

PENNSYLVANIA CAMPAIGN FOR CLEAN WATER

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April 26, 2007

Deputy Secretary Cathy Myers
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
Harrisburg PA 17105

Dear Secretary Myers:

We are pleased that the Department of Environmental Protection (DEP) is presently reviewing and revising the Chapter 105 Dam Safety and Waterway Management Regulations. On February 5, 2007, we attended a meeting with Cedric Karper, Ken Murin and other DEP staff to discuss the pending revisions and offer our suggestions for improvements to Chapter 105. We thank you and your staff for the opportunity to meet and proactively discuss this important regulatory package.

Chapter 105 is a set of regulations critical to ensuring protection of the Commonwealth's most important water resources, as it regulates direct impacts and encroachments upon rivers, streams, wetlands and other waters of the Commonwealth. In light of recent Supreme Court interpretations of the federal government's jurisdiction over such actions, Chapter 105 has taken on increasing importance in the last year.

There are many elements to existing Chapter 105 regulations that are strong and work well to protect water resources, while adequately balancing social and economic interests. These include:

- **Strong and comprehensive definitions of “wetlands” and “watercourse.”** Section 105.1 appropriately defines “wetlands” based on their natural functions instead of presence of standing water. The definition of “watercourse” is also protective and strong in that it extends protections to artificial conveyances and streams with intermittent flow. Encroachments and water obstructions in such waterways have adverse impacts on instream and downstream water quality and functions of the entire watershed, and we agree that such impacts should be regulated.
- **Strong protections for Exceptional Value (EV) wetlands.** The definition of EV wetlands in Section 105.17 provides important increased protection for EV wetlands, and should be maintained. The types of wetlands defined and protected as EV wetlands all serve critical biological, water quality, and anthropogenic functions. The additional permitting requirements for EV wetlands provided in Section 105.18a(a) provide strong protections that discourage unjustified destruction of these valuable natural resources.
- **Strong definition of “practicable alternative” for projects that impact wetlands.** Sections 105.18a(a)(3) and 105.18a(b)(3) define “practicable alternative” to include

properties not presently owned by the applicant. This language tracks federal regulations and is important to ensure that all offsite alternatives are considered in an effort to meet the regulatory requirement of avoidance.

- **Presumption of practicable alternatives for projects that impact wetlands.** Section 105.18a(b)(3) also establishes a presumption that a practicable alternative exists that would have less impact on wetlands, and places the burden upon the applicant to rebut that presumption. This provision encourages avoidance and minimization and properly places the burden on applicants who propose to destroy wetlands. We do, however, recommend that these strong requirements be extended to stream encroachments (*see* Comment 3.d).

We recommend that DEP keep these important elements in its revisions to Chapter 105 to ensure continued protection of our water resources.

As we discussed at the February 5 meeting with your staff, we do have a number of suggestions for changes to Chapter 105. These suggestions are detailed in Comments 1-8 below. Where appropriate throughout the comments, we address some of the questions raised by your staff during the February 5 meeting.

1. Conversion of Waivers and Establishment of Tiered Permitting Approach

In general, we support the conversion of unilateral waivers contained in Section 105.12 to permits-by-rule. Section 105.12 currently establishes waivers for sixteen separate activities. We believe that all of these activities should be regulated in some manner, as potential environmental impacts exist if the activities are not properly performed. A permit-by-rule provides more safeguards for the resource than the existing waiver provision by allowing conditions to be specified in the regulations. It also eliminates the perception of being completely exempt from regulation that exists when activities are eligible for permit waiver.

We recommend, however, that clear and specific special conditions be set forth in the regulations for each type of established permit-by-rule that are sufficiently protective of the impacted resources and enforceable. Where current waivers under Section 105.12 reference activities for which other permits issued by DEP or other agencies are required, the permits-by-rule (or general permits) that will replace these waivers should include special conditions that require applicants to obtain these other applicable permits.

So long as types of regulated activities are placed in the correct tiers based on potential environmental impact, we are also supportive of DEP's proposed establishment of permitting tiers consisting of Tier I (Permit-By-Rule), Tier II (General Permit Registration Only)¹, and Tier III (General Permit, DEP Review and Approval Required). We assume that, under this structure, "Tier IV" will consist of activities for which Individual Permits are required.

