



**BEFORE THE
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Dam and Safety Waterway Management : 25 PA. CODE CH. 105, 50 Pa. B. 6863

**COMMENTS OF
NATIONAL FUEL GAS COMPANY ENTITIES TO THE PROPOSED
RULEMAKING DATED DECEMBER 5, 2020.**

I. Introduction

In response to the Department of Environmental Protection (“DEP” or “Department”) Environmental Quality Board’s December 5, 2020 request for comments to its Proposed Rulemaking to amend 25 Pa. Code Ch. 105 relating to dam safety and waterway management (the “Proposed Rulemaking”), The National Fuel Gas Company Entities¹ (hereinafter, “National Fuel”), as further described below, respectfully provide the following comments. In addition to providing its own comments in this matter, National Fuel strongly supports the comments submitted to this docket by the Marcellus Shale Coalition.

National Fuel Gas Supply Corporation is an interstate natural gas pipeline company regulated by the Federal Energy Regulatory Commission (“FERC”) that provides natural gas transmission and storage services for affiliated and non-affiliated companies through an integrated natural gas pipeline system that encompasses over 1,600 miles of transmission pipeline located in New York State and the Commonwealth of Pennsylvania. National Fuel Gas Distribution Corporation is a natural gas utility company that provides safe and reliable natural gas service to more than 747,000 residential, commercial and industrial customers in New York and Pennsylvania. National Fuel’s gathering segment operations are carried out by National Fuel Gas Midstream Company, LLC’s limited liability companies. The gathering segment constructs, owns and operates natural gas gathering pipelines and compression facilities in the Appalachian region.

Due to the nature of National Fuel’s operations and maintenance requirements for existing facilities, as well as our obligation to provide customers with safe and affordable natural gas service, National Fuel frequently engages in new or remedial construction activities which, in many cases, requires permitting under Chapter 105. As such, National Fuel welcomes the opportunity to provide feedback, assisting the DEP with its efforts to strengthen its implementation of the dam safety and water obstruction and encroachment programs, provide clarity for project

¹ The National Fuel Gas Company Entities commenting on this rulemaking are comprised of the following separately-operating National Fuel Gas Company subsidiaries: National Fuel Gas Supply Corporation, National Fuel Gas Distribution Corporation and National Fuel Gas Midstream Company, LLC’s limited liability companies.

applicants and the public on existing regulations, and enable the Department and local delegated authorities to utilize resources in a more effective and efficient manner, as stated in the Proposed Rulemaking.

Similarly, as a member of the regulated community in Pennsylvania, and a regular Chapter 105 applicant, National Fuel also believes it is equally as important to inform the Department of any items in the Proposed Rulemaking that it feels require additional clarification or may potentially create substantial delays in completing important, safety-related, infrastructure projects. Timely reviews and issuance of applicable permitting is necessary for National Fuel to make necessary modernization improvements to our facilities, thereby protecting the safety of landowners, the public, and company personnel, as well as providing critical energy deliveries to communities, local businesses, and other markets. As part of its review of the Proposed Rulemaking, National Fuel reached out to its environmental permitting consultants, who regularly apply for permits in Pennsylvania, and although they agree with the DEP's efforts to provide clarity for project applicants, the consultants are concerned that many aspects of the Proposed Rulemaking may lead to additional permitting time/costs and, potentially, actually increase the amount of technical deficiencies issued by the Department.

II. Comments

A. §105.1 – Definitions

1. Definition of Aquatic Resource Impacts, Direct Impacts, Indirect Impacts and Secondary Impacts

The Proposed Rulemaking adds the definition “Aquatic resource impacts.” The proposed definition of the term includes “direct impacts,” “indirect impacts” and “secondary impacts.” While National Fuel acknowledges that the terms “direct impacts” and “indirect impacts” are already defined in the Department’s environmental assessment form instructions, 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) (relating to review of applications) and understands the Department’s objective of codifying terms currently utilized during the Chapter 105 application process, the broad scope created by adopting each of those impact categories into the definition, may only create confusion. The expansive proposed definition leaves the door open for a great deal of scrutiny of assessed impacts during the permitting process.

