



American Petroleum Institute

Pennsylvania



The Honorable Secretary Patrick McDonnell  
Chairperson, Environmental Quality Board  
Rachel Carson State Office Building, 16th Floor  
400 Market Street  
Harrisburg, PA 17101

February 3, 2021

RE: Proposed Rulemaking: Dam Safety and Waterway Management (#7-556)

Submitted electronically to: <https://www.ahs.dep.pa.gov/eComment/>

Dear Secretary McDonnell:

API Pennsylvania (API PA) would like to offer the following comments on the proposed rulemaking: Dam Safety and Waterway Management (#7-556). We appreciate the willingness of the department to work with our industry to improve regulatory processes as well as our natural environment. As an organization, API is committed to advancing safe and responsible natural gas production while continually reducing environmental impacts and improving the health and safety of our employees, operations, and communities. Accordingly, please find our comments attached with this correspondence.

API PA is a division of the American Petroleum Institute (API), the national trade association representing all facets of the natural gas and oil industry, which supports more than 10 million U.S. jobs. API's 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of millions of Americans.

API is also a standard setting organization. For more than 100 years, API has led the development of petroleum and petrochemical equipment and operating standards. These standards represent the industry's collective wisdom on everything from drill bits to environmental protection, and embrace proven, sound, engineering and operating practices and safe, interchangeable equipment and materials for delivery of this important resource to our nation. API maintains more than 700 standards and recommended practices. Many of these are incorporated into state and federal regulations. API encourages and participates in the development of state regulations and other regulatory documents that are protective of public health and safety, the environment, and the industry workforce. In this context, API PA offers the following comments and looks forward to continuing to work with the Department.

Sincerely,

A handwritten signature in cursive script that reads 'Stephanie Catarino Wissman'.

Stephanie Catarino Wissman  
Executive Director  
API Pennsylvania

**API PA****Comments on Proposed Revisions to Chapter 105  
Dam Safety and Waterway Management****• § 105.1 – Definitions**

- “Geomorphic” – The term “geomorphic” does not appear in the current Chapter 105 regulations but the new terms “geomorphic measurements” and “geomorphic stability” are used in new Proposed language at §§ 105.15(a)(4)(viii), and 105.161(a)(3). We suggest that a definition of “Geomorphic” be added to ensure clarity on what “geomorphic stability” and “geomorphic measurements” are referring to in the proposed language where those terms are used.
- “Incremental Dam Breach Analysis” – Although not related to a proposed revision, in the current definition, should the wording “to determine the highest runoff event” actually refer to the “highest” runoff event that causes the threats described, or should it be the “lowest” runoff event that causes those threats?
- “Maintenance” – In the proposed definition of “maintenance,” we suggest removing the language at the end of the definition that reads “as authorized by the Department” to avoid a strict interpretation that every small maintenance activity on a dam, water obstruction, or encroachment must be DEP “authorized.” For example, § 105.171(b) requires that for culverts, “maintenance activities shall be conducted to minimize erosion and sedimentation resulting therefrom” and it would seem unnecessary to have to ensure specific DEP authorization prior to every such maintenance activity that may become necessary. We suggest that the definition be revised as shown below:
  - *“Maintenance—Periodic activities conducted to preserve the condition of a dam, water obstruction or encroachment ~~as authorized by the Department.~~”*
- “Paleo-Aquatic” – DEP should consider defining the term “paleo-aquatic,” as used in the proposed new language at § 105.15(a)(4)(viii), since this is not commonly used terminology and does not appear in the current Chapter 105 regulations.
- “Probable Maximum Flood (PMF)” and “Probable Maximum Precipitation (PMP)” – In the definitions for both the PMF and PMP, should the term “possible” within the definitions be used rather than the word “probable” as in the terms themselves. For example, in the definition of PMP, it isn’t clear how one would be able to determine the amount of precipitation that is “physically possible,” but the amount “physically probable” could seemingly be determined from historical records (and the same for “reasonably possible” vs a recommended “reasonably probable” in the definition of PMF).

