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VIA ELECTRONIC MAIL

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Oct. 6, 2020

RE: Guidance on Notification Requirements for Spills, Discharges and other Incidents of a Substance Causing or Threatening Pollution to Waters of the Commonwealth Under Pennsylvania's Clean Streams Law (DEP ID: 383-4200-003)

On behalf of the Pennsylvania Chamber of Business and Industry ("PA Chamber"), the largest, broad-based business advocacy organization in the Commonwealth, thank you for the opportunity to provide our members' perspective and comments on the draft technical guidance document prepared by the Pennsylvania Department of Environmental Protection ("PADEP") regarding notification requirements for spills, discharges and other incidents. The PA Chamber represents more than 9,000 members companies across all industries in every region of the state, ranging in size from Fortune 500 companies to sole proprietorships.

Notice of the availability of the proposed technical guidance for public comment was published in the Pennsylvania Bulletin on August 8, 2020. See 50 Pa. Bull. 4091 (Aug. 8, 2020). That notice triggered a 60-day comment period ending on October 6, 2020.

It is the position of the PA Chamber that with substantial revisions the proposed technical guidance document, as well as potential revisions to the regulations set forth at 25 Pa. Code § 91.33 (relating to reporting obligations), PADEP can provide long-needed clarity and certainty to the regulated community and the public regarding when a notification must be made to PADEP regarding a spill or release. Broadly, this comment letter describes the long-standing gap (and resulting challenges to the regulated community) between the text of the Clean Streams Law and the regulations codified in 25 Pa. Code Chapter 91 regarding what constitute standards of pollution. In addition, this comment letter provides recommendations for necessary revisions to the proposed technical guidance and PADEP's regulatory framework, including allowing a notification made to the National Response Center ("NRC") using the federal "List of Lists" to satisfy state notification requirements. Finally, this comment letter describes practical challenges that the proposed technical guidance document as currently drafted will create.

Statement of Policy

The PA Chamber is guided in its advocacy by the policy positions developed by our diverse board of directors. The Pennsylvania Chamber believes that environmental excellence and economic growth are mutually-compatible objectives, and that environmental and natural resources laws and programs should be framed and implemented to concurrently meet these twin objectives. The PA Chamber advocates for environmental laws, regulations and policies that:

- are based on sound science and a careful assessment of environmental objectives, risks, alternatives, costs, and economic and other impacts;
- set environmental protection goals, while allowing and encouraging flexibility and creativity in their achievement;
- allow market-based approaches to seek attainment of environmental goals in the most cost-effective manner;
- measure success based on environmental health and quality metrics rather than fines and penalties;
- assess compliance based on clear, predictable and defined criteria established through stakeholder processes and with sound science;
- do not impose costs which are unjustified compared to actual benefits achieved;
- do not exceed federal requirements unless there is a clear, broadly accepted, scientifically-based need considering conditions particular to Pennsylvania;
- develop a private-public relationship which promotes working together to meet proper compliance; and
- ensure timely regulatory approvals and authorizations.

With these tenets of policy in mind, the PA Chamber respectfully submits the following comments.

1. PADEP Should Define Standards of Pollution as Required by the Clean Streams Law.

The Clean Streams Law includes a very broadly written definition of pollution. To wit, the Clean Streams Law provides that "Pollution" shall be construed to mean:

[C]ontamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. *The department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.*

35 P.S. § 691.1 (emphasis added)

However, Pennsylvania's regulations, most notably those contained in 25 Pa. Code § 91.33 regarding requirements to notify PADEP and downstream water users of "incidents causing or threatening to cause pollution," do not define standards for determining whether a discharge does or does not constitute pollution. Instead, 25 Pa. Code § 91.33(a) requires notification for spills or releases which threaten pollution or cause pollution, but pollution remains undefined. The term "standards" implies a commonly understood, publicly available metric that establishes uniform criteria or processes. To our knowledge, no such standards have been developed by PADEP for adoption by the Pennsylvania Environmental Quality Board.

Further, PADEP's regional offices have taken inconsistent positions regarding whether a spill or release that does not harm public health or the environment should be reported. PA Chamber members have reported facing enforcement for lack of notifications, due to PADEP second-guessing judgment calls that facility managers must make as to whether harm has occurred or will potentially occur. Moreover, if members of the regulated community conservatively decide out of an abundance of caution to report every spill or release, regardless of circumstances, this approach invites enforcement or increased scrutiny from state and federal regulators. Such results are incongruent with good regulatory practice.

