

## COMMENT / RESPONSE DOCUMENT

### Chapter 105 Dam Safety and Waterway Management Fee Package

The proposed Chapter 105 Dam Safety and Waterway Management Fee Package was published in the *Pennsylvania Bulletin* at 42 Pa.B. 553 on January 28, 2012. This publication date marked the beginning of a 30 day public comment period from which the Environmental Quality Board received the following comments from 30 individual commentators, including the Independent Regulatory Review Commission (IRRC).

### COMMENTATORS

1. Ms. Orianna Roth Richards, Resource Conservationist | Monroe County Conservation District
2. Mr. Allan Percha, Environmental Manager | Hanson Aggregates North America
3. Mr. Nicholas DeBenedictis, Chairman / President | Aqua Pennsylvania, Inc.
4. Mr. Karl Brown, Executive Secretary | State Conservation Commission\*  
*\* The State Conservation Commission (SCC) requested comments from the conservation districts via two (2) Advisory Committees. The comments submitted are on behalf of approximately twenty-five county conservation districts and compiled by the SCC.*
5. Ms. Emily Krafjack
6. Mr. Peter Vlahos, President | PA Aggregates and Concrete Association
7. Ms. Molly Burns, Executive Assistant | PA Association of Conservation Districts
8. Ms. Barbara Jarmoska
9. Mr. David Plank
10. Mr. Jon Bogle
11. Mr. Jerry Silberman
12. Mr. and Mrs. Sheila and Norman Lunger
13. Ms. Janie Richardson
14. Ms. Margaret E. Cronin
15. Mr. Dan Greig, BCCD District Executive | Berks County Conservation District
16. Ms. Carol J. Kafer, President | Loyalsock Creek Watershed Association
17. Board of Directors | The Responsible Drilling Alliance
18. Ms. Kathryn Klaber, President | Marcellus Shale Coalition
19. Ms. Karen Feridun, Founder | Berks Gas Truth
20. Mr. and Mrs. Barbara and Charlie Gerlach | Berry Fields Farm
21. Ms. Susan Beecher, Executive Director | Pike County Conservation District
22. Mr. and Mrs. Richard and Allison Rupert
23. Ms. Melian McKee
24. Mr. Ted Stroter
25. Mr. Mark Szybist, Staff Attorney | PennFuture
26. Ms. Karen Frock
27. Mr. David Lewis, Chair | National Association of Water Companies, Pennsylvania Chapter
28. Ms. Cynthia Bower

29. Mr. Paul Zielinski, Senior Director - Water Quality and Environmental Compliance | Pennsylvania American Water Company  
30. Mr. David Sumner, Executive Director | IRRRC

## COMMENTS / RESPONSES

### GENERAL

#### Support

1. Comment - I support the EQB proposal to update 25 PA Code, Chapter 105 by increasing existing fees and including additional fees for activities performed by the Department of Environmental Protection with regards to the Dam Safety and Encroachments Act. ... This area of our government needs additional funds which could be generated by increasing fees and those funds used to increase staffing needs for public safety and waterway management and various other activities performed by PA DEP. The current fees for most activities have not been increased since 1991 and do not provide enough revenue to support existing program functions. (5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 22, 23, 24, 25, 26, 28)

Response - DEP acknowledges the comment and support for the fee revision.

#### Oppose

2. Comment - Fees should bear a reasonable relationship to the actual cost of providing a service. Most of the proposals put forth for comment in this rulemaking do not meet this standard. (27)

Response - DEP acknowledges the comment and respectfully disagrees. The fee amounts in the final rulemaking are reasonable, in light of the method used to determine each fee. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. These fees were developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program and the Dam Safety Program.

3. Comment - The program shift from a service provision to one of a fee based program is of concern to several of the Districts. The increasing of fees will not have a positive, and may very likely result in a negative, influence on water quality protection. (4)

Response - DEP acknowledges the comment and respectfully disagrees. DEP expects that everyone will comply with the law and seek permits when required and cannot speculate on any of the possible unintended effects of the fees. The imposition of the fees on the other hand will allow the Department to fund its important permitting,

inspection and enforcement activities under Chapter 105 that have a positive environmental benefit to the citizens of the Commonwealth.

4. Comment - The regulation imposes significant fee increases of more than \$5 million which, overall, amounts to a 12-fold increase over existing fees and revenues. The EQB should explain how all of the fees in the final regulation meet the statutory provision for reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act. ... For the final-form regulation, the EQB should provide calculations showing how the specific fee increases it proposes correlate to the costs and activities required to administer the Act. (30)

Response - DEP acknowledges the comment. The statutory language mentioned by the commentator does not pertain to which entities pay the fees and relates instead to the amount of each fee charged. The fee amounts in the final rulemaking are reasonable, in light of the method used to determine each fee. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. Furthermore, these fees were developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program and the Dam Safety Program. Reasonable fees could include a full cost recovery of administering the Chapter 105 program; however, an initial evaluation of the full-cost recovery option determined those fees to be too burdensome on the regulated community. DEP believes the fees to be reasonable based on a comparison with other states and the fact that the fees offset only a portion of the cost to manage the WO&E Program and the Dam Safety Program. DEP will continue its ongoing efforts to improve efficiency and reduce program costs.

