

**PROPOSED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
DAM SAFETY AND WATERWAY MANAGEMENT
25 PA CODE CH. 105**

Preamble

The Environmental Quality Board (Board) proposes to amend Chapter 105 (relating to Dam Safety and Waterway Management) to read as set forth in Annex A. This proposed rulemaking would amend Chapter 105 to clarify existing regulations; delete or update obsolete and antiquated requirements; incorporate new or revised definitions to support the proposed amendments and clarify existing regulations; and correct previous typographical errors discovered in certain sections of Chapter 105. The new and amended sections are §§ 105.1, 105.3, 105.4, 105.12—17, 105.18a, 105.20a, 105.21, 105.25, 105.35, 105.43, 105.47, 105.53, 105.81, 105.82, 105.89, 105.96—105.98, 105.121—123, 105.134, 105.161, 105.171, 105.245, 105.401, 105.411, 105.446, 105.451 and 105.452.

This proposed rulemaking would amend this Chapter 105 to add structures and activities eligible for a permit waiver and clarify existing waivers, add antidegradation and cumulative impacts subsections to the applicant information requirements and revise existing information requirements for better clarity and organization, provide a new option for dam owners to satisfy proof of financial responsibility obligations, amend the environmental assessment section to add application information requirements specific to environmentally beneficial projects, amend the Wetland replacement criteria section to update provisions relating to the compensatory mitigation framework for unavoidable impacts to aquatic resources and their aquatic resource functions, add notice of transfer requirements for the owners of dams eligible for a permit waiver, add new structures and activities that may be exempt from submerged lands licensing charges, require periodic inspections by high hazard dam owners and update the application information requirements for projects seeking to discharge dredged or fill material into aquatic resources. This proposed rulemaking would amend various sections of Chapter 105 to further clarify existing requirements, delete or update obsolete requirements and correct previously identified typographical errors. The proposed rulemaking would add or revise definitions to support these revisions.

This notice is given under Board order at its meeting of _____ (date)_____.

A. Effective Date

These amendments will be effective upon final-form publication in the *Pennsylvania Bulletin* .

B. Contact Persons

For further information contact Pamela Kania, Acting Director, Bureau of Waterways Engineering and Wetlands, P.O. Box 8460, Rachel Carson State Office Building, Harrisburg, PA 17105-8460, (717) 787-3411, or Jesse C. Walker, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464,

(717) 787-7060. Information regarding the submittal of comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov ("Public Participation Center," select "Environmental Quality Board (EQB)").

C. Statutory Authority

This proposed rulemaking is authorized under sections 5, 7, 10, 11 and 17 of the Dam Safety and Encroachments Act (act) (32 P.S. §§ 693.5, 693.7, 693.10, 693.11 and 693.17); sections 5 and 402 of The Clean Streams Law (35 P.S. §§ 691.5 and 691.402); sections 302 and 402 of the Flood Plain Management Act (32 P.S. §§ 679.302 and 679.402); section 11(2) of the Conservation District Law (3 P.S. § 859(2)); and sections 514(a), 1901-A(1) and (20), 1908-A, 1917-A and 1920-A of The Administrative Code of 1929 (71 P.S. §§ 194(a), 510-1(1) and (20), 510-8, 510-17 and 510-20), unless otherwise noted.

D. Background and Purpose

Pennsylvania's Dam Safety and Waterway Management regulations are codified at Chapter 105. Under section 2 of the act (32 P.S. § 693.2), the Department regulates dams and other water obstructions and encroachments located in, along or across or projecting into aquatic resources to: protect the health, safety, welfare and property of the people; assure proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs; assure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments; and to protect natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve and protect the water quality, natural regime and carrying capacity of watercourses. *See also* 25 Pa. Code § 105.2.

The Commonwealth's Chapter 105 wetland protection and dam safety regulatory program has traditionally been one of the leading wetlands and dam safety programs in the Mid-Atlantic States, as well as nationally. These proposed regulatory revisions would allow the Department to focus resources on activities and threats to public health, welfare, safety and the environment, while providing general management, oversight, and review for more routine activities to ensure compliance with the objectives of the act. In recent years, the Department's emphasis on improved clarity and consistency in the implementation of Chapter 105 has centered on large scale projects, including linear and phased projects. As a result, the Board has identified a need for multiple revisions and updates to Chapter 105.

The purpose of this proposed rulemaking is to amend Chapter 105 to strengthen the Department's implementation of the dam safety, and water obstruction and encroachment programs, provide clarity for project applicants and the public on existing regulations, and enable the Department and local delegated agencies to utilize resources in a more effective and efficient manner. The proposed amendments would revise several sections of Chapter 105 to clarify existing requirements; delete or update obsolete and antiquated requirements; incorporate new or revised definitions to support proposed amendments and existing terminology used in Chapter 105; integrate new or revised sections by codifying existing requirements; and correct previous typographical errors.

Regulatory History

Pennsylvania has a long history of regulating dams, water obstructions and encroachments. The Act of June 8, 1907 (P.L. 496, No. 332) established the Pennsylvania Navigation Commission for the Delaware River and authorized the Commission to issue licenses for the construction, extension, alteration, improvement and repair of wharves, piers, bulkheads, docks, slips and basins along the waterfront. As a result of the Austin Dam failure in Potter County on September 30, 1911, which claimed 78 lives, the General Assembly enacted the Water Obstructions Act — act of June 25, 1913 (P.L. 555, No. 355), to enable a Department predecessor, the Water Supply Commission, to regulate dams, water obstructions and encroachments in the Commonwealth. The Department's predecessor, the Department of Environmental Resources (DER), adopted the initial Title 25, Chapter 105 regulations (relating to water obstructions and encroachments) on September 11, 1971 (1 Pa.B. 1804).

The General Assembly recognized the need for the Commonwealth's dredged and fill program to contain proper inspection and enforcement provisions after the failure of the Laurel Run Dam, Sandy Run Dam and four others near Johnstown, PA, in 1977. The General Assembly repealed the Water Obstructions Act and enacted the act on November 26, 1978 (P.L. 1375, No. 325). The act provided for the regulation of dams, water obstructions and encroachments; consolidated and clarified the programs of DER and the Commissions; established penalties; and repealed certain acts. The General Assembly amended the act on October 23, 1979 (P.L. 204, No. 70). On September 26, 1980, the Board rescinded the entire 25 Pa. Code Chapter 105 and adopted new Chapter 105 regulations under the authority of the act and The Clean Streams Law (10 Pa.B. 3843).

The Board promulgated the last comprehensive revisions of the Chapter 105 regulations on October 11, 1991 (21 Pa.B. 4911). The main purpose of those amendments was to ensure more adequate protection of wetlands in Pennsylvania by establishing more specific information requirements for the permitting of structures and activities in wetlands, clear standards for permit review, and specific criteria for wetlands replacement. *Id.* In addition, the 1991 rulemaking sought to streamline permitting, and better focus the Department's resources through the addition of: a simpler permitting process for small projects; additional categories eligible for waiver of permit requirements; authority to issue emergency permits; creation of a simplified transfer process; and other administrative changes. *Id.*

The Board promulgated amendments to Chapter 105 on January 7, 2011 to address issues pertaining to dams and reservoirs (41 Pa.B. 219). Specifically, those amendments clarified dam permit and engineering requirements necessary for the proper design and construction of dams, updated dam classification categories and improved protection of the public by providing the Department with the ability to remove or modify unsafe or deficient high-hazard dams. The amendments also provided five years for owners to comply with proof of financial responsibility or security for the operation and maintenance or permit approval for existing Hazard Potential Category 1 or Category 2 dams, as classified in § 105.91 (relating to classification of dams and reservoirs), and water obstructions or encroachments, which present a substantial risk to life or property.

The proposed amendments are consistent with section 2 of the act (32 P.S. § 693.2) and sections 5 and 402 of the Clean Streams Law. The proposed amendments would protect the health, safety, welfare and property of Pennsylvania residents; ensure proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs; ensure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments; and enhance the protection of natural resources, environmental rights and values, and conserve and protect the water quality, natural regime and carrying capacity of watercourses.

