

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-556 (IRRC #3278)

### Dam Safety and Waterway Management

March 5, 2021

We submit for your consideration the following comments on the proposed rulemaking published in the December 5, 2020 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (Board) to respond to all comments received from us or any other source.

#### 1. RRA Section 2 – Reaching of consensus.

##### **RRA Section 5.2(b)(2) – Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources.**

The Board proposes to amend Chapter 105 (relating to dam safety and waterway management) to strengthen the Department of Environmental Protection (Department) implementation of the dam safety and water obstruction and encroachment programs, provide clarity for project applicants and the public on existing regulations, and enable the Department and local delegated agencies to utilize resources in a more effective and efficient manner. In doing so, the Board must develop a regulation that takes into consideration the regulatory review criteria of the RRA. To illustrate, we note that Section 5.2(b)(2) of the RRA (71 P.S. § 745.5b(b)(2)) is the criterion related to the protection of the public health, safety, and welfare, and the effect on the Commonwealth’s natural resources.

The Board states in the Preamble that the proposed regulatory revisions would allow the Department to focus resources on activities and threats to public health, welfare, safety, and the environment, while providing general management, oversight, and review for more routine activities to ensure compliance with the objectives of the Dam Safety and Encroachments Act (Act). 32 P.S. §§ 693.1—693.27.

This proposal has generated significant interest from legislators, the House Environmental Resources and Energy Committee (House Committee), state agencies, environmental advocacy groups, the regulated community, and the public. One of the key issues raised in comments from legislators and many others is that environmental advocacy groups were not involved in the development of the regulation. Section 2 of the RRA (71 P.S. § 745.2) explains why the General Assembly felt it was necessary to establish a regulatory review process. Given the interest this proposal has generated, we believe it is appropriate to highlight the following provision of

Section 2(a) of the RRA which states: “To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.”

Through these comments, we strongly urge the Board to seek input from all interested parties as the Board works to draft a final regulation that strikes an appropriate balance of requirements on the regulated community while protecting the health, safety, welfare, and environment of Pennsylvania citizens. In reviewing the Board’s responses to our comments, we will evaluate the explanations of how the provisions in question protect the public health, safety, welfare, and environment.

## **2. RRA Section 5.2(a) – Legislative comments.**

The House Committee voted to submit a letter to this Commission and the Department identifying numerous objections to the proposed rulemaking. The objections relate to the following:

- The proposed amendments to Chapter 105, in short, 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;
- The proposed regulation contains numerous incorrect citations and references;
- There are many new words that lack definition within the proposal, along with phrases that are open to broad interpretation. For example:
  - Small drainage structures, long waived from permit requirements under Section 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 the Department, and any dam, water obstruction, or encroachment that discontinues a construction project could be deemed “abandoned” under Section 105.1; and
  - “Ephemeral stream,” “intermittent stream,” “geomorphic,” and “paleo-aquatic” are examples of the important, yet undefined, terms found within the proposed regulation;
- 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. Farmers could possibly, depending on the interpretation of Section 105.12(a)(17) by an individual Department employee, need a permit to construct an animal fencing along a stream but not crop-related fencing;

- A Submerged Lands Licensing Agreement fee for “groin structures” serves no legitimate purpose. Groin structures fit well within the exemption suggested under Section 105.35(c), as they are constructed for environmentally beneficial purposes and serve to conserve the coastline of Lake Erie; and
- The proposed regulation, in its current form and with its many errors, is unacceptable for the people and businesses of this Commonwealth.

State Senator Carolyn Comitta submitted comments asking the Board to:

- Reject any weakening of the Chapter 105 regulations, especially when it comes to allowing waivers of the permitting process for some of Pennsylvania’s most critical streams; reduce, not expand, the number of waivers granted; and prohibit any waivers for activities impacting [exceptional value waters (EV)], [high quality waters (HQ)], Class A, wild trout, or already impaired streams;
- Reconsider the proposal to require a company seeking a permit for an industry activity that crosses multiple counties to submit only one application, rather than needing to go to each county the activity impacts;
- Consider garnering detailed input from organizations committed to protecting Pennsylvania’s water in proposing or advancing such revisions; and
- Give careful consideration and deliberation to the views of Pennsylvania’s statewide environmental organizations in this process.

