

Regulatory Analysis Form

(Completed by Promulgating Agency)

INDEPENDENT REGULATORY REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency

Environmental Protection

(2) Agency Number: 7

Identification Number: 587

IRRC Number:

(3) PA Code Cite: 25 Pa. Code § 91.33

(4) Short Title:

Notification Requirements for Unauthorized Discharges to Waters of the Commonwealth

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Laura Campbell, 717.783.8727, laurcampbe@pa.gov

Secondary Contact: High Garst, 717.783.8727, argarst@pa.gov

(6) Type of Rulemaking (check applicable box):

Proposed Regulation

Final Regulation

Final Omitted Regulation

Emergency Certification Regulation

Certification by the Governor

Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

This proposed rulemaking is intended to provide clarity and consistency as to which unauthorized discharges of a substance require immediate Department notification, while enabling the Department to meet its statutory duty to protect the waters of the Commonwealth from pollution and without changing which incidents are currently reportable. The proposed regulation incorporates a federal list of reportable quantities for substances designated as hazardous by the United States Environmental Protection Agency (EPA) under the Clean Water Act (CWA) that, if discharged in a quantity greater than or equal to the reportable quantities on the federal list, will require immediate Department notification. If the unauthorized discharge is less than the reportable quantities or involves a substance not included on the federal list, the proposed rulemaking provides factors that must be evaluated and documented in order to determine that an unauthorized discharge does not require immediate Department notification. However, under this proposed rulemaking, a responsible person may simply report an unauthorized discharge and avoid the requirement to evaluate and document the provided factors.

(8) State the statutory authority for the regulation. Include specific statutory citation.

This proposed rulemaking is authorized under sections 5(b)(1) and 402 of The Clean Streams Law (CSL) (35 P.S. §§ 691.5(b)(1) and 691.402), which authorize the Environmental Quality Board (Board) to develop and adopt rules and regulations to implement the CSL (35 P.S. §§ 691.1—691.1001), and section 1920-A of The Administrative Code of 1929, (71 P.S. § 510-20), which grants to the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The proposed regulation is not required by federal or state law.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The Department's existing regulation at § 91.33 requires immediate Department notification of certain unauthorized discharges to waters of the Commonwealth. These notification requirements for unauthorized discharges are an important part of the Department's implementation of the CSL's prohibition against pollution of the waters of the Commonwealth. More specifically, these notification requirements are a key part of the Department's implementation of section 401 of the CSL (35 P.S. § 691.401), which makes it unlawful for anyone to discharge any substance resulting in pollution of waters of the Commonwealth.

For authorized or permitted discharges, such as a discharge with a National Pollutant Discharge Elimination System (NPDES) permit, the location and characteristics of the discharge are known prior to the discharge occurring, which allows permit terms and conditions (such as effluent limits) to be developed, monitored, and enforced to ensure that the discharge will not cause or contribute to pollution of waters of the Commonwealth. For unauthorized discharges (such as spills), the location and characteristics of the discharge are not known prior to the discharge occurring, and many site-specific and situation-specific factors affect the risk that an unauthorized discharge will result in pollution of waters of the Commonwealth.

The immediate notification requirements of § 91.33 serve to ensure that the Department receives information needed to assess if and what kind of emergency response needs to be mobilized to prevent pollution and property damage and to protect public health and safety.

The Department typically receives notification about unauthorized discharges through the Department's regional or statewide emergency contact phone lines or through the Department's online Environmental Complaints tool. Based on information provided in these notifications, staff in the Department's regional and district offices determine what immediate emergency response actions may be needed. The Department's Clean Water Program receives several hundred notifications or complaints each year. The most common notifications or complaints are related to discharges of sewage, but these notifications or complaints often involve fish kills, oily sheens in waterways, releases of materials resulting from traffic accidents, and many other incidents.