#### **EQB Review**

5. Comment - The Board should reduce the initial review period in 25 Pa. Code § 105.13(l) (concerning review of the adequacy of the new fees by DEP) to one year in order to determine whether the proposed fees should be raised further. Given the diversity of the new fees being added to Chapter 105, and the wide range of new administrative work that they will entail, the current three-year period is too long. After the first year's review, a regular three-year period should suffice. (25)

Response - DEP acknowledges the comment and respectfully disagrees. DEP has not made the suggested change as this three-year review period is consistent with other recently revised regulations such as 25 Pa. Code §§ 92a.26(h) and 92a.62(e).

6. Comment - Section 105.13 (l) should read as follows: The Department and the Conservation Districts will review the adequacy of the fees once every three years and jointly provide a report to the EQB. (4)

Response - DEP acknowledges the comment and respectfully disagrees. DEP has not made the suggested change as the regulations are the responsibility of the Environmental Quality Board and not the Conservation Districts. As many of the Conservation Districts choose to take on Chapter 105 delegation as authorized in Section 105.4, DEP will continue to coordinate with the Conservation Districts.

7. Comment - Subsection (l) states that the Department's report regarding the adequacy of fees will contain recommendations to increase fees to eliminate the disparity. As written, the regulation precludes the possibility of a finding that fees could be more than adequate and should be reduced. We recommend amending this provision to also accommodate the possibility of a fee decrease. (30)

Response - Section 105.13(l) has been revised to identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and contain recommendations to "adjust" fees to eliminate the disparity, including recommendations for regulatory amendments. This language is consistent with other recently revised regulations, such as 25 Pa. Code §§ 102.6(b)(2).

### **DAM SAFETY**

8. Comment: Section 105.13(c)(1)(iv)(C) contains an error, which can be corrected by adding the words, *equal or*, as follows: If, after completion of the project, the total construction costs *equal or* exceed \$250,000. (1, 30)

Response: DEP agrees with the comment and has revised the section accordingly.

9. Comment: If the fees in §105.13(c)(1)(viii) are intended to cover DEP's costs for administering annual dam inspections and EAPs, we suggest that an annual fee be assessed on Category 4 dams, which should be inspected by DEP periodically, but perhaps not as frequently as Category 3 dams are inspected. The fee should also consider that EAP updates every 5 years are not required for Cat. 4 dams as they are for Cat. 3 dams. (1,3)

Response: Annual fees are not being assessed to the Category 4 dams because they are inspected once every five years per Department standard practice. Because there is such little cost to DEP regarding Category 4 dams, DEP decided not to assess the annual fee to Category 4 dams.

10. Comment: Section 105.131a contains an error in the reference to 105.13(c)(viii), which should be corrected to *105.13(c)(1)(viii)*. (1, 30)

Response: DEP agrees with the comment and has revised the section accordingly.

11. Comment: Avoid duplication of inspection effort by Dam Safety Program personnel by recognizing the value of inspections performed by licensed professionals. Provide relief (reduced annual fees) for entities that engage professionals in performing inspections at a specified frequency and to specified standards. This would be

particularly warranted where this work duplicates functions that would otherwise be performed by the Dam Safety Program. (3, 30)

Response: The DEP is not required by statute or regulations to inspect dams. DEP's standard practice is to annually inspect Hazard Potential Category 1 and Category 2 high hazard dams, biennially inspect Category 3 non-high hazard dams, and to inspect Category 4 dams once every 5 years.

While there is not a specific requirement that DEP inspect dams, two of the purposes listed in the Dam Safety and Encroachments Act of 1978, P.L. 1375, No. 325 (Act) are to:

- (1) Provide for the regulation of dams and reservoirs, water obstructions and encroachments in the Commonwealth, in order to protect the health, safety and welfare of the people and property.
- (2) Assure proper planning, design, construction, maintenance, monitoring, and supervision of dams and reservoirs, including such preventative measures as necessary to provide an adequate margin of safety.

It is difficult for DEP to assure proper design, construction, maintenance, and monitoring of dams and ultimately protect the health, safety, and welfare of the people if it were not inspecting dams. DEP relies heavily on the inspection by the regional office to identify deficiencies. The inspections performed by the regional offices for high hazard dams are timely and are mostly completed by the same inspector who is very familiar with the dam and would notice subtle changes in the condition of the dam. DEP Dam Safety engineers review the annual inspection reports in conjunction with the dam file to determine if a high hazard dam has an acceptable rating or if it should be added to the Unsafe Dam list.

DEP regulations, at 25 Pa. Code Section 105.53, require the owners of Hazard Potential Category 1 and 2 high hazard dams to submit annual reports certified by a registered professional engineer regarding the condition of the dam to DEP. While admittedly there is a duplication of effort with regards to these inspections/reports, due to the hazard potential and the possibility of the loss of life due to the failure of a dam, this redundancy is considered acceptable and adds to the overall factor of safety of high hazard dams.