State Senator Katie Muth also submitted a number of concerns regarding:

- Expanding the list of consulted stakeholders to include all interested parties, including organizations that prioritize people and environment;
- The proposed definition of “maintenance” and the potential increase of unreported environmental harm due to definition modifications;
- Construction-related environmental impacts may be defined as temporary and may be exempt from reporting requirements;
- Section 105.13(e)(4) that would allow the Department, conservation district, or delegated local agencies to make case-by-case determinations regarding the time period an applicant would have to remedy an inadequate application;
- The need to incorporate private wells in addition to public water supplies in Section 105.401; and
- Section 105.13(d) that would allow projects crossing county boundaries to be submitted under one permit application, removing aspects of local control associated with permitted activities and limiting public participation associated with the consideration of future permits.

Under the RRA, the comments, objections, or recommendations of a Standing Committee is one of the criteria the Commission must consider when determining if a regulation is in the public interest. Our comments below address many of the issues raised by the House Committee and

legislators. When this proposal is delivered as a final-form regulation to this Commission and the Standing Committees for review, the issues raised by the House Committee and legislators, and the Board's response to those issues, will be one of the criteria used by this Commission to determine if the regulation is in the public interest.

**3. Section 105.1. Definitions. – Protection of the public health, safety, and welfare and the effect on this Commonwealth's natural resources; Clarity; Implementation.**

*Abandonment*

The Board proposes to add a definition of "abandonment" as follows: "The discontinued construction, or operation and maintenance of a dam, water obstruction or encroachment by the owner or permittee." Commenters question this newly defined term, noting that the legal concept of abandonment under common law involves elements of both intention and permanency, and express concern that the proposed definition lacks clarity. Also, commenters question if there is a potential conflict with the provisions of Section 105.452(c) (relating to status of prior converted cropland – statement of policy), which appears to limit the term's application to specific occurrences. The Board should clarify this definition in the final-form regulation to address concerns raised by commenters.

*Aquatic resource functions*

Commenters note that the definition of "aquatic resource functions," which make reference to "chemical, physical, or biological processes that occur in aquatic resources," does so 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. Similarly, the definition references "current scientific principles" without distinguishing or measuring 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 ask the Board to clarify this term to address these issues in the final-form regulation.

We note that the portion of this comment relevant to "scientific principles" applies to the definition of *wetland functions*, as well as Section 105.14(a).

*Aquatic resource impacts*

Commenters raise concerns related to language contained in the "secondary impacts" portion of the definition of "aquatic resource impacts," which states, in part, "[c]hanges associated with but not the direct result of the construction or substantial modification of the dam or reservoir, water obstruction or encroachment . . . ." Commenters assert that this provision falls short of providing meaningful clarity for assessing whether a condition that is "not the direct result of" a water obstruction would nonetheless fall within the definition of "aquatic resource impacts." We ask the Board to clarify this term in the final-form regulation.

### *Cross section*

The Board proposes to amend the definition of “cross section” to: “The area from the top of the bank to the top of the opposite bank of a stream, floodway or body of water as cut by a vertical plane passed at a right angle to the course of a stream, floodway or body of water.” Commenters assert 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. We ask the Board to clarify this term and how it will be implemented.

### *Maintenance*

The Board proposes to define “maintenance” as “periodic activities conducted to preserve the condition of a dam, water obstruction or encroachment as authorized by the Department.” Commenters raise several concerns regarding this new definition, including whether the Department intends to authorize **every** maintenance activity on a dam, water obstruction, or encroachment and how the term “periodic” will be measured. We ask the Board to clarify this term and how it will be implemented.

### *Stormwater management facilities*

The definition of “stormwater management facilities” states, in part, that “the term does not include swales or ditches that have not been maintained and have developed into watercourses . . . .” Commenters assert that the regulation does not define a watercourse or explain how to evaluate whether a swale or ditch has developed into a watercourse. We ask the Board to clarify this term in the final-form regulation.

### *Additional definitions to consider*

#### *Geomorphic*

The term “geomorphic” is not defined but the new terms “geomorphic measurements” and “geomorphic stability” are used in several sections. Commenters note that if this term is added as a design standard, then quantifiable ways to measure degradation, such as width/depth ratios, entrenchment, and sinuosity should be referenced so that permit applicants and reviewers have a consistent method of assessment. We ask the Board to define this term to provide clarity, or explain why not defining the term in the final regulation protects the public health, safety, welfare, and environment.