2. Definition of Stormwater Management Facilities

The Proposed Rulemaking would amend the existing definition of “Stormwater management facilities” to exclude “swales or ditches that have not been maintained and have developed into watercourses or other bodies of water, including wetlands.” National Fuel appreciates the Department’s intent to improve applicability, provide clarity and update the terminology used for man-made stormwater management facilities. However, the updated definition may lead to confusion surrounding delineations. There are no defining criteria included to determine when a man-made swale becomes a regulatory feature, other than the vague phrase “that have not been maintained . . .” For example, existing swales, ditches, or even waterbars could

be placed in this category and require additional permitting and/or fees. Accordingly, National Fuel requests clarification from the Department.

B. §105.12 – Waiver of Permit Requirements

National Fuel supports the addition of proposed waivers for certain low impact structures and activities that would enable the Department to more effectively and efficiently utilize its resources, while enabling those structures and activities to be conducted without delay. Specifically, National Fuel supports the addition of subsections:

(a)(21) (waiving water obstruction or encroachment permit requirements for archeological, geotechnical or environmental testing, monitoring activities, or investigative activities of a temporary nature); and

(a)(22) (waiving the placement, maintenance and removal of temporary mats and pads used as a best management practice for minimizing erosion and sedimentation at wetland crossings).

Despite seemingly adding efficiency as described above, waivers for such activities are not included in the PASPGP-5 or draft PASPGP-6. Therefore, impacts to U.S. Army Corps of Engineers (“USACE”) jurisdictional features would potentially require USACE authorization. Accordingly, such benefits may be null and void if there are inconsistencies between state and federal permitting requirements. National Fuel requests that the Department consider the aforementioned concern and provide clarification as to whether there will be coordination with the USACE, or at the very least provide more explanation as to how this results in a benefit if authorization is still needed from the USACE.

In addition, National Fuel requests that the Department clarify the applicability of proposed subsection (a)(22). Specifically, the Department has previously acknowledged that the waiver will not apply to a GP-8 temporary road crossing (DEP PowerPoint Presentation dated October 28, 2020). It remains unclear as to whether there are limitations for the proposed waiver. Additional information is necessary regarding: (1) the use of mats for erosion and sedimentation purposes versus temporary crossings; (2) whether there is a wetland size limitation for the waiver; and (3) whether there are exclusions based on watershed/feature classification. National Fuel therefore requests clarification from the Department as to precisely what conventions or caveats are associated with the placement, maintenance and removal of temporary mats and pads used for minimizing erosion and sedimentation at a wetland crossing so that post-final rule, National Fuel can ensure its entities are in compliance with the Department’s intent.

C. §105.13 – Regulated Activities – Information and Fees

1. §105.13(d)

National Fuel appreciates and supports the proposed revisions to subsection (d). If amended, this provision will allow for the submission of a single permit application for a single project proposed to be located in more than one county. Such revisions would eliminate the need for the submission of multiple permit applications with redundant information and additional fees

for a single project and are in line with the Department's focus of revising certain requirements for timely permitting.

2. *§105.13(e)(1)(i)(A) (Site Plan)*

National Fuel respectfully requests further clarification surrounding the proposed revisions to subsection (e)(1)(i)(A) (Site Plan). Specifically, clarification is necessary as to whether field demarcation also includes the floodplain and floodway. The proposed revisions remove the phrase "regulated waters of this Commonwealth" and insert the newly added phrase "aquatic resources," which is defined as "Regulated waters of this Commonwealth, including watercourses, streams, wetlands or other bodies of water and their floodways." National Fuel requests clarification from the Department in regards to whether applicants can continue to base a 50-foot floodway off of global positioning system ("GPS") data points taken at the "top of bank" of streams. In addition, confirmation is necessary as to whether continued use of FEMA floodplain/floodway geographic information system ("GIS") layers is acceptable, or whether a copy of the actual FEMA FIRMette or floodplain map is also required.

3. *§105.13(e)(1)(iii)(D) (Project Description)*

The proposed revisions to subsection (e)(1)(iii)(D) seek to replace a previously required "statement" on water dependency with a "narrative discussion and analysis." If the DEP now requires a more expansive narrative, which would include additional calculations and/or exhibits, it should state what it is requiring. Permit applicants already provide so much information and analysis in support of applications, so if this revised language somehow changes or expands what must be included for project scope, please advise, especially because additional time and resources will be needed to assemble further supporting information.