12. Comment: Establish fees for review of dam permit applications (for all categories of owners, all categories of dams) that reasonably reflect the cost of Dam Safety Program staff review of applications and processing of permits. Aqua recognizes that this could result in an increase in permit applications fees, but the costs would be equitably borne by all classes of owners. Because delays in review can cause substantial increases in costs for some projects, expedited review could command a premium which could help offset program costs while avoiding sponsor project costs that can arise from delays in permit review. Many dam owners are struggling to fund necessary maintenance and repairs of aging dams. An explanation of how the various proposed fees were determined would be useful. (3, 21)

Response: A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. Further, this proposal is not a full cost recovery of all program costs. With respect to an expedited review, the Department remains open to the suggestion, however if administratively complete and technically sound applications are not received at the first submittal the expedited review process fails and the money for fees would have been better spent by the applicant preparing and submitting a quality application, which in itself would prevent costly delays in the project schedule.

13. Comment: While it's clear that the EQB has statutory authority to collect "reasonable" fees and may "waive permit requirements for any category of dam, water obstruction or encroachment," we question why this proposed rulemaking seeks to continue to exempt applications submitted by Federal, State, county or municipal agencies or a municipal authority for a dam, water obstruction or encroachment from "reasonable" fees? It appears that owners of privately owned dams will be asked to disproportionately carry the costs of program administration. (27, 29, 30)

Response: The statutory language "waive permit requirements ..." pertains to General Permits and not to fees. The fee amounts in the final rulemaking are reasonable, in light of the method used to determine each fee. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. Furthermore, the Dam Safety and Encroachment Act was passed in 1978 and allowed, "reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act." The federal agencies were not included in the definition of "Person" for this Act and were therefore exempt. When the regulations (Chapter 105) were promulgated one year later, state and local governments were excluded. The DEP has chosen to maintain the existing exemptions in the regulation recognizing full cost recovery is not achievable with the included exemptions. The private sector is not bearing any program costs associated with the exempt entities as this rulemaking does not seek a full cost recovery of all the program administration costs.

14. Comment: Of the approximately 3,200 dams and reservoirs throughout this Commonwealth overseen by the Dam Safety Program, how many are owned by Federal, State, county or municipal agencies or a municipal authority? (27)

Response: Federal – 76, State – 273, County/Municipal – 659

15. Comment: How many of the unsafe, high hazard dams are owned by Federal, State, county or municipal agencies or a municipal authority? (27)

Response: Federal – 0, State – 26, County/Municipal – 32

16. Comment: Has the Department determined that such entities continue to have an “insignificant effect upon the safety and protection of life, health, property and the environment;” thereby, maintaining their exemption from any fees? (27)

Response: The statutory language “waive permit requirements ...” pertains to General Permits and not to fee requirements. The Dam Safety and Encroachment Act was passed in 1978 and allowed, “reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act.” The federal agencies were not included in the definition of “Person” for this Act and were therefore exempt. When the regulations (Chapter 105) were promulgated one year later, state and local governments were excluded. The DEP has chosen to keep the existing exemptions in the regulation recognizing that complete cost recovery is not possible with the included exemptions. The DEP has not inflated the fees to the private sector in an attempt to offset the costs associated with the exempt entities.

17. Comment: Was a workload analysis prepared by the Department and how do such costs break out? (27)

Response: A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the individuals times and wages were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff.

18. Comment: A large number of dam rehabilitations involve the need to provide additional hydraulic spillway capacity. With large dam rehabilitation designs, a hydrologic and hydraulic review by the Department is usually required very early in the design process to assure that money is not wasted on duplicate efforts throughout design. How will this staged review approach be handled in accordance with the new fees? (29, 30)

Response: Conducting the hydrologic and hydraulic review early in the process should not have an effect on the appropriate fees. In fact, reviewing this information early in the process will allow the DEP to make a better assessment of the correct fee to charge because the fees are based on size and hazard potential categories.

19. Comment: PAWC also requests that a "cap" or maximum dollar amount be considered for permits, reviews, and any fees on an annual basis that would be considered by the DEP. (29)

Response: The DEP does not believe that it is in its best interest to provide a “cap” or maximum dollar amount at this time. Establishing a “cap” could lead to the submission of

incomplete or deficient applications in order to meet a timeframe to stay under the cap and could ultimately result in longer review times by DEP.

20. Comment: We request that the program be reviewed to assure that all DEP operations are streamlined to maximize review efficiency while maintaining proper oversight of dam safety, including use of electronic delivery of information required and updating and developing new general permits. Efficiencies could be gained by using "prequalified" engineers by the DEP where shorter DEP reviews could be presented at a lower fee. (18, 29, 30)

Response: DEP acknowledges the comment. The Department will continue its ongoing efforts to improve efficiency, streamline the permitting process and reduce program costs, including continued efforts to expand electronic permitting processes and updating and developing new general permits.

## **WATER OBSTRUCTIONS and ENCROACHMENTS**

### **Oppose**

21. Comment - Although the fees have not been adjusted since 1991, some of the proposed changes would result in dramatic increases. For example, individual obstruction and encroachment permit fees are currently in the range of \$100 to \$350, depending on the activity. The proposed fees will be \$1,750 plus an additional charge based on the acreage disturbed. This is an order of magnitude increase in fees. The effect on industry is compounded if one considers this period of historically low gas prices and the recent passage of Act 13 of 2012, which imposes significant new impact fees on unconventional natural gas resources. (18)

Response - DEP acknowledges the comment. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. These fees were developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program.

