

STATEMENTS OF POLICY

Title 25—ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION [25 PA. CODE CH. 105]

Identification and Delineation of Wetlands; and Status of Prior Converted Cropland in this Commonwealth

The Department of Environmental Protection (Department) amends § 105.451 (relating to the identification and delineation of wetlands—statement of policy). The amendment refers to the methodology used to identify and delineate wetlands. The Department adds § 105.452 (relating to status of prior converted cropland—statement of policy) to exclude prior converted cropland from jurisdiction under the Department's Wetland Protection Program contained in Chapter 105 (relating to dam safety and waterway management).

A. Effective Date

These statements of policy will take effect upon final publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact Kenneth R. Reisinger, Chief, Division of Wetlands Protection, Bureau of Dams, Waterways and Wetlands, P. O. Box 8554, Rachel Carson State Office Building, Harrisburg, PA 17105-8554, (717) 787-6827; or David Gromelski, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). These policies are available electronically through the Department's web site (<http://www.dep.state.pa.us>).

C. Statutory Authority

These statements of policy are amended and added under the authority of the Dam Safety and Encroachments Act (act) (32 P. S. §§ 693.1—693.28) and by other affected statutes administered by the Department, including The Clean Streams Law (35 P. S. §§ 691.1—691.1001); the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003); the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.31); the Pennsylvania Sewage Facilities Act (35 P. S. §§ 750.1—750.20); and the Oil and Gas Act (58 P. S. §§ 601.101—601.605) which authorize the Department to permit, inspect and otherwise regulate structures or activities described as dams, encroachments or water obstructions in wetlands.

D. Summary and Purpose of the Amendment to § 105.451

This amendment will provide consistency among State and Federal agencies that are involved in the permitting of activities affecting wetlands while at the same time providing the necessary protection of this Commonwealth's wetland resources. The amendment refers to the methodology used to identify and delineate wetlands.

The Department is authorized and has the duty under the act to permit, inspect and otherwise regulate structures or activities-labeled dams, encroachments or water obstruction-in wetlands. "Wetlands" is defined in regula-

tions promulgated under the act, at § 105.1 (relating to definitions), as follows:

"Areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas."

This definition, as used by the Department, is identical to the definition of "wetlands" used by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACOE). However, the Department uses a different manual than the Federal agencies to determine how the definition is to be applied in identifying and delineating wetlands.

The Department until now used the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989 Interagency Manual). The EPA and the USACOE use the 1987 *Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1)* with the guidance provided by the USACOE, Major General Arthur E. Williams' memorandum dated 6 March 1992, *Clarification and Interpretation of the 1987 Manual*. Permit applicants have been required to provide wetland delineations using two different methods, even though both methods are based on a similar three-parameter approach and result in very similar wetland delineations in this Commonwealth.

With this amendment, the Department will adopt the same methodology for identifying and delineating wetlands used by the United States Army Corps of Engineers which is the 1987 *Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1)* with guidance provided in the 6 March 1992 USACOE memorandum entitled *Clarification and Interpretation of the 1987 Manual* and any subsequent changes, as part of the Department's permitting program under Chapter 105 and other applicable regulatory programs.

Summary and Purpose of the Addition of § 105.452

This statement of policy will exclude areas identified as prior converted cropland from jurisdiction under the Department's Wetland Protection Program contained in Chapter 105. This will provide consistency among State and Federal agencies that are involved in the permitting of activities affecting wetlands while at the same time providing the necessary protection of this Commonwealth's wetland resources.

The definition of "wetlands" in § 105.1 is identical to the definition of wetlands used by the EPA and USACOE. However, the Federal agencies do not include prior converted croplands as waters of the United States under the Clean Water Act. Waters of the United States are defined, in pertinent part at 33 U.S.C.A. § 328.3(a)(8), amended August 25, 1993, by notice at 58 FR 45036, as follows:

"Waters of the United States do not include Prior Converted Cropland. Notwithstanding the determination of an area's status as Prior Converted Cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act justification remains with EPA."

This policy excludes areas identified as prior converted cropland as defined in the *National Food Security Act Manual* (180-V-NFSAM, 3rd Edition, March 1994) from

jurisdiction under the Department's Wetland Protection Program. According to that definition, "prior converted cropland" are wetlands that were drained, dredged, filled, leveled or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned for the purpose of, or to have the effect of, making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985. Abandonment is the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:

- Wetland criteria are met.
- The area has not been enrolled in a conservation set-aside program.
- The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.

Prior converted cropland may also be considered abandoned if the landowner provides written intent to abandon the area and wetland criteria are met.

Under this statement of policy, the Department will recognize prior converted croplands as a normal circumstance as the term is used in the definition of wetlands and will not regulate prior converted cropland under the Commonwealth's Wetland Protection Program. This is consistent with USACOE regulations that specify that waters of the United States do not include prior converted cropland. This policy change does not affect the existing Chapter 105 exemption for plowing, cultivating, seeding and harvesting for the production of food fiber and forest products or the waiver for maintenance of field drainage systems. See § 105.12(a)(7) and (8) (relating to waiver of permit requirements). These waivers and exemptions remain unchanged and in effect.

