The plan shall be subject to review and modification by the Department in consultation with the Pennsylvania Fish and Boat Commission and must include, but not be limited to, the following:

- (1) Placement of bed gravel.
- (2) Stabilization of banks and bed.
- (3) Installation of stream improvement devices.
- (4) Revegetation of stream and banks.
- (5) Stocking of fish and other aquatic life.

OPERATION, MAINTENANCE AND EMERGENCIES

§ 105.134. EAP.

(a) The permittee or owner of an existing or proposed Hazard Potential Category 1, Category 2 or Category 3 dam as classified in § 105.91 (relating to classification of dams and reservoirs) shall develop an EAP to be followed in the event of a dam hazard emergency as defined in § 105.135 (relating to dam hazard emergencies). The EAP **[shall] must** be submitted to the Department and **[approved] acknowledged** by the Department and the Pennsylvania Emergency Management Agency (PEMA).

(1) Prior to submitting the EAP for review **[or approval]**, the permittee or owner shall schedule a meeting with the county emergency management coordinators for those counties affected by the dam's failure.

(2) Each submission of the EAP must be signed by the dam **permittees or** owners, the dam operators, and the county emergency management coordinators for those counties affected by the dam's failure signifying concurrence with the EAP.

(3) In the case of a proposed dam, the EAP **[shall] must** be **[submitted to the Department and] approved** by the Department and PEMA prior to commencement of storage of water, fluid or semifluid.

(4) The EAP must be prepared **[in accordance with] under** the most recent EAP **[guidelines] template** developed by the Department and PEMA **and must be uploaded into the online emergency management planning system**.

(b) **[Upon] On [approval] Department and PEMA acknowledgment** of the EAP, the permittee or owner shall provide a copy of the **[signed approved] acknowledged** EAP to the municipal emergency management agencies and the emergency response agencies listed in the EAP.

(c) Within 60 days of the date of the Department's **[approval letter] acknowledgment**, the permittee or owner shall provide the Department **with** a written statement certifying that **[a signed approved] an acknowledged** copy of the EAP has been provided to each municipal emergency management agency and to each emergency response agency listed in the EAP.

(d) In addition to **[the requirements in] meeting** subsections (a), (b) and (c), the permittee or owner of a Hazard Potential Category 1 or Category 2 dam shall post notices in public locations in areas that may be affected by the failure of the dam. The **[notice] notices** must indicate that copies of the EAP are available for review at the appropriate county and municipal emergency management offices. Also, the **[notice shall] notices must** be posted by the permittee or owner in public places within each political subdivision situated within the inundation area downstream of the dam. The **[notice shall] notices must** be posted in the city, borough[, and township buildings in the affected municipalities, with the management's permission. Additionally, the **[notice shall] notices must** be posted in locations within **or near** the inundation area, such as[, post offices, libraries, grocery stores[, or] **and** gas stations, with the management's permission.

(e) Within 60 days of the date of the Department's **[approval] acknowledgment** letter, the permittee or owner shall provide the Department **with** a written statement certifying that the **[notice has] notices have** been posted in the locations listed in the EAP. The permittee or owner shall certify in each subsequent annual inspection report, as required **[in] under** § 105.53(a)(2), that the notices remain posted or were reposted in the locations listed in the EAP.

(f) The EAP shall be reviewed and updated every 5 years or **at** the frequency interval indicated in the most recent EAP **[guidelines] template** developed by the Department and PEMA.

(g) The **[Department may require the] EAP must** be updated [, as necessary, if there is a new owner or operator, if changes occur in the downstream inundation area or in the Hazard Potential Category.] **if either of the following circumstances occur:**

(1) There is a new permittee, owner, owner's representative or operator.

(2) Changes occur in the downstream inundation area or in the Hazard Potential Category.

Subchapter C. CULVERTS AND BRIDGES

DESIGN CRITERIA FOR CONSTRUCTION OR MODIFICATION

§ 105.161. Hydraulic capacity.

(a) Bridges and culverts shall be designed and constructed in accordance with the following criteria:

(1) The structure shall pass flood flows without loss of stability.

(2) The structure may not create or constitute a hazard to life or property, or both.

(3) The structure may not materially alter the natural regimen and the geomorphic stability of the stream.

