

Pennsylvania Issues New Guidance on Evaluating Aquatic Resource Compensatory Mitigation

March 1, 2022

FNREL Water Law Newsletter

(By [Lisa M. Bruderly](#), [Mackenzie Moyer](#) and [Evan M. Baylor](#))

On January 25, 2022, the Pennsylvania Department of Environmental Protection (PADEP) published a long-awaited technical guidance document, entitled “Pennsylvania Function- Based Aquatic Resource Compensation Protocol,” PADEP Doc. No. 310-2137-001 (effective Mar. 1, 2022) (Mitigation Guidance), for evaluating and valuing aquatic resource compensatory mitigation.

As background, a draft version of the Mitigation Guidance was published in March 2014. PADEP revised that draft to incorporate feedback from other federal and Pennsylvania agencies, PADEP’s Water Resources Advisory Committee, and public comments.

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 stated purposes of the Mitigation Guidance are to:

1. provide an acceptable methodology to evaluate functional compensation offsets associated with proposed aquatic resource impacts and determine compensatory mitigation requirements;
2. assist in identifying measures that minimize proposed project impacts on aquatic resource functions to reduce subsequent compensation requirements; and
3. provide a means for evaluating compensation proposals performed on-site, at a mitigation bank, or through an in-lieu fee

Id.

The Mitigation Guidance is intended to ensure consistency in determining compensation requirements and valuing compensation projects. *Id.* It is intended to be compatible, and used concurrently, with the federal compensatory mitigation requirements of the U.S. Environment Protection Agency and U.S. Army Corps of Engineers. *Id.* at 3.

This Mitigation Guidance applies to all intermittent and perennial watercourses, floodways and floodplains, wetlands, and other bodies of water, such as lakes and reservoirs, that are wholly or partly within Pennsylvania. *Id.* at 1. The Mitigation Guidance separates the regulated waters of the commonwealth into three aquatic resource groups based on the predominant functions of each aquatic resource type: (1) riverine (intermittent and perennial wadeable watercourses and their floodways/floodplains); (2) lacustrine (lakes, reservoirs, and non-wadeable rivers); and (3) palustrine (wetland environments, including unvegetated wetlands). *Id.* at 3–10. Function groups have been established for each resource type and are intended to represent the “predominant functions present within the applicable aquatic resource types.” *Id.* at 4.

Evaluation of whether a project may require compensation starts with establishing the project’s potential effect on the function group for the applicable resource type. The evaluation examines the area and type of impact (i.e., direct, indirect, or temporal). *Id.* at 4–5. The project effect is then scored (i.e., minimal to severe) and adjusted, as appropriate. *Id.* at 5–8. A resource condition assessment is also conducted. *Id.* at 8–9. Other scores are assessed for (1) the aquatic resource value, taking into account the resource’s uniqueness, protected or public uses, and other special characteristics; and (2) the wetland coefficient of conservatism, a criterion relied on to categorize the wetland resource value for an impact area. *Id.* at 10–15.

In instances of after-the-fact permitting or enforcement, resource conditions are assigned to an already impacted resource area by either assuming the impacted resource was in the best attainable condition or by conducting a Condition Level

1 Rapid Assessment. *Id.* at 9. Compensation requirements are calculated after determining the areas of direct, indirect, and temporal impacts, the project effect category and value for each applicable function group, the appropriate resource condition scores for each resource area, and the appropriate resource value category and value for each resource. *Id.* at 15.

The Mitigation Guidance also describes the methodology to evaluate whether a mitigation project provides adequate compensation to offset the function compensation requirements. *Id.* at 23. This methodology includes scoring and adjustment (if appropriate) of the compensation value factor and determining the condition differential between the condition of the resource before and after the project. *Id.* at 18. After evaluation of other factors, the functional credit gain is calculated for each resource function group and adjusted, if appropriate. *Id.* at 22.

The Mitigation Guidance will be effective March 1, 2022. PADEP will provide updated application forms, instructions, and training prior to the effective date. The Mitigation Guidance and the accompanying Aquatic Resource Condition Level 2 Rapid Assessment Protocols are available on PADEP's eLibrary website.

Copyright © 2022, The Foundation for Natural Resources and Energy Law, Westminster, Colorado

Babst | Calland
Attorneys at Law

PITTSBURGH, PA | CHARLESTON, WV | HARRISBURG, PA | LAKWOOD, NY | STATE COLLEGE, PA | WASHINGTON, DC