Federal Consistency and Coordination

This proposed rulemaking is consistent with the Commonwealth's authority under the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*), as amended. Under Section 510 of the Clean Water Act, the function of developing water quality standards and antidegradation implementation requirements has long been a function reserved to the states. 33 U.S.C. § 1370. See also, 40 C.F.R. § 131.4. Section 303 of the Clean Water Act (33 U.S.C. § 1313), authorizes states to establish water quality standards within their jurisdictions. In section 303(a)(2) of the Clean Water Act (33 U.S.C. § 1313(a)(2)), Congress mandates that the state water quality standards adopted by states pursuant to their own laws prior to October 18, 1972, remain in effect unless the U.S. Environmental Protection Agency (EPA) determines they are inconsistent with the Clean Water Act. Section 303(c)(1) of the Clean Water Act (33 U.S.C. § 1313(c)(1)), gives states the authority to review and revise water quality standards for surface waters within their borders.

The Commonwealth's water quality standards in 25 Pa. Code Chapters 93, 96 and 105 have been promulgated by the Board under The Clean Streams Law (35 P.S. §§ 691.1—691.1001), enacted in 1937. The Department's 25 Pa. Code Chapter 96 regulations implement the Chapter 93 water quality standards. Section 96.3(b) provides that antidegradation requirements found in §§ 105.1, 105.15, 105.17, 105.18a, 105.20a and 105.451 shall apply to surface waters. In addition, § 96.3(g) establishes that the functions and values of wetlands shall be protected pursuant to Chapters 93 and 105. EPA has approved Pennsylvania's antidegradation regulations as meeting the federal requirements at 40 CFR 131.12. 75 FR 29,899-29,900 (May 28, 2010). Upon the Board's promulgation of this proposed rule as a final-form regulation, the Department will submit the final-form regulation to EPA for approval as an amendment to Pennsylvania's water quality standards in effect for Clean Water Act purposes.

This proposed rulemaking would be consistent with the Department's coordination efforts with the U.S. Army Corps of Engineers (Corps) under section 17(d) of the act (32 P.S. § 693.17(d)). See also, 25 Pa. Code § 105.24 (relating to coordination of permits). Section 404(e) of the Clean Water Act (CWA) (33 U.S.C. § 1344(e)), provides for the issuance of Department of the Army (DA) general permits (GPs) on a statewide basis, which operate in conjunction with a State regulatory program that protects the aquatic environment in a manner that the Corps has determined to be equivalent to the DA regulatory program, provided that the activities permitted under each category of such GPs are similar in nature and result in no more than minimal individual or cumulative adverse effects on the aquatic environment. The Department's coordination process is undertaken through the implementation of the Pennsylvania State Programmatic General Permit (PASPGP) which has been issued by the Corps in Pennsylvania pursuant to Clean Water Act Section 404(e) since 1991 and is based upon consistency with the

requirements of 40 CFR, Part 230 (relating to section 404(b)(1) guidelines for specification of disposal sites for dredged or fill material). The Department and Corps also utilize a joint permit application form to coordinate efficient processing of applications for larger scale projects. The Department coordinates with the Corps and other state and federal agencies and commissions regarding projects that require compensatory mitigation through the PASPGP and joint permitting processes.

On April 10, 2008, the U.S. Environmental Protection Agency and the Corps, through a joint final rule entitled *Compensatory Mitigation for Losses of Aquatic Resources* (2008 Mitigation Rule), amended 33 CFR chapter II by adding Part 332 (compensatory mitigation for losses of aquatic resources) and 40 CFR Part 230, by adding subpart J (relating to compensatory mitigation for losses of aquatic resources), respectively, to include more comprehensive standards for compensatory mitigation (73 FR 19,594). Compensatory mitigation involves actions taken to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources authorized by Department of the Army permits, after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem pursuant to 40 CFR Part 230. See 40 CFR 230.93 (a)(1) and 33 CFR 332.3(a)(1). The Corps defines compensatory mitigation as restoration, establishment, enhancement, and/or preservation of aquatic resources to offset unavoidable impacts to waters of the United States. 40 CFR 293.92 (definition of compensatory mitigation).

The Department has its own authority to require mitigation for impacts to aquatic resources and aquatic resource functions that cannot be eliminated. The purpose of the act is, among other things, to “[p]rotect the natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses.” 32 P.S. § 693.2; See also, 25 Pa. Code § 105.2. Under Section 4 of The Clean Streams Law, “[i]t is the objective of the Clean Streams Law not only to prevent further pollution of waters of the Commonwealth, but to also reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted.” 35 P.S. § 691.4. See also, 35 P.S. § 691.5. The existing definition of *mitigation* in Chapter 105 requires project proponents to: (A) Avoid and minimize impacts by limiting the degree or magnitude of the action and its implementation. (B) Rectify the impact by repairing, rehabilitating or restoring the impacted environment. (C) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action. If the impact cannot be eliminated by following clauses (A) –(C), compensate for the impact by replacing the environment impacted by the project or by providing substitute resources or environments. 25 Pa. Code § 105.1. Mitigation is incorporated throughout this chapter under §§ 105.13(e), 105.16, 105.18a and 105.20a.

Consistent with the Department’s authority under the act, The Clean Streams Law and existing Chapter 105 requirements relating to mitigation, this proposed rulemaking would amend § 105.20a (relating to wetland replacement criteria) to update provisions relating to the compensatory mitigation framework for proposed impacts to aquatic resources and aquatic resource functions that cannot be eliminated. These revisions include the addition of siting criteria for compensatory mitigation projects, compensation factors, acceptable methodologies and monitoring and performance standards. This proposed rulemaking would add the definition of “aquatic resources” and “aquatic resource functions” to support these revisions and further

coordination efforts with the Corps during its implementation of the 2008 Mitigation Rule under 40 CFR 230, subpart J. These proposed amendments to § 105.20a are generally consistent with the EPA and Corps 2008 Federal Mitigation Rule by: (1) maintaining a “no net loss” of wetlands requirement; (2) revising siting criteria on a watershed basis; (3) providing for mitigation banking, in-lieu fee, and permittee responsible mitigation options; and (4) requiring financial assurances for long-term management and protection of a compensation site.

Although the Federal government does not have companion dam safety regulations for non-federal dams, this proposed rulemaking would revise the terminology used in Chapter 105 relating to stability of dam structures while utilizing appropriate uplift pressures, ice loads, and silt loads to make it consistent with the Corps’ standard design terminology and manual.

This proposed rulemaking would also amend references to the determination of prior converted cropland for agricultural crop production purposes in § 105.452 (relating to status of prior converted cropland — statement of policy) to provide further clarity. This proposed revision would be consistent with the Federal guidance provided by the United States Department of Agriculture (USDA) *National Food Security Act Manual*.

Consultations

In developing this proposed rulemaking, the Department sought input from principal stakeholders that would be affected by the proposed amendments. The Department’s outreach included participation in a Chapter 105 Agricultural Workgroup consisting of the U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS); Pennsylvania Department of Agriculture (PDA), State Conservation Commission (SCC); Pennsylvania Association of Conservation Districts (PACD), Pennsylvania Department of Conservation and Natural Resources (DCNR), representatives from select county conservation districts; and the Pennsylvania State University, Dirt, Gravel and Low Volume Road program.

The Department has solicited input from Commonwealth agencies and commissions during the development of this proposed rulemaking, including DCNR, PDA, the Department of Transportation, the Fish and Boat Commission, and the Turnpike Commission. The Department also conducted a separate workgroup with PACD. There are currently 34 conservation districts that the Department has delegated Chapter 105 authority in the Commonwealth. These delegated conservation districts would be affected by the proposed rulemaking as co-regulators. The workgroup included both delegated and non-delegated conservation districts.

On February 29, 2020, the Department provided a presentation of this proposed rulemaking to the Pennsylvania Chamber of Business and Industry and provided an opportunity for feedback.

The Department consulted the Agricultural Advisory Board (AAB) and Water Resources Advisory Committee (WRAC) on the proposed rulemaking. The Department provided pre-proposal updates to WRAC on July 25, 2019 and the AAB on November 12, 2019. On January 27, 2020, and January 30, 2020, respectively, the AAB and WRAC unanimously concurred with the Department’s recommendation to move this proposed rulemaking forward to the Board for consideration for adoption and publication as a proposed rulemaking for public comment.