¹ For some activities that may qualify for a Tier II General Permit, additional review by DEP or conservation district staff may be necessary, particularly to determine whether the applicant meets certain permit conditions or Tier II thresholds.

However, we believe that only some of the most minimal activities currently falling under the waiver provision should be converted to permit-by-rule. Other activities presently eligible for Section 105.12 waivers are more appropriately regulated under a Tier II or Tier III General Permit. Still others should be regulated by requiring “Tier IV” Individual Permits. These include current Waiver 2 (water obstructions in watersheds with drainage areas of 100 acres or less). Our concerns with Waiver 2 are addressed in detail in Comment 2.

Enclosed with this letter is a table setting forth our organizations’ recommendations for categorizing the existing waivers and general permits into Tiers I-IV as suggested by DEP.

Finally, we believe that requiring some form of notification to DEP (either electronically or by mail) by those who wish to use a permit-by-rule or general permit is an important element of the regulatory program. With the advent of electronic forms, DEP certainly could design an electronic registration form which would be easy to use and administer, would meet the requirements of the applicable general permit or permit-by-rule, and would reduce DEP staff workload. Unless DEP can identify those who are utilizing permits-by-rule and general permits, it will be impossible for DEP and the general public to know how many permitted activities are occurring, to assess their potential impacts and the effectiveness of the program, to track compliance with the requirements of the general permit, and to allow for inspections and enforcement as appropriate.²

2. Waiver 2 (Water Obstructions in Streams or Floodways with Drainage Area 100 Acres or Less)

Section 105.12(a)(2) currently grants a waiver from permitting requirements for “[a] water obstruction in a stream or floodway with a drainage area of 100 acres or less” (Waiver 2). Waiver 2 has resulted in entire small watersheds, many of them headwater streams, being filled without regulatory oversight. The environmental consequences are serious. We do not believe such activities should be eligible for waivers, permits-by-rule or general permits, but rather, individual permits should be required. As discussed below, current science supports greater protection for headwater streams.

Current regulations impose a double standard in protection of streams from encroachments. Larger streams are subject to the fuller extent of permit requirements, whereas waivers for a range of activities are available in smaller, headwater streams. The double standard is at odds with the growing body of scientific evidence of the ecological significance of headwater streams, and the greater, not lesser, sensitivity of their ecosystem services to manmade impacts.

² At a minimum, DEP notice forms should require the following information:

- Name, address, phone, email of the property owner
- Name, address, phone, email of the person(s) and/or company undertaking the project
- Name, address, phone, email of the person(s) and/or company implementing the work
- Precise address and description of the project location including municipality, county and watershed
- Name of any waterway being affected directly or indirectly by the project
- Map identifying project location with waterway(s) to be impacted clearly identified
- Precise description of the work to be done and how the project complies with the permit-by-rule or general permit limitations and requirements.

Summarizing the ecosystem services of small streams, a team of nationally recognized stream scientists noted in a 2003 white paper, *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams*:

The special physical and biological characteristics of intact small streams and wetlands provide natural flood control, recharge groundwater, trap sediments and pollution from fertilizers, recycle nutrients, create and maintain biological diversity, and sustain the biological productivity of downstream rivers, lakes, and estuaries. These ecosystem services are provided by seasonal as well as perennial streams and wetlands. Even when such systems have no visible overland connections to the stream network, small streams and wetlands are usually linked to the larger network through groundwater.

J.L. Meyer, Louis A. Kaplan, Denis Newbold, David L. Strayer, Christopher J. Woltemade, Joy B. Zedler, Richard Beilfuss, Quentin Carpenter, Ray Semlitsch, Mary C. Watzin, Paul A. Zedler (Revised March 2007).