22. Comment - Since the fees assessed in §105.13(c)(2) differentiate between major and minor amendments, this section should include definitions as do sections 105.13(c)(1)(iv)(B) and (C). The implication that major amendments include temporary and/or permanent impacts while minor amendments do not should be explicit in this section. (1, 30)

Response - DEP acknowledges the comment and agrees. DEP has revised §105.13(c)(2) to provide clarity and address the comment. DEP has added §105.13(c)(2)(v) to clarify that a minor amendment of an existing water obstruction and encroachment permit authorization or water quality certificate before its expiration is an amendment that does not require an extensive review and evaluation and includes: changes that do not substantially alter permit conditions, increase the amount of surface water impacts, increase the size of the operation, or reduce the capacity of the facility to protect human health, safety, or the environment; requests for time extensions; and aquatic resource mitigation credit transfers from an approved mitigation bank. DEP has also added §105.13(c)(2)(vi) to clarify that a major amendment of an existing

water obstruction and encroachment permit authorization or water quality certificate before its expiration is any amendment that is not a minor amendment.

23. Comment - By referencing fees established under Section 105.13, is Paragraph 105.444(5) limiting fees for new general permits because those new permits are not specifically listed in Paragraph 105.13(c)(2)? (1, 30)

Response - DEP thanks the commentator for the question and agrees that clarification is warranted. DEP has added §105.13(c)(2)(ii)(C) to allow fees for new General Permits and address the comment. The General Permits will be amended accordingly.

24. Comment - In the current Chapter 105 regulations, there is a definition for Small Project. The Small Project is also described in Annex A, Section 105.13 (f) and (g). However, this type of authorization is no longer listed as a type of permit in the fee section. The small project designation should be deleted, as it is no longer an activity for permitting under the Water Obstructions and Encroachments section. (4, 29)

Response - A “small project” is within the Joint Application for a Water Obstruction and Encroachment permit and therefore the same \$1750 Administrative Filing Fee will apply. Dependent upon the nature of the permit, a \$400 per tenth acre Temporary Disturbance Fee and/or \$800 per tenth acre Permanent Disturbance Fee may be added. DEP has added §105.13(c)(2)(i) to clarify that Small Projects require a Joint Application for a Water Obstruction and Encroachment Permit and therefore will follow the same fee requirements.

25. Comment - In the Preamble, the EQB expressly seeks input regarding modifying the proposed rule to incorporate flexibility in the water obstructions and encroachments fee proposal to accommodate multiple structures in one project. We recognize this phrasing is used in existing Subsection 105.13(c); however, it is not clear what modifications the EQB contemplates. ... Additionally, as noted previously, the EQB states in the Preamble that the final-form rulemaking will include counties and municipalities within the Dam Safety Program’s fee exemption in Paragraph 105.13(a)(1). We question why the EQB chose to state this information in the Preamble rather than include it in the body of the proposed rulemaking. In order to give the regulated community and other interested parties an opportunity to provide input on any revisions made by the EQB related to these two issues, we recommend that the EQB publish an Advanced Notice of Final Rulemaking (ANFR). An ANFR would provide the opportunity to review and resolve remaining issues before submittal of a final-form regulation. (30)

Response - DEP acknowledges the comment. DEP does not believe an ANFR is necessary as minor edits to the existing language in §105.13(e) will provide the flexibility identified as necessary. DEP will provide further clarity and examples while revising the permit application and General Permit registration documents to assist in fee determination. The Preamble was used to state the information regarding the decision to include counties and municipalities within the Dam Safety Program’s fee exemption in Paragraph 105.13(a)(1) The comments received indicate that the public received adequate notice from the Preamble regarding DEP’s intention to exempt the counties and municipalities from the Dam Safety Program fees. Municipalities did not submit comments in opposition to the rulemaking, presumably because interested

municipalities were aware that DEP intended to make them exempt from the fee requirements. Additionally, DEP received numerous comments in opposition to the fee exemptions. The existence of these comments indicates that the Preamble provided adequate notice. DEP has responded to these comments in this Comment-Response document and in changes to the final regulation as indicated elsewhere in this Comment-Response document.

## **Dredgers**

26. Comment - Commentators who represent dredging operations provided calculations demonstrating that application of the fees to their operations could result in permit fees of \$1.4 million for a single permit and the disturbance fee could cost over \$48 million for their operations. Fees of this magnitude would be unaffordable to them. We agree with the commentators that it does not appear this was the EQB's intent within the context of an overall estimated fee increase of \$5 million. Did the EQB intend for the proposed rulemaking to apply to dredgers? If so, the EQB should explain in the Preamble of the final-form regulation how it considered the economic impact on this industry, and how it found that impact to be reasonable. If not, the regulation should specifically provide a clarification that the fees do not apply to dredging operations. (2, 6, 30)

Response - DEP acknowledges the comment and agrees clarifications are warranted. DEP and the Fish and Boat Commission recently developed increased royalty fees applicable to the sand and gravel dredging industry and codified in Title 58 of the Pennsylvania Code. Part of the royalty fee comes back to DEP to offset program costs. It was not DEP's intention to apply both a Disturbance Review Fee and royalty fee to the areas subject to sand and gravel dredging. Revenue from the application of the Disturbance Review Fee to commercial sand and gravel dredgers was not included in the calculations for either industry costs or estimated revenues. DEP has added §105.13(c)(2)(iii)(B) to clarify that permit applicants subject to payment of royalties to the Commonwealth under 58 Pa. Code § 51.92, will not require the Disturbance Review Fees for the area of disturbance subject to the royalty payment.