- “Restoration” – The proposed definition requires reestablishing or rehabilitating aquatic resources to “natural characteristics and functions,” however the reference to “natural” is somewhat ambiguous and subject to varying interpretations. Consequently, the definition should also allow for reestablishing or rehabilitating to “pre-impact” characteristics and functions, as shown below:
    - *“Restoration—The process of reestablishing or rehabilitating aquatic resources to natural or pre-impact characteristics and functions.”*
  - “Wetland Functions” – The proposed addition to this definition of new item (x) that reads “Aquatic resource functions pertaining to wetlands” seems unnecessary and repetitive. We suggest that it be deleted, or further clarified as to how it is intended to be different than the functions already described in items (i) through (ix) of the definition.
- **§ 105.12 – Waiver of Permit Requirements**
    - § 105.12(a) – To read more correctly, the proposed wording in the first sentence that reads “unless the project does not meet the eligibility criteria in subsections (c) and (d)” should be revised to read “unless the project does not meet the eligibility criteria per subsection (c),” as shown below:
      - *“(a) Under section 7 of the act (32 P. S. § 693.7), the requirements for a permit are waived for the following structures or activities, regardless of when commenced, **unless the project does not meet the eligibility criteria per ~~in~~ subsections (c) and (d).**”*
    - § 105.12(a)(2) – The proposed new wording in the first sentence of this paragraph specifying that this waiver is only available if an obstruction or encroachment does not “impede flow or aquatic life passage” is problematic since the word “impede” is undefined for purposes of this waiver, and any “obstruction or encroachment” could have at least a minimal effect of “impeding” flow to some extent. An appropriate qualifier, such as “significantly” should be inserted as shown below (similar to how the concept of having a “significant effect” is already used in § 105.12(a)):
      - *“(2) A water obstruction or encroachment in a stream or floodway with a drainage area of 100 acres or less that will not significantly impede flow or aquatic life passage.”*
    - § 105.12(a)(5) – In the current regulation, the citation to the Oil and Gas Act in this paragraph is out of date and should be updated and revised accordingly, such as shown below:
      - *“(5) A water obstruction or encroachment located in, along, across or projecting into a wetland or impoundment, constructed and maintained for the purpose of treating acid mine drainage, sewage or other waste, if the wetland or impoundment is a treatment facility constructed under a valid permit issued by the Department under the Surface Mining Conservation and Reclamation Act (52 P.*

*S. § § 1396.1—1396.31), The Clean Streams Law (35 P. S. § § 691.1—691.1001), the Noncoal Surface Mining Conservation and Reclamation Act (52 P. S. § § 3301—3326), the Solid Waste Management Act (35 P. S. § § 6018.101—6018.1003), the Oil and Gas Act (58 Pa.C.S.A. § § 2301—3504 P. S. § § ~~601.101—601.605~~) and the Pennsylvania Sewage Facilities Act (35 P. S. § § 750.1—750.20).”*

- § 105.12(c)(1) – This proposed new paragraph that would exclude “submerged lands of the Commonwealth” from eligibility for permit waivers appears inappropriate and unjustified. The Dam Safety & Encroachments Act, at 32 P.S. 693.7(a), provides that “the Environmental Quality Board may, by regulation, waive the permit requirements for any category of dam, water obstruction or encroachment which it determines has insignificant effect upon the safety and protection of life, health, property and the environment,” regardless of whether the project involves “submerged lands of the Commonwealth.” As long as a project is determined to have insignificant effect upon the safety and protection of life, health, property and the environment, the Act allows for a waiver from permitting regardless of whether the structure or activity occupies submerged lands of the Commonwealth. As such, we recommend that the proposed paragraph (c)(1) be removed
- § 105.12(c)(2) – This proposed new paragraph would broadly exclude any area that is considered “habitat” (an undefined term) for a threatened or endangered species. Given the potential breadth and subjectivity of determining areas that could be considered “habitat” for certain species, it would be better to limit this ineligibility criteria to “designated critical habitat” of threatened or endangered species, as shown below:
  - *“(2) The structure or activity is located within an area which serves as ~~a~~ designated critical habitat of a threatened or endangered species protected by the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. § § 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543) or for a species which has been designated as a threatened or endangered species under the Wild Resource Conservation Act (32 P. S. § § 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code).”*
- **§ 105.13 – Regulated Activities – Information and Fees**
  - § 105.13(c)(2)(iv) – This paragraph says that the “Environmental Assessment for waived activities fee” applies to use of the waivers at § 105.12(a)(11) and (16), and then goes on to say that the Environmental Assessment for these waivers is required under § 105.15(d), however § 105.15(d) does not include a reference to § 105.12(a)(16), which appears to be an inconsistency between the language in those two sections. That apparent inconsistency between those two sections with regard to the reference to § 105.12(a)(16) in § 105.13(c)(2)(iv) that refers to § 105.15(d), but then the omission of § 105.12(a)(16) in § 105.15(d), should be considered and resolved.