The February 2007 issue of the Journal of the American Water Resources Association (AWRA) features a collection of articles based on a 2005 meeting of the AWRA convened to examine the state of scientific understanding of the ecosystem services of headwater, intermittent and ephemeral streams. Addressing the role of headwater streams in downstream water quality, authors Richard B. Alexander, Elizabeth W. Boyer, Richard A. Smith, Gregory E. Schwartz and Richard B. Moore provide modeling results indicating that headwater streams contribute approximately 65% of the nitrogen mass and 70% of the water volume in second-order streams, and the contributions decline only marginally in higher-order streams. *The Role of Headwater Streams in Downstream Water Quality*, Journal of the American Water Resources Association, 43 (1), p. 53-54.

Pennsylvania's small streams play critical roles in providing aquatic habitat. According to the U.S. Fish and Wildlife Service, "in many areas of Pennsylvania, for example the southwest region, streams less than 100 acres often support twenty or more taxa of benthic invertebrates, salamanders, and small fish such as creek chubs." Memorandum from Cindy Tibbott, U.S. Fish and Wildlife Service, Pennsylvania Field Office, to Pennsylvania Department of Environmental Protection (undated) provided by author.

In light of the importance of small headwater streams, the destruction of entire watersheds 100 acres or less should no longer be facilitated by waiving such activity from permitting requirements. Even under DEP's proposed conversion of waivers to a tiered permitting approach, permits-by-rule and general permits do not offer sufficient protection for such important and sensitive aquatic resources. Destruction of even the smallest watersheds can have deleterious downstream effects. Accordingly, we recommend that DEP protect all watersheds regardless of size by eliminating entirely the "drainage area" threshold for permitting purposes. Instead, DEP should require individual permits for encroachments and water obstructions regardless of watershed size, unless the activity qualifies for a permit-by-rule or general permit in some other respect.

We do recognize that certain minimal impacts on streams may appropriately be regulated pursuant to a Tier III General Permit. We propose that DEP develop a general permit for activities that impact 250 linear feet or less of streams, but require an individual permit for activities that impact greater than 250 linear feet of streams. This approach would be consistent with federal regulations for eligibility under the Pennsylvania State Programmatic General Permit (PASPGP).

However, consistent with scientific consensus regarding the functions and values of headwater streams, we recommend that such streams be granted even greater protection than larger streams. Accordingly, we recommend that the impact threshold for general permits in first-order streams be set at 150 linear feet instead of 250 linear feet.

3. Alternatives Analysis

a. Revise language in Section 105.18a(b)(2) to ensure avoid-minimize-mitigate sequence is followed when evaluating alternatives

Section 105.18a(b) sets forth the requirements for permitting activities in wetlands not defined as Exceptional Value wetlands. Section 105.18a(b)(2) specifies that a permit for an activity in a wetland shall not be granted unless DEP issues a written finding that “[a]dverse impacts on the wetland will be avoided *or* reduced to the maximum extent possible.” 25 Pa. Code § 105.18a(b)(2) (emphasis added).

We recommend that the “or” in this sentence be changed to “and.” Because of the use of the “or” instead of “and,” the language in the present regulations muddies the “avoid-minimize-mitigate” sequence that is traditionally followed in wetlands regulatory schemes. It allows a permittee to obtain permits to disturb or destroy wetlands as long as they have attempted to *either* avoid the impacts *or* reduce the impacts. This loophole allows permittees to give short shrift or ignore altogether alternative sites or project designs that would completely avoid impacts, which is what the wetlands regulations should be designed to encourage. The present standard fails to maximize the avoidance of adverse impacts to waters of the Commonwealth, instead allowing a reduction in impacts to qualify a project for authorization, even where a no-impact alternative may be available.

Changing the “or” to “and” in Section 105.18a(b)(2) is particularly important because Pennsylvania has been delegated Clean Water Act Section 404 permitting authority under the PASPGP, under which Pennsylvania issues joint Section 404/Chapter 105 permits for activities that supposedly meet Clean Water Act requirements. Federal regulations governing Section 404 permits clearly require consideration of alternatives that avoid impacts *and* those that minimize impacts. *See* 40 C.F.R. §§ 230.10(a), (d). Official written guidance on implementing Section 404 outlines the avoid-minimize-mitigate sequencing process for approval of any permits to dredge or fill waters, whereby applicants must (1) seek alternative locations for projects that do not involve a discharge into “waters of the United States,” bearing the burden of proof that avoidance of impacts to waters is not practicable; (2) demonstrate that all practicable efforts to minimize unavoidable impacts to waters have been taken in project design and construction plan; and (3) provide compensation for unavoidable impacts. *See* 1990 Memorandum of Agreement

Between the Department of Army and the Environmental Protection Agency: the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines.

