



417 Walnut Street
 Harrisburg, PA 17101
 717 255-3252 / 800 225-7224
 FAX 717 255-3298
 www.pachamber.org



VIA ELECTRONIC FILING

Feb. 3, 2021

The Honorable Patrick McDonnell, Chairman
 Environmental Quality Board
 P.O. Box 8477
 Harrisburg, PA 17105-8477

RE: Dam Safety and Waterway Management, 25 Pa. Code Chapter 105

Dear Chairman McDonnell,

On behalf of the diverse membership of the Pennsylvania Chamber of Business and Industry (PA Chamber), thank you for the opportunity to present our members' perspective on the proposed rulemaking to modify and add to the state's Dam Safety and Waterway Management regulations, as published for comment in the PA Bulletin on Dec. 5, 2020. The PA Chamber is the largest, broad-based business advocacy organization in the Commonwealth, representing thousands of member companies representing all sizes and commercial and industrial categories.

As DEP and EQB are aware, the PA Chamber has for decades worked with a coalition of businesses, industries and associations to review and provide comments on proposed regulatory changes. As we have expressed in our past comment letters, our members recognize that the development, use and stewardship of the Pennsylvania's water resources are essential to the health, success and vitality of every community, industry and enterprise within state. With that recognition, we understand that stewardship of our water resources requires a delicate, but essential, balancing of environmental and economic considerations.

Statement of Policy

As a matter of policy, as established by our diverse board of directors, The PA Chamber advocates for environmental laws, regulations and policies that:

- are based on sound science and a careful assessment of environmental objectives, risks, alternatives, costs, and economic and other impacts;
- set environmental protection goals, while allowing and encouraging flexibility and creativity in their achievement;
- allow market-based approaches to seek attainment of environmental goals in the most cost-effective manner;
- measure success based on environmental health and quality metrics rather than fines and penalties;
- assess compliance based on clear, predictable and defined criteria established through stakeholder processes and with sound science;
- do not impose costs which are unjustified compared to actual benefits achieved;
- do not exceed federal requirements unless there is a clear, broadly accepted, scientifically-based need considering conditions particular to Pennsylvania;
- develop a private-public relationship which promotes working together to meet proper compliance; and

- ensure timely regulatory approvals and authorizations.

With specific respect to water, the PA Chamber advocates for water laws, regulations and policies that treat both water quality and quantity issues in a balanced and fair manner. We believe that water quality management should address both point and non-point sources equitably and proportional to their contribution to water quality challenges. The PA Chamber supports implementation of creative, well-structured and stable market-based approaches as part of a holistic water resources approach, including trading mechanisms that will result in an overall improvement in water quality while providing for innovation and flexibility among trading partners. The PA Chamber supports the improvement of Pennsylvania water use information and planning programs to provide an adequate basis for assessing current and potential future water resource challenges, and providing a sound basis for public and private decisions.

Guided by this policy approach, the PA Chamber has in concert with its membership developed the following comments in response to the EQB's solicitation for comment on this rulemaking. These comments are organized by the section of the proposed revisions to Chapter 105.

Definitions, §105.1

The rulemaking proposes a new definition of project. As proposed, the definition would include "reasonably foreseeable areas planned to contain future dams, water obstructions or encroachments." This definition contains no qualitative or quantitative bounds on how far into the future an applicant must attempt to foresee additional development by the applicant, or even by others. While the current regulations state that the *Department* will consider reasonably foreseeable future development within the affected watershed in evaluating an application, that is fundamentally different from this newly proposed obligation for an *applicant* to define *its project* as including future dams, water obstructions or encroachments, potentially by others. Accordingly, as written, the proposed definition could present an unreasonable burden on applicants and should be deleted.

In addition, neither the current nor proposed rulemaking adequately define aquatic resources. The PA Chamber requests the final rulemaking include a definition of "ephemeral stream" and "intermittent stream" in order to formalize among the public, the Department and the regulated community a commonly understood delineation as to how to identify such resources. For example, culverts that pass ephemeral flows from one side of a roadway into intermittent or perennial waterways on the opposite side may not necessarily encourage upstream aquatic life movements as the upstream ephemeral channels are not defined in Chapter 105 as an aquatic resources. Despite this, PA Chamber members have reported some level of contention by permit review staff in some, but not all, regional offices that such upstream ephemeral channels must be regulated and that any impacts to it, in terms of lost or gained aquatic resource function, be addressed in the permit, even if the resource is not plainly within the regulatory definition.

Permit Waivers, §105.12

The Dam Safety and Encroachments Act's concept of permit waivers is to allow for waiver of permits for those categories of dams, water obstructions and encroachments determined to have an "insignificant effect upon safety and protection of life, health, property and the environment." 32 P.S. §693.7(a). The concept was to allow the Department to focus upon those structures and activities that have significant effects, and to avoid time-consuming paperwork and consumption of limited agency staff time for many

small, minor, low impact projects. The long-standing set of permit waivers has, we believe, served fairly well in addressing those objectives.

