



pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Policy Office

Notification Requirements for Unauthorized Discharges to Waters of the Commonwealth – Draft Proposed Rulemaking

Water Resources Advisory Committee

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Josh Shapiro, Governor

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Outline

- Goals of this rulemaking
- History
- Existing regulations
- Statutory basis
- Context within DEP's Clean Water Program
- Draft proposed amendments
- Examples
- The TGD
- Request for WRAC support

Goals of this Rulemaking

- Making notification requirements for unauthorized discharges to waters of the Commonwealth as straightforward for the public, the regulated community, and DEP to understand and apply as consistently as possible across the Commonwealth while also enabling DEP to meet its constitutional and statutory duty to protect the waters of the Commonwealth from pollution.
- DEP intends this rulemaking to provide the public, the regulated community, and DEP staff increased clarity and a basis for consistency as to which unauthorized discharges require DEP notification and which do not.

History

- fact sheet(s)
 - *Reporting Requirements for Spills and Pollution Incidents Under Pennsylvania's Clean Streams Law (2014 – 2018)*
 - *Water Main Breaks (1998 – 2007)*
 - *Planned and Unplanned Discharges of Chlorinated Water to Surface Waters (2017 – present)*
- TGD
 - Initial draft: presented to WRAC 29 Jul 2020; published for public comment 08 Aug 2020 – 06 Oct 2020
 - Revised draft: presented to WRAC 19 May 2022; published for public comment 16 Oct 2021 – 15 Dec 2021
- rulemaking

Existing Regulations

25 Pa. Code § 91.33. Incidents causing or threatening pollution.

(a) If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.

Statutory Basis

- Notification requirements for unauthorized discharges to waters of the Commonwealth are an important part of DEP's Clean Water Program implementing the Commonwealth's Clean Streams Law

Statutory Basis – Clean Streams Law

- Section 401. Prohibition Against Other Pollutions.--It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

Statutory Basis – Clean Streams Law

- “Waters of the Commonwealth” defined broadly to include “any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.”

Statutory Basis – Clean Streams Law

- "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.**

▶ Context within DEP's Clean Water Program

- For **authorized/permitted discharges** (such as discharges with NPDES permit coverage), the location and characteristics of the discharge are known prior to the discharge.
- Permit terms and conditions (such as effluent limits) are designed to ensure that the discharge will not cause or contribute to pollution.

Context within DEP's Clean Water Program

- For **unauthorized discharges** (such as spills), the location and characteristics of the discharge are **not** known prior to the discharge.
- Many site-specific and situation-specific interacting factors affect the risk that any spill or other unauthorized discharge will result in pollution.
- For unauthorized discharges, the way it is ascertained if a discharge constitutes pollution is by the responsible party notifying DEP of the discharge, then DEP investigating and assessing the incident to determine if the discharge did or did not constitute pollution.

Context within DEP's Clean Water Program

- In this respect, the notification requirements in Chapter 91 ensure DEP receives the information needed to meet its statutory obligation in the Clean Streams Law to determine when a particular unauthorized discharge constitutes pollution by assessing the effects of the discharge against the relevant standards.
- The notification requirements in Chapter 91 are regulatory provisions that also ensure DEP receives the information needed to execute DEP's trustee duties under Article 1, Section 27 of the Constitution of Pennsylvania.

Draft Proposed Amendments

- The draft proposed amendments to 25 Pa. Code § 91.33 detail factors relevant to determining if an unauthorized discharge will endanger downstream users or would otherwise result in pollution or create a danger of pollution of waters of this Commonwealth.

Draft Proposed Amendments

factor		characterization		
substance	effects on protected water uses	low toxicity	↔	highly toxic
	volume	small volume	↔	large volume
	concentration	low concentration	↔	high concentration
	persistence in the environment	not persistent	↔	highly persistent
	mobility in soil and water	low mobility	↔	highly mobile
location	proximity to waters of the Commonwealth	distant	↔	direct discharge to waters of the Commonwealth
	proximity to downstream users	distant	↔	near
	characteristics of nearest waters of the Commonwealth	large river with non-special protection use	↔	small, exceptional value stream
	relevant infrastructure presence and qualities	well-maintained spill containment system	↔	no spill containment system or poorly maintained spill containment system
OVERALL RISK		LOWER RISK OF POLLUTION	↔	HIGHER RISK OF POLLUTION

Draft Proposed Amendments

- An activity or incident described in subsection (a) involving a quantity of substance greater than the reportable quantity listed in 40 CFR 117.3 (relating to determination of reportable quantities) must be immediately reported to the Department.

