



December 15, 2021

Via PADEP eComment

Technical Guidance Coordinator
Department of Environmental Protection
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P.O. Box 2063
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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)

To Whom It May Concern:

The Marcellus Shale Coalition ("MSC"), a regional trade association with a national membership, hereby submits the following comments to the Pennsylvania Department of Environmental Protection ("PADEP" or the "Department") regarding PADEP's proposed Technical Guidance Document ("TGD") entitled *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 MSC was formed in 2008 and is currently comprised of approximately 125 producing, midstream, transmission and supply chain members who are fully committed to working with local, county, state and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, gathering, processing and transmission, in the country, as well as the suppliers, contractors and professional services firms who work with the industry.

The MSC submits the following comments regarding PADEP's proposed TGD.

General Comments

The MSC appreciates the concept underlying the proposed TGD – namely, to provide the regulated community and PADEP staff with greater clarity regarding the circumstances when a spill, discharge or other incident must be reported to PADEP pursuant to the Clean Streams Law ("CSL") and the regulations thereunder. However, as drafted, the TGD is likely to add to the confusion that already exists as to the requirements for notifications and what constitutes a reportable spill for the oil and gas industry. Specifically, the different reporting requirements that exist within 25 Pa. Code Chapter 78a and 25 Pa. Code § 91.33 give our members the most significant consistency concerns.

On page 1 of the TGD, PADEP states that "Pennsylvania regulations require immediate notification to [PADEP] when a spill, discharge, or other incident results in a substance that

would endanger downstream users, result in pollution, create a danger of pollution, or damage property being discharged to waters of the Commonwealth or being placed such that the substance might discharge, flow, be washed, or fall into waters of the Commonwealth.” While acknowledging that “some spills or other unauthorized discharge incidents pose negligible risk of pollution of waters of the Commonwealth, endangering downstream users, or damaging property and [PADEP] does not expect notification of such incidents,” the proposed TGD goes on to say 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.)

While the aspirational objective set forth above may be a preference that PADEP has endorsed as a policy matter and that some members of the regulated community may even embrace, PADEP’s views are unhelpful in actually clarifying the legal requirements for reporting under the CSL. The CSL does not require immediate notification for every spill or release. PADEP recognizes as much in the proposed TGD. The CSL certainly does not require any release of fluid to primary or secondary containment (even if it does not result in an “unauthorized discharge”) to be reported to PADEP. Requiring the reporting of spills that are not required to be reported where the risk is not entirely known or certain would cause tremendous confusion for the regulated community and could cause PADEP inspectors to issue notices of violations (“NOVs”) for releases that are not actually reportable under the Clean Streams Law. Over-reporting would also result in the unintended consequence of overloading downstream users with spill notices which could very well lead them to begin to ignore such notices.

The Pennsylvania Environmental Quality Board (“EQB”) has promulgated regulations implementing reporting requirements under the CSL as set forth in 25 Pa. Code § 91.33(a). These regulations contain certain operative building blocks for reporting requirements, including the following:

- An accident, other activity or incident must have occurred.
- The accident, other activity or incident must have caused the discharge of a toxic substance or another substance that would:
 - Endanger downstream users of surface waters,
 - Result in pollution,
 - Create a danger of pollution, or
 - Result in property damage.



- The discharge must be directly to groundwater or surface waters or to a location where the discharged substance might discharge, flow, be washed or fall into groundwater or surface waters.

Intrinsic to the foregoing building blocks is the concept of “pollution.” This term is defined in Section 1 of the CSL as follows:

“Pollution” shall be construed to mean contamination 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).

