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February 3, 2021



Patrick McDonnell, Chair
Environmental Quality Board
16th Floor, Rachel Carson State Office Building
400 Market Street
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Proposed rulemaking to amend 25 Pa. Code Ch. 105, published in the December 5, 2020 issue of the *Pennsylvania Bulletin* (50 Pa. B. 6863)

VIA EMAIL TRANSMISSION (ReqComments@pa.gov)

Dear Secretary McDonnell:

Pennsylvania Farm Bureau (“PFB”) offers the following comments to the Environmental Quality Board (“EQB”), regarding the proposed rulemaking noted above. PFB is a statewide general farm organization that provides political advocacy, information and educational services, and professional assistance for farm and rural families throughout the Commonwealth. Our organization includes fifty-four (54) local Farm Bureau affiliates that are actively engaged in sixty-three Pennsylvania counties. PFB is the state affiliate of the American Farm Bureau Federation. We appreciate the opportunity to offer comments on this rulemaking.

We hope the EQB fully appreciates the potential impact and challenges that regulation under the current provisions of Chapter 105 and the proposed revision in standards that may apply under the rulemaking’s changes to Chapter 105 have on Pennsylvania’s farming operations. Farms and the lands on which farming operations are operated are not replicates in form or function. Each farm tract and farming operation is individually unique, and vary widely in size of operation, area of land capable for use in agricultural production, amount and variety of commodities produced, and existing natural and existing environmental features and conditions within and neighboring the land utilized in agricultural production, such as soil, slope and water characteristics. The breadth and range of areas regulated under the Dam Safety and Encroachment Act and regulations established pursuant to the Act are themselves wide and varied – from structures that control water flow to land use activities that disturb surface soils, and from standards that regulate safety to standards that regulate environmental quality.

Given the uniqueness of farms and farming operations and the broad spectrum of areas regulated under the Act and Chapter 105, it is critically important for revisions to Chapter 105 to clearly identify and define which conditions, types, structures and activities are subject to regulation and permitting requirements and which are not, as well as clearly identify the information and documentation that farmers and landowners are expected to provide as condition for permit for those conditions, types, structures and activities that are subject to permitting requirements. Farm ponds that many farmers would consider to be

“ordinary” can be subject to Chapter 105 regulation depending on the pond’s relative size, location and potential impact of water runoff from deterioration in the pond’s integrity. Soil disturbance activities that farmers would consider to be part of “normal farming” activity may or may not be regulated under Chapter 105 and the rulemaking’s proposed revisions, depending on location and purpose of the activity being performed.

Generally speaking, numerous provisions among the extensive changes to Chapter 105 proposed in the rulemaking give us cause for concern. A substantial number of amendatory provisions in the rulemaking include terms that are not themselves defined. And other provisions would establish standards that are seriously lacking in specificity or practical ability of farmers and others potentially regulated to reasonably assess and determine whether their condition, structure or activity is one that is subject to regulation under Chapter 105 or whether materials they submit as part of their application for permit is sufficient in the eyes of the Department.¹ We fear that without additional revision in language, many of the proposed changes in the rulemaking will lead to greater inconsistency and arbitrariness in the Department’s interpretation and application of Chapter 105’s regulatory standards and criteria, and ultimately to greater confusion among farmers in their understanding of standards and greater risk of legal jeopardy and penalties from unknown violations as a consequence.

Our comments to specific changes proposed in the rulemaking are offered below.

§ 105.1 – Definition of “Abandonment”: This term and definition are proposed to be added. As proposed, there is a lack of clarity and potential conflict with the provisions of § 105.452(c) (governing status of prior converted cropland – statement of policy). While §105.452(c) uses the same term, that section appears to limit the term’s application to specific occurrences. We would request further amendments to this definition to further clarify and resolve the potential conflict in interpretation

§ 105.1 – Definition of “Aquatic resource functions”: This term and definition are proposed to be added. The definition makes a general reference to “chemical, physical or biological process that occur in aquatic resources” without offering any quantitative or qualitative measure of frequency or infrequency of “occurrence” to distinguish services that fall within or outside the scope of the definition. The definition also generally references “current scientific principles without effort to distinguish or measure the relative validity of claimed or competing “scientific principles” in the determination of whether a function falls within or outside the scope of the definition. We would recommend further amendments to this definition that give much further clarity and guidance in understanding and application of the general terms noted in this comment. If practical clarification and guidance in interpretation of these general terms cannot be expressly provided, we would recommend these terms be deleted from the definition.

