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House of Representatives  
 Commonwealth of Pennsylvania  
 Harrisburg

February 24, 2021

Independent Regulatory Review Commission  
 333 Market Street  
 Harrisburg, PA 17101

Dear Commissioners:

As members of the House Environmental Resources and Energy Committee, we write to you to express our disapproval of proposed Environmental Quality Board (EQB) Regulation #7-556 (IRRC # 3278).

The Committee voted today, February 24<sup>th</sup>, in favor of sending you this letter disapproving of the proposed regulations regarding Dam Safety and Waterway Management. As the standing House Committee with legislative oversight of the Department of Environmental Protection (DEP), it is our role to ensure that regulations proposed by DEP through the EQB do not pose an undue burden on the regulated community within the Commonwealth. This proposal is rife with errors, lacks qualifying language and definitions, and will further muddy the existing inconsistent regulatory climate within the dams and waters of the Commonwealth.

The proposed Amendments to Chapter 105, in short, would incur significant revisions to functioning waiver processes, add new poorly defined and undefined language throughout the regulations, and lead to inconsistent and largely subjective oversight of the Commonwealth's waterways.

To begin, the proposed regulation contains numerous incorrect citations and references. Most notably regarding the Oil and Gas Act throughout the proposal, and also references to a draft DEP guidance document that has yet to be finalized. This alone is not reason to disapprove of a proposed regulation, but it is reason to believe this proposal was not crafted by a team doing their due diligence or coordinating with the regulated community.

There are many new words that lack definition within the proposal, along with phrases that are open to broad interpretation. Small drainage structures, long waived from permit requirements under §105.12(a)(2), would now require a permit if it were to "impede flow or aquatic life passage". A newly imposed "cumulative impact analysis" would need to contain ostensibly limitless examples of indirect and secondary impact predictions of "changes associated with but not the direct result of the construction or substantial modification of a dam or reservoir, water obstruction or encroachment." The terms "abandon" and "discontinue" within the proposed definition of "abandonment" seem to be left to the whims of DEP, and any dam, water obstruction, or encroachment that discontinues a construction project could be deemed "abandoned" under §105.1. Furthermore, "ephemeral stream", "intermittent stream", "geomorphic", and "paleo-aquatic" are but some examples of the important, yet undefined, terms found within the proposed regulation.

In each of the examples provided the lack of definition, clarity, and qualifiers all serve to benefit the Department's ability to oversee the permitting process with no clear guidelines at the expense of the

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ENVIRONMENTAL RESOURCES AND  
 ENERGY COMMITTEE  
 CHAIRMAN

applicants. All projects in or around water could “impede flow or aquatic life passage”, cause “changes associated with” future construction, or have a project briefly discontinue resulting in “abandonment”. The Department’s frequent use of unbounded requests from applicants and broad means of impeding otherwise complete permit applications via ever increasing regulation present an unreasonable burden on applicants and must be disapproved.

Of particular concern is the uncertainty faced by the agricultural community in clearly identifying and defining which conditions, types, structures, and activities would be subject to regulation and permitting under the proposed regulation. Farm ponds, which have been an ordinary agricultural operation for generations, could be dramatically impacted by the loose language and interpretations proposed. Farmers could risk being cited for “abandonment” if facilities or property are left fallow or unattended, which is counter to standards established under the Food Security Act by the Natural Resources Conservation Service. Farmers could possibly, depending on the interpretation of §105.12(a)(17) by an individual DEP employee, need a permit to construct an animal fencing along a stream but not crop related fencing. The addition of uncertain terms and permitting conditions would only further DEP’s inconsistent and arbitrary application of Chapter 105’s regulatory standards upon the farmers of Pennsylvania.

A new definition proposed within the regulation for “groin structures” is welcome and long overdue, but an insistence on a Submerged Lands Licensing Agreement (SLLA) fee serves no legitimate purpose. In the 2020 session, after discovering the staggering increase to \$750 in SLLA fee assessments on groin structures, the ERE Committee passed HB 1779 with the intent to define groin structures and exempt them from the fee entirely. These “groin structures” cannot be used as docks, are not commercial, are environmentally friendly, and exemptions are already in place for state or municipally owned groins. “Groin Structures” fit well within the exemption suggested under §105.35(c), as they are constructed for environmentally beneficial purposes and serve to conserve the coastline of Lake Erie.

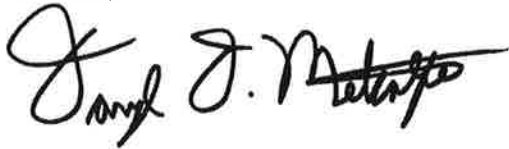
The proposed regulation, in its current form and with its many errors, is unacceptable for the people and businesses of this Commonwealth. Such extreme changes to existing regulations, particularly when they are rife with unbounded language and requirements of applicants, are not in the best interest of the Commonwealth or the regulated community.

It is the Committee’s opinion that in order to make this regulation acceptable special attention must be paid to assure additional boundaries and specifically defined language are included. It has become far too common for similar permit applications to be treated differently based on the unique opinions and preferences of individual DEP staff, and as written the proposed regulation would only lessen the certainty for the regulated community and give broad interpretive authority to state employees.

The proposed regulation is unacceptable, and DEP has failed to coordinate and communicate sufficiently with advisory boards and interest groups to address the inconsistencies and unbounded authority of the proposal. If this regulation were to move forward the future of farming, minor construction projects, and property ownership would be at the whim of DEP employees and vary wildly across the State. Therefore, we ask IRRC to disapprove this regulation in its proposed form, and for DEP to withdraw this proposed regulation and further coordinate and communicate with the regulated community. We, the undersigned members of the House Environmental Resources and Energy Committee, write this letter

to draw your attention to our concerns and disapproval of this proposed regulation and respectfully ask for your consideration.

Sincerely,



Daryl D. Metcalfe, Chairman  
Environmental Resources & Energy



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75<sup>th</sup> Legislative District



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76<sup>th</sup> Legislative District



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Rep. Pam Snyder  
50<sup>th</sup> Legislative District

Cc: Environmental Quality Board  
Department of Environmental Protection