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Sent via e-mail and U.S. Mail

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Bureau of Waterways Engineers and Wetlands
Division of Wetlands, Encroachments, and training
Attention: Kenneth Murin, Chief
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**Re: Comments on Proposal to Modify and Reissue General Permit BWEW-GP-8
Noticed in 43 Pa.B. 6599 (Saturday, November 2, 2013)**

To Whom It May Concern:

On behalf of our members and the undersigned organizations, the Center for Coalfield Justice ("CCJ") submits the following comments on the Department of Environmental Protection's ("Department") proposal to modify and reissue Pa Code Chapter 105 General Permit BWEW-GP-8 (Temporary Crossing and Environmental Testing or Monitoring Activities). The Department made BWEW-GP-8 ("Proposed GP-8") available for public comment on November 2, 2013 and is accepting public comments through January 10, 2014.¹

The Center for Coalfield Justice is a Pennsylvania-incorporated not-for-profit organization with federal Internal Revenue Service § 501(c)(3)-status recognition located at 184 S. Main Street, Washington, PA 15301. CCJ is a membership organization with a mission to "improve policy and regulations for the oversight of fossil fuel extraction and use; to educate, empower and organize coalfield citizens; and to protect public and environmental health." CCJ consists of individual members and is governed by a volunteer Board of Directors. The Center for Coalfield Justice has over one thousand members and supporters in the area, many of which live in the immediate region of the Bailey Mine Complex.

The Center for Coalfield Justice was formed as the "Tri-State citizens Mining Network" in 1994 by a coalition of grassroots groups and individuals concerned about

¹ See Pa.B. 6599 (November 2, 2013)

the effects coal mining had on communities and the environment. The people involved recognized the need to work together to build a strong voice in the coalfield community. Tri-state was incorporated in 1999 and re-organized into “Center for Coalfield Justice” in 2007.

In 2011 CCJ’s mission was expanded to include work on all fossil fuel extraction in recognition of the harmful effects of natural gas production on environmental quality and public health in Greene and Washington Counties. To carry out its mission, CCJ offers it support in education, leading, organizing, and coordinating individuals and groups that have been negatively impacted by fossil fuel extraction and use.

The Department is not authorized to proceed with Proposed GP-8 in its current form. The projects are not similar in nature;² the projects cannot be adequately regulated utilizing the same standardized specifications and conditions;³ it does not contain conditions governing the design, construction, operating, maintenance, and monitoring to adequately protect life, health, property, and the environment;⁴ and the specification of watersheds and streams where the general permit is effective does not adequately account for various statewide protected water uses.⁵ Because it is so deficient, the Department should not issue Proposed GP-8. In the event that Proposed GP-8 is revised, the scope and significance of the necessary revisions merit a second public comment period.

1. The Department has failed to demonstrate that the projects are similar in nature, and can be adequately regulated utilizing the same standardized specifications and conditions.

General permits are a special category of permits that may be issued for certain activities that the Department may regulate without the need for individual permit reviews. Section 7(b) of the Dam Safety and Encroachments Act authorizes the Department to issue general permits for a category of dam, water obstruction or encroachment if the Department determines that the projects are “similar in nature, and can be adequately regulated utilizing standardized specifications and conditions.”⁶ Neither in the public notice nor in the draft GP-8 nor in the December 20, 2013 webinar does the Department articulate a reasoned explanation for its conclusion that temporary road crossings, temporary service line crossings, and environmental testing and monitoring are all similar and nature, and can be adequately regulated utilizing the same specifications and conditions.

² 25 Pa. Code § 105.442(a)(1)

³ 25 Pa. Code § 105.442(a)(2).

⁴ 32 P.S. § 693.7(c); 25 Pa. Code § 105.444(4)

⁵ 25 Pa. Code § 104.444(2); 25 Pa. Code § 93.4a

⁶ 32 P.S. § 693.7(b)

While the Existing GP-8 is limited to temporary road crossings, Proposed GP-8 would authorize temporary road crossings, temporary service line crossings, and temporary testing and monitoring activities, which may include seismic testing.⁷ These changes represent a significant expansion in the scope of GP-8. To date, the purpose of GP-8 has been to authorize temporary road crossings across or along regulated waters of the Commonwealth, including wetlands, where no practicable alternative exists. Proposed GP-8 attempts to authorize a wide range of disparate activities by expanding the scope to also authorize electric and telephone lines, water lines and other pipelines as large as 24 inches in diameter that may carry polluted water, and temporary testing and monitoring activities. It appears that the only common denominator for all three activities covered under Proposed GP-8 is that they are considered temporary. However, this is not sufficient to satisfy the requirement that activities authorized under a general permit must be similar in nature and adequately regulated utilizing standardized specifications and conditions.⁸ The expanded scope of the proposed BWEW-GP-8 is inappropriate and contrary to the Dam Safety and Encroachments Act and Chapter 105 regulations because environmental testing and monitoring is not similar in nature.

A. Environmental testing and monitoring as defined in Proposed GP-8 is not similar in nature because its project narrative is different.