§ 105.1 – Definition of “Aquatic resource impacts” – Inclusion of “(iii) Secondary impacts”: This term and numerous components attempting to identify and define “types” that would fall within the scope of the term, are proposed to be added. We believe the language contained in the “secondary impacts” provision falls very short of providing meaningful clarity or guidance to those in assessing whether a condition that is “not the

¹ References to the “Department” in these comments apply to the Department of Environmental Protection.

direct result of” a water obstruction would nonetheless fall within the definition of “aquatic resource impacts.” We would recommend this provision be deleted or provide a much clearer and specific description of the types of occurrences that are intended to fall within and outside the scope of “secondary impacts.”

§ 105.1 – Proposed amendments to the definition of “Cross section”: We are concerned that the inclusion of “floodway” as proposed and the definition’s reference to “top of the bank” in the context of floodway may cause confusion and may conflict with the definition of “floodway” currently contained in Chapter 105 (not amended in the proposed rulemaking) which provides more specific standards in identifying those areas considered to fall within and outside the boundary of a “floodway.” (i.e. the area indicated on FEMA maps and flood insurance studies, or in absence, 50 feet beyond the bank of a stream). We would recommend the proposed amendment be deleted or further clarification be provided in the definition to reconcile the apparent inconsistency with Chapter 105’s current definition of “floodway”.

§ 105.1 – Definition of “Project”: This term and definition are proposed to be added. A provision is included within the definition, which unequivocally states: “The term includes reasonably foreseeable areas planned to contain future dams, water obstructions or encroachments.” Nothing is provided in the definition that provides any meaningful guidance or criteria in assessing or determining those obstructions or encroachments that should be “reasonably foreseeable”. We also see the terms “reasonably foreseeable” (which suggests what an individual should anticipate to result from an intended obstruction or encroachment) and “planned” (which suggests what obstruction and encroachment an individual intends to perform) as inconsistent and conflicting in the context of this provision. We would recommend this provision be deleted from the definition or be further amended to provide more practical guidance and clarification of the provision’s intent.

§ 105.1 – Proposed amendments to the definition of “Wetland functions”: A provision is proposed to be added that would include within the definition’s scope, “Other aquatic resource functions pertaining to wetlands that may be recognized by ***current scientific principles***.” (Emphasis added) As with the inclusion of the reference to “current scientific principles” in other proposed provisions of this rulemaking, we are concerned with inclusion of the term “current scientific principles” here without any meaningful effort to qualify which among the theories espoused by scientists are considered to be mainstream and fall within the scope of accepted “scientific principles” and which are not. We would recommend further amendments to give much further clarity and guidance in criteria to determine and identify which among claimed wetland functions are supported by “current scientific principles.” If practical clarification and guidance cannot be expressly provided, we would recommend the proposed amendments to this definition be deleted.

Proposed amendments to § 105.12(a)(2) – Waiver of permit requirements: The proposed rulemaking would amend existing standards governing waiver of permit for obstructions and encroachments under subsection (a) to also prescribe generally that the obstruction or encroachment “not impede flow or aquatic life passage.” Nothing is provided in the amendatory language to identify the standard, measure or threshold of impediment to be applied in evaluating whether or not the rulemaking’s proposed prerequisite for waiver has been met. Since arguably any activity performed to a water or within a water body can have the effect to causing some slowing in rate of water flow or in rate of aquatic life

passage (eg. aquatic insects or microscopic aquatic organisms), application of the rulemaking's proposed provision could have the practical and legal effect of negating any opportunity for continued waiver of activities within a water body that have been traditionally considered to be subject to permit waiver, including waived activities that farmers have performed as integral to maintaining viability of their farming operations. We believe this proposed amendment should be deleted, or further amended to expressly recognize that marginal or de minimis impediments flow or aquatic life passage will not nullify permit waiver and provide more specific and quantifiable identification of the threshold of "impediment" that must be attained for waiver of permit to no longer apply.