(4) The structure may not so increase velocity or direct flow in a manner which results in erosion of stream beds and banks.

(5) The structure may not significantly increase water surface elevations.

(6) The structure shall be consistent with local flood plain management programs.

* * * * *

(e) The structures shall pass the 100-year frequency flood with less than a 1.0-foot increase in the natural unobstructed 100-year water surface elevation, except where the structure would be located in a floodway which is delineated on a FEMA map, in which case no increase in the 100-year water surface elevation will be permitted. Exceptions to this criteria may be approved by the Department if the applicant prepares a risk assessment which demonstrates, and the Department finds, that the structure will not significantly increase the flooding threat to life and property or the environment, and if applicable, is consistent with municipal floodplain management programs adopted under the National Flood Insurance Program and a FEMA Flood Insurance Study. [This information may be obtained from the Department of Community Affairs, Floodplain Management Division, Forum Building, Harrisburg, Pennsylvania 17120.]

* * * * *

OPERATION AND MAINTENANCE

§ 105.171. Maintenance.

* * * * *

(c) Removal of silt and debris from the stream channel for the purposes of culvert or bridge maintenance shall be accomplished in accordance with the Department's Standards for Channel Cleaning at Bridges and Culverts, as updated and amended. [A copy of this document can be obtained from the Bureau of Dams and Waterway Management, Division of Waterways and Stormwater Management, Post Office Box 8554, Harrisburg, Pennsylvania 17105-8554.]

* * * * *

Subchapter E. CHANNEL CHANGES AND DREDGING FOR FACILITY CONSTRUCTION AND MAINTENANCE

* * * * *

CRITERIA FOR APPROVAL FOR CONSTRUCTION OR MODIFICATION

* * * * *

§ 105.245. Disposal of waste materials.

(a) Discharge of dredged material into **[the regulated waters of this Commonwealth] aquatic resources** shall be subject to Subchapter J (relating to discharges of dredged and fill material).

(b) Dredged spoil and sludge deposits collected during the operation shall be deposited in a location and a manner approved by the Department.

(c) Bilge, ballast or wastewater from dredging operations shall not be discharged to the stream without removal of oils, petroleum products or toxic or hazardous compounds as defined by the **Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. [§ § 6901—6986] Sections 691—6985)** in a manner approved by the Department.

* * * * *

Subchapter J. DISCHARGES OF DREDGED OR FILL MATERIAL

PERMITS

§ 105.401. Permit applications.

In addition to the requirements of § 105.13 (relating to permit applications—information and fees) and other applicable requirements of this chapter, applications for discharges of dredged or fill material into **[the regulated waters of this Commonwealth shall] aquatic resources must** contain the following information:

(1) The location of **[a] public water supply wells within one mile measured radially from the proposed project boundary and all public water supply [intake] intakes** located within 1 mile upstream and 10 miles downstream **of the proposed project boundary**.

(2) The location of areas of shell-fish production.

(3) The impact of the activity **[upon] on** a threatened or endangered species as identified under the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. § § 460l-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543), and the critical habitat of the species.

(4) The impact of the activity **[upon] on** those species of aquatic life indigenous to the waterbody.

(5) **[The amount of percentage of the discharge that will consist of toxic material regulated under section 6 of the Toxic Substances Control Act (15 U.S.C.A. § 2605) or hazardous materials as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. § § 6901—6986) in other than trace quantities.] A demonstration that the dredged or fill material is uncontaminated, nonwater-soluble, nondecomposable, inert solid material. An applicant may use the Department's Management of Fill Policy (258-2182-773) or other equivalent alternative methodology to make this demonstration. For dredged or fill material containing a toxic material regulated under section 6 of the Toxic**

Substances Control Act (15 U.S.C.A. § 2605), a hazardous waste as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. Sections 691—6985) or a hazardous material as defined by regulation at 49 CFR 171.8 (relating to definitions and abbreviations) that is not included in the *Management of Fill Policy*, a demonstration must be made that a discharge into waters will not contain an amount that will cause an adverse impact to human health, safety or the environment.

(6) A demonstration that the quantity of dredged or fill material to be used is limited to what is necessary to complete the project.

[(6)](7) Other information as the Department may require.

CRITERIA FOR APPROVAL

§ 105.411. General criteria.

