



February 3, 2021

Submitted electronically via the Department of Environmental Protection's eComment portal

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Proposed rulemaking: Dam Safety and Waterway Management (#7-556)

To Whom It May Concern:

Trout Unlimited (TU) is pleased to provide comments to the Environmental Quality Board for the proposed rulemaking at 25 Pa. Code Chapter 105 (relating to dam safety and waterway management). TU is the largest coldwater conservation organization in the Commonwealth, representing over 15,000 volunteer sportsmen and women. Development of sound conservation science and policy, as well as support of regulations that provide robust protections of aquatic resources are integral to TU's mission both in Pennsylvania and nationwide. TU chapters and programs regularly require permits/authorizations under Chapter 105 for projects that increase aquatic organism passage, address water quality concerns, and enhance instream and riparian habitats and landscapes. These projects provide significant ecological and recreational benefits to all Pennsylvania citizens.

TU is supportive of many of the changes contained in the proposed rulemaking; however, we do express concerns as outlined in the attached comments relative to certain waiver provisions, antidegradation demonstrations, and mitigation requirements. We also have included comments in relation to other sections of the draft regulation, many of which request additional clarity on regulatory intent or roles of the Department/delegated entities in implementation of certain provisions.

Trout Unlimited appreciates the opportunity to provide comment on this important proposed rulemaking. Should you have questions, please contact me at jen.orrgreene@tu.org or (717)364-4368. Thank you.

Sincerely,

Jennifer Orr-Greene

Jennifer Orr-Greene,
Eastern Policy Director,
Trout Unlimited

cc: Greg Malaska, President, Pennsylvania Council Trout Unlimited
Eric Baird, President, Brodhead Chapter Trout Unlimited
Ann Foster, Advocacy Committee, Brodhead Chapter Trout Unlimited
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Craig Todd, Brodhead Chapter Trout Unlimited

Comments Trout Unlimited Proposed Rulemaking 25 Pa. Code Chapter 105

105.1 Definitions

- The inclusion of concise definitions for direct, indirect, and secondary impacts is appreciated, as the interpretation of these terms has been subjective and not consistent between reviewers.

105.4 Delegation to local agencies

- 105.4(a) - To what other local county agencies would authority for permit or authorization issuance be delegated?

105.12 Waiver of Permit Requirements

- 105.12(a)(1) – This requirement should also include an exclusion of those waters with existing or designated uses related to migratory fishes under 25 Pa. Code Chapter 93, in addition to wild trout listings.
- 105.12(a)(2) – This waiver is of concern to TU as it does not provide adequate analysis of potential impacts and require a permit/authorization for these activities under Chapter 105. Watershed drainage areas of under 100 acres can contain groundwater seeps or springs, which can support robust wild trout populations, including some listed as Class A by the Pennsylvania Fish and Boat Commission (PFBC). These springs, especially in areas of karst geology, can contain large amounts of flow coming from groundwater sources but have a very small upstream watershed area. The Department should reconsider its use of waivers based on small upstream watershed areas to provide appropriate resource protection.
- 105.12(a)(7) – This waiver, as worded, addresses existing tile drain systems only, not new systems. The Department should clarify if this is indeed the intent of the application of this waiver condition.
- 105.12(a)(18) – This waiver, while intended to address low-impact recreation activities, could result in impacts to aquatic organism connectivity, an issue of particular relevance in coldwater systems, and as such is of concern to TU. Culverts in particular must be evaluated for potential impacts, even when included on pedestrian trails, equestrian trails, or other trails.
- 105.12(a)(18) and (a)(19) – These waivers should include a bulleted provision for the plan preparer to provide documentation that the proposed activity conforms to the requirements of 105.12.(c) and 105.12.(d).
- 105.12(a)(22) – This waiver also is of concern to TU. The use of mats in wetlands, a practice that is intended to prevent habitat degradation and associated erosion often does not do so. In practice, even when these mats are used during temporary activities, wetland impacts often occur, which can be permanent in nature and would require compensatory mitigation. As such, waivers should not be granted for these types of activities.

105.13 Regulated activities – information and fees

- 105.13(d) – Will the Department be the authorizing entity in cases where projects span multiple counties, such as linear utility and pipeline projects?
- 105.13(e)(v)(A) – TU requests clarity regarding the requirement for a stormwater analysis as part of a stormwater management plan that has been prepared or adopted and is identified as “current” under the Storm Water Management Act (32 P.S. §§ 680.1—680.17). What is the definition of a current plan under the Act?
- 105.13(e)(viii)(A) – The alternatives analysis as described requires “a level of detail as commiserate with the anticipated impact”. How will the Department or delegated entity evaluate if the level of detail is commensurate with the anticipated impact? These criteria are very ambiguous and subjective, thus prone to inconsistent evaluation by reviewers.
- 105.13(e)(xii) – What is the demonstration as referenced for consistency with state antidegradation requirements under Chapter 105 and Chapters 93, 96 and 102 (relating to water quality standards; water quality standards implementation; and erosion and sediment control) and the Clean Water Act (33 U.S.C.A. §§ 1251—1376)? Does the Department have technical guidance to assist applicants in making this demonstration? These types of demonstrations under Chapter 105 are not outlined in the Department’s *Water Quality Antidegradation Implementation Guidance* (Document 390-0300-002). What are the requirements of the analysis for exceptional value wetlands as required under Chapter 96.3(g) to assure that permitted/authorized activities will have no impacts on wetlands (96.3(g)) and, specifically, that there will be no change to functions and values of wetland resources? Changes in wetland functions and values, in addition to being impactful in and of themselves, can negatively impact water quality and existing and designated uses as defined in Chapter 93, potentially causing impairment. This analysis must be rigorous and consider the connection between wetland resource impacts and instream uses. Further, how do activities in EV wetlands that are connected to exceptional value waters (where no change to water quality is allowed) comply with antidegradation requirements in this chapter and Chapter 96?
- 105.13(e)(xiii) – TU is pleased to see the addition of cumulative impact analysis requirements included in the chapter. Cumulative impacts can collectively cause degradation to aquatic resources from linear projects such as utility and pipelines; this requirement will consider these impacts as a whole and require appropriate mitigation for the sum of these impacts.

