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April 1, 2020¹

Secretary Patrick McDonnell
Pennsylvania Department of Environmental Protection
16th Floor, Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105-2063

BY ELECTRONIC MAIL

Dear Secretary McDonnell:

As you know, last week the U.S. Environmental Protection Agency (EPA) released a Memorandum titled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program,” the first of several Enforcement Policies, that will guide the enforcement of federal environmental laws during the ongoing COVID-19 pandemic. We write to thank the Pennsylvania Department of Environmental Protection (DEP) for its decision not to follow this guidance regarding the enforcement of federal laws over which the DEP has delegated authority, and to ask that the DEP clarify on its website that regulated entities must continue to comply with all applicable monitoring and enforcement obligations unless the DEP grants a case-specific temporary suspension.

Our organizations write on behalf of our hundreds of thousands of members in Pennsylvania, who, like all Pennsylvanians, depend on fair and consistent enforcement of pollution control rules to protect our families, properties, and communities.

EPA’s new policy announces that the agency “does not expect to seek penalties for noncompliance with routine monitoring and reporting obligations” if a company claims COVID-19 related problems and EPA agrees that those problems excuse compliance. Yet, these routine obligations provide assurance that discharge and emissions limits are being met and public health protected. Notably, the federal policy does not tie flexibility to the impact of noncompliance on nearby or downstream communities. It abandons accountability across the board rather than providing flexibility on a case-by-case basis as extant policies do. The new federal policy fails to require even minimal after-the-fact showings that are open to public review and scrutiny that could prevent abuse.

¹ This letter was revised on April 2, 2020 to add several new signatories.

The DEP appears to have wisely rejected the EPA's approach. According to the Department's website:

In accordance with Governor Wolf's Proclamation of Disaster Emergency of March 6, 2020 and the Governor's powers pursuant to the Emergency Management Code, 35 Pa.C.S. §7301, the Governor has authority to suspend regulatory obligations and other legal obligations within his jurisdiction where strict compliance will prevent, hinder, or delay necessary action in coping with the COVID-19 emergency.

To request a temporary suspension of regulatory requirements and/or permit conditions, fill out this form and submit to RA-EPCOVID19SuspReq@pa.gov.

*If you are requesting suspension of a Federal requirement, under only Federal authority, please contact US EPA Region III and refer to the US EPA March 26, 2020 Memorandum (COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program). To the extent the request relates to a federal program delegated to Pennsylvania, Pennsylvania will review requests submitted in this format.²

We sincerely appreciate this prudent response. However, in the interest of clarity, we ask that you make explicit that in the absence of DEP approval of a properly submitted temporary suspension request, regulated entities must comply with all monitoring and reporting obligations under the DEP's jurisdiction, notwithstanding the EPA Memorandum. This is especially important with respect to the many industries that Governor Wolf has deemed "life-sustaining" and that therefore continue physical operations in the Commonwealth. Such a statement would give confidence to communities burdened by air and water pollution in addition to COVID-19. It would also provide clarity to regulated entities in Pennsylvania who might otherwise be misled by EPA's announcement.

We request that the DEP emphasize these points:

- Pennsylvanians depend on the DEP to protect clean air and clean water, particularly during times of crisis.
- Monitoring and reporting requirements ensure that public health and the environment are being protected.
- Because Governor Wolf has authorized many of the state's most polluting industries to continue operating during the pandemic,³ controlling the pollution from these industries is essential to keeping communities safe.
- The DEP recognizes that during this pandemic, with staff falling unpredictably ill or needing to quarantine for extended periods of time, regulated entities may face challenges

² See DEP COVID-19 Update, available at <https://www.dep.pa.gov/Pages/AlertDetails.aspx> (last checked April 1, 2020)

³ See Industry Operation Guidance at <https://www.scribd.com/document/452553026/UPDATED-2-30pm-March-24-2020-Industry-Operation-Guidance> (last checked April 1, 2020). Industries authorized to continue physical operations include oil and gas production, mining, animal production, and numerous categories of manufacturing activity.

meeting some ongoing monitoring and reporting deadlines, and the agency will work with regulated entities based on individual circumstances.

- This flexibility does not remove the obligations of regulated entities to communicate with state and local emergency managers when the entities have knowledge or constructive knowledge that their pollution control systems are failing or at heightened risk of failure, or for regulated entities to notify state and local officials immediately if the entities expect to have trouble meeting monitoring, reporting, testing, or certification requirements.
- Under Article I, Section 27 of the Pennsylvania Constitution, all Pennsylvanians have the right to clean air and pure water, and the DEP has a duty to protect that right, irrespective of EPA policy.

Emerging evidence suggests that Americans with heavy lifetime exposures to pollution may face disproportionately greater risks from this pandemic, underlining the need to maintain strong protections for our air and water. Yet, we also recognize that the ongoing COVID-19 pandemic presents a major challenge for all our public and private institutions, including environmental managers. At a time when federal leadership has been lacking or muddled, we appreciate the strong state leadership in health policy and emergency response we have observed over the last month. Now similar state leadership is needed in the context of environmental enforcement as well.

We thank you for protective approach to the enforcement of environmental laws in Pennsylvania and look forward to your response.

Sincerely,

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