The Department may issue a general permit for a category of activities *only if* the Department determines that the activities in such category are similar in nature.⁹ In order to make such a determination, the Department must consider the description, or the project narrative, and potential impacts of the activities to be authorized under the General Permit. In a webinar hosted by the Department on December 20, 2013, the Department stated that it is proposing to expand the scope of GP-8 because it has determined that the additional activities will cause “no more adverse effects than temporary road crossings.”¹⁰ This is inadequate because the Department must consider more than just the impacts of the activities.

Temporary water crossings have several characteristics in common: selection of the water crossing location has a significant impact on the type of structure required; they require a properly engineered structure to safely carry the load; they usually involve water diversion to allow construction in dry conditions; they can have a significant impact on fish habitat, water quality, and fish migration; protection and maintenance of fish habitat, wildlife habitat and water quality are important considerations; and finally,

⁷ DEP Webinar held on December 20, 2013

⁸ *Id.*

⁹ 25 Pa. Code § 105.442(a)(1)

¹⁰ The Department also stated that it had determined these activities were “similar in nature as far as crossings.” CCJ disagrees. Environmental testing and monitoring is not a “crossing” that must be constructed like temporary road crossing and temporary service line crossings.

the failure of water crossing structures can have serious consequences on the stream or wetland.

As to the project narrative, temporary road crossings and temporary service line crossings are similar because they involve earth disturbance activities. These activities include road or service line planning and location, land clearing and grubbing, earth grading, installation of drainage ditches and culverts, graveling, maintenance, and finally removal. Land clearing involves the removal of standing trees to make room for the construction of the road or service line. The equipment normally used in clearing includes chainsaws, bulldozers, wheeled skidders and other loading or haulage equipment. Grubbing consists of the removal and disposal of stumps, roots, brush, small trees and embedded logs and organic material overlying the soil. Grubbing is done to expose the soil to prepare for earth grading operations. Earth grading reshapes the original ground contours to the shape of the road in profile and in cross-section. Drainage consists of the excavation of roadside ditches and the installation of cross culverts and drainage culverts. Graveling refers to the placement of sand and gravel material to form the structural road sub-base and surface that supports the wheel loads. Finally, road or service line abandonment occurs when its original purpose or the two-year limit of the project has expired. Abandonment under Proposed GP-8 requires the physical removal of the structure. Removal of the structure will necessarily require excavation. Once the structure is removed, the operator is required to perform restoration activities, which might involve re-grading to return the area to its original contour, stabilization, and re-vegetation. During each of these phases the same kind of equipment is usually used: bulldozers, backhoes, dump trucks, front-end loaders, and graders

On the other hand, environmental testing and monitoring, as defined in Proposed GP-8 is not similar in nature because the project narrative sounds quite different. The Department has defined environmental testing and monitoring in Proposed GP-8 as: "Investigative activities of a temporary nature, not to exceed one (1) year, including but not limited to soils sampling, borings of soil or rock material, sensor placement and recording devices and other similar or related activities." During the webinar held on December 20, 2013, the Department made clear that the phrase "other similar or related activities" includes seismic testing. There are two types of energy sources used in seismic testing, explosive and non-explosive. Existing GP-8 does not include any language about the use of explosives. However, Proposed GP-8 does contemplate the use of explosives in item 14 and requires that the applicant secure a written permit from the Pennsylvania Fish and Boat Commission ("PFBC") under 30 Pa. C.S. § 2906. Although the Department has not provided any explanation for including language regarding use of explosives in Proposed GP-8, and has not explicitly included seismic testing in the definition of environmental testing and monitoring, it appears that any use of explosives authorized under Proposed GP-8 must be related to environmental testing and monitoring, specifically seismic testing.

The project description for seismic testing using explosives highlights two significant characteristics that disqualify such activity from coverage under Proposed GP-8. First, if the Seismic testing uses an explosive energy source, drilling is conducted at each designated source marker. By contrast, the project description for temporary stream crossings is void of any language related to drilling. In fact, the Department expressly excludes temporary stream crossings that are bored from coverage under Proposed GP-8. Second, a dynamite charge is loaded down each hole and detonated in a sequence. The energy waves, reflected back to the subsurface formations, are picked up by the geophones and relayed to the recording truck. Again, nothing in the project narrative for temporary stream crossings suggests that the use of explosives is necessary in the construction, maintenance, or removal of temporary stream crossings. Moreover, it is clear that the Department does not anticipate the use of explosives for temporary streams crossings because Existing GP-8, which covers temporary road crossings, is silent as to the use of explosives.

The Department cannot authorize activities under a single general permit that are not similar in nature.¹¹ Therefore, the Department should remove environmental testing and monitoring from the scope of Proposed GP-8. In the event that environmental testing and monitoring is not removed, then the Department must redefine environmental testing and monitoring to exclude seismic testing using explosives.

B. Environmental testing and monitoring as defined in Proposed GP-8 cannot be adequately regulated utilizing the same standardized specifications and conditions because the impacts are not the same.