## **Fee Exemptions**

27. Comment - It is important that any new fees be adjusted such that permit application fees are payable by Federal, State, county, municipal agencies and authorities. This is an issue of fundamental fairness that spreads the real program costs over the entire group of applicants and permittees, not just the private sector. (15, 18, 27)

Response - DEP acknowledges the comment and respectfully disagrees. The fee amounts in the final rulemaking are reasonable, in light of the method used to determine each fee. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. As

a result, the fee per activity would not change regardless of which entities are exempted from paying the fees. Furthermore, the Dam Safety and Encroachment Act was passed in 1978 and allowed, "reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act." The federal agencies were not included in the definition of "Person" for this Act and were therefore exempt. When the regulations (Chapter 105) were promulgated one year later, state and local governments were excluded. DEP has chosen to maintain the existing exemptions in the regulation recognizing complete cost recovery is not possible with the included exemptions. DEP has not inflated the fees to the private sector in an attempt to offset the costs associated with the exempt entities. The private sector is not bearing any program costs associated with the exemptions as this rulemaking does not seek a full cost recovery of all the program administration costs.

28. Comment - Also are state agencies such as Penn Dot, DCNR and municipalities/township exempt from the fees? (4)

Response - Yes.

#### **Further Clarification**

29. Comment - Did the EQB intend for a general permit applicant to pay the Administrative Filing Fee, the Disturbance Fee and appropriate General Permits Fee? (29, 30)

Response - No. A general permit applicant will pay the appropriate general permit fee. General Permit Registration for GP-11 and GP-15 will also require a Disturbance Review Fee where applicable. DEP has revised §105.14(c)(2) to add clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

30. Comment - Does the Disturbance Review Fee only apply to GP 11 and GP 15? Is it only for full Water Obstruction and Encroachment permits? (4, 30)

Response - The Disturbance Review Fees are added to the Joint Application Administrative Filing Fee, GP-11 and GP-15, and Major Amendments to Water Obstruction and Encroachment Permits. The Disturbance Review Fee may be applicable to General Permits developed in the future as well, but that determination will be noted in the General Permit. DEP has revised §105.13(c)(2) to add clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

31. Comment - To which permits would the \$1,750 Administrative Filing fee apply? (4, 29, 30)

Response - The \$1750 Administrative Filing Fee is the base permit fee for the Joint Application for a Water Obstruction and Encroachment Permit. Dependent upon the nature of the permit, a \$400 per tenth acre Temporary Disturbance Fee and/or \$800 per tenth acre Permanent Disturbance Fee may be added. DEP has revised §105.13(c)(2) to add clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

32. Comment - When would the proposed \$500 fee for Environmental Assessment for Waived Activities apply? (4, 30)

Response - The \$500 Environmental Assessment for Waived Activities fee would apply under use of the waivers found at §105.12(a)(11) and §105.12(a)(16), commonly referred to as waiver 11 and waiver 16, which both require Department review. The requirement for the Environmental Assessment for these waivers is per §105.15(c). DEP has added §105.13(c)(2)(iv) to add clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

33. Comment - I still feel that some of these fees are way out of line for some landowners who have to submit a full blown 105 WO&E for something they plan to do in a floodway or because a GP does not apply (for instance an outfall in HQ or EV watersheds). If I calculated correctly with the admin fee, plus the permanent and temporary disturbance fee, and the Environmental Assessment fee the cheapest WO&E permit would cost \$3,450! Is that correct?? (4)

Response - The \$500 Environmental Assessment for Waived Activities fee is only applicable to the use of the waivers found at §105.12(a)(11) and §105.12(a)(16), commonly referred to as waiver 11 and waiver 16, and not added onto the Administrative Filing Fee for a Water Obstruction and Encroachment Permit. A Joint Application for a Water Obstruction and Encroachment Permit is the \$1750 Administration Filing Fee. Dependent upon the nature of the permit, a \$400 per tenth acre Temporary Disturbance Fee and/or \$800 per tenth acre Permanent Disturbance Fee may be added. DEP has added §105.13(c)(2)(iv) to provide clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

34. Comment - Paragraph 105.13(c)(2) lists fees for bridges and other water obstructions and encroachments as \$200 and then in the chart, there are other numbers for various types of encroachments. Example:GP-3 \$250 Does this mean \$250+\$200 or \$200 or \$250? (4)

Response - The first set of fees which lists bridges and other water obstructions and encroachments as \$200 are the existing fees which are proposed to be deleted. The larger chart of fees is the proposed addition and new fee schedule. DEP has revised §105.13(c)(2) to provide clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

35. Comment - We recommend that the EQB clearly establish the applicability of fees in the final-form regulation in response to all public comments. (30)

Response - DEP has revised §105.13(c)(2) to provide clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

36. Comment - Will applicants be required to obtain an approved Erosion and Sediment Control Plan and pay the associated fees in addition to the proposed permit fees? (4, 30)

Response - DEP has revised §105.13(c)(2) to provide clarity. Further, DEP has added §105.13(c)(2)(ii)(B) specifying that the Conservation Districts have the authority to charge additional review fees. Specific requirements of each permit are found within the permit and not the regulation. DEP intends to revise permit application and General Permit registration documents to clarify the requirements of each permit.