The Department will not approve an application to discharge dredged or fill material into [regulated waters of this Commonwealth] aquatic resources, unless the applicant demonstrates to the Department that applicable criteria under this chapter are met and a public benefit [which] outweighs the [damage] adverse impact to the [public natural resources] public health, safety and environment, [if] when one or more of the following [is true] criteria exists:

- (1) The discharge is to a spawning area during spawning season.
- (2) The discharge would restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the waters unless the primary purpose of the fill is to impound waters.
- (3) The discharge is into [regulated waters of this Commonwealth, except wetlands,] aquatic resources which are breeding, feeding or nesting areas for migratory [water birds] waterfowl.

Subchapter L. GENERAL PERMITS

§ 105.446. Procedure for issuance.

- (a) At least 60 days prior to issuance of a general permit, the Department will:
 - (1) Publish notice in the *Pennsylvania Bulletin* of intent to issue a general permit, including the text of the proposed general permit and locations for obtaining standardized plans.
 - (2) Provide written notice of the proposed general permit to the United States Army Corps of Engineers; the United States Coast Guard; the United States Fish and Wildlife Service; the United States Environmental Protection Agency; the Pennsylvania Fish and Boat Commission; the Pennsylvania Game Commission; applicable river basin commissions created by interstate

compact; county agencies holding delegations under § 105.4 (relating to delegations to local agencies) and other interested Federal, State or interstate agencies or commissions.

(b) An opportunity shall be provided for interested members of the public, Federal and State agencies to provide written comments on a proposed general permit.

(c) The Department may, at its discretion, hold a public hearing on a proposed general permit for the purposes of gathering information and comments.

(d) General permits issued by the Department will be published in the *Pennsylvania Bulletin* at least 30 days prior to the effective date of the permits, as required [by] under section 7(d) of the [Dam Safety and Encroachments] Act (32 P. S. § 693.7(d)).

(e) The Department will periodically review issued general permits for adequacy and when necessary or appropriate make revisions, updates or revocation of a general permit.

Subchapter M. STATEMENTS OF POLICY

WETLANDS

§ 105.451. Identification and delineation of wetlands—statement of policy.

* * * * *

(c) The Department adopts and incorporates by reference the 1987 *Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1, January 1987)* along with the guidance provided by the United States Army Corps of Engineers, Major General Arthur E. Williams' memorandum dated 6 March 1992, *Clarification and Interpretation of the 1987 Manual* and any subsequent changes as the methodology to be used for identifying and delineating wetlands in this Commonwealth. The 1987 *Corps Wetland Delineation Manual*[, Publication No. ADA 176734 is available from the National Technical Information Service (NTIS), Springfield, VA 21161, or telephone: (703) 487-4650] may be found online. Copies of the Supplemental Guidance, including Regional Supplemental Guidance, issued by the Corps concerning use of the 1987 Manual, [(that is, the October 7, 1991, Questions and Answers, and the March 6, 1992, Clarification and Interpretation Memorandum) as well as the Administration's Wetlands Plan of August 24, 1993, may be obtained by contacting the regulatory branch of a local Corps District, or the EPA Wetlands Hotline at (800) 832-7828. For more information, contact Pennsylvania Department of Environmental Protection, Bureau of Dams, Waterways and Wetlands, Post Office Box 8554, Harrisburg, Pennsylvania 17105-8554, telephone (717) 787-6827] may also be found online.

§ 105.452. Status of prior converted cropland—statement of policy.

(a) This section sets forth the policy of the Department as to the status of prior converted cropland in this Commonwealth.

* * * * *

(c) Naturally occurring events, including variations in long-term climatic conditions, may result in either creation or alteration of wetlands. It is necessary to determine whether alterations to an area have resulted in changes that are now “normal circumstances” of the particular area. The Department recognizes and adopts the concept of “prior converted cropland,” as defined in the *National Food Security Act Manual* ([180-V-NFSAM, Third Edition, March 1994] Fifth Edition 180-NFSAM-514-D-514.30, December 2018, as revised by Circular 190-18-1, as amended), as “normal circumstances” as the [term]phrase is used in the definition of wetlands in § 105.1 (relating to definitions). [These prior converted croplands are not regulated as wetlands under the Commonwealth’s Wetland Protection Program contained in this chapter.] The Department acknowledges the definitions of [Prior]prior converted cropland, farmed wetland and converted wetland [is defined] found in the *National Food Security Act Manual (NFSAM)*.], as wetlands that were drained, dredged, filled, leveled or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned, for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985.] For the purpose of the Department’s policy:

[(1) Abandonment is the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:

- (i) Wetland criteria are met.
- (ii) The area has not been enrolled in a conservation set-aside program.
- (iii) The area was enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.