#### *Paleo-aquatic*

Proposed new language at Section 105.15(a)(4)(viii) references the term “paleo-aquatic,” which is undefined and described by commenters as not commonly used terminology. We ask the Board to define this term to provide clarity, or explain why not defining the term in the final regulation protects the public health, safety, welfare, and environment.

### *Practicable alternative*

The Board uses the term “practicable alternative” throughout the proposed regulation. While this term is not defined in the proposed regulation, we note that the Board does define “practicable” in Sections 105.18a(a)(3) and (b)(3), which are not a part of the Annex. We ask the Board to define this term to provide clarity, or explain why not defining the term in the final regulation protects the public health, safety, welfare, and environment.

### *Registration*

In the Preamble related to Section 105.4 (relating to delegation to local agencies), the Board explains that it proposes to incorporate the authorization of general permit registrations. The Board states that this language more accurately reflects the terminology that is used for permits and registrations. However, commenters are unclear as to the meaning of the term “registration.” We ask the Board to define this term to provide clarity, or explain in the Preamble to the final regulation how a registration differs from a permit.

#### **4. Section 105.12. Waiver of permit requirements. – Protection of the public health, safety, and welfare and the effect on this Commonwealth’s natural resources; Clarity; Implementation procedures.**

The Board proposes to amend Paragraph (a)(2) to read: “A water obstruction or encroachment in a stream or floodway with a drainage area of 100 acres or less that will not impede flow or aquatic life passage. This waiver does not apply to a water obstruction or encroachment proposing to impact a wetland located in the floodway, or to a stream enclosure.” Commenters state that the proposed language does not identify the standard, measure, or threshold of impediment to be applied in evaluating whether or not the prerequisite for waiver has been met, and assert that any activity performed to a water or within a water body can have the effect of causing some slowing in rate of water flow or in rate of aquatic life passage. Other commenters assert that there should be no waivers allowed in EV, HQ, Class A, wild trout streams, or impaired waterbodies, no matter how small the stream size. We ask the Board to clarify and provide certainty as to how this provision will be implemented, or explain how this provision in the final regulation protects the public health, safety, welfare, and environment.

Paragraph (a)(17) includes a provision stating: “Fencing may not be constructed of materials that will collect flood debris resulting in the restriction of flow or the creation of a backwater condition . . . .” Commenters raise concerns as to what standards or criteria will be applied in determining whether a fencing material meets the requirement that it will not collect flood debris resulting in the restriction of flow or the creation of a backwater condition. They assert that, 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 ask the Board to clarify this provision and how it will be implemented.

Commentators raise concerns related to Paragraph (a)(20) relating to waiver of a permit for “the temporary emergency placement, operation and maintenance of a water obstruction or encroachment for water withdrawal related to crop production or fire protection.” Some

commenters note that relative to loss of crops, the immediacy of the threat to crops may vary from day to day, depending on the expected extremity of heat and other climate and weather conditions. Other commenters assert that there should be an explicit time limit for such withdrawals, as well as a requirement that they be removed. These commenters also express concern that this waiver of a permit does not become a recurring seasonal event. We ask the Board to clarify and provide certainty as to how this provision will be implemented, or to explain how this provision in the final regulation protects the public health, safety, welfare, and environment.

**5. Section 105.13. Regulated activities—information and fees. – Determining whether the regulation is in the public interest; Protection of the public health, safety, and welfare and the effect on this Commonwealth’s natural resources; Clarity and lack of ambiguity.**

The Board proposes to amend Subsection (d) to allow a single application permit for a project that is located within multiple counties. This change generated significant comments, including comments from Senator Katie Muth and Senator Carolyn Comitta. Comments primarily express concern that this change will remove aspects of local control associated with permitted activities and limit public participation associated with the consideration of future permits. If single application permits are retained in the final regulation, how will the Board ensure that local governments, residents, and interested parties are informed and have an opportunity to be involved in the process? Will the Board evaluate the cumulative effects of these multiple encroachments when determining if a waiver is appropriate? We ask the Board to explain how this provision in the final regulation protects the public health, safety, welfare, and environment.

In Clause (e)(1)(iii)(D), the Board proposes to replace a previously required “statement” on water dependency with a “narrative discussion and analysis.” Commenters request clarification of what specific information will be required in each the “discussion” and “analysis.” We ask the Board to clarify this provision in the final-form regulation.