- § 105.13(e)(1)(iii)(D) – In the proposed language in this paragraph, it’s unclear which “location” (the selected location or the alternate location) is being referred to where it reads “.... and the use of location ....” It would seem that the intent there is to refer to the selected location, so that clarification should be inserted. This same comment and suggested edit also applies to the similar sentence in § 105.14(b)(7). The suggested edit for § 105.13(e)(1)(iii)(D) is shown below:
  - *“(D) A narrative discussion and analysis on water dependency. Water dependency must be based on the demonstrated unavailability of any practicable alternative location, route or design and the use of the selected location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth.”*
- § 105.13(e)(1)(x) – The subparagraphs that follow subparagraph (E), which are currently designated as “(A), (B), & (C)” should be re-designated as “(F), (G), & (H)”
- § 105.13(h) – In the third sentence of this paragraph, with regard to who must sign a permit application for a corporation, the current wording in § 105.13(i) that allows for an application to be signed by an “other responsible official” no longer appears in the proposed revised wording in § 105.13(h), but it should be retained since it is common practice for corporations to delegate permit application signature authority to appropriate officials responsible for the permitted activity at the regional or local level where the specified corporate officers are not directly engaged with those activities. The suggested revisions in that sentence of proposed § 105.13(h) is shown below:
  - *“(h) .... In the case of a corporation, the president or vice president and the treasurer, assistant treasurer, secretary, ~~or assistant secretary,~~ or other responsible official authorized to sign on behalf of the corporation shall sign and submit the application.”*
- **§ 105.14 – Review of Applications**
  - § 105.14(a) – We recommend that the proposed addition of the words “with an adequate margin of safety” be removed from this paragraph, since that language is unnecessarily subjective and provides no clarity beyond the remaining language that requires “using prevailing practices in the engineering profession, and in accordance with current scientific and environmental principles and practices.” The suggest revision is shown below:
    - *“(a) An application will be reviewed under this chapter to determine the proposed project’s effect on life, health, safety, property and the environment, ~~with an adequate margin of safety,~~ using prevailing practices in the engineering profession, and in accordance with current scientific and environmental principles and practices.”*

- § 105.14(b)(7) – Similar to the comment above at § 105.13(e)(1)(iii)(D), the proposed language in the second sentence of § 105.14(b)(7) is unclear as to which location (the selected location or the alternate location) is being referred to where it reads “.... and the use of location ....” It would seem that the intent there is to refer to the selected location, so that clarification should be inserted, as are shown below:

- *“(7) The extent to which a project is water dependent and thereby requires access or proximity to or siting within water to fulfill the basic purposes of the project. The dependency must be based on the demonstrated unavailability of any practicable alternative location, route or design and the use of the selected location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth.”*

- **§ 105.15 – Environmental Assessments**

- § 105.15(a)(4)(viii) – As previously noted in comments above for § 105.1 related to Definitions, DEP should either consider defining the term “paleo-aquatic,” as used in this new proposed paragraph § 105.15(a)(4)(viii), since that is not commonly used terminology, or make it clearer in this paragraph what is meant by that term.

- **§ 105.172 – Inadequate or Collapsed Structures**

- § 105.172(c) – In this paragraph in the existing rule, there appears to be a grammatical error or omission in the portion of the sentence that reads “.... which not to permit ....” DEP should clarify and correct that portion of the sentence for proper readability. See the underlined portion of the sentence below that is in question, as it currently appears in the regulation:
  - “(c) If the Department finds that the inadequate size, improper placement, collapse or imminent collapse of a bridge or culvert creates an immediate danger of stream obstruction and a hazard to life or property which not to permit the issuance of an order or notice to the owner or permittee or if the owner or permittee cannot be readily contacted in sufficient time to assure adequate protection of life or property, the Department may exercise its powers under section 14 of the act (32 P. S. § 693.14) to remove or repair the conditions and take the actions it deems necessary to protect life and property and recover the cost and expense thereof from the owner or permittee.”

- **§ 105.245 – Disposal of Waste Materials**

- § 105.245(c) – In the Proposed new wording referring to “Sections 691 – 6985” it appears the “691” is incorrect and should read “6901.”