The PA Chamber supports the proposed expansion to the set of waivers listed in subsection (a), notably those provided for temporary environmental testing, monitoring or investigative activities (21) and for temporary mats and pads in wetlands (22). The former will accommodate due diligence and remediation activities, such as in the context of brownfields redevelopment, and the latter to minimize environmental impacts during utility or infrastructure maintenance.

However, the new formulations contained in §105.12 appear to add in some cases complexity and additional submission requirements that undermine the original streamlining objectives of the permit waiver program.

- ***Small drainage area structures:*** For the past 40 years, §105.12(a)(2) has waived permit requirements for water obstructions located in small drainage areas (100 acres or less). The formulation of that waiver was simple and straightforward. New language would restrict the waiver by adding a broadly-worded but ill-defined condition requiring that the structure “not impede flow or aquatic life passage.” If this is read to preclude any restriction on flow or on aquatic life passage, no matter how minor, the condition will essentially eviscerate the waiver. If a small drainage area culvert on a landowner’s property causes a minor amount of backwater in a high storm event that remains on the landowner’s, why should that kick the culvert out of the waiver? Some concept of significance needed to be reflected. We would suggest that the condition be redrafted to state: “unless the Department finds that the structure will significantly restrict flow (i.e., not cause backwater or impairment of flow impacting other properties) or significantly restrict the movement of aquatic life actually present in the waterbody.”
- ***Single poles:*** The proposed changes to §105.12(a)(3) adds language that appears to attempt to clarify that aerial crossing of certain types of lines are exempt, maintenance of “single poles with concrete foundations or pilings” are not exempt. The PA Chamber seeks clarification that a single, direct buried pole would be exempt; the PA Chamber would support such an exemption.
- ***Dam, obstruction and encroachment removal:*** The changes to §105.12(a)(11) will require in all cases that a person using the waiver for dam, water obstruction or encroachment removal submit an “environmental assessment” form under §105.15. That form, even for “small projects,” involves some substantial information. Some further consideration should be given as to when such a submission should really be required, particularly if the Department wants to encourage owners to remove no-longer useful structures. Ironically, we note that under the current formulation of this “removal waiver” structures whose installation and maintenance are subject to other waivers – such as those covered by waivers for small dams ((a)(1)), small drainage area structures ((a)(2)), areal crossings ((a)(3)), and MSHA regulated dams (a)(4) – which obviate the need for applications or information submission prior to construction would nevertheless be obligated to submit extensive EA submissions before removal.
- ***Eligibility Criteria:*** While we understand the rationale behind some of the new waiver eligibility criteria placed in §105.12(c) (such as the exclusion for structures in areas serving as the habitat of threatened or endangered species), the new blanket exclusions for structures or activities located in areas identified as a state and local historical places are questionable. If someone wants to remove a culvert on a farm that lies within a historical site (where the culvert itself is not the historical feature),

why should the waiver for structure removal be barred? If a project owner obtains a concurrence from the Historic and Museum Commission or the political subdivision that designated a local historical site that the proposed structure or activity would not impact the historical or archeological resource or that such impact has been mitigated, these waivers should continue to be applicable, and the rules should not blanket shift the entire project to the Ch. 105 individual permit program.

- ***Submerged Lands of the Commonwealth Exclusion.*** The proposed new §105.12(c)(1) would for the first time exclude from permit waivers any project located in submerged lands of the Commonwealth. This exclusion is unnecessary and unwarranted. Section 7 of the Act, 32 P.S. §693.7(a), authorizes the EQB to waive permit requirements for any insignificant project, irrespective of whether it is located in, under or above submerged lands of the Commonwealth or not. If a project is sufficiently small and insignificant to warrant a waiver, the fact that it lies in areas of either navigable waters or other waters whose bed is owned by the Commonwealth should not preclude *waiver of the permit*. The regulations may waive the permit requirement, but nevertheless, if warranted, retain the requirement as applicable for projects that occupy state owned submerged lands to obtain a Submerged Lands License Agreement. The requirements for Submerged Lands License Agreements and for permits are separate and independent, and that point can be made clear by stating in §105.12(c) that one cannot utilize a waiver for a structure or activity that occupies submerged lands of the Commonwealth unless the project has obtained a Submerged Lands License Agreement if and to the extent required under §§105.31-105.35.
- ***Small Water Supply Dams.*** The existing §105.12(b)(1) provides a waiver for the continued operation and maintenance of existing small (≤ 5 foot high) dams operated and maintained for water supply purposes, irrespective of location. This waiver applies to such small water supply dams (essentially intake weirs) that were constructed prior to July 1, 1979, and applies so long as the Department does not find that the structure poses a significant effect on public health, safety, property or the environment. Now, after 40 years, the Department is proposing to negate that waiver if the existing dam is located in an areas of submerged lands of the Commonwealth. Again, there is no compelling need for such a change. If there is some concern that certain such structures require a Submerged Lands License Agreement, the remedy is to clarify that requirement, not flip the entire existing small project into an individual permit process.
- ***Seepages from Dams.*** The PA Chamber requests the final rulemaking exempt from Chapter 105 requirements any wetland characteristics that have formed within the footprint of a dam due to seepages, particularly if such formation has occurred due to failures in man-made structures requiring repair. Seeps and wetlands established on dam embankments and appurtenances should be clearly defined as non-jurisdictional features and not included in impact assessments and mitigation requirements. Further, secondary impacts from repairing seeps that result on loss of hydrologic flow to such wetlands should also be exempted as such flow was not intended to convey water under natural or designed circumstances.