The Chapter 105 standard must be raised to meet or exceed the federal standard, to ensure that all measures are taken to avoid the loss or degradation of the Commonwealth's waters. In addition to changing "or" to "and" in Section 105.18a(b)(2), in order to provide clear direction to the regulated community we recommend that DEP import the relevant 404(b)(1) guidelines language directly into Pennsylvania's regulations, establishing comparable sequencing requirements. This will further ensure that compensatory mitigation is *only* considered after all steps have been taken, first, to avoid, and then to minimize adverse impacts to waters of the Commonwealth.

b. Timing of alternatives analyses

Current Chapter 105 regulations do not specify when an applicant is to conduct its alternatives analysis. Alternatives analyses are essential to meeting the preferred goals of avoiding and minimizing impacts to streams and wetlands. In order for the alternatives analysis to be meaningful, the applicant should begin analyzing alternative project sites and onsite alternative designs at the time it is choosing the site location for its proposed project, and should continue to give full consideration to any alternatives that become available during the permit review process.

An applicant should not be able to argue that an alternative site is not feasible if that site was available at the time the applicant selected its site location but is no longer available at the time a permit application is filed and reviewed. *See Bersani v. Robichaud*, 850 F.2d 36, 44-45 (1st Cir. 1988) (properties available at the time applicant purchased property should be considered among the viable alternatives to the project site). Requiring applicants to proactively seek alternative sites as part of their due diligence at the time they are initially seeking a site location will maximize opportunities for impact avoidance and minimization.

Likewise, if an alternative site that avoids and minimizes impacts becomes available during the permit review process, DEP should require the applicant to consider this site in order to meet avoidance and minimization goals. Turning a blind eye on an alternative simply because it becomes available later in the process does not adequately protect the resource.

c. Definition of "project purpose"

We are concerned that the current Chapter 105 regulations contain no definition of "project purpose." This allows applicants to attempt to circumvent Chapter 105's alternatives analysis by defining the basic project purpose so specifically that reasonable alternative uses are excluded. For example, a project purpose of a mixed-use commercial development might be defined to include a minimum size (e.g., 100 acres) that results in the exclusion of available practicable alternative sites and lower impact onsite alternative designs because they are less than 100 acres in size. Allowing applicants to disregard available alternatives by artificially maximizing the size of the project and its environmental impacts is contrary to the letter and intent of Chapter 105, as well as current DEP initiatives toward low impact design in its NPDES Stormwater Permitting Program. We are equally concerned that current guidance to staff not to question the

purpose, size and scope of the project is in conflict with the express language of the regulation, 25 Pa. Code § 105.18a(b)(3).

We recommend that DEP add a definition of “project purpose” sufficient to prevent this abuse of the alternatives analysis:

“Project purpose” is defined as the basic or general description of the type of project for which permits are sought under this chapter, such as commercial development, residential development or marina. A description of project purpose required in a permit application shall not include a minimum size or any other restriction on mitigation measures.

d. Alternatives analysis for activities that impact watercourses

While an alternatives analysis is required for proposed activities in streams and other watercourses pursuant to Section 105.13(d)(1)(viii), the detailed analysis requirements (including the presumption that practicable alternatives exist) set forth in Section 105.18a only apply to the permitting of activities in wetlands, not streams. Since streams and other watercourses also provide important functions and values, we recommend that Chapter 105 be revised to include the Section 105.18a alternatives analysis provisions for proposed activities in watercourses.

We further recommend that the suggested revisions discussed in subsections a, b and c above be incorporated into any new alternatives analysis provisions applicable to watercourses to provide consistency and sufficient protection for impacted waters. In particular, the phrase “avoid or minimize” in Section 105.13(d)(1)(viii) should be changed to “avoid and minimize” consistent with our recommendation in subsection a.