*E. Benefits and Costs; Paperwork Requirements—
§ 105.451*

Because there will be only one accepted method to delineate wetlands, a reduction in time, effort and paperwork in preparing permit applications is expected. This change will require minimal staff retraining as the two methods currently used at the State and Federal levels are very similar in nature. This change will not result in an increase in paperwork or cost to the Commonwealth.

*Benefits and Costs; Paperwork Requirements—
§ 105.452*

In acknowledging prior converted cropland as "normal circumstances" and therefore not wetlands, the State program is consistent with the Federal agencies in not regulating agricultural lands that meet the definition of prior converted cropland. This change will not result in an increase in paperwork or cost to the Commonwealth.

JAMES M. SEIF,
Secretary

(Editor's Note: The regulations of the Department of Environmental Protection, 25 Pa. Code Chapter 105, are amended by amending a statement of policy at § 105.451 and by adding a statement of policy at § 105.452.)

Fiscal Note: 7-502 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 105. DAM SAFETY AND WATERWAY MANAGEMENT

Subchapter M. STATEMENTS OF POLICY

WETLANDS

§ 105.451. Identification and delineation of wetlands—statement of policy.

(a) This section sets forth the policy of the Department as to the methodology to be used for the identification and delineation of wetlands.

(b) The use of some delineation method is necessary in order to administer, implement, enforce and determine compliance with the act, The Clean Streams Law (35 P. S. §§ 691.1—691.1001), the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003), the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.31), the Pennsylvania Sewage Facilities Act (35 P. S. §§ 750.1—750.20), the Oil and Gas Act (58 P. S. §§ 601.101—601.605) and other applicable statutes administered by the Department and regulations promulgated under these statutes.

(c) The Department adopts and incorporates by reference the 1987 *Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1)* along with the guidance provided by the United States Army Corps of Engineers, Major General Arthur E. Williams' memorandum dated 6 March 1992, *Clarification and Interpretation of the 1987 Manual* and any subsequent changes as the methodology to be used for identifying and delineating wetlands in this Commonwealth. The 1987 *Corps Wetland Delineation Manual*, Publication No. ADA 176734 is available from the National Technical Information Service (NTIS), Springfield, VA 21161, or telephone: (703) 487-4650. Copies of the Supplemental Guidance issued by the Corps concerning use of the 1987 Manual, (that is, the October 7, 1991, Questions and Answers, and the March 6, 1992, Clarification and Interpretation Memorandum) as well as the Administration's Wetlands Plan of August 24, 1993, may be obtained by contacting the regulatory branch of a local Corps District, or the EPA Wetlands Hotline at (800) 832-7828. For more information, contact Pennsylvania Department of Environmental Protection, Bureau of Dams, Waterways and Wetlands, Post Office Box 8554, Harrisburg, Pennsylvania 17105-8554, telephone (717) 787-6827.

§ 105.452. Status of prior converted cropland—statement of policy.

(a) This section sets forth the policy of the Department as to the status of prior converted cropland in this Commonwealth.

(b) The use of some procedure for determining wetlands is necessary in order to administer, implement, enforce and determine compliance with the act, The Clean Streams Law (35 P. S. §§ 691.1—691.1001), the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003), the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.31), the Pennsylvania Sewage Facilities Act (35 P. S. §§ 750.1—750.20), the

Oil and Gas Act (58 P. S. §§ 601.101—601.605) and other applicable statutes administered by the Department and regulations promulgated under these statutes.

(c) Naturally occurring events may result in either creation or alteration of wetlands. It is necessary to determine whether alterations to an area have resulted in changes that are now "normal circumstances" of the particular area. The Department recognizes "prior converted cropland," as defined in the *National Food Security Act Manual* (180-V-NFSAM, Third Edition, March 1994), as "normal circumstances" as the term is used in the definition of wetlands in § 105.1 (relating to definitions). These prior converted croplands are not regulated as wetlands under the Commonwealth's Wetland Protection Program contained in this chapter. Prior converted cropland is defined in the *National Food Security Act Manual*, as wetlands that were drained, dredged, filled, leveled or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned, for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985.

(1) Abandonment is the cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:

(i) Wetland criteria are met.

(ii) The area has not been enrolled in a conservation set-aside program.

(iii) The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.

(2) Prior converted cropland may also be considered abandoned if the landowner provides written intent to abandon the area and wetland criteria are met.

(d) This policy change does not affect the exemption for plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products or the waiver for maintenance of field drainage systems found at § 105.12(a)(7) and (8) (relating to waiver of permit requirements).

[Pa.B. Doc. No. 96-142. Filed for public inspection February 2, 1996, 9:00 a.m.]