Water Dependency and No Practicable Alternatives Criteria

We understand and support those elements of the proposed rule which reiterate the long-standing interpretation of the existing Ch. 105 regulations with respect to “water dependency” criteria and the linkage of water dependency determinations to considerations of *practicable* alternatives.

Determination of Water Dependency

As held in *Clean Air Council et al. v. DEP*, EHB Docket No. 2017-009-L, 2018 EHB 35 (“*Clean Air Council*”) and *Delaware Riverkeeper Network v. Sec’y of the Pa. Dep’t of Env’tl. Prot.*, 870 F.3d 171, 183 (3d Cir. 2017). (“*Delaware Riverkeeper Network*”), where the Ch. 105 regulations require consideration of whether a project or activity is “water dependent,” determination of “water dependency” is not singularly and exclusively focused on whether the project requires access or proximity to or siting with a wetland or other protected body of water to fulfill the basic purposes of the project. The water dependency and no practicable alternatives criteria must be read together, that there are some projects which qualify as being “water dependent” because there are no practicable alternatives to placing some part of the project in proximity to or in a wetland or water body in order for the project to meet its ultimate purpose.

Examples of such situations include linear projects, such as water pipelines, sewer lines, electric transmission lines and roads, which need to cross or be near streams and wetlands. Similarly, gravity sewer systems often need some portion of their lines to intercept wastewaters at the topographically lowest points of the system (often along streams) and convey those flows to a wastewater treatment plant. A categorical definition and application of water dependency criterion that does not consider whether practicable alternatives exist would lead to the absurd results of never allowing pipelines, transmission lines and roads to cross certain wetlands and waterbodies.

We urge that care be taken, both in crafting the regulatory language and in statements accompanying the rulemaking, to make clear that these rules are codifying, not modifying, the interpretations reflected in *Clean Air Council* and *Delaware Riverkeeper Network*.

In this regard, we are concerned that the movement of the definition of “water dependent” from § [●] to § 105.1 in no way be misconstrued. And in order to make that intent crystal clear, we would suggest that the definition of “water dependent” specifically reflect that established interpretation:

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, including a circumstance where no less disruptive practicable alternatives are available.

Water Dependency Application Description - §105.13(e)(iii)(D).

The new language of §105.13(e)(iii)(D) provides for submission of a narrative description and analysis of water dependency. While it refers to a consideration of whether or not practicable alternatives exist, which we support, it actually changes the test that was enunciated by the Environmental Hearing Board in *Clean Air Council*. In that case, the EHB referred to making a determination that “no ***less disruptive*** practicable alternatives are available” (emphasis added).

The draft language of §105.13(e)(iii)(D) refers to “demonstrated unavailability of ***any*** practicable alternative.” This, perhaps inadvertently, drops a very important point. The EHB’s formulation recognizes that there may be other “practicable alternatives” available, but if those alternatives have other significant adverse effects on the environment, those other adverse effects must also be considered and weighed.

We would suggest that §105.13(e)(iii)(D) be revised to read:

Water dependency must be based on the demonstrated unavailability of any practicable alternative location, route or design that does not have other significant adverse effects on the environment 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.

Practicable Alternatives Definition

Throughout the Ch. 105 rules, the term “practicable alternative” is used. And in this regard, we support the change to §105.14(a)(7) adding the word “practicable” to the phrase “alternative location, route or design and the use of location, route or design.”

While we support the practicable alternatives concept, we believe that it would be helpful to provide some further elucidation in the regulations and accompanying explanatory text of what is meant by the term “practicable alternative.” Under the pertinent federal regulations and guidelines, “practicable alternatives” are those alternatives that are “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 CFR 230.10(a)(2). Many “alternatives” might be conceivable, but “practicable” alternatives involve a narrower set of those location and design options which are actually available, technically feasible, and economically feasible, considering a project’s purposes. Currently, that concept is buried in §105.18a(a)(3); but given its usage in various parts of Ch. 105, moving the definition of that term to §105.1 would be warranted.

Alternatives Analysis, §105.13(d)(viii)

If we understand it correctly, we support the concept reflected in the new 105.13(d)(viii)(A) that the alternatives analysis required to be submitted as part of a permit application be of a level of detail commensurate with the anticipated environmental impact of the project. A small project with a minor impact -- such as a recreational dock or an underground or overhead utility line that impacts 0.1 acres of wetlands -- does not warrant the same degree and level of alternatives analysis as a project that impacts 25 acres of wetlands or may impact specially protected habitat. Common sense and practicality need to be applied to the alternatives analysis requirements.