4. Jurisdictional Determinations

Accurate information about proposed impacts to wetlands should accompany all permit applications. Existing Section 105.13 requirements limit the types of projects that must provide a full description and delineation of the wetlands on site to larger projects. Section 105.13(b)(1)(i) provides an exception for small projects from the requirement for a demarcation of floodplains and regulated waters of the Commonwealth. In addition, a full impacts analysis including an assessment of the wetlands functions and values and survey of wetland and property boundaries is only required for proposed impacts to EV wetlands and impacts of one or more acres of wetlands. 25 Pa. Code § 105.13(d)(2), (3).

Unless there is a full and verified delineation of the waters of the Commonwealth on a project site, it is not possible to assess the full extent of direct and indirect impacts to those waters and to determine if the impacts are justified. Accurate jurisdictional determinations (JDs) are also the basis for properly determining if projects meet the thresholds of, and hence are eligible for, Chapter 105 general permits. Without a verified delineation, it is also not possible to determine if a project qualifies for authorization under the PASPGP, or must be reviewed directly by the Corps.

In addition, following the Supreme Court’s decision in *Rapanos*, verified Chapter 105 delineations take on greater importance because it is no longer appropriate for DEP to rely exclusively upon JDs conducted by the Corps utilizing post-*Rapanos* “waters of the United States” guidance.

The New England states of Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire and Maine are all subject to Corps-issued State Programmatic General Permits, similar to the PASPGP. However, all of these states conduct verifications of wetland delineations as part of their program. In the case of Vermont, for example, the state program provides delineations for small projects, but verifies all delineations of wetlands subject to state permit requirements. The programs in Connecticut and Massachusetts conduct verifications for smaller projects permitted by local conservation commissions, while projects involving impacts greater than 5,000 square feet are referred to the New England District of the Corps for JDs.

Considering the importance of accurate and verified delineations, while remaining sensitive to the realities of limited staff and resources, we recommend revising Chapter 105 to require the following:

- *DEP shall conduct JDs to verify delineations of regulated waters for all projects impacting wetlands greater than 5,000 square feet or watercourses greater than 150 linear feet.*
- *DEP shall develop and implement a program for conducting random JDs to verify delineations of regulated waters for projects impacting wetlands 5,000 square feet or less or watercourses 150 linear feet or less.*
- *Any permittee or consultant that has been determined by DEP to underreport jurisdictional waters in delineations on three or more occasions shall be subject to DEP Chapter 105 JDs for any and all future permit application submittals irrespective of the size of the proposed impact.*

5. Definition of “Restoration”

With respect to waters that are impacted by regulated activities under Chapter 105, it is critical that the regulations require the functions and values of such waters be replaced. In order to achieve this objective, we recommend adding a definition of restoration to ensure that, where restoration occurs, it results in full and complete reestablishment of functions and values of wetlands, streams and other waters of the Commonwealth. For volunteer restoration projects, such a definition will ensure that only those projects achieving full and complete restoration of functions and values are eligible for general permits. In addition, defining restoration will ensure that wetlands or stream restoration conducted as a requirement of compensatory mitigation or corrective action for unpermitted activities results in reestablishment of full functions and values of such waters.

6. Compensatory Mitigation

a. Compensatory mitigation for wetlands

As discussed in Comment 3, Chapter 105 establishes a permitting sequence which requires applicants to, first avoid, then minimize, then finally mitigate impacts to wetlands, streams and other regulated waters. Strengthening the regulations to reinforce the order of that sequence is recommended in Comment 3.

For those projects where avoidance and minimization cannot eliminate impacts, compensatory mitigation is a requirement. As presently written, the Chapter 105 compensatory mitigation criteria reflect the false premise that wetlands are readily replaced, in both function and area. The Section 105.20a wetland replacement criteria require a minimum area replacement ratio of 1:1 and replacement of “functions and values that are physically and biologically the same as those lost.” While language requiring replacement of functions and values is important and should remain in revisions to Chapter 105, the current criteria, including the 1:1 replacement ratio, are not sufficient to ensure adequate compensation for destroyed wetlands. The following additional criteria should be incorporated into the regulations.