(2) Prior converted cropland may also be considered abandoned if the landowner provides written intent to abandon the area and wetland criteria are met.]

(1) Prior converted cropland means a converted wetland that, before December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making the production of an agricultural product possible.

(2) Prior converted croplands are not regulated as wetlands under this chapter when used for crop production, unless they have been abandoned and have reverted to wetlands.

(3) The Department will consider prior converted cropland to be abandoned when one of the following occurs under (i)—(iv):

(i) Crop production ceases to be established, due to any of the following circumstances under (A)—(E):

(A) The landowner establishes intent to convert the area to another use.

(B) The area has been or is being converted to another use.

(C) The area was not used for, or in support of, crop production at any time in the past five years.

(D) The area has lain idle so that modifications to the hydrologic regime, including the removal of woody vegetation, are necessary to resume operations.

(E) The area requires expansion or modification, other than maintenance, of a field drainage system to make crop production possible.

(ii) The area was or is enrolled in a conservation program.

(iii) The area was or is enrolled in a State or Federal wetland restoration program including the Wetland Reserve Program, used for compensatory mitigation, or used as part of a pollution reduction strategy.

(iv) The landowner informs the appropriate Department office's wetland program, and, when applicable, the Pennsylvania Department of Agriculture or the United States Department of Agriculture Natural Resource Conservation Service (USDA NRCS) of the intent to abandon the area in writing and wetland criteria are met. Prior converted cropland will be considered abandoned on receipt of the landowner's correspondence unless the landowner otherwise identifies a specific date to abandon the area.

(d) In reviewing information relating to prior converted cropland as normal circumstances for the purpose of making a wetland determination:

(1) The Department will accept a certified wetland determination performed by the United States Department of Agriculture Natural Resources Conservation Service (USDA NRCS) of prior converted cropland.

(2) The Department retains final authority to make independent regulatory and state jurisdictional determinations, and any action taken by the Department shall be consistent with the criteria set forth in § 105.21.

[(d)] (e) This policy [change] does not affect the exemption for plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products or the waiver for maintenance of field drainage systems found at § 105.12(a)(7) and (8) (relating to waiver of permit requirements).



November 10, 2020

David Sumner
Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17120

Re: Proposed Rulemaking: Dam Safety and Waterway Management (#7-556)

Dear Mr. Sumner:

Pursuant to Section 5(a) of the Regulatory Review Act, please find enclosed a copy of the Dam Safety and Waterway Management (#7-556) proposed rulemaking for review by the Independent Regulatory Review Commission (Commission). This proposal is scheduled for publication in the *Pennsylvania Bulletin* on December 5, 2020, with a 60-day public comment period. The Environmental Quality Board adopted this proposal on July 21, 2020.

This rulemaking proposes to amend 25 Pa. Code Chapter 105 to clarify and update the regulations governing planning, design, construction, operation, maintenance and monitoring of water obstructions, encroachments, dams and reservoirs in Pennsylvania. The proposed regulatory revisions would allow the Department of Environmental Protection's (Department) resources to be focused on the most important activities and threats to public health, welfare, safety and the environment, while providing general management, oversight, and review for the more routine activities to ensure compliance with the objectives of the Dam Safety and Encroachments Act (32 P.S. §§ 693.1—693.27). The amendments will clarify and incorporate existing practices which address application requirements for State Water Quality Certifications, alternatives analysis, cumulative impacts, environmentally beneficial aquatic resource restoration, and aquatic resource assessment and replacement criteria.

As set forth in the Regulatory Review Act, the Department will consider any comments and recommendations made by the Commission, as well as the House and Senate Environmental Resources and Energy Committees and the public, prior to final adoption of the enclosed rulemaking.

Please contact me by e-mail at laurgriffi@pa.gov or by telephone at 717.783.8727 if you have any questions or need additional information.

