

## PENNSYLVANIA CAMPAIGN FOR CLEAN WATER

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U.S. Army Corps of Engineers  
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P.O. Box 1715  
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ATTN: Patricia Strong

Re: Comments on Proposed Pennsylvania State Programmatic General Permit (PASPGP-3)  
(Special Public Notice #05-54)

Dear Ms. Strong:

The undersigned organizations request that the following comments be included in the Corps' administrative record on its proposal to reissue with modifications the Pennsylvania State Programmatic General Permit (PASPGP).

Our organizations are firmly committed to ensuring that the Commonwealth's wetlands and other waters are protected from all unnecessary and avoidable impacts. We recognize that the partnership of state and federal regulatory programs through the PASPGP has the potential to function as the most effective regulatory process for minimal impact activities. Nonetheless, the PASPGP must be conducted in compliance with the Clean Water Act statutory requirements for general permits, and consistently with the §404(b)(1) guidelines.

The Corps is proposing to reissue the PASPGP with modifications as PASPGP-3. Some of the modifications represent improvements to the PASPGP that have the potential to strengthen protection and consistency with Clean Water Act requirements. We applaud the clarification that indirect as well as direct project impacts must be included in the calculation of overall project impacts to waters of the United States. We also support the improved protection for wetlands and other waters at risk of piecemeal impacts associated with development.

On the other hand, the Corps is proposing modifications that threaten to take the program backwards by weakening safeguards for wetlands, streams and other waters. We oppose the proposal to make additional activities non-reporting. We also oppose the proposed expansion in scope of linear project impacts eligible under the program. And finally, we believe that the Corps' proposal unacceptably fails to address weaknesses in the program that must be improved, including impacts from waived activities and non-compliance with §404(b)(1) guidelines for avoidance, minimization and compensatory mitigation of impacts.

Specific Comments

## I. Scope of Activities

### a. Comprehensive project impact assessment

Our organizations strongly support the clarification contained in Section I.A.2. that the determination of eligibility of projects for the PASPGP-3 is to be based on the acreage of **all** impacts, including indirect as well as direct impacts. We appreciate the Corps' recognition that a clarification is necessary to ensure that indirect impacts through flooding, excavation or drainage are included in the analysis of overall project impacts, consistent with Clean Water Act regulatory requirements. The potential alteration of the hydrologic regime of wetlands and other waters by nearby activities is of particular concern, and we appreciate the Corps' recognition that such impacts have not been adequately addressed in the consideration of the scope of impacts of proposed activities and their eligibility for authorization under the PASPGP.

### b. Linear project scope

Our organizations strongly oppose the modification proposed in II.B.3. to expand the scope of linear projects eligible for authorization under the PASPGP, **allowing the one acre limit to apply to each individual crossing** of a waterbody, where multiple crossings are involved. The Corps characterizes this modification as a "clarification" of the allowable scope of linear projects [See Special Public Notice #05-54, p. 6]. In fact, the Corps is proposing a **change**, which would exempt projects involving multiple road crossings and other linear activities from the maximum acreage threshold established in 2001 for the PASPGP program. The Corps claims that this proposed modification "is consistent with the Corps' Nationwide Permit program and guidance on threshold eligibility for linear projects" [SPN #05-54], which is not the case. While it is true that multiple crossings are authorized under the Nationwide Permits, **individual road crossing impacts are subject to a half-acre limit under the Nationwide Permits.**

We are especially concerned that the expansion in allowable scope of activity for linear projects will reduce the incentive to minimize the impacts of projects potentially involving multiple crossings, and that it will allow authorization of road and other linear projects that, potentially, grossly exceed the one-acre threshold of overall impacts under the PASPGP. The Corps has failed to provide any real justification for this substantial modification in the program. The changed threshold appears to be aimed especially at streamlining permitting for Pennsylvania Department of Transportation, an agency that has relentlessly sought special treatment in the permitting process. In fact, the draft Annual Report of Accomplishments of the Pennsylvania Environment and Transportation Steering Committee, obtained as a result of a FOIA request to the Philadelphia District on a PADOT violation, indicates that PADOT has actively sought changes in the PASPGP to ease the permitting requirements they face [see "Corps Commitments Made at Gettysburg Meeting", #3(sic), no page available].

## II. Activities Eligible for PASPGP-3 Authorization

### a. Waiver 2

Our organizations are also especially disappointed in the failure of the Corps to propose a more effective approach to the continuing problem of unregulated activity and inadequately regulated activity associated with the use of Pennsylvania's Chapter 105.12(a)(2) waiver. As provided under the PASPGP-2 and specifically prescribed in the Standard Operating Procedures: Waiver #1, 2 and 14 activities are processed as Category III activities when they are (1) proposed by themselves or (2) are part of a single and complete project involving other waivers and GPs (Category I Activities) being evaluated by the Department. These waivers may be considered as Category II activities if they are part of a single and complete project being evaluated by the Department and published in the PA Bulletin (i.e., an E- or D-permit). If the Waiver #s 1, 2 and 14 are not being evaluated by the Department (as when proposed by themselves), then the applicant is responsible for forwarding the relevant information and obtaining authorization from the Corps." [PASPGP Standard Operating Procedures, February 20, 2002].

