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July 20, 2009

Via Electronic Mail – *rkachonik@state.pa.us*

Mr. Robert Kachonik
Bureau of Water Standards and Facility Regulation
Department of Environmental Protection
Rachel Carson State Office Building, 11th Floor
Harrisburg, PA 17105-8774

Re: Guidance for Civil Penalty Calculations for Effluent Violations, Doc. No. 362-4180-001; Civil Penalty Calculation Procedure for Pollution Incidents, Doc. No. 362-4180-002; Civil Penalty Assessment Informal Hearing Procedure, Doc. No. 362-4180-006

Dear Mr. Kachonik:

On behalf of its 24,000 members and customers, the Pennsylvania Chamber of Business & Industry (“Chamber”) respectfully offers the following comments regarding the above-referenced draft guidance documents, as noticed in the June 20, 2009, *Pennsylvania Bulletin* (the “Water Program Penalty Guidance”).

At the outset, given the extensive nature of the policy and procedural changes reflected in the proposed Water Program Penalty Guidance, we are extremely surprised that these proposals have not been presented to or discussed with the Water Resources Advisory Committee (“WRAC”). Although these may be viewed as “enforcement documents,” the manner in which the enforcement of Pennsylvania’s water quality regulations is implemented has important policy, programmatic and practical implications. At the very least, such issues should be raised and aired in the advisory body that was created to vet such matters, rather than merely being released for a public comment via a notice in the *Pennsylvania Bulletin*. As detailed below, we believe that there are a variety of issues embedded in these documents that merit broader discussion before the new Water Program Penalty Guidance is adopted in final form.

A. Proposed Civil Penalty Calculation Procedure for Pollution Incidents

1. Rationale for Changes?

The proposed revised guidelines for calculating penalties for pollution incidents represents a significant departure from the existing guidance; however, a rationale for the many changes made has not been provided and is not apparent. The previously existing approach starts with a base calculation considering the severity of the incident, and then utilized considerations of damages, relative willfulness, and past violation history to ascertain the relative amount that would be assessed within each severity classification. On its face, and in practice, that approach seemed logical and workable. While certainly different approaches might be considered, the rationale for changing a fairly well established pattern and practice should be enunciated.

2. Considering All Factors vs. Imposing Penalties on Single Factors

The current guidelines provide for a consideration and balancing of all factors in arriving at a penalty calculation. The current guidelines first set relative ranges of penalties, up to the statutory maximum of \$10,000 per day, based on the overall severity of the incident. The proposed revised guidelines would allow for imposing the maximum statutory penalty based on any one factor alone, without regard to overall severity. As a result, large penalties may be imposed on parties where there was a wholly accidental incident (even if all reasonable precautions were taken), and where there was no prior history of incidents or violations. There are clearly situations, such as those occasioned by natural catastrophes (*e.g.*, a major flood), where imposing severe penalties is unjustified. An “all factors” approach, versus a single factor approach, would appear better situated to take such considerations into proper account and balance.

As noted below, under the proposed policy, certain factors have been entirely eliminated from consideration (*e.g.*, cooperation with the Department). By contrast, the existing policy properly recognizes this factor.

3. Compliance History

The proposed approach in §I.C to assessing a substantial unauthorized discharge penalty based on past history, irrespective of damage or willfulness of the incident in question, is not appropriate. As currently worded, if a facility had a minor discharge that resulted in low damage and was entirely accidental, but the facility operator had at some past time entered into a consent order and agreement (“COA”) or paid a penalty for any prior violations of the Clean Streams Law, the operator would be assessed a penalty from \$3,000 up to the statutory maximum of \$10,000. As thus framed, if a facility ever settles with the Department with a COA, they are forever destined to be assessed a high penalty for any release incident, no matter how small. That approach is irrational, and will certainly have the unintended consequence of discouraging operators from entering into settlement COAs with DEP.

Further, Section I.C is notably unclear and overly broad in terms of describing what constitutes or qualifies as a prior history warranting a higher penalty assessment. For example, the “prior incidents” category refers to “[t]he violator had some minor incidents, Notices of

Violation (NOVs), or other notifications.” What type of incidents? NOVs about what? Notifications about what? In what time frame? Surely the Department is not suggesting that NOVs 5, 10 or 20 years, ago regarding matters that were long-ago resolved, are evidence that a facility is operator is a bad actor – yet, literally read, that is what this draft guidance suggests.

In the same vein, the “prior enforcement” category encompasses an operator who “had been in Consent Order and Agreement for previous violations. A COA about what? How long ago? Does entry into a COA about upgrading a sewage plant 10 years ago mean that every subsequent spill casts the facility into the “prior enforcement” category?