The Department may issue a general permit for a category of activities *only if* the Department determines that the activities in such category can be adequately regulated using the same standardized conditions and specifications.¹² In order for the Department to make this requisite finding, it must evaluate the project narrative and the potential impacts of the activities. In the webinar hosted by the Department on December 20, 2013, the Department stated that it is proposing to expand the scope of GP-8 because it has determined that the additional activities will cause “no more adverse effects than temporary road crossings.” CCJ respectfully disagrees.

Each general permit issued by the Department must include a set of standardized specifications or conditions necessary to adequately protect the environment.¹³ Item Three (3) of Proposed GP-8 addresses Best Management Practices for activities conducted under the general permit. Proposed GP-8 requires the applicant to comply with Chapter 102 and provide an Erosion and Sedimentation Control Plan (E&S Plan) specific to the activity conducted under Proposed GP-8. The purpose of an E&S Plan is to minimize

¹¹ 25 Pa. Code § 105.442(a)(1); 32 P.S. § 693.7(b)

¹² 32 P.S. § 693.7(b); 25 Pa. Code § 105.442(a)(2)

¹³ 25 Pa. Code § 105.444(4);

impacts that earth disturbance activity on streams and wetlands using Best Management Practices (BMPs).¹⁴ Based on the project narratives for temporary road crossings and service line crossings, the primary environmental impact associated with their construction, maintenance, and removal is erosion and sedimentation. In other words, the pollution profile for temporary road crossing and temporary service line crossings is primarily sediment. As a result, it is likely that the Department can adequately regulate the installation, maintenance and removal of these temporary crossings using the same conditions and specifications found in Chapter 102, which regulates earth disturbance activity. Of course, any release of water containing pollutorial materials from a temporary pipeline into a water of the Commonwealth would implicate the Clean Water Act and Clean Streams Law.

However, the impacts associated with environmental testing and monitoring, specifically seismic testing using explosives, are different and cannot be adequately regulated using these same conditions. The use of explosives will, of course, result in earth movement and increased sedimentation. But, the harm associated with the use of explosive in or near waters of the Commonwealth is not limited to earth movement and increased sedimentation. Such activity would almost certainly alter or disturb the streambed, fish habitat, and water so as to cause damage to or loss of fish or other aquatic life.

Proposed GP-8 requires compliance with Chapter 102. However, requiring compliance with Chapter 102 does not satisfy Section 7(c) of the Dam Safety and Encroachment's Act. Section 7(c) requires the Department to include conditions in the general permit as are necessary to adequately protect life, health, property, and the environment.¹⁵ Chapter 102 cannot by itself satisfy the comprehensive focus Section 7(c) because it is focused on only two possible impacts: erosion and sedimentation.¹⁶ Given this narrow focus, it is impossible for Chapter 102 compliance to satisfy the full range of what Section 7(c) requires: conditions necessary to adequately protect the environment.¹⁷ The "minimization" of impacts under Chapter 102 does not adequately protect the environment from all of the impacts associated with seismic testing using explosives.

Proposed GP-8 contains nothing that would account for the impacts to the streambed, fish habitat, or loss of fish or other aquatic life. Section 7(b) clearly requires the Department to determine that projects authorized under the same general permit can be adequately regulated utilizing the same standardized specifications and conditions.¹⁸

¹⁴ 25 Pa. Code § 102.2(a)

¹⁵ 32 P.S. § 693.7(c)

¹⁶ 25 Pa. Code § 102.2(a) (purpose is to "require persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation.")

¹⁷ 32 P.S. § 693.7(c)

¹⁸ 32 P.S. § 693.7(b)

However, the use of explosives in or near streambeds and wetlands will result in harm that is not adequately regulated under the conditions specified in Proposed GP-8. Failure to comply with the requirements imposed by Sections 7(b) and 7(c) is contrary to law and the permit, if issued, would be unlawful. The Department must consider how seismic testing using explosives will impact stream and riparian habitat of aquatic life and include conditions necessary to protect the aquatic life use.¹⁹

* * *

The Department must remove environmental testing and monitoring from the scope of Proposed GP-8 or revise the scope of such activity to exclude seismic testing. The Department cannot issue a general permit in the absence of the requisite finding that the activities are similar and nature and adequately regulated utilizing standardized conditions and specifications. Environmental testing and monitoring, as it is defined in Proposed GP-8, is not similar in nature because it has unique physical characteristics and impacts. Regulation of explosives presents a unique blend of health, safety and environmental concerns. Chapter 102 cannot by itself regulate these activities because it is focused on only two possible impacts to water quality: erosion and sedimentation.²⁰ While it is necessary to account for increased sedimentation resulting from the use of explosives in or near streams, the limited scope of Chapter 102 is insufficient to achieve compliance with water quality standards when other impacts threaten the receiving water.

2. Proposed GP-8 is contrary to the Dam Safety and Encroachments Act because it does not contain adequate mechanisms for the Department to ensure protection of water quality and uses.