However, we see little benefit and no clarity provided by some of the additional verbiage incorporated in (viii)(B) and (C), specifically their references to “reliable and convincing evidence” or “reliable and representative” demonstrations. While the phrase “reliable and convincing evidence” is part of the rebuttable presumption under 105.18a(b)(3), the phrase “reliable and representative” has not established legal or regulatory meaning. What is a “representative” demonstration -- representative of what? Compared to what? In each instance referred to in (B) and (C), the applicant needs to provide information demonstrating that certain criteria listed in other rule sections are met. Piling on additional words does not clarify the application requirement, but only serves to provide fodder for potential third-party permit appeals. If the information submitted by an applicant does not support the demonstration, the Department can request additional supporting information or determine that the demonstration has not been met.

Finally, it is our understanding that the Department is working on a technical guidance document that would further define and refine these issues. Such a guidance should be put out for comment concurrent with this rulemaking and be finalized before this rulemaking codifies the approach the Department prefers.

Impact Analysis

Impacts Analysis, §105.13(d)(x)

We would offer several comments concerning the scope and content of required impact analysis:

- ***Scope and Detail Commensurate with Project Impacts.*** As a starting point, as in the case of alternatives analysis, the regulation's requirements for impact analysis should explicitly recognize that the scope and detail of required impact assessment should be commensurate with the impact of the project or activity. Small projects with limited impacts should not require the same depth and detail of impact assessment as larger, more complex projects. We would recommend that the following sentence be added to §105.13(d)(x): "The scope and level of detail of impact analysis required should be commensurate with the anticipated impacts of the proposed project."
- ***Offsite Alternatives.*** The opening sentence of §105.13(d)(x) refers to an analysis of both onsite and offsite alternatives. While we understand that it may be appropriate to consider alternative locations and routes for particular projects, the regulations and accompanying narrative should clarify and emphasize that the scope of offsite location considerations are limited to those that are practicable. And in terms of practicability, alternative locations are not practicable unless (1) they are reasonably available -- meaning that they can be acquired and actually utilized at reasonable cost; and (2) those sites can actually be utilized for the proposed purpose (i.e., considering applicable land covenants, zoning, siting, setback and other restrictions). Most project sponsors lack the power of eminent domain, and even those that possess such condemnation authority confront legal and practical limits on its use -- not the least of which is the considerable time involved in the situation of contested proceedings.
- ***Indirect and Secondary Impacts.*** The new language of §105.13(d)(x)(D) and (E) introduce new requirements for consideration of "indirect" and "secondary" impacts. We are concerned that the definitions of "indirect impacts" and "secondary impacts" are extremely broad, and potentially unbounded.
 - ***Indirect Impacts Definition.*** The "indirect impacts" definition should be refined to make clear that what we are talking about are alterations of the chemical, physical, or biological characteristics of an aquatic resource *that are caused by the construction, operation or maintenance of the structure or activity that is the subject of the permit application.*
 - ***Secondary Impacts Definition.*** Although borrowed from the existing §105.14(b)(12), the definition of "secondary impacts" should nevertheless be carefully re-examined and clarified.

First, the loose wording of the definition, referring to "changes associated with but not the direct result of the construction or substantial modification of a dam or reservoir, water obstruction or encroachment" leaves open room for considerable debate, and litigation, as to "changes" to what, and how far the concept of "associated with" goes. Some project opponents might argue, for example, that a simple culvert permit for a road or pipeline requires consideration of all impacts arising from the road or pipe over its entire length, and might further argue that secondary impacts should encompass evaluations of the climate change implications of emissions associated with vehicles using the road or activities producing products conveyed by the pipeline.

Second, the final clause of the definition referring to “future impacts of dams, water obstructions and encroachments, the construction of which would result in the need for additional dams, water obstructions or encroachments to fulfill the project purpose” is far from the model of clarity. The future impacts *of what* dams, water obstructions and encroachments? And what additional dams, water obstructions or encroachments are to be considered -- tied to what projects purpose?

The proposed language of the definition could be further clarified as follows:

(iii) Secondary impacts—Changes to aquatic resources associated with but not the direct result of the construction or substantial modification of the dam or reservoir, water obstruction or encroachment that is the subject of the permit application where such changes occur in the area of the project structure or activity being permitted and in areas adjacent thereto and future impacts to aquatic resources associated with additional dams, water obstructions or encroachments, the construction of which are planned or reasonably anticipated to be required to fulfill the purpose of the project which is the subject of the permit application would result in the need for additional dams, water obstructions or encroachments to fulfill the project purpose.

Cumulative Impact Analysis, §105.13(d)(xiii)

In §105.13(d)(xiii), the proposed rule would add for the first time a requirement that all permit applications include a broad “cumulative impact analysis.” On the one hand, we can understand and support a requirement that a permit application include an analysis of the impacts of all dams, water obstructions and encroachments that are part of a single project. If a housing subdivision project involves 15 road crossings and multiple wetland fill areas to be conducted over several phases, it is reasonable to require consideration of the cumulative impacts of the combined activities in all phases.