The Department conferred with the SCC on November 12, 2019 and February 11, 2020, and the Citizens Advisory Council (CAC) on November 19, 2019 and February 18, 2020. This proposed rulemaking is consistent with sections 2, 5, 7, 10, 11 and 17 of the act and sections 5 and 402 of the Clean Streams Law. The Board is proposing to adopt these amendments to the Chapter 105 Dam Safety and Waterways Management Regulations.

E. *Summary of Regulatory Requirements*

A summary of the proposed amendments to Chapter 105 in this rulemaking and the purpose for each proposed amendment is provided below.

§ 105.1 *Definitions*

This proposed rulemaking would revise § 105.1 to amend the terms “Cross section,” “Incremental dam breach analysis,” “Levee,” “Stormwater management facilities,” and “Wetland functions” and add the terms “Abandonment,” “Aquatic resources,” “Aquatic resource functions,” “Aquatic resource impacts,” “Conservation district,” “Crop production,” “Groin structure,” “Maintenance,” “Probable Maximum Flood (PMF),” “Probable Maximum Precipitation (PMP),” “Project,” “Project purpose,” “Reservoir,” “Restoration” and “Water dependent” to support the proposed amendments to Chapter 105. The proposed rulemaking would delete and replace the term “PMF”.

“Abandonment” is proposed to be added as a defined term. This term is used extensively in Chapter 105, but has not been previously defined. The identification of the discontinued construction, or operation and maintenance of a dam, water obstruction or encroachment is crucial to provide a clear understanding of the term as it is used in this chapter. The addition of this definition would provide further clarity to the meaning and use of the term in Chapter 105 as opposed to how this term is interpreted to constitute deactivation from service under the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration regulations at 49 CFR 192.3 (definition of abandoned) and 49 CFR 192.727 (relating to abandonment or deactivation of facilities).

“Aquatic resources” is proposed to be added to support the proposed amendments to §§ 105.15 and 105.20a. This term is defined as “regulated waters of this Commonwealth” to provide a more convenient use of the terminology in the proposed revisions. This proposed term would also serve the additional purpose of building a bridge between the Department and Corps regulatory programs for coordination purposes under section 17(d) of the act.

“Aquatic resource functions” is proposed to be added as a new definition to support amendments to this chapter, including amendments to § 105.20a. This new definition identifies ecosystem services that result from the chemical, physical, or biological processes that occur in “aquatic resources” as defined in § 105.1, including hydrologic, biogeochemical and habitat functions as recognized under current environmental principles and practices. This terminology is used in the Department’s functional assessment protocol and compensatory mitigation technical guidance documents and for coordination purposes with the Corps under the 2008 *Compensatory Mitigation for Losses of Aquatic Resources* final rule (73 FR 19,594).

This proposed rulemaking would add the definition “Aquatic resource impacts”. This new definition would be added to support the proposed amendments to §§ 105.13(x) and 105.20a. The terms direct and indirect impacts are already defined in the Department’s environmental assessment form instructions (3150-PM-BWEW0017) and the term secondary impacts is already defined under the factors the Department will consider when making a determination of impact under § 105.14(b)(12). Aquatic resource impact assessments do not refer to evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93.

“Conservation district” is proposed for addition to clearly identify a delegated conservation district is one that has authority under the Conservation District Law (3 P.S. § 851(c)) in this Commonwealth to administer and enforce all or a portion of the program covered under delegation from the Department.

“Crop production” is proposed to be added to § 105.1. This term was previously included in § 105.12(a)(7), but moved to § 105.1, as the term is used in other sections of Chapter 105.

This proposed rulemaking would amend the definition of “Cross section” to provide clarity and consistency for all regulated waters of the Commonwealth covered by this chapter.

The proposed rulemaking would define “Groin structure”. This term is proposed for addition to identify a specific structure used for controlling wave action, shore erosion or for trapping and accumulating sand. The term is predominately used for the activities in and along the Lake Erie shoreline, and in the context of submerged lands license agreements.

“Incremental dam breach analysis (IDBA)” is proposed to be amended to add the acronym to the term, since this acronym is used elsewhere in the proposed rulemaking.

“Levee” is proposed to be amended to correct a reference to the term watercourse.

“Maintenance” is proposed to be added as a defined term to identify that periodic activities may be conducted to preserve the condition of a dam, water obstruction or encroachment as authorized by the Department. This new definition provides further clarity for the regulated community and general public as the term is used frequently throughout this chapter.

This proposed rulemaking would delete “PMF”. The Board is proposing to add a new definition of “Probable Maximum Flood (PMF)” to replace this definition.

“Probable Maximum Flood (PMF)” is proposed to be added as a new defined term to include precipitation data from site-specific studies when such studies are available as opposed to just data from the National Oceanographic and Atmospheric Administration (NOAA). This would enable the use of alternative studies that are available. This term would replace the current definition of “PMF”.

This proposed rulemaking would add “Probable Maximum Precipitation (PMP)” to identify the depth of precipitation for dam safety design purposes.

“Project” is proposed to be added as a new defined term to clearly identify the geographic area of the site which needs to be considered when a proposed dam, water obstruction or encroachment is being considered .

“Project purpose” is proposed to be added as a defined term to clarify that an applicant must provide a description of the proposed structures and activities that may impact aquatic resources, for which the applicant is seeking a permit authorization, and the necessity for the proposed project to be located in or in close proximity to aquatic resources.

This proposed rulemaking would add the term “Reservoir”. This term is already defined in section 3 of the act (32 P.S. § 693.3), used extensively in this chapter and is distinguishable as a certain type of jurisdictional body of water.

This proposed rulemaking would add the term “Restoration”. This term is already used in Chapter 105 and would be added to support the existing permit waiver for restoration activities under § 105.12(a)(16) and proposed amendments to § 105.15 relating to the information requirements for projects proposing the restoration of aquatic resources.

The proposed rulemaking would amend the existing definition “Stormwater management facilities” to improve applicability, provide clarity, and update the terminology used for man-made stormwater management facilities.

“Water dependent” is a new proposed defined term to support proposed amendments and the existing use of the term in this chapter. The term is proposed for addition to § 105.1 since it is used in multiple sections and would clarify the demonstration that an applicant needs to make as part of a permit application when proposing a dam, water obstruction, encroachment in or in close proximity to aquatic resources.

The proposed rulemaking would amend and update the existing definition “Wetland functions” to include other aquatic resource functions that may be recognized using current scientific principles.

§ 105.3 Scope

Proposed subsection (b) would update current elevation data for Lake Erie and allow for the incorporation of future updates from the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), National Geodetic Survey (NGS) International Great Lakes Datum elevation criteria.

§ 105.4 Delegation to local agencies

Proposed subsection (a)(4) would delete reference to the term county as conservation districts may be independent of a county political subdivision.

Proposed subsection (e) would be amended to replace the word “issued” with “authorized”. This amendment would more accurately reflect that a local agency is able to authorize coverage for

certain categories of eligible structures and activities under General Permits, when delegated to do so.

§ 105.12 Waiver of permit requirements

The Board is proposing to amend subsection (a) to revise or clarify existing waivers and add permit waivers for certain low impact structures and activities. The addition of the proposed waivers for certain low impact structures and activities would enable the Department to more effectively and efficiently utilize its resources, while enabling those structures and activities to be conducted without delay. The proposed structures and activities eligible for waiver under this subsection would be required to comply with requirements of the act and this chapter. Subsection (b) would be revised to provide further clarity. The Board would revise current subsection (c) to add criteria to limit eligibility for a structure or activity to qualify for a waiver in subsection (a). A new proposed subsection (d) would be added to retain the current requirements of existing subsection (c).

Subsection (a) is proposed to be amended to clarify existing waivers and add permit waivers for certain low impact structures and activities. Amendments would also make eligibility for a waiver under subsection (a) subject to the new proposed eligibility criteria in subsection (c) and compliance with this chapter under new subsection (d).