The Dam Safety and Encroachments Act requires a general permit to specify design, operating, and monitoring conditions as are necessary to adequately protect the environment.²¹ In Pennsylvania there three categories of water quality standards: 1) surface water uses; 2) water quality criteria;²² and 3) antidegradation policy.²³ One of the essential tasks of the Department is to ensure that the existing uses and the water quality necessary to support those uses is maintained and protected.

¹⁹ 32 P.S. § 693.7(b); 25 Pa. Code § 93.4a(b) (“existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected”)

²⁰ See 25 Pa Code § 102.2(a)

²¹ 32 P.S. 693.7(c)

²² Both narrative or “general” see 25 Pa. Code § 93.6 and numeric or “specific” see 25 Pa Code § 93.7

²³ Pennsylvania’s anti-degradation policy provides that existing in-stream uses of each water body and the level of water quality necessary to protect those uses shall be maintained and protected.

Once the Department has issued a general permit, it is available for use by anyone with a project that satisfies the terms and conditions of that general permit.²⁴ A person seeking to use a general permit for a specific project must first register the project with the Department.²⁵ However, this act is simply ministerial and does not involve a technical review by the Department.²⁶ The obligation to ensure that the use applied for is in compliance with the terms and conditions of the general permit falls on the registrant.²⁷ As a result, it is especially important for the Department to develop adequate and effective terms and conditions in all general permits.

A. The applicability of Proposed GP-8 should be limited based on categories of streams or wetlands.

General permits issued under the Dam Safety and Encroachments Act may be issued on statewide basis or they may be limited to specific watersheds, particular categories of streams, or geographic regions.²⁸ Special protection waters and impaired waters require additional controls and conditions. Existing GP-8 only prohibits fords on special protection streams. Proposed GP-8 maintains that prohibition but allows other kinds of temporary activities in both special protection and impaired waters.

CCJ encourages the Department to exercise its authority to make Proposed GP-8 ineligible for use in any Special Protection or impaired waters. Doing so would not prohibit these activities; it would simply allow the Department to perform a technical review, provide public notice and comment, and authorize approval through an individual permit once the Department is satisfied that the activity will not violate water quality standards.

i. Temporary road or service lines that cross or impact Special Protection Waters should not qualify for a general permit.

Proposed GP-8 should not be available in any special protection watersheds. Special Protection waters, which include both exceptional value (EV) and high quality (HQ) waters, represent the best streams and wetlands in the Commonwealth. Projects in special protection watersheds require a thorough and site-specific analysis to ensure that

²⁴ 25 Pa. Code. § 105.443.

²⁵ 25 Pa. Code § 105.447

²⁶ 25 Pa. Code §§ 105.443, 105.447

²⁷ 25 Pa. Code § 105.443(b); 25 Pa. Code § 105.44 (requiring anyone who operates, maintains, or enlarged a water obstruction or encroachment under a General Permit to comply with the terms and conditions thereof.

²⁸ 25 pa code § 105.442(b)

water quality will be maintained and protected.²⁹ Such an analysis is incompatible with the expedited approach contemplated by the general permit.

Activities that will impact High Quality or Exceptional Value waters are subject to specific antidegradation requirements.³⁰ More specifically, when activities are proposed in Special Protection Waters the Department must “assure that cost-effective and reasonable best management practices for nonpoint source control are achieved.”³¹ Although Proposed GP-8 requires a registrant to submit an E&S Plan for approval, this falls short of satisfying the Department’s duty. Special Protection Waters require that the *existing* in-stream water quality is maintained and protected. If the receiving stream is High Quality or Exceptional Value, it means that the quality of the water exceeds that which is necessary to support its uses. It is that better-than-necessary level of quality that the antidegradation scheme protects. In order to ensure protection, the Department must perform a technical review of the proposed activity and consider the all of the impacts on water quality and uses.³²

One obvious impact that the Department should consider is disturbance to riparian vegetation. Temporary stream crossings will result in disturbances to riparian vegetation that will reduce stream surface shading, riparian vegetation height, and density. This disturbance has the potential to cause or contribute to in-stream temperature increases that exceed the water quality standard for the protection of aquatic life uses, namely the Cold Water Fishes (CWF) and HQ-CWF designated uses.³³

HQ-CWF streams are subject to Section 93.7(a), which imposes maximum limitations on temperature, ranging as low as 38°F during January and February, a range of 48-58°F during April and May, to 66°F in July and August.³⁴ Since the criteria are maximums, they must never be exceeded. When canopy densities are compromised, thermal loading increases in response to the increase in stream surface exposed to solar radiation. Water temperature influences the metabolism and mortality of aquatic organisms. Natural temperatures of a stream or wetland fluctuate daily and seasonally. However, these natural fluctuations do not eliminate indigenous populations. Aquatic life may survive brief periods of higher temperatures, but cannot persist in waters where the maximum temperature is consistently exceeded. Disturbance of riparian vegetation may cause modifications to these natural in-stream temperatures, resulting in deleterious impacts on aquatic life. Of all of the environmental factors affecting aquatic organisms, temperature is always a factor that must be considered. One of the essential tasks of the Department under its regulations is to assure that the existing HQ-CWF use will be maintained

²⁹ See 25 Pa. Code §§ 93.4a, 93.4c

³⁰ 25 Pa. Code § 93.4c

³¹ 25 Pa. Code § 93.4c(b)(2)

³² 25 Pa. Code §§ 104.14(b)(4), (11)

³³ 25 Pa. Code §§ 93.7(a), 93.4a(b),(c)

³⁴ 25 Pa. Code § 93.7(a)

despite the disturbance to riparian vegetation. If the Department does not require and review a thermal impacts analysis, there is no way to know whether the Section 93.7(a) parameters will be met.