4. *§§105.13(e)(1)(iii)(v) and (vi) (Stormwater Management and Floodplain Management)*

National Fuel supports the Department's objective to provide further clarity regarding what an applicant is responsible for submitting as part of a permit application, specifically what must be submitted to satisfy the stormwater management demonstration and floodplain management consistency requirements. The proposed revisions to subsections (v) and (vi) read:

(v)(A) If a watershed stormwater management plan has been prepared or adopted, and is current under the Storm Water Management Act (32 P.S. §§680.1-680.17) and a letter commenting on the project's consistency with that plan has been provided by the county or municipality, that letter must be included as part of the application; and

(vi) If the proposed dam, water obstruction or encroachment is located within a floodway delineated on a FEMA map, include an analysis of the project's impact on the floodway delineation and water surface profiles and, when provided by the county or municipality, a letter commenting on the analysis as part of the application.

It is National Fuel's understanding that any concurrence letters provided by the county or municipality must be submitted as part of the application, only if a letter has already been provided at the time of submission. If applicants were required to provide such letters during the initial application process, National Fuel's concern is that this may lead to timing constraints as consistency is not always achieved by the time an application is submitted. It would be problematic if this then meant applications were considered incomplete. Therefore, National Fuel requests clarification of its understanding as it relates to the aforementioned language.

5. *§105.13(e)(1)(viii) (Alternatives Analysis)*

National Fuel understands the Department's efforts to clarify and expand upon the information requirements, which an applicant must provide as part of the application review process. The completeness of such information is vital to providing a complete application and avoiding technical deficiency letters. National Fuel supports the Department's goal to improve the quality of application submittals. However, National Fuel is concerned that the newly proposed requirements related to alternatives analysis are overly broad and unduly burdensome, likely to result in significant additional costs and time to complete permit applications, and in some cases, resulting in increased instances of technical deficiencies due to vague terminology included therein and the inability to acquire all necessary "alternatives analysis" data, as described below.

The proposed additions set forth by subsections 105.13(e)(1)(viii)(A)-(C) appear to require that the analysis of each alternative be comprised of, in essence, its own administratively and technically complete permit package. In addition, the proposed new requirements raise several questions regarding the meaning of the phrases "commensurate with the anticipated environmental impact," "reliable and convincing evidence" and "reliable and representative demonstration." Further guidance is necessary to assist the regulated community with determining the level of effort and the level of detailed information that is required to comply with the above standards as used in the revised regulations. Without such guidance, it will be very difficult for permit applicants to determine costs and timing factors associated with future project applications.

It should be noted that alternatives are identified at the macro level (comparing completely different and distinct routes), at an intermediate level (variations to the same route) and at a micro level (variations of the necessary footprint that affects an individual resource). There are also alternatives to construction installation methods (for example, HDD versus dam and pump) and other construction Best Management Practices ("BMP's") that are applied to mitigate impacts and achieve the most environmentally safe and constructible alternative given the topography, vegetation, geology, soils and many other characteristics.

In addition to Chapter 105 criteria, there are numerous factors that must be weighed as part of an alternatives analysis, including endangered species habitat, archeological and historical concerns and landowner wishes. It should be noted that the analysis for macro and intermediate level alternatives and variations are best handled with higher level data acquisition processes, including the use of GIS, federal, state and local databases, aerial photography, infrared satellite imagery and drone acquired data, among others. It cannot be overstated that, if on-the-ground field reviews are required to support the collection of such information for all alternatives, large and small, this will require an unreasonable amount of landowner coordination and subsequent

survey approval acquisition, creating costly permit preparation and approval delays. In contrast, the use of highly effective GIS-based comparisons of macro and intermediate level alternatives and route variations, will result in highly effective alternatives comparison. Data collected via boots on-the-ground surveys should only be required for the primary or preferred alternative being permitted.²

It is unclear from the Department's draft "Chapter 105 Alternatives Analysis Technical Guidance Document," ("TGD") dated April 17, 2020, what the expectations are to satisfy the Department's requirements. While it is clear that some statements recognize desktop reviews, other statements suggest that everything should be field delineated. For example, see below for language taken from subsection II(D)(1) of the TGD:

*"Field delineations of these resources may not be possible for location alternatives if permission to access the parcel(s) cannot be obtained. **In these circumstances, digital resources can be used to conduct a cursory analysis.** The approximate locations of many watercourses and wetlands can be identified utilizing data available from several resources, however, it should be recognized that such digital mapping resources are not meant to be precise and can be inaccurate due to the limitations of the data collection method. See Section VI, Part B of this technical guidance document for a list of resources that may be useful. For design avoidance and minimization alternatives analyses, applicants should not rely solely upon desktop resources for identifying wetlands, streams, and other aquatic resources. **Rather, a field delineation of all Regulated waters of this Commonwealth, including wetlands, should be conducted.**"*

As noted above, proposed revisions to subsection (e)(1)(viii) are likely to result in increased instances of technical deficiencies due to vague terminology included therein and the inability to acquire all necessary "alternatives analysis" data. If the Department's TGD leads to further inconsistencies and confusion, permit applicants will be left with little guidance when compiling information for applications. Therefore, National Fuel respectfully asks the Department to consider the use of technologically advanced and highly effective data acquisition processes before the final rulemaking and finalization of the TGD.

National Fuel also requests further clarification as to what "reasonably foreseeable future development" means, as set forth by newly proposed subsections (e)(1)(viii)(D) and (E). As it relates to this language, specifically, what are the spatial and timing limits associated with "reasonably foreseeable future development"? Will the Department clarify how far-reaching an analysis must be to satisfy this threshold? As noted above, additional guidance is necessary to assist permit applicants with determinations of how much time, effort and costs are required to meet the vague standards as proposed by the Department. For example, should applicants anticipate having to scout or delineate alternative routes, review Pennsylvania Natural Diversity Inventory ("PNDI"), and other surrounding physical features to provide an adequate description? Pre-application meetings will likely be required to adequately discuss permit application

² Moreover, many permit applicants operating in Pennsylvania, including National Fuel Gas Supply Corporation, are regulated by FERC, which has exclusive jurisdiction over routing and siting for interstate pipeline projects.

submissions and the level of effort necessary to satisfy the requirements of subsection (e)(1)(viii). Without such guidance, it will be difficult for applicants to satisfy the Department's goal of improving the quality of application submittals.

6. §105.13(e)(1)(x) (*Impacts Analysis*)

The Department's Proposed Rulemaking significantly changes the requirements set forth by subsection (e)(1)(x). National Fuel understands the Department's intent to establish consistency with the factors the Department currently uses to make a determination of impact under §105.14(b)(1)-(5) and (12). However, National Fuel is concerned that such revisions are overly broad and unduly burdensome, and provide no additional environmental benefit, likely to also result in significant additional costs and time to complete permit applications. For example, subsections (e)(1)(x)(D) and (E) require a detailed analysis of "direct, indirect and secondary impacts." These new requirements would result in substantial investigative work for all relative applications.

In addition, clarification is necessary as to what "secondary impacts" actually entail, and how such impacts are distinguishable from "indirect impacts." National Fuel would appreciate examples and/or additional guidance from the Department as to how far-reaching an impacts analysis must go during the permit application process, especially because the expansive requirements in subsection (E) are significant. Specifically, asking for the indirect and secondary impacts to "local, Federal and State forests or parks, recreation, nature areas, wildlife, sanctuaries, prime farmlands, areas or structures of National, State, or local cultural, historical or archaeological significance..." and so on, seems not only difficult to conceptualize without further explanation, but also requires guidance on what the DEP planned to receive and review when drafting this section. Further, under subsection (E) ("other impacts"), National Fuel requests clarification as to what is considered "nearby" for special lands.

7. §105.13(e)(1)(xiii) (*Cumulative Impact Analysis*)

The Department is proposing to add new subparagraph (e)(1)(xiii) regarding 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. Further clarification by DEP is requested, given that this is another area where significant time could be added to preparation of the permit application. Requesting a cumulative impact analysis beyond the project to *also* include "reasonably foreseeable" and "potential" dams, water obstructions, and encroachments seems to be an unnecessary request, given that an analysis of the project and existing dams, water obstructions, and encroachments is already part of the new section and would provide a great deal of information on its own. Additionally, the language in this section stating that "*applicants must identify piecemeal impacts on each wetland resource in the project area and must consider the wetland resource as part of a complete and interrelated area*" is seemingly contrary to the current "single and complete" project definition in the Pennsylvania State Programmatic General Permit and should be removed or revised, as necessary.