PADEP has never established standards “whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined” as Pennsylvania’s General Assembly has explicitly directed. This fundamental failure has been a leading cause in the significant difficulties that reporting requirements have posed for the regulated community to satisfy and PADEP to administer for many years. In short, by not promulgating objective standards for whether a discharge constitutes pollution, PADEP has left the regulatory language of 25 Pa. Code § 91.33 to the subjective interpretations of individual PADEP staff members who administer the reporting obligations. Such objective standards are necessary to draw the line between discharges that constitute “pollution” or those that do not. The fact that the CSL mandates such a line-drawing exercise highlights the fact that not all discharges constitute “pollution” and are therefore not reportable. PADEP acknowledges as much in the proposed TGD but does very little to actually establish the scope of what is legally required to satisfy reporting obligations.

For those in the oil and gas industry, the intersection of multiple reporting requirements makes the arena of reporting requirements even more of a quagmire. Since 2016, when 25 Pa. Code Chapter 78a was published in final form, it has been the oil and gas industry’s experience that when any spill of any quantity (even those captured by containment) is reported to PADEP’s Oil



and Gas Program, sometimes voluntarily out of an abundance of caution, inspectors issue NOV's alleging a plethora of violations to the operator for every regulation and statute that may be applicable, including (but not limited to) the CSL, the Solid Waste Management Act, 25 Pa. Code § 78a.66, and 25 Pa. Code § 91.33. In many ways, the objective articulated by PADEP in the proposed TGD to report in any and all circumstances has translated into shorthand for a legal standard (which it is not) that inspectors seek to use in administering spill reporting requirements. The MSC believes that the proposed TGD is inconsistent with the thrust of the existing regulations. 25 Pa. Code § 78a.66(b)(1) states that an operator must notify PADEP when there is a "[a] spill or release of a regulated substance causing or threatening pollution of the waters of the Commonwealth in the manner required under [25 Pa. Code] § 91.33." 25 Pa. Code § 78a.66(b)(2) also provides that an operator must notify PADEP when there is "[a] spill or release of 5 gallons or more of a regulated substance over a 24-hour period that is not completely contained by secondary containment." The requirements relating to spill or release notification have been inconsistently administered across PADEP's regional offices and through PADEP's individual inspectors, resulting in NOV's being issued to oil and gas operators asserting hundreds of violations for spills completely contained by containment and/or not posing a threat to waters of the Commonwealth. The incorrect assignment of NOV's also inaccurately represents the true environmental compliance rate of the industry to the public and policymakers. The subjective application of reporting requirements that the MSC's members have persistently experienced underscores the need for a robust TGD that sets forth clear, objective standards for spills and releases that are reportable and those that are not. However, the proposed TGD in its current form falls well short of that mark and is likely to do little to address the current challenges that are posed by PADEP's inconsistent administration and interpretation of reporting requirements.

The MSC also notes that the terms 'spills' and 'releases' appears to be used interchangeably in the proposed TGD. The MSC recommends that PADEP provide clarification within the proposed TGD that a spill is reportable only if it constitutes a release. In very basic terms, a release connotes an incident in which a regulated substance has escaped into the environment. A spill may lead to a release but if a spill is contained or occurs in a setting where escape to the environment does not occur, then a spill does not qualify as a release. For example, a spill that is fully captured in secondary containment never enters the environment and does not qualify as a release. Because of the definition of "pollution" in the CSL as discussed above, a spill that never reaches the environment cannot affect groundwater or surface water in a manner that qualifies as "pollution and, therefore, need not be reported. It appears that PADEP does not disagree with this basic proposition. On page 10 of the proposed TGD, PADEP identifies "[s]pills or overflows collected by appropriate secondary containment" as an example of incidents that do not require notification. It would be beneficial if PADEP would emphasize that only spills that result in a release to the environment are required to be reported.

The MSC fully supports addressing the challenges that have highlighted the need for the proposed TGD. Discerning what 25 Pa. Code § 91.33 actually requires in particular situations has proved to be a vexing problem for the regulated community and PADEP staff for many



years. The absence of objective standards for determining what constitutes “pollution” within the meaning of the CSL is a gap in Pennsylvania’s regulatory fabric that has contributed to these difficulties. The proposed TGD does not close this gap. As a result, it is largely ineffective in achieving the objectives that served as the genesis for the TGD. The MSC strongly recommends that PADEP work with various stakeholders to come up with a more workable and effective TGD.