But §105.13(d)(xiii) seems to go way beyond that concept. It refers to conducting a “projectwide cumulative impact analysis” without specifying impacts *to what*. Similarly, it is unclear what is the meaning and intent of the phrase requiring an “analysis *using available resources*” – does that mean using reasonably available information sources or something else?

Finally, and perhaps most troublesome, the provision purports to require that an applicant evaluate “reasonably foreseeable” dams, water obstructions or encroachments on wetlands -- ostensibly including projects to be conducted by other entities and parties on other properties over a completely undefined area. The concluding sentence of (xiii) then requires the applicant to demonstrate that the project, along with other “potential or existing” structures, “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).

This cumulative impact formulation presents numerous concerns:

- Requiring each and every project applicant who proposes to construct or modify, operate, or remove a structure to submit a cumulative impact analysis is extremely burdensome and overkill. Many projects are small in character and in impact, and permit application requirements should be commensurate with the scope and impact of the project being considered. A farmer proposing to put in a driveway culvert should not be required conduct an analysis of all road culverts -- and every other type of encroachment -- planned or possible over some large area.

- The areal extent of impact analysis is left entirely undefined. It would be one thing if the analysis were focused on impacts on the same wetland area -- e.g., considering all existing and actually known proposed structures or activities affecting the same 25 acre wetland. But the first and last sentences of §105.13(d)(xiii) are not so focused. Those sentences contain no geographic limitation either in terms of wetland resource, local watershed, municipality or other boundary. And the last sentence goes beyond consideration of other structures and projects that are actually known to requiring an evaluation of all “potential” structures. Read literally, and taken together, (xiii) seems to require an analysis of all impacts by all existing, proposed and potential structures and activities on all Commonwealth wetland resources.
- Heretofore, it was the Department that was required to consider the cumulative impacts of projects planned or proposed by other parties when evaluating an applicant’s permit application. That made sense, since the Department is far more likely to have information regarding proposed and planned projects. By contrast, most individual permit applicants only have access to information as to the project they themselves are planning. Asking each permittee to hunt for and identify potential dams, water obstructions and encroachments that might be undertaken by some number of unknown entities is not reasonable and incredibly inefficient.

The scope of cumulative impact analysis in (xiii) should be refined and focused, and tied to a trigger that invokes such requirements only when a cumulative impact evaluation is determined to be truly needed. We would suggest the following alternative wording:

(xiii) *Cumulative Impact Analysis.* A permit applicant shall provide an analysis of the cumulative impacts on wetland resources of all dams, water obstructions and encroachments that the permit applicant plans to undertake as part of a project, including all current and future phases of the project. If the Department determines that the proposed project, in combination with other existing and known planned projects, has a reasonable potential to have a significant impact upon the wetland resources in the project area, the Department may require the permit applicant to conduct an analysis of the cumulative impacts on such wetland resources of all dams, water obstructions and encroachments planned by the applicant together with those existing and known proposed dams, water obstructions and encroachments undertaken by other persons on the same complete interconnected wetland area. The cumulative analysis required under this provision will be considered as part of the Department’s determinations under § 105.18a(a)(6) and §105.18a(b)(6).

Project Review Criteria / Margin of Safety, §105.14

Proposed changes to §105.14 would modify the current project review criteria for both permit applications and registrations to use general permits. The current rule requires a determination of the proposed project’s effect on health, safety and the environment in accordance with prevailing practices in the engineering profession and current environmental principles. To our knowledge, that language has been applied and stood well the test of time over the past 40 years.

New language, however, would add reference to “with an adequate margin of safety.” Nothing in the rule or accompanying rulemaking package explain what that “adequate margin of safety” means, or how far it extends.

Members of the regulated community deserve to be provided clear guidance as to the standards that need to be met. The fact is that throughout Ch. 105, the rules establish a wide range of hydrologic, hydraulic and other design standards and other criteria which are designed to protect public health, safety, property and the environment. And in almost all cases, those design criteria already embed conservative assumptions that provide a “margin of safety” and encompass the margins of safety reflected in generally accepted engineering practice. Which generates the question -- is this new language adding a further undefined margin of safety to an already prescribed margin of safety? In adding an additional review criterion referring to “an adequate margin of safety,” the Department appears to be opening up the specter that individual staff members can apply their own notions of what additional “safety margins” (i.e., more stringent hydraulic design criteria, ad hoc buffers, etc.) might be imposed to protect the health, safety, property and the environment beyond the regulations’ already detailed standards requirements. This formulation threatens to become a recipe for unbounded additional prescriptions, and a fulcrum point for third party appeals claiming the need for layer-upon-layer of “margins of safety” to “adequately” protect various resources or situations.

The concepts in this provisions need to be further refined, defined, and focused in order to provide both agency staff and the regulated community with clear and objective guidance as to the applicable standards and requirements.

