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RECEIVED

Via First-Class Mail

JUL 14 2011

Mr. Michael Krancer
Secretary of the Department of Environmental Protection
Rachel Carson State Office Building
P.O.Box 2063
Harrisburg, PA 17105-2063

ENVIRONMENTAL QUALITY BOARD

Re: Petition to Adopt Regulation


Dear Mr. Krancer,

Enclosed is a Petition Form, with attachments and exhibits, requesting the Environmental Quality Board to adopt a new regulation regarding the standards for conducting inspections at NPDES-permitted facilities. Please time stamp the copy of the petition form and return it to me in the self-addressed, stamped envelope I have provided.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

GSP Management Co.



Daniel F. Schranghamer, Esq.

C. Describe the types of persons, businesses and organizations likely to be impacted by this proposal.

All NPDES permittees subject to inspections by the Department.

D. Does the action requested in the petition concern a matter currently in litigation? If yes, please explain.

Yes. A declaratory judgment was sought in Commonwealth Court to require the Department to utilize its published "Guidelines for Identifying, Tracking and Resolving Violations for Water Quality" when conducting NPDES inspections. The Department moved to have the action dismissed because the Department did not believe Commonwealth Court was the proper forum. The Department also argued that the Guidelines document is merely a policy statement and, therefore, not enforceable. In filing this petition, Mr. Perano is acting in accordance with the Department's arguments by seeking to have the Guidelines document codified as a regulation by the entity with the authority to promulgate regulations.

E. For stream redesignation petitions, the following information must be included for the petition to be considered complete. Attach supporting material as necessary.

1. A clear delineation of the watershed or stream segment to be redesignated, both in narrative form and on a map.
2. The current designated use(s) of the watershed or segment.
3. The requested designated use(s) of the watershed or segment.
4. Available technical data on instream conditions for the following: water chemistry, the aquatic community (benthic macroinvertebrates and/or fishes), or instream habitat. If such data are not included, provide a description of the data sources investigated.
5. A description of existing and proposed point and nonpoint source discharges and their impact on water quality and/or the aquatic community. The names, locations, and permit numbers of point source discharges and a description of the types and locations of nonpoint source discharges should be listed.
6. Information regarding any of the qualifiers for designation as high quality waters (HQ) or exceptional value waters (EV) in §93.4b (relating to qualifying as High Quality or Exceptional Value waters) used as a basis for the requested designation.
7. A general description of land use and development patterns in the watershed. Examples include the amount or percentage of public lands (including ownership) and the amount or percentage of various land use types (such as residential, commercial, industrial, agricultural and the like).
8. The names of all municipalities through which the watershed or segment flows, including an official contact name and address.
9. Locational information relevant to items 4-8 (except for contact names and addresses) displayed on a map or maps, if possible.

**All petitions should be submitted to the
Secretary of the Department of Environmental Protection
P.O. Box 2063
Harrisburg, PA 17105-2063**

Attachment A

II(B) Why is the petitioner requesting this action from the Board?

The Department has no fixed criteria that it applies when conducting inspections of NPDES-permitted facilities. Its inspectors are basically left to employ whatever methods they choose. This ad-hoc, informal mentality, however, severely prejudices an NPDES permittee, who has no certainty about what types of inspections the Department is conducting, what information the Department is collecting during an inspection, or even if an inspection has occurred. Because of this lack of certainty, and the lack of any binding guidance on inspectors, Mr. Perano is filing this petition to codify the Department's existing guidelines for conducting NPDES inspections.

1. Background

On June 26, 1991, the Department entered into a Memorandum of Agreement (the "MOA") with the United States Environmental Protection Agency, Region III ("EPA"), related to enforcement of the Clean Water Act's permitting program. A copy of the MOA is attached hereto as Exhibit 1. The MOA states, among other things, that it "establishes policies, responsibilities and procedures pursuant to 40 CFR Part 123 and defines the manner in which the National Pollutant Discharge Elimination System (NPDES) will be administered by [the Department] and reviewed by [EPA]."