First, in light of the well-documented relative success of restoration projects in achieving wetland functions when compared to wetland creation projects, a preference for restoration over creation should be specified. Restoration of wetlands in areas where they have been lost is scientifically preferable because soils, hydrology and other site conditions often exist to ensure long term success of the mitigation project and full establishment of wetlands functions and values. This preference is consistent with findings of the National Academy of Sciences and other studies. National Research Council, *Compensating for Wetlands Losses Under the Clean Water Act*. 2001.

Second, replacement should be required to be of the same type as the destroyed wetland, unless a rigorously developed watershed plan demonstrates the desirability of replacement with an alternative type.

Third, the current 1:1 ratio for replacing impacted wetlands is not sufficient. Given the relatively high failure rate for manmade wetlands, many of the wetlands that are constructed as replacements will never function adequately, nor will they replace the functions lost from the destroyed wetlands. Pennsylvania has already lost over half of its original wetlands. Not only should DEP ensure that no additional naturally existing wetlands are unavoidably lost, but that a net gain, not merely “no net loss,” in wetlands acreage is achieved through compensatory mitigation as well as other wetlands restoration initiatives. To that end, the ratio of replacement to lost wetland acreage should be a minimum of 2:1, and higher for forested and other wetlands of special concern.

We do not support the concept of allowing protection of other wetlands on a site through easements or deed restrictions to count as compensatory mitigation. The PASPGP requires that wetlands on a site that are not directly impacted be protected by easements or deed restrictions. We encourage DEP to incorporate such a requirement as conditions of permits issued under Chapter 105. Preserving the remaining wetlands permanently should not qualify as mitigation necessary to offset direct impacts, particularly when applicants have a regulatory duty to avoid and minimize impacts.

Similarly, we do not support allowing projects to enhance remaining wetlands to count as compensation. Enhancement is not replacement or restoration. While enhancement of remaining wetlands could and should be a condition of the permit for impacting a wetland, enhancement should not be considered compensatory mitigation.

b. Compensatory mitigation for streams

We support the concept of compensatory mitigation for stream encroachments. However, we have several concerns about how such a requirement would be implemented.

First and most critical, mitigation activities cannot be allowed to justify greater stream encroachments. As we noted in Comment 3 above, willingness to implement mitigation activities should not allow encroachments and impacts that are avoidable. Avoiding impacts should be the first priority in reviewing any proposed projects.

Second, stream enhancement projects that do not achieve complete restoration should not be considered compensatory mitigation. Stream compensatory mitigation projects must successfully and completely replace the lost functions or habitat of impacted streams.

7. Riparian Buffers

We understand that DEP is proposing revisions to Chapter 102 that would limit disturbance in riparian buffer areas on all streams. In the interest of consistency and because of the well-documented scientific importance of riparian buffers, we encourage DEP to incorporate a similar requirement into the Chapter 105 regulations. We recommend that buffers be required on all undisturbed waters (both streams and wetlands) on a permitted site, as well as on compensatory mitigation sites associated with the project, as a condition of any wetlands or stream encroachment permit. For redevelopment sites, where such buffers are not forested or otherwise vegetated, we recommend that buffer restoration be included as a permit condition.

8. After-The-Fact Permits

The regulations should do more to discourage destruction of wetlands and other waters without a permit. Currently, the regulations provide for wetland replacement at a minimum area ratio of 2:1 where mitigation cannot be achieved. *See* 25 Pa. Code § 105.20a(a)(1) and (2). Mitigation is defined in the regulations as an action undertaken to accomplish any of the following: avoidance and minimization of impact; rectification of impact; reduction and elimination of impact; or compensation for impact if none of these other three can be accomplished. *See* 25 Pa. Code §105.1.

Based on the frequency with which DEP issues after-the-fact permits, it is clear that these provisions do not create enough of a disincentive for developers to impact wetlands without a permit. The regulations should do more to discourage disregard for regulatory compliance among developers, who currently appear to regard these requirements merely as the cost of doing

business, resulting in the avoidable loss of aquatic resources. Simply stated, the regulations need more teeth.

