



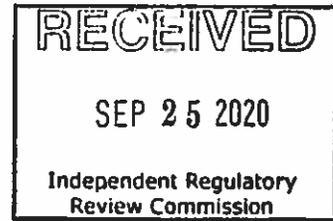
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PennFuture

September 25, 2020

Sent via Email

Environmental Quality Board
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RegComments@pa.gov



**Re: PennFuture’s Comments on the “Water Quality Standard for Manganese and Implementation” Proposed Rulemaking
50 Pa. Bull. 3724 (July 25, 2020)**

Dear Environmental Quality Board:

Citizens for Pennsylvania’s Future (“PennFuture”) submits the following comments on behalf of the organization and its members on the “Water Quality Standard for Manganese and Implementation” proposed rulemaking adopted by the Environmental Hearing Board (“Board”) on December 17, 2019. 50 Pa. Bull. 3724 (July 25, 2020). In sum, PennFuture supports the more stringent manganese limitation of 0.3 mg/l and keeping the point of compliance for this more stringent standard at the point of discharge. We oppose the alternative that would move the point of compliance to the point of surface withdrawal for drinking water supplies.

PennFuture is a Pennsylvania-statewide environmental organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture strives to protect our air, water and land, and to empower citizens to build sustainable communities for future generations. A main focus of PennFuture’s work is to improve and protect water resources and water quality across Pennsylvania through public outreach and education, advocacy, and litigation. On February 26, 2018, PennFuture provided comment and information to the Pennsylvania Department of Environmental Protection regarding the “Water Quality Standard for Manganese Advance Notice of Proposed Rulemaking” (48 Pa. Bull. 605) in which we expressed support for a more stringent manganese limitation that would protect additional protected water uses.

The Board proposes to amend Chapters 93 and 96, water quality standards and implementation, by deleting manganese from Table 3 in 25 Pa. Code § 93.7 (relating to specific water criteria) and adding manganese to Table 5 in § 93.8c (relating to human health and aquatic life criteria for toxic substances). The proposed amendment would remove the existing potable water supply criterion of 1.0 mg/L for manganese in Table 3 and add manganese to Table 5 as a

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toxic substance with a criterion of 0.3 mg/L to protect human health. The Board also proposes two alternative points of compliance for the manganese standard: (1) the point of all existing or planned surface potable water withdrawals; or (2) all surface waters, meaning compliance would remain at the point of discharge.

PennFuture supports the proposed addition of a human health toxics criterion for manganese of 0.3 mg/L as necessary to protect human health, aquatic life, and other water uses such as recreation and agriculture. However, PennFuture strongly opposes the proposed alternative which would change the point of compliance to the point of potable water supply withdrawals. This change would endanger Pennsylvania's waterways, jeopardize human health and aquatic life, and shift the cost of pollution control from the polluters to the public. For the following reasons, PennFuture respectfully requests that the Board adopt the 0.3mg/L standard and reject the proposed alternative to change the point of compliance.

I. The Board should adopt the proposed manganese water quality criterion of 0.3 mg/L to protect human health, aquatic life, and other water uses from the toxic effects of manganese.

The Board proposes adding manganese as a toxic substance and adopting a new numeric human health water quality criterion of 0.3 mg/L. The proposed amendment would remove the current potable water supply criterion of 1.0 mg/L for manganese as not protective of public health.¹ Manganese has been identified as a nervous system toxin, specifically tied to negative impacts on children's neurodevelopment. In addition, studies indicate that elevated manganese is toxic to most aquatic organisms including fish, freshwater mussels, and aquatic insects.² Studies have also shown that elevated manganese levels have a negative impact on livestock watering.³ The Board states that the proposed 0.3 mg/L criterion will protect human health against the neurotoxicological effects of manganese while also ensuring adequate protection for all water uses. It is clear that the current manganese water quality criterion of 1.0 mg/L is not protective of public health, aquatic life, or other water uses. Accordingly, PennFuture supports the Board's proposed amendment deleting the outdated standard and adopting the new water quality criterion of 0.3 mg/L for manganese to protect human health, aquatic life, and all water uses.

¹ The existing 1.0 mg/l standard is 20 times the level of manganese that water suppliers can have in the water supplies (e.g., 0.05 mg/l) according to the federal Environmental Protection Agency's secondary maximum contaminant level.

² There is presently no manganese water quality standard to protect aquatic life in Pennsylvania.

