

Comments on Proposed Revisions to 6 NYCRR Part 613

ENVIRONMENTAL AND ENERGY LAW SECTION: Petroleum Spills Committee

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VIA ELECTRONIC MAIL

derweb@dec.ny.gov

New York State Department of Environmental Conservation
ATTN: Ms. Jenn Dawson
Division of Environmental Remediation
625 Broadway
Albany, NY 12233-7012

Re: Comments on Proposed Part 613

Dear Ms. Dawson:

We write to you on behalf of the Petroleum Spills Committee (the “Committee”) of the Environmental and Energy Law Section of the New York State Bar Association (“EELS”) , regarding the proposed regulatory revisions to 6 NYCRR Part 613 (“Proposed Regulations”). Specifically, Section 613-2.4(a), which states:

(a) ‘Reporting responsibilities.’ The reporting requirements of subdivisions (b) and (e) of this section apply to the following persons: (1) the facility owner; (2) the tank system owner; (3) the operator; (4) the carrier; (5) any contractor in a contractual relationship with the facility owner, tank system owner, or operator; (6) any other party and its contractors who have been retained as part of a business transaction relating to the facility; (7) any person who causes a spill at the facility.

While the addition of the new subsection (a), and enumeration of specific parties obligated to report in subparagraphs (1)-(4) and (7) indeed provides clarity, subparagraphs (5) and (6), as written, raise numerous issues and uncertainties. We are concerned that these uncertainties in the Proposed Regulations could be construed in such a way that negatively impacts an attorney’s ethical obligations. The uncertainty of subparagraphs (5) and (6) is exacerbated by the new definition of “discovery” contained in Section 613-1.3(t), as “observing, directly or indirectly, or being informed of an observation,” which makes *anyone* a person who “discover[ed]” a spill, and in light of the numerous persons potentially required to report pursuant to the proposed Section 613-2.4, the Proposed Regulations simply go too far.

First, Proposed Section 613-2.4(a)(5) is too broad. Specifically, the use of the phrase “any contractor” will cause confusion because it is not defined in the Proposed Regulations, and the ordinary meaning of the term contractor could be generally applicable in a variety of contexts. At

a minimum, there needs to be specificity as to the types of parties that would be subject to this obligation and confirmation that it does not apply to attorneys. Otherwise, the regulated community and their associated service providers will not be sure as to the applicability of this obligation. Further, the phrase “in a contractual relationship” adds to the breadth of subparagraph (5), for the same reasons. If the Department intended for the phrase, “in a contractual relationship,” to be interpreted in the same manner as 33 USC §2703(d) and/or 42 USC §9601(35)¹, then additional language contained within those statutes should be added to the Proposed Regulations to properly define the nature of the applicable relationships. Otherwise, subparagraph (5) is too broad, and includes persons that should not be obligated to report. Section 613-2.4(a)(5) also includes reference to any person who is “in a contractual relationship” with the facility owner, tank system owner, or operator, which the nature of the relationship has nothing to do with the petroleum on the site or environmental conditions, such as plumbers, painters, and electricians, by way of example. These types of contractors are likely unfamiliar with the nuances of spill reporting, and would not readily understand their obligation to do so if these regulations were finalized as is.

Thus, subparagraph (5) should be amended to include specific examples of the types of “contractor[s] in a contractual relationship” that are applicable to these circumstances, perhaps utilizing the language “including but not limited to.” Alternatively, Section 613-2.4(a) could be amended to include a much longer list of exactly the persons the Department believes is obligated to report pursuant to the applicable law. At the very least, the proposed Section 613-2.4 regulations should be amended to explicitly exclude attorneys from persons responsible for reporting responsibilities due to their ethical obligations to maintain confidentiality in their attorney-client communications. *See* NYS Professional Rules of Conduct, Rule 1.6.

Second, proposed Section 613-2.4(a)(6) is too broad. Similar to subparagraph (5), this subparagraph is problematic because “contractor” is not defined. Further, subparagraph (6) includes the term “business transaction” which is also not defined. It is unclear which persons the Department is trying to capture in subparagraph (6) not already included in subparagraph (5). Again, some examples are needed of the persons that fall under proposed subparagraph (6).

Finally, on behalf of the Committee and EELS, we want to thank the Department for its hard work in revising Part 613. We appreciate and recognize the Department’s time and energy and the major effort it took to revise Part 613. Given the breadth of the revisions, we would like to suggest that the Department host a number of workshops/informational meetings regarding the Proposed Regulations, in an effort ensure maximum compliance, and perhaps even consider a one year (at least) grace period to comply with the Proposed Regulations, specifically Section 613-2.4(a).

We welcome the opportunity to discuss any of these comments and recommendations

¹ The Federal Oil Spill Act, states: “[f]or purposes of subsection (a)(3) the term “contractual relationship” includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession....” *See* 33 USC §2703(d). The Comprehensive Environmental Response, Compensation, and Liability Act states “[t]he term “contractual relationship”, for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession...” *See* 42 USC §9601(35).

above, or how the Petroleum Spills committee can serve as a resource to your office on any relevant matters. Please do not hesitate to reach our Governmental Relations Department at 518-487-5651 or GR@nysba.org to schedule a meeting with our committee.

Thank you.

Respectfully,
**Co-Chairs, Melissa M. Valle, Esq. and
Jeffrey C. Stravino, Esq.**
Petroleum Spills Committee
Environmental and Energy Law Section
New York State Bar Association