Proposed addition of § 105.12(a)(17) – Additional allowance for permit waiver of streambank conservation practice:

We appreciate the proposed rulemaking's inclusion of additional opportunity for waiver of Chapter 105 permit for "streambank fencing conservation practice[s]." However, we believe the scope of the rulemaking's proposed waiver for streambank activity should be broadened. And we also believe that further clarification of the intended scope and limitation of waiver to be provided under this provision is needed. We do not fully understand why waivers are expressly limited to those fencing practices that are "associated with crop production" or temporary fencing "conservation planting." Why is the opportunity for permit waiver not also available for stream exclusion fencing of animals along a stream or water body? We also are unsure what standards and criteria will be applied in determining whether the fencing materials to be used will meet the requirement that they "will [not] collect flood debris resulting in the restriction of flow." Theoretically, use of fencing material of any size or substance can potentially collect flood debris, and collection of any flood debris can impede water flow. We recommend further amendments be made to this provision, consistent with the comments and concerns expressed herein. Additionally, we recommend the amendments include provisions that specifically identify those fencing materials considered to be acceptable for purposes of permit waiver.

Proposed addition of § 105.12(a)(20) – Additional allowance for permit waiver of water obstruction or encroachment for water withdrawal related to crop production or fire protection:

We appreciate and support the proposed rulemaking's inclusion of this express provision for waiver of Chapter 105 permit. We believe inclusion of this provision recognizes in regulation the applications that the Department has traditionally exercised in situations where access to water was essential to avoidance of serious loss of agricultural crops or property loss from fires. We are, however, concerned with the meaning and interpretation of the qualifier "emergency" in the context of interpretation and administration of the permit waiver to be provided under this provision. The term may connote to some that the waiver only applies if the risk of loss is both imminent and immediate in time. Relative to loss of crops, the immediacy of the threat may to crops vary from day to day, depending on the expected extremity of heat and other climate and weather conditions. We believe that at least some latitude should be provided relative to the permit waiver in engagement of preemptive response to failing crop conditions and weather forecasts, substantially before the time that crop conditions become acute and loss becomes unavoidable. We recommend that "emergency" be deleted from the provision or there be further clarification of this provision to identify existing crop and anticipated climate conditions that warrant permit waiver in response to crop and fire loss.

Proposed amendments to § 105.13(e)(1)(iii)(D) – Demonstration of water dependency in project description: As amended, the proposed rulemaking would require an applicant for Chapter 105 permit to provide “an analysis” of water dependency of a proposed dam, obstruction or encroachment that “demonstrate[s] unavailability of any practicable alternative location, route or design . . . to avoid the adverse impact . . . upon the environment and to protect the public natural resources of the Commonwealth.” Nothing is expressly provided that attempts to identify, quantify or give guidance on the standard of review to be applied by the Department in evaluation or determination of whether the applicant has sufficiently met this demonstration requirement. We recommend this provision be amended to give more substantial clarity in identification and guidance of the standard of review to be applied.

Proposed amendments to § 105.13(e)(1)(x)(D) – Impacts analysis: As amended, the proposed rulemaking would require an applicant for Chapter 105 permit to provide “analysis” of. “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*. (Emphasis added). Neither the current provisions nor the rulemaking’s proposed revisions to Chapter 105 define or attempt to identify the type or degree of analysis that will satisfy requirements for analysis of “flow regime.” Also, required analysis for “other significant environmental factors” is itself a difficult and nebulous standard. The proposed rulemaking fails to provide any standard of review that will be applied by the Department in evaluating or determining whether an applicant has met this standard. We recommend the provisions for required analysis for “flow regime” and for “other significant environmental standards” be deleted or further amended to provide criteria and guidance that more clearly identifies the standard of review to be applied.

Proposed amendments to § 105.13(e)(1)(x)(E) – Analysis of “other impacts”: As amended, the proposed rulemaking would require an applicant for Chapter 105 permit to provide “an analysis” of “nearby local” public parks, recreational areas, areas of historical or archaeological significance, prime farmlands and other named features and conditions. The meaning and intended scope of the term “nearby local” are unclear. And the rulemaking’s proposed language does not provide to permit applicants sufficient guidance on how this term is to be interpreted and applied in determining the scope of features and conditions for which analysis is required. We would recommend modifications of this provision be made to give further clarification and guidance on the scope and limitation of the term “local nearby.”