4. Stacking Violations and Penalties

The proposed guidelines would “stack” a series of “violations” into a multiple set of penalties arising from the same basic incident. Section II of the guidelines indicates that in addition to a penalty assessed for unauthorized discharge, separate penalties (ranging from 0-100% of the unauthorized discharge penalty amount) may be assessed based on “failure” in reporting, “failure” to mitigate, “failure” to take preventative actions, “failure” to develop PPC plans, concerns regarding operation and maintenance practices, violation of water quality standards, and causing a sheen.

The Chamber strongly objects to what could become, in effect, a regularized and automatic stacking of violations. While there may be situations where separate violations are warranted – such as where a facility has failed to adopt any PPC plan, and the incident would have been prevented by such a plan – assessing multiple violations arising from a single incident should be handled with common sense and balance.

5. Failure to Report Factor

The “failure to report” factor raises several concerns.

First, the guidance does not clarify what constitutes “delayed reporting.” Reference to §91.33(a)’s requirement for “immediate” notification still requires the exercise of judgment in determining when the reporting has been unreasonably delayed. Is a report provided 1 minute, 10 minutes, 30 minutes, etc., after an incident a delayed report?

Second, the assessment of a significant penalty (33%) for delayed reporting of any incident that the facility operator was *unaware* of seems unjustified. For example, an underground tank starts to leak, and the operator finds and reports the incident when the facility timely conducts its next regular periodic inventory check. According to this proposed guidance, that situation would apparently require an additional 33% penalty assessment because the operator “delayed” reporting the leak until the inventory check disclosed the problem.

Third, the proposed guidance appears to provide for no consideration of the severity of the failure to report from the perspective of potential damages arising from delayed reporting or the willfulness of the delay. The current guidance indicates that the penalty for failure to report

should consider the results that such failure to report had on the effects of the incident (*e.g.*, did it result in extensive preventable damage or a threat to public health and safety). That approach was logical and supportable. The proposed guidance, however, seems to call for assessment of a separate “reporting” violation even if there was no consequence whatever to the delay. Under proposed guidance, the same penalty value is ostensibly assessed if the delayed report created a threat of great harm or no harm.

Finally, the current policy recognizes that there should be no assessment for failure to report if the discharger was unable to report (for example, a transportation accident where injury or remoteness resulted in the first report being from someone other than the discharger).

In the Chamber’s view, the current guidance is more rational and appropriate.

6. Failure to Mitigate

With regard to the failure to mitigate factor (§II.B), the categories of delayed action or no actions, versus no additional adverse impacts, are poorly defined and do not make much sense. First, it’s not clear from the guidance as to what the terms “delayed action” or “no additional adverse effects” mean.

As to the term “delayed action,” if a facility operator was unable to remove all contamination within 15 days, but proceeded diligently to do what they could, is that “delayed action” or not? In such a situation, if there were no additional adverse effects, why would a penalty be assessed?

If there are no adverse effects, that would suggest that the circumstances did not present conditions to be mitigated. If there are no conditions that are required to be mitigated in order to avoid adverse effects, then what is the purpose or rationale for assessing a penalty of 20% or 80%.

7. Failure to Take Preventative Measures

A prime example of stacking is §II.C’s conjunction of a penalty for the discharge with a separate penalty for violation of §91.34(a) – failure to take preventative actions. As the draft guidance is currently written, apparently any unauthorized discharge would result in a double penalty – one for the discharge, and one for not preventing the discharge. The matrix indicates that if any unauthorized discharge occurs, that triggers at least another 20% “add on” based on a claim that although the measures were “somewhat effective,” they still allowed a “minor discharge.” Under the proposed matrix, the only way that a penalty is avoided is if the measures prevent any polluting substance from reaching waters of the Commonwealth. But if polluting substances never reach waters of the Commonwealth, there could never have been an “unauthorized discharge” in the first place, and thus there would have been no basis for triggering of a penalty under Part I.

If a facility has taken reasonable measures to address reasonably foreseeable conditions that might cause a discharge of polluting substances, a separate penalty under §91.34(a) would be inappropriate. The matrix of factors should not just look at whether measures did or did not prevent a discharge, but what were the circumstances that led to the discharge, how foreseeable were those conditions, and had the facility operator taken reasonable and prudent measures to address such foreseeable conditions.