Provisions Relating to Abandonment

Abandonment Definition, §105.1

It is understood that the Dam Safety and Encroachments Act and regulation reflected in 25 Pa. Code §105.11(a) requires procurement of a permit in order to “abandon” a dam, water obstruction or encroachment. The terms “abandon” or “abandonment” are not defined in the statutes, and heretofore (that is for over 40 years since passage of the statute) have not been defined in the Chapter 105 regulations.

We note that in the absence of a statutory definition or regulatory definition, the Statutory Construction Act provides that such terms have their commonly understood meaning. In that regard, the commonly understood dictionary meanings of “abandon” are “to forsake entirely”; “to renounce and forsake”¹; “to cease intending or attempting to perform”; or “to give up with the intent of never again claiming a right or interest in.”² In each dictionary definition, as well as in the legal concept of abandonment under common law, the concept of abandonment involves elements of both *intention* and *permanency*.

The Proposed Rulemaking proposes to add the following definition of “abandonment”:
“The discontinued construction, or operation and maintenance of a dam, water obstruction or encroachment by the owner or permittee.”

Our concern is that this definition’s formulation does not add much in the way of clarity, and without more (both in the regulation or in clarifying preamble commentary) it could be misconstrued and misapplied. The definition trades one term (“abandon”) with another (“discontinue”), without elucidating what are the essential element or hallmarks of either.

¹ Webster’s New Twentieth Century Dictionary of the English Language Unabridged (Second Ed., 1983)

² <https://www.merriam-webster.com/dictionary/abandon>

The term “discontinue” may actually be a much looser term. The word “discontinue” merely means to stop doing something, but that leaves the question as to whether a particular inaction is permanent or merely temporary, and whether it is intentional or unintentional.

These distinctions are particularly relevant in the context of dams, water obstructions and encroachments.

First, the construction of structures in waterways is frequently not a continuous process. Water levels and weather conditions may require that work started in one season be suspended for a period of time until conditions again allow access to the waterway. The “discontinuation” of construction for a temporary period should most certainly not be construed to constitute an abandonment.

With respect to “operation” and “maintenance”, it may be observed that many structures (for example, intakes, outfalls and culverts) are relatively passive installations. They may require infrequent active maintenance; and depending on the circumstances, the structures may be utilized not continuously, but only on an intermittent or infrequent basis. For example, an intake installed as a backup source of a water supply system might only be placed into operation during rare droughts or other emergencies. A culvert on a fire break road might be used (i.e., “operated” upon) only during fires. Abandonment should not be premised upon mere inactivity.

We recommend that the definition of “abandonment” be clarified by reflecting the commonly understood elements of the term “abandon” – permanence and intentionality. We would recommend the following formulation be considered:

“Abandonment” -- The intentional and permanent discontinuation of the construction, or operation and maintenance of a dam, water obstruction or encroachment by the owner or permittee.

At the same time, we would recommend that the Department add to the regulation provisions and procedures for addressing situations where an “abandonment” is alleged to have occurred as the result of perceived inaction. Owners and permittees should be given “show cause” notice by the Department where it believes that circumstances indicate a potential abandonment, allowing the owner or permittee to rebut that claim. Of course, if the issue is one involving conditions of structural disrepair, the Department may require the owner/permittee to repair and restore the structure, or alternatively to remove the structure if it is no longer to be used and maintained; and the Department may determine that the owner or permittee has abandoned a dam, water obstruction or encroachment if such owner or permittee fails to undertake actions to maintain or repair the structure following written notice to the owner or permittee from the Department.

Abandonment – Structure Removal, §105.47

We understand that the proposed language in §105.47(b) and (c) is intended to clarify the obligations of a structure’s owner / permittee with respect to removal of all or part of the structure at the time of abandonment. However, we believe some further clarification and refinement is needed:

- The triggering phrase of §105.47(b) purports to require structural removal actions “*prior to* discontinuing use or abandonment.” This phrasing read literally has a logical and practical problem. Prior to discontinuing use, a structure is still in use. If a structure is still in use, it would not be abandoned, and removal of a structure while it is still in use makes no sense.