Simply because the activities are considered temporary does not exempt an operator or the Department from complying with water quality standards. In order to ensure that the *existing* quality and uses of Special Protection streams and wetlands are protected, the Department must evaluate whether the construction, maintenance and removal of temporary crossings will comply with all three categories of water quality standards before it issues a permit. A general permit is inappropriate because this evaluation is necessarily site specific. Furthermore, because High Quality and Exceptional Value wetlands are afforded special protections, the Department cannot regulate encroachment activities that impact these kinds of waters using the same standards and conditions applicable to waters that do not qualify for special protection.³⁵

ii. Temporary road or service line crossings impact impaired or threatened waters should not qualify for a general permit.

Similarly, Proposed GP-8 should not be available in impaired watersheds. The Department must ensure that earth disturbance activities associated with temporary crossings do not contribute sediment load to water bodies already impaired for sediment. As a result, proposed activity in impaired watershed also requires a more rigorous analysis than Proposed GP-8 requires.

Restoring impaired waters in the Commonwealth is critical, but will not occur unless the Department takes appropriate actions to ensure that discharges to impaired waters will not contribute to impairment and are consistent with current restoration plans. This necessarily requires the Department to perform heightened, site-specific review of proposed activities that may impact impaired waters. Department staff must first determine whether runoff from the proposed activity is expected to contain pollutants, which are already causing impairment of the water body. This will, of course, vary from project to project.

Under the federal Clean Water Act, each state is required to establish TMDLs for each water resource within its boundaries that does not meet water quality standards even after required effluent limits are applied.³⁶ A TMDL accounts for all pollutant

³⁵ 25 Pa. Code § 105.14(11) (in reviewing a permit application the Department will consider the projects consistency with State antidegradation requirements contained in Chapters 93, 95, and 102 (relating to water quality standards; wastewater treatment requirements; and erosion and sediment control) and the Clean Water Act (33 U.S.C.A. §§ 1251 – 1376)); Pa. Code § 105.17 (acknowledges that exceptional value wetlands deserve special protection); 25 Pa. Code § 96.3 (relating to water quality protection requirements).

³⁶ 33 U.S.C. 1313(d)(1)(A)

sources, including point sources and nonpoint sources, for a particular stream and calculates of the total pollutant loading, or budget, that the stream can assimilate while still meeting the applicable water quality standards.³⁷ In other words, the Department is required to identify specific waters where problems exist or are expected to exist, set priorities for these waters, allocate pollutant loadings among point and nonpoint sources, and seek EPA approval for their determinations.³⁸ This allocation process unavoidably differs from one stream to another because its purpose it to achieve reductions in the discharge of pollutants contributing to the water quality violations. Authorization under Proposed

GP-8 does not allow for the kind of review necessary to ensure that the required load reductions to achieve compliance with water quality standards are met. The Department cannot delay improving the water quality of an impaired stream simply because the activity is considered temporary.

Furthermore, the Department cannot assign all of the necessary load reductions to point sources that discharge into impaired waters. The NPDES program is only one of the two primary programs that provide maintenance and improvement of water quality and the Department's duties and responsibilities for issuing NPDES permits is only one of the focal points in water quality improvement. Furthermore, for waters impaired by sediment, it is conceivable that many of the loading sources are nonpoint sources. The NPDES permitting scheme is limited to point source discharges.³⁹ It is incongruous, if not disingenuous, to rely on a program that does not apply to nonpoint source discharges for the purposes of achieving reductions in loads from sources that are classified as non-point sources.

* * *

For these reasons, Proposed GP-8 should not apply in Special Protection and impaired watersheds. Section 6 of Proposed GP-8 should be revised to include: "Projects located in or with the potential to impact waters that have a designated or existing use of Exceptional Value or High Quality under Chapter 93 (relating to water quality standards) or for which the identification as impaired pursuant to Section 303(d)(1)(A) of the Federal Clean Water Act (33 U.S.C.A. § 1313(d)(1)(A)) has been approved pursuant to Section 303(d)(2) of the Federal Clean Water Act (33 U.S.C. § 1313(d)(2))."

