H.B. 1973 (2018)
Rules- Administrative Oversight Committee Hearing
September 26, 2018
Written Testimony of Bob Menees, Staff Attorney
Great Rivers Environmental Law Center

1. Reasonably Certain Standard in Section 644.051.1(1) RSMo

I commend the Conservation and Natural Resource Committee for recognizing that the proposed amendment in HB 1973 to remove the "reasonably certain to cause pollution to waters of the state" standard from Section 644.051.1(1) RSMo should not be adopted because the amendment would prohibit the State from stopping water pollution before it occurs, leaving only a reactive authority to address water pollution. However, I would argue that the proposed change from "reasonably certain" to "demonstrably certain" should also be rejected by the House and that the "reasonably certain" standard should be retained.

Don't fix what's not broken. The proponents of HB 1973 have put forth no examples of why the "reasonably certain" standard should be removed. "Reasonably" is a term of art used in the law to import an objective, ordinary, third person standard to an issue of fact. I would note that our Revised Statutes use the term "reasonably" eight hundred eighty nine (889) times in various laws. In contrast, our Revised Statutes use the term "demonstrably" eight (8) times. Moreover, the statutes use the term "reasonably certain" four (4) times, whereas the term "demonstrably certain" is never used in our statutes.

A review of case law suggests that the term "reasonably certain" is a common phrase used in the law, appearing in almost eight hundred (800) Missouri appellate decisions. The phrase is often used as a test for whether someone can prove damages at law—i.e. the damages must be reasonably certain to be recovered. However, I believe the use of the phrase in the Missouri Clean Water law can be traced to the phrase's use in several cases regarding the standard of proof for seeking injunctive relief. See *Lee v. Rolla Speedway, Inc.,* 494 S.W. 2d 349 (Mo.1973) (granting of injunctive relief is premised on whether the evidence demonstrated a reasonable likelihood that an action would invade the rights of others, rejecting an earlier articulated standard that required evidence to "clearly and conclusively" demonstrate such invasion). And, that is exactly what the State would be using this provision for-- seeking injunctive relief to prevent pollution in a situation where such pollution is reasonably certain to occur.

The concerns expressed in the Senate Agriculture Committee hearing on the identical Senate Bill 823 revealed that concerns about the "reasonably certain" standard stemmed from a belief that this standard was "too subjective." However, as explained above, the standard is objective and changing the phrase from "reasonably" to "demonstrably" does not make the proof the State would need any less subjective or more objective. Again, don't fix what's not broken.

2. Proposed Amendments to Definitions in Section 644.012 RSMo

A. *Lack of Clarity*

Bill proponents say they are only trying to clarify that the Missouri Clean Water Law does not require non-point sources of pollution to obtain a permit. If this were true, bill proponents could suggest amending Sections 644.082 and 644.051 RSMo to make what is already abundantly clear in DNR's regulations also clear in the statute-- that non-point pollution sources are not required obtain a permit. In fact, the amendments to the definitions in Section 644.012 RSMo would make the definition of point source and water contaminant source redundant, and would create significant confusion in the remainder of the MCWL and DNR's regulations. This smoke screen about permit clarity is designed to obscure the true intent of the bill-- to ensure that no matter how bad pollution might be from an agricultural source, the State can't do anything about it. Unfortunately, the proposed amendments would have far reaching consequences beyond agriculture and would result in lack of clarity for the State's ability to prevent water pollution and to protect public health.

The following amendments would meet the stated objectives of the bill proponents, without giving rise to the uncertainty created by the broader definitional amendments proposed.

