

**CONDITIONAL STATE WATER QUALITY CERTIFICATION FOR
THE U.S. ARMY CORPS OF ENGINEERS
PENNSYLVANIA STATE PROGRAMMATIC GENERAL PERMIT (PASPGP-5)**

COMMENT RESPONSE DOCUMENT

JULY 15, 2016



BUREAU OF WATERWAYS ENGINEERING AND WETLANDS

Conditional State Water Quality Certification for the U.S. Army Corps of Engineers Pennsylvania State Programmatic General Permit (PASPGP-5)

The Pennsylvania Department of Environmental Protection (Department or DEP) published notice in the *Pennsylvania Bulletin* on May 28, 2016 (46 Pa. B. 2737) of Pennsylvania's Proposed Conditional State Water Quality Certification for the Pennsylvania Statewide Programmatic General Permit – 5 (PASPGP-5) issued by the United States Army Corps of Engineers (Corps). The Department received comments from one commentator during a 30-day public comment period on the proposed certification. The Department has reviewed those comments and its responses follow.

COMMENTATOR

1. Krissy Kasserman and Faith Zerbe Pennsylvania Campaign for Clean Water

COMMENTS / RESPONSES

1. **Comment:** Under Chapter 105, waiver 2, any stream in Pennsylvania where the drainage area is 100 acres or less – including any EV or HQ stream – can be filled in and eliminated. Such impacts to Special Protection waters would qualify for SPGP (general permit) as non-reporting which means that they would not be reviewed at any level. Despite the science that clearly documents the harm this headwater filling practice causes, it appears no changes are being considered at this time to stop this practice for the next five years. This type of waiver should not be allowed in any stream and definitely should not be allowed in Special Protection waters. The science on headwater streams clearly indicates that these important headwaters provide essential watershed health qualities, habitat for benthic macro invertebrates and other wildlife and fauna, nutrient cycling, and reduction of sediment and pollutants to help purify water quality downstream. We attach this scientific white paper with our comment to provide more details and support for not allowing this waiver to continue. At the very least, the Department should not allow this waiver in HQ and EV streams.

Response: Under Pennsylvania's Dam Safety and Encroachments Act (32 P.S. §§ 693.1-693.27) and its implementing regulations (25 Pa. Code Chapter 105), the Department regulates the construction, operation, maintenance, modification, enlargement or abandonment of dams, water obstructions and encroachments. In certain instances, however, the requirement to obtain a permit has been waived (25 Pa. Code § 105.12). A water obstruction in a stream or floodway with a drainage area of 100 acres or less qualifies for a permit waiver (25 Pa. Code § 105.12(a)(2)).

The conditions included by the Department in the State Water Quality Certification for PASPGP-5 protect Pennsylvania's water resources, including streams or floodways that do not require a Chapter 105 permit under 25 Pa. Code § 105.12(a)(2). To obtain coverage under PASPGP-5, an applicant must obtain all necessary permits or approvals from the Department, including, but not limited to those required by the Clean Streams Law (35 P.S. §§ 691.1-691.1001), the Dam Safety and Encroachments Act the Hazardous Sites Cleanup Act (35 P.S. §§ 6020.101-6020.1305), the Land Recycling and Environmental Remediation Standards Act (35 P.S. §§ 6026.101- 6026.908) and the regulations promulgated thereunder including 25 Pa.

Code Chapters 91, 92a, 93, 95, 102, 105 and 260a-299. Additionally, an applicant must comply with all environmental assessments and other requirements under these regulations.

The commentator's assertion that headwater streams with drainage areas of 100 acres or less can be filled and eliminated without any level of review under PASPGP-5 is incorrect. The Corps has issued PASPGP-5 under section 404(e) of the Clean Water Act (33 U.S.C. § 1344) authorizing the discharge of dredged and/or fill material into waters of the United States for activities identified as being similar in nature and resulting in no more than minimal individual or cumulative adverse effects on the aquatic environment. To obtain coverage under PASPGP-5, a person conducting an eligible activity in a headwater stream with a drainage area of 100 acres or less must obtain State authorization from the Department. *See* PASPGP-5 Part VI.A.30 (General Conditions and Processing Requirements).

An applicant seeking authorization for coverage under PASPGP-5 for an activity that the applicant believes qualifies for the State permit waiver provided under 25 Pa. Code § 105.12(a)(2) must submit a request to the appropriate DEP Regional Office for review. The request must include sufficient information about the proposed project and its direct and indirect impacts to waters of the Commonwealth, both temporary and permanent, to allow the Department to determine whether the activity is eligible for the Chapter 105 permit waiver and coverage under PASPGP-5. After review, the Department will send written notice to the applicant as to its eligibility for the Chapter 105 permit waiver and coverage under PASPGP-5.