Specific Comments

- Page 4, When to Notify Downstream Users: PADEP states that preparedness, prevention and contingency (“PPC”) plans “*should*” identify downstream users of water in their emergency response plans.

The proposed TGD appears to adopt the same approach for notifying downstream water users as it articulates for notifying PADEP – i.e., encouraging notification for any spill or discharge. If the regulated community follows this recommendation, unintended consequences may follow. Notification of downstream water users in circumstances where a real threat to such users is posed is of critical importance. Upon receiving such a notice, the downstream water user may implement emergency procedures such as closing water intakes or suspending operations. If downstream water users are deluged with protective notifications, it will become extremely hard for such users to distinguish between notifications that are associated with real threats that require immediate action and notifications that are simply designed to be a protective step for the person or entity that has had some type of minor incident posing no real risks to the downstream water users. In other words, warnings to downstream water users need to be treated seriously. Creating an abundance of notifications that do not propose a real threat undercuts this proposition.

- Page 6, first paragraph: PADEP states in the proposed TGD that, “Moreover, spills and unauthorized discharges are often not direct discharges to surface waters, . . . so – in addition to the many factors that go into determining permit conditions (e.g., effluent limits) for permitted direct discharges to surface waters – several additional factors need to be assessed to determine if a spill or unauthorized discharge that does not directly enter a surface water will result in violation of water quality standards in nearby surface waters.”

The MSC agrees with the last part of this sentence, namely, that a spill or unauthorized discharge that does not directly enter a surface water body may not result in a violation of water quality standards in nearby surface waters. When a PADEP inspector is investigating a spill reported at a well site, the act of reporting the spill should not result in an NOV asserting multiple violations being issued immediately. If it is determined that the spill or unauthorized release does pose a threat to waters of the Commonwealth,

such an NOV may then be considered. However, if no threat exists, an NOV should not be issued despite the notification that PADEP received. In other words, if members of the regulated community follow the objective articulated by PADEP of reporting even if not legally required to do so, they should not be punished for that action through receipt of an NOV or other enforcement activity. The MSC requests clarity and consistency during the inspection and the issuance of NOV's in connection with spills or releases, consistent with the regulatory requirements, especially when spills are contained by containment and prevented from migrating off-site or impacting waters of the Commonwealth.

Further, the current uncertainty surrounding spills that leads to NOV's being issued for companies that report out of an abundance of caution is counterproductive to PADEP's underlying effort. Meaning, because of the unnecessary and punitive NOV's being issued for spills that are being reported out of caution, companies may be less likely to report such events that PADEP is encouraging.

- Page 8, Table 1: The MSC believes Table 1 is helpful. However, the MSC would like to see it contain additional information. Within either the column labeled "Lower Risk of Pollution" or the column labeled "Overall Risk," PADEP should make mention of spills or unauthorized discharges that are completely contained. Further, the MSC recommends that within the Lower Risk of Pollution characterization, these events should not commonly result in the issuance of NOV's because, by their nature, they do not threaten waters of the Commonwealth. Adding this information to the table would help with consistency across PADEP's regional offices and inspectors in the field when investigating spills and unauthorized discharges. Further, the MSC recommends that PADEP develop a "frequently asked questions" document or an additional resource document to be utilized for potential comparison examples.

Certain additional factors can also be added to Table 1 to further clarify when a spill or release is reportable. The factors currently listed in the "substance" category include known effects, volume, and concentration. The MSC recommends adding a factor for the propensity to migrate through soil. The factors currently listed in the "location" category include proximity to nearby users, proximity to surface water, characteristics of the nearest waters of the Commonwealth, and relevant infrastructure presence and qualities. The MSC recommends adding a factor for the depth to groundwater.