To provide more clarity, this proposed rulemaking specifies that immediate Department notification is required for an unauthorized discharge involving a substance in a quantity greater than or equal to the

reportable quantity listed in 40 CFR 117.3. This federal regulation lists reportable quantities for substances designated as hazardous by EPA under section 311(b)(2)(A) of the CWA (33 U.S.C. § 1321(b)(2)(A)). This section of the CWA directs EPA to develop regulations designating substances which, when discharged, “present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches” as hazardous substances. Section 311(b)(4) of the CWA then directs quantities of these hazardous substances, which may be harmful to public health or the welfare of the environment, to be determined by regulation (33 U.S.C. § 1321(b)(4)). Because the list at 40 CFR 117.3 was developed for this purpose, it is appropriate to regard such a discharge as creating a danger of pollution to waters of the Commonwealth. While the reportable quantities listed at 40 CFR 117.3 are not exhaustive of all possible substances that may cause or threaten pollution to waters of the Commonwealth, the quantities listed in those federal regulations are large enough that an unauthorized discharge involving those quantities of those substances would cause or threaten pollution of waters of the Commonwealth, making it appropriate to use for this purpose.

For substances that are in a quantity less than the reportable quantity listed in 40 CFR 117.3 or for substances that are not on the list, the proposed regulation establishes factors that a person responsible for an unauthorized discharge must evaluate and document in order to self-determine that an unauthorized discharge does not require immediate Department notification. This provides flexibility for persons with the capability to assess these factors quickly and determine on their own if notification to the Department is required. However, under this proposed rulemaking, a responsible person may simply report an unauthorized discharge and avoid the requirement to evaluate and document factors.

This proposed rulemaking benefits responsible persons by providing clarity on what spills of specific substances and quantities need to be reported by including the federal list of hazardous substances, and factors to be used to evaluate and document when an unauthorized discharge does not need to be immediately reported to the Department.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

No. The proposed regulation is not more stringent than federal standards, as there is no applicable federal standard.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania’s ability to compete with other states?

Spill regulations vary widely from state to state. For example Virginia’s reporting regulations are very similar to Pennsylvania’s and require prompt notification (but no later than 24 hours) for the discharge of sewage, industrial waste, other wastes or any noxious or deleterious substance into state waters or a discharge that may reasonably be expected to reach state water. New York’s regulations breakdown specific reporting requirements for sewage, hazardous waste and petroleum, and substances have reporting thresholds dependent on substance discharged. Both approaches described above are derived from the state laws of those respective states. Pennsylvania’s regulation is based on the Department’s responsibility to implement Pennsylvania’s Clean Streams Law. This regulation is not expected to affect Pennsylvania’s ability to compete with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

Section 91.33 is referenced in other regulations at 25 Pa. Code §§ 78a.66, 78.66, 83.312, 83.351, and 92a.41. Sections 78a.66, 78.66, and 92a.41. require reporting when there is pollution or threatened pollution in accordance with § 91.33. Because this rulemaking does not change what is pollution or threatened pollution, this rulemaking will not affect these other regulatory programs. Sections 83.312 and 83.351 establish that enough information must be contained in site-specific emergency response plans and site-specific contingency plans respectively, in order to comply with the notification requirements in § 91.33. Because these sections cross reference § 91.33 only in the context of plan requirements, these sections will not be directly impacted by this proposed regulatory amendment.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. (“Small business” is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

Department staff delivered a presentation of the draft proposed regulation to the Water Resources Advisory Committee (WRAC) on September 21, 2023. At that initial presentation, WRAC members expressed concerns about the rulemaking. Following the initial presentation to WRAC, the Department made several revisions to the draft proposed regulation to address the members’ concerns. Including revisions made following the initial presentation to WRAC, Department staff presented the draft proposed regulation to the Agricultural Advisory Board (AAB) on October 19, 2023. AAB members expressed general support for the draft proposed regulation. Department staff also presented the draft proposed regulation to the Public Water System Technical Assistance Center (PWS TAC) Board on October 26, 2023. The PWS TAC Board also supported the draft proposed regulation moving forward. Department staff presented the revised draft proposed regulation to WRAC on May 16, 2024, which WRAC supported moving forward to the Board.