In addition, a proposed activity requires review by the Corps under PASPGP-5 even if it qualifies for the State permit waiver provided under 25 Pa. Code § 105.12(a)(2) in circumstances described in PASPGP-5 Part IV.B. (Reporting Activities). For example, Corps review is required when certain impact thresholds are exceeded (*e.g.*, > 0.5 acres of waters/wetlands are impacted, > 250 linear feet of streams are permanently impacted, etc.), when certain issues of Federal concern are present (*e.g.*, threatened and endangered species, historic resources, etc.), or when other significant adverse impacts are present. To the extent a proposed project involves both regulated activity that requires a permit under Chapter 105, as well as regulated activity that qualifies for the permit waiver under 25 Pa. Code § 105.12 (a)(2), the Department requires that all regulated activities be included in the permit, even those that qualify for the permit waiver. In this circumstance, all regulated activity covered by the permit would be considered in determining whether Corps review is required under PASPGP-5.

The Department encourages persons who believe that project specific activities eligible for the permit waiver under § 105.12 (a)(2) are being conducted without obtaining State authorization from the Department to contact the appropriate DEP Regional Office. If the Department, upon complaint or investigation, finds that a structure or activity which is eligible for a permit waiver under 25 Pa. Code § 105.12(a), has a significant effect upon safety or the protection of life, health, property or the environment, the Department may require the owner to apply for and obtain a Chapter 105 permit.

2. **Comment:** It appears from the language that certain Chapter 105 General Permit registrations still are allowed in HQ and EV waters. In both of these situations the projects impacting our streams and wetlands will get little to no review and so are essentially on the

“honor” system of the applicant. We believe that such impacts being automatically allowed in EV (and possibly in HQ) waters would be in direct opposition to state and federal (Tier 3) antidegradation requirements, the Clean Streams Law and Article 1, Section 27 of the Pennsylvania Constitution. We believe that all activities proposed in HQ and EV waters should be authorized only after careful individual permit review, and that no waivers or general permits should be allowed in EV or HQ waters—otherwise, the Department cannot ensure that these streams are being afforded “special protection” or that activities proposed in them will satisfy state and federal anti-degradation requirements.

Response: An applicant may be eligible for coverage under PASPGP-5 for an activity that qualifies for coverage under a general permit issued by the Department under 25 Pa. Code Chapter 105, Subchapter L. In some instances, activities that qualify for coverage under a Chapter 105 general permit can be authorized in an EV or HQ water. For example, the Department has issued a general permit for utility line stream crossings that can be used in HQ waters (BWEW-GP-5), a general permit for minor road crossings that can be used in HQ streams (BWEW-GP-7), and a general permit for temporary crossings that can be used in EV or HQ streams (BWEW-GP-8). In these instances, the Department includes requirements in the general permits to ensure that the permittee will conduct the activities that qualify for coverage consistent with Federal and State antidegradation requirements. Activities authorized under these Chapter 105 general permits can qualify for coverage under PASPGP-5.

The commentator’s assertion that activities authorized under Chapter 105 general permits receive little or no review is incorrect. To qualify for coverage under a Chapter 105 general permit, an applicant must submit required information to the appropriate DEP Regional Office or delegated County Conservation District Office to register for coverage. This information is then reviewed by the Department or delegated Conservation District to ensure that the proposed activity is eligible for coverage under the general permit. As part of this review process, the Department or Conservation District staff will review any proposed direct or indirect impacts and, if warranted, require mitigation as defined in 25 Pa. Code § 105.1. In addition, a proposed activity may require review by the Corps under PASPGP-5 even if it qualifies for the Chapter 105 general permit for the reasons described in Part IV.B. of PASPGP-5.

Any person engaging in a regulated activity under PASPGP-5 is obligated by Federal and State law to conduct that activity consistent with the terms and conditions of the Federal and State authorizations granted. The Corps and the Department have authority to conduct inspections and to investigate complaints to verify compliance with PASPGP-5 and the associated State authorizations. An applicant’s authorization can be suspended or revoked for failure to comply with the terms and conditions of its authorization. In addition, the Corps and the Department can take enforcement actions and impose penalties upon applicants that do not comply with the terms and conditions of their authorizations. The Department encourages persons who believe regulated activities are being conducted without the proper authorization from the Department, or contrary to the terms and conditions of the authorization received from the Department, to notify the appropriate DEP Regional Office for investigation.