



DATE: July 12, 2011

SUBJECT: Joint Agency Guidance for Permitting Projects Performed by Entities Other than PennDOT on Property under PennDOT's Jurisdiction.

TO: PennDOT District Executives and PADEP Program Managers

FROM: Daryl St. Clair  
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The Pennsylvania Department of Transportation (PennDOT) and the Department of Environmental Protection (PA DEP) have worked jointly to develop the *Joint Agency Guidance for Permitting Projects Performed by Entities Other than PennDOT on Property under PennDOT's Jurisdiction*. The guidance document has been developed by representatives from PennDOT Bureaus of Maintenance and Operations and Project Delivery and PA DEP Central and Regional Offices.

The purpose of this document is to provide guidance on who should apply for a permit issued by PADEP for activities within right of way owned by PennDOT that are being performed or controlled by a municipality, developer, adjacent property owner, watershed group or some other group. Attached is a copy of the Joint Guidance document dated April 18, 2011. For PennDOT, the guidance will become part of the Highway Occupancy Permit Guidelines (Pub. 282) in the next updates. For PA DEP, this document will be available online in the Chapter 105 Online Guidance Manual and will be part of PA DEP's desk manual for review of permit applications.

The guidance is available for immediate use. If you have any questions, please contact Glenn Rowe at PennDOT at 717-783-6479 or Jeff Means at PA DEP at 717-772-5643.

#### Attachment

cc: R. Scott Christie, PE Reading File  
Highway Administration Bureau Directors  
Glenn Rowe  
Gary Fawver, PE  
PennDOT District ADEs  
PennDOT District Permit Managers  
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## **JOINT AGENCY GUIDANCE FOR PERMITTING PROJECTS PERFORMED BY ENTITIES OTHER THAN PENNDOT ON PROPERTY UNDER PENNDOT'S JURISDICTION**

**July 12, 2011**

### **I. INTRODUCTION**

This document provides guidance on who should apply for a permit issued by the Department of Environmental Protection (PaDEP) for activities within right of way owned by the Pennsylvania Department of Transportation (PennDOT) that are being performed or controlled by a municipality, developer, adjacent property owner, watershed group or some other group (hereinafter referred to collectively as “developer”). This guidance will be applicable to situations involving highway occupancy permits (HOP) where the developer or municipality must make improvements to the existing roadway network to accommodate the traffic generated by the new development and when a stream enhancement or mitigation project is being performed by an entity other than PennDOT. Under both of these scenarios, the proposed activity in part is occurring on property owned or under the jurisdiction of PennDOT. In the past, there has been some question over whether PennDOT is required to obtain the Chapter 105 and/or NPDES permits or whether the entity proposing the activity obtains these permits. The intent of this guidance is to achieve consistency throughout the state.

### **II. IMPROVEMENTS REQUIRED FOR HOP**

Developers requesting a HOP permit from PennDOT are required to submit traffic information which documents that the existing roadways can handle the traffic generated by the proposed commercial and/or residential development. Many times the existing roadways cannot handle the additional traffic and the developer must make changes to the existing road network to accommodate the vehicular and pedestrian traffic that the proposed development is predicted to generate. These improvements may trigger the need for a permit under the Dam Safety and Encroachment Act (a Chapter 105 permit) due to impacts to streams or wetlands and/or a NPDES permit to address stormwater runoff issues.

#### **1. Chapter 105 Permits**

Although countless different scenarios of roadway improvements that may be required exist, for purposes of illustration, a common example is the need to add turning lanes to the existing road to add capacity to the intersection for it to operate at an acceptable level of service. The addition of turning lanes either (1) may require the extension of existing bridge, culvert, or pipe or (2) may impact a wetland or other water of the Commonwealth located adjacent to the roadway. These activities would require a Chapter 105 permit approval prior to construction. Under each of these scenarios, the developer, not PennDOT, would be the applicant for purposes of the Chapter 105 permit process which is consistent with 25 Pa. Code §105.13(g)&(c).