As discussed above, wetlands restoration has been proven more successful than wetlands creation. On that basis, the regulations should first require developers to rectify their impacts by repairing, rehabilitating or restoring the impacted environment, unless there is a determination that doing so would not be environmentally preferable. Second, the regulations should require additional compensation at a minimum area ratio of 2:1. Where rectification would not be the environmentally preferred approach, the regulations should require that the impacted wetland be replaced at a minimum area ratio of 3:1. Finally, all after-the-fact permits should be subject to full individual permit review, with public notice and comment.

Thank you for the opportunity to submit these comments. If you have any questions concerning this letter, please contact Robin Mann of Sierra Club, Chair of the Pennsylvania Campaign for Clean Water Wetlands Workgroup, at (610) 527-4598, robinmann@earthlink.net. We would be happy to meet again with you and your staff to discuss your draft revisions when they are ready for review.

Sincerely,

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Youghiogheny Riverkeeper

Pennsylvania Campaign for Clean Water
Proposal Regarding Activities by Tier

Tier I: Permit-By-Rule (electronic or written notice to DEP only)	
Activity	Current Level of Regulation
Aerial crossing of non-navigable stream or wetland by electric, telephone or communications lines	Waiver 3 (§ 105.12(a)(3)) Notice not required
Maintenance of field drainage systems that were constructed and continue to be used for crop production	Waiver 7 (§ 105.12(a)(7)) Notice not required
Plowing, cultivating, seeding or harvesting for crop production	Waiver 8 (§ 105.12(a)(8)) Notice not required, except those activities in streams
A navigational aid or marker, buoy, float, ramp or other device or structure for which a permit has been issued by the Fish Commission	Waiver 10 (§ 105.12(a)(10)) Notice not required
The construction, operation or removal of staff gages, water recording devices, water quality testing devices, including, but not limited to, sensors, intake tubes, weirs and small buildings which contain required instruments and similar scientific structures	Waiver 12 (§ 105.12(a)(12)) Notice not required
A bridge or culvert purchased from an operating railroad company subsequent to the abandonment of the railroad line, track, spur or branch pursuant to approval of the Interstate Commerce Commission. <i>Note: we recommend that the permit-by-rule specify as a special condition that "major maintenance or reconstruction, or stream dredging may not be undertaken until the new owner obtains a Chapter 105 permit"</i>	Waiver 13 (§ 105.12(a)(13))
The maintenance of an artificial pond or reservoir to its original storage capacity where: (i) The contributory drainage area is less than or equal to 100 acres; (ii) the greatest depth of water at maximum storage elevation is less than or equal to 15 feet; (iii) the impounding capacity at maximum storage elevation is less than or equal to 50 acre feet	Waiver 14 (§ 105.12(a)(14)) Notice may be required depending on scale of maintenance project
Tier II: General Permit (registration only, no DEP review, possible conservation district review)	
Activity	Current Level of Regulation
Construction and maintenance of ford crossings for individual private personal use	Waiver 9 (§ 105.12(a)(9))
A water obstruction or encroachment located in, along, across or projecting into a stormwater management facility or an erosion and sedimentation pollution control facility which meets the requirements in Chapter 102 (relating to erosion and sediment control), if the facility was constructed and continues to be maintained for the designated purpose	Waiver 6 (§ 105.12(a)(6))
A water obstruction or encroachment located in, along, across or projecting into a wetland or impoundment, constructed and maintained for the purpose of treating acid mine drainage, sewage or other waste, if the wetland or impoundment is a treatment facility constructed under a valid permit issued by DEP	Waiver 5 (§ 105.12(a)(5))