We are very concerned that Waiver 2 activities that have the potential for significant impacts to waters of the United States, especially headwater streams, that **are** being forwarded to the Corps may not be receiving appropriate review, and that the impacts are not being avoided, minimized and mitigated to the extent consistent with Clean Water Act requirements. We are even more concerned that activities are being carried out under the recognition that they are waived under Waiver 2, but **are not** being forwarded to the Corps. The Corps is not able to provide any data, when requested, to indicate the extent to which the requirement to report Waiver 2 activities to be processed by the Corps has reduced the problem. Nor can they provide any estimate of the number of activities that are not being reported, but we understand from discussions with consultants and resource agency staff that Waiver 2 activities, especially when carried out by themselves, continue to go unreported.

We have consulted with the U.S. Fish and Wildlife Service on the potential for significant environmental impacts occurring under Waiver 2. USFWS biologist Cindy Tibbott has furnished us with materials prepared in connection with raising concerns with the Corps and the Department about Waiver 2 activities early in the PASPGP-2 process. Our understanding from Ms. Tibbott [email communication dated January 31, 2006] is that DEP issued guidance subsequent to her consultation with them, explaining the Department's authority to recapture such activities and apply permit requirements. She indicated that it appears that the Corps' review of Waiver 2 activities impacting 250 linear feet of more of stream that are reported to them has apparently reined in unregulated Waiver 2 activity to some degree. She acknowledged, however, that it is very likely many Waiver 2 activities continue to go unreported.

We are very concerned that the public is being shut out of the process of the agencies efforts to address the problem with Waiver 2. **The issue is not even mentioned** in the PASPGP-2 Monitoring Report issued with the public notice proposing PASPGP-3. We believe that the Corps and DEP should be open with the public regarding such as voids in regulatory protection and problem solving. Such openness might inspire more confidence among the public and the environmental community than ignoring the subject altogether.

In the meantime, as we argued 5 years ago, in connection with the proposed PASPGP-2, the Corps cannot issue a §404 authorization for activities that are not subject to state review. To do so shields these activities from the review required under the Clean Water Act. Although we

recognize that there has been improvement since the inception of the PASPGP program, we also know that substantial losses of headwater streams and their ecosystem functions have occurred as a result of the failure to properly regulate Waiver 2 activities. We understand that the Corps is relying on DEP to initiate changes to Chapter 105 regulations to limit Waiver 2. Our organizations fully support adoption of improvements to Chapter 105 regulations, including elimination of Waiver 2 and other waivers which result in destruction of the Commonwealth's water resources. We strongly believe, however, that it is incumbent upon the Corps to bring the PASPGP into compliance with the Clean Water Act at this time, by excluding Waiver 2 activities from eligibility under the PASPGP, rather than take on faith that a solution may be forthcoming.

b. Reduced reporting requirements

Our organizations also strongly oppose removal of reporting requirements for GP-3 projects with impacts of less than 250 linear feet [Part III.A. Category I Activities, p. 4]. Abuse of GP-3 permit conditions were especially egregious under PASPGP-1. As a result of extensive, unnecessary damage to stream resources associated with gravel bar removal activities documented by agency officials during the PASPGP-1, it was determined to require reporting for all of this activity under PASPGP-2. It is our understanding that the reporting requirement has substantially reduced the unnecessary damage to streams from gravel bar removal activities, and has encouraged project proponents to limit the extent of their activities. We seriously question the justification for relaxing the reporting requirement and inviting a likely return to the abuse of this permit category. We urge the Corps to retain the reporting requirement for all GP-3 projects.

Our organizations also strongly oppose the planned elimination of the reporting requirement for GP-11 maintenance, testing, repair, rehabilitation and replacement projects impacting less than 250 linear feet of stream. We continue to oppose the authorization of GP-11 activities through the PASPGP, in light of our concerns as to the potential for significant impacts to water resources as a result of deficiencies in the permit conditions. We object, particularly, to the scope of infrastructure replacements eligible under GP-11 and to the failure of DEP to require approval of the erosion and sedimentation plan prior to project authorization. We do not believe the Corps is justified in overlooking the potential for GP-11 projects to result in impacts inconsistent with §404(e) requirements for minimal impacts. And we expect that if smaller GP-11 projects are made non-reporting, it will invite understatement of project impacts to evade review. We urge the Corps to retain the reporting requirement for all GP-11 projects.

c. Prevention of piecemeal destruction

As provided in Part III.C.8., the Corps is proposing to address the potential for destruction or degradation of wetlands and other water resources located within project boundaries, but not directly impacted by the project. We recognize that the piecemeal destruction of resources after the project is underway or completed is a serious concern, and we support the Corps' effort to ensure that remaining, not directly impacted wetlands and other waters are protected in perpetuity by deed restrictions, conservation easements or similar instruments. Nevertheless, as has been communicated to us by township officials very familiar with the problems of enforcing restrictions on individually owned property within subdivisions, following completion of development, a considerable, ongoing enforcement obligation will accompany the

restrictions. We encourage the Corps to consider that fee simple acquisition by the responsible public or private entity holding the restrictions may reduce enforcement difficulties, and should be encouraged as a preferred solution.