The Department's responsibilities under the MOA include evaluating and assessing compliance, taking timely and appropriate enforcement actions as outlined in Section IV of the MOA, and maintaining files for each permittee that include but are not limited to copies of all inspection reports. In undertaking these responsibilities, the Department is required to conduct compliance inspections in accordance with EPA's inspection manual. MOA, §IV(A)(2).

The current EPA Inspection Manual, entitled “NPDES Compliance Inspection Manual,” was published in July 2004 and is identified as Document No. 305-X-04-001 (the “Inspection Manual”). A copy of the relevant portions of the Inspection Manual are attached as Exhibit 2. The entire Inspection Manual can be downloaded from EPA’s website at <http://www.epa.gov/oecaerth/resources/publications/monitoring/cwa/inspections/npdesinspect/npdesmanual.html> In Chapter 1, the Inspection Manual identifies all of the different types of inspections that may be conducted as part of the compliance review process:

- Compliance Evaluation Inspection (CEI).
- Compliance Sampling Inspection (CSI).
- Performance Audit Inspection (PAI).
- Compliance Biomonitoring Inspection (CBI).
- Toxics Sampling Inspection (XSI).
- Diagnostic Inspection (DI).
- Reconnaissance Inspection (RI).
- Pretreatment Compliance Inspection (PCI).
- Follow-up Inspection.
- Sewage Sludge Inspection.
- Storm Water Inspection.
- Combined Sewer Overflow (CSO) Inspection.
- Sanitary Sewer Overflow (SSO) Inspection.
- Concentrated Animal Feeding Operation (CAFO) Inspection.

A detailed definition of each inspection type can be found in Exhibit 2. While the Inspection Manual recognizes that some types of NPDES inspections may encompass several elements of

the primary inspection types, it does not provide for the possibility of conducting types of inspections not identified in the Inspection Manual. In particular, the Inspection Manual does not provide for “stop by,” “quick check,” or “drive-by” visits / inspections. The Inspection Manual further requires an inspector to complete an inspection report following every inspection.

The Inspection Manual also states that every inspector must maintain a field notebook, which contains accurate and inclusive documentation of all inspection activities. The Inspection Manual further states that the field notebook should be bound, that entries should be made in permanent ink, and that it should include observations, documents reviewed and photographs taken, unusual conditions and problems, and other general information.

Pursuant to its delegated enforcement authority under the NPDES permitting program, the Department drafted the document “Guidelines for Identifying, Tracking and Resolving Violations for Water Quality,” Document Number 362-4000-006 (the “Guidelines”). A copy of the Guidelines is attached as Exhibit 3. The Guidelines apply to any Water Quality staff in the Department involved with the compliance and enforcement of applicable water quality requirements, including NPDES program requirements. Guidelines, page 1.

The Guidelines also identify the types of inspections the Department conducts to determine compliance with the NPDES permitting program:

- Reconnaissance Inspection.
- Facility Inspection.
- Compliance Evaluation Inspection (CEI).
- Compliance Sampling Inspection (CSI).
- Performance Audit Inspection (PAI).
- Non-NPDES Inspection.

- Construction Progress Inspection.
- Case Specific Stream Survey.
- Compliance Assistance Visit.
- Combined Sewer Overflow Inspection (CSO).

A detailed definition of each inspection type can be found in Exhibit 3. The Guidelines expressly state that the EPA Inspection Manual should be used as a reference for conducting inspections. Guidelines, §1(A)(4). In addition, the Guidelines, like the EPA Inspection Manual, do not provide for the possibility of conducting types of inspections not identified in the Guidelines, such as “stop by,” “quick check,” or “drive-by” visits / inspections. The Guidelines further state that an inspection report must be prepared following an inspection and that before an inspector leaves a facility following an inspection, a closing conference must be conducted with the contact at the facility. Guidelines, §1(A)(4).