The Department is coordinating with the Small Business Ombudsman to ensure the small business community will be notified of their opportunity to submit comments on this proposed regulation during the 60-day public comment period following publication in the *Pennsylvania Bulletin*.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

This regulation applies to any person responsible for unauthorized discharges to waters of the Commonwealth. Because unauthorized discharges are generally unanticipated (such as spills), the types and number of persons and entities that may be affected by the regulation are not readily identifiable. However, this rulemaking does not change which unauthorized discharge incidents require immediate Department notification, so this rulemaking would not change who already needs to comply with the unauthorized discharge notification requirement.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

See the response to question #15.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

This rulemaking does not change which unauthorized discharges need to be reported and the Department does not expect the rulemaking to have any measurable financial, economic and social impact.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

This regulation is intended to reduce uncertainty over which incidents must be immediately reported to the Department by providing a list of substances that require notification at specific quantities and factors that a person responsible for an unauthorized discharge must evaluate and document in order to self-determine that an unauthorized discharge does not require immediate Department notification. The Department does not expect this regulation to result in any measurable costs or adverse effects.

(19) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The Department does not expect the regulated community to incur any measurable expense or savings in order to comply with this requirement. No legal, accounting or consulting procedures are required.

This proposed regulation establishes that responsible persons can meet the requirements of § 91.33 by simply notifying the Department of an unauthorized discharge without consideration of the factors established in this proposed regulation. While responsible persons may choose to self-determine that an unauthorized discharge does not require immediate Department notification, they are not required to do so.

(20) Provide a specific estimate of the costs and/or savings to the local governments associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The Department does not expect any local governments to incur any measurable expense or savings in order to comply with this requirement. No legal, accounting or consulting procedures are required.

This proposed regulation establishes that responsible persons can meet the requirements of § 91.33 by simply notifying the Department of an unauthorized discharge without consideration of the factors established in this proposed regulation. While responsible persons may choose to self-determine that an unauthorized discharge does not require immediate Department notification, they are not required to do so.

(21) Provide a specific estimate of the costs and/or savings to the state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

The Department does not expect the state government to incur any measurable expense or savings in order to comply with this requirement. No legal, accounting or consulting procedures are required.

This proposed regulation establishes that responsible persons can meet the requirements of § 91.33 by simply notifying the Department of an unauthorized discharge without consideration of the factors established in this proposed regulation. While responsible persons may choose to self-determine that an unauthorized discharge does not require immediate Department notification, they are not required to do so.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

Subsections (a.3) and (a.4) of the proposed rulemaking provide for additional paperwork requirements if responsible persons choose to self-determine that immediate Department notification is not required. Such paperwork is necessary for the Department to be able to verify that decisions made by responsible persons to not notify the Department about certain unauthorized discharges were correct.

However, as provided in subsection (a.2) of the proposed regulation, responsible persons can avoid these additional paperwork requirements by simply notifying the Department of an unauthorized discharge instead of performing their own evaluation.

(22a) Are forms required for implementation of the regulation?

The Department has developed a form that can be used to document a responsible person’s evaluation and determination that an unauthorized discharge does not need to be immediately reported to the Department.

(22b) If forms are required for implementation of the regulation, attach copies of the forms here. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.

No new forms are required to implement this regulation. However, the Department has developed the attached form that may be used to document a responsible person’s evaluation and determination that an unauthorized discharge does not need to be immediately reported to the Department.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY 2024-25	FY +1 2025-26	FY +2 2026-27	FY +3 2027-28	FY +4 2028-29	FY +5 2029-30
SAVINGS:	\$	\$	\$	\$	\$	\$