Subsection 105.12(a)(1) would be amended to include the formal title of the Pennsylvania Fish and Boat Commission.

Subsection 105.12(a)(2) would be amended to provide a waiver for a water obstruction or encroachment in a stream or floodway with a drainage area of 100 acres or less. This existing waiver is proposed to be amended to ensure that the water obstruction or encroachment does not impede flow or aquatic life passage. The amendments to subsection (a)(2) would further specify that a water obstruction or encroachment proposing to impact a wetland in a floodway, or a stream enclosure is not eligible for this waiver.

Subsection 105.12(a)(3) would be amended to include clarifying deletions and additions. The proposed deletion of “nonnavigable” would be addressed through a blanket restriction for the applicability of waivers where otherwise eligible structures and activities would occur in submerged lands of the Commonwealth under new proposed subsection (c). The eligibility restriction for monopoles or single poles with concrete foundations or pilings is proposed to address large diameter structures located in or along a stream or wetland.

Subsection 105.12(a)(4) would be amended to correct the Hazard Potential Classification for mine related dams eligible for a waiver. The current Hazard Potential Classification “3” is an overlooked error and would be corrected to Category “4” to correspond to the new dam classifications established under the 2011 amendments to Chapter 105 (41 Pa.B. 219; January 7, 2011).

Subsection 105.12(a)(7) would be amended to remove the definition of “crop production”. This term was moved to § 105.1 as it is used in other sections of this chapter.

Subsection 105.12(a)(9) would be amended to reference the new proposed term “aquatic resources”.

Subsection 105.12(a)(11) would be amended to provide further clarity regarding use of this waiver to remove abandoned dams, water obstructions and encroachments. The revisions to this subsection are intended to specify that an applicant can submit an environmental assessment form under § 105.15 to demonstrate eligibility for this waiver.

Subsection 105.12(a)(16) would be amended to incorporate the current requirement for an applicant seeking to conduct restoration activities to provide an environmental assessment under § 105.15.

Subsection 105.12(a)(17) is proposed as a new subsection that would allow the construction and maintenance of a streambank fencing conservation practice associated with crop production or a temporary fencing for protection of a conservation planting or practice located in or along a body of water, along watercourses and their floodways or along a lake, pond or reservoir. This amendment is intended to include protective fencing for riparian buffers. This proposed waiver is not intended for fencing that would collect flood debris or restrict the flow of a body of water or watercourse or that would extend across a stream or watercourse.

Subsection 105.12(a)(18) is proposed as a new subsection that would waive authorized water obstruction or encroachment permit requirements for low impact and non-motorized recreational activities such as walking or biking trails with certain specific length and design restrictions. This waiver would require the development and submittal of a plan to the Department for approval and would specify the information that must be provided in the plan submittal.

Subsection 105.12(a)(19) is proposed as a new subsection that would waive authorized elevated boardwalks in wetlands when utilized for educational and interpretive purposes. This waiver would require the development and submittal of a plan to the Department for approval and would specify the information that must be provided in the plan submittal.

Subsection 105.12(a)(20) is proposed as a new subsection that would waive permit requirements for the temporary emergency placement, operation and maintenance of a water obstruction or encroachment for water withdrawal, including dry fire hydrants for crop production or fire protection. The water obstruction or encroachment for water withdrawal may not alter the bed or bank of the watercourse or body of water. This waiver would not apply to parking or other areas for ancillary activities.

Subsection 105.12(a)(21) is proposed as a new subsection that would waive water obstruction or encroachment permit requirements for archeological, geotechnical or environmental testing, monitoring activities, or investigative activities of a temporary nature. This waiver would include boring or placement of sensors to sample or test soil or rock material and other similar activities, but would not apply to parking or other ancillary areas.

Subsection 105.12(a)(22) is proposed as a new subsection that would waive the placement, maintenance and removal of temporary mats and pads used as a best management practice for

minimizing erosion and sedimentation at wetland crossings. This new subsection would further specify that the wetland must be fully restored to its pre-existing condition after the removal of the temporary mats and pads.

Subsection 105.12(b)(1) would be revised to provide further clarity. This subsection would replace the term “nonnavigable” with submerged lands of this Commonwealth, a defined term in § 105.1.

Subsection 105.12(c) would be revised to add circumstances which would limit the eligibility of a structure or activity for a permit waiver under subsection 105.12(a). The proposed circumstances that would limit eligibility for a permit waiver have been identified by the Department as warranting additional review through the Chapter 105 permitting process due to the Commonwealth’s public trustee obligations. 25 Pa. Code § 105.2(4); See also, 25 Pa. Code § 105.21.

Subsection (d) would be added to incorporate the requirements under existing § 105.12(c). This new subsection would also specify that a structure or activity eligible for a waiver under section 105.12 must be properly designed.

§ 105.13 Regulated activities—information and fees

The proposed amendments to this section would: incorporate updated processes for submitting payment to the Department; provide applicants with the option to submit the disturbance review fee during technical review; clarify the type of dam permit transfers that are subject to the existing fees; eliminate redundancy in the permit application process; and clarify existing requirements regarding what information a project applicant must submit to the Department for review as part of a permit application. The proposed amendments to subsection 105.13(e) would provide further specificity for applicants regarding existing information requirements such as, the cumulative impact analysis, water dependency demonstration, a stormwater management demonstration, floodplain management consistency, alternatives analysis, antidegradation analysis, impacts analysis and mitigation plan. The proposed amendments to this section would also identify authorized signatories on a Chapter 105 application and add subsection (j), to clearly set forth the seal requirements for geologists and engineers. Subsection (k) would be amended to specify that the Department has the discretion to waive specific information requirements under this chapter for restoration projects and other similar activities.

Subsection 105.13(a) would be amended to specify that an applicant may submit permit application fees to the Department by check or other forms of payment. Other methods of payment acceptable to the Department would include electronic transactions.

Subsection 105.13(c)(1)(vii) would be revised to correct the type of dam permit transfers associated with existing fees. The fees in this subsection were initially published in reverse order by error. The fee for a dam permit transfer for dams classified as hazard potential category 1 or 2 under § 105.91, for which proof of financial responsibility is required under § 105.13b, would be \$550. The fee for a dam permit transfer for dams classified as hazard potential category 3 or

4 under § 105.91, for which no proof of financial responsibility is required under § 105.13b, would be \$300.

Subsection 105.13(c)(2)(iii)(A) would be amended to provide applicants with the option to submit the disturbance review fee to the Department during the technical or eligibility review and before the Department's decision on a permit application. This subsection would also be amended to explain how the Department calculates a disturbance review fee for a project. These proposed revisions reflect that the Department works with the applicant to avoid and minimize impacts during the permit application process and are also being proposed to address the practical reality that the scope and purpose of an applicant's proposed project may change after the submission of a permit application and administrative filing fee.

Subsection 105.13(d) would be amended to provide flexibility for applicants relating to permit applications for single projects located in more than one county. This subsection would be amended to allow for the submission of a single permit application for a single project proposed to be located in more than one county. This proposed amendment would benefit applicants by eliminating the need for the submission of multiple permit applications with redundant information and additional fees for the same project. A consolidated permit application review for multi-county projects is practical because the Department now has a more efficient means of reviewing Chapter 105 applications through electronic permitting. In addition to better organization of application material for a single project, the Department would benefit in terms of staffing needs for reviewing multi-county projects.

Subsection 105.13(e) would be amended to provide further clarity regarding existing application requirements. In some instances, current subsection (e) contains permit application components that are already required for the Department's review under § 105.14 but lacks specificity as to what information the applicant must submit to the Department as part of a permit application. The proposed revisions by the Board would provide better clarity and organization regarding the information that is required to be submitted, and therefore, would improve the quality of the application submittals to the Department.