As one example, Pennsylvania's electric utilities each respond to as many as several hundred incidents per year in which, due to storms, vehicle accidents or mechanical failures, fluids used to insulate transformers hit the ground. The average volume of such incidents are less than 25 gallons of mineral oil, less than the standards required for reporting under the federal framework. Further, utilities' aggressive spill response programs ensure that in nearly all cases there will not be an impact to the waters of the Commonwealth. However, PADEP's regional offices have taken different positions on whether such incidents nevertheless must be reported.

Rather than addressing the critically important issue of providing standards for determining what constitutes "pollution" as mandated by the Clean Streams Law, PADEP sidesteps that issue and further aggravates an already deeply problematic flaw in the existing regulatory framework in Pennsylvania by adding in the proposed technical guidance document additional gloss on the language in 25 Pa. Code § 91.33(a). Much of the proposed technical guidance document is a recitation of existing regulatory language in 25 Pa. Code § 91.33(a). However, PADEP makes subtle but potentially important changes in its paraphrasing of that language which could be read to serve as an attempt to broaden the scope of the notification requirements under 25 Pa. Code § 91.33(a). Pennsylvania's regulations require that where a substance which "*would* endanger downstream users of the waters of this Commonwealth, *would* otherwise result in pollution or create a danger of pollution of the waters, or *would* damage property, is discharged into these waters," immediate notification is required. 25 Pa. Code § 91.33(a) (emphasis added). By contrast, the proposed technical guidance document more expansively requires immediate notification where a discharge "*may* endanger downstream users, *may* result in pollution, *may* create a danger of pollution, or *may* damage property." (emphasis added). If PADEP intends to broaden the scope of regulatory requirements through guidance, it should clearly so state. If PADEP is not seeking to broaden notification obligations, PADEP should more precisely follow the contours of the existing regulatory language in 25 Pa. Code § 91.33(a).

2. PADEP Should Implement Standards Defining Pollution as Required by the Clean Streams Law using Objective Criteria

Page 3 of the proposed technical guidance document states that "25 Pa. Code 91.33(a) does not provide a threshold amount of a substance that triggers mandatory notification requirements." In this regard, the proposed technical guidance documents ignores a crucial section of the Clean Streams Law in discussing threshold levels of pollution. Specifically, 25 Pa. Code § 91.33(a) is based on Section 5 of the Clean Streams Law, which in fact does have a threshold for purposes of reporting requirements. Section 5 of the Clean Streams Law prohibits pollution of "waters of the Commonwealth" that would render such waters "inimical or injurious to the public health or objectionable for public water supply purposes." Section 5 of the Clean Streams Law also grants PADEP with the power to adopt and enforce "reasonable" orders and regulations. It is a questionable proposition for PADEP to maintain that, absent a numerical reportable quantity standard of pollution, all parties should err on the side of caution and report any spill or release, given that the foundational statute defines pollution as inimical or injurious – that is, not merely the contribution of a substance to the water source.

As PADEP is well aware, the federal environmental framework for notification requirements rests in significant part on the concept of “reportable quantities” of particular substances being released to the environment. There are notification requirements based on numeric reportable quantities codified into multiple federal statutes and their implementing regulations, including the Clean Water Act, the Emergency Planning and Community Right-to-Know Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Clean Air Act. These reportable quantities are captured in the federal “List of Lists” developed by the United States Environmental Protection Agency (“EPA”). PADEP should adopt by reference these standards as the reportable quantities which are considered to cause or threaten to cause pollution of waters of the commonwealth.

3. PADEP Should Provide Clarity and Certainty that a Discharge Notification Through the National Response Center Satisfies Applicable State Notification Requirements

Generally, spills or releases of quantities above the amounts set forth in EPA’s List of Lists requires notification through the hotline maintained by the NRC. The NRC then in turn promptly notifies other agencies including PADEP. PADEP should provide certainty such that a notification made through the NRC hotline satisfies notification requirements to PADEP as required by 25 Pa. Code § 91.33. We recognize that Pennsylvania’s regulations may require reporting in circumstances where reporting to the NRC is not mandated. In such cases, direct reporting to PADEP is still appropriate. However, where a notice is provided to the NRC which then provides notice to a series of other agencies and entities including PADEP, the “one stop shopping” approach that the NRC is designed to serve should be given credence in Pennsylvania.