Regulated Community	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable
Local Government	“	“	“	“	“	“
State Government	“	“	“	“	“	“
Total Savings	“	“	“	“	“	“
COSTS:						
Regulated Community	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable
Local Government	“	“	“	“	“	“
State Government	“	“	“	“	“	“
Total Costs	“	“	“	“	“	“
REVENUE LOSSES:						
Regulated Community	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable	Not Measurable
Local Government	“	“	“	“	“	“
State Government	“	“	“	“	“	“
Total Revenue Losses	“	“	“	“	“	“

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY-3 (2021-22)	FY-2 (2022-23)	FY-1 (2023-24)	Current FY (2024-25)
Environmental Program Management	\$34,160,000	\$35,739,000	\$38,004,000	\$42,510,000
Environmental Protection Operations	\$98,036,000	\$102,719,000	\$107,091,000	\$125,881,000

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.**
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.**
- (c) A statement of probable effect on impacted small businesses.**
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.**

Since this rulemaking does not change which unauthorized discharge incidents require immediate Department notification, this rulemaking would not change who must immediately notify the Department of unauthorized discharges and would not add additional compliance costs to responsible persons, including small businesses. Subsections (a.3) and (a.4) of the proposed rulemaking provide for additional paperwork requirements if responsible persons choose to self-determine that immediate Department notification is not required. Such paperwork is necessary for the Department to be able to verify that decisions made by responsible persons to not notify the Department about certain unauthorized discharges were correct.

However, as provided in subsection (a.2) of the proposed rulemaking, responsible persons can avoid these additional paperwork requirements by simply notifying the Department of an unauthorized discharge instead of performing their own evaluation.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

No special provisions are included in this proposed rulemaking.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The Department considered developing a state-specific list of reportable quantities but determined that such an approach would be administratively unfeasible as the 86,000 miles of waterways across the Commonwealth are incredibly diverse – a spill that may be catastrophic to a small headwater stream may be innocuous in a large river. Additionally, waterway flows can vary significantly throughout the year due to seasonal precipitation patterns, which can be exacerbated even further under drought conditions. Furthermore, the amount of a spilled substance is not the only factor that affects whether a spill will result in pollution – the location of the spill and any dilution or transformation of spilled substances that occur between the spill site and waters of the Commonwealth also affect whether the spill will result in pollution. To account for every possible material that could be spilled into the waters of the Commonwealth and then determine a reportable quantity for each that would be protective of all the diverse waters of the Commonwealth under all possible flow conditions would be a nearly impossible task for the Department to undertake. This proposed rulemaking is the least burdensome acceptable alternative.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;**
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;**
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;**
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and**
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.**

Since this rulemaking does not change which unauthorized discharge incidents require immediate Department notification, this rulemaking would not change who must immediately notify the Department of unauthorized discharges and would not add additional compliance costs to responsible persons, including small businesses. Subsections (a.3) and (a.4) of the proposed rulemaking provide for additional paperwork requirements if responsible persons choose to self-determine that immediate Department notification is not required. Such paperwork is necessary for the Department to be able to verify that decisions made by responsible persons to not notify the Department about certain unauthorized discharges were correct.

However, as provided in subsection (a.2) of the proposed rulemaking, responsible persons can avoid these additional paperwork requirements by simply notifying the Department of an unauthorized discharge instead of performing their own evaluation.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Data is not the basis for this regulation.

(29) Include a schedule for review of the regulation including:

- A. The length of the public comment period: 60 days
- B. The date or dates on which any public meetings or hearings will be held: None planned
- C. The expected date of delivery of the final-form regulation: Quarter **TBD**
- D. The expected effective date of the final-form regulation: Upon publication in *Pennsylvania Bulletin* as final-form rulemaking.
- E. The expected date by which compliance with the final-form regulation will be required: Upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.
- F. The expected date by which required permits, licenses or other approvals must be obtained: No permits, licenses or other approvals will be needed to implement this regulation.

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Board is not proposing to establish a sunset date for these proposed regulations because they provide additional clarity to existing regulations that are needed for the Department to carry out its statutory authority. Once final and implemented, the Department will continue to closely monitor these proposed regulations for their effectiveness and recommend updates to the Board as necessary.