



417 Walnut Street  
Harrisburg, PA 17101  
717 255-3252 / 800 225-7224  
FAX 717 255-3298  
www.pachamber.org

**VIA ELECTRONIC FILING**

Jessica Shirley, Director  
Policy Office  
Pennsylvania Department of Environmental Protection  
Rachel Carson State Office Building  
P.O. Box 2063  
Harrisburg, PA 17105-2063

Dec. 15, 2021

**RE: Proposed 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 regarding a proposed technical guidance document prepared by the Pennsylvania Department of Environmental Protection (“PADEP”) titled *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* (the “proposed technical guidance”). 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 October 16, 2021. *See* 51 Pa. B. 6559 (Oct. 16, 2021). That notice triggered a 60-day comment period that is ending on December 15, 2021. The proposed technical guidance is the second iteration of technical guidance regarding notification requirements that PADEP has issued in draft form. Notice of the availability of the initial version of the proposed technical guidance was published in the *Pennsylvania Bulletin* on August 8, 2020. The PA Chamber submitted comments on the initial version of the proposed technical guidance on October 6, 2020.

We appreciate that PADEP continues to strive toward crafting a more workable framework for when spills and releases ought to be reported under the Clean Streams Law; however, the proposed technical guidance as currently drafted does not provide sufficient clarity to the regulated community. 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 whether 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.

## **Executive Summary of Comments**

The Clean Streams Law obligates the department to both determine when pollution has occurred and to establish standards to make such determinations. The Environmental Quality Board has not developed through regulation standards of pollution as required by the statute; instead, the Department has relied on post hoc determinations of spills and releases based on an inconsistently enforced policy of spill notifications.

PADEP should through the regulatory process codify a spill and release framework based on reportable quantities, as other states and the federal government has done. PADEP has also through regulation in other program areas established spill reporting requirements.

In both its existing and proposed revised versions, PADEP's spill reporting policy establishes binding norms to effectuate the Clean Streams Law, to such an extent it approaches being a regulation subject to the Regulatory Review Act.

The technical guidance document as drafted will likely result in over-reporting to downstream users, who may have difficulty distinguishing between events that pose real risk of harm versus notifications that were made pro forma.

PADEP should provide certainty such that spill and release notifications made through the federal government's National Response Center satisfies state reporting obligations.

If PADEP is committed to factor-based approach as outlined in this draft technical guidance, it should include additional factors. The guidance should also provide additional clarity with respect to discovery of historic contamination and releases to containment.

### **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. However, the term "pollution" as used in this regulatory requirement remains undefined in direct contravention of the mandate that the General Assembly imposed on PADEP to "establish standards whereby and wherefrom it can be ascertained and determined whether [a] discharge does or does not constitute pollution." The term "standards" implies a commonly understood, publicly available set of metrics that establish uniform criteria or processes. 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 reach the ground. The average volume of such incidents is less than 25 gallons of mineral oil, less than the standards required for reporting such incidents 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 because the mineral oil is quickly recovered and cleaned up. However, PADEP's regional offices have taken different positions on whether such incidents nevertheless must be reported. Moreover, in the proposed technical guidance, PADEP has used as an example of an incident that triggers mandatory reporting the release of 15 gallons of mineral oil from a broken transformer even when the utility responds within 30 minutes and implements appropriate spill response actions. PADEP justifies its position based on "uncertainties" that exist in such circumstances. With all due respect to PADEP, the Clean Streams Law does not set a legal standard for reporting based on "uncertainty." Instead, there must be an affirmative determination that a release has actually affected surface water or groundwater or poses a material threat that such impact will occur.

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). The proposed technical guidance document includes an extensive recitation of existing regulatory language in 25 Pa. Code § 91.33(a). Pennsylvania's regulations require immediate notification in circumstances 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." (Emphasis added). However, the proposed technical guidance does not provide guidance on what impacts to waters are considered pollution or a danger of pollution.