B. Proposed GP-8 must contain adequate specifications and conditions to protect aquatic life.

A review of Proposed GP-8 raises significant doubts as to the efficacy of the conditions related to aquatic life. The Department must include a set of conditions

³⁷ 25 Pa. Code § 96.1

³⁸ 33 U.S.C. § 1313(d)(2)

³⁹ See 25 Pa. Code § 92.3

governing the construction, operation, maintenance, inspection and monitoring of the projects authorized under GP-8 consistent with all other laws administered by the Department.⁴⁰ Aquatic life is a surface water use and is therefore protected under Pennsylvania's water quality standards. Section 93.4a(b) requires that "existing instream water uses and the level of water quality necessary to protect the existing uses" be maintained and protected.⁴¹ The narrative water quality standard is stated in the regulations at Chapter 93, "Water may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life."⁴² This standard is applicable to designated and existing uses.

The only condition in Proposed GP-8 pertaining to aquatic life appears in condition 16: "No regulated activity may substantially disrupt the movement of those species of aquatic life indigenous to the watercourse, stream, or body of water including those species which normally migrate through the area." This is unlawfully inadequate because it only attempts to protect the movement of aquatic life. It is clear that Sections 93.6(a) and 93.4a(b) are meant to be comprehensive in the sense that they require protection of the receiving water from all pollutants, including sediment, which might impair the use of that water. Such a holistic approach is essential for the protection of aquatic life.

Sediment that is deposited in surface waters is of particular concern because of its potential to degrade in-stream conditions and aquatic communities. Excessive sediments deposited on stream bottoms can impact spawning gravels by reducing survival and growth rates, impair fish food sources, reduce cover from prey and thermal impacts, and reduce habitat complexity in stream channels.⁴³ Excessive suspended sediments can make it more difficult for fish to find prey and at high levels can cause direct physical harm, such as clogged gills.⁴⁴ "Fine sediments, of the size that can be deposited between grains of sand, are most threatening to fish. If deposited on fish eggs, fine sediments can reduce egg-to-fry survival and fry quality by suffocating eggs and forming physical barrier to emerging larvae."⁴⁵ Furthermore, "sediment suspended in water increases turbidity, limiting the depth to which light can penetrate if turbidity increased to a sufficient

⁴⁰ 25 Pa. Code § 105.444(4) ("Each general permit issued by the Department, will include... a set of conditions governing the construction, operation, maintenance, inspection and monitoring of the projects covered by the general permit as are necessary to assure compliance with the act and this chapter and with other laws administered by the Department, the Fish and Boat Commission and a river basin commission")

⁴¹ 25 Pa. Code § 93.4a(b)

⁴² 25 Pa. Code § 93.6(a)

⁴³ Waters, T.F. 1995. *Sediment in streams – Sources, biological effects, and control*. American Fisheries Society Monograph 7. American Fisheries Society, Bethesda, MD.

⁴⁴ *Id.*

⁴⁵ EPA, *National Management Measures to Control Nonpoint Source Pollution from Forestry, Chapter 2: Water Quality and Forestry Activities*, at 2-10.

degree and, thus, potentially reducing photosynthesis and oxygen replenishment.⁴⁶ A quantity of suspended sediment far in excess of that normally present in a water body can suffocate aquatic animals and severely limit the ability of sight-feeding fish to find and obtain food.”⁴⁷

The Department cannot proceed with Proposed GP-8 in its current form because doing so would be inconsistent with the Department’s duty to implement Pennsylvania’s water quality standards.⁴⁸ Requiring compliance with Chapter 102 BMPs is not, by itself, sufficient to satisfy this duty. Compliance with Chapter 102 regulations may be considered compliance with the Clean Streams Law only if the implementation of BMPs does not allow a violation of water quality standards. The purpose of Chapter 102 is to minimize the potential for accelerated erosion and sedimentation.⁴⁹ However, the “minimization” of impacts under Chapter 102 regulations may not be adequate to protect aquatic life.

For these reasons, the Department must include additional conditions in Proposed GP-8 to ensure that aquatic life is adequately protected.⁵⁰ First, Proposed GP-8 should be amended to include: “The owner of a temporary crossing authorized by this general permit may not discharge, from point or nonpoint sources, substances in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.” Additionally, the Department should explicitly require that any area that will be dormant for more than 14 days be stabilized. This will reduce the amount of sediment that is washed into waters of the Commonwealth.

3. Proposed GP-8 is inadequate because it does not contain any conditions to protect the water body from invasive species.

The Department must include a set of condition governing the construction, operation, maintenance, inspection and monitoring of projects covered by the general permit as are necessary to assure compliance with laws administered by the Fish and

⁴⁶ *Id.*

⁴⁷ *Id.* at 2-11.

⁴⁸ 25 Pa Code § 104.444(4); 40 C.F.R. § 131.12(a)(1) (State water quality standards must include an antidegradation policy that ensures that existing in-stream water uses and the level of water quality necessary to sustain them are maintained and protected); 25 Pa. Code § 93.4a(b) (“Existing in-stream water uses and the level of water quality criteria necessary to protect the existing use shall be maintained and protected.”)

25 Pa Code §§ 93.6(a), 93.4a(b)

⁴⁹ 25 Pa. Code § 102.2(a) (Purpose is to “require persons proposing or conducting earth disturbance activities to develop, implement, and maintain BMPs to minimize the potential for accelerated erosion and sedimentation”).