The Department, however, does not follow either the Inspection Manual or its own Guidelines during and after inspections. In particular, the Department is:

- Conducting inspections not provided for in the MOA, the Inspection Manual, or the Guidelines, such as “stop by,” “quick check,” or “drive-by” visits.
- Not documenting the results of each visit in an inspection report, particularly if the result of a visit would be positive to the permittee.
- Not taking samples during a visit if the effluent from the facility looks good, but taking samples during a visit if the effluent from the facility looks poor.
- Not keeping field notebooks.
- Not entering all inspections into the eFACTS database.

Former Department supervisor Randy King testified under oath that the Inspection Manual is mere guidance for the Department's inspectors and that as the Department's inspectors become more experienced, they rely less upon the Inspection Manual. Mr. King offered additional testimony about further deviations from the Guidelines, the Inspection Manual, and the MOA:

- Inspectors are not expected to complete an inspection report after every visit to a facility.
- Some visits to permitted facilities by Department inspectors are not considered to be inspections.
- Department inspectors will visit a permitted facility just to "stop by" and "do a quick check."
- The Department does not expect its inspectors to complete inspection reports after these "stop by" and/or "quick check" visits.
- The Department looks for problems during its visits and if there are no problems, it does not prepare an inspection report.

Department Supervisor Shawn Arbaugh also testified under oath about his undocumented visits to permitted facilities. In particular, Mr. Arbaugh has testified that he does not prepare an inspection report if his "visit" is not a "compliance evaluation inspection."¹ He further testified under oath that he has conducted undocumented "drive-by" inspections. The Department, in fact, has admitted that on at least five occasions in 2006 and 2007 its inspectors have visited Mr. Perano's Pleasant Hills facility without completing inspection reports.

Without inspection reports from every visit, a permittee is left without any written evidence that the Department did not find any violations during one of its "visits." The lack of

¹ Inspector Arbaugh, unfortunately, also verified to the contrary that he documented every "visit" he made to Pleasant Hills with an inspection report. He was eventually forced to recant this untruthful statement after numerous witnesses stated that they had seen him at the Pleasant Hills property on numerous occasions.

documentary evidence, in turn, creates an incomplete picture of the operating status of a facility. This incomplete picture is a problem for NPDES permittees when the Department takes the position in enforcement proceedings that its actual written reports are not representative of the conditions at a sewage treatment plant on dates not covered by those written reports (in other words, when the Department states that it assumes a facility was out of compliance on dates for which it has no written report). This incomplete picture is also a problem when the Department takes the contrary position in other enforcement proceedings that its actual written reports are representative of the conditions at a sewage treatment plant on dates not covered by written reports (in other words, when the Department states that it assumes a facility was in compliance on dates for which it has no written report).

Furthermore, the Department relies on the results of undocumented alleged violations to support its position in enforcement matters, such as appeal proceedings before the Pennsylvania Environmental Hearing Board. Without inspection reports or comprehensive field notes from these alleged inspections, a permittee has no basis to challenge an inspector's verbal assertions about the conditions at a permitted facility, particularly new allegations of past, unrecorded, violations at the facility. A permittee is subjected to great uncertainty about what to expect in Department enforcement actions and left without any evidence to defend against conditions allegedly observed during undocumented inspections.

The purpose of a regulation, of course, is to establish a standard of conduct which has the force of law, while a statement of policy, such as the current Guidelines, merely announces an agency's intentions for the future. The problem here is that the Guidelines, as currently applied by the Department, do not create any standards upon which NPDES permittees may rely. It also presents an opportunity for the Department to escape its responsibility under the MOA to

properly enforce the NPDES program. Put another way, there are currently no standards pursuant to which the Department *must* conduct its inspections. If the language of the Guidelines is not promulgated as a regulation, the Department will remain free to deviate from, or even completely ignore, the standards set forth in its own Guidelines and conduct any kind of “inspection” or visit that it pleases. This regulatory uncertainty harms the business climate in Pennsylvania.

2. Change being recommended to address problem.

In this Petition, Mr. Perano requests that the Environmental Quality Board promulgate a regulation containing the language set forth in Attachment “B.”