Sincerely,

A handwritten signature in cursive script that reads "Laura E. Griffin".

Laura Griffin
Regulatory Coordinator

Enclosures

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO
THE REGULATORY REVIEW ACT**

I.D. NUMBER: 7-556

SUBJECT: Dam Safety and Waterway Management

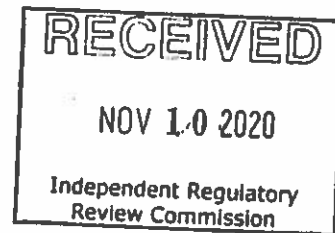
AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION, Environmental Quality Board

TYPE OF REGULATION

- ☒ Proposed Regulation
- ☐ Final Regulation
- ☐ Final Regulation with Notice of Proposed Rulemaking Omitted
- ☐ 120-day Emergency Certification of the Attorney General
- ☐ 120-day Emergency Certification of the Governor
- ☐ Delivery of Tolled Regulation

a. ☐ With Revisions

b. ☐ Without Revisions



FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION

11/10/2020 Patricia M. Nye

Majority Chair, HOUSE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY
Representative Daryl Metcalfe

11/10/2020 A. I.

Minority Chair, HOUSE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY
Representative Greg Vitali

11/10/2020 electronic submittal

Majority Chair, SENATE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY
Senator Gene Yaw

11/10/2020 electronic submittal

Minority Chair, SENATE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY
Senator Steven Sontarski

11/10/2020 electronic submittal

INDEPENDENT REGULATORY REVIEW COMMISSION
David SUMNER

ATTORNEY GENERAL (for Final Omitted only)

11/10/2020 electronic submittal

LEGISLATIVE REFERENCE BUREAU (for Proposed only)

Stephen Hoffman

From: Bulletin <bulletin@palrb.us>
Sent: Tuesday, November 10, 2020 12:43 PM
To: Griffin, Laura
Cc: Leah Brown; Adeline E. Gaydosh
Subject: [External] Re: Proposed Rulemaking #7-556 Preamble and Annex A

***ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.*

Hello Laura!

Thank you for sending us these files! We have this scheduled for publication in the December 5th Bulletin.

Have a great day!

Leah

From: Griffin, Laura <laurgriffi@pa.gov>
Sent: Tuesday, November 10, 2020 12:38 PM
To: Bulletin <bulletin@palrb.us>
Cc: Leah Brown <lbrown@palrb.us>; Adeline E. Gaydosh <agaydosh@palrb.us>
Subject: Proposed Rulemaking #7-556 Preamble and Annex A

Good afternoon,

Please see the attached Face Sheet, Preamble, and Annex A for Proposed Rulemaking – Dam Safety and Waterway Management (#7-556), for publication on December 5, 2020.

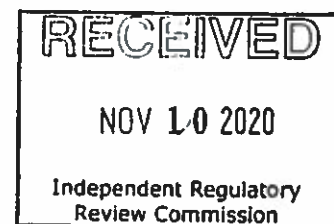
Notifications of receipt of the rulemaking from the Senate Environmental Resources and Energy (ERE) Committees are attached as well as the transmittal sheet confirming receipt of the rulemaking by the House ERE Committees.

Please confirm that you received the rulemaking documents for publication.

Thank you!

Laura

Laura Griffin | Regulatory Coordinator
Department of Environmental Protection | Policy Office
Rachel Carson State Office Building
400 Market Street | Harrisburg, PA
Phone: 717.772.3277 | Fax: 717.783.8926
Email: laurgriffi@pa.gov
www.dep.pa.gov



Connect with DEP on: [Twitter](#) | [Facebook](#) | [LinkedIn](#) | [YouTube](#) | [Instagram](#)

PRIVILEGED AND CONFIDENTIAL COMMUNICATION: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and delete the material from any and all computers.

In order to prevent the further spread of COVID-19, all DEP offices will remain closed until restrictions are lifted. In the meantime, I will be working remotely to continue the mission of the Pennsylvania Department of Environmental Protection and frequently retrieving emails. Thank you for your patience.

