



Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Public Hearing on Senate Bill 619 and Spill Reporting Notifications

Before the:
House Environmental Resources and Energy Committee

Presented by:
Kevin Sunday
Director, Government Affairs

Harrisburg, PA
September 30, 2020

417 Walnut Street
Harrisburg, PA 17101-1902
717.720.5443
<http://www.pachamber.org>

Chairman Metcalfe, Chairman Vitali, and members of the House Environmental Resources and Energy committee,

On behalf of the Pennsylvania Chamber of Business and Industry, the largest, broad-based business advocacy organization in the Commonwealth, thank you for the opportunity to present the perspective on Senate Bill 619 and spill reporting notifications. On behalf of the Pennsylvania Chamber of Business and Industry, the largest, broad-based business advocacy organization in the Commonwealth, thank you for the opportunity to provide our members' perspective and comments on Senate Bill 619, which would amend the Clean Streams Law regarding when a notification of a spill or release must be made to DEP and downstream water users. This testimony will also reference the draft guidance regarding notification of spills, as published Aug. 8, 2020 in the Pennsylvania Bulletin.

The PA Chamber supports SB 619. It is also the position of the PA Chamber that with some substantial revisions the spill reporting guidance document in its final form, as well as potential revisions to the Chapter 91 regulations, can provide long-needed clarity and certainty to the regulated community and public regarding when a notification must be made to the department regarding a spill or release. Whether through regulatory or legislative action, policymakers in state government should address the long-standing gap (and resulting challenges to the regulated community) between the text of the Clean Streams Law and Chapter 91 regulations regarding what constitutes standards of pollution, as well as necessary revisions to the guidance and DEP's regulatory framework, including allowing a notification made to the National Recovery Center per the federal "List of Lists" as satisfying state notification requirements.

Statement of Policy

The PA Chamber is guided in its advocacy by the policy positions developed by our diverse board of directors. The Pennsylvania Chamber of Business and Industry believes that environmental excellence and economic growth are mutually-compatible objectives, and that environmental and natural resources laws and programs should be framed and implemented to concurrently meet these twin objectives. The PA Chamber advocates for environmental laws, regulations and policies that:

- are based on sound science and a careful assessment of environmental objectives, risks, alternatives, costs, and economic and other impacts;
- set environmental protection goals, while allowing and encouraging flexibility and creativity in their achievement;
- allow market-based approaches to seek attainment of environmental goals in the most cost-effective manner;
- measure success based on environmental health and quality metrics rather than fines and penalties;
- assess compliance based on clear, predictable and defined criteria established through stakeholder processes and with sound science;
- do not impose costs which are unjustified compared to actual benefits achieved;
- do not exceed federal requirements unless there is a clear, broadly accepted, scientifically-based need considering conditions particular to Pennsylvania;
- develop a private-public relationship which promotes working together to meet proper compliance; and
- ensure timely regulatory approvals and authorizations.

With this tenets of policy in view, the PA Chamber respectfully submits the following comments.

1. The General Assembly and DEP should take this opportunity as to define standards of pollution as required by the Clean Streams Law.

The Clean Streams Law includes a very broadly written definition of pollution. To wit, “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.*” (emphasis added)

However, DEP’s regulations, most notably those contained in Chapter 91.33 regarding the requirement to notify DEP and downstream water users of “incidents causing or threatening to cause pollution,” do not define standards of pollution. Instead, Chapter 91.33 requires notification of spills or releases which threaten pollution or cause pollution, but pollution remains undefined. The term “standards” implies a commonly understood, publicly available metric that establishes uniform criteria or processes. To our knowledge, no such standards have been developed by the department.

Further, DEP’s regional offices have taken inconsistent positions regarding whether a spill or release that does not harm public health or the environment should be reported. PA Chamber members have reported facing enforcement for lack of notifications, due to the agency second-guessing facility management’s judgment, as well as enforcement or increased scrutiny from state and federal regulators for, out of an abundance of caution, reporting every spill or release. Such results are incongruent with good regulatory practice.

SB 619 will do what has not yet been done to date by the Department, which is to define a threshold level for spill notification based on whether the spill or release would violate in-stream water quality standards.

2. Should there be opposition to establishing the threshold for pollution at the ability of a waterway to meet a designated use, a reasonable alternative is simply adoption by reference the federal “List of Lists” of reportable substances and quantities.

Page 2 of the draft guidance reads that “25 Pa. Code 91.33(a) does not provide a threshold amount of a substance that triggers mandatory notification requirements.” However, 91.33 is based on Section 5 of the Clean Streams Law, which in fact does have such a threshold. Section 5 prohibits pollution of such waters that would render such waters “inimical or injurious to the public health or objectionable for public water supply purposes.” Section 5 also granted the department the power to adopt and enforce “reasonable” orders and regulations. It is a questionable proposition for the department to maintain that, absent a numerical reportable quantity standard of pollution, all parties should err on the side of caution and report any spill or release, given that the foundational statute defines pollution as inimical or injurious – that is, not merely the contribution of a substance to the water source.

There are notification requirements, based on numeric reportable quantities, codified into federal statutes and their implementing regulations, including the Emergency Planning and Community Right-to-Know Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Clean Air Act. These quantities are captured in the federal “List of Lists.” As an alternative to the approach taken by SB 619 as currently drafted, the Clean Streams Law could be amended such that adoption by reference of these federal reporting standards as being the reportable quantities which are considered to cause or threaten to cause pollution of waters of the commonwealth.

3. The department should provide clarity and certainty that a spill notification through the National Recovery Center satisfies notification requirements.

Generally, spills or releases of quantities above the amounts in the List of Lists requires notification through the federal National Recovery Center hotline. Such notifications are then passed along to the state agency and downstream water users. DEP should provide certainty such that a notification made through the NRC hotline satisfies notification requirements to the agency and downstream water users, as required by Chapter 91.33.

4. The guidance appears to require notification of all spills or releases, including those that do not impact or threaten to impact water supplies. The department may wind up receiving an unmanageable amount of notifications, and downstream users may begin ignoring them due to the volume.

The proposed guidance appears to require notification by Chapter 92 NPDES holders for all spills, including spills that do not threaten waters of the commonwealth. Should the agency require so many notifications, it is likely both the agency and downstream users will be bombarded with notifications. DEP's recording of these incidents may expose facilities to increased scrutiny by EPA or the public, despite no damage being done to the environment or public health. Further, and perhaps more concerning, a constant wave of notifications to downstream water users may have the unintended effect of such users tuning out the notifications given most will be for small volumes.

As an example, Pennsylvania's electric utilities each respond to as many as several hundred incident per year in which, due to storms, vehicle accidents or mechanical failure, fluids used to insulate transformers hit the ground. The average volume of such incidents are less than 25 gallons of mineral oil, less than the volumetric reporting threshold required by CERCLA. Further, utilities' aggressive spill response programs ensure that in nearly all cases there will not be an impact to the waters of the Commonwealth, but regional offices have taken different positions on whether such incidents should be reported.

In closing, we appreciate this committee and the department's attention to this issue and look forward to working with the General Assembly and the administration on a resolution.