3. The Legal Authority for this Petition.

Mr. Perano is filing this petition pursuant to Section 1920-A of the Administrative Code of 1929 (71 P.S. §510-20(h)). The Environmental Quality Board possesses the authority to promulgate the proposed regulation pursuant to section 5(b)(1) of the Clean Streams Law (35 P.S. §§691.5(b)(1)) and section 1920-A of the Administrative Code of 1929 (71 P.S. §510-20).

Attachment B

25 Pa. Code Chapter 92a.63 National Pollutant discharge Elimination System Permitting, Monitoring and Compliance

Subchapter D. Monitoring, Annual Fees, and Inspections

Section 92a.63. Identifying, Tracking, and Resolving Violations for Water Quality.

- (a) For each facility or activity holding an NPDES permit, the Department shall undertake the following activities to determine whether a violation has occurred at a facility or activity.
- (1) On-Site Inspections.
- (i) The Department may conduct one or more of the following inspections at a permitted facility or activity:
- a. Reconnaissance Inspection – This is a visit to a facility primarily to evaluate compliance status. The degree of detail and formality will depend on the conditions observed during the inspection. Grab samples (or composites) may be collected if effluent violations are observed or suspected.
 - b. Facility Inspection – This may be conducted when a certificate of construction is not submitted. This type of inspection is intended to evaluate compliance with construction, operation, maintenance, and discharge requirements in a facility's or activity's Water Quality Management permit and NPDES permit. Both the permit engineer and the area field person shall be present, especially for complex facilities.
 - c. Compliance Evaluation Inspection (CEI) - This is a comprehensive inspection to review all aspects of a facility or activity. A CEI can stand alone as an inspection but it is also an element of any Compliance Sampling Inspection and may be part of a Performance Audit Inspection. Grab samples shall be collected, field tests of the effluent conducted, and observations made of the receiving waters.
 - d. Compliance Sampling Inspection (CSI) - This is similar to a CEI except that, in addition, sampling is conducted at all outfalls in accordance with the NPDES permit requirements. This sampling, to the extent possible, shall be done consistently with the permittee's required sampling and samples split with the permittee when possible.

- e. Performance Audit Inspection (PAI) - This is an audit of a facility's or activity's or a private laboratory's sampling, analytical, and record keeping techniques.
- f. Non-NPDES Inspection - This is a comprehensive inspection to review all aspects of a Water Quality Management permit or any other activity regulated by the Clean Streams Law.
- g. Construction Progress Inspection - This inspection is conducted to determine whether or not construction is being carried out in accordance with the approved plans and specifications. This type of inspection may be conducted at all new facilities at least once during critical portions of the construction phase.
- h. Case Specific Stream Survey - This involves biological and chemical sampling for the purpose of evaluating the effect, in detail, of a specific discharger on the receiving waters. Examples of when such surveys are conducted include when intermittent pollution is suspected, to evaluate damage after a pollution incident, or to evaluate the adequacy of permit effluent limitations. A CSI or CEI conducted along with the survey should be considered.
- i. Compliance Assistance Visit - A visit to the site for which the sole purpose is to provide compliance assistance, such as operator outreach or educational assistance, on such things as Discharge Monitoring Report (DMR) preparation, operation and maintenance, or lab procedures.
- j. Combined Sewer Overflow Inspection (CSO) – This is a detailed inspection of facility records pertaining to CSO-related documentation required by the NPDES Permit, the approved Nine Minimum Control Plan, and implementation of the long-term control plan (LTCP). Physical inspection of the CSO structures must be conducted to ensure that implementation of certain controls are achieved and maintained. Consideration must be given for advance notice to the CSO facility to gather the large amount of documentation that will be reviewed during the inspection.

(ii) Inspection Frequency.

- a. The inspection frequency is a U.S. Environmental Protection Agency (EPA) Grant obligation and may change yearly with each new grant. The frequency may not be reduced below the inspections needed to meet the Department's obligations under its Section 106 Grant Agreement with EPA.