644.051.2. It shall be unlawful for any person to operate, use or maintain any water contaminant or point source in this state that is subject to standards, rules or regulations promulgated pursuant to the provisions of sections 644.006 to 644.141 unless such person holds an operating permit from the commission, subject to such exceptions as the commission may prescribe by rule or regulation. However, no operating permit shall be required of any person for any emission into publicly owned treatment facilities or into publicly owned sewer systems tributary to publicly owned treatment works**, or from agricultural stormwater discharges and return flows from irrigated agriculture except as specified in chapter 640.**

644.082. It shall be unlawful for any person to operate, use or maintain and discharge water contaminants from any water contaminant or point source or wastewater treatment plant unless he holds a permit from the commission. **However, except as specified in chapter 640, agricultural stormwater discharges and return flows from irrigated agriculture are not required to hold permits.** Any person violating this section shall be deemed guilty of a misdemeanor and shall be fined upon conviction at least one hundred dollars and not more than five hundred dollars and shall be required to apply for such a permit within thirty days.

The clarity sought by proponents will only lead to a greater lack of clarity. "Water contaminant source" and "point source" currently have separate definitions. If the definition of "water contaminant source" and "point source" are combined to have the same meaning, the MCWL and the regulations promulgated thereunder will be superfluous and duplicative.

Statutory inconsistencies: Under the Missouri Clean Water Law (Chapter 644), "water contaminant source" is used six (6) times, "point source" is used eighteen (18) times, and the phrase "water contaminant or point source" is used five (5) times.

Regulatory inconsistencies: Under MDNR regulations, Chapter 6 of 10 CSR 20 uses "water contaminant source" thirteen (13) times, "point source" forty-four (44) times, and "water contaminant or point source" two (2) times.

Just one example of how these definitional amendments have not been fully thought through is to look at Section 644.051.1(4) RSMo. Basically, the proposed amendment to the definition of "discharge," which would make a discharge required to be from a "point source," would result in the State legalizing the act of allowing "radiological, chemical, or biological warfare agent or high-level radioactive waste" to enter waters of the state so long as not done from a point source. Clearly, this cannot be allowed.

B. *Alignment with CWA*

Proponents of HB 1973 argue that they are only trying to make the Missouri Clean Water Law in alignment with the federal Clean Water Act, but there is a major difference between the two laws. The Clean Water Act only regulates surface water whereas the Missouri Clean Water Law regulates surface water and groundwater. Groundwater is vital resource of Missouri that is used by the entire southern part of the state as drinking water. This explains why since 1974, the State has regulated water pollution more broadly that the federal Clean Water Act and has chosen to regulate water contaminant sources as well as point sources. And, let's be honest, when was the last time Missouri has taken the position that we should do something exactly how the federal government wants us to. We may have to do what they say, but sometimes we recognize we like to do things different and better.

C. *No-Discharge Permits*

MDNR administers a program where it issues permits to facilities that do not discharge to waters of the state, but have the reasonable potential to do so. The net effect of the amendment to "water contaminant source" which would require a "discharge" is that it sheds doubt on MDNR's ability to issue no-discharge permits where a water contaminant source places water contaminants in a location that is reasonably certain to cause pollution to waters of the state but does not actually discharge. This frustrates the purpose of the Missouri Clean Water Law to eliminate discharges to waters of the state and would deny MDNR and the public important information, such as land application records and annual reports, to determine whether operations are causing harm to our waters. Missouri should retain the flexibility to administer this program, protect our waters and promote an even playing field among operations.

D. *Don't fix what's not broken*

In the Senate Committee hearing on SB 823, an identical bill to HB 1973, proponents testified that one time MDNR sent a letter to a farmer in Versailles, Missouri stating that the farmer needed to get a water permit. According to this testimony, the situation was handled by a phone call in which MDNR then stated that the farmer did not need a permit. This is hardly justification to change definitions, which have protected Missouri's waterways for nearly fifty years. These definitions have worked since 1974 when the Missouri Clean Water Law was passed. Proponents of the bill have put forth no concrete examples of why the definitions need to be changed. This entire exercise to amend the definitions in the Missouri Clean Water is reminiscent of Cervantes' famous Don Quixote and his noble quest to tilt windmills.