37. Comment - The regulated activities listed under Subsection (a) do not appear to be consistent with the language in the fee descriptors listed under Subsection (c). For example, Subsection (a) includes a registration for a general permit but we do not see any reference to a registration for a general permit under Subsection (c). These subsections should be consistent in describing the regulated activities in the final-form regulation. (30)

Response - DEP acknowledges the comment. DEP has revised §105.13(c)(2) to provide clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

38. Comment - Section 105.448. Determination of applicability of a general permit. Subsection (c) states that a project requiring registration under Section 105.447 may be charged an application fee. This is nonregulatory language. The final-form regulation should specify when an application fee will be charged. (30)

Response - DEP acknowledges the comment. DEP has revised §105.448(c) to provide clarity and address the comment. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

### **Submerged Lands License Agreements (SLLAs)**

39. Comment - §105.35. Charges for use and occupation of submerged lands of this Commonwealth- Licenses and Annual Charges should be carefully reviewed prior to raising fees. The change in the minimum annual charge for SLLA from \$250 to \$750 seems to be excessive. (4)

Response - DEP acknowledges the comment and respectfully disagrees. Charges for use and occupation of submerged lands of this Commonwealth- Licenses and Annual Charges were carefully reviewed prior to raising fees. SLLA charges vary across the United States and Pennsylvania's proposed amendments are comparable to other states that have similar programs.

### **Miscellaneous Comments**

40. Comment - WCD has been reviewing 105 GP's for some time. We charge an E&S review fee to process the 105 GP's. (DEP agreed to this approach.) Our E&S review fee for 105 GP's is based on the degree of stream disturbance which is associated with the permitted activity. Our base fee is \$125 and the fees go up a little more after that. These fees do not recover all of our 105 GP program costs. (4)

Response - DEP acknowledges the comment. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. These fees were

developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program.

41. Comment - The 105 General Permit Program has evolved from its original intent. The program is so complicated that to apply to use the general permit, a small landowner must employ a consultant to fill out the application. The program needs to be revamped to make it simple again. If not, remove the GPs and require everyone to apply for a joint permit. (15)

Response - DEP acknowledges the comment. The General Permit program has evolved over time in order to typically enable applicants to obtain both State and Federal authorizations in one process. Further, DEP recently revised the General Permit Registration form and supporting documents for clarity and ease of use by landowners. DEP intends to revise permit application and General Permit registration documents to assist in fee determination.

42. Comment - The MSC recommends the establishment of processing timelines for permits relating to water obstruction and encroachment. We request that the review period for GPs must not exceed 45 days, and for those activities not covered by a GP, the review period must not exceed 90 days. The introduction of certainty in the approval process would be a fair and reasonable expectation in return for any increase in the fee structure. (18)

Response - DEP acknowledges the comment. With the implementation of permit fees the General Permits will be required to meet the timeframes established in DEP's Permit Decision Guarantee policy.

43. Comment - Please provide the fee analysis DEP used to determine program costs. Does this analysis include costs associated with the 30 delegated conservation districts? (4)

Response - DEP acknowledges the comment. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process and has included that information in the Fee Report Form. A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. The analysis utilized data related to the processing of Chapter 105 General Permits reported by the delegated Conservation Districts.

44. Comment - Section 105.12(e) states "An application for or a registration of a permit shall be accompanied by information, maps, plans, specifications, design analyses, test reports and other data specifically required by this chapter and additional information as required by this chapter to determine compliance with this chapter". Where is 'the additional information as required' identified and defined? (4)

Response - DEP acknowledges the comment. The information necessary to review a permit application is based on the site specific conditions. Such conditions may require

additional information that can reasonably be provided that supports and demonstrates compliance with the requirements of this regulation.

45. Comment - How many Chapter 105 General Permits were issued in 2009, 2010 and 2011? Of those, how many were done by a delegated District? How many GPs issued were not part of a NPDES or an ESPC permitted site? (4)

Response - DEP acknowledges the comment and does not have the data at this time. The fees were developed using information prior to 2009.

46. Comment - The EQB states in Subsection (b) that fees collected by the Dam Safety Program and Water Obstruction and Encroachment Program will be deposited into the Clean Water Fund and utilized to offset the operating costs to implement respective programs. A commentator suggests that any fees and penalties associated with Chapter 105 be accounted for separately from other monies that go into the Clean Water Fund. The EQB should explain how it can ensure that the funds collected through Chapter 105 will be used only for the benefit of the Water Obstruction and Encroachment Program, Submerged Lands License Agreement Program and the Dam Safety Program to offset the costs of these respective programs. (4, 30)

Response - DEP acknowledges the comment. As a part of identifying and tracking the costs associated with implementing its individual programs the Department has developed program specific sub-ledgers within DEP's Clean Water Fund to deposit the appropriate fees.

