

# PADEP Rescinds 2022 Guidance on Evaluating Aquatic Resource Compensatory Mitigation

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In early 2022, the Pennsylvania Department of Environmental Protection (PADEP) published a technical guidance document entitled “Pennsylvania Function-Based Aquatic Resource Compensation Protocol,” PADEP Doc. No. 310-2137-001 (effective Mar. 1, 2022) (Mitigation Guidance). See Vol. 55, No. 1 (2022) of this *Newsletter*. On January 7, 2023, PADEP published a notice in the *Pennsylvania Bulletin* rescinding the Mitigation Guidance for re-evaluation. 53 Pa. Bull. 107 (Jan. 7, 2023).

The Pennsylvania Dam Safety and Encroachments Act, 32 Pa. Stat. §§ 693.1–.27, and its implementing regulations, 25 Pa. Code ch. 105, require a person to obtain a permit from PADEP to construct, operate, maintain, modify, enlarge, or abandon a dam, water obstruction, or encroachment that alters the course, current, or cross section of a body of water. Mitigation Guidance at 1. A mitigation plan is typically required with the permit application, including, as applicable, a plan to compensate for the impact to regulated waters as a result of the project. *Id.* at 2.

The Mitigation Guidance was meant to provide a standardized system for evaluating functional compensation offsets associated with proposed aquatic resource impacts, determining compensatory mitigation requirements, assisting in identifying measures to minimize proposed project impacts, reducing subsequent compensation requirements, and evaluating compensation proposals. *Id.* Prior to the Mitigation Guidance, Pennsylvania’s method for determining compensation for losses to aquatic resources was based on acreage and linear feet.

Due to pushback from affected entities, including mitigation banks and permittees, PADEP formed a stakeholder working group to review the Mitigation Guidance. PADEP officially rescinded the Mitigation Guidance “to reevaluate its effectiveness and review potential revisions through stakeholder outreach.” 53 Pa. Bull. at 107. Until new guidance is developed, the previous acre-and-feet method will be used to identify and calculate mitigation needs and requirements.

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