### **a. Bridge, Culvert, or Pipe Extensions**

For activities that involve the extension of an existing bridge, culvert, or pipe owned and maintained by PennDOT, the Chapter 105 permit will be issued to the developer. The developer will be responsible for constructing the proposed roadway improvements consistent with the permit. The developer will also be responsible for any maintenance required under 25 Pa. Code §105.171 for two years following construction. This is known as the two year guarantee period under the HOP permit. *See* 67 Pa. Code §441.6(15). When an existing bridge, culvert, or pipe conveying a water of the Commonwealth is extended by a developer a permit condition similar to the following should be added to the HOP permit:

This Highway Occupancy Permit authorizes the modification of an existing [bridge, culvert, or pipe] within PennDOT's right of way to address traffic impacts caused by the proposed development. Applicant or his agent assumes responsibility for all environmental clearances, including a Chapter 105 permit, associated with this project. When two years from PennDOT's written acknowledgement to the permittee that all work authorized under the referenced Highway Occupancy Permit, and any supplements thereto, is completed and accepted, permittee will transfer the Chapter 105 permit obtained for the modification of the existing [bridge, culvert, or pipe] to PennDOT. The HOP permittee is responsible for any maintenance required for the existing and modified sections of the [bridge, culvert, or pipe] under 25 Pa. Code §105.171, regardless of who holds the Chapter 105 permit.

Any violations of the permit or maintenance responsibilities under the Chapter 105 regulations during the construction and the two year guarantee period will be the sole responsibility of the developer as the permit holder.

After construction is complete and the two year guarantee period expires under the HOP permit, the permit will be transferred to PennDOT. In agreeing to this transfer, PennDOT is not in any way waiving any of the provisions contained in the HOP regulations (67 Pa. Code §441.6(12)) with regard to the developer's maintenance responsibilities. However, from the DEP's point of view, PennDOT is the point person if future maintenance issues arise within the right of way. It is PennDOT's responsibility to have the developer fix the problem if PennDOT feels under its HOP regulations that it is the developer's responsibility.

### **b. Impacts to Waters of the Commonwealth Not Requiring Extensions of Existing Bridges, Culverts, or Pipes.**

For activities within PennDOT's right of way that (1) involve the placement of fill material in wetlands or other waters of the Commonwealth and/or (2) involve the construction of a new bridge, culvert, or pipe within a water of the Commonwealth, the Chapter 105 permit will be issued to the developer. The developer will be responsible for constructing the proposed roadway improvements consistent with the permit. The developer will also be responsible for any required mitigation under the permit and any maintenance required under 25 Pa. Code §105.171 following construction.

## **2. NPDES permits**

For any activities proposed by an entity other than PennDOT within PennDOT's right of way regardless of whether or not the activity involves the extension of an existing bridge, culvert, or pipe, the entity proposing or completing the activity (usually the developer or its contractor) will be the permittee for purposes of the NPDES permit process. PennDOT does not have to be a co-permittee on the developer's NPDES permit even if construction is required within PennDOT's right of way.

### **III. STREAM ENHANCEMENTS OR OTHER MITIGATION PROJECTS**

Situations arise where a municipality, other resource agency, watershed group, adjacent property owner, and other interest group (hereinafter "project sponsor") has proposed a stream enhancement or other mitigation project that requires construction within PennDOT's right of way. The project sponsor would have primary responsibility over the completion of the project. For these types of projects, if PennDOT is willing to have the project sponsor complete the proposed project within PennDOT's right of way, PennDOT and the project sponsor would enter into a Right of Entry Agreement. The Right of Entry Agreement (ROE Agreement) would include language indemnifying PennDOT from any liability resulting from the proposed project. If the project sponsor is another resource agency, either an Intergovernmental Agreement (IGA)(for a non-state agency – Federal, local or county conservation district), an Interagency Agreement (IA) (for an independent state agency - e.g. commissions), or a Memorandum of Understanding (MOU)(for an agency under the Governor's jurisdiction) would be executed rather than a ROE Agreement.<sup>1</sup> The ROE or other agreement would give the project sponsor permission to complete the project described therein.

The project sponsor would be responsible for applying for and obtaining all environmental permits including Chapter 105 and NPDES permits, if applicable. The ROE Agreement, MOA, or MOU will be attached to the permit application as proof that PennDOT has been consulted and is allowing the construction of the project within its right of way if permitted by DEP. If the permit application requirements are satisfied, the environmental permits will be issued to the project sponsor. The project sponsor will be responsible for constructing the proposed project consistent with the permit. The project sponsor will also be responsible for any required mitigation under the permit and any monitoring and maintenance required by the permit(s) or the applicable regulations (such as 25 Pa. Code §105.171) following construction.

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<sup>1</sup> The PennDOT District should contact the Contract and Legal Services Section of the Office of Chief Counsel for guidance on the use of IGAs, IAs, and MOUs.