- Section §105.47(c) lacks any triggering phrase -- that is, it does not define when a dam owner or permittee will be required to remove all or a portion of the structure. Although this subsection has lacked such a phrase for some time, it warrants some clarification. We believe that like §105.47(b), this provision should be triggered by abandonment. We note that separately the Department has the power under Section 14 of the Dam Safety and Encroachments Act, 32 P.S. §693.14(b), to order repair, improvement or removal of any dam (or any water obstruction or encroachment) that it determines poses a threat to public health, safety, property or the environment.
- In §105.47(b), the scope of the removal requirement should be clarified. The currently proposed wording indicates that the owner must “remove all or part of the water obstruction or encroachment “which poses a threat to public health, safety, property, or environment, or no longer serves a purpose ...” We acknowledge the point that those portions of a structure that pose a threat to public health, safety, property, or the environment may warrant removal. But we question the need for the final clause (“no longer serves a purpose”) and how it fits with the other criteria. Consider for example, a discharge outfall structure on the side of a stream set in concrete structure that ceases to be used (i.e., the discharge is terminated). If the structure does not pose a threat to public health, safety, property or the environment, what is the justification for requiring in all cases removal of the entire structure just because it is no longer serving a purpose?
- It should be recognized that the process of structural removal involves both significant costs and impacts to the environment. Removing structures may engender significant impacts to adjacent stream banks and beds, surrounding wetland areas, and other features. Where structures are stable and benign, and do not pose significant public health, safety, property or environmental hazards, mandating removal for the sake of removal is not justified. Serious consideration needs to be given to balancing the cost and impact of removing all or portions of structures to the benefits to be obtained.
- The wording of §105.47(b) and (c) also warrant refinement in terms of the relationship between “removal” requirements and “other actions.” As currently worded, both subsections state first a removal requirement, but then provided “**and** other actions as necessary to protect the public health, safety, property and the environment.” That phrasing seems to suggest that removal is always required, and “other actions” are only supplemental. The Department should give consideration to the point that in some cases, “other actions” to protect public health, safety, property and environment may be used in lieu of actual structural removal. For example, a water or sewer pipeline might have been placed under a stream. Instead of digging up the stream to remove the no longer useful line, it may be better (in terms of the balance of effectiveness and impact) to close and seal the line in situ.

Reflecting these concerns, we would suggest consideration be given to the following revised wording of these provisions:

(b) At the time of abandonment, the permittee or owner of a water obstruction or encroachment covered by this chapter shall remove all or those portions of the water obstruction or encroachment which pose a threat to public health, safety, property, or the environment and/or take other actions as necessary to protect public health, safety, property and the environment under a permit or other approval issued by the Department.

(c) At the time of abandonment, the owner or permittee of a dam covered by this chapter shall remove all or those portions of the dam which pose a threat to public health, safety, property, or the environment and/or take other actions as necessary to protect public

health, safety, property and the environment under a permit or other approval issued by the Department.

(d) Determination of appropriate actions to be taken upon abandonment of a water obstruction, encroachment or dam shall be based upon a consideration of (i) the degree of risk to public health, safety, property and the environment; (ii) the effectiveness of the potential structure removal and other actions in protecting public health, safety, property and environment; (iii) the costs and other impacts of the potential structure removal and other actions.

Transfer of Permits - Facilities Not Requiring Permits, §105.25(f)

The new subsection 105.25(f) would add for the first time a requirement that a dam that does not require a permit notify the Department in writing of a change of ownership within 30 days following the ownership transfer. The legal basis and need for this requirement is unstated and questionable.

The Dam Safety and Encroachments Act specifically excludes from the Department's regulatory jurisdiction dams in certain categories, including on-stream dams with a contributory drainage area of \leq 100 acres, with a depth of \leq 15 feet, and an impounding capacity of \leq 50 acre-feet, and water storage dams not on streams which an impounding capacity of \leq 50 acre-feet. 32 P.S. §693.4(1). Where dams lie outside of the Department's regulatory jurisdiction, we can perceive of no legal basis for imposing a requirement on the owners of such unpermitted structures to notify the agency of an ownership change.

Further, the Act and regulations provide for waivers of permits for structures that have insignificant impacts, including (1) dams that are less than 3 feet high and 50 feet in width on streams other than wild trout streams; and (2) likewise, a waiver is provided for MSHA-regulated dams of lower hazard categories. 25 Pa. Code §105.12. If such structures are insignificant such as to not warrant a permit, what is the justification for imposing an ownership transfer notice.

The preamble to the proposed rule suggests that the Department's purpose is to "track the owner and permittee responsible for operating and maintaining" such dams. But if the dam is not permitted in the first place, the Department does not know its owner in the first instance, so "tracking" seems like an elusive goal. The Department is ill-equipped to serve as a "recorder of deeds" office, tracking the ownership of thousands of parcels with structures that require no permits. If an issue truly arises with respect to the condition of a dam that does not require a permit, the Department has readily available access to county tax and land records (most of which are now available on line) by which it can ascertain ownership.

Absent a compelling justification, adding such an ownership transfer notice to unregulated dams will doubtless result in confusion and inadvertent non-compliance. The owner of an unpermitted dam would be hard pressed to find this new requirement, which is buried in a section headed "transfer of permits" (which any reasonable reader would assume only applies to structures requiring permits). The owners of thousands of farm ponds and similar unregulated and unpermitted small impoundments would likely find themselves tripped up by this rule, and thereby exposed to onerous civil penalties. Absent a compelling legal basis and no apparent real benefit, this additional notification and paperwork mandate is not justified.