Stephen Hoffman

From: Troutman, Nick <ntroutman@pasen.gov>
Sent: Tuesday, November 10, 2020 11:50 AM
To: Bulletin; Santarsiero, Steven; Yaw, Senator Gene
Cc: Shirley, Jessica; Reiley, Robert A.; Kauffman, Gregory; Collins, Timothy; Martin, Megan; DeLiberato, Vincent C. (LRB); Duane Searle; A.J. Mendelsohn; Griffin, Laura
Subject: RE: Delivery of Proposed Rulemaking #7-556 --Dam Safety and Waterway Management

Received in Senator Yaw's Office

From: Bulletin <bulletin@palrb.us>
Sent: Tuesday, November 10, 2020 11:23 AM
To: Santarsiero, Steven <steve.santarsiero@pasenate.com>; Yaw, Senator Gene <gyaw@pasen.gov>
Cc: Shirley, Jessica <jessshirley@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Kauffman, Gregory <grekauffma@pa.gov>; Collins, Timothy <Timothy.Collins@pasenate.com>; Martin, Megan (OS) <mtmartin@os.pasen.gov>; DeLiberato, Vincent C. (LRB) <vdeliberato@palrb.us>; Duane Searle <dsearle@palrb.us>; A.J. Mendelsohn <amendelsohn@palrb.us>; Griffin, Laura <laurgriffi@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>
Subject: Delivery of Proposed Rulemaking #7-556 --Dam Safety and Waterway Management

Ⓢ CAUTION : External Email Ⓢ

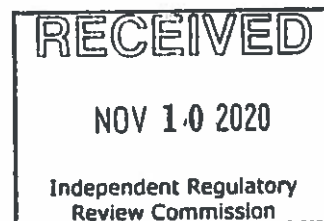
Good Morning:

We have attached Proposed Rulemaking No. 7-556 from the DEP/EQB.

Please confirm receipt of this email by replying to all.

Thank you.

The Pennsylvania Code & Bulletin Office



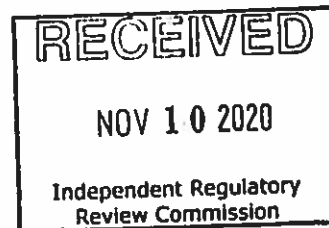
Stephen Hoffman

From: Collins, Timothy <Timothy.Collins@pasenate.com>
Sent: Tuesday, November 10, 2020 11:59 AM
To: Bulletin; Santarsiero, Senator Steve; Yaw, Senator Gene
Cc: Shirley, Jessica; Reiley, Robert A.; Kauffman, Gregory; Martin, Megan; Vincent Deliberato; Duane Searle; A.J. Mendelsohn; Griffin, Laura; Troutman, Nick
Subject: Re: Delivery of Proposed Rulemaking #7-556 --Dam Safety and Waterway Management

Received by Sen. Santarsiero's office.

Thank you.

Timothy Collins
Executive Director
Senate Environmental Resources & Energy Committee
Senator Steve Santarsiero, Democratic Chairman
184 Main Capitol Building
717-783-8235



From: Bulletin <bulletin@palrb.us>
Sent: Tuesday, November 10, 2020 11:22 AM
To: Santarsiero, Senator Steve <Steve.Santarsiero@pasenate.com>; Yaw, Senator Gene <gyaw@pasen.gov>
Cc: Shirley, Jessica <jesshirley@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Kauffman, Gregory <grekauffma@pa.gov>; Collins, Timothy <Timothy.Collins@pasenate.com>; Martin, Megan <mtmartin@os.pasen.gov>; Vincent Deliberato <vdeliberato@palrb.us>; Duane Searle <dsearle@palrb.us>; A.J. Mendelsohn <amendelsohn@palrb.us>; Griffin, Laura <laurgriffi@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>
Subject: Delivery of Proposed Rulemaking #7-556 --Dam Safety and Waterway Management

■ EXTERNAL EMAIL ■

Good Morning:

We have attached Proposed Rulemaking No. 7-556 from the DEP/eqb.

Please confirm receipt of this email by replying to all.

Thank you.

The Pennsylvania Code & Bulletin Office

This message and any attachment may contain privileged or confidential information intended solely for the use of the person to whom it is addressed. If the reader is not the intended recipient then be advised that forwarding, communicating, disseminating, copying or using this message or its attachments is strictly prohibited. If you receive this message in error, please notify the sender immediately and delete the information without saving any copies.