#### Additional concerns

##### a. Compliance with Clean Water Act §404(b)(1) guidelines

Our organizations are concerned that there is a much greater lack of compliance with Section 404(b)(1) guidelines than is acknowledged by the Corps. We note the Corps' discussion of compliance with the guidelines in the PASPGP-2 Monitoring Report, where it is essentially argued that the structure of PASPGP and the lack of concerns raised regarding any failure to properly avoid and minimize impacts subject to Category II review, together suggest that the program is in compliance with the guidelines [PASPGP-2 Monitoring Report, "PASPGP-2 and Section 404(b)(1) Compliance," p. 12].

We do not believe that the Corps has adequately addressed this concern with Clean Water Act requirements for avoidance, minimization and mitigation of impacts to waters of the United States. In reviewing permit data for the PASPGP-2 period requested from the Corps, we are struck by the scale of many of the authorized activities. We are especially concerned by the scale of many activities authorized in streams indicated in the data. There appears to be a pattern of authorizing especially large impacts by the North Central Regional Office. Examples are: E14-420 for a fill of 8,447 linear feet of stream; E14-420 for enclosure of 7,588 linear feet of stream; stream restoration of 11,355 linear feet of stream under E08-419. An authorization by the Northwest Regional Office was made for filling 11,808 LF of stream under E25-666. If such impacts were, in fact, authorized under PASPGP-2, in our view, they should also have been subject to an individual review by the Corps under §404(b)(1) guidelines. The data generally raise serious questions as to whether projects are being limited in scale and impact consistent with the guidelines.

Our organizations recommend that the Corps undertake measures to randomly review compliance with the §404(b)(1) guidelines, to more fully consider if avoidance and minimization is occurring properly through the PASPGP process.

##### b. Compensatory Mitigation

Our organizations are concerned that significant net losses of the Commonwealth's wetlands and stream resources and their functions are being lost under the PASPGP program. Three issues are of particular concern. First, we are concerned that the type of project accepted as mitigation may not effectively replace lost functions and acreage of impacted wetlands and streams. We are concerned that DEP is, in some instances, allowing wetland replacement projects to serve the dual purpose of providing stormwater treatment. Directing stormwater runoff to wetland mitigation projects can result in degraded water quality and impaired biological function.

We are also concerned that preservation of non-impacted streams and wetlands on the project site is being accepted as mitigation for impacts, resulting in a net loss of resources. An example of such compensation was highlighted by Ms. Tibbott of USFWS in connection with our inquiry on Waiver 2 activity, indicating that compensation for filling 1,610 LF of five tributaries was in the form of conservation easements on unimpacted stretches of three of the tributaries [email correspondence dated January 31, 2006, containing summary of PASPGP 200300254].

Finally, we continue to be concerned that the Wetland Replacement Fund may not be providing full and timely replacement of wetland functions. We requested the opportunity to review the 2005 report on the Wetland Replacement Program, but we have been informed, first by DEP and then the Corps, that it is not yet available. We recognize that the 2005 report may address some of our concerns. However, based on data provided by the Corps and previous reports, we are concerned that the location of mitigation projects under the fund is not ecologically preferred, but dependent upon voluntary commitments of land. We are also concerned that, whereas the program was intended to provide larger mitigation projects, which the agencies considered to have greater potential to achieve and sustain the full panoply of wetland functions, the actual size of several WRP sites is below one acre.

#### c. Jurisdictional determinations

Our organizations are concerned that there may be instances in which project impacts are not based on an accurate wetland determination. The PASPGP Monitoring Report demonstrates that jurisdictional determinations are conducted for only a fraction of the PASPGP-authorized projects. We are concerned that some projects may be deemed eligible for the non-reporting Category I, that in fact exceed the threshold for that category. We are also concerned that there may be projects reviewed as Category III applications that actually impact wetlands and streams beyond the scope of the PASPGP. The Monitoring Report indicates that the number of Category III authorizations, in fact, exceeded the number of jurisdictional determinations during the monitoring period. The Corps should investigate this issue.

#### d. Monitoring Report

Finally, our organizations believe that the monitoring and reporting function should be made more accessible to the public. We are concerned that the agencies operate in a vacuum when consider and address issues that arise. The public is not receiving full information on the conduct of the program and concerns, such as the extensive impacts from Waiver 2 activities raised by the USFWS. We are expected to take at face value that the Monitoring Report is comprehensive, when we know otherwise. We encourage the Corps, working in cooperation with the DEP, to more openly address the issues that arise in the program.

In summary, we support the proposed improvements to the PASPGP program which are intended to strengthen protection of Pennsylvania's wetland and stream resources, but we strongly oppose the measures that would reduce protection and reverse some of the progress made in the last 5 years in bringing the program closer to consistency with Clean Water Act

statutory and regulatory requirements. We urge the Corps to give full consideration to our recommendations.

Sincerely yours,

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