Subsection 105.13(e)(1) would be amended to specify that applicants must conduct a field verification of aquatic resources, and identify proposed temporary and permanent structures or activities as part of a permit application submittal for a dam, water obstruction or encroachment. Proposed revisions to § 105.13(e)(1)(i)(G) clarify what cross sections must contain to be acceptable to the Department and would prevent inconsistent application submittals in this respect. Proposed revisions to § 105.13(e)(1)(iii) would specify the manner in which an applicant is required to meet project description requirements and specifically provides information on what demonstration an applicant must provide to show that a project is water dependent. This amendment would set forth that the dependency must be based on the unavailability of practicable alternatives. *Clean Air Council et al v. DEP*, (“*Clean Air Council*”) 2018 EHB 35, 40 (“[a]n alternative is not really available if it is not practicable.”); *see also Del. Riverkeeper Network v. Sec’y of the Pa. Dep’t of Env’t. Prot.*, (“*Del. Riverkeeper Network*”) 870 F.3d 171, 183 (3d Cir. 2017).

Subsection 105.13(e)(1)(v) and (vi) would be revised to clarify stormwater management demonstration and floodplain management consistency requirements. These proposed revisions are intended to provide further clarity regarding what the applicant is responsible for submitting as part of a permit application and under what standards the Department will review these demonstrations.

Subsection 105.13(e)(1)(vii) would be amended to specify what information requirements should be included for the risk assessment in coastal zone management areas. The proposed amendment specifies that the applicant include an evaluation of short-term and long-term water elevation changes projected by the National Oceanic and Atmospheric Administration.

Subsections 105.13(e)(1)(viii)—(xiii) would be amended to specify what information requirements an applicant must provide as part of the application review process. These particular information requirements have been the subject of frequent technical deficiency letters throughout the history of the Department’s implementation of the Chapter 105 program. The proposed amendments would improve the quality of application submittals. The proposed amendments would incorporate existing requirements for a project alternative demonstration for wetlands under §§ 105.18a(a)(3) and (b)(3) and other aquatic resources under § 105.16. The proposed amendments would also require the applicant to consider reasonably foreseeable development within the watershed when assessing alternatives to ensure that impacts are avoided and minimized to the maximum extent practicable.

Proposed amendments to § 105.13(e)(1)(ix) would specify what information an applicant must include in a mitigation plan and would add a cross reference to other mitigation requirements in § 105.20a (relating to compensation for impacts to aquatic resources). Proposed amendments to § 105.13(e)(1)(x) would provide further specificity regarding what an applicant’s impacts analysis must include. The proposed reorganization of this subsection is intended to be consistent with the factors the Department uses to make a determination of impact under §§ 105.14(b)(1)—(5) and 105.14(b)(12) and would incorporate the terms “direct impacts” and “indirect impacts” from the existing environmental assessment form and “secondary impacts” from existing subsection 105.14(b)(12) under aquatic resource impacts in proposed subsection 105.13(e)(1)(x)(D). The new definition of “aquatic resource impacts” would be added to § 105.1 to support these amendments. The proposed amendments would also clarify that the impacts analysis is not the same as evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93. Finally, the Board is proposing to add new subparagraphs 105.13(e)(1)(xii) relating to antidegradation and (xiii) relating to cumulative impact analysis to incorporate existing factors that the Department evaluates to make a determination of impact under § 105.14(b) into the information requirements section. These proposed additions to subsection 105.13(e) would provide better clarity and organization for applicants regarding what an applicant’s demonstration or analysis must include to meet these existing requirements as part of an application submittal.

Subsection 105.13(e)(4) would be amended to incorporate flexibility for the Department, conservation district or delegated local agency regarding the period for applicants to submit information to remedy incomplete applications or registrations and information requirements. Under this proposed revision, the Department, conservation district or delegated local agency

would make a case-by-case determination regarding how long of an extension the applicant should have to remedy an inadequate application or registration submittal. Through the current implementation of the Chapter 105 program, the Department has determined that some incompleteness items do not warrant the current full 60 day period. The proposed revisions to this subsection would help the Department, conservation districts and local agencies process applications in a more efficient manner and avoid backlogs. Applicants would still be able to request a specific extension to the Department, conservation district or delegated local agency, in writing, and would be required to provide justification for the extension as part of a request. The proposed revisions to this subsection would also add a cross-reference to § 105.21 (criteria for permit issuance and denial).

Subsection 105.13(f) would be revised to clarify what cross sections must contain to be acceptable to the Department and would prevent inconsistent application submittals in this respect.

Subsection 105.13(g) would be revised to more clearly explain the expectation that an applicant for a Chapter 105 permit must provide proof of an application for a permit or erosion and sedimentation control plan under Chapter 102. The proposed amendments are intended to reiterate the applicant's obligations to comply with Chapter 102 during the construction, operation, maintenance, modification, abandonment or removal of a dam, water obstruction or encroachment under this chapter.

This proposed rulemaking would amend subsection 105.13(h) to consolidate the existing requirements under current subsection 105.13(i) since both subsections deal with application signature requirements. This amendment is also intended to incorporate current technology and practices consistent with the Commonwealth's Electronic Transactions Act of 1999 (73 P.S. §§ 2260.101—2260.501).

Existing subsection 105.13(i) is proposed for deletion. This subsection also involves signature requirements for persons who own or have primary responsibility for a dam, water obstruction or encroachment, and would be consolidated into subsection 105.13(h).

The proposed amendments would reorganize existing subsection 105.13(j) as new subsection 105.13(i). New subsection 105.13(i) would add a citation to the Commonwealth's Engineer, Land Surveyor and Geologist Registration Law (63 P.S. § § 148—158.2) for consistency requirements for professional seals, certifications and signatures and would add a citation to 73 P.S. § 2260.303 (relating to Legal recognition of electronic records, electronic signatures and electronic contracts) for consistency requirements if those seals, certifications and signatures would be submitted electronically.

This proposed rulemaking would add a new subsection 105.13(j) to specify what application materials must be submitted to the Department with the affixed seal of a registered professional geologist or engineer as required under Pennsylvania law. This new subsection would also add reference to standards for electronic submission of professional seals, certifications and signatures. This new section is being proposed to eliminate ambiguity regarding what application materials must be submitted with a seal.

Subsection 105.13(k) would be amended to specify that the Department may waive information requirements determined to be unnecessary under the chapter in writing as opposed to just information requirements in § 105.13. The proposed amendments would specify that the Department also has discretion to waive unnecessary information requirements under this chapter for environmentally beneficial projects. The Board is proposing this amendment because environmentally beneficial projects often require similar information which the Department is proposing to incorporate into § 105.15, but have historically encountered delay due to applicants having to address information requirements under this chapter that are not even applicable to these types of projects. By making application preparation and submittal more concise and less burdensome, these types of projects would encounter less delay and the Commonwealth would more expeditiously recognize environmental benefits.

§ 105.13a Complete applications

Proposed amendments to subsection 105.13a(a) would specify what the Department, conservation district or other delegated agency determines to be a complete application or registration. The Board is proposing this amendment to eliminate situations where applicants have experienced confusion or misunderstanding regarding what constitutes a complete application or registration.

Proposed revisions to subsection 105.13a(b) would address inadequate application or registration submittals by applicants. The Board is proposing to provide the Department, conservation districts and other delegated agencies with more flexibility to make case-by-case determinations on how long of an extension an applicant should have to remedy an inadequate application or registration submittal. Through the current implementation of the Chapter 105 program, the Department has determined that some incompleteness items do not warrant the current full 60 day period. This added flexibility would enable the Department, conservation district and other delegated agencies to use resources in a more efficient manner and help ensure that review backlogs do not accrue due to inadequate application submittals. The amendments to this subsection would require applicants to provide a justification for an extension as part of a request. The proposed revisions to this subsection would also add a cross-reference to § 105.21 (criteria for permit issuance and denial).

§ 105.13b Proof of financial responsibility

Section 105.13b would be amended to add potential environmental risks where the Department may require financial assurances, including for compensatory mitigation project sites under § 105.20(a), where applicable. The proposed amendments would also add another option for owners of a high hazard dam that presents a substantial risk to life or property to meet proof of financial responsibility requirements under this chapter.