## **CONSERVATION DISTRICTS**

### **Conservation District Roles**

47. Comment - If DEP decides to charge their own fee for Chapter 105 GP's, it would not be fair to impose it universally, because in some counties (like Westmoreland) the CD does all the review & processing of the GP. It should only be imposed on counties where the CD is not delegated 105. (4)

Response - DEP acknowledges the comment and respectfully disagrees. The regulations are the responsibility of DEP and then certain portions of the Water Obstruction and Encroachment (WO&E) Program are delegated to those Conservation Districts that chose to take on those responsibilities. In counties where the Conservation District is delegated responsibilities under Chapter 105, those Conservation Districts will be allowed to retain fees to the extent determined in the delegation agreement between the conservation district and DEP.

48. Comment - The State Conservation Commission (SCC) submitted comments reflecting comments it received from 25 county conservation districts. The SCC comments raise concerns with what it describes as excessive fees, issues related to implementation of the fees, services provided by county conservation districts, whether county conservation districts will receive part of the fees and delegation agreements. We will review the EQB's responses to all of the SCC comments as part of our review of the final-form regulation. We also ask the EQB to explain how the regulation will impact county

conservation districts, what services they provide related to the programs the fees will support and whether the revenues received as a result of this regulation will be shared with the county conservation districts. (30)

Response - DEP acknowledges the comment. DEP recognizes the interest in the answers to these questions and has made many clarifications in the regulation to address them. However, the details of program implementation should not be determined by regulation but rather through DEP policy and the negotiated delegation agreement. DEP has revised §105.13(c)(2) to provide clarity. The regulations are the responsibility of DEP and then certain portions of the Water Obstruction and Encroachment (WO&E) Program are delegated to those Conservation Districts that chose to take on those responsibilities. In counties where the Conservation District is delegated responsibilities under Chapter 105, those Conservation Districts will retain the fees for acknowledging General Permit registrations.

### **Distribution of Fees Collected**

49. Comment - The current revisions do not explain if or how the fees will be distributed between DEP and delegated districts. The Districts feel strongly that delegated districts should receive most if not all of the fees collected in the 105 program. ... language should be added that allows those Chapter 105 delegated Districts to receive and keep the fees. ... Chapter 102.6 provides Districts the opportunity to collect and retain fees. The current 105 and proposed 105 revisions do not. We recommend that §105.13 be amended to provide for general permit processing fees to be submitted directly to delegated conservation districts. (1, 4, 7, 15, 21)

Response - DEP acknowledges the comment. DEP recognizes the interest in the answers to these questions and has made many clarifications in the regulation to address them. However, the details of program implementation should not be determined by regulation but rather through DEP policy and the negotiated delegation agreement. DEP has revised §105.13(c)(2) to provide clarity. The regulations are the responsibility of DEP and then certain portions of the Water Obstruction and Encroachment (WO&E) Program are delegated to those Conservation Districts that chose to take on those responsibilities. In counties where the Conservation District is delegated responsibilities under Chapter 105, those Conservation Districts will retain the fees for acknowledging General Permit registrations.

50. Comment - Revise 105 .13(b) to state that *Fees collected by the Department or conservation district will be deposited into a restricted revenue account .... and utilized to offset the operating costs to administer the programs;* (21), (30)

Response - DEP acknowledges the comment. As a part of identifying and tracking the costs associated with implementing its individual programs the Department has developed program specific sub-ledgers within DEP's Clean Water Fund to deposit the appropriate fees. DEP recognizes the interest in the answers to these questions and has made many clarifications in the regulation to address them. However, the details of program implementation will be expanded on in DEP policy and the negotiated delegation agreement. DEP has revised §105.13(c)(2) to provide clarity.

51. Comment - Add a new § 105.13 subsection which is consistent with Chapter 102, § 102.6(b)(3): *Conservation districts may charge additional review fees in accordance with section 9(13) of the Conservation District Law (3 P.S. § 857(13)).* (1, 21)

Response - DEP acknowledges the comment. DEP has revised §105.13(c)(2) to provide clarity and added §105.13(c)(2)(ii)(B) giving Conservation Districts the authority to charge additional review fees.

### **Alternate Fee Structure**

52. Comment - The base administrative filing fee as well as the permanent disturbance fee in 105.13(c)(2) may be excessive for certain projects. ... There are certain general permits that are not approved for use in Exceptional Value (EV) waters. In the current proposal, this would result in a significant permit fee burden for relatively small impact projects (such as docks, utility line and minor road crossings, or intake/outfall structures) located in EV watersheds. We suggest that the Department consider another fee category for projects in EV watersheds that would otherwise be eligible for general permit coverage. (1, 4, 21)

Response - DEP acknowledges the comment and respectfully disagrees. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. Activities conducted in EV waters require a more substantive review than those activities conducted in non EV waters.

53. Comment - If DEP charges 105 GP fees, they should be based on impact, according to square feet of impact or length of impact ... Separate categories depending on the type of applicant should be created, i.e.: Commercial/Industrial, Residential Development, Timber Harvest, and Residential. ... (4)

Response - DEP acknowledges the comment and respectfully disagrees. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. Fees for General Permits (GP) are based upon the time required to review and process the registration and not necessarily upon the impact to the environment, which is minimal when qualifying for the use of a GP.