§§ 105.13(e)(2) and 10513a(b) – Required time for applicant or registrant to correct insufficient submissions: The proposed rulemaking would eliminate the currently prescribed time period of 60 days after an application for permit or submission of registration is determined to be substantially inadequate to correct the inadequacy. In its place, the proposed rulemaking would establish a standard that gives the Department or conservation district sole and unlimited discretion to set the time period that the applicant or registrant must act to correct the inadequacy. The rulemaking also would provide to the Department or conservation district sole and unlimited discretion to deem the application or registration as withdrawn or deny the application upon failure of the applicant or registrant to meet the Department’s or conservation district’s imposed deadline. We believe the rulemaking’s

attempt to eliminate currently prescribed and recognized time periods for correction of deficiencies and provide regulatory authorities sole discretion to set deadlines for correction is dangerous, and provides opportunity for regulatory officials to abuse that discretion and set arbitrary and unreasonable time periods for applicants to act. While we understand that there may be instances where the deficiency in the application or registration may not be so serious as to warrant the full use of the 60-day window for action, we still believe a prescribed time window for corrective action by the applicant or registrant should be retained to avoid the potential for regulatory abuse. We would recommend that the prescribed 60-day window for corrective action be retained. If the EQB would determine that the final regulation should include both a prescribed period for applicants or registrants to take corrective action and discretionary authority of Department or conservation district to extend that period, we would have no objection.

Proposed amendments to § 105.452 – Status of prior converted farmland: The proposed rulemaking is attempting to make wholesale changes to the section’s current provisions that we believe would substantially deviate from the standards established under the Food Security Act by the Natural Resources Conservation Service (NRCS) relative to farmers’ use of potential wetland areas for crop production under “prior converted wetland” and “farmed wetland” standards. Most notably, the proposed rulemaking attempts to seriously curtail the federal standard that discontinuation in use and management of converted or farmed wetland areas must be for 5 consecutive years before the land is considered to be “abandoned” for regulatory purposes. We are very concerned that the rulemaking’s extensive changes and the inconsistencies that will result between state and federal standards in this area will likely create confusion among farmers, and will place those farmers relying on the federal standards in use of prior converted land and farm wetlands for farming activities in legal jeopardy for violation of state law and assessment of severe regulatory sanctions and penalties. Several questions can and should be raised specifically on the clarity and practicality in interpreting and applying several of the standards that are proposed:

- Abandonment of use of land for crop production would be considered to have occurred under the proposed rulemaking when the farmer “establishes intent” to convert to another use. What does “establish[ing] intent” mean and not mean?
- Abandonment of use of land for crop production would be considered to have occurred under the proposed rulemaking if the land “was or is enrolled in a conservation program.” The term “conservation program” is nowhere defined in either the current provisions of Chapter 105 or the proposed rulemaking. And numerous “conservation programs” enrolled by farmers serve dual purposes of furthering sound environmental management and viable economic management of the farm operation. What is the intended scope and limitation of “conservation programs” enrolled by farmers for which enrollment will be considered to constitute abandonment?
- Abandonment of use of land for crop production would be considered to have occurred when: “The area has lain idle so that modifications to the hydrologic regime, including the removal of woody vegetation, are necessary to resume operations.” What standard or measurement can reasonably be applied in assessment of whether the land has “lain idle”? What degree of change in characteristics would constitute “modifications to the hydrologic regime”? And what threshold amount or

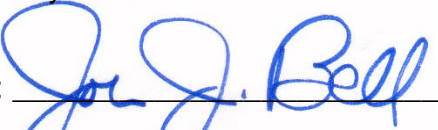
characteristics of removal of woody vegetation would constitute that which “are necessary to resume operations”?

Additionally, we question whether the extensive changes contemplated for this section in the rulemaking were adequately presented by the Department to the Department’s Agricultural Advisory Board, as required under the provisions of Chapter 7 of Title 27 of the Pennsylvania Statutes. Based on the concerns expressed above, it is our recommendation that the rulemaking’s proposed changes to § 105.452 not be included in final adoption, and the Department defer further action on these proposed changes until more intensive discussion with and more input from the agricultural community, NRCS and Department’s Agricultural Advisory Board has occurred.

Please feel free to contact us by email at jjbell@pfb.com or by telephone at (717) 731-3547 if you have any questions regarding the comments offered above. And thank you again for the opportunity to share our views.

Respectfully submitted,

Pennsylvania Farm Bureau

By: 

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