- **§ 105.401 – Permit Applications**

- § 105.401(5) – In the Proposed new wording referring to RCRA “Sections 691 – 6985” it appears the “691” is incorrect and should read “6901.”

- **§ 105.442 – Authorization for General Permits**

- § 105.442(c)(3) – It appears that the citation of “§ 105.20” in the current version of this paragraph to reference the financial responsibility requirements should be changed to cite “§ 105.13b” where the financial responsibility requirements now appear, as shown below:
  - *“(3) A dam, water obstruction or encroachment which may present a substantial risk to life and property, requiring proof of financial responsibility under § 105.13b~~20~~ (relating to proof of financial responsibility).”*

- **§ 105.445 – Waiver of Certain Requirements**

- § 105.445 – In the current regulation, the citations to some of the referenced regulatory sections in § 105.445(1) to (7) appear to be somewhat out of date and should be updated and revised accordingly, such as shown below:
  - *“In issuing a general permit, the Department may waive the procedural requirements of any or all of the following sections of this chapter as applied to a particular category of dams, water obstructions or encroachments covered by the general permit:*
    - (1) Section 105.41 (relating to notices and reports).*
    - (2) Section 105.42 (relating to terms and conditions of Department permits and approvals acknowledgment of conditions).*
    - (3) Section 105.53 (relating to inspections by permittees or owners and inspection reports).*
    - ~~(4) Section 105.101 (relating to notices and reports).~~*
    - ~~(45) Section 105.102(b) (relating to personnel and supervision).~~*
    - ~~(56) Section 105.1087 (relating to completion, certification and project costs ~~certificate and final plans~~).~~*
    - ~~(67) Section 105.111 (relating to commencement of storage of water, fluid or semifluid storage).~~”*

- **§ 105.451 – Identification and Delineation of Wetlands – Statement of Policy**

- § 105.451(b) – In the current regulation, the citation to the Oil and Gas Act in this paragraph is out of date and should be updated and revised accordingly, such as shown below:

- *“(b) The use of some delineation method is necessary in order to administer, implement, enforce and determine compliance with the act, The Clean Streams Law (35 P. S. § § 691.1—691.1001), the Solid Waste Management Act (35 P. S. § § 6018.101—6018.1003), the Surface Mining Conservation and Reclamation Act (52 P. S. § § 1396.1—1396.31), the Pennsylvania Sewage Facilities Act (35 P. S. § § 750.1—750.20), the Oil and Gas Act (58 Pa.C.S.A. § § 2301—3504 P. S. § § 601.101—601.605) and other applicable statutes administered by the Department and regulations promulgated under these statutes.”*

- **§ 105.452 – Status of Prior Converted Cropland – Statement of Policy**

- § 105.452(b) – In the current regulation, the citation to the Oil and Gas Act in this paragraph is out of date and should be updated and revised accordingly, such as shown below:
  - *“(b) The use of some procedure for determining wetlands is necessary in order to administer, implement, enforce and determine compliance with the act, The Clean Streams Law (35 P. S. § § 691.1—691.1001), the Solid Waste Management Act (35 P. S. § § 6018.101—6018.1003), the Surface Mining Conservation and Reclamation Act (52 P. S. § § 1396.1—1396.31), the Pennsylvania Sewage Facilities Act (35 P. S. § § 750.1—750.20), the Oil and Gas Act (58 Pa.C.S.A. § § 2301—3504 P. S. § § 601.101—601.605) and other applicable statutes administered by the Department and regulations promulgated under these statutes.”*
- § 105.452(c) – The Proposed new wording in the first sentence of this paragraph that reads “including variations in long-term climatic conditions” is unnecessary and has no clear meaning with regard to how “variations” would or would not be attributed to “long-term climatic conditions.” That wording should be removed as unnecessary and vague, as shown below:
  - *“(c) Naturally occurring events, ~~including variations in long term climatic conditions,~~ may result in either creation or alteration of wetlands. It is necessary to determine whether alterations to an area have resulted in changes that are now “normal circumstances” of the particular area. The Department recognizes and adopts the concept of “prior converted cropland,” as defined in the National Food Security Act Manual (Fifth Edition 180-NFSAM-514-D-514.30, December 2018, as revised by Circular 190-18-1, as amended), as “normal circumstances” as the phrase is used in the definition of wetlands in § 105.1 (relating to definitions).”*