PADEP has taken that position that all releases that may result in pollution should be reported, with a reading that the Clean Streams Law provides, in its definition section for "pollution," that "the department shall determine when a discharge constitutes pollution." Importantly, the Clean Streams Law then continues, with the clear directive that in addition to making such determinations the department shall also "establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution."

A spill reporting framework that simply through a statement of policy places on individuals and businesses the burden of determining whether a set of conditions could constitute pollution, but that does not actually provide standards for what constitutes pollution, is not faithfully executing the text of the law passed by the General Assembly and signed into law by a previous Governor.

In point of fact, the Pennsylvania Supreme Court has noted in particular regard to statements of policy: "A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Pa. Hum. Rels. Comm'n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977).

The proposed technical guidance on page 11 argues that a reportable quantity framework would “only take into account a couple of the key risk factors,” but this begs the question by presuming that a regulation to define reportable quantities and, more importantly, the standards of pollution as required by the Clean Stream Law, would be limited in what risk factors should be factored into the equation of defining reportable quantities. In point of fact, if the department’s position that the risk factors identified in this draft technical guidance are in effect binding norms to effectuate the Clean Streams Law, then is that not an admission that the guidance approaches being a regulation subject to the Regulatory Review Act and Commonwealth Documents Law?

The proposed technical guidance then presumably reflects a framework that PADEP hopes to one day implement through a rulemaking. Yet, rather than develop standards (as directed under the Clean Streams Law), the proposed technical guidance only provides a list of factors that an individual or business must apply at a moment’s notice to determine whether an incident is immediately reportable. The use of these factors invites future disagreement between the individual or business that made a decision on whether to report an incident and PADEP regional inspectors making decisions in hindsight.

Rather than develop standards for what constitutes pollution that can be uniformly applied, PADEP’s recommendation in the proposed technical guidance is to report whenever the risks are unknown or uncertain, stating that “[PADEP] strongly encourages notification be made to [PADEP] for any spill or unauthorized discharge where the risks of pollution to waters of the Commonwealth, property damage, or endangering downstream users are unknown or uncertain. It is best to err on the side of caution and notify [PADEP] when you are unsure of the impact a spill or unauthorized discharge may have on waters of the Commonwealth.” (Emphasis in original.) Requiring the reporting of spills where the risk is not entirely known or certain will continue to create confusion for the regulated community and will lead to PADEP inspectors initiating enforcement actions for releases that are not actually reportable under the Clean Streams Law. It is quite likely facilities will respond to such confusion, should this guidance be finalized as proposed, by over-reporting spills to downstream users.

Over-reporting will also have the negative unintended consequence of overwhelming downstream users with prophylactic notifications. Upon receiving a notice for a spill or release that does not otherwise require a notification, downstream water users may currently implement certain emergency procedures as a matter of course. If downstream water users are inundated with protective notifications, such users will have difficulty distinguishing between notifications associated with legitimate threats and notifications that are made simply as a protective step and that pose no real risks to the downstream water users. This dynamic in turn may lead to dire consequences if a downstream water user is unable to properly discern which notifications present real and immediate threats from those that are merely precautionary.

## **2. PADEP Can and Should Implement Standards Defining Pollution as Required by the Clean Streams Law Using Objective Criteria**

Page 4 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. For PADEP to now claim in the proposed technical guidance that it is incapable of developing standards for purposes of determining what constitutes a reportable incident under the Clean Streams Law runs counter to federal practice as well as PADEP’s own actions in the context of other programs. For example, PADEP has established statewide health standards under the Pennsylvania Land Recycling and Environmental Remediation Standards Act (“Act 2”) that are applicable throughout the Commonwealth based on certain risk and exposure assumptions for use where site-specific risk and exposure information is not known with certainty in advance of potential exposure. In fact, even in one of the examples provided in the proposed technical guidance, PADEP has seemingly established a reportable quantity for mineral oil (e.g., 15 gallons). The fact that doing what is required by the Clean Streams Law may be challenging is not a reason for not complying with what the General Assembly expressly directed PADEP to do.