Provisions Relating to Dams

Construction Time Limits, §105.43

The newly proposed §105.43(c)(2) is problematic and confusing. It appears to state that if the work authorized by a dam permit cannot be completed within the timeframe stated in the permit, the permittee must notify the Department at least 90 days prior to commencing any work, and that in turn will trigger a reassessment of the project design. The obvious problem is that frequently it is not known whether or not construction or modification work cannot be completed within a permit's timeframe. As the Department well knows, construction and alteration of dams is a technically complex and time-consuming process, and during the course of work conditions may arise (such as adverse weather conditions) that delay efforts. In those situations, permittees have no "time machine" allowing them to go back to 90 days before work commenced in order to notify the Department. Moreover, if the Department thinks that work should take a certain period (say, 24 months), but it takes a somewhat longer period, triggering a project design reassessment is not justifiable. Design reassessments should be limited to those rare situations where delays have been engendered by the discovery of new geologic, foundation, or other similar conditions that impact the design and engineering of the structure. We would suggest that §105.43(c)(2) be amended to read as follows:

(2) If work involving construction or modification of a dam 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, the permittee or dam owner shall promptly notify the Department, and the Department may extend the time for completion of the work upon good cause shown. If the delay in completion of the authorized work is caused by unanticipated geologic, foundation, or similar site conditions that impact the design and engineering of the structure, 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.

Conduit Inspections, §105.53

The proposed new §105.53(a)(3) would impose new and extensive requirements related to inspections of all "piping systems passing through or under" any Category 1 and 2 dams to be conducted at least every 10 years. With respect to such piping systems, the provision would, without any apparent exceptions, mandate visual inspections of all conduits, intakes, valves, gates, and other appurtenant features, including photographic or video documentation.

The objective of this provision is neither stated in the rule itself nor in the proposed rule's preamble. While various types of period inspections, tailored to the particular design, age and conditions of the dam, may be appropriate as a preventative measure to check the structure and functionality of its works, this particular prescription fails to recognize some important points:

- (1) Not all Class 1 and 2 dams are alike. These class dams include a range of construction types. Inspection or other checks on conduits are most pertinent in relation to earthfill embankment dams, where uncontrolled leakage and internal erosion present a risk of potential failure. The same is not

true of other types of structures, such as concrete or masonry gravity or arch dams, which are not subject to “piping” as a failure mode. In the latter case, absent observations of seepage or other unusual issues that might indicate a need to investigate internal works, inspection of the entire piping system is not justified.

- (2) As a corollary, different types of structures would warrant differing inspection intervals and inspection methods. While conduit inspections at least every 10 years may be appropriate for earthfill embankment structures, a lesser frequency and different types of inspections would be justified for non-earthfill gravity and arch dams where conduit issues do not pose a dam failure risk.
- (3) Some (perhaps many) existing Class 1 and 2 dams were not designed with piping systems that can be inspected visually, either from the outside or the inside. The current wording of §105.53(a)(3) seems to countenance no exceptions -- it simply refers to “all piping” without any differentiation as to location or accessibility. With respect to such piping systems, inspection is not as simple as running a camera down and through the pipes; pipe diameters, turns and angles frequently restrict or preclude passage of visual imaging devices over their entire length. Any inspection rule needs to provide for exceptions and alternatives where sections of the conduit system are not reasonable accessible to visual inspection via typical methods.
- (4) The functionality and performance of some piping system features, such as valves and gates, can be checked and confirmed via means other than visual inspections -- including via actually exercising (opening and closing) those features and making sure that they function as expected.

We recommend that the Department work with dam owners and their engineers to develop a more refined approach to periodic inspection and facility checks. Those provisions should differentiate between different dam construction types, and should provide for alternatives to visual inspections to confirm the functionality of essential conduit and control structure features.

Emergency Action Plan/EAP, Public Notice Provisions, §105.134(d)

The public notice provisions of §105.134(d) reflect an outmoded and substantially ineffective method for disseminating to the public information concerning the potential inundation areas of a Class 1 or 2 dam failure. The provisions mandate that notices be posted in the city, borough, and township buildings and in locations within or near the inundation area, such as post offices, libraries, grocery stores, and gas stations.

The fact is the most municipalities do not have public bulletin boards where information can be posted, secured, and observed by the public over a long period of time. Where such community bulletin boards exist in municipal offices, post offices, libraries or commercial establishments, information may go up one day, and be taken down by anyone within a short time later. Limited members of the public actually stop to read posted materials in public buildings, and even fewer in grocery stores and gas stations.

The original §105.134(d) was written in the days before the internet, and reflects an outdated approach to providing the public with access to information. It would be far more effective if the rule were to provide for posting of notices of where information may be obtained via the internet, on (i) municipal websites (where available); (ii) county emergency management websites; and/or (iii) a dedicated dam safety information page on the PADEP website. It is our understanding that for homeland security / crucial infrastructure protection reasons, the actual inundation mapping should not be posted.

* * *

In closing, thank you for your consideration of the PA Chamber's comments on this matter. We welcome further discussion with EQB and Department staff on this matter, and stand willing to serve as a resource for further deliberations.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Sunday". The signature is written in a cursive style with a large initial "K" and "S".

Kevin Sunday
Director, Government Affairs