105.20a Compensation for impacts to aquatic resources

- 105.20a(a)(2) – Function and value replacements for exceptional value wetlands should be required at a ratio of greater than 2:1 to satisfy the antidegradation requirements in 96.3(g). Under no circumstances should replacement ratios for EV wetland impacts be at a less than 2:1 ratio.
- 105.20a(a)(3) – Similarly to replacement ratios for EV wetlands impacts, mitigation sites must be located in the watershed of the impact, not externally unless physically impossible due to lack of suitable habitat. In addition, what is the scale of the watersheds in which mitigation can occur?
- 105.20a(c) – In-lieu fee mitigation should not be allowed for impacts to EV wetlands to assure antidegradation requirements are met in a timely manner.

- What are the requirements for verification and reporting of implementation of compensatory mitigation to assure no net loss and attainment of functions and values as required?

105.21 Criteria for permit issuance and denial

- 105.21(f) – Automatic issuance of 401 water quality certification when permits are issued should not occur as a blanket practice. Water quality certifications are often very general in nature and refer back to implementing regulations such as Chapter 105, 102 and 93. However, as previously commented, there is not a strong link between some demonstrations required under Chapter 105 and corresponding water quality regulations, particularly those related to antidegradation. Thus, blanket 401 issuance can result in requirements that are not as robust relative to water quality standard protections as are necessary for resource protection.

105.96 Outlet structures and 105.122 Drawdown of impounded waters

- 105.96(d) - Current drawdown permits required by the Pennsylvania Fish and Boat Commission in accordance with 30 Pa.C.S. § 3506 are sometimes inadequate to protect downstream resources from sedimentation impacts. TU recommends working with PFBC to implement more appropriate BMPs for sediment control and update associated drawdown procedures, including maximum rates of drawdown.

105.123 Restoration of aquatic life

- 105.123(5) – In circumstances where trout species are restocked into coldwater habitats to restore fisheries resources, TU requests the Department use wild fishes as opposed to hatchery fishes to the extent practicable. Repopulation utilizing wild stocks increases genetic diversity and allows fish that are not acclimated to human interaction to establish wild populations.

105.401 and 105.411 Permit applications (under Subchapter J related to discharges of dredge and fill materials)

- The requirements for analysis of impacts from the discharges of dredge and fill material should be similar, if not identical, to those required for other Chapter 105 permitted/authorized activities. These should include evaluation of impacts to water quality and designated and existing uses and include an antidegradation analysis as required in Chapter 96.3(b) and (g), respectively.

105.451 Identification and delineation of wetlands – statement of policy

- What are the requirements of verifiers for wetland delineations in the field? While there are requirements to provide the name and qualifications of the verifiers throughout the chapter, there are no required criteria for the training and qualifications. This could allow individuals with insufficient background and training to be conducting verification of wetland resources, which could potentially create issues in environmental assessments and mitigation requirements. Additional information regarding these requirements in the statement of policy and/or in others of the chapter related to wetland delineations would address this issue.

General comments

- While aquatic resource impacts may not be as defined in Chapter 93 related to attainment of uses, impacts to aquatic resources as defined in this chapter may very well have impacts on the attainment of uses as defined in Chapter 93. Thus, separation of the two and demonstrations that do not acknowledge and evaluate these interconnections may not be as protective as required in state regulations and the Clean Water Act. In particular, water quality standards determinations under Section 401 and in special protection waters as defined in Chapter 93 and requiring antidegradation protections are specifically tied to designated and existing use protections.
- Wherever the term “wild trout” is listed, TU requests that “Class A listed streams” also be included. As outlined in Chapter 93, those streams listed as Class A by the Pennsylvania Fish and Boat Commission are to be evaluated by the Department for existing use protection and the designation of high quality to be adopted upon evaluation and promulgation. This provides protection for this important class of waters by requiring evaluation by the Department of these uses when issuing permits or authorizations.
- TU strongly supports the commitment of the Department to implement a compliance assistance plan as part of a final regulatory effort. The expeditious update of all guidance, permits/authorizations, and other materials, including those used by state agencies and commissions related to fulfillment of Chapter 105 requirements, is critical to assure consistency. TU requests that some education and outreach efforts be directed toward NGOs and other groups that frequently apply for Chapter 105 permits/authorizations for restoration and reclamation activities.