Small docks and boat launch ramps	General Permit (GP-2) Registration required
Intake and outfall structures	General Permit (GP-4) Registration required
Tier III: General Permit (registration and DEP review required)	
Activity	Current Level of Regulation
A dam not exceeding 3 feet in height in a stream not exceeding 50 feet in width, except wild trout streams designated by the Fish Commission	Waiver 1 (§ 105.12(a)(1))
The removal of abandoned dams, water obstructions and encroachments <i>Note: we recommend current requirements of Waiver 11 be incorporated into the Tier III General Permit as permit conditions</i>	Waiver 11 (§ 105.12(a)(11))
Construction and maintenance of an encroachment or water obstruction on an abandoned mining site, where DEP has issued a notice of intent to forfeit the bond for a mining activity permitted after July 1982	Waiver 15 (§ 105.12(a)(15))
Restoration activities undertaken and conducted pursuant to a restoration plan which has been approved, in writing, by DEP <i>Note: restoration activities should meet the Chapter 105 definition of “restoration” as we recommend in Comment 5 of our letter</i>	Waiver 16 (§ 105.12(a)(16))
Fish habitat enhancement structures	General Permit (GP-1) Registration and PFBC approval required
Bank rehabilitation and protection activities not exceeding 500 linear feet <i>Note: we recommend that the Tier III General Permit require the use of natural bank rehabilitation techniques unless demonstrated to be impracticable</i>	General Permit (GP-3) Registration and PFBC notification required
Gravel bar removal not exceeding 250 linear feet <i>Note: we recommend the lower General Permit threshold for gravel bar removal activities to discourage the practice of gravel mining from stream banks</i>	General Permit (GP-3) Registration and PFBC notification required
Utility line stream crossing <i>Note: we recommend that temporary and permanent access roads and maintenance structures be excluded from eligibility. In addition, we recommend the Tier III General Permit require vertical crossings, unless demonstrated to be impracticable</i>	General Permit (GP-5) Registration and PFBC notification required
Agricultural crossings and ramps	General Permit (GP-6) Registration and PFBC notification required
Minor road crossings	General Permit (GP-7) Registration and PFBC notification required
Temporary road crossings <i>Note: we recommend that a Tier IV Individual Permit be required where impacts resulting from the activity are of a permanent nature</i>	General Permit (GP-8) Registration and PFBC notification required
Agricultural activities (grassed or lined waterways, terraces, diversions, waste	General Permit (GP-9)

storage facilities, spring development and minor drainage)	Registration and PFBC notification required
Abandoned mine reclamation	General Permit (GP-10) Registration and PFBC notification required
Maintenance, testing, repair or rehabilitation of water obstructions and encroachments <i>Note: we recommend that Tier IV Individual Permits be required for replacement or reconstruction of water obstructions and encroachments</i>	General Permit (GP-11) Registration and PFBC notification required
Private residential construction in wetlands less than 0.5 acre	General Permit (GP-15) Registration required
Activities not qualifying as bank rehabilitation or removal that impact 250 linear feet or less of second order streams or larger <i>Note: we recommend replacement of Waiver 2 with a general permit threshold based on size of the impact, not size of the watershed</i>	Individual Permit unless activity meets some other waiver or general permit category
Activities not qualifying as bank rehabilitation or removal that impact 150 linear feet or less of first order streams <i>Note: we recommend a lower threshold for first order streams because of the important functions and values they provide</i>	Likely qualifies for Waiver 2 (§ 105.12(a)(2))
Tier IV: Individual Permit	
Activity	Current Level of Regulation
Activities not qualifying as bank rehabilitation or removal that impact more than 250 linear feet of second order streams or larger	Individual Permit unless activity meets some other waiver or general permit category
Activities not qualifying as bank rehabilitation or removal that impact more than 150 linear feet of first order streams	Likely qualifies for Waiver 2 (§ 105.12(a)(2))
Replacement or reconstruction of water obstructions and encroachments	General Permit (GP-11) Registration and PFBC notification required
A dam subject to the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2 (relating to water, sediment or slurry impoundments and impounding structures; identification; and water, sediment, or slurry impoundments or impounding structures; minimum plan requirements; changes or modifications; certification), if the Department determines on the basis of preliminary data submitted by the applicant that the dam is of Size Classification C and Hazard Potential Classification 3 as defined in §105.91 (relating to classification of dams and reservoirs) and is not located in a watercourse or body of water designated as a wild and scenic river under the Wild and Scenic Rivers Act of 1968 or the Pennsylvania Scenic Rivers Act	Waiver 4 (§ 105.12(a)(4))
All other regulated activities that do not qualify for Tier I Permit-By-Rule or Tier II or III General Permit	Individual Permit