§ 105.14 Review of applications

Subsections 105.14(a) and (b) would be amended to further clarify existing regulations. Subsection 105.14(a) and subparagraph 105.14(b)(1) would be amended consistent with sections

2 and 5 of the act. See also, 25 Pa. Code § 105.2. The proposed amendments to subsection 105.14(b)(6) would clarify that a dam, water obstruction or encroachment must comply with applicable laws administered by other Commonwealth agencies or commissions. The proposed amendment to subsection 105.14 (b)(7) would specify that the Department will consider whether an alternative location, route or design is practicable during its review of an application. This amendment is consistent with the recent opinions of the Environmental Hearing Board in *Clean Air Council* and *Del. Riverkeeper Network*. Subsection 105.14(b)(13) would be amended to clarify that the Department will evaluate the effects of the proposed project on aquatic resources and their functions when making a determination of adverse environmental impact. The proposed amendments to this subsection would further specify that the Department will evaluate proposed compensatory mitigation demonstrations under § 105.20a for proposed environmental impacts to aquatic resources and their functions.

§ 105.15 Environmental assessment

The Board proposes to add subsection 105.15(a)(4) to identify environmental assessment requirements for aquatic resource restoration projects such as a stream or floodplain restoration. Through the implementation of Chapter 105 over the past several years, the Department has discovered a need to differentiate the application requirements for environmentally beneficial projects that reestablish or rehabilitate aquatic resources to their natural characteristics and aquatic resource functions from the application requirements for other projects.

Proposed amendments to subsection 105.15(d) would specify that the Department has conducted environmental assessments for the new categories of waivers proposed in § 105.12(a).

§ 105.16 Environmental, social and economic balancing

This section, which applies to aquatic resources other than wetlands, would be amended to add a cross-reference to compensation requirements in § 105.20a.

§ 105.17 Wetlands.

The Board is proposing to amend § 105.17(1) by splitting current subsection (iii) into 3 new subsections for clarity. The new subsections will be as follows: new subsection (iii) would refer to wetlands associated with wild trout streams; new subsection (iv) would refer to wetlands associated with exceptional value streams; and new subsection (v) would refer to wetland associated with wild and scenic rivers. Subsequently, current subsections (iv) and (v) would be renumbered to (vi) and (vii) respectively.

§ 105.18a Permitting of structures and activities in wetlands

Proposed amendments to subsections 105.18a(a)(7) and (b)(7) would incorporate the title of § 105.20a as proposed to be amended by the Board.

§ 105.20a Compensation for impacts to aquatic resources

Proposed amendments to this section would update the existing compensatory mitigation framework for proposed impacts to aquatic resources and aquatic resource functions that cannot be eliminated. These amendments would be consistent with section 2 of the act, The Clean Streams Law, existing requirements under this chapter relating to mitigation and current scientific principles and practices. These amendments would generally be consistent with the Corps 2008 Mitigation Rule at 40 CFR part 230, subchapter J.

Subsection 105.20a(a) would be updated to require an applicant to provide compensation for unavoidable impacts to aquatic resources by replacing the aquatic resource functions that will be impacted or by providing substitute resources or environments. Amendments to this subsection are intended to incorporate compensation requirements for watercourses and their floodways, wetlands and other bodies of water into one section. These requirements are found in the definition of *mitigation* in §§ 105.1, 105.13(e)(ix), 105.16(a), 105.18a(a)(7) and (b)(7) and 105.20a.

The proposed amendments would add “no net loss” of wetlands in subsection 105.20a(b) consistent with the Department’s longstanding goal and set forth general considerations for siting criteria for service areas in subsection 105.20(c) for the three types of mitigation sites. Subsection 105.20a(d) would be added to specify the compensation information that the applicant will provide for the Department to evaluate as part of a compensatory mitigation determination for impacts to aquatic resources and their aquatic resource functions. In addition, the proposed amendments would add subsection 105.20a(e) to reference to the Department’s function based aquatic resource compensation protocol (technical guidance 310-2137-001) and aquatic resource assessment protocols (technical guidance 310-2137-002, 310-2137-003, 310-2137-004) and other equivalent methodologies as methodologies that may be used for assessing a project’s proposed effects on aquatic resources and aquatic resource functions. The proposed amendments would clarify that these assessments are not the same as evaluations or assessments of protected water uses made under 25 Pa. Code Chapter 93.

Subsection 105.20a(f) would be added to specify monitoring and performance standards for compensatory mitigation to ensure the proper achievement of replacement criteria for aquatic resources and aquatic resource functions..

Subsection 105.20a(g) would be added to provide the Department with the authority to require compensatory mitigation at a higher ratio based on the determination of the area(s) affected, the functions destroyed or adversely affected by an unauthorized project and the willfulness of the violation. This subsection is intended to address willful non-compliance with the permitting requirements of this chapter to protect and maintain aquatic resources and aquatic resource functions.

The definitions “aquatic resources,” “aquatic resource functions,” and “aquatic resource impacts” are proposed to be added as definitions in § 105.1 to support these proposed amendments.

§ 105.21 Criteria for permit issuance and denial

Section 105.21 would be revised to provide consistency with updated terminologies and to clarify that issuance or denial of a permit under this chapter constitutes issuance or denial of a Clean Water Act Section 401 water quality certification as integrated under § 105.15 for structures and activities only seeking authorization from the Corps under Section 404 of the Clean Water Act (33 U.S.C. § 1344) or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 and 403).

§ 105.25 Transfer of Permits

Proposed amendments to § 105.25 would require the permittee and owner to report a change in ownership of a dam, water obstruction or encroachment to the Department in writing within 30 days of the transfer of ownership; and would also include the transfer of ownership of a dam not needing permit under this chapter. These proposed amendments to § 105.25 would help the Department track the owner and permittee responsible for operating and maintaining for a dam, water obstruction and encroachment.

§ 105.35 Charges for use and occupation of submerged lands of this Commonwealth

This proposed rulemaking would amend § 105.35 to clarify existing requirements and add new categories of activities.

Subsection 105.35(a)(1)(ii) would be amended to clarify that the mooring areas are associated with barge fleeting only; subsection 105.35(a)(2) would be amended to clarify that the \$250 annual charge for occupying submerged lands of the Commonwealth is only applicable to coverage under the general permit, for small docks and boat launching ramps (currently GP-2). These clarifications would resolve confusion that has arisen during the Department's implementation of the submerged lands license program regarding structures and activities that are required to pay charges for occupying submerged lands of this Commonwealth.

The addition of subsection 105.35(a)(3) is intended to clarify that a groin structure that occupies submerged lands of the Commonwealth in and along the shoreline of Lake Erie would have an annual submerged lands license charge of \$250. Groin structures are generally unique to the Lake Erie shoreline area in Pennsylvania.

Subsections 105.35(c)(6) and (7) would be amended to clarify references; the Board is proposing to add new subsections 105.35(c)(8) and (9) to make projects and activities constructed for the significant benefit of the environment and projects or activities of a temporary nature not to exceed one year eligible for exemptions from annual charges.

§ 105.43 Time limits

Proposed amendments to subsection 105.43(c) relating to dams would delete the existing language and add subparagraphs 105.43(c)(1)—(c)(3) to provide more clarity regarding the expiration of dam permits unless extended by the Department; specify the notification

requirements by the permittee or owner. The Department has determined to revise this section due to confusion that has resulted from dam owners.

§ 105.47 Removal of dams and removal or abandonment of water obstructions and encroachments

Section 105.47(b) would be amended to specify that the permittee or owner is required to remove a water obstruction or encroachment which may pose a threat to public health, safety or the environment, or that no longer serves a purpose. This language is proposed due to the legacy of abandoned industrial and commercial structures in Pennsylvania's waterways and to ensure that water obstructions or encroachments that may pose a threat are being properly addressed by the owner or permittee.

§ 105.53 Inspections by permittees and inspection reports

This section would be revised to add conduit inspection criteria in new proposed subsection (a)(3) for Hazard Potential Category 1 and Category 2 dams as classified in § 105.91. Existing subsections 105.53(a)(3) to (a)(7) would be reorganized into subsections 105.53(a)(4) to (a)(8).

§ 105.81 Permit applications for construction and modification of dams and reservoirs

This section would be amended to correct a cross-reference by replacing § 105.13(d)(1)(i) with § 105.13(e)(1)(i) (relating to permit applications-information and fees).