- b. All NPDES facilities will receive a CEI, CSI or a Reconnaissance Inspection in accordance with the Annual Compliance Monitoring Strategy and NPDES Compliance Inspection Plan submitted under the Section 106 Grant Agreement with EPA.
 - (iii) Conducting an inspection.
 - a. EPA's NPDES Compliance Inspection Manual shall be used as a reference for conducting inspections.
 - b. Before the inspector leaves the activity or facility following an inspection, a closing conference shall be conducted with the contact at the plant.
 - (iv) An inspection report shall be prepared following every inspection of a facility or activity.
 - (v) All inspections shall be entered into the Environment, Facility, Application, Compliance Tracking System (eFACTS) within 10 working days of the inspection; or within 10 working days of receiving the laboratory results.
 - (vi) For purposes of this section, the term "inspection" shall mean any visit to a facility or activity by a Department employee for the purpose of assessing the facility's or activity's compliance with the Clean Streams Law, the Department's regulations, or the terms of the facility's or activity's NPDES permit.
- (2) Review of information in required reports. The following guidelines shall be used during the review of reports and compliance documents submitted by a facility's responsible official:
 - (i) Monthly DMRs are received from the permittee and reviewed by Department field inspectors.
 - (ii) Miscellaneous reports may be required by each facility's NPDES permit. Each report is evaluated for compliance with the applicable conditions of the NPDES permit.
- (3) Review of reporting obligations. Reports received from the regulated community shall be reviewed for compliance with all applicable requirements as soon as practicable after receipt of the report.
- (4) Evaluating information. Information received should be reviewed for compliance with all applicable requirements as soon as practicable but no later than the next on-site compliance inspection.

- (b) For each facility or activity holding an NPDES permit, the Department shall notify the permittee or the permittee's legal representative that a violation has occurred at a facility or activity as follows:
- (c) Notification of Violation.
- (1) Violations determined during or as a result of inspections:
 - (i) All apparent violations shall be documented in writing in an inspection report on the date of the inspection and presented to the facility before ending the inspection, if possible. If the violation(s) cannot be determined on the date of the inspection because the receipt of sample results and/or further information is necessary, the determination of a violation and subsequent notification to the violator/responsible party shall be done within 21 calendar days after receiving the necessary information, including laboratory results.
 - (ii) All violations, and the basis for the violations, shall be clearly and concisely identified on the inspection report or on the follow-up notification to the facility owner or operator.
 - (2) Violations determined during the review of DMRs or other reports. For any violations determined during the review of DMRs, a Notice of Violation will be issued in writing according to Section (c)(4), below.
 - (3) Notice. Notice to the permittee of any violations identified during an on-site inspection or review of DMRs or other reports shall be made through a compliance notice or a notice of violation. A Compliance Notice is a written notification that violations have been identified, and includes an inspection report.
 - (4) A Notice of Violation (NOV) is issued for one of the following violations:
 - (i) A DMR violation that meets one or more of the following criteria.
 - a. For major facilities, an effluent violation that meets the requirements under 40 CFR Part 123, Subpart C, Appendix A to §123.45.
 - b. For minor facilities, an effluent violation of significant magnitude and frequency to have an impact on the receiving stream.
 - (ii) A discharge that may endanger human or environmental health or safety, or cause property damage.
 - (iii) A discharge that has caused a fish kill.
 - (iv) An unauthorized discharge not currently being addressed by a Department action.

- (v) A violation for failure to properly operate and maintain a system, which if uncorrected, will cause imminent harm to the environment, or may result in a violation of the permitted discharge limits.
 - (vi) Non-compliance with the terms and conditions of a permit.
 - (vii) Chronic violations not addressed in (c)(4)(i)(a) above.
- (5) No later than 21 calendar days after the Department has determined that a violation exists, an NOV will be issued to the violator, or a legal representative of the violator.
 - (6) All NOV actions shall be entered into eFACTS within 10 working days of the completion of the inspection or the mailing of an NOV as required under Section (b)(4), above.
 - (7) The NOV shall be closed out in eFACTS when the violations identified in the NOV have been resolved, and the violator shall be notified in writing that the Department considers the violation(s) resolved.