8. Failure to Develop a Pollution Prevention Contingency (PPC) Plan

The Chamber clearly endorses the general concept and accepted practice that major operating facilities develop and maintain PPC plans. Our concern, however, is that as § II.D of the proposed guidance is drafted, the penalty matrix does not tie the lack of the PPC plan to the incident in question. If a facility did not have a PPC plan or the PPC plan was inadequate, *and a properly developed PPC plan would have prevented or mitigated the unauthorized discharge*, we could see that a penalty enhancement might be warranted. However, if the PPC plan's particular inadequacy has nothing to do with the unauthorized discharge incident in question, that inadequacy should not be a cause for imposing a separate penalty under § II.D.

At the same time, we would observe that it would be improper for Department staff to simply claim that because a spill took place, the PPC plan must have been inadequate and therefore seek to impose a double penalty. PPC plans are plans, not insurance policies. Accidents or other circumstances can occur that might not have been foreseen, but that does not mean that the plan was deficient.

9. Violation of General Water Quality Standards & Causing Sheen

Two of the most egregious of the stacking provisions are those in §2.F and 2.G, for violation of general water quality standards and causing sheen. As the guidance is framed, a minor incident that causes a small amount of noticeable floating material, or a small sheen along the stream bank only, would trigger a double or triple assessment – starting with an unauthorized discharge assessment, plus another 33% in each case for what are minor consequences. Relatively small amounts of floating materials and small sheens should not be triggering major “add ons” – those minor impacts should have already been considered and subsumed in the assessment of the base unauthorized discharge penalty under Part I, which clearly considers such issues as part of the “damage” factor.

10. Special Situations – Conditions Found After Facility Acquisition or in Transactional Due Diligence

One of the special situations which the Department should consider involves legacy or residual pollution conditions found by a facility purchaser after site acquisition, or which are discovered during transactional due diligence and are promptly reported to the DEP after the buyer acquires the property. As the Department well knows, there are many brownfield facilities across the Commonwealth where legacy contamination conditions are found during the course of transactional environmental assessments, or are discovered by new owners after the properties

are acquired. Indeed, those conditions may have arisen from situations decades past. For example, in one recent transaction in western Pennsylvania, groundwater contamination was discovered under a parking lot area stemming from a service station that had been removed more than 20-30 years past. The Chamber would suggest that the reporting of such situations should not be cause for triggering this penalty guidance, but that (as now) such situations are most appropriately addressed through the Pennsylvania Land Recycling and Environmental Remediation Standards Act (“Act 2”).

11. Penalty Mitigation – Cooperation and Other Factors

The Department’s existing guidance concerning civil penalties associated with pollution incidents properly includes a section discussing factors that would mitigate penalty assessments, particularly the degree of cooperation provided by the facility operator. (See Doc. Id. 362-4180-002 (July 29, 2002) §3). For reasons that are not apparent, the proposed replacement guidance drops this section entirely.

Under Section 605 of the Pennsylvania Clean Streams Law, the Department is required to consider and balance a series of factors in assessing civil penalties, including willfulness, injury to water resources, costs of restoration and “other relevant factors.” As reflected in the existing water quality program guidance, and in a variety of penalty guidance under other environmental programs, the degree of operator cooperation is certain an “other relevant factor.” Any penalty policy should strongly encourage such cooperation, and the provisions of the existing policy (offering a discount of up to 20% for excellent cooperation) is beneficial to that objective.

B. Proposed Guidance for Civil Penalty Calculations for Effluent Violations

1. A Need for Vetting of Complexity and Results

The proposed guidance for effluent violation civil penalties represents a radical departure in approach from the Department’s current guidance and practice. The proposal is almost Byzantine in it’s complexity of factors and numerical calculations.

One of the difficulties with this radical change and complexity is that absent some fulsome discussion of various examples, it is extremely difficult to test out the reasonableness of the results, or its potential inequities. As noted above, the Chamber suggests that this draft guidance be referred to the Water Resources Advisory Committee for discussion. As part of that process, we would suggest that a range of hypothetical examples be framed, and those examples be worked through the existing guidance and the proposed guidance for comparison. Only then can the real impacts of the proposed guidance, and its potential merits or pitfalls, be assessed.

2. Starting with Assumed Statutory Maximum Penalties

The existing guidance starts with a “bottoms-up” approach to penalty calculations, commencing with a base amount for certain types of effluent violations (daily, weekly, or monthly), and then applying multipliers depending of factors such as magnitude, stream

classification, duration, and discharge volume to stream flow. In contrast, the proposed guidance starts with the assumption that every violation warrants a maximum statutory penalty imposition of \$10,000 per day (\$70,000 for each weekly effluent violation, \$300,000 for every monthly average effluent violation), and that value is only to be discounted if certain factor criteria are satisfied.