4. PADEP Should Carefully Consider the Ramifications of Overly Expansive Reporting Requirements

The proposed technical guidance document appears to require notification to PADEP for all spills, including spills that do not threaten waters of the Commonwealth. Moreover, this reporting obligation extends to downstream water users where “the possibility that downstream public water supplies and other water users could be affected” exists. (emphasis added). We certainly agree that there are circumstances where prompt notification to downstream water users is critically important so that such water users can initiate protective measures (such as closing water intakes or shutting down operations) until the danger has passed. If, however, PADEP constructs a framework of requirements where “over notification” becomes the rule, both PADEP and downstream water users may be bombarded with prophylactic notifications. While perhaps PADEP can handle this dynamic, downstream water users are likely to find it increasingly difficult to separate out what are notifications of real and imminent potential harm versus prophylactic notifications that can and should be ignored. Stated differently, a constant wave of notifications to downstream water users may have the unintended effect of causing such users to “tune out” to the notifications given that most will be for small volumes that may not even reach or threaten surface waters. Such a phenomenon, whereby operators are exposed to a high frequency of notifications with the result being a desensitization to them, has been dubbed “alarm fatigue” and has been documented in disciplines such as medical care, the power generation industry, the mining sector and construction.

5. PADEP Should Include in the Proposed Technical Guidance Recognition that Response Actions to Certain Incidents May Take Longer than 15 Days to Complete

In addition to reporting obligations, Pennsylvania’s regulations describe actions that must be taken immediately following completion of a report. Specifically, 25 Pa. Code § 91.33(b) states as follows:

In addition to the notices in subsection (a), a person shall immediately take or cause to be taken steps necessary to prevent injury to property and downstream users of the waters from pollution or a danger of pollution and, in addition thereto, within 15 days from the incident, shall remove from the ground and from the affected waters of this Commonwealth to the extent required by this title the residual substances contained thereon or therein.

In many circumstances, a spill or other incident can be fully addressed within the 15 day period specified by the foregoing regulatory requirements. However, there are also frequent cases where response actions take much longer to complete. Indeed, it may be impossible to “remove from the ground and from the affected waters of this Commonwealth” the residual substances that are present due to a spill or other incident within 15 days after the spill or incident (or perhaps even over much longer time frames).

Pennsylvania has adopted the Pennsylvania Land Recycling and Environmental Remediation Standards Act (“Act 2”) which sets forth a unified set of procedures and cleanup standards that are to be used in addressing releases of regulated substances. Such procedures and cleanup standards apply both when remediation is undertaken voluntarily and when remediation is required under, among other statutes, the Clean Streams Law. The timeline for completing response actions under 25 Pa. Code § 91.33(b) must necessarily reflect the practical realities of the investigation and remediation process for larger spills and incidents. In fact, PADEP’s stated purpose for inserting the phrase “this title” in 25 Pa. Code § 91.33(b) was to “assure that activities related to removal of pollutants from the ground are conducted in accordance with appropriate [PADEP] regulations including regulations promulgated under Act 2.” 27 Pa. Bull. 4343, 4345 (Aug. 23, 1997). The proposed technical guidance document, however, does not attempt to harmonize the 15-day response requirement under 25 Pa. Code § 91.33(b) with the Act 2 process which may take considerably longer to complete than 15 days. This issue should be addressed in the proposed technical guidance document.

6. PADEP Should Address in the Proposed Technical Guidance How Discovery of Historic Conditions is to be Handled in the Context of Reporting Requirements

The regulatory language in 25 Pa. Code § 91.33(a) was clearly crafted with a new spill, release or incident in mind (i.e., something that just happened). However, the language is also capable of being construed to potentially apply to spills, releases or incidents that occurred long ago and are subsequently discovered. Discovery of historic conditions often arises in the context of due diligence associated with potential transfers of property. The dearth of guidance and clarity as to whether (and to what extent) reporting obligations are triggered by the discovery of historic conditions has vexed both the regulated community and PADEP personnel for many years. This issue should be addressed as part of developing revisions to the proposed technical guidance document.

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We suggest that PADEP table the current proposed technical guidance and work with stakeholders including the PA Chamber to develop more robust and helpful technical guidance to address reporting

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obligations. As part of such an effort, we strongly recommend that PADEP address issues set forth in this submission, including but not limited to those relating to standards defining “pollution” and those relating to reporting obligations associated with historic conditions that are discovered.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Sunday". The signature is written in a cursive style with a large initial "K" and "S".

Kevin Sunday
Director, Government Affairs