³ Studies show that manganese concentrations above 0.05 mg/L may inhibit dairy cattle from ingesting sufficient amounts of water resulting in reduced milk production. See Penn State Extension, "Interpreting Drinking Water Tests for Dairy Cows" (available at <https://extension.psu.edu/interpreting-drinking-water-tests-for-dairy-cows>); see also Beede, D. "Evaluation of Water Quality and Nutrition for Dairy Cattle" (2006) at 8 (available at <https://msu.edu/~beede/dairycattlewaterandnutrition.pdf>).

II. The Board should reject the proposed alternative point of compliance for the manganese criterion and maintain the existing point of compliance at the point of discharge.

The Board is seeking public comment on two alternative points of compliance for the proposed manganese criterion. The first alternative, consistent with the directive in Act 40 of 2017, is to move the point of compliance to the point of all existing or planned surface potable water withdrawals. The second alternative is to maintain the existing point of compliance in all surface waters, meaning at the point of discharge. For the following reasons, PennFuture strongly opposes changing the long-standing point of compliance and urges the Board to reject this proposed alternative.

A. Moving the point of compliance would fail to protect human health, aquatic life, and other water uses in violation of the Clean Streams Law and Clean Water Act.

Changing the point of compliance from the point of discharge to the point of potable surface water withdrawals would result in the significant degradation of Pennsylvania's waterways and the endangerment of human health and aquatic life in violation of the Pennsylvania's Clean Streams Law ("CSL") and the federal Clean Water Act ("CWA"). Under the CWA, state water quality standards must "protect the public health or welfare." 33 U.S.C. § 1313(c)(2)(A). In setting a new water quality standard, the CWA also requires states to consider the standard's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes . . ." *Id.* Similarly, an objective of the CSL is to prevent pollution and to restore presently polluted streams. 35 P.S. § 691.4(3). The CSL defines pollution to include contamination that renders 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 . . ." *Id.* § 691.1. The CSL also requires the consideration of present and possible future uses of waters in the adoption of rules and regulations. *Id.* § 691.5(a).

Here, the proposed alternative would change the point of compliance from the point of discharge to the point of a potable water supply intake, leaving the waters between those two points devoid of protections from the toxic effects of manganese. Any aquatic life in the intervening waters would be subjected to harmful levels of manganese. Any other uses of the intervening waters would also be endangered, such as use by livestock, boating, fishing, agriculture, or use by other industries. This proposed compliance point would also allow these waters to contain manganese at levels harmful to human health. Failure to establish a water quality standard, which includes an appropriate point of compliance, that is protective of human health, aquatic life, and other beneficial uses such as recreation and agricultural violates the CSL and CWA.

B. Moving the point of compliance would undermine the foundation of Pennsylvania's water protection system and violate the central purposes of the Clean Streams Law and Clean Water Act.

The central principle of our national and state water protection laws is to prevent the discharge of pollutants into our waterways. The regulation and elimination of the discharge of pollutants forms the foundation of the entire system of environmental laws that has sought to protect our water quality for decades. A national goal of the CWA is the elimination of the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a). A fundamental pillar of the CWA is its prohibition of the discharge of any pollutant from a point source into navigable waters without a permit. *See* 33 U.S.C. § 1311(a). Pennsylvania's CSL similarly prohibits the unpermitted discharge of sewage, industrial wastes, and other pollutions, 35 P.S. §§ 691.201, .301, .401, and declares as policy the prevention and elimination of pollution, 35 P.S. § 691.4(4). The foundation of the CWA and CSL is the regulation and elimination of discharges of pollution.

Here, the proposed change in compliance point turns the entire system of water protections on its head by regulating pollution at the intake point of a water supply rather than regulating the discharge of pollution into the waters of the state. This would remove the long-standing obligation the CSL and CWA place on dischargers to limit the pollution they release into waterways. This change will establish a dangerous precedent of allowing industry dischargers to circumvent their responsibilities to comply with environmental laws, to pollute our waterways without limits thereby endangering public health and the environment, and to burden water suppliers and the public with the cost of cleaning up the resulting pollution. A water quality standard that shifts the burden of pollution control from the discharger to the public runs counter to public policy and the central premise underpinning our water protection laws. The CWA was established to end the harmful idea that "dilution is the solution to pollution" and Pennsylvania cannot backslide its protections by changing the point of compliance from the discharge point.

C. Moving the point of compliance would require Pennsylvania to take the unprecedented and unacceptable action of exempting a toxic pollutant from the compliance point for all other human health water quality standards for toxic pollutants.

