

PADEP Presents Revised Draft Notification Rules for Unauthorized Spills into Waters of the Commonwealth

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At the May 16, 2024, Water Resources Advisory Committee (WRAC) meeting, the Pennsylvania Department of Environmental Protection (PADEP) presented a revised draft proposed rule that would amend and clarify certain existing spill reporting requirements. The regulation, 25 Pa. Code § 91.33 (Existing Rule), governs notification requirements for unauthorized releases of substances into waters of the commonwealth. Specifically, the Existing Rule requires immediate notification to PADEP if the release of a substance “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.” 25 Pa. Code § 91.33(a). The party responsible for initiating the notification is “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.” *Id.* Notably, the Existing Rule, which was adopted in 1971, offers no clear guidance on determining whether notification is required.

To address this, PADEP has proposed a revised draft of the regulation that clarifies the requirements for notifying or not notifying the agency of an unauthorized release (Proposed Rule). See [Proposed Revisions to 25 P.A. Code § 91.33](#). Proposed subsection 91.33(a.1) would require reporting for substances listed in 40 C.F.R. § 117.3 when released in amounts equal to or greater than their reportable quantities and subsection 91.33(a.2) states that a person who immediately notifies PADEP in accordance with subsections (a) and (a.1) has satisfied the notification requirements under section 91.33. The most substantive changes are found in proposed subsection 91.33(a.3), which sets forth the method by which a responsible party can determine that an unauthorized release does not require immediate notification to PADEP. To reach the conclusion that an unauthorized release does not require immediate notification, the responsible party must evaluate and document enumerated factors to determine that the substance(s) “does not cause or threaten pollution of the waters, endanger downstream users or cause damage to property.” Proposed Rule § 91.33(a.3). Those factors include:

- The properties of the substance(s) involved (e.g., harmful effects on human health, animal health, and the environment); persistence in the environment (and how the substance(s) might change); mobility of the substance(s) in soil and water; and the concentration and quantity of the substance(s);
- The location or locations involved, including proximity to commonwealth waters and the characteristics of such waters; land use, soils, and geology; and the presence and qualities of relevant infrastructure, e.g., spill containment systems;
- Weather conditions before, during, and after the incident;
- Presence and implementation of adequate response plans, procedures, or protocols;
- The duration of the accident or other activity or incident.

Id. Under the Proposed Rule, the responsible party would be required to provide this documentation to PADEP upon request, with a signed statement attesting to its accuracy. *Id.* § 91.33(a.4). The last addition, proposed subsection 91.33(a.5), confirms that not immediately reporting “an accident or other activity or incident which caused or threatened pollution, endangered downstream users or caused damage to property as described in subsection (a)” is a violation of section 91.33.

At the May 16, 2024, WRAC meeting, PADEP stated its goals for and the purposes of the Proposed Rule: (1) make notification requirements straightforward for stakeholders, including PADEP’s consistent application of the Proposed Rule; (2) provide stakeholders increased clarity and consistency regarding notification of unauthorized discharges;

and (3) confirm that the Proposed Rule does not expand the set of discharges that require notification to PADEP. [PowerPoint Presentation](#), WRAC, “Notification Requirements for Unauthorized Discharges to Waters of the Commonwealth: Revised Draft Proposed Rulemaking” (May 16, 2024) (PADEP Presentation). PADEP also offered examples of unauthorized discharges where notification would not be required (e.g., minor motor oil spill that will not reach waters), may be required (e.g., spill of non-liquid materials like soybeans into stream), and would be required (e.g., sanitary sewer overflows that reach waters of the commonwealth). See PADEP Presentation, slides 13–15. Although not required to move the Proposed Rule forward, PADEP requested WRAC’s support.

This is not the first time PADEP has attempted to revise the Existing Rule or offer clarifying guidance. In September 2023, the agency presented a draft revision to WRAC (that revision was updated by the Proposed Rule). Prior to that, PADEP published a draft technical guidance document (TGD) that offered guidance on notifying PADEP under the Existing Rule. See [“Guidance on Notification Requirements for Spills, Discharges, and other Incidents of a Substance Causing or Threatening Pollution to Waters of the Commonwealth Under Pennsylvania’s Clean Streams Law,”](#) No. 383-4200-003 (Oct. 16, 2021).

Although this TGD was never finalized, some of its elements, e.g., the factors for evaluating the risk that an unauthorized release constitutes or threatens pollution, are included in the Proposed Rule. In its recent meeting with WRAC, PADEP said it intends to revisit the October 2021 TGD when the Proposed Rule is finalized, including providing “updated practical examples of when reporting may or may not be required” PADEP Presentation, slide 16. Although PADEP has not yet indicated how it will proceed, if the agency decides to move forward with the Proposed Rule as written, the Proposed Rule will be published in the *Pennsylvania Bulletin*, which will begin a public comment period.

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