54. Comment - Fees should be consistent between types of GPs as the processing time and amount of work associated with reviewing each is roughly the same. The differences in the amount of work involved should not be such that it justifies such a huge range as \$50-\$750 to cover the administration costs. (4)

Response - DEP acknowledges the comment and respectfully disagrees. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process.

A work load analysis was conducted by DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. Projects aiming for environmental protection or restoration were taken into consideration during the fee development process so as not to be a deterrent for completion of those projects.

55. Comment - Latitude should exist to waive fees for projects sponsored by Conservation Districts or other State/County agencies. A landowner participating in a Growing Greener or other District sponsored project for stream bank stabilization or Ag BMP installation should not be required to pay a fee. (4)

Response - DEP acknowledges the comment. The existing fee exemptions for Federal, State, county or municipal agencies or a municipal authority is maintained through this regulatory revision. If a Conservation District feels strongly enough about a project, they may accept responsibility as the applicant/permittee. As a county agency, Conservation Districts would be exempt from permit fees where they are the applicant/permittee for a project. However, as applicant/permittee, the Conservation District would not be able to also review/acknowledge the General Permit but would have to send it to the appropriate DEP Regional Office for authorization.

#### **Delegation Agreement**

56. Comment - Delegated conservation districts currently participate in an established Department quarterly reporting system for tracking delegated conservation districts' Chapter 102 and Chapter 105 related activities. This system could easily be revised to track general permit fees accepted by delegated conservation districts. (21)

Response - DEP acknowledges the comment and intends to use the quarterly reporting system along with delegation agreements when the fees are implemented.

57. Comment - The current delegation agreement between the Department and Districts for the 105 program is inadequate to meet the needs of the Districts and will need to be revised to indicate that all fees collected by delegated Conservation Districts remain there to help cover the costs of administering the program. (4, 7)

Response - DEP acknowledges the comment and intends to revise the delegation agreements and quarterly reporting system when the fees are implemented.

58. Comment - The revisions do not mention the delegation agreements or the Conservation Districts other than to point out that an Erosion and Sediment Control Plan adequacy is needed to utilize the GP. We wonder if this is an oversight of the Department or intentional. (15)

Response - DEP acknowledges the comment and intends to revise the delegation agreements and quarterly reporting system when the fees are implemented. However, the details of program implementation should not be determined by regulation but rather through DEP policy and delegation agreement.

## TECHNICAL ASSISTANCE, COMPLIANCE and ENFORCEMENT

59. Comment - Some Districts expressed concerns that individuals will not seek technical assistance due to the fees, which may in turn result in improper design and implementation of projects and result in additional impacts. (4)
- Response - DEP acknowledges the comment. DEP expects that people will act in accordance with the law.
60. Comment - The District suggests that the proposed fees for certain general permits may be excessive. For example, the general permit-2 fee of \$175 for a small dock is difficult to justify based on our experience in registering this general permit. ... An explanation of how the various proposed fees were determined would be useful. (4, 21)
- Response - DEP acknowledges the comment and respectfully disagrees. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. A work load analysis was conducted by the DEP for all activities performed by staff members. The average time spent for each aspect of the review was determined and multiplied by the wage of the specific individual performing the review thus giving a total for the review. All of the times and wages for each individual were added together giving a total for the review of a specific project. This allowed the DEP to establish a fee for each activity reviewed by staff. These fees were developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program.
61. Comment - The fee schedule reflects the necessity to keep the fee low for the agricultural community to a certain extent but does not consider an average landowner trying to access their property or stabilize the stream, hence preventing erosion. These proposed fees are too excessive for these particular landowners and will encourage noncompliance (4)
- Response - DEP acknowledges the comment and disagrees. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. These fees were developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program. DEP expects that people will act in accordance with the law.
62. Comment - Pike County Conservation District believes that there should be a balance between collecting fees to offset the operating costs of the program and maintaining the substantial benefits to water resources and public and private property infrastructure gained from compliance with the Chapter 105 regulations. If the required fees are perceived as costing more than the consequences of conducting regulated activities without authorization, delegated conservation districts and DEP will be spending more time and resources in compliance and enforcement ... (21)
- Response - DEP acknowledges the comment and disagrees. DEP has completed an evaluation of program costs and estimated revenue as part of this rulemaking process. These fees were developed to offset only a portion of the operating costs of the Water Obstruction & Encroachment (WO&E) Program.

63. Comment - Several Districts expressed their concerns over the current lack of enforcement in the 105 program and the need for more enforcement especially if fees are going to be charged. (4)

Response - DEP acknowledges the comment. While this comment is outside the scope of the regulatory change, DEP expects that everyone will comply with the law and seek permits when required and cannot speculate any possible unintended effects of the fees.

64. Comment - How many enforcement actions did DEP take in 2009, 2010 and 2011 for 105 General Permit activities when a permit was issued after the activity occurred? If few enforcement actions were taken, what incentive does one have to apply for and pay for the use of a GP knowing that little if anything will occur after the fact? (4)

Response - DEP acknowledges the comment and does not have the data at this time. The fees were developed using information prior to 2009.