§ 105.82 Permit applications for operation and maintenance of existing dams and reservoirs

Subsection 105.82(a)(1) would be amended to correct a cross-reference by replacing § 105.13(d)(1)(i) with § 105.13(e)(1)(i). Subsection 105.82(a)(9) is proposed for amendment to clarify the need for dams constructed or modified after July 1, 1979 to obtain easements.

§ 105.89 Permit applications for operation and maintenance of existing dams and reservoirs

This section would be amended to correct a cross-reference by replacing § 105.13(d)(1)(i) with § 105.13(e)(1)(i).

§ 105.96 Outlet works

Section 105.96 would be amended to clarify criteria for the drawdown rate of reservoirs impounded by earth fill dams, how to determine the drawdown rate, and address seepage control along conduits. This section would also be amended to provide the Department with the discretion to waive one or more of the conditions of this section if necessary.

§ 105.97 Stability of structures

Specific Corps design requirements would be added to § 105.97 for earth fill and concrete dams. Existing subsections 105.97(d)(1) —(g)(2) would be deleted and existing subsection 105.97(h)

would be reorganized as 105.97(e). The terminology used in the existing regulation differs from the design requirements set by the Corps which represents the standard in design. The current version of Chapter 105 refers to normal pool and maximum pool while the Corps refers to usual, unusual and extreme pools. The proposed amendments would make this section consistent with the Corps' standard design terminology.

§ 105.98 Design flood criteria

Section 105.98 would be revised to clarify flood ranges and reference incremental dam breach analysis (IDBA). For dams of Hazard Potential Category 1 or 2, the design flood is proposed to be based on the results of an IDBA or in cases where an IDBA is not performed, the design flood shall be the Probable Maximum Flood (PMF). This proposed revision would help clarify the discharge and storage capacity requirements under this section.

§§ 105.121—105.123 relating to Fishways; Drawdown of impounded waters; and Restoration of aquatic life

Amendments to §§ 105.121—105.123 would add formal reference to the Pennsylvania Fish and Boat Commission.

§ 105.134 EAP.

Proposed amendments would update subsection 105.134(a)(4) to specify that the permittee or owner must use the most recent EAP template developed by the Department and PEMA; and that the EAP is required to be uploaded into the online EAP system for submission and acknowledgement of EAPs. Subsection (g) would be amended to provide further clarity as to when an EAP must be updated.

§ 105.161 Hydraulic capacity.

Subsection 105.161(a)(3) would be revised to include reference to geomorphic stability as part of the natural regime of a stream. Subsection 105.161(e) would be revised to remove antiquated references.

§ 105.171 Maintenance.

The Board proposes to delete an antiquated reference to the Bureau's former address.

§ 105.245 Disposal of waste materials.

The board proposes to correct an erroneous reference to the Resource Conservation and Recovery Act of 1976.

§ 105.401 Permit applications.

Proposed amendments to § 105.401 would update application information requirements, including the criteria for discharges of dredged or fill material into aquatic resources. The existing requirements of this section do not explicitly address the location of water supply wells, and certain language in this section is not current or does not reference applicable state requirements. The proposed amendments to § 105.401(1) would require project applicants to identify all public water supply wells within a one mile radial distance of proposed project boundaries. The proposed amendments to subsection 105.401(5) would require the applicant to provide a demonstration that dredged or fill material is not contaminated and provides that the applicant may use the Department's *Management of Fill Policy* (258-2182-773) or other equivalent alternative methodology to make this demonstration. The demonstration must show that the dredged or fill material does not contain a toxic material regulated under section 6 of the Toxic Substances Control Act (15 U.S.C.A. § 2605), a hazardous waste as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §§ 691—6985) or a hazardous material as defined by regulation at 49 CFR 171.8 (relating to definitions and abbreviations) that is not included in the *Management of Fill Policy* in an amount that will cause an adverse impact to human health, safety or the environment. The proposed amendments to this section would also add a new subsection, § 105.401(6), to limit the quantity of dredged or fill material to the amount necessary to complete the project.

§ 105.411 General criteria.

Proposed revisions to § 105.411 would incorporate reference to applicable criteria under this chapter and are intended to ensure that adverse impacts to the public health, safety and the environment are nullified.

§ 105.446 Procedure for issuance.

Subsection 105.446(e) would be amended to provide for the Department to periodically review issued general permits for adequacy and revise, update, or revoke a general permit when necessary.

§ 105.451 Identification and delineation of wetlands—statement of policy.

Proposed revisions to § 105.451 would remove the Bureau's outdated contact information and indicate that the *1987 Corps of Engineers Wetland Delineation Manual* along with regional supplemental guidance can be found online.

§ 105.452 Status of Prior Converted Cropland—statement of policy.

This proposed rulemaking would update this section to: provide further clarity for coordination with USDA; update references to the latest version of the *National Food Security Act Manual*; provide for future amendments; and reference terms as used in the *National Food Security Act Manual* relating to determination of prior converted cropland for agricultural crop production purposes. The proposed updates to this section would provide the opportunity for consistency with Federal agency determinations relating to prior converted cropland, including the Corps and

EPA, and to the implementation of best management practices for agricultural crop production purposes.

Proposed revisions to § 105.452 would provide clarifications regarding the Department's implementation of policy regarding prior converted cropland for making wetland determinations. The proposed update also clarifies circumstances where the Department would consider these areas abandoned, reverting to wetlands and therefore subject to this chapter.

F. Benefits, Costs, and Compliance

Benefits

The regulated community is expected to benefit from the proposed Chapter 105 regulatory amendments by way of incorporating updated and revised sections and definitions, providing further clarity regarding existing application requirements, updating planning, design, construction, monitoring and maintenance of dams, and updating the compensatory mitigation framework for proposed impacts to aquatic resources and aquatic resource functions that cannot be eliminated.

The incorporation of updated and revised sections and accompanying definitions would provide an opportunity for improved understanding of the requirements under this chapter, foster the submission of better-quality applications by the regulated community, and result in more timely permit decisions by the Department.

The proposed addition of structures or activities eligible for a permit waiver under § 105.12(a) and structures and activities eligible for exemptions from annual submerged lands license charges in § 105.35(c) would provide incentive for trail associations, conservation and environmental groups to undertake low-risk, minimal environmental impact or environmentally beneficial projects, such as trails and educational boardwalks, which would otherwise entail application fees, annual submerged lands charges or both. The addition of a proposed waiver for the temporary emergency placement, operation and maintenance of water withdrawal intakes for crop production or fire protection would eliminate application fee costs for farmers and volunteer fire companies.

The proposed amendment to § 105.13(d) allowing projects crossing county boundaries to be submitted under one permit application or registration would result in additional cost savings for the regulated community. The Department estimates that it receives roughly 25 multi-county projects per year on average based on experience in recent years. Most of these applications are for linear projects from non-governmental entities, such as utilities, and these projects typically span two counties. About 15 of those projects required individual Chapter 105 permit applications. The applicant for an individual permit would save on not having to pay an additional \$1,750 administrative filing fee per county. The Department occasionally receives applications for long linear utility projects that cross several counties, and in those cases, an applicant would save on the cost of the administrative filing fee based on the number of counties the proposed project would be located in. The Department estimates that four projects per year would fall into this category, crossing four counties on average, which would translate to an estimated savings of \$5,250 per application.

This proposed rulemaking would improve compensatory mitigation planning, implementation and management by emphasizing a watershed approach in selecting project locations, requiring measurable environmental performance standards for each form of aquatic resource compensation. This proposed revisions to § 105.20a would address compensation of unavoidable impacts to aquatic resources in a manner that is generally consistent with the 2008 Federal Mitigation Rule by: (1) maintaining a “no net loss” of wetlands requirement; (2) revising siting criteria on a watershed basis; and (3) allowing mitigation banking, in-lieu fee, and permittee responsible mitigation options. The proposed amendments would incorporate the Department’s Rapid Assessment and Aquatic Resource Functional Assessment Protocols for compensatory mitigation by reference and allow flexibility for project applicants to submit mitigation proposals using other demonstrated acceptable methodologies. The addition of these guidance documents and methodologies would provide a standardized and predictable process for the regulated community in evaluating the appropriate level of compensatory mitigation needed to offset unavoidable impacts to aquatic resources for a given project. These compensatory mitigation actions are necessary to allow the Department to fulfill its purposes under section 2 of the act and section 4 of The Clean Streams Law to protect, conserve, and improve aquatic resources and their aquatic resource functions.