⁵⁰ 25 Pa Code § 104.444(4); 40 C.F.R. § 131.12(a)(1); 25 Pa. Code § 93.4a(b); 25 Pa. Code § 93.6(a)

Boat Commission (“PFBC”)⁵¹ The PFBC has prohibited the transportation of a species into this Commonwealth from another State, province or country and the transportation from waters in this Commonwealth to another drainage of this Commonwealth where the particular species is not always present.⁵² However, Proposed GP-8 is silent as to invasive species.

“Invasive species are one of the most significant threats to native ecosystems in the nation.”⁵³ A species is considered invasive if it is not native to the ecosystem under consideration and its establishment causes or is likely to cause economic, environmental or human harm.⁵⁴ These species can be any type of organism including plants, fish, invertebrates, disease or pathogen. Most new introductions of invasive species occur as a result of human activity and construction equipment has already been recognized as a potential vehicle for the spread of invasive species in Pennsylvania.⁵⁵

The Department cannot issue Proposed GP-8 because doing so would be inconsistent with the Department’s duty to assure compliance with laws administered by the PFBC. The Department should amend Proposed GP-8 to include conditions as are necessary to assure compliance with the PFBC’s prohibition on the transportation of invasive species.

4. The Department must revise the definitions of Temporary Road Crossing and Temporary Service Line Crossing so that they are consistent with the Department’s restrictions on applicability.

In order to use standardized definitions for consistency and future revisions, the Department proposes to amend GP-8 to include definitions for Road Crossing, Service Line Crossing, and Temporary Crossing, thereby incorporating the definitions for road crossing and service line crossing into the definition for temporary crossing. However, this has the potential to cause confusion among the public and the regulated community.

Existing GP-8 defines a temporary road crossing as a road installed for a period of time not to exceed one year across a wetland or across or along a stream. Proposed GP-8 defines road crossing as: a road that is placed in, along, under, across or over a regulated water of a Commonwealth. Similarly, Proposed GP-8 defines service line crossing as

⁵¹ 25 Pa. Code § 105.444(4) (“Each general permit issued by the Department, will include... a set of conditions governing the construction, operation, maintenance, inspection and monitoring of the projects covered by the general permit as are necessary to assure compliance with the act and this chapter and with other laws administered by the Department, the Fish and Boat Commission and a river basin commission.”)

⁵² 58 Pa. Code § 73.1(a)

⁵³ Department Of Natural Resources Invasive Species Management Plan (January 2011)

⁵⁴ Federal Executive Order 13112 (1999)

⁵⁵ Pennsylvania Invasive Species Council, *Pennsylvania Invasive Species Management Plan*, (May 2009).

including electric transmission lines, pipeline, telephone lines, water lines and other similar facilities which are placed in, along, under, across or over a water of this Commonwealth. The definition for Temporary Crossing in proposed GP-8 appears to incorporate the definitions for road crossing and service line crossing and places two restrictions: 1) that the crossing be placed for a specific period of time not to exceed one year, and 2) that the crossing be removed in its entirety after that period of time. These proposed changes are problematic for a number of reasons.

First, a new road under or in a stream or wetland would cause major impacts during its construction and removal. Existing GP-8 limits temporary road crossings to being across a wetland or across or along a stream. The Department has not provided any explanation or justification for now allowing a temporary road to go under a stream or on a streambed.

Second, the definition of service line crossing contradicts the restrictions on applicability contained in item 6 of Proposed GP-8. If the definition of temporary crossing and service line crossing are read together, it would seem that the Department is attempting to authorize a service line crossing that is placed in, along, under, across or over a water of this Commonwealth so long as it is not in place for more than a year and it is removed in its entirety after that period of time. However, item 6 of Proposed GP-8 states that the general permit will not apply and will not be valid when the temporary service line is trenched or bored and when the temporary service line crossing is on streambeds. These restrictions appear to exclude any temporary service line from coverage under Proposed GP-8 that is placed in or under a water of a Commonwealth. It is unclear how the Department can reconcile these restrictions with the new definitions.

Third, it is irrational for the Department to limit temporary service line crossings to only those that are across or along while still expanding temporary road crossings to include roads that are placed under and in waters of the Commonwealth. The installation, maintenance, and removal of temporary roads under or in streams will result in the same kind of harm that the Department seeks to avoid by not authorizing temporary service lines that are trenched, bored, or located on streambeds.

Fourth and finally, the Department is trying to maintain a logically contrary position by applying definitions for crossing that are not temporary in a general permit that only authorizes temporary activities. While CCJ can appreciate the Department's desire to use standardized definitions, the benefits of using standardized definitions do not outweigh any adverse effects in this case. As noted above, the obligation to ensure that the use applied for is in compliance with the terms and conditions of the general permit falls solely on the registrant.⁵⁶ There is little question these contradictions will cause confusion among not only the regulated community, but also the public.