- Page 1, third paragraph, and Page 9, second paragraph: "[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 of a spill or unauthorized discharge may have on waters of the Commonwealth."



While many operators do try to “err on the side of caution” when reporting a spill or an unauthorized discharge to PADEP, as mentioned above, inspectors for PADEP’s Oil and Gas Program have routinely issued NOVs asserting multiple violations for any and all spills that are reported, even ones that do not escape containment and do not pose a threat to waters of the Commonwealth. According to the PADEP Oil and Gas Compliance Reporting Database, operators have been issued violations for spills less than the required reporting threshold of 5 gallons (a quantitative reporting requirement in 25 Pa. Code § 78a.66(a)) that are captured by containment. For the reasons explained above, the MSC recommends that PADEP remove the above language and add clarifying language to the proposed TGD that if a spill is reported to PADEP out of an abundance of caution, it will not necessarily result in enforcement action, especially considering the multi-factor framework in Table 1 on Page 8, “Lower versus Higher Risk of Pollution.”

- Page 10, Examples of Incidents Where PADEP Does Not Expect Notification: The MSC finds these examples to be extremely helpful in clarifying when notification to PADEP should occur (and when notification is not required). As discussed above, inspectors for PADEP’s Oil and Gas Program have routinely issued NOVs to operators asserting violations for minor spills that occur within both containment and on the well pad that are immediately remediated. These NOVs involve both the spill itself and reporting requirements relating to the spill. Additionally, NOVs are also routinely issued for spills collected by secondary containment controls. Examples of these NOVs can be found in the PADEP Oil and Gas Compliance Reporting Database on PADEP’s website.

The MSC requests that PADEP state for clarity in these examples that if spills do not require notification, then inspectors should not issue NOVs for not reporting and for the spills themselves, presuming they are cleaned up immediately and/or collected by secondary containment.

- Pages 5-6, 11: PADEP’s Rejection of a Reportable Quantity Framework

PADEP takes the position in the proposed TGD that it is unable to establish standard reportable quantities in advance of an unplanned discharge because reportable quantities do not allow PADEP to consider all of the fact-specific circumstances of a particular release. Yet, this is precisely what the CSL directs PADEP to do. The CSL requires PADEP to “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). Not only do Pennsylvania’s regulations fail to create any such standards, the proposed TGD explicitly rejects adopting them. PADEP is clearly required to adopt standards for determining whether a particular discharge constitutes pollution and is reportable. This would not be the first time that PADEP has issued standards where every fact-specific circumstance of every possible exposure



scenario is not known in advance. For example, PADEP has established statewide health standards under the Pennsylvania Land Recycling and Environmental Remediation Standards Act 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 TGD, PADEP has seemingly established a reportable quantity for mineral oil (e.g., 15 gallons).

The federal government applies a reportable quantity framework for releases throughout the country under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, and the Clean Water Act, and PADEP can adopt this framework. Adopting reportable quantity standards would provide certainty to the regulated community and PADEP inspectors. PADEP is clearly both required to and capable of establishing reportable quantities by adopting the reportable quantities under federal regulations or potentially examining whether to issue state-specific reportable quantities.

Inconsistencies among PADEP Programs and Regulated Industries

A recurring theme that MSC members have raised with PADEP over the years has been the disparate treatment of often similar activities under Pennsylvania's regulations when often the only difference is the industry performing the activity. This is particularly true with respect to the oil and gas industry as compared to other industries regulated by PADEP. Harmonizing reporting obligations – including the timing and manner of reporting – would be highly beneficial for both PADEP's staff and the regulated community.

Conclusion

On behalf of the MSC and its member companies, thank you for your consideration of these comments. Please do not hesitate to contact me should you have any questions or request any clarification.

Sincerely,

Jim Welty
Vice President, Government Affairs