The Board proposes to add Clause (e)(1)(x)(D) stating, “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.” The phrase “other relevant significant environmental factors” is ambiguous and proposed to be added in other sections, as well. What standards will be used to determine what qualifies as other environmental factors? What standards determine whether these factors are relevant and significant? The Board should clarify this provision so that the regulated community has a clear understanding of “other significant environmental factors.”

In Paragraph (e)(4), the Board proposes to eliminate the currently prescribed 60-day timeframe after an application for permit or submission of registration is determined to be substantially inadequate to correct the inadequacy. As amended, the Department would state “a specified period” in writing within which the applicant must act to correct the deficiency. In the Preamble, the Board states that some incompleteness items do not warrant the current full 60-day period,

and the proposed change would provide flexibility and allow for a case-by-case determination, resulting in a more efficient process and avoiding backlogs. Commenters are concerned that the shift in the proposed language opens up the process for abuse. One commenter states that the change which provides “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.” In response to commenters’ concerns, we ask the Board to further explain why the elimination of the current 60-day period is in the public interest. This comment also applies to Section 105.13a(b).

Subsection (h) as proposed incorporates existing language from Subsection (i) regarding who must sign for a permit application for a corporation. However, the existing phrase “other responsible official empowered to sign for the corporation” has not been carried over into this Subsection. Commenters assert that this phrase should be retained since it is common practice for corporations to delegate permit application signature authority to appropriate officials responsible for the permitted activity at the regional or local level where the specified corporate officers are not directly engaged with those activities. We ask the Board to incorporate this language into the final regulation, or explain in the Preamble why it is in the public interest not to permit an empowered responsible official to sign for a corporation.

#### **6. Section 105.13a. Complete applications and registrations. – Clarity; Need for the regulation; Implementation procedures.**

Subsection (a) currently states, “An application or registration for a permit is complete when the necessary information is **provided** . . . and requirements under the act and this chapter have been **satisfied** . . . and **verified** . . .” [Emphasis added.] This sentence lays out three requirements for completeness. However, new language added to the end of Subsection (a) states: “A complete application or registration is one that meets both of the following: (1) Satisfies principal completeness requirements. (2) Contains information that is necessary to demonstrate compliance . . . including the identification of all proposed impacts to aquatic resources.” We ask the Board to amend this provision to clarify how it will be implemented.

The Board proposes to amend Subsection (b) regarding when it will notify an applicant in writing regarding an application or registration. Currently, when the Department, conservation district, or other delegated agency determines that an application or registration is incomplete or “contains insufficient information,” it will notify the applicant in writing. The Board proposes to change “incomplete or contains insufficient information” to “incomplete or substantially inadequate.” As written, this change allows for the review of an application or registration that is inadequate. What standards will differentiate between inadequate and substantially inadequate? How will the Department ensure that applications and registrations are reviewed consistently? We ask the Board to explain the need for this change and to amend the provision to provide certainty and consistency in how it will be implemented.

**7. Section 105.14. Review of applications and registrations. – Need for the regulation.**

The Board proposes in Paragraph (b)(10) to delete the phrase “including identified 1-A candidates” but does not provide an explanation for this change in the Preamble. We ask the Board to explain the need for this change.

**8. Section 105.20a. Compensation for impacts to aquatic resources. – Clarity; Implementation procedures.**

The Board proposes new Paragraph (d)(3), stating: “The level of effect of the proposed project on the aquatic resource functions.” Commenters raise questions as to how the Department will evaluate the “level of effect” of the proposed project on the aquatic resource functions. Commenters note that the new definitions proposed for “aquatic resource impacts,” and direct and secondary impacts within that definition, do not differentiate between the “level of effect” of these impacts. What standards will differentiate levels of effect? How will the Department ensure that levels are evaluated consistently? We ask the Board to clarify this provision and how it will be implemented in the final-form regulation.

**9. Section 105.25. Transfer of permits. – Clarity.**

The Board states in the Preamble that proposed amendments to Section 105.25 would require the permittee and owner to report a change in ownership of a dam, **water obstruction, or encroachment** to the Department in writing within 30 days of the transfer of ownership. [Emphasis added.] However, within Paragraph (a)(3) the actual revision deletes the phrase “water obstruction or encroachment,” leaving the provision applicable only to dams. We ask the Board to clarify this provision in the final-form regulation.

