

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2021

PHILADELPHIA, TUESDAY, FEBRUARY 23, 2021

VOL 263 • NO. 35

An **ALM** Publication

## ENVIRONMENTAL LAW

### Changes on Tap for Stream and Wetlands Permitting

BY TODD D. KANTORCZYK

*Special to the Legal*

The year 2021 promises to be eventful for those looking to complete projects in Pennsylvania that may impact streams and wetlands, such as residential and commercial building construction, and linear projects like pipelines and roads. On Dec. 5, 2020, the Pennsylvania Environmental Quality Board (EQB) published a proposed rulemaking to amend the Pennsylvania Department of Environmental Protection's (PADEP) Chapter 105 regulations, which are the commonwealth's wetland and aquatic resource permitting regulations. The proposed amendments amount to the first substantive revisions to the Chapter 105 regulations in nearly 30 years. In addition, changes to the federal wetland permitting program are scheduled to be implemented in 2021, and the scope of federal Clean Water Act jurisdiction in this area will likely be revisited. This article highlights some of the potentially significant changes associated with these anticipated developments in state and federal aquatic resource permitting programs.

#### CHAPTER 105 AMENDMENTS

In the preamble of the notice for the Chapter 105 rulemaking, the EQB positioned the proposed amendments



**TODD D. KANTORCZYK**

*is a partner with the environmental, energy, safety and land use law and litigation firm Manko, Gold, Katcher & Fox, located in suburban Philadelphia. He can be reached at 484-430-2359*

*or [tkantorczyk@mankogold.com](mailto:tkantorczyk@mankogold.com).*

as simply an update to improve the clarity, consistency and efficiency of the implementation of Chapter 105 by reflecting guidance and practices already adopted by PADEP in administering the Chapter 105 program. Nevertheless, many of the proposed changes have the potential to place additional requirements on obtaining necessary approvals or create uncertainty as to what projects are permissible.

For example, the Chapter 105 amendments include a number of new definitions. One notable addition is for the term "project," which as proposed includes not just the area of the proposed activity, but also reasonably foreseeable areas planned to contain future development that would require 105 permits. While the Chapter 105 program has always required PADEP to consider reasonably foreseeable development within the affected watershed in evaluating an application, changing the scope of an applicant's project to

“ The combination of the state and federal developments to aquatic resource programs have the potential to affect significantly how—and whether—projects that impact wetlands and streams receive necessary regulatory approvals in 2021 and beyond. ”

include this future development could have unintended consequences.

The proposed Chapter 105 amendments also include a new definition of the term "water dependent," a key concept that PADEP is required to evaluate for every 105 permit application. The EQB has indicated that the new definition, along with other changes to the regulations governing what must be included in a 105 application, are intended to reflect a recent decision from the Pennsylvania Environmental Hearing Board that held that the question of water dependency is not just a narrow evaluation of whether the basic purpose of the project requires

access to or impacts on an aquatic resource, but also consideration of the availability of less disruptive practicable alternatives that can also fulfill the basic purpose of the project. Whether all stakeholders agree that these changes, and how PADEP applies them going forward, accurately reflect the scope of the Board's decision on this issue remains to be seen.

In addition, the proposed Chapter 105 amendments would provide additional details on what is required to be submitted as part of a 105 application to better reflect the details that PADEP has been requesting to date through published instructions associated with permit application forms. One area of focus is the alternatives analysis, which requires the applicant to examine whether other locations or designs could avoid or minimize environmental impacts without affecting the basic purpose of the project. PADEP, however, is also working on a technical guidance document that would provide even more details concerning the components of a sufficient alternatives analysis but has yet to officially release that document for public comment.

Another area that has received additional clarification in the proposed Chapter 105 amendments concerns compensatory mitigation for aquatic resource impacts that cannot be avoided. The applicable section has been completely updated to be consistent with PADEP guidance and 2008 federal regulations, focuses on aquatic resource functions, and now references direct, indirect and secondary impacts. Importantly, the new regulation explicitly provides for the in-lieu fee program and the use of approved mitigation banking sites as

options for compensatory mitigation. The proposed regulation also replaces the 1:1 wetland area replacement ratio with a "no net loss" standard that was previously articulated as a PADEP strategy and as a goal in the 2008 federal rule.

The proposed changes to the Chapter 105 program also augment the types of projects that are eligible for permit waivers. Among the newly eligible projects are geotechnical or environmental site investigations, recreational trails and temporary pads at wetland crossings. The new waiver provision also includes some additional restrictions, however, that exclude waivers for projects in certain areas, including threatened and endangered species habitats and identified historic, cultural or archaeological sites.

## FEDERAL PROGRAM CHANGES

In addition to these proposed state regulatory amendments, changes to the federal aquatic resource program are expected in 2021. First, a primary wetland permitting vehicle used to obtain approvals under the federal Clean Water Act and the 105 program, the Pennsylvania state programmatic general permit, is set to change as of July 1. The new general permit will revise certain eligibility requirements and the instances when PADEP can approve an application without consulting the U.S. Army Corps of Engineers. In January, the Corps also announced the modification and reissuance of 12 nationwide permits, plus the issuance of four new general permits, that can be used to secure federal Clean Water Act authorization for certain projects.

2021, however, may also see renewed efforts to expand the

scope of federal jurisdiction over aquatic resources. During 2020, the Trump administration promulgated the "Navigable Waters Protection Rule," which narrowed the extent of "Waters of the United States" subject to federal jurisdiction. A number of environmental organizations and a group of states and cities appealed the rule, but the rule went into effect in June in all jurisdictions except Colorado. The incoming Biden administration, however, is expected to take steps to undo this rule and return the scope of federal jurisdiction to the more expansive standard previously articulated in a rule promulgated in 2015. These efforts may also include additional changes to the nationwide permits referenced previously. Any proposed changes to the federal program, however, will likely result in more lawsuits and uncertainty as to what qualifies as "Waters of the United States" in a given jurisdiction.

In sum, the combination of the state and federal developments to aquatic resource programs described above have the potential to affect significantly how—and whether—projects that impact wetlands and streams receive necessary regulatory approvals in 2021 and beyond. •

---

**MANKO | GOLD**  
**KATCHER | FOX** LLP  
AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

---

Reprinted with permission from the February 23, 2021 edition of THE LEGAL INTELLIGENCER © 2021 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-256-2472, reprints@alm.com or visit [www.almreprints.com](http://www.almreprints.com). # TLI-02222021-482973