



February 3, 2021

Delivered Via e-Comment at <http://www.ahs.dep.pa.gov/eComment>

Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101-2301

Re: Comments on the Proposed Rulemaking [25 Pa. Code Ch.105] – Dam Safety and Waterway Management – Published at 50 Pa. Bull. 6863 (December 5, 2020)

Dear Board Members:

On December 5, 2020, the Pennsylvania Department of Environmental Protection (“DEP”) published a proposed rulemaking in the Pennsylvania Bulletin proposing numerous changes to regulations concerning dam safety and water management at 25 Pa. Code Ch. 105 (“Proposed Rulemaking”).

Seneca Resources Company, LLC (“Seneca”) is the exploration and production segment of National Fuel Gas Company. Seneca explores for, develops and produces natural gas and oil reserves in California, New York and Pennsylvania, including the Marcellus and Utica Shales. Seneca appreciates the opportunity to comment on the Proposed Rulemaking, which provides many needed updates and clarifications to Ch. 105. In addition, the Marcellus Shale Coalition (the “MSC”), of which Seneca is a member, is contemporaneously submitting comments regarding this Proposed Rulemaking. Seneca incorporates herein and supports the Comments submitted by the MSC. Seneca hereby submits its additional comments to the Proposed Rulemaking.

In general, many of the changes in the Proposed Rulemaking will provide more clarity for the regulated community. However, contrary to that goal, there are many provisions within the Proposed Rulemaking that do not provide sufficient guidance as to the factors or descriptions of requirements that must be met, and instead simply leaves matters up to the discretion of the DEP. The MSC’s comments touch on a number of these provisions and will not be repeated here. Such generic and subjective rulemaking will only lead to uncertainty in the regulatory community and inconsistent interpretation and application of the rules within DEP itself, particularly among its various permit reviewers. Uncertainty and inconsistency among DEP regions and staff creates difficulties for businesses, like Seneca, that operate in multiple regions in the Commonwealth. While the intended goal of providing discretion on the part of DEP concerning various rules is presumably to provide flexibility in DEP’s decision making; the unintended result is potentially inconsistent application of the rules that could cause two

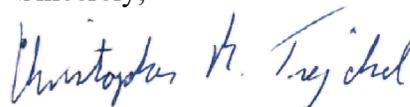
substantially similar applications to be treated very differently based on the unique preferences of individual DEP staff members. While some may suggest that sufficient discretionary boundaries can be established through a guidance document, unfortunately a guidance document is created outside the scrutiny and detail of review that is required of a regulation and would not have the force and effect of law. Seneca recommends that DEP re-evaluate the various discretionary components of the Proposed Rulemaking and provide additional express boundaries within the regulations to provide greater certainty for the regulated community and DEP staff.

Somewhat related to the above-referenced concerns about establishing boundaries governing matters of DEP discretion, Seneca believes that the revised definition of “stormwater management facilities” that would be modified to include concepts of maintenance activity is unclear. Specifically, the proposed addition stating that 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” is confusing. The new definition of “maintenance” would acknowledge that maintenance is performed periodically, dependent on the facility in question. If between maintenance periods, minor signs of wetland vegetation begin to grow in the stormwater management facility, then is the operator precluded from performing its routine maintenance? What are the factors that will be relied upon by DEP in determining that the facility has now developed into a wetland? Knowing the factors that DEP will consider in making a determination of such a classification change are important for the regulated community to understand how frequently it will need to schedule its maintenance activities in order to ensure the feature remains a stormwater management facility.

One area the Proposed Rulemaking provides too narrow a discretionary boundary for DEP is concerning siting criteria for service areas under 105.20a(c). Under this new section, compensatory mitigation “will generally not be approved unless the compensatory mitigation site is located within the same designated watershed boundaries identified by the Department.” The DEP does not explain its rationale for this watershed restriction which may have a significant impact on an applicant’s ability to locate and secure a compensatory mitigation site. The mere fact that a compensatory mitigation site happens to be in a different watershed should not act as a *de facto* disqualification. Seneca recommends that this language be modified to state that it is DEP’s preference that the compensatory mitigation site be situated in the same watershed if practicable. This change will provide appropriate guidance and flexibility to both applicants and DEP staff.

Seneca appreciates the opportunity to comment on the Proposed Rulemaking and is willing to answer any questions or provide additional clarification concerning these comments upon request. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Christopher M. Trejchel". The signature is written in a cursive, slightly slanted style.

Christopher M. Trejchel
Deputy General Counsel