**10. Section 105.35. Charges for use and occupation of submerged lands of this Commonwealth. – Clarity; Implementation procedures.**

New Paragraph (c)(8) creates a fee exemption for “a project or activity constructed and operated for the significant benefit of the environment . . . .” What standards will be used to evaluate and determine whether a project or activity provides a significant benefit? How will the Department ensure that projects or activities are evaluated consistently? We ask the Board to clarify this provision and its implementation in the final-form regulation.

**11. Section 105.43. Time limits. – Clarity.**

New language in Paragraph (c)(2) states, in part, that if work will not be completed before the date established in the permit, the permittee or dam owner shall notify the Department 90 days before the anticipated commencement of work. Might a permittee or dam owner not know 90 days prior to the start of a project that work will not be completed by a date certain? We ask the Board to clarify this provision in the final regulation.

**12. Section 105.82. Permit applications for operation and maintenance of existing dams and reservoirs. – Need for the regulation.**

The existing language of Paragraph (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 Board proposes to amend this to require proof of title or flowage easements only “for dams constructed or modified after July 1, 1979.” The Preamble provides no explanation for the change. We ask the Board to explain the need for this change.

**13. Section 105.134. EAP. – Protection of the public health, safety, and welfare and the effect on this Commonwealth’s natural resources; Need for the regulation.**

The Board proposes to amend language regarding a submitted Emergency Action Plan (EAP) from the current practice of **approving** the EAP to the proposed practice of **acknowledging** the EAP. [Emphasis added.] The Preamble provides no explanation for the change. Will EAPs no longer be evaluated and approved? We ask the Board to explain the need for this change and how the provision in the final regulation protects the public health, safety, welfare, and environment.

Commenters note that the public notice provisions of Subsection (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. Commenters recommend posting notices in ways that disseminate information via the internet, such as on municipal websites, county emergency management websites, and/or a dedicated dam safety information page on the Department website. We ask the Board to amend this provision consistent with commenters’ recommendations, or to explain why such amendments would not be in the public interest.

**14. Section 105.161. Hydraulic capacity. – Clarity.**

The proposed amended Paragraph (a)(3) states: “The structure may not materially alter the natural regimen **and** the geomorphic stability of the stream.” [Emphasis added.] As written, this allows for an interpretation that the Board is prohibiting only instances where the alteration of **both** the natural regimen **and** the geomorphic stability of the stream occur. Is that the intent? Or does the Board intend to prohibit each type of alteration, independent of whether the other occurs? If so, the Board should clarify the Paragraph in a format similar to Paragraph (a)(2).

**15. Section 105.401. Permit applications. – Protection of the public health, safety, and welfare and the effect on this Commonwealth’s natural resources; Clarity; Need for the regulation.**

This Section would require project applicants to identify all public water supply wells within a one-mile radius of any proposed discharges of dredged or fill material into aquatic resources. Senator Katie Muth comments on this provision, urging the Department to incorporate private well identification as a requirement of any activity. Similar comments from others assert that documentation of private drinking water supplies in the vicinity of a proposed project is key to

fully understanding the potential impacts of a project and protecting the public health and safety. Other commenters note that due to infrastructure security concerns, the specific locations of wells and intakes are not public information, and are protected from disclosure under provisions of the Pennsylvania Right-to-Know Law. We ask the Board to explain the need to include or not include private wells in the permit application process, and how this provision in the final regulation protects the public health, safety, welfare, and environment.

Additionally, Subsections (5) and (6) require a “demonstration” regarding the quality and quantity of dredged or fill material. What standards will be used to evaluate and determine whether a demonstration satisfies the Department’s requirement? We ask the Board to clarify this provision to set defined standards.

**16. Section 105.446. Procedure for issuance. – Clarity.**

New Subsection (e) states that “the Department will periodically review issued general permits for adequacy and when necessary or appropriate make revisions, updates or revocation of a general permit.” Similar to the comment on the term “maintenance,” we question how frequently will a “periodic review” occur? What standards will be used to evaluate the adequacy of general permits? Will the public be informed of these reviews, when changes have been made, or when a permit has been revoked? We ask the Board to clarify this provision in the final-form regulation.