⁵⁶ 25 Pa. Code § 105.443(b); 25 Pa. Code § 105.44

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The definitions for temporary road crossing and temporary service line crossing must be revised. Temporary Road Crossing should be defined as: "A road installed for a period of time not to exceed one year across a wetland or across or along a stream utilizing a pipe culvert or series of culverts, a bridge, a causeway or a ford, that is removed in its entirety after termination of its intended use or at the end of the one (1) year period." Temporary Service Line Crossing should be defined as: "A electric transmission line, pipeline, telephone line, water line or other similar facilities installed for a period of time not to exceed one year across a wetland or across or along a stream, that is removed in its entirety after termination of its intended use or at the end of the one (1) year period."

5. The Department should not extend the authorization except in the most extreme circumstances and should require each person that requires an extension to pay a reasonable fee.

Existing GP-8 includes a condition, which states: "Crossings may remain installed for a period of time not to exceed one (1) year from the Department's acknowledgement (Item 7) unless extended in writing by the Department." The Department now proposes to amend that condition to include a maximum limit of two (2) years and a requirement that registrants provide the Department with "documentation of need". CCJ appreciates the Department's efforts to place limits on extensions of authorization under GP-8. Based on the Department's expressed intention, CCJ recommends the following revisions:

First, the standard for "documentation of need" is not defined.⁵⁷ An extension should only be granted in the most rare and unusual circumstances. The purpose of GP-8 is to authorize *temporary* activities. However, temporary activities do not necessarily have an insignificant impact on streams and wetlands. It may take a stream or wetland many years to recover from a significant disruption. One year measured from the initial site disturbance to the completion of site restoration should be adequate for truly temporary work. In order for the project to qualify for authorization under GP-8, the project should last no more than one year. Therefore, CCJ recommends that the Department define the standard for documentation of need by amending GP-8 to include the following language: "In the event that the owner of a temporary road crossing or temporary service line crossing is prevented from complying with the time limit imposed solely because of circumstances beyond the owner's control and which the owner, by the exercise of all reasonable diligence, is unable to prevent, then the owner may request an extension of

⁵⁷ When asked how the Department would evaluate the "need" for an extension during the Webinar hosted on December 20, 2013, the Department responded by saying that it would evaluate the need for an extension using the same conditions in the general permit. This is quite surprising because "need" is not defined by Proposed GP-8 and the only condition that is related to "need" is the one that allows a registrant to request an extension.

time from the Department. An owner's financial ability to comply with any of the obligations imposed by this General Permit shall not be grounds for any extension of time. An owner shall only be entitled to an extension if it notifies the Department within five (5) working days by telephone and within ten (10) working days in writing of the date the owner becomes aware or reasonable should have become aware of the event impeding performance. The written submission must include all necessary documentation including reasons for the delay, the expected duration of the delay, and the efforts that have been made and are being made by the owner to mitigate the effects of the event and to minimize the delay. "

Second, the Department should require the operator of a temporary road crossing or a temporary service line crossing who requires an extension to pay a reasonable fee. Allowing a registrant to request that temporary structures remain in place beyond the one (1) year time limit raises the possibility that the temporary activity will degrade the quality or impair the uses of the water body. Furthermore, even the Proposed GP-8 language related to an extension necessarily requires additional review by the Department to determine if the registrant has shown "need".

Conclusion

Proposed GP-8 is severely flawed. As a result, the Department should not proceed with Proposed GP-8 in its current form. First, the Department cannot expand the scope GP-8 to include environmental testing and monitoring because doing so would be contrary to the Dam Safety and Encroachments Act and regulations. Second, the Department must carry out its duty to protect and maintain the water quality and its uses, but the Proposed GP-8 does not ensure the minimum level of protection required. Therefore, the Center for Coalfield Justice requests that:

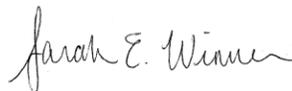
1. The Department remove environmental testing and monitoring from the scope of Proposed GP-8. 25 Pa. Code § 104.442
2. The Department amend Proposed GP-8 to specify that it is not valid in watersheds, streams or wetlands that have a designated or existing use of Exceptional Value or High Quality, or have been identified as impaired. 25 Pa. Code § 105.444(2).
3. The Department amend Proposed GP-8 to include conditions that fully and properly protect aquatic life. 25 Pa. Code § 105.444(4); 25 Pa. Code § 93.6(a)
4. The Department amend Proposed GP-8 to include a condition that any area that will be dormant for more than 14 days must be stabilized. This will reduce the amount of sediment that washes into the waters of the Commonwealth. 25 Pa. Code § 105.444(4); 25 Pa. Code § 93.6(a)
5. The Department amend Proposed GP-8 to include conditions that

protect the stream or wetland from invasive species. 32 P.S. 693.7(c)

6. The Department amend Proposed GP-8 to include a standard for issuing an extension of time beyond one year and require each operator requesting an extension beyond one year to pay a reasonable fee. 25 Pa. Code § 105.444(4)

Thank you for the opportunity to submit this comment and for your consideration of it. If you have any questions or concerns regarding any of the proceeding, please do not hesitate to contact us.

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