Draft Proposed Amendments

- On the redrafted TGD, some commenters suggested using water quality standards as “reportable quantities” for unauthorized discharges
- That approach is not viable for several reasons
 - Most water quality (WQ) criteria are concentrations of specific substances. Concentration is not the only relevant factor in determining if a spilled substance will result in pollution.
 - Some WQ criteria are not directly applicable to discharged substances, but to the instream effects those substances may have (for example, spilled milk → lower dissolved oxygen)
 - Very complicated to implement
 - Most WQ criteria apply to specific protected uses. Different waterbodies have different designated and existing uses
 - Some WQ criteria (like dissolved oxygen) vary by time of year
 - Special protection waters are protected at existing quality
 - Some waters have site-specific WQ criteria

Draft Proposed Amendments

- On the redrafted TGD, some commenters suggested using water quality standards as “reportable quantities” for unauthorized discharges
- That approach is not viable for several reasons
 - WQ criteria are **instream** criteria and cannot be directly applied to a substance spilled
 - Some WQ criteria are equation-based criteria where the criteria varies depending on other instream parameters (such as pH or hardness)
 - There are not WQ criteria for many substances that may cause pollution (such as butyl acrylate and isobutylene, which are chemicals that were involved in the train derailment in East Palestine, Ohio earlier this year)

Draft Proposed Amendments

- If the risk of pollution to waters of the Commonwealth, property damage or endangering downstream users is unknown or uncertain under subsection (a)(2), it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department.
- If requested by the Department, a person who claims that the Department need not have been notified of an incident under this section shall explain in a signed statement, under penalty of law, why the incident would not endanger downstream users, result in pollution or create a danger of pollution, or damage property, based on the factors listed in subsection (a)(2).

▶ Examples – Notification *Not Required*

- Minor spills or small leaks onto the ground where the contaminated soil can be immediately removed if necessary and there is no possibility of the substance(s) reaching waters of the Commonwealth, including groundwater or surface waters, directly or indirectly, in a way that would endanger downstream users, would otherwise result in pollution or create a danger of pollution, or would damage property.
- Spills or overflows collected by appropriate, properly operated and maintained secondary containment where there is no possibility of the substance(s) reaching waters of the Commonwealth, including groundwater or surface waters, directly or indirectly, in a way that would endanger downstream users, would otherwise result in pollution or create a danger of pollution, or would damage property.

▶ Examples – Notification *May Be Required*

- Discharges of other chlorinated water, such as from a swimming pool or spa, may require immediate notification to DEP if the discharge is not dechlorinated and appropriately managed. Further information can be found in DEP's fact sheet Management of Swimming Pool, Hot Tub, and Spa Water Discharges (3800-FS-DEP4251).
- Activities such as car washes in parking lots may require immediate notification to DEP if the wash water is not appropriately contained or treated as detailed in DEP's fact sheet Management of Cleaning Wastewater (3830-FS-DEP1944) or if there is a discharge to waters of the Commonwealth.
- Spills of non-liquid materials into waters of the Commonwealth. Examples of such incidents can include spills of sand, gravel, or plastic pellets into a stream. Depending on the characteristics and quantity of the material, the location of the spill, and other factors like those noted in the risk framework outlined above, such spills may require immediate notification to DEP.

Examples – Notification *Required*

- Unanticipated bypasses of raw or inadequately treated sewage or industrial wastes to waters of the Commonwealth or conduits to waters of the Commonwealth.
- Vehicular or other transportation accidents in which pollutants are spilled on or into the ground, storm drains, drainage swales, or surface water, directly or indirectly, in a way that would endanger downstream users, would otherwise result in pollution or create a danger of pollution, or would damage property.
- Inadvertent returns that occur during the use of trenchless technologies (such as horizontal directional drilling) such that a substance is discharged into the waters of the Commonwealth or might discharge, flow, be washed, or fall into the waters of the Commonwealth in a way that would endanger downstream users, would otherwise result in pollution or create a danger of pollution, or would damage property.

The TGD

- The Department will likely be re-revising the associated TGD as this rulemaking moves through the rulemaking process.

Request for support from WRAC

- The Department requests WRAC's support for this draft proposed rulemaking.



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