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February 3, 2021

Dear Environmental Quality Board,

The Responsible Drilling Alliance, a 501c(3) education and advocacy collation based in Lycoming County would like to submit the following comments on the Chapter 105 proposed rulemaking.

In reference to § 105.1 and § 105.12(a)(16), the waiver of permit requirements for “restoration activities” does not specifically identify what is considered a restoration activity. This is of particular concern due to the never-ending addition of more water withdrawal permits issued by the Susquehanna River Basin Commission for sites on the four large regional creeks flowing though our county and beyond. Issuance of these permits can then require temporary flow impediment for the construction of intake structures such as cofferdams.

Construction of these projects causes direct aquatic resource impacts, something we do not take lightly. Will these projects be exempt under Section 105.12(a)? It is unclear to us if expansion of the waiver for small dams under proposed Section 105.12(a)(1) might include cofferdams. Does the expansion of the small drainage area waiver under proposed Section 105.12(a)(2) consider surface water intakes an encroachment or an obstruction? If so, we object to cofferdams or surface intakes being included.

In-stream construction usually takes place in the warmer months that coincide with the height of recreational use of these treasured natural resource assets. Activities such as fishing, floating, paddling, swimming, exploring for underwater life and other aquatic enjoyments are of extreme value to the health of our families and quality of life (and therefore economic health) in our region and must take precedence over desires for expediency by private developers.

We join others in suggesting significantly enhanced clarity of language to describe typical restoration activities in § 105.12(a)(16) regarding the applicability and extent of this waiver. Doing so would aid applicants and practitioners of actual restoration projects in understanding the regulations. This would also create crucially needed differentiation between actual restoration, and industrial activities

that temporarily make a mess of a stream flow and then necessitate restoring it, thereby possibly claiming the whole project is technically a restoration project and qualifies for waivers. Failing to differentiate between these two markedly different categories of activities would reward harm to local communities and ecosystems, and would encourage noncompliance.

Another problematic section is the proposed removal of the requirement in §105.35 for a submerged lands license/fees for occupying submerged lands for the following:

(c)(9) A project or activity of a temporary nature of 1 year or less, unless the Department authorizes a longer period in writing, for which the site of the project or activity will be fully restored to its previous condition consistent with one or more Department authorized permits or registrations under this chapter.

We have seen instances where activities or related facilities deemed “temporary” by an industry continue far beyond the allowed time and the Department just keeps re-authorizing the project over and over. We are simply pointing out the problems to which such imprecise language can lead and request that further limits be defined. Submerged lands are trust resources, whether under the common law, or under Article I, Section 27 of the Pennsylvania Constitution. The Department cannot allow open-ended occupation of such lands without violating its trustee obligations.

We are also very concerned with the proposed changes to § 105.16. Environmental, social and economic balancing:

(a) If the Department determines that there may be an impact on natural, scenic, historic or aesthetic values of the environment, the Department will consult with the applicant to examine ways to reduce the adverse environmental impact. If, after consideration of mitigation measures and consistency with § 105.20a (relating to compensation for impacts to aquatic resources), the Department finds that the adverse environmental impact will occur, the Department will evaluate the public benefits of the project to determine whether the public benefits outweigh the environmental harm.

While we commend the Board in recognizing the values that are enshrined in the Pennsylvania Constitution, the use of language in the last two clauses of the sentence above belie a lack of understanding of how our Commonwealth’s highest court has now consistently interpreted Pennsylvania’s Environmental Rights Amendment. It is those very values noted, “natural, scenic, historic or aesthetic values of the environment” that are the primary public benefit in determining social balancing. The Pennsylvania Supreme Court specifically stated that the meaning of the term “for the benefit of all the people” does *not* mean any use or benefit; rather, that term refers back to the rest of the Amendment and the very people who have

reserved environmental rights, and are the beneficiaries of the Commonwealth's rich, scenic, and treasured public natural resources. Pa. Env'tl. Defense Found'n v. Com., 161 A.3d 911, 934-35 (Pa. 2017). We also note that Section 105.16 still harkens back to the now-overruled legal framework from Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973) and should be re-written to reflect what the Pennsylvania Supreme Court has set forth in its 2013 Robinson Township decision, and its 2017 Pa. Environmental Defense Foundation decision.

Our region's large creek drainages encompass incredibly valuable and vital source water assets of the Commonwealth: wetlands, bogs, ponds, small streams, runs, and springs. As have many who gave you comment on this proposed rulemaking, we do not want to see any weakening of Chapter 105 regulations and also oppose any waivers of this permitting process in which Exceptional Value, High Quality, Class A trout, Wild trout, and already impaired waters are involved, regardless of the size of the stream. As evidence of this need, natural gas pipeline construction in particular in our area has so often negatively impacted these treasured water resources.

Finally, we ask the Board to reconsider the proposal to require a company seeking a permit for an industry activity that crosses multiple counties to submit only one application, rather than one in each county crossed. This proposal for Chapter 105 will only benefit one specific industry over all others. The time has ended for considering additions to our now vastly overbuilt and underutilized natural gas pipeline infrastructure as vital to national security or as economically advantageous for Pennsylvanians. It is time our Constitutional environmental rights take precedence for our future economic prosperity as much as any of the other required reasons.

The one-application proposal will only add to the difficulty for residents and their municipal and county governments to respond in a timely manner to proposed industrial activities that might affect their waters, leading to less citizen participation in processes that for a long time have appeared, and have in fact been, pre-destined in industry favor.

Thank you for considering our comments and concerns.

Sincerely,
The Board of Directors of the Responsible Drilling Alliance
Robert Cross, President
Barbara Jarmoska
Jon Bogle
Mark Szybist
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