Changing the compliance point for manganese, a toxic pollutant under the proposed rule, would be unprecedented in Pennsylvania. The criteria for all human health toxic pollutants currently listed in Table 5 of 25 Pa. Code § 93.8 must be met in all surface waters, meaning at the point of discharge, consistent with 25 Pa. Code § 96.3(c). In contrast, the proposed alternative compliance point would list manganese as an exception in § 96.3(d), which only requires compliance at the point of potable water supply withdrawal. This exception has only been applied to certain potable water supply criteria that have not been identified as toxic. No toxic substances are currently identified as an exception under § 96.3(d).

The proposed alternative compliance point for manganese would carve out an exception allowing industry to discharge a toxic pollutant into Pennsylvania's waters with no water quality-

based effluent limit if no water supply intake exists. Even if there is an existing or proposed water supply withdrawal downstream, a discharger's effluent limitation would be determined based on achieving the 0.3 mg/L limit at the point of the water supply intake. The intervening surface waters between the discharge and the water supply intake would be left with no protection from dangerous levels of toxic manganese pollution.

This runs counter to both the CSL and the CWA. CSL regulations provide that “[t]he waters of this Commonwealth may not contain toxic substances attributable to point or nonpoint source waste discharges in concentrations or amounts inimical to the water uses to be protected.” 25 Pa. Code § 93.8a(a). Under the CWA, it is national policy to prohibit the discharge of toxic pollutants in toxic amounts. 33 U.S.C. § 1251(a)(3). Here, industry would be allowed to discharge toxic amounts of manganese into waterways as long as any water supply intake point downstream is able to meet the 0.3 mg/L criterion. Accordingly, the Board would violate the CSL and CWA in approving the alternative compliance point for the manganese water quality standard, and the Board should maintain the compliance point at the point of discharge.

D. Moving the point of compliance would burden intervening industries, water suppliers, and consumers with the costs of pollution control for the benefit of industry polluters.

Shifting the point of compliance from the point of discharge to the intake of potable water supplies unfairly shifts the burden of treating manganese from industrial dischargers to water suppliers and ultimately the public. This will create a significant financial windfall for the mining industry and other industry dischargers, while water suppliers and the public pick up the tab for treating industry pollution. Water suppliers may require additional monitoring for manganese or costly facility upgrades for manganese treatment. These types of additional costs for water suppliers will likely result in increased fees for consumers. Other industries that require surface water intakes, such as food and beverage industries, may also bear the cost of additional monitoring or treatment. As discussed above, this system runs counter to the framework of water protection law which is intended to place the onus for pollution control on the polluters themselves rather than the public.

E. The directive in Act 40 of 2017 to move the point of compliance for manganese is unconstitutional.

The provision in Act 40 which directs the Board to promulgate regulations moving the point of compliance for manganese water quality criteria to the point of potable water supply discharge under 25 Pa. Code § 96.3(d) violates Article III of the Pennsylvania Constitution. Article III, Section 3 of the Pennsylvania Constitution, commonly referred to as the single subject rule, provides that “No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.” Pa. Const. art. III, § 3.

To comply with Section 3, a final bill enacted by the General Assembly must meet two criteria: (1) the title of the bill must clearly express the substance of the proposed law; and (2)

the differing topics within the bill must be germane to each other. *See e.g., Commonwealth v. Neiman*, 84 A.3d 603, 612 (Pa. 2013). The single subject rule requires that the provisions within the bill are germane to a single unifying subject and that there must be a common nexus among the provisions. *See Neiman*, 84 A.3d at 612-13; *Leach v. Commonwealth*, 118 A.3d 1271, 1282-83 (Pa. Commw. Ct. 2015). Here, Act 40 has no such single unifying subject or common nexus. Instead, Act 40 contains a hodgepodge of unrelated amendments to various provisions of the Administrative Code with wide-ranging subject matters. Accordingly, Act 40's provision requiring the Board to move the point of compliance for manganese violates the single subject rule of Pennsylvania's Constitution.

We appreciate the opportunity to submit these comments on the proposed rulemaking for the "Water Quality Standard for Manganese and Implementation." For the reasons stated herein, PennFuture respectfully urges the Board to approve the 0.3 mg/L manganese criterion and maintain the point of compliance at the point of discharge, rejecting the proposed alternative point of compliance. Please contact the undersigned if you have any questions or wish discuss these comments.

Sincerely,



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cc:

Patrick McDonnell, Secretary of Pennsylvania Department of Environmental Protection
Jay Patel, Acting Director of DEP Bureau of Clean Water