D. §105.20a – Compensation for Impacts to Aquatic Resources

The Department has proposed to substantially modify the existing compensatory mitigation framework for impacts to aquatic resources and aquatic resource functions that cannot be eliminated. Rather than specific ratios, compensatory mitigation for unavoidable impacts would require “replacing the resource functions that will be impacted” or “providing substitute resources or environments.”

In relation to the revised framework, National Fuel is concerned that proposed revisions will allow ample opportunity for Department reviewers to apply their own subjective opinions, considering that each reviewer may have their own preferred method of handling projects. It is possible, and in fact likely, that a Chapter 105 permit approved in county A, may not be approved in county B, even with the same exact methodologies and proposed mitigation efforts.

Proposed subsection (c) relating to “siting criteria for service areas” introduces an opportunity for compensatory mitigation through use of a Department approved mitigation bank, in-lieu fee program or permittee responsible mitigation site. However, it is also noted that “Compensatory mitigation for impacts to aquatic resources will generally not be approved unless the compensatory mitigation site is located within the same designated watershed boundaries identified by the Department.” Therefore, although alternate mitigation opportunities are introduced by this provision, the language indicates that approval will be entirely up to the Department. Similarly, various factors such as: location size, ecological site criteria, and ability to acquire landowner agreements allowing construction and monitoring can make identification of permittee responsible mitigation sites difficult. A further restriction that the site needs to be within “the same designated watershed” will make it even more problematic and infeasible to identify and utilize to mitigate unavoidable project impacts. Additionally, National Fuel supports the DEP’s new in-lieu fee program, Pennsylvania Integrated Ecological Services, Capacity Enhancement and Support Program (“PIESCES”), allowing applicants that are required to offset their aquatic resource impacts for both state and federal permits to pay a fee, which is in turn used on aquatic resource projects within the watershed. This plan saves the permittee time and costs for completing restoration or aquatic enhancement projects independently. Then, the money can be aggregated and used for larger projects which may serve to have a broader positive environmental effect than multiple small projects. Also, the locations should be selected from anywhere within the larger watershed and chosen for the site’s ecological potential rather than in the direct watershed where the disturbance occurred by the project. Coordination between the USACE and the DEP should occur in developing the wetlands banking determinations or in mitigation funding.

Based on the significant amount of criteria set forth by the proposed revisions, a pre-application meeting would be encouraged for every site, not only to establish how the DEP would like to see the site-specific direct/indirect/secondary impacts calculated, but also to ensure everyone is on the same page when it comes to expectations for mitigation, as well as on-going monitoring and maintenance. Such pre-application meetings would serve to minimize back and forth during application review. However, National Fuel asks the DEP to take into consideration availability of its staff time to administer pre-application meetings while applicants work to understand and comply with the onerous criteria proposed in subsection 105.20a.

Section 105.20a(b): National Fuel requests clarification from the Department as to whether the addition of “no net loss of wetlands” will change the requirements for mitigation, or if this is a way for the Department to internally track mitigation efforts. For example, the Chapter 105 Registration Form specifies that if permanent impacts are greater than 0.05 acres, then mitigation is required. Will this be removed from the Registration Form to account for the addition of Section 105.20a(b)?

E. Consistency in Final Rulemaking

National Fuel respectfully requests that the DEP review all newly-proposed sections before the final rulemaking to ensure consistency throughout the regulations, especially with punctuation where similar concepts and items in a series are listed but do not read the same in a different subsection.

III. Conclusion

National Fuel commends the DEP for its efforts in providing this Proposed Rulemaking to provide clarity and consistency for project applicants. National Fuel respectfully requests that the DEP consider its comments and reach out if it would like to discuss anything included herein in further detail. Thank you for the opportunity to submit comments and provide information on this very important regulatory matter.

Respectfully submitted,

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