A survey conducted by the Department in 2006 determined permittee-responsible compensatory mitigation has an average range in cost of \$60,000 to \$90,000 per acre, not including land purchase costs. Adjusted for inflation, that cost ranges from approximately \$78,350 to \$117,520 in 2020. Mitigation costs for stream and floodway impacts in 2006 ranged in costs from \$400 to \$600 per linear foot. Those mitigation costs in 2020 are estimated to be \$520 to \$785 per linear foot. The availability of mitigation banking and an in-lieu fee mitigation program in Pennsylvania provides the opportunity for an alternative to the permittee in designing, constructing and operating individual mitigation sites, considered as “permittee responsible” mitigation sites. Also, larger scale projects, made possible by mitigation banking and in-lieu fee programs, also provide for greater natural resource improvements. Adding these mitigation options through this proposed rulemaking will reflect updated practices and provide greater flexibility and predictability for applicants. This will translate into time savings for both applicants and the Department while improving natural resources through improved quality of mitigation projects. Potential benefits also exist to social and environmental wellbeing from mitigation banking and in-lieu fee program by restoring historically impaired or impacted aquatic resources, such as removal of legacy sediment.

The proposed addition of § 105.35(a)(3) to revise submerged lands license agreement (SLLA) charges for 26 groin structures in and along the shoreline of Lake Erie would result in the reduction of the annual charge of \$750 to an annual charge of \$250, a savings of \$500 annually. Under the existing regulations, the owners of these groin structures pay \$19,500 in total annual charges. This proposed rulemaking would result in the regulated community paying only \$6,500 in total annual charges, a total savings of \$13,000 annually.

The proposed addition of § 105.35(a)(8) to exempt SLLA charges for projects or activities constructed and operated for the significant benefit of the environment would provide an annual cost savings for the regulated community. The Department estimates that less than 10% of

projects require an SLLA and that roughly 7% incur charges. It is infeasible to estimate the cost savings that would be affected by this proposed regulatory change, as the charges are based on the facility area needed to be occupied for long-term operation and maintenance activities.

Costs

The Board is proposing minor regulatory revisions that would have a direct effect on costs to some parties. These revisions include clarifying that the submission of disturbance fees may occur during the Department's permit application review; establishing additional permit waivers for specific water obstructions or encroachments associated with a streambank fencing conservation practice or temporary fencing for the protection of a conservation planting or practice, non-motorized low impact trails, emergency water withdrawals, environmental testing, and erosion and sediment control practices for wetlands; and the exclusion of annual charges for submerged lands license agreement charge exemptions for permittees with projects and activities which consist of construction, implementation, operation or maintenance of an aquatic resource restoration project, agricultural conservation practices, environmental reclamation or remediation, environmental treatment or clean-up; and other similar activities.

The clarification of existing requirements are not expected to result in any substantial indirect cost increase for persons constructing, operating or maintaining a dam, water obstruction or encroachment as most of the amendments are a codification of existing practices that are being provided for clarity, so compliance costs are not expected to increase.

There is an expectation that cost savings would result from: providing clarification for improved quality and timeliness of permit application and registration materials; through the elimination of the outdated and unnecessary requirements; and by the addition of activities qualifying for Department permit waivers.

The Board also expects that the financial responsibility of permittees and environmental benefits would both improve by providing an alternative to permittee-responsible mitigation which has been demonstrated to succeed less often due to site and landowner constraints, and perform suboptimally due to smaller size which limits the potential for effective environmental benefits. By amending § 105.20a to update the compensation framework, permit applicants would have improved flexibility to address the compensation of impacted aquatic resources through mitigation banking, in-lieu fee program or permittee responsible mitigation.

Under the Department's enhanced mitigation banking program, mitigation bankers can create, restore, and enhance wetlands and waterways at different sites and then sell the mitigation credits earned at these sites to permit applicants to meet the Chapter 105 mitigation requirements. This allows for timelier application reviews and better controlled and more effective wetland and stream mitigation projects. While 8 acres of wetland mitigation have been approved for the 2018-2019 fiscal year, it is expected that many more acres of wetland mitigation will be approved over upcoming fiscal years as more entrepreneurial bankers become established and permitted. The Department approved one new mitigation bank site in the 3rd quarter of the current fiscal year approving 2,137 linear feet of stream and floodplain restoration and approximately 6 acres of wetlands. The Department also approved two additional mitigation

bank sites in the 4th quarter to repair and rehabilitate over 36,600 linear feet of streams and their floodplains, and create, reestablish, rehabilitate or enhance over 38 acres of wetlands. The Department is currently reviewing 6 additional mitigation bank sites (acreage figures not yet available) and it expects to approve in the 4th quarter. Overall, a net positive effect on competitiveness of regulated firms occurs because such policies promote cost-cutting efficiency improvements, which in turn reduce or completely offset regulatory costs, and foster innovation in new mitigation strategies.

The proposed regulatory amendments have the potential to affect any person or entity that is proposing to construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment located in, along or across or projecting into aquatic resources. Data on the magnitude and portion of specific number of business entities, including small businesses, required to comply with the proposed amendments is not known. The Department cannot predict with any degree of confidence the number of permit applications or the size, scope, or types of proposed projects. Several factors play into this unpredictability, including that; 1) application fees are tied to the number of crossings for some types of projects and are based on impact acreage or per linear footage for other types; 2) the type of Chapter 105 permit/authorization is dependent on eligibility criteria, including whether there are crossings of exceptional value waters; and 3) the activity levels of industry and other regulated entities ebbs and flows with market conditions, contract negotiations and availability of funding.

Compliance assistance plan

The Board will provide the necessary modifications to forms, fact sheets, and technical guidance, and provide supplemental training through webinars, workshops, or other public venues.

Paperwork requirements

Most of the revisions to this proposed rulemaking are updates, clarifications, waivers, or codifications of existing requirements. The Board envisions that the rulemaking will require less forms, reports, or other paperwork. For a minor component of the proposed revisions, the Board anticipates only minor modifications to forms, fact sheets, and technical guidance.

G. Pollution Prevention

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. DEP encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This regulation has incorporated the following pollution prevention incentives:

This proposed rulemaking would address pollution prevention in several ways. One way is by introducing amendments to simplify the environmental assessment requirements for aquatic

resource restoration projects, including stream restoration or a floodplain restoration project. These types of projects are of a similar nature and seek to reestablish or rehabilitate aquatic resources to their natural characteristics and aquatic resource functions.

The proposed Chapter 105 rulemaking would clarify permit application information and plan requirements, including the mitigation plan, impacts analysis, cumulative impact analysis, water dependency, alternatives analysis, antidegradation implementation requirements for ensuring the protection, maintenance, reclamation and restoration of aquatic resources.

H. *Sunset Review*

The Board is not proposing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on **DATE**, the Board submitted a copy of the proposed Chapter 105 amendments and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed amendments within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor.

J. *Public Comments*

Interested persons are invited to submit to the Board written comments, suggestions, support or objections regarding the proposed rulemaking. Comments, suggestions, support or objections must be received by the Board by **DATE**. In addition to the submission of comments, interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by the Board by **DATE**. The one-page summary will be distributed to the Board and available publicly prior to the meeting when the final-form rulemaking will be considered.

Comments including the submission of a one-page summary of comments may be submitted to the Board online, by e-mail, by mail or express mail as follows.

Comments may be submitted to the Board by accessing eComment at:
<http://www.ahs.dep.pa.gov/eComment> .

Comments may be submitted to the Board by e-mail at RegComments@pa.gov . A subject heading of the proposed rulemaking and a return name and address must be included in each transmission.

If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt.

Comments submitted by facsimile will not be accepted.

Written comments should be mailed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477. Express mail should be sent to the Environmental Quality Board, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

K. Public Hearings

If sufficient interest is generated as a result of this publication, a public hearing will be scheduled at an appropriate location to receive additional comments.

Patrick McDonnell
Chairperson