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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

25th ANNIVERSARY

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November 30, 2015

ecomment@pa.gov
Pennsylvania Department of Environmental Protection
Bureau of Conservation and Restoration
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

Re: Comments on Draft Policy
"Pennsylvania Improving Waters Program Guidelines:
Documenting and Reporting Measurable, Incremental Improvements in Water Quality of Streams, Rivers and Lakes"
Document Number 394-3000-001

To Whom It May Concern:

On October 31, 2015, the Pennsylvania Department of Environmental Protection (the "Department") published in the Pennsylvania Bulletin a notice announcing the availability for public comment of a draft policy entitled "Pennsylvania Improving Waters Program Guidelines: Documenting and Reporting Measurable, Incremental Improvements in Water Quality of Streams, Rivers and Lakes (the "Policy"). 45 Pa. B. 6452. The Department's notice stated that it was seeking comments on the Policy, which it would accept through November 30, 2015.

Please accept the following comments on the Policy on behalf of Waste Management of Pennsylvania, Inc. and Waste Management Disposal Services of Pennsylvania, Inc., and its network of affiliates operating in Pennsylvania.

A. Background

The purpose of the Policy, as set forth therein, "is to explain the process for the Department staff and others involved in water quality monitoring, in documenting and reporting measurable, incremental improvements for water quality in streams, rivers and lakes towards an impairment free condition." The Policy further describes the chemical, biological and physical parameters to be measured to determine if there are measurable, incremental improvements in the water quality of surface waters and thereafter suggests certain methodologies to collect such data. The information collected pursuant to the Policy will be used, as described in the Policy, in

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the Department's preparation of a report entitled the "Pennsylvania Improving Waters Report," which will "illustrate water quality attainment successes" and "share information about surface waters that show incremental improvement."

These are laudable goals of the Policy. However, as described below, there are inherent flaws in the Policy that, if left uncorrected, may result in the collection of unreliable data leading to improper reporting and unintended consequences.

B. The Policy Does Not Include the Necessary Safeguards to Ensure the Collection of Accurate Data.

1. An Accurate Baseline of Data is Needed to Demonstrate Incremental Improvement.

It is axiomatic that to identify any improvement in water quality, an accurate and established baseline condition is needed for comparison purposes. For many parameters, the Policy fails to identify what baseline condition will be used to identify incremental improvement. For other parameters, the Policy suggests an inappropriate baseline. For example, for the fecal coliform bacteria parameter, the Policy states that a "one-time grab sample can be used as background." A one-time grab sample should not be used as the background condition for any parameter, since it represents, by definition, a snapshot of the condition of a particular parameter at a single point in time. Therefore, a one-time grab sample should never be used to represent a background condition.

The Policy should therefore be modified to identify how the baseline condition of a waterbody will be identified. To be an accurate baseline condition, this would presumably consist of measurements conducted over a period of years, with the number of years of data collected to identify a baseline condition being determined by the specific parameter under investigation.

2. The Policy Does Not Ensure That the Data Reporters are Properly Trained and Therefore the Data Reported May be Unreliable.

The Policy defines its purpose as explaining the process for "Department staff and others" to use to document incremental improvement in water quality throughout the Commonwealth. The Policy then identifies the chemical, biological and physical parameters that can be evaluated to identify incremental improvements, and further identifies assessment methodologies for the Department staff and others to use to determine whether there has been any incremental improvement to a waterbody. The Policy fails, however, to ensure that the individuals submitting data, whether they be Department staff or others, have the proper training and experience to accurately collect the data.

Obviously, some of the parameters identified in the Policy will need less training and experience to collect accurate data than the collection of data for other parameters. But to report accurate conditions, the individual collecting the data will need to be properly trained, and have the requisite experience, to be able to accurately collect any of the data of interest to the Department.

To ensure accurate and reliable data is collected and reported to the Department pursuant to the Policy, it is recommended that the Department modify the Policy in three ways. First, it is recommended that the Reporting Template found as Appendix 1 to the Policy be amended to add a section that identifies by name the individual(s) collecting the data, and the training and experience of the named individual(s) regarding the data being reported. Second, the Reporting Template should be further modified to add a certification statement, similar to the certification statement found with Discharge Monitoring Reports, which would be signed by the individual submitting the report to the Department. The certification attached to each report sent to the Department pursuant to the Policy should read as follows:

> "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this report and all attachments, and that I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment."

Since the information submitted to the Department will be used by the Department to evaluate improvements in water quality, and perhaps to initiate enforcement actions against individuals, businesses and other entities (see below), it is critical that the submitter of the information understands the importance of the reliability and accuracy of the data submitted. A signed certification, as suggested above, will help to ensure that (i) the submitter of the data understands the importance of true, accurate and complete data submittal, and (ii) the data has an indicia of reliability.

Finally, the Policy should be amended to state that any data submitted without identifying the name and training of the data collector, and a signed certification, will *not* be considered by the Department.

3. The Policy Appears to Contain Elements Inconsistent With Its Stated Purpose.

The Policy states that its purpose is to "explain a process for DEP staff and others involved in water quality monitoring" to document and report measurable, incremental improvements in water quality, which information will be used for the Department to develop an "Improving Waters Report." The Policy goes on to define the phrase "Improving Waters" in a positive manner, noting that it applies to "water bodies where their quality has increased in some measurable way." However, the Reporting Template requests information that is inconsistent with this purpose, such as providing information to the Department regarding the "source/cause of impairment" and also requesting "recommendations for additional actions to restore and protect [the] water body." If the purpose of the Policy is, as stated, to document and report measurable improvements, the information requested by these two questions only invites mischief, and inaccurate and unreliable reporting. It also appears that reporting this information could lead to subsequent enforcement actions by the Department or citizen suits against entities that have no connection to observed conditions.

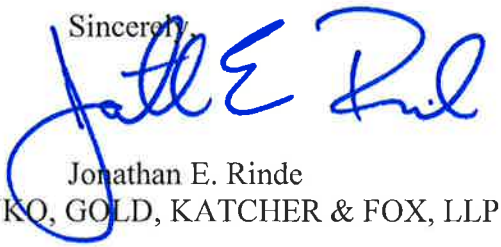
Therefore, it is recommended that the Department delete the request for certain information identified above in in its Reporting Template.

C. Conclusion

As set forth above, it is requested that the Policy be modified to address the concerns discussed herein.

Thank you for the opportunity to provide the Department with these comments on the Policy. If the Department wishes to discuss these comments in more detail, please feel free to contact me.

Sincerely,



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For MANKO, GOLD, KATCHER & FOX, LLP

JER/mrb
cc: Waste Management of Pennsylvania, Inc.