The proposed guidance appears destined (if not designed) toward imposing maximum penalties, and significantly raising the amount of penalties imposed across the regulated community. The ultimate goal of the civil penalty tool should be to stimulate compliance. Under the existing policy, the Chamber's understanding is that the amount of civil penalties assessed in Pennsylvania are significant compared to other jurisdictions. At the same time, we have not seen any evidence offered by the Department that Pennsylvania's currently compliance program (including its civil penalty approach) is not fostering appropriate compliance and attention by facility operators.

Absent a cogent explanation of what is wrong with the existing civil penalty approach, the Chamber has serious concerns as to the objective being sought in this proposal. The timing and direction of this proposal (released in the midst of the current budget stalemate) gives serious cause for concern. We would emphatically stress that the civil penalty element of the Clean Streams Law's compliance program must not be wielded as a revenue enhancement device to support the Commonwealth's governmental operations.

3. Magnitude – Sizing Factor

Historically, the magnitude of discharge flow and the relative volume of discharge to stream flow have both been factors considered in weighing an appropriate penalty for effluent exceedances.

While §III.B preserves consideration of the "sizing factor," it contains ambiguous and troublesome statements suggesting that the factor may be inappropriate for some industrial facilities where the complex is large, but is served by a very small industrial wastewater treatment plant. The import of this statement is unclear. Is the Department suggesting that if a large facility has only a small discharge, it should be nevertheless be arbitrarily assessed a higher sizing factor? Across the Commonwealth, many industries have undertaken concerted efforts at process adjustments, water conservation, water recycling and reuse and other methods to lower the volume of wastewater generated and discharged. The size of an industrial complex is irrelevant to its discharge impact. If the discharge is low in volume, it's low in volume. Other factors being the same, there is not rationale we believe for treating a 100,000 gpd discharge from a 100 acre facility any differently than a 100,000 gpd discharge from a 1 acre facility.

4. Differentiating Between Chronic Effluent Exceedances and Monthly Average Exceedances Caused by Infrequent Short Duration Events

On of the current shortcomings of the guidance is its assumption that every monthly average effluent limit exceedance warrants a \$300,000 base penalty (30 x \$10,000), without giving any consideration as to the circumstances causing the “average” to be exceeded.

As the Department is aware, there are situations across the Commonwealth where monthly average values for certain parameters (such as total suspended solids – TSS) are calculated from infrequent sampling (*e.g.*, one grab sample taken each week). A single “spike” – such as might occur in a particular rain event – could cause both an instantaneous maximum violation and a monthly average limit to be exceeded merely because of the small number of samples that comprise the average, even if every other day of the month had compliant (even low) concentration values.

Infrequent “spike” situations should be differentiated from conditions where effluent limits are being chronically exceeded. Rather than a rote 30 times the maximum value approach, Department staff should have the flexibility to consider the causes, nature and frequency of such monthly average exceedance situations, framing penalties that are commensurate with the situation.

C. Proposed Civil Penalty Information Hearing Procedure

The Chamber notes that the proposed Doc. No. 362-4180-006 represents the first guidance issued by the Department regarding informal hearings since the adoption of 25 Pa. Code §92.93 in November 2000. Although perhaps belated, the adoption of guidance as to the process is probably appropriate.

1. Presiding Officer

The proposed guidance should indicate that the presiding officer in any hearing (even if informal) should be an *independent* relatively senior Department officer or staff member. Put another way, the presiding officer should be an experienced individual who was not involved in either directing or supervising the inspection and investigation of the compliance matter, or the issuance of the permits in question. If informal hearing processes are to be valuable, they need to be framed in a manner where the person hearing the matter is not serving multiple roles of prosecutor, judge and jury. If roles are mixed – for example, if regional compliance staff chair the hearings – the process will be perceived as inherently biased and inequitable.

2. Failure to Request an Informal Hearing Not Waiver of Appeal Rights to EHB

The guidance should make clear that whether or not an individual requests an informal hearing, they in any case retain the right to appear the final Department assessment to the Environmental Hearing Board.

Mr. Robert Kachonik
Department of Environmental Protection
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The Chamber appreciates the opportunity to submit these comments. Should you have any questions regarding these comments, please do not hesitate to contact us. Our Water Work Group would certainly welcome the opportunity to meet with the Department to discuss these issues and concerns, with the common objective of assuring an effective, efficient, consistent and equitable water quality compliance program across the Commonwealth.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Catarino Wissman".

Stephanie Catarino Wissman
Director, Government Affairs