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Independent Regulatory
Review Commission

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Via Electronic: RegComments@pa.gov
and First Class Mail

Pennsylvania Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Objection to Proposed Rulemaking at 50 Pa. Bull. 6895 [Pa. Code 105.82(a)(9)]

Dear Members of the Board:

This letter is intended as an objection to the Environmental Quality Board's (the "Board") proposed rulemaking, published in the Pennsylvania Bulletin on December 5, 2020, at 50 Pa. Bull. 6895, which would amend Pa. Code 105.82(a)(9). The current text of Pa. Code 105.82(a)(9) requires all applicants for a permit to operate and maintain an existing dam to provide "[p]roof of title or flowage easements for land areas below the top of the dam elevation that is subject to inundation." The proposed rulemaking would amend this subsection to only require proof of title or flowage easements "for dams constructed or modified after July 1, 1979."

First, we object to the proposed rulemaking that so drastically and detrimentally alters the above subsection because it conflicts with one of the stated purposes of Chapter 105, which is to "[p]rovide for the comprehensive regulation and supervision of dams . . . in order to protect the health, safety, welfare and property of the people." 25 Pa. Code § 105.2(1). The current text of Pa. Code 105.82(a)(9) recognizes that one may not inundate the property of another but for a legal right to do, usually by means of a flowage easement. We urge the Board to continue to require the applicant's establishment of this right to be a prerequisite to any permit approval, regardless of whether the dam at issue was constructed or modified before July 1, 1979 (the effective date of the Dam Safety and Encroachments Act, 32 P.S. § 693.1–.27).

Second, the proposed amendment of Pa. Code 105.82(a)(9) would unfairly disadvantage and endanger persons and property near older unpermitted dams relative to persons and property near more recent unpermitted dams. Property owners near dams constructed or modified after that date would maintain their ability to meaningfully participate in the permit approval process by leveraging flowage easement approval. Conversely, property owners near unpermitted dams constructed or modified before that date would unfairly lose that ability.

Finally, removing the flowage easement requirement at Pa. Code 105.82(a)(9) for owners of older unpermitted dams poses a counterintuitive and alarming safety issue, given the inherently higher risks involved in operating and maintaining an unpermitted dam that is, at a minimum, more than forty years old. Many such unpermitted dams are later classified by the Department of Environmental Protection's Division of Dam Safety as high-risk dams, being in hazard categories 1, 2, or 3.

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For these reasons, we respectfully request that the Board refrain from the proposed rulemaking insofar as it pertains to Pa. Code 105.82(a)(9).

Thank you.

Very truly yours,



Matthew M. McKeon