It is also 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. Adopting reportable quantity standards would provide greater certainty and objectivity to the regulated community and PADEP inspectors than the current framework. PADEP is clearly both required to and capable of establishing reportable quantities for determining whether an incident is reportable under the Clean Streams Law.

### **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 in turn 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. In an era where we have a unified system for reporting through the NRC, PADEP should embrace that system.

### **4. Under a Factor-Based Approach to Reporting, PADEP Should Include Additional Relevant Factors in Table 1**

The PA Chamber has reviewed Table 1 in the proposed technical guidance and offers additional factors for consideration. In the “substance” category, the factors include known effects, volume, and concentration. The PA Chamber recommends adding a factor for the “propensity to migrate through soil.” In the “location” category, the factors include proximity to nearby users, proximity to surface water, characteristics of the nearest waters of the Commonwealth, and relevant infrastructure presence and qualities. The PA Chamber recommends adding a factor for the “depth to groundwater.”

##### **5. The Proposed Technical Guidance is Unclear Regarding Whether Spills Collected by Containment are Reportable, and Appears to Conflict with Existing Storage Tank Regulations Regarding Reportable Incidents**

Page 10 of the propose guidance plainly states that PADEP does not expect notification when spills or overflows are “collected by appropriate secondary containment.” However, further on, in its matrix of risk factors, the presence and qualities (whether well-maintained or not) of “relevant infrastructure (e.g., spill containment)” is identified as presenting a lower or higher risk of pollution. If PADEP’s intention is to say that categorically all spills contained by secondary containment systems are not reportable, and that the quality of maintenance at issue in establishing risk is that of the *primary* containment system, it should clearly state so.

However, to categorically state that all releases to secondary containment are not subject to reporting, without qualification, provides further confusion to the regulated community. While we recognize this guidance to be limited strictly to spills or releases under the Clean Streams Law, PADEP’s storage tank regulations (25 Pa. Code Chapter 245) have their own separate reporting requirements for releases from tanks into surface waters or groundwaters as well as into containment, with a release specifically defined in 25 Pa. Code § 245.1 as “spilling, leaking, emitting, discharging, leaching or disposing from a storage tank into a containment structure...” The definition of a release in 25 Pa. Code § 245.1 also includes specific references to reportable quantities codified in various federal statutes.

Further, the definition of “immediate threat of contamination” in 25 Pa. Code § 245.1 also pulls in federal reportable quantities for regulated substances, even if the release was captured by containment. Yet the proposed revisions of the spill reporting guidelines under the Clean Streams Law arguably assert that PADEP does not expect reporting of such releases. The proposed guidance is silent on any reference to reporting requirements contained in Pennsylvania’s storage tank regulations or other state or federal programs. While the proposed guidance could be finalized with a general advisory to the public and regulated community that there are other state or federal programs with reporting requirements, it is somewhat beguiling that one program has proceeded with establishing reporting requirements through regulation, and another has proceeded through technical guidance. This is all the more reason why PADEP, the public, and the regulated community should work through these issues in the context of a formal regulatory docket.

To be clear, the PA Chamber continues to maintain the position that releases to secondary containment that are captured by secondary containment should not constitute reportable events. The PA Chamber made that point in comments regarding amendments to Pennsylvania’s storage tank regulations and has consistently taken the position that only releases that escape into the environment (or pose an immediate and material risk of escape) are potentially reportable. Secondary containment is designed and installed to prevent regulated substances from reaching the environment even if there is an incident that causes regulated substances to enter secondary containment. If secondary containment performs as intended, regulated substances simply are not in a position to enter surface water or groundwater.

## **6. 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 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.

## **7. 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. We raised this issue in our comments last year regarding the then-proposed version of the spill reporting guidance document. We note that on page 10 of the currently pending proposed technical guidance, PADEP has taken the position that “historical/existing pollution that is newly discovered” is reportable. However, the proposed technical guidance does nothing to unpack that position further and there still remains a lack of clarity over what constitutes pollution